**No. 18-10638**

# In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS,
*Plaintiff – Appellee Cross-Appellant*,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
VICTORIA LIPNIC, in her official capacity as Acting Chair of the EEOC;
JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General for the United States,
*Defendants – Appellants Cross-Appellees.*

On Appeal from the United States District Court
for the Northern District of Texas, Lubbock Division

## BRIEF FOR APPELLEE/CROSS-APPELLANT

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# Certificate of Interested Persons

No. 18-10638

State of Texas,

*Plaintiff – Appellee Cross-Appellant*,

v.

Equal Employment Opportunity Commission;
Victoria Lipnic, in her official capacity as Acting Chair of the EEOC;
Jefferson B. Sessions, III, in his official capacity as Attorney General for the United States,

*Defendants – Appellants Cross-Appellees.*

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee/cross-appellant, as a governmental party, need not furnish a certificate of interested parties.

/s/ Jason R. LaFond
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## Statement Regarding Oral Argument

This case concerns questions of constitutional and statutory standing, statutory interpretation, and federalism. Texas agrees that oral argument would be helpful to the Court.

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## INTRODUCTION

EEOC's Felon-Hiring Rule (the Rule) displays a common tactic of today's federal agencies: couching directives with practical binding effect as mere "guidance" or "policy statements." The goal is to illicitly enjoy the best of both worlds. Agencies impose policies of their choosing on regulated parties while eschewing the discipline of APA rulemaking. In doing so, agencies undermine the values embedded in the APA rulemaking process, including broad opportunities for public participation, an agency's ability to inform itself of other perspectives, and rigorous analysis induced by the agency's obligation to respond to comments. This case is the latest round of an ongoing cat-and-mouse game—with regulated parties and courts on one side and agencies on the other—in which agencies seek to avoid wherever they can the obligations imposed on them by Congress.

The Rule, which binds EEOC to an erroneous interpretation of Title VII of the Civil Rights Act is a triple-insult to Congress. First, the Rule's very existence is contrary to Title VII's prohibition on EEOC's promulgating substantive rules concerning racial discrimination. Second, EEOC promulgated the Rule without notice-and-comment, in breach of the APA's requirements for substantive rules. Third, as DOJ concedes, the Rule is contrary to the substantive provisions of Title VII. It is a lawless act.

Defendants, DOJ and EEOC, concede that Texas is an object of EEOC's Rule and DOJ concedes that the Rule distorts Title VII. Yet they both continue to insist that Texas is without recourse to challenge the Rule. They are wrong, as a panel of this Court has already held. *See Texas v. EEOC*, 827 F.3d 372 (5th Cir. 2016) (*Texas*

*I*), *vacated on reh'g*, 838 F.3d 511 (5th Cir. 2016) (*Texas II*). Although that prior panel vacated its decision to allow the district court to address the Supreme Court's then-recent decision in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), *Hawkes* only confirms that the original decision got it right. To resolve defendants' jurisdictional challenges, then, all the Court need do is follow the persuasive reasoning of the prior panel: "To wholly deny judicial review . . . would be to ignore the presumption of reviewability, and to disregard the Supreme Court's instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA." *Texas I*, 827 F.3d at 387.

Because the Rule is a final agency action that binds EEOC and imposes legal consequences on employers, it is necessarily invalid because EEOC has no power to promulgate such a substantive rule and failed to engage in the notice-and-comment procedure required by the APA. Defendants concede as much. Yet the district court refused to hold that the Rule was outside EEOC's power, instead enjoining the Rule only until EEOC put the Rule through notice and comment. Texas seeks correction of this error, and others, in its cross-appeal.

## ISSUES PRESENTED

The issues presented are:

1. Is the Rule a final agency action?
2. Does Texas have standing to challenge the Rule?
3. Does EEOC have the authority to promulgate substantive rules like the Rule?
4. If the Court affirms the district court's injunction, should it order the dismissal of Texas's Declaratory Judgment Act (DJA) claim because declaratory judgment would serve no useful purpose?
5. Is the Rule, as applied to Texas state agencies, consistent with Title VII?

## STATEMENT OF THE CASE

### I. EEOC's Promulgation of the Rule and Troubling Enforcement History

By a 4 to 1 vote on April 25, 2012, EEOC Commissioners adopted the Rule. *See* ROA.1239-93. The Rule did not go through notice and comment and was unseen by the public until its release. The Rule binds EEOC staff to its interpretation of Title VII. *See* ROA.1244 (Rule at 3).

In pertinent part, the Rule relies on national data now more than a decade old to conclude that the use of criminal histories in employment creates an unlawful disparate impact in every industry and geographical area. RROA.1242-44 (Rule at 1-3); *but cf.* Appellants' Br. 22 (conceding that reliance on national data was error). Thus, the Rule, which is also expressly directed towards "employers considering the use of criminal records in their selection and retention processes," purports to limit the prerogative of employers to categorically exclude felons from employment positions.ROA.1242-44 (Rule at 1-3). The Rule makes clear that "[a]ll entities covered by Title VII are subject to this analysis," including "state . . . governments." ROA.1244, 1268 (Rule at 3 & n.2).

The Rule establishes that hiring policies or practices that categorically exclude convicted felons from employment opportunities create a per se unlawful disparate impact under Title VII. *See* ROA.1243 (Rule at 2). The Rule thus requires that employers always "provide[] an opportunity to [an] individual [rejected for employment because of a felony conviction] to demonstrate that the exclusion does not properly apply to him," and concludes that categorical exclusions for felons are "not

job related and consistent with business necessity." ROA.1259-60 (Rule at 18-19) (capitalization altered).

The Rule provides that it is the employer's burden to prove that the felony disqualification is "job related for the position in question and consistent with business necessity." ROA.1250 (Rule at 9). And the Rule provides further that even "exclusions [that] are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies" are likely invalid unless they provide for an "individualized assessment." *See* ROA.1258-61 (Rule at 17-20). In contrast, the Rule offers a safe harbor for employers that provide for individual assessments. ROA.1243 (Rule at 2).

According to the Rule, an individual assessment must allow an applicant to show "that the policy as applied is not job related and consistent with business necessity." ROA.1259 (Rule at 18). To complete this assessment, the employer must consider "[t]he facts or circumstances surrounding the offense or conduct"; "[t]he number of offenses for which the individual was convicted"; the applicant's "age at the time of conviction, or release from prison"; "[e]vidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct"; "[t]he length and consistency of employment history before and after the offense or conduct"; "[r]ehabilitation efforts, e.g., education/training"; "[e]mployment or character references and any other information regarding fitness for the particular position"; and "[w]hether the individual is bonded under a federal, state, or local bonding program." ROA.1259 (Rule at 18).

The Rule also purports to preempt conflicting state and local laws. ROA.1265 (Rule at 24). The Q&A associated with the Rule explains that one of the ways that the Rule "differ[s] from the EEOC's earlier policy statements" is that the Rule "says that state and local law or regulations are preempted by Title VII if they" cause an unlawful disparate impact. ROA.832. This was a sea change from prior understanding of the effect of Title VII. EEOC relies on a provision of Title VII stating that Title VII does not "exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under" Title VII. 42 U.S.C. § 2000e-7. In 2008, DOJ argued to the Supreme Court that this provision does *not* "displace[]" "facially neutral state" laws. *See* Br. of the United States as Amicus Curie 14, *Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Gulino*, No. 07-270 (U.S. May 23, 2008) (Gulino *Amicus Br.*).[1]

Behind the commands of the Rule lies EEOC's reputation for aggressive, and at times abusive, enforcement. *See, e.g.*, *EEOC v. Freeman*, 778 F.3d 463, 468 (4th Cir. 2015) (Agee, J., concurring) ("I write separately to address my concern with the EEOC's disappointing litigation conduct. The Commission's work of serving 'the public interest' is jeopardized by the kind of missteps that occurred here."); *EEOC v. Freeman*, 961 F. Supp. 2d 783, 803 (D. Md. 2013) ("By bringing actions of this nature, the EEOC has placed many employers in the 'Hobson's choice' of ignoring

[1] The text of the brief can be found at ROA.810-28.

criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.").

In a particularly troubling example, EEOC brought a disparate-impact lawsuit against a temporary staffing company named Peoplemark because it refused to hire a woman named Sherri Scott after her criminal-background check disclosed that she was "a two-time felon with convictions for housebreaking and larceny." *EEOC v. Peoplemark, Inc.*, No. 1:08-cv-907, 2011 WL 1707281, at *1 (W.D. Mich. Mar. 31, 2011), *aff'd*, 732 F.3d 584 (6th Cir. 2013). Attempting to prove that Peoplemark's hiring policy created a disparate impact, EEOC conducted a three-year investigation of the company and subpoenaed 18,000 pages of corporate documents. Its investigation uncovered nothing, and Peoplemark's decision not to hire Sherri Scott proved prudent when she went back to prison in the middle of EEOC's investigation for a third felony conviction (this one for felonious assault). *Id.* at *3 n.2. EEOC nonetheless continued to litigate against Peoplemark in an effort to harass the company and to "drive up [Peoplemark's] costs." *Id.* at *5. The United States District Court for the Western District of Michigan sanctioned EEOC by dismissing its complaint with prejudice, awarding Peoplemark over $750,000 in fees and costs, and concluding that EEOC's conduct "falls between frivolous and insulting." *Id.* at *5, *11 n.8, *12.

## II. DOJ's Coordination With EEOC

EEOC and DOJ share enforcement responsibilities concerning claims of discrimination against state and local governments. EEOC investigates and, if it finds a violation, attempts to a reach a settlement with the government employer. *See* 42 U.S.C. § 2000e-5. If no settlement is reached, EEOC refers the matter to DOJ, which then pursues litigation. *See id.* § 2000e-5(f)(1). DOJ has never disavowed an intention to pursue enforcement of EEOC referrals pursuant to the Rule. To the contrary, DOJ has expressly endorsed EEOC's views and vowed to conduct itself in a manner consistent with EEOC's views.

For example, the Rule is a direct outgrowth of efforts by then-Attorney General Eric Holder to "remov[e] barriers to employment for ex-offenders." ROA.1244, 1270 (Rule at 3 & n.16). Presaging the Rule, Holder sent a letter to all state attorneys general requesting that they reevaluate "employment-related restrictions on ex-offenders." ROA.1292-93 (Rule at 24 n.165). A Holder deputy also testified at an EEOC meeting that state laws that deny employment opportunities to felons are "antiquated" and "unnecessary." *See* EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier, *Written Testimony for Amy Solomon Senior Advisor to the Assistant Attorney General Office of Justice Programs, U.S. Department of Justice* (July 26, 2011), https://perma.cc/4UEL-8D23; *see* ROA.2462. In the district court, DOJ insisted that "the [Rule] is 'fairly encompassed' by Title VII," ROA.1548, which DOJ agreed demands "individualized assessments" for every single potential job. *See, e.g.*, ROA.1536.

And after this suit was filed, DOJ followed up its public statements by executing a Memorandum of Understanding with EEOC specifically directed at coordinating DOJ and EEOC efforts against state and local governments. *See Memorandum of Understanding Between the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice – Civil Rights Division Regarding Title VII Employment Discrimination Charges Against State and Local Governments* (March 2, 2015), *available at* https://perma.cc/53HP-CFBF (*MOU*). Among other things, the MOU seeks to "eliminate . . . inconsistency in the enforcement of the federal employment discrimination laws." *Id.* at 1. The MOU goes on to reiterate that, "[g]iven their shared and overlapping responsibilities, EEOC and [DOJ] have a common interest in ensuring that enforcement of Title VII is consistent" and "ensuring that allegations of discrimination in violation of Title VII are effectively investigated and, where a violation is found, appropriate remedies are obtained." *Id.* at 2. The collaboration between the DOJ and EEOC includes "investigation, resolution, and litigation of charges," as well as "development of policy guidance." *Id.* DOJ and EEOC committed to involving DOJ attorneys at every stage of EEOC's investigations of state and local governments. *Id.* at 7-10. DOJ and EEOC also expressly agreed to seek "coordination" of "[a]nalytical approaches to identifying and remedying employment discrimination." *Id.* at 10.

In a press release distributed at time the MOU was executed, EEOC noted that the MOU "codifies a pilot project launched in 2009 by DOJ and EEOC" that "served to . . . ensur[e] . . . a consistent enforcement strategy." Press Release,

EEOC (March 3, 2015), https://perma.cc/5XYM-7TZ5. A high-ranking DOJ official commented, "[t]he MOU brings to life our vision to approach our shared Title VII enforcement responsibilities as a partnership," and "institutionalizes that partnership." *Id.*[2]

## III. Texas's Public Policy on Hiring Felons

As this Court has explained, Texas has an interest in excluding from certain privileges those convicted of a felony. *See Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978). Felons "have breached the social contract" and "manifested a fundamental antipathy to the criminal laws of the state or of the nation." *Id.* Texas law accordingly disenfranchises felons, and bars them from serving on juries and holding public office. Tex. Elec. Code §§ 11.002(a)(4)(A), 141.001(a)(4); Tex. Gov't Code § 62.102(8).

A felony conviction also affects one's access to employment-related privileges. In addition to limited opportunities for public employment, professional licenses are generally not extended to felons. *See, e.g.*, Tex. Gov't Code § 82.062; Tex. Occ. Code § 801.402; 22 Tex. Admin. Code §§ 3.149, 571.5. In addition, the Texas Legislature and state agencies regularly consider the risks associated with hiring felons

[2] The MOU and associated press release are not included in the record on appeal. Nonetheless, the Court may take judicial notice of these documents. *See, e.g.*, *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 518-19 (5th Cir. 2015) (taking judicial notice of "online state agency records"); *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1310 n.3 (9th Cir. 2000) (taking judicial notice of inter-agency memorandum of understanding); *cf.* Appellants' Br. 23, 40 (relying on DOJ memorandum, the text of which is not included in the record on appeal).

in certain positions, in certain agencies, in certain environments, and the like. Regarding many jobs, the Texas Legislature adopts a functional "no risk" policy—making them permanently off-limits to felons. Many longstanding hiring policies of Texas impose absolute bans on hiring convicted felons (or in some instances persons convicted of certain categories of felonies). To take just a couple of examples, "[a] person who has been convicted of a felony is disqualified to be an officer" for any law-enforcement agency anywhere in Texas, *see* Tex. Occ. Code § 1701.312(a), and Texas-owned and -run facilities that house the elderly and disabled are also prohibited from hiring certain felons, *see* Tex. Health & Safety Code § 250.006; 40 Tex. Admin. Code § 3.201. Beyond statutory requirements, many Texas agencies maintain no-felon policies of their own. *See, e.g.*, ROA.1806-07, 1813.

The no-risk policy adopted by the Legislature and various agencies for certain positions is also concomitant of Texas's sovereign immunity. The general rule in Texas is that sovereign immunity "shield[s] [the public] from the costs and consequences of improvident actions of their governments." *City of Galveston v. State*, 217 S.W.3d 466, 472 (Tex. 2007) (quotation marks omitted); *see also* Tex. Civ. Prac. & Rem. Code § 101.057(2) (excluding all "intentional tort[s]" from the Texas Tort Claims Act's waiver of sovereign immunity). The result is that the risk of misfeasance by government employees falls squarely on those interacting with the government. For that reason, Texas and its agencies have an obligation to reduce that risk wherever possible.

## IV. Procedural History

Texas sued to challenge the Rule immediately upon receiving notice that a rejected applicant for a job at Texas's Department of Public Safety had filed a charge of discrimination with EEOC challenging the Department's no-felon policy. *See* ROA.24-98; *see also* ROA.306-89. The district court dismissed Texas's complaint for lack of jurisdiction. ROA.880-88.

This Court reversed, finding both that Texas had standing and that the Rule was a final agency action. *See Texas I*, 827 F.3d 372. On standing, the Court began by observing that, because Texas is unquestionably an "object" of the Rule, there should be "little question that the action or inaction has caused [Texas's] injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 378. The Court rejected the argument that Texas lacked standing because no enforcement action had been brought against it. *See id.* Because Texas faced increased regulatory pressure, it could challenge the source. *Id.* at 379. The Court concluded that "these injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state defending its existing practices and threatened authority." *Id.*

Turning to the APA, the Court concluded that the Rule was a final agency action because there was no dispute that it was the "'consummation' of the EEOC's decision making process" and "imposes 'legal consequences' in the sense that the EEOC has committed itself to applying the [Rule] when conducting enforcement and referral actions." *Id.* at 380-81. The Court went on to review, and ultimately rely

on, the Supreme Court's then-recent decision in *Hawkes*, concluding that *Hawkes* supported the Court's conclusion. *See id.* at 383-84.

On panel rehearing, the Court vacated its decision so that the district court apply *Hawkes* in the first instance. *Texas II*, 838 F.3d at 511. The Court took this course because another panel had done something similar. *See id.* (citing *Belle Co. v. U.S. Army Corps of Eng'rs*, 667 F. App'x 520, 521 (5th Cir. 2016) (per curiam) (on remand from the Supreme Court following *Hawkes*, remanding to the district court "for further proceedings consistent with the opinion of the Supreme Court"). The parties in *Belle* jointly dismissed the case, so no analysis of *Hawkes* was ever performed. *See* Order, *Belle Co.*, No. 3:12-cv-247 (M.D. La. Dec. 12, 2016) (ECF 50).

On remand in this case, the district court denied defendants' renewed motion to dismiss for lack of jurisdiction, hewing closely to the reasoning of *Texas I* on the questions of standing and final agency action. *See* ROA.1102-10.

Texas's operative complaint raised claims under the APA and DJA, respectively. Texas's APA claim sought to enjoin the Rule because EEOC's promulgation of the Rule exceeded its power under Title VII, occurred without notice and comment, and was substantively unreasonable. *See* ROA.1234-35. Texas's DJA claim sought a declaration that its felon-hiring restrictions were consistent with Title VII. *See* ROA.1233-34.

Following cross-motions for summary judgment, the district court granted judgment to Texas on its APA claim, but dismissed its DJA claim. On the APA claim, the district court concluded that the Rule "is a substantive rule issued without notice or the opportunity for comment." ROA.2439. The district court, however, refused to

reach the antecedent question of EEOC's authority to promulgate a substantive rule and refused to consider whether the Rule was unreasonable. *See* ROA.2439. The district court rejected Texas's DJA claim, concluding that while "[t]here are certainly many categories of employment for which specific prior criminal history profiles of applicants would be a poor fit and pose far too great a risk to the interests of the State of Texas and its citizens," "a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush." ROA.2439. Both defendants and Texas appealed. ROA.2473-2477.

## SUMMARY OF THE ARGUMENT

**I.** This district court had jurisdiction to review the Rule and the district court correctly enjoined defendants from using the Rule against Texas.

**A.** Defendants raise two jurisdictional objections: (1) Texas lacks standing and (2) the Rule is not a reviewable final agency action. Texas will address the latter first, because its standing naturally follows from the inescapable conclusion that the Rule is a final agency action. An agency action is reviewable if it is the consummation of the agency's decisional process and has legal consequences. Defendants do not dispute that the Rule satisfies the first criterion. And while defendants profess to dispute the second, they do not dispute the one fact that, in the end, defeats their argument. Defendants have never contested that the Rule binds EEOC to an idiosyncratic interpretation of Title VII. While they insist that this is not enough to create legal consequences, controlling precedent from this Court and the Supreme Court

says otherwise: if an action binds an agency to a contested view of the law, it is reviewable. In addition, the Rule has legal consequences because it rejects certain safe harbors while creating others and purports to preempt state law.

**B.** Texas, as an employer and a sovereign, is an object of the Rule. Thus, there is no obstacle to Texas—a state deserving special solicitude in the standing analysis—seeking redress for the procedural injury it incurred when EEOC promulgated the Rule without authority and without notice and comment. In addition, Texas has suffered an independent sovereign injury in the form of the pressure the Rule places on Texas to change its laws and policies and the Rule's purported preemption of Texas laws and policies. And Texas's standing reaches DOJ, which has formally agreed to act in concert with EEOC in enforcing the Rule against state and local governments.

**C.** With jurisdiction established, defendants only remaining challenge to the district court's injunction attacks form, not substance. Defendants first argue that the injunction is vague. But as defendants concede, context permits only one interpretation. Thus, the injunction satisfies Federal Rule of Civil Procedure 65. Defendants next argue that the injunction should not include DOJ because DOJ did not promulgate the Rule. This is nothing more than a standing argument by other means and fails for the same reasons defendants' other standing arguments fail.

**II.** Texas's cross-appeal asks the Court to expand the district court's injunction and vacate (or, in the alternative, reverse) the district court's rejection of Texas's DJA claim.

**A.** While the district court's injunction was correct as a far as it went, it did not go far enough. The district court enjoined the Rule until it undergoes notice and comment. But the district court refused to answer the antecedent question whether EEOC had any power to promulgate the Rule—with or without notice and comment. The answer to that question is no, so the Rule should be barred without condition.

**B.** The district court rejected the merits of Texas's DJA claim, which sought to establish that Title VII does not prevent Texas agencies from following facially neutral state laws and policies restricting the hiring of felons. This was error. If the Court affirms the district court's injunction, however, it need not reach the merits of Texas's DJA claim. At that point, Texas's requested declaratory judgment, aimed at a rule that could not be enforced against Texas, would not serve a useful purpose. Instead of reaching the merits, the Court should vacate the district court's ruling and render judgment dismissing Texas's DJA claim for lack of jurisdiction.

If the Court reaches the merits, it should vacate or reverse. The district court's decision is internally inconsistent: it concludes that it is premature to evaluate the substantive merits of the Rule while at the same time rejecting Texas's challenge to the merits of the Rule. It is also wrong for several reasons. Texas's restrictions on felon-hiring are an exercise of its traditional police powers. If Congress wishes to alter the federal-state balance by usurping such power, it makes its intention clear. There is no clear statement of intent in Title VII, so it cannot be read to tread on this traditional state power. The doctrine of constitutional avoidance is another barrier. Allowing disparate-impact claims against state agencies for their following state law is not congruent or proportional to the evil—intentional discrimination—targeted

by the Fourteenth Amendment. If Title VII is read to allow such claims, it would be an unconstitutional abrogation of sovereign immunity. Finally, Texas's restrictions on the public employment of felons serve two important interests—maintaining the trust of its citizens and promoting respect for its laws. Texas's restrictions bear a manifest relationship to the State's interests and thus satisfy Title VII.

## STANDARD OF REVIEW

Texas agrees that the Court should review de novo jurisdiction and the district court's grants and denials of summary judgment. *See* Appellants' Br. 17. Whether to exercise jurisdiction to reach Texas's DJA claim, however, is within this Court's discretion. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

## ARGUMENT

### I. Defendants' Appeal

The district court enjoined defendants from enforcing the Rule against Texas until the Rule goes through notice and comment. Defendants challenge three injunction on three grounds—the Rule was not final agency action, Texas lacks standing, and the injunction was vague and overbroad. None has merit.

#### A. The Rule is a reviewable final agency action.

The Supreme Court has held that agency actions are "final" and hence reviewable under the APA if they mark the "consummation" of the agency's decision-making process, and "legal consequences will flow" from what the agency did. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). EEOC does not contest that the Rule marks the "consummation" of its rulemaking process; accordingly, reviewability boils

down to whether the Rule generates "legal consequences." It does, in at least four ways. First, it binds EEOC to a particular interpretation of Title VII. Second, it denies employers potential safe harbors from EEOC and DOJ enforcement actions. Third, at the same time, it creates different norms or safe harbors that allow employers to avoid EEOC and DOJ enforcement actions. Fourth, it purports to preempt state law.

**1. The Rule binds EEOC.**

**a.** Courts including this one repeatedly have held that agency "guidance" documents like the Rule constitute final and reviewable agency actions under the APA because they "bind" the agency and its employees "to a particular legal position." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("The primary distinction between a substantive rule — really any rule — and a general statement of policy . . . turns on whether an agency intends to bind itself to a particular legal position."); *accord Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) ("[W]e focus[] primarily on whether the rule has binding effect on agency discretion or severely restricts it.") (quotation marks omitted), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).[3] The Supreme Court in *Hawkes* confirmed that an action

[3] The question in *Texas v. United States* was whether the challenged guidance was a "policy statement[]" or a "substantive rule[]." 809 F.3d at 171. A substantive rule, by definition, is a final agency action. *See Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717 (D.C. Cir. 2011) (en banc). Thus, *Texas v. United States* is governing precedent on this question.

"bind[ing]" an "agenc[y]" to a legal view "gives rise to 'direct and appreciable legal consequences.'" *Hawkes*, 136 S. Ct. at 1814 (quoting *Bennett*, 520 U.S. at 178).

For example, in *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009), *opinion vacated in part on other grounds*, 650 F.3d 717 (D.C. Cir. 2011) (en banc), the court held that an IRS "guidance" document entitled "Notice 2006-50" constituted final agency action. *Id.* at 13. That document "announce[d]" the IRS's interpretation of the Tax Code and "provide[d] related guidance to taxpayers and collectors." IRS Notice 2006-50, 2006-1 C.B. 1141 (June 19, 2006). Critically, legal consequences flowed from the IRS's "guidance" insofar as it used "mandatory words like 'will' instead of permissive words like 'may'" to describe how the agency's staff would process refund claims. *Cohen*, 578 F.3d at 7. Like EEOC here, the IRS tried to insulate its rule from judicial review by backing away from it and disclaiming it as nothing more than worthless words; but the D.C. Circuit held "[t]hat's just mean" because it "places taxpayers in a virtual house of mirrors" where they can't figure out which of the agency's instructions to heed. *Id.* at 9.

In another similar case from the D.C. Circuit, the court held that an agency's "guidance" document constituted final agency action because the agency used its guidance to announce a "multi-factor, case-by-case analysis" that EPA's staff would apply to determine the adequacy of States' air-quality monitoring standards. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). The court found irrelevant that answers to EPA's "case-by-case analysis" turned on facts that were unknowable ex ante. *Id.* at 1022-23. All that mattered, the court held, is that the

agency directed States to search their laws and policies, to find standards that conflicted with EPA's analysis of the Clean Air Act, and to replace them in accordance with the "guidance" document. *Id.* at 1023. Even a disclaimer stating that "'[t]he policies set forth in this paper are intended solely as guidance, do not represent final [a]gency action, and cannot be relied upon to create any rights enforceable by any party,'" *id.* (quoting guidance document), did nothing to render the guidance non-final under the APA because legal consequences nonetheless flowed from it:

> Insofar as the "policies" mentioned in the disclaimer consist of requiring State permitting authorities to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit, "rights" may not be created but "obligations" certainly are—obligations on the part of the State regulators and those they regulate. At any rate, the entire Guidance, from beginning to end—except the [disclaimer] paragraph—reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their "marching orders" and EPA expects the States to fall in line.

*Id.*; *see also Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) (holding that "[g]uidance" document constitutes final agency action reviewable under Section 704 insofar as it "withdraws some of the discretion" administrative staff "previously held"); *NRDC v. EPA*, 643 F.3d 311, 319-20 (D.C. Cir. 2011) (similar); *Barrick Goldstrike Mines v. Browner*, 215 F.3d 45, 47-48 (D.C. Cir. 2000) (similar).

**b.** Defendants do not dispute that the Rule binds EEOC. *Cf.* Appellants' Br. 14 (arguing only that the Rule "does not bind [DOJ]"). Nor could they. The Rule includes page after page of the unconditional and "mandatory" language that so often is "decisive" of the Section 704 issue. *Cohen*, 578 F.3d at 7; *see, e.g.*, ROA.1249 ("EEOC would find reasonable cause to believe that discrimination occurred.");

ROA.1251 (EEOC "will" "investigate" "criminal record exclusions"); ROA.1253 ("EEOC would find reasonable cause to believe that his employer violated Title VII."); ROA.1255 ("the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."); ROA.1258 ("EEOC concludes that there is reasonable cause to believe that the [employer's] policy" violates the Rule.); ROA.1261 ("EEOC finds reasonable cause to believe that Title VII was violated."); ROA.1262 ("EEOC finds that the policy is" unlawful.). And EEOC went out of its way to condemn categorical no-felon policies like Texas's in mandatory terms: "A policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct *is* inconsistent with the [enumerated] factors because it does not focus on the dangers of particular crimes and the risks in particular positions." ROA.1257 (emphasis added); *see Iowa League of Cities v. EPA*, 711 F.3d 844, 864 (8th Cir. 2013) ("[T]he language used to express 'the EPA's position'—'should not be permitted'—is the type of language we have viewed as binding because it 'speaks in mandatory terms.'").

In short, "the entire [Rule], from beginning to end . . .[,] reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power*, 208 F.3d at 1023. Thus, the prior panel of the Court in this case concluded that the Rule gave rise to legal consequences because it bound EEOC: "the [Rule] here provides an analytical framework that applies across the board to *all* employers—including the hundreds

of state agencies at issue in this suit, which employ hundreds of thousands of employees—and binds EEOC staff in later actions." *Texas I*, 827 F.3d at 384-85. For all the reasons above, the Court should reaffirm that conclusion.

