No. 14-10949

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS,
Plaintiff-Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
JACQUELINE BERRIEN, in her official capacity as Chair of the Equal Employment Opportunity Commission;
ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Lubbock Division
5:13-cv-00255-C

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. State of Texas, Plaintiff-Appellant

2. Andrew S. Oldham, Arthur C. D'Andrea, Richard B. Farrer, Dustin M. Howell, and Alex Potapov, Counsel for Plaintiff-Appellant

3. Equal Employment Opportunity Commission, Jacqueline Berrien, in her official capacity as Chair of the Equal Employment Opportunity Commission, and Eric H. Holder, Jr., U.S. Attorney General, Defendants-Appellees

4. Stephanie Robin Marcus and Justin Michael Sandberg, Counsel for Defendants-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

This Court should hear argument because this case presents issues of exceptional importance throughout the State of Texas and the Nation. The federal government, speaking through the Equal Employment Opportunity Commission ("EEOC" or "Commission"), purported to preempt numerous state laws that ban the hiring of convicted felons to be Texas State Troopers, kindergarten teachers, and nursing-home caregivers. The district court held that it was powerless to stop the EEOC because there is no such thing as pre-enforcement review of a federal administrative regulation. *But see, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). This Court should hear argument and reverse.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361. On August 20, 2014, the district court entered a final order and judgment granting the defendants' motion to dismiss, thus disposing of all parties' claims. ROA.863-71. On September 5, 2014, the State of Texas timely filed a notice of appeal. ROA.872. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

On April 25, 2012, the Equal Employment Opportunity Commission adopted a rule that prohibits employers from categorically refusing to hire felons. The issues presented are:

1. Whether an employer has standing to challenge the rule before suffering an enforcement action.

2. Whether the ripeness doctrine precludes a facial challenge to the rule.

3. Whether the rule constitutes final agency action.

STATEMENT

A. Statutory and Regulatory Background

1. Title VII contains only two relevant provisions. First, the statute makes it "an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Obviously, that provision says nothing about whether an employer can refuse to hire felons without regard to their race.

Second, the statute withholds from the EEOC the power to specify by regulation *what* constitutes an "unlawful employment practice." *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) ("Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title."). To the contrary, Congress gave the Commission power to promulