



April 27, 2023

Shalanda Young
Director of the Office of Management and Budget
The Office of Management and Budget
725 17th St NW
Washington, DC 20503

America First Legal Foundation’s Comments on Docket OMB–2023–0001, OMB’s Initial Proposals for Updating Race and Ethnicity Statistical Standards

Dear Ms. Young:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to promote the rule of law, prevent executive overreach, protect due process and equal protection, and educate Americans about the individual rights guaranteed under the Constitution and laws of the United States.

Docket OMB-2023-0001, the Office of Management and Budget’s (“OMB”) Initial Proposals For Updating OMB Race and Ethnicity Statistical Standards inverts the Constitution and our non-discrimination laws, threatens individual equality, and presents a clear and present danger to the social and political cohesion of our ethnically and racially diverse polity. Furthermore, the proposed definitions of the minimum categories lack a rational basis and therefore cannot produce more accurate and useful race and ethnicity data. Accordingly, OMB should abandon these proposals and instead rescind SPD 15.

I. General comments

A. OMB asserts, “Federal race and ethnicity standards are inherently complex because they seek to capture dynamic and fluid sociopolitical constructs” and “not an attempt to define race and ethnicity biologically or genetically.” Office of Management and Budget, *Initial Proposals For Updating OMB’s Race and Ethnicity Statistical Standards*, 88 Fed. Reg. 5375, 5377-78 (Jan. 27, 2023). However, this claim—the core predicate and justification for the agency’s action—contradicts the law.

The ordinary public meaning of “race” and “sex,” for example, is firmly rooted in objective biological, genetic, and other similar criteria. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1020, 1022 (11th Cir. 2016) (citations omitted) (rejecting the government’s claim that the “concept of race is not limited to or defined by immutable

physical characteristics”); *see also* *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738-39 (2020) (the term “sex” means status as “either male or female [as] determined by reproductive biology”); *Black’s Law Dictionary* (1951); *Webster’s New International Dictionary* (1961; edited 1993); *The Oxford English Dictionary of English Etymology* (1966); *The Random House Dictionary of the English Language* (1967); *American Heritage Illustrated Encyclopedic Dictionary* (1987); *accord* 18 U.S.C. 1093(6) (1988) (“the term ‘racial group’ means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent”). Similarly, the legal meaning of the term “ethnicity” is also rooted in immutable biological ancestry. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

It is axiomatic that OMB’s authority to collect information on race, sex, national origin, “ethnicity,” or anything else ultimately must be grounded in an effective and lawful Congressional authorization. However, OMB cites no authority for the proposition that Congress has *ever* defined race or ethnicity as, or considered it to be, “dynamic and fluid sociopolitical constructs” (a phrase, we note, without any fixed or readily discernable legal meaning). Dividing the American people by race and ethnicity is a sordid and dangerous business. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part). OMB should identify explicit statutory authorization for its proposed data collection generally and articulate a rational justification for all the classifications made therein. Without legal authority and a rational justification for the categories of data collected, SPD 15, and all of OMB’s proposed actions concerning it, are *ultra vires*.

B. The minimum categories proposed by SPD 15 lack a rational basis. For example, “[p]eople qualify as ‘American Indian’ only if they maintain an (undefined) ‘cultural identification.’ But someone with origins in a ‘black racial group of Africa’ qualifies as ‘Black’ regardless of cultural identification.”¹ Additionally, “Black or African American” is defined racially, whereas “Asian” and “White” are only defined by geographic region.² And the definition of Latino and Hispanic mixes geographic and linguistic characteristics in incoherent ways. It “includes all individuals who identify with one or more nationalities or ethnic groups originating in ... South[] America,”³ which is a continent where half of the population speaks Portuguese, yet the same definition also includes a linguistic definition that only covers “Spanish cultures,” going so far as to include Europeans from Spain.

C. Notably, OMB suggests collecting “race and ethnicity information using one combined question.”⁴ Arbitrarily and capriciously, however, it also proposes to detach

¹ DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA* 18 (2022).

² *Id.* at 18.

³ 88 Fed. Reg. at 5384.