**c.** Defendants' two contrary arguments fail to get them out from under the weight of this precedent.

Defendants argue (at 30) that, although the Rule binds EEOC, the Rule does not have legal consequences because it does not impose any obligations on Texas, its state agencies, or other employers. As the numerous decisions from this Court, the Supreme Court, and other courts cited above show, that argument is a non-starter. As the D.C. Circuit explained in *Syncor International Corp. v. Shalala*, "[t]he primary distinction between [a rule] and a general statement of policy . . . turns on whether an agency intends to *bind itself* to a particular legal position." 127 F.3d at 94 (emphasis added). This Court has adopted the same position. *See Texas v. United States*, 809 F.3d at 171. In other words, the Rule is reviewable if it binds EEOC itself to the position that race-neutral refusals to hire felons can constitute unlawful employment practices. And the Rule indisputably does that. Tellingly, defendants cannot cite a single decision in which a court has held that a guidance document binding an agency was not a final agency action.[4]

[4] None of the cases cited by defendants (at 37)— *Luminant Generation Co. v. EPA*, 757 F.3d 439, 442 & n.7 (5th Cir. 2014); *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 404-05 (D.C. Cir. 2013); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 858-59 (4th Cir. 2002); *AT&T Co. v. E.E.O.C.*, 270 F.3d 973, 975 (D.C. Cir. 2001)—considered agency rules that were binding on agency staff. De-

In a similar vein, defendants next argue (at 30) that because EEOC "lacks authority to issue binding interpretations of a statute," its binding interpretation of Title VII is not final. Defendants mistake a reason why the Rule is *not valid* for a reason that it is not final. Texas has no quarrel with defendants' concession that EEOC had no authority to issue a binding rule; but as defendants do not dispute, the Rule *is binding* on EEOC. The whole point of this lawsuit is that EEOC has violated clear statutory commands from Congress and promulgated an unlawful substantive rule; EEOC cannot credibly claim that the very command it violated somehow forever shelters its unlawful conduct from judicial review. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) ("[I]n the phrase 'final action' . . .[,] the word 'action[]' . . . is meant to cover comprehensively every manner in which an agency may exercise its power."); *Texas v. United States*, 809 F.3d at 171-72 (concluding that DOJ memorandum was substantive rule notwithstanding DOJ's failure to subject document to required notice and comment).

**2. A different interpretation of Title VII would have shielded private employers from EEOC enforcement actions and Texas from DOJ enforcement actions.**

Another reason that the Rule has legal consequences is that, had EEOC reached different conclusions in the Rule—for example, concluding that felon-hiring bans did not have disparate impact or concluding that conforming to neutral state laws

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fendants citation to *AT&T* is particularly curious because the plaintiff there conceded that the agency had not taken final action and the court distinguished cases, like this one, involving guidance that bound agency staff. *See* 270 F.3d at 975-76.

shielded employers from liability—it would have "narrow[ed] the field of potential plaintiffs and limit[ed] the potential liability" that employers face as a result of their felon-hiring bans. *Hawkes*, 136 S. Ct. at 1814. Those revised conclusions would undoubtedly result in legal consequences, *see id.*; "[i]t follows that" denying those potential safe harbors has "legal consequences as well," *id.* "This conclusion tracks the 'pragmatic' approach [the Supreme Court has] long taken to finality." *Id.* at 1815.

EEOC has the power to bring its own enforcement actions against private employers. *See* 42 U.S.C. § 2000e-5(f). If the Rule had, for example, deemed felon-hiring bans consistent with Title VII, it would bind EEOC and no enforcement action would be brought. And even though an aggrieved person could still file suit, *see* Appellants' Br. 31, "the field of potential plaintiffs" would still be "narrow[ed]." *Hawkes*, 136 S. Ct. at 1814. Thus, under *Hawkes*, the Rule has legal consequences because it essentially expands the field of potential plaintiffs.

That EEOC has no power to bring an enforcement action against *Texas*, *see* Appellants' Br. 31, 35, does not alter this conclusion. The Rule at all times either is or is not a final agency action. Its status does not change based on the identity of the plaintiff challenging the action. *See Texas I*, 827 F.3d at 381-82. Holding the opposite would hardly be "pragmatic." *Hawkes*, 136 S. Ct. at 1815; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (rejecting argument that agency action was not reviewable "on the ground that . . . the agency involved could [not] implement its policy directly," but had to rely on "the Attorney General [to] authorize criminal and seizure actions for violations of the statute").

In any event, a different Rule could also have limited the potential field of plaintiffs and claims facing Texas. DOJ may file suit against Texas. But DOJ cannot file suit on an individual's claim of discrimination unless EEOC, after investigating the claim and finding it meritorious, refers the claim to DOJ. *See* 42 U.S.C. § 2000e-5(f)(1); *Texas I*, 827 F.3d at 383-84 & n.7. If a binding rule had deemed felon-hiring bans consistent with Title VII, EEOC would never refer an individual claim premised on such a ban to DOJ, and DOJ would thus never bring suit on such a claim. This would "narrow[] the field of potential plaintiffs." *Hawkes*, 136 S. Ct. at 1814.

Defendants argue (at 35-36) that while DOJ may not be able to bring an individual claim in such a scenario, it would still be able to bring a "pattern or practice" claim without a referral. Even if correct, this does not change the fact that an entire category of claims by DOJ would be eliminated. Under *Hawkes*, denying that safe harbor is a legal consequence.

Moreover, defendants' argument rests on the false premise that DOJ would exercise independent judgment in deciding to bring a pattern-or-practice claim. Although DOJ has the authority to make its own decisions about such claims, it executed an MOU with EEOC with the avowed aim to "eliminate . . . inconsistency in the enforcement of the federal employment discrimination laws" against state and local governments. MOU at 1; *see supra* pp. 9-10. This tracks the memorandum of agreement present in *Hawkes*. *See* 136 S. Ct at 1814. Accordingly, it is simply not believable that DOJ would pursue enforcement on a theory expressly rejected by EEOC. And a "'pragmatic' approach," *id.* at 1815, mandates recognition of this reality. *See Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1031-32 (D.C. Cir. 2016) (finding legal

consequence based on prior representations by agency; rejecting agency's change of position on appeal); *cf. Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (rejecting deference to agency position that appears to be "nothing more than a convenient litigating position . . . or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack") (cleaned up).

**3. The Rule sets norms or safe harbors.**

A third reason that the Rule has legal consequence is that it sets forth norms or safe harbors by which private employers can avoid EEOC enforcement actions and public employers can avoid referrals to DOJ. When, as here, "the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter." *Cohen*, 578 F.3d at 9 (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)); *accord Hawkes*, 136 S. Ct. at 1814-15 (explaining that a safe harbor is a legal consequence); *Texas I*, 827 F.3d at 383-84.

The Rule contains two norms or safe harbors on which EEOC expects employers to rely in shaping their behavior. It describes "[t]wo circumstances in which the Commission believes employers will consistently meet the 'job related and consistent with business necessity' defense." ROA.1255. The Rule then defines those circumstances in two paragraphs that lay out the standards an employer could meet to take advantage of the safe harbors.

Defendants' primary rejoinder (at 33) is that the Rule does not "guarantee that an employer will not be found liable in the event of a lawsuit"; rather "[a] federal court would make those determinations." This is true, but irrelevant. While a private

plaintiff is not legally bound by the Rule, EEOC is, and this, in turn, has a practical binding effect on employers who wish to avoid EEOC's wrath. *See Iowa League of Cities*, 711 F.3d at 864 (citing *Gen. Elec. Co.*, 290 F.3d at 383). Thus, defendants do not dispute that employers can and should rely on these norms or safe harbors to avoid EEOC enforcement actions or referrals to DOJ. *Cf. Texas I*, 827 F.3d at 382 ("EEOC does not dispute . . . that, if employers will conform their conduct to reflect the 'safe harbors' set forth by the [Rule], such employers would virtually always escape adverse EEOC determinations on charges of felony hiring discrimination."). Because the Rule "narrows the field of potential plaintiffs and limits the potential liability" of employers, it has legal consequences. *Hawkes*, 136 S. Ct. at 1814; *see also Rhea Lana*, 824 F.3d at 1032 (rejecting argument that possibility of court disagreeing with agency robbed agency action of legal consequence).

Defendants also argue (at 32-33) that that these provisions "do not qualify as safe harbors" because of their "equivocal language." In other words, they merely promise that "the Commission believes employers will consistently" be free of liability, Appellants' Br. at 33 (quotation marks and emphasis omitted), instead of claiming that "the Commission is certain that employers will invariably" be free of liability. But defendants cite no authority suggesting that absolute certainty is required for the creation of a norm or safe harbor. Such a requirement would be antithetical to the "pragmatic" and "flexible" approach required by the Supreme Court. *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs.*, 387 U.S. at 149-50). It is apparent that regulated entities "can rely on [these provisions] as a norm or safe harbor by which to shape their actions." *Cohen*, 578 F.3d at 9. In fact,

those provisions were clearly put in place *precisely* so that employers would use them as a norm to guide their actions. *See* ROA.1244 (explaining that "[t]he Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes"). This is enough to make the Rule reviewable.

**4. The Rule purports to preempt state law.**

A fourth and final reason why the Rule has legal consequence is that it purports to preempt state laws barring felons from certain occupations. ROA.1265; *see also* ROA.832. The Rule states that "if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability." ROA.1265. For example, even if state law prohibits preschools from hiring convicted sex offenders, a preschool would still be subject to investigation and potential Title-VII liability for refusing to hire a man who was recently convicted of indecent exposure. *See* ROA.1265.

Defendants can hardly argue that this is not an important legal consequence, so their only recourse is to argue (at 29, 38) that it is a consequence of Title VII itself, and not of the Rule. This argument fails.

To buy defendants' argument, one has to believe that the meaning of Title VII changes depending on who is reading it. In 2008, DOJ told the Supreme Court that Title VII means the opposite of what EEOC now says it means. DOJ argued that an employer "is not liable under Title VII for complying with a facially neutral state licensing regime that limits the universe of potential employees to those who have

complied with the State's requirement." *Gulino* Amicus Br. at 9. Of course, the requirements of Title VII do not change based on presidential elections and whether EEOC is playing offense or defense.

It is equally obvious that defendants can change their *interpretation* of the statute—as they did when EEOC finally and formally adopted the Rule. But after doing so, defendants cannot deny that the Rule—and not the statute—is carrying their water; nor can they deny that their administrative efforts to preempt state law constitute final agency action within the meaning of the APA's review provision, "which is meant to cover comprehensively every manner in which an agency may exercise its power." *Am. Trucking*, 531 U.S. at 478.

**5. Defendants' remaining arguments are meritless.**

Defendants' other sundry arguments why the Rule does not create legal consequences all miss their respective marks.

Defendants' argument (at 27) that "[a]ny legal consequences resulting from [employers'] use of criminal history records as an employer would flow from Title VII itself and court decisions applying the statute" is defeated by the abundant precedent cited above showing all the different ways that agency action can have legal consequences outside of a courtroom and the accompanying demonstration that the Rule is a final agency action under that precedent. *Cf. Texas I*, 827 F.3d at 384 (observing "the Supreme Court's emphasis on a 'pragmatic approach' to assessing whether APA review is appropriate, instead of reliance on formalistic criteria, such as whether the agency decision itself imposes penalties or is binding on a court").

Defendants' citation to *Luminant Generation Co. v. EPA*, 757 F.3d 439 (5th Cir. 2014), does not advance their cause either. *Luminant* was decided prior to the Supreme Court's decision in *Hawkes*. To the extent *Luminant* and *Hawkes* conflict, *Hawkes* must prevail. As shown above, *Hawkes* conclusively establishes that the Rule has legal consequence because the Rule, like the action in *Hawkes*, binds an agency and affects the field of potential plaintiffs and liability facing regulated parties. *See Louisiana State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016) ("Judicially reviewable agency actions normally affect a regulated party's possible legal liability."). Defendants' analysis of *Hawkes* (at 33-36) ignores this portion of the Supreme Court's opinion and is thus unhelpful. Moreover, in focusing on the memorandum of agreement analyzed by the Supreme Court, defendants ignore the existence a similar agreement between DOJ and EEOC. *See supra*, pp. 9-10; *see also Hawkes*, 136 S. Ct. at 1817 (Ginsburg, J., concurring) (suggesting that the same result would have been reached in the absence of the memorandum of agreement).

In any case, as this Court has found once before, *Luminant* is easily distinguishable:

> The agency document in *Luminant* merely expressed the agency's opinion about the legality of the plaintiff's conduct; it did not, as here, commit the administrative agency to a specific course of action should the plaintiff fail to comply with the agency's view. Furthermore, the agency action in *Luminant* was limited to a fact-specific situation and a particular violator. In contrast, the [Rule] here provides an analytical framework that applies across the board to *all* employers—including the hundreds of state agencies at issue in this suit, which employ hundreds of thousands of employees—and binds EEOC staff in later actions . . . . Furthermore, . . . the [Rule]'s safe harbor provisions set out rules that employers are to follow if they wish to avoid legal consequences. Or, stated another way, an employer is assured

> protection from agency referral and prosecution—effectively immune to a government-backed enforcement action—if it conducts itself in the manner prescribed by the [Rule].

*Texas I*, 827 F.3d at 384-85. In other words, in *Luminant*, "the writing was not on the wall. Here it is." *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (distinguishing guidance that regulated parties are "free to ignore" from guidance that "ma[kes] abundantly clear" how the agency will act). This analysis is spot-on and should be readopted.

Meanwhile, defendants' contention (at 28, 37) that Texas's position conflicts with the Court's decision in *Louisiana State* is facially implausible. In *Louisiana State*, the Court repeatedly cited *Texas I*'s conclusion that the Rule was a final agency rule to *support* its analysis. *See Louisiana State*, 834 F.3d at 581-83. It is inconceivable that the Court would have done so if it believed that two decisions were in conflict.

*Louisiana State* is also distinguishable. The Court there explained that, "[a]lthough this issue is not free from doubt," the challenged action was not final because the agency's conclusion was expressly contingent on a future event. *See id.* at 582 ("Had the government been unable to obtain Louisiana's assent to cost-sharing, it is likely that the closure project proposed in the 2008 Report could not have gone forward."). The Rule, by contrast, is indisputably final. And the action at issue in *Louisiana State* did not purport to regulate anyone or effect potential plaintiffs and liability. *See id.* at 582-83. As conclusively shown above, the Rule does.

Finally, defendants mistakenly equate the Rule to a mere "administrative investigation." Appellants' Br. 31-32. The initiation of an investigation is not a final agency action because it is definitionally not *final*. *See Jobs, Training & Servs., Inc. v.*

*East Tex. Council of Gov't's*, 50 F.3d 1318, 1324-25 (5th Cir. 1995) (cited at Appellants' Br. 31). In contrast, where, as here, "the challenged action is a definitive statement of the agency's position," the "agency action is final." *Id.* at 1324; *see Texas I*, 827 F.3d at 387 (Texas is not . . . simply challenging the prospect of an investigation by the EEOC. Instead, it is challenging the [Rule] itself, which represents the legal standards that the EEOC applies when deciding when and how to conduct such an investigation, and what practices may require charges."); *see also Texas v. United States*, 809 F.3d at 164 (distinguishing between a single immigration proceeding and an agency "decision to grant lawful presence to millions of illegal aliens on a class-wide basis").

What is more, defendants' suggestion that employers must wait to challenge EEOC's definitive statement of its position until after a costly and possibly abusive investigation and subsequent initiation of an enforcement action is foreclosed by Supreme Court precedent. That precedent makes clear that objects of agency action need not wait until the agency "'drop[s] the hammer'" and should not be forced to undergo "arduous, expensive, and long" administrative processes "in order to have their day in court." *Hawkes*, 136 S. Ct. at 1815 (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)); *see also id.* (describing prior precedent: "Although [an] order . . . giv[ing] notice of how the Commission interpreted the relevant statute . . . would have effect only if and when a particular action was brought against a particular carrier, . . . we held that the order was nonetheless immediately reviewable.") (cleaned up).

### B. Texas has standing to sue both EEOC and DOJ to challenge the Rule.

With reviewability of the Rule under the APA established, Texas's standing to seek that review follows as a matter of course. Article III requires only an injury, caused by the agency, which a court can redress. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And where, as is indisputably the case here, the plaintiff is "an object of the [agency's] action," "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Id.* at 561-62.[5] On top of this axiom lay two additional circumstances that remove any doubt about standing. First, Texas, as a sovereign state, is afforded "'special solicitude'" in the standing analysis. *Texas v. United States*, 809 F.3d at 162 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). Second, Texas is "seeking to enforce a procedural requirement" (EEOC's compliance with Title VII's limits on its rule-making power and the APA's notice-and-comment provisions) "the disregard of which could impair a separate concrete interest of theirs" (Texas's interest in following and having its citizens follow the felon hiring restrictions mandated by state law and policy). *Lujan*, 504 U.S. at 572. Because the APA's provisions give Texas "a procedural right to protect [its] concrete interests," it "can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 572 n.7. For all these reasons, when a state, as the object of

[5] Defendants argue (at 19) that this rule is limited to "final agency action from which legal consequences flow." They thus effectively concede that if the Court finds that the Felon-Hiring Rule is reviewable under the APA, Texas's standing to seek that review follows.

federal action, asserts a procedural right, there can be *no* question about its standing to sue. *See Texas v. United States*, 809 F.3d at 154, 161-62.

Defendants never even mention the special solicitude owed Texas or the lessened burden accompanying procedural injuries, let alone factor them into their arguments. In fact, not one authority cited by defendants evaluated a state's standing. Thus, from the outset, defendants' arguments are unhelpful. For example, defendants fail to address this Court's precedent establishing that regulatory pressure on a state to change its laws is a sufficient Article III injury. And while pointing to the lack any enforcement action against Texas, defendants never once acknowledge the well-established precedent that standing to sue over a procedural injury does not demand such immediacy. What is left of defendants' argument—that DOJ should be freed from this suit because it now concedes that the Rule is erroneous—has nothing to do with standing at all, because that change of heart occurred after Texas filed suit.

**1. The Rule places regulatory pressure on Texas.**

**a.** "As this court has stated before, 'being pressured to change state law constitutes an injury' for the purpose of state standing analysis." *Texas I*, 827 F.3d at 379 (quoting *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015)). EEOC's professed aim is to pressure employers to change their policies; it cannot be heard to now dispute that Texas, as a direct object of the Rule, is under that pressure. As the Seventh Circuit explained in an analogous case:

> The Agency's standing argument . . . ignores the very idea that it advances to justify adopting the . . . rule in the first place: a punitive stick (it says) is necessary to increase compliance with [the agency's] regulations. The [agency's] rule aims to alter [its objects]' behavior now to avoid a remedial

> directive in the future. . . . In the end, it strikes us as odd that the Agency is arguing that it must have a strict rule *now* to get [its objects] to be more compliant with [the agency's] rules, but at the same time it is asserting that these rules are not meant to change anyone's immediate behavior enough to confer standing to challenge that regulation.

*Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 586 (7th Cir. 2011)[6]; *see also Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (finding it "more than a little ironic" that a federal agency "would suggest Petitioners lack standing and then, later in the same brief," label the petitioner a "prime example" of the "very problem the [r]ule was intended to address") (internal quotation marks omitted).

So too here. It is EEOC's position that Texas's categorical refusal to hire felons for certain jobs necessitated a rule condemning the practice as "unlawful." *See* ROA.1244, 1265. EEOC asserts an urgent "interest" in stopping the State from following state law insofar as it categorically bars felons from employment, ROA.1247, 1265, and EEOC wields "a punitive stick . . . to increase compliance with" its Rule, *Owner-Operator*, 656 F.3d at 586; *see* ROA.1224-26 (listing examples of EEOC's punitive enforcement tactics). It is "more than a little ironic," *Stilwell*, 569 F.3d at 518, to claim that the State nonetheless incurs no injury from EEOC's efforts to preempt Texas law and to change the hiring policies for the State's police officers, youth-

[6] In *Owner-Operator*, truck drivers challenged a rule that regulated the number of hours they could operate their vehicles, and, as here, the agency argued that the plaintiffs' injury was "speculati[ve]" because they were not presently subject to an enforcement action. 656 F.3d at 586.

correction officers, state-supported-living-center employees, game wardens, and school teachers.