⁴ 88 Fed. Reg. 5379.

data collection categories from objective criteria. As a result, the proposed categories are simultaneously over and under-inclusive. For example, there is no category for Australian Aborigines or those from Brazil, Madagascar, and Cape Verde who retain an “ambiguous or confused” status.⁵

D. OMB’s proposed definitions of minimum categories are irrational and unlawfully arbitrary. For example, OMB proposes creating a new category for those of Middle Eastern and North African (MENA) descent. According to the U.S. Census Bureau American Community Survey (ACS), 2.1 million Americans claim an Arab identity. However, 1.4 million Americans identify as Portuguese, 500,000 identify as Brazilian, and 100,000 have a Cape Verdean identity,⁶ which would mean there are at least 2 million Americans of Lusitanian ethnicity. Why does OMB propose disparate treatment for two groups of nearly identical size?⁷ How can the proposed new categories “capture dynamic and fluid sociopolitical constructs”⁸ by irrationally including some groups while arbitrarily excluding others? Simply, they cannot.

Also, OMB proposes irrationally overbroad definitions of “White” and “Asian,” lumping together groups that “practice different religions, have distinct ancestral languages, vary dramatically in culture, and sometimes have long histories of conflict with one another.”⁹ The ACS reports 40.3 million persons who are German; 31.2 million who are English, Scottish, or British; 30.4 million who are Irish; 20.1 million who identify only as American; and 16.1 million who are Italian.¹⁰ Why does OMB recognize white persons from MENA separately without offering white persons from different regions of Europe or who identify uniquely as American similar treatment? Similarly, the Harvard Encyclopedia Of American Ethnic Groups classifies Mormons as not only a distinct ethnic group but “the clearest example to be found in our national history of the evolution of a native and indigenously developed ethnic minority.”¹¹ Why does OMB propose minimum categories that exclude the nearly seven million persons in the United States¹² who would likely identify as a Mormon ethnicity?

⁵ Bernsten, *supra* note 1 at 20.

⁶ 2019 American Community Survey 1-Year Estimates. Table B04006, United States Census Bureau, (2019), <https://tinyurl.com/2y9udbr7>.

⁷ See also, Jeremy Klemin, How Should Portuguese Americans Be Classified? The question of who Portuguese Americans are—white, Hispanic, minority, nonminority—remains unsettled, *The Atlantic*, Apr. 10, 2023, <https://tinyurl.com/2cnejc5r>.

⁸ 88 Fed Reg. at 5377.

⁹ DAVID E. BERNSTEIN, CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA 19 (2022). OMB’s current nationality and ethnic group categories, especially the “Hispanic or Latino” categories, are similarly flawed.

¹⁰ *Supra*, note 10.

¹¹ Dean L. May, “Mormons,” in Stephan Thernstrom, ed., *The Harvard Encyclopedia Of American Ethnic Groups*, 1980 at 720-731.

¹² Newsroom, Facts and Statistics, The Church of Jesus Christ of Latter-day Saints, (accessed on Apr. 20, 2022), <https://tinyurl.com/ybzh2wtx>.

II. Responses to OMB's specific requests for public comment

A. Concerning OMB's Request for Public Comment 1c, we believe OMB should demonstrate that it is legally authorized to collect all the proposed data. To the extent OMB has such authority, the data categories must have some rational basis and be appropriately inclusive. To date, it has failed both to specify its legal authority and to explain the rational basis for its choices.

B. Concerning OMB's Request for Public Comment 2b, we believe OMB has failed to demonstrate that it is legally authorized to add "Middle Eastern or North African (MENA)" as a new minimum category and to collect the proposed data. For example, OMB fails to cite *any* statute charging *any* Executive Branch agency with the authority or duty to "track the experience and wellbeing of the MENA population[.]"¹³ To the extent OMB has the legal authority to add MENA as a new minimum category, it may do so only if there is a rational basis to add MENA while excluding other larger ethnic groups.

C. Concerning OMB's Request for Public Comment 3, we believe OMB lacks the legal authority to require an information collection of "detailed race and ethnicity categories by default."¹⁴ To the extent that OMB is authorized by statute to collect information on race or ethnicity, it is bound to define the operative terms in accordance with the express statutory language and/or the ordinary public meaning thereof when the relevant authorizing statute was enacted. OMB has failed to demonstrate that it has done so.

D. Concerning OMB's Request for Public Comment 6c, we believe OMB lacks the legal authority to collect data "related to descent from enslaved peoples originally from the African continent." First, OMB fails to cite controlling legal authority for any such action. Second, OMB irrationally fails to define any objective metric for determining the "degree of descent" required for a person to fall within this category. Would any person who "identifies" with the specified enslaved peoples be included in this category or will OMB require a genetic link or test for inclusion? If "identification" with enslaved peoples is sufficient, then what assurance does OMB have that the data it collects will indeed be "more accurate and useful"?¹⁵ Alternatively, if OMB intends to specify an objective test, then what degree of descent is sufficient? Is any remote ancestor who was an enslaved person in the United States enough or must there be a direct familial line?