**b.** Defendants never consider the regulatory pressure that EEOC is intentionally placing on Texas, instead arguing (at 18) that the Rule does not "compel Texas to do anything." For reasons just explained, that misses the point. The executive action challenged in *Texas v. United States* did not compel Texas to do anything either, and unlike here, it was not even obviously defendant's intent there to exert pressure. *See* 787 F.3d at 748-49. And yet the Court concluded that Texas had standing. It did so because "'states have a sovereign interest in the power to create and enforce a legal code,'" and interference with that interest "constitutes an injury." *Id.* at 749 (quoting *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999)).

Defendants do not and cannot contest that the one of the aims of the Rule is to pressure states to alter what defendants see as states' "antiquated" and "unnecessary" "employment-related restrictions on ex-offenders." ROA.1292, 2273. Warning employers, including state agencies, that following state law will result in costly investigations and enforcement actions is clear interference with states' interest in their "power to create and enforce a legal code." *Tex. Office of Pub. Util. Counsel*, 183 F.3d at 449; *see also id.* (holding that agency's simply declaring authority over object of state law was a sufficient injury, even though agency had not yet exercised that authority); *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (agreeing that the State has standing to seek declaratory and injunctive relief "because DOT claims that its rules preempt state consumer protection statutes, [and therefore] the States have suffered injury to their sovereign power to enforce state

law"). "[T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state defending its existing practices and threatened authority." *Texas I*, 827 F.3d at 379.

For similar reasons, defendants' objections (at 24-25) that Texas cannot point to an enforcement action or any state agency that is considering changing its policy are misplaced. Neither objection undermines the indisputable fact that defendants are pressuring states like Texas to change their laws. Defendants' "refusal to exercise [their] declared authority" to investigate and sue states and other employers based on the employers' compliance with state law "does not deprive states of standing." *Tex. Office of Pub. Util. Counsel*, 183 F.3d at 449. And far from supporting defendants, the evidence that at least one Texas state agency has gone to the cost of "analy[zing] its laws, policies, regulations, or practices in response to the" Rule, Appellants' Br. 25, confirms that the regulatory pressure intended by the Rule in fact exists. It matters not whether other agencies have caved to that pressure or will in the future, *see id.*; the pressure is there and ongoing, and judgment for Texas will reduce or eliminate it.

Defendants are also off-base when they insist (at 18) that any burden on Texas comes from Title VII, not the Rule. As shown above in Section I.A.4, *supra* pp. 28-29, it is the Rule's *interpretation* of Title VII, not the statute itself, that is doing the work here. At bottom, defendants' argument goes to causation—if Title VII "on its face" required the Rule, "then [Texas] would be subject to [the same rule] regardless of [EEOC]'s rulemaking." *United States v. Johnson*, 632 F.3d 912, 921 (5th Cir. 2011). But Title VII does not "on its face" require the Rule. *Id.*; *see also Zivotofsky ex*

*rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) (evaluating standing, requiring only that an agency action conflict with "a colorable reading of the statute"). In fact, DOJ concedes (at 21-22) that the Rule is inconsistent with Title VII in multiple respects. *See also Gulino* Amicus Br. at 8-15 (DOJ arguing that neutral state-law hiring requirements do not violate Title VII); *but see* ROA.1265 (Rule arguing the opposite).

**2. Texas may sue to correct EEOC's procedural error.**

Even absent regulatory pressure, Texas would have standing to bring its APA claim. If Texas is "correct on the merits, as [the Court] must assume for standing purposes, such a challenge presents a clearly redressable injury." *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012). Texas is an object of the Rule and success on its APA claim will require EEOC "to entertain and respond to [Texas]'s claims about the" Rule. *Id.* Thus, Texas "can assert violation of the APA's notice-and-comment requirements, as those procedures are plainly designed to protect the sort of interest alleged." *Id.* And if Texas's view of Title VII is correct, "the merits of which, again, [the Court] must assume" its claims are "potentially redressable by compelling [EEOC] to align the [Rule] with [Title VII]'s mandate." *Id.*

It makes no difference that Texas has so far avoided enforcement action. Texas "may assert this claim of procedural error 'without meeting all the normal standards for redressability and immediacy.'" *Johnson*, 632 F.3d at 921 (quoting *Lujan*, 504 U.S. at 573 n.7). In *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442 (9th Cir. 1994), for example, the court held that plaintiff apartment tenants who were merely "subject to the *threat* of eviction for alleged criminal activity" by a third party

had standing to raise procedural violations by HUD in promulgating rules affecting eviction proceedings. *Id.* at 445-46 (emphasis added). Texas's position is similar. The Rule binds EEOC and thus affects referrals it makes to DOJ. *See supra*, p. 25 Texas faces a threat of enforcement actions and the Rule has a demonstrable effect on how and whether that threat will come to fruition. That is enough for Texas—especially when afforded special solicitude—to have standing to assert procedural error.

Similarly, it does not matter that there is no guarantee that, absent the Rule, Texas will not face some enforcement action related to its felon-hiring bans. *See* Appellants' Br. 20. Just as "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered," an employer subject to the Rule "has standing to challenge the" EEOC's "failure to" follow procedural rules "even though he cannot establish with any certainty that" doing so will foreclose an enforcement action against it. *Johnson*, 632 F.3d at 921 (quotation marks omitted).

Finally, Texas has an independent basis to challenge EEOC's procedural error, because the Rule encourages lawsuits and enforcement actions against Texas. In *Parsons v. United States Department of Justice*, 801 F.3d 701 (6th Cir. 2015), the Sixth Circuit held that a group labeled a gang by an FBI report had standing to challenge the procedures leading to that report based on allegations that the report encouraged harassment by third-party law enforcement. *Id.* at 713. This case is on all fours: the

Rule expressly encourages actions by private attorneys general against Texas, *see* ROA.1244; ROA.1298 (showing that at least one charge relying on the Rule had already been filed), and binds EEOC to engage in costly and potentially abusive investigations of Texas agencies followed by referrals to DOJ for enforcement.

### 3. DOJ's change of position on appeal does not affect Texas's standing.

DOJ, as the muscle behind the Rule, is a necessary defendant in this case. Defendants' final challenge to Texas's standing (at 20-24) argues that Texas lacks standing to sue DOJ because DOJ (1) now agrees that the Rule is erroneous, and (2) bars its employees from treating agency guidance as binding. This challenge has no more merit than defendants' other flawed arguments.

Defendants stumble out of the gate because whatever DOJ is doing or saying *now* has nothing to do with standing. "In identifying an injury that confers standing, courts look *exclusively* to the time of filing." *Loa–Herrera v. Trominski*, 231 F.3d 984, 987 (5th Cir. 2000) (emphasis added). So while DOJ's belated change of heart is welcomed, and confirms that Texas's substantive challenges to the Rule are meritorious, it does nothing to undermine Texas's standing.

Defendants do not contend that DOJ's change of heart moots Texas's claims against DOJ. Nor could they. "[A] lawsuit neither becomes moot nor loses the adversariness essential to a case or controversy merely because one party, on appeal, endorses its adversary's view of the law." *United States v. Brainer*, 691 F.2d 691, 693 (4th Cir. 1982); *accord Sibron v. New York*, 392 U.S. 40, 58 (1968).

Only a commitment by DOJ not to honor referrals by EEOC based on the Rule could possibly moot Texas's claim against DOJ. *See, e.g.*, *McKinley v. Abbott*, 643 F.3d 403, 406-07 (5th Cir. 2011) (case mooted by attorney general's declaration "that neither he nor any county or district attorney . . . will attempt to enforce" challenged law). No such commitment has been forthcoming. DOJ's advisory on agency guidance, *see* Appellants' Br. 23-24, is facially insufficient. Moreover, DOJ's pledge to "not use its enforcement authority to effectively convert agency guidance documents into binding rules," *id.* at 23 (quotation marks omitted), rings hollow in the face of the MOU between DOJ and EEOC, which "instutionalize[s]" a "partnership" between EEOC and DOJ in enforcing Title VII against state and local governments. *Supra*, pp. 9-10. DOJ has vowed to "ensur[e]" that when EEOC finds a "violation," DOJ will "obtain[]" an "appropriate remed[y]." MOU at 2. DOJ need not rely directly on the Rule for marching orders, it may just as readily rely on the MOU to achieve the same result.

### C. The form and scope of the district court's injunction is proper.

The district court enjoined EEOC and DOJ "from enforcing the EEOC's interpretation of the [Rule] against the State of Texas until the EEOC has complied with the notice and comment requirements under the APA for promulgating an enforceable substantive rule." ROA.2441. The proper response by EEOC would have been to withdraw the Rule, which EEOC had no power to promulgate in the first place. Instead, defendants plead ignorance as to the scope of the injunction and try once again to ferry DOJ out of this lawsuit. Neither effort is well-taken.

Rule 65(d) requires every injunction to "state its terms specifically [and] describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C). Courts evaluate the definiteness of an injunction "in the light of the circumstances surrounding (the injunction's) entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1137 (D.C. Cir. 2009) (quotation marks omitted); *accord Scott v. Schedler*, 826 F.3d 207, 213 (5th Cir. 2016) (per curiam) ("The specificity requirement is not unwieldy. An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited.") (quotation marks and ellipsis omitted).

Defendants insist (at 39) that they cannot tell whether they are "are barred from enforcing the [Rule] as such, or are barred from enforcing an interpretation of Title VII that is embodied in the [Rule]." But at the same time, they acknowledge that, "[b]ecause the court ruled against defendants solely on APA procedural grounds and did not rule on the substantive validity of any interpretation of Title VII in the [Rule], only the former interpretation is consistent with the court's legal holding." *Id.* Texas agrees; thus, "the circumstances surrounding (the injunction's) entry," *Philip Morris USA Inc.*, 566 F.3d at 1137, remove any confusion.[7]

[7] In the district court, trial counsel for Texas suggested that the district court's injunction applied to any interpretation of law contained in the Felon-Hiring Rule. *See* ROA.2461. That was a mistake.

To be clear, this does not mean that defendants may simply withdraw the Rule from public view but continue to treat the interpretation embodied in the Rule as binding. As this Court explained in *Texas v. United States*, if an agency stakes a position and eliminates discretion of its staff on the front lines, that is a substantive rule requiring notice and comment. *See* 809 F.3d at 171-76. Because the district court's injunction bars enforcing the Rule without notice and comment, it is sufficiently clear from "the context of the case," *Philip Morris*, 566 F.3d at 1137, that defendants may not treat the Rule as binding in any respect. The district court is not and will never be positioned to identify all the different ways defendants could treat the Rule as binding; defendants naturally are. So, the injunction is properly open-ended in that respect. *See Scott*, 826 F.3d at 213 ("The district court cannot be expected to act as an executive or legislative agent of the state, dictating with intricate precision the policies the state should adopt in order to fulfill its statutory obligations.").

Defendants' dressed-up standing argument (at 40)—that the injunction should not have named DOJ—is also misguided. DOJ has formalized a partnership with EEOC with the avowed purpose to ensure consistent enforcement of Title VII against state and local governments. *See supra*, pp. 9-10. Thus, for the same reasons that Texas has standing to sue DOJ, the district court had the power to enjoin DOJ. *See* Fed. R. Civ. P. 65(d)(2)(C) (injunction binds "other persons who are in active concert or participation with" party named); *Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 85 (5th Cir. 1976) (holding that district court properly included party in an injunction who had previously assisted in activity now enjoined).

## II. Texas's Cross-Appeal

While the district court got much right, it also committed a couple of mistakes. The district court held only that the Rule may not be enforced against Texas until it goes through the APA's notice-and-comment procedures. But, in fact, the Rule should never be permitted, because EEOC has no power to promulgate a substantive rule. Thus, the district court did not go far enough in its injunction.

In addition, the district court was wrong to reject the merits of Texas's DJA claim, which sought to affirm the ability of Texas agencies to follow Texas law and policy. The Court does not need to reach the merits of this question, however, if it affirms the district court's injunction. In that case, the Court could use its discretion to decline the reach Texas's DJA claim, vacate the district court's ruling, and render judgment dismissing the claim for lack of jurisdiction.

### A. EEOC lacked authority to promulgate the Rule.

Texas's APA claim set forth three infirmities with the Rule: (1) EEOC had no power to promulgate a substantive rule; (2) as a substantive rule, the Rule was improperly promulgated without notice and comment; and (3) the Rule is substantively unreasonable. ROA.1234-35. The district court reached only the second infirmity, concluding that the Rule "is a substantive rule issued without notice and the opportunity for comment." ROA.2439, 2441. The district court declined to reach the other two because "such findings are not necessary to the adjudication of the claims and would be premature at this time." ROA.2439-40.

This was error for at least two reasons. First, reaching EEOC's power to promulgate the Rule was, in fact, "necessary to the adjudication of" Texas's APA claim.

ROA.2440. As the case now stands, EEOC may re-promulgate the Rule after notice and comment. *See* ROA.2441. But if the district court had concluded that EEOC had no power to promulgate the Rule, that would prevent any reincarnation. The district court gave Texas less relief than requested, so it could not avoid reaching this issue.

Second, the adjudication of this issue was not "premature." ROA.2440. The district court concluded that the Rule was a substantive rule requiring notice and comment. ROA.2439-40. But there is no dispute that EEOC has no power to promulgate such a rule. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); Appellants' Br. 30. Thus, it necessarily follows that EEOC exceeded its authority in promulgating the Rule. The district court should have enjoined the Rule without any condition subsequent.

### B. The district court erroneously rejected Texas's DJA claim on the merits.

The district court was also wrong to reject the merits of Texas's DJA claim. Before reaching the merits, however, the Court should first consider whether there is an easier path to dispose of this claim. A court's jurisdiction under the DJA is discretionary. Thus, when declaratory judgment would serve no useful purpose, a court should decline to reach the claim. Should the Court affirm the district court's injunction prohibiting enforcement of the Rule against Texas, declaratory judgment would serve no useful purpose. In that event, the Court should render judgment dismissing Texas's DJA claim for lack of jurisdiction.

Texas's DJA claim sought to establish that Title VII does not preclude state agencies from adhering to facially neutral state laws and policies restricting the hiring

of certain felons. ROA.1233-34. Should the Court reach the merits, it will find that, for at least four reasons, the district court's rejection of Texas's DJA claim was erroneous. First, the Court's ruling is internally inconsistent on whether a ruling was proper at all. Second, Title VII does not displace facially neutral state law and policy restricting the employment of felons. Third, a contrary reading would render Title VII an unconstitutional abrogation of state sovereign immunity. Fourth, restricting public-employment opportunities for felons bears a manifest relationship to the State's interest in maintaining the trust of the public and respect for the law.

**1. The Court may decline to reach the merits of Texas's DJA claim.**

"[E]xercising [its] 'unique and substantial discretion in deciding whether to declare the rights of litigants' under the federal Declaratory Judgment Act," the Court may "decline to consider [Texas]'s claim for declaratory judgment." *Edionwe v. Bailey*, 860 F.3d 287, 294 n.2 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 687 (2018) (quoting *Wilton*, 515 U.S. at 286). Texas's DJA claim arises from the controversy created by the threatened enforcement of the Rule. *See* ROA.1233-34. If the Rule is enjoined, however, declaratory judgment would serve no useful purpose, and it would be an inappropriate exercise of jurisdiction to reach that claim.

Substantial authority provides that declaratory relief is not appropriate to address a challenged law or policy that no longer affects the plaintiff. In *Golden v. Zwickler*, 394 U.S. 103 (1969), for example, the plaintiff challenged a New York law that prevented him from "distribut[ing] anonymous literature" about a specific congressman. *Id.* at 104. During the pendency of litigation, however, the congressman

left politics with no plans to return. *Id.* at 106. Nonetheless, the district court declared the challenged law unconstitutional. *Id.* at 107. The Supreme Court reversed, holding that the district court should have dismissed the claim. *Id.* at 108, 110. "It was not enough," the Court explained, that the plaintiff desired an "adjudication of unconstitutionality." *Id.* at 109. Rather, because the plaintiff was no longer at risk of being subject to the law, there was no longer "a substantial controversy . . . of sufficient immediacy . . . to warrant the issuance of a declaratory judgment." *Id.* at 108. Numerous courts since, including this one, have held similarly. *See, e.g.*, *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 562 (8th Cir. 2009) (vacating as "superfluous" a declaratory judgment by the district court where the offending practice had been enjoined); *Drayden v. Needville Indep. Sch. Dist.*, 642 F.2d 129, 133 (5th Cir. 1981) (explaining that "[a]ny declaratory . . . relief granted by a district court regarding the cessation of discriminatory practices" following settlement between local and federal parties "would now be . . . redundant and superfluous"), *abrogated other grounds by Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992); *Feliciano v. Jerry's Fruit & Garden Ctr., Inc.*, No. 93-CV-5911, 1994 WL 142963, at *6 (N.D. Ill. Apr. 15, 1994) (refusing to grant declaratory judgment on alleged discrimination because plaintiff no longer worked for defendant).

Put simply, "[i]t would be an abuse of discretion for this Court to make a pronouncement on the [validity] of a" regulation unless "it plainly appeared" necessary. *Ala. State Fed'n of Labor, Local Union No. 103, United Bhd. of Carpenters & Joiners of Am. v. McAdory*, 325 U.S. 450, 471 (1945). If the Rule is enjoined, Texas would

no longer be subject to it. Thus, it would be unnecessary and inappropriate to consider declaratory judgment on the Rule's validity.

While Texas's DJA claim would serve no useful purpose if the Rule is enjoined, the claim will continue to raise substantial constitutional questions. *See infra*, pp. 50-54. Thus, the doctrine of constitutional avoidance further counsels against reaching Texas's DJA claim in that event. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016) (en banc) (vacating district court's ruling and dismissing claims based on "the well established principle governing the prudent exercise of this court's jurisdiction that normally this court will not decide a constitutional question if there is some other ground upon which to dispose of the case") (cleaned up).

**2. If the Court reaches the question, it should hold that Texas agencies do not violate Title VII by adhering to facially neutral state laws and policies restricting the hiring of felons.**

The district court rejected the merits of Texas's DJA claim because the court believed that it would be "illogical" to find that there are not "instances in which otherwise qualified job applicants with certain felony convictions in their criminal histories pose no objectively reasonable risk to the interests of the State of Texas and its citizens." ROA.2439. Thus, the district court concluded that "a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush." ROA.2439. But that reasoning has nothing to with do the question raised by Texas's DJA claim: whether Title VII bars state agencies from complying with facially neutral, presumptively valid state law and policy. If a

felon believes that some restriction on his hiring is "illogical" because it has no connection to any valid state interest, ROA.2439, he may bring an equal-protection challenge against that restriction. *See Glass v. Paxton*, 900 F.3d 233, 244 (5th Cir. 2018). But until then, courts must presume that Texas is not acting, and will not act, illogically. *See Duarte v. City of Lewisville*, 858 F.3d 348, 354 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 391 (2017); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) ("[T]he good faith of the state legislature must be presumed.") (quotation marks and alterations omitted).

The district court tore down a straw man. When the actual substance of Texas's DJA claim is considered, it is evident that the district court's ruling cannot stand.