Similarly, how may OMB rationally collect data only regarding "descent from enslaved peoples originally from the African continent" while ignoring, e.g., descent from other peoples who were enslaved in America's history but not originally from

¹³ 85 Fed. Reg. at 5379.

¹⁴ 85 Fed. Reg. at 5380.

¹⁵ 85 Fed. Reg. at 5384.

the African continent¹⁶ or the current survivors of human trafficking who were among the millions of victims of modern slavery?¹⁷ Even if the collection of this limited slice of data is authorized by Congress, it could serve no utility given the continuum across which an individual could be partially descended “from enslaved peoples originally from the African continent.”¹⁸ The imprecision of OMB’s proposal is very troubling. It suggests that the purpose of this data collection is not to produce more accurate and useful race and ethnicity data but rather to facilitate the Biden Administration’s efforts to lay the groundwork for the implementation of inherently divisive, unjust, and unlawful “reparations” policies. “Reparations” divide Americans generally¹⁹ and existing Black and African American communities specifically.²⁰

E. Concerning OMB’s Request for Public Comment 6d, we believe that SPD 15 cannot be revised to produce “more accurate and useful race and ethnicity data.” Instead, it should be discarded. To begin with, we believe that the agency lacks the legal authority to define minimum categories unless directly authorized to do so by Congress and then only per express statutory language and/or the ordinary public meaning thereof at the time the relevant authorizing statute was enacted. OMB has failed to demonstrate that it has done so.

Additionally, OMB has failed to demonstrate that Congress has authorized defining, or that it has a rational basis to define, minimum categories based on the “people who identify” formulation.²¹ OMB has further failed to demonstrate that Congress has authorized defining, or that it has a rational basis to define, minimum categories as it has done. For example, the American Indian or Alaska Native category includes “all individuals who identify with any of the original peoples of North, Central, and South America.” Notably, OMB does not define the terms “identify” and “original peoples.” However, all other categories seem to be based either on immutable genetic characteristics (e.g., “Black racial groups”) or political national origin.²² Furthermore, OMB’s failure or refusal to define the critical terms “originating” and “ethnic groups” by reference to objective and fixed criteria leads to absurd results - an Ethiopian who was educated in England, went to India for graduate school, and then moved to the United States and became an American citizen could “identify” at the same time as “Black,” “White,” “MENA,” and “Asian.” Even if OMB could show that Congress has expressly authorized collecting racial and ethnic data, such a flawed framework

¹⁶ See e.g., Charles Frederick Holder, *Chinese Slavery in America*, 165 North American Rev. No. 480, 288-294 (Sep. 1897).

¹⁷ The International Labor Organization (ILO) estimates that 50 million people are in situations of slavery globally. ILO, *Global Estimates of Modern Slavery* (Sep. 2022), <https://bit.ly/3Lg900l>.

¹⁸ Tara Bahrapour, *They Considered Themselves White, but DNA Tests Told a More Complex Story*, WASH. POST (Feb. 6, 2018), <https://bit.ly/3LC3lUb>.

¹⁹ Carrie Blazina and Kiana Cox, *Black and White Americans Are Far Apart in Their Views of Reparations for Slavery*, PEW RSCH. CTR. (Nov. 28, 2022), <https://bit.ly/446fiZl>.

²⁰ Not all Black or African American individuals are descendants of enslaved peoples.

²¹ 85 Fed. Reg. at 5384.

²² *Id.*

cannot rationally generate accurate information or meet relevant statutory requirements.

III. Conclusion

OMB must have Congressional authorization for the terms and conditions of the proposed data collection. Yet OMB has failed to specify the statutory provisions authorizing SPD 15, much less explain how the proposed minimum categories serve a lawful end. OMB's racial and ethnic "bean counting" is a sordid business indeed. The proposed revisions to SPD 15, made without explicit reference to statutory guardrails, are further evidence that the Biden Administration's core purpose in collecting the requested data is to institutionalize a hyper-partisan racial spoils system.²³ This inverts the Constitution and our non-discrimination laws, threatens individual equality, and presents a clear and present danger to the social and political cohesion of our ethnically and racially diverse polity. SPD 15 should be discarded, not revised.

Sincerely,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation

²³ See Exec. Order No. 14091, 88 Fed. Reg. 10825, 10829, 10831 (Feb. 16, 2023); Exec. Order No. 86 Fed. Reg. 7009, 7010-12 (Jan. 25, 2021).