**a. The district court's merits ruling is inconsistent with other parts of its decision.**

Texas challenged the substance of the Rule in both its APA claim and its DJA claim. *See* ROA.1233-35. Texas relied on the same arguments for both claims. *See* ROA.1727-41, 2409-21, 2423-29. The district court concluded that it was "premature" to make the findings necessary to reach Texas's substantive challenge under the APA. ROA.2439-40. But the district court reached the identical challenge in rejecting Texas's DJA claim. At the very least, this inconsistency requires a remand, because courts should "refrain" ruling on a DJA claim "unless there is a full-bodied record." 10B Charles A. Wright, et al., *Federal Practice and Procedure* § 2759, at 520-21 (4th ed. 2016).

### b. Title VII cannot be read to supplant facially neutral state laws and policies restricting the hiring of felons.

Complying with an otherwise valid law is obviously a business necessity with no reasonable alternative. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (holding that avoiding possible violation of OSHA was a valid business justification); *see also Gulino* Amicus Br. 10-11 ("[C]ompliance with a valid facially neutral state mandate is a business necessity to which there is no reasonable alternative."). So, complying with a facially neutral, presumptively valid state law or policy should never result in a Title-VII violation. The Rule says the opposite. *See* ROA.1265 (Rule at 24). It warns employers, including state agencies, that state law must be ignored. That position is wrong.

**i.** The Rule cites 42 U.S.C. § 2000e-7 as the basis for its position that employers must ignore state law. ROA.1265, 1293 (Rule at 24 & n.166).[8] But section 2000e-7 "is an *anti-preemption* provision" designed to "allow[] states latitude in the design of their own antidiscrimination law." *Bradshaw v. Sch. Bd. of Broward Cty.*, 486 F.3d 1205, 1210 (11th Cir. 2007) (emphasis added). And while section 2000e-7 carves out of its anti-preemption scope laws that "require or permit . . . unlawful employment practice[s]," 42 U.S.C. § 2000e-7, a facially neutral state law or policy restricting the hiring of felons "does not remotely purport to require or permit any refusal to

[8] "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7.

accord federally mandated equal treatment to [those] similarly situated." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 296 (1987) (Scalia, J., concurring in the judgment); *see also Malabed v. N. Slope Borough*, 335 F.3d 864, 870 (9th Cir. 2003); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 710 (9th Cir. 1997); *Gulino* Amicus Br. 13-14 (concluding that section 2000e-7 "does not expose to liability an employer who gives effect to a" facially neutral state law).

**ii.** Even if section 2000e-7 could be read to require the violation of facially neutral state law or policy restricting the hiring of felons, the Tenth Amendment would preclude such a reading. *See Gulino* Amicus Br. 7-8.

States are not forbidden by the Constitution from enacting or enforcing laws that have unintentional disparate impacts. *Washington v. Davis*, 426 U.S. 229, 242-46 (1976). And the Constitution expressly reserves to the States the exercise of traditional police powers. *See* U.S. Const. amend. X. According to the Rule, Title VII usurps states' traditional police power to establish restrictions on convicted felons. But courts "must be absolutely certain that Congress intended such an exercise" of power before they displace authority reserved to the States in the Tenth Amendment. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). There is no such certainty to be found in Title VII. Thus, one cannot use Title VII to challenge the exercise of traditional police powers, such as felon-hiring restrictions, that purportedly cause downstream disparate impacts in employment. *Cf., e.g.*, *Camacho v. Puerto Rico Ports Auth.*, 369 F.3d 570, 578 (1st Cir. 2004) (noting "long line of cases" holding that licensing authorities are not subject to Title VII).

As DOJ explained in *Gulino*, what plaintiffs cannot accomplish directly by challenging state law, they also cannot achieve indirectly by seeking to hold employers liable for following state law. *Gulino* Amicus Br. 9-10. Any other conclusion would effectively result in the same reworking of the federal-state balance as a regime making the States liable directly for their facially neutral laws affecting employment. State police powers would be vitiated if employers could be held liable under Title VII for complying with facially neutral state laws, because the threat of such liability would frustrate compliance with such state laws.

**c. A contrary reading of Title VII would render the law an unconstitutional abrogation of state sovereign immunity.**

In Title VII, Congress abrogated state sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976). But an abrogation of state sovereign immunity is unconstitutional if not exercised "pursuant to a valid exercise of power." *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). Title VII's abrogation was pursuant to section 5 of the Fourteenth Amendment. *See Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1979). When Congress acts to enforce the Reconstruction Amendments, legislation that reaches beyond the Constitution's substantive guarantees "must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (quotation marks omitted). A state employment decision violates the Reconstruction Amendments only if it is motivated by a discriminatory *purpose* to

burden persons based on immutable characteristics; the Constitution does not prohibit employment decisions because of their results. *See Washington v. Davis*, 426 U.S. at 242-46.

Title VII does contain such a prohibition. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It thus goes one step beyond the constitutional guarantee. It arguably satisfies the congruent-and-proportional test because "a genuine finding of disparate impact can be highly probative of the employer's motive," especially when "the employer cannot demonstrate that the challenged practice is a job[-]related business necessity." *In re Emp't Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1321, 1322 (11th Cir. 1999). But the probative value of disparate impact disappears when the employer is simply following a facially neutral state law or policy. *See Gulino* Amicus Br. 10-13. At that point, Title VII is no longer sufficiently tied to the constitutional ban on purposeful racial discrimination. *Cf. In re Cao*, 619 F.3d 410, 447 (5th Cir. 2010) (constitutional standards cannot depend on "prophylaxis-upon-prophylaxis").

"[I]t is well established that statutes should be construed to avoid constitutional questions if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 333 (1988). When a statute can be read in a way that avoids possible incongruence and disproportionality, that is the path a court should take. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-11 (2009). Because a contrary reading would raise serious constitutional concerns, the Court should conclude that Title VII

does not impose liability on employers following facially neutral state laws or policies restricting the employment of felons.[9]

**d. The "public interest" in barring felons from public employment satisfies Title VII.**

Even absent a state law or policy mandating the exclusion of certain felons from certain areas of public employment, a state agency's decision to bar the hiring of felons would not run afoul of Title VII. Texas has an interest in maintaining the trust of its citizens and motivating compliance with the law. Felons "have manifested a fundamental antipathy to the criminal laws of the state or of the nation" and "raised questions about their ability to [act] responsibly." *Shepherd*, 575 F.2d at 1115. Thus, barring felons from public employment serves both of these interests and so is consistent with Title VII.

While private businesses must demonstrate a business necessity to satisfy their burden in a disparate-impact case, governments may satisfy their burden by demonstrating a "public interest" in a challenged policy. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015). Relying on Title-VII precedent, the Supreme Court cautioned in *Inclusive Communities* that disparate-impact liability cannot overcome "valid governmental policies." *Id.* at 2522 (citing

[9] It is true that DOJ does not need to rely on an abrogation of state sovereign immunity to sue Texas. But Title VII cannot mean one thing when DOJ is a plaintiff, and another when the plaintiff is a private citizen. So the reading of Title VII that avoids constitutional difficulty in one circumstance must apply to all circumstances. "The lowest common denominator, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

*Griggs*, 401 U.S. at 431); *see also Contreras v. City of Los Angeles*, 656 F.2d 1267, 1285 & n.11 (9th Cir. 1981) (holding that plaintiff's disparate-impact claim could not overcome city's interest in maintaining civil service requirements, which were "designed to eliminate the spoils system of political hiring").

Government employers are unique in that all their employees serve the public good in some respect. In addition, government employers are often called upon to further some wider policy goal of the State. *See, e.g.*, Tex. Gov't Code § 657.003 (rewarding veterans with hiring preferences). It is vital that the government maintain the trust of the public and respect for criminal laws. That occasionally means that jobs will be closed off to those who have "have manifested a fundamental antipathy to the criminal laws of the state or of the nation" and "raised questions about their ability to [act] responsibly." *Shepherd*, 575 F.2d at 1115. Employers in general are entitled to err on the side of caution. *See, e.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 997 (5th Cir. 1984); *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519 (E.D. La. 1971), *aff'd* 468 F.2d 951 (5th Cir. 1972) (table). Particularly when hiring for jobs "importan[t] to the public welfare," *Davis v. City of Dallas*, 777 F.2d 205, 210 (5th Cir. 1985), as all state jobs necessarily are. So government employers are entitled to err of the side of caution in serving the public interest, which by itself justifies barring felons from public employment. After all, if a felony conviction is "a reasonable ground of eligibility for voting," *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality op.)—a "precious" and "fundamental" right, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966)—it should also be for public employment.

Because there is a "manifest relationship" between barring felons from public employment as the Legislature and state agencies see fit and the public interest in maintaining the trust of the public and respect for the law, Title VII does not bar the practice. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quoting *Griggs*, 401 U.S. at 432); *accord New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (public employer's blanket ban on employing persons undergoing methadone treatment bore a "'manifest relationship to the employment in question'" because the agency's "goals are significantly served by—even if they do not require—[the] rule as it applies to all methadone users including those who are seeking employment in nonsafety-sensitive positions'") (quoting *Griggs*, 401 U.S. at 432)); *see also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 997-99 (1988) (plurality op.) (refusing to limit "business necessity" inquiry to effect on "actual on-the-job performance").

## Conclusion

The Court should render judgment precluding enforcement of the Rule against Texas. The Court should affirm the district court's conclusion that the Rule is a substantive rule promulgated without notice and comment. The Court should reverse the district court's denial of Texas's motion for summary judgment concerning EEOC's power to promulgate the Rule. The Court should vacate the district court's merits ruling on Texas's DJA claim and order dismissal of the claim for lack of jurisdiction, or, in the alternative, reverse the district court's merits ruling on Texas's DJA claim.

Respectfully submitted.

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## Certificate of Service

On November 2, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jason R. LaFond
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## Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because it contains 15,287 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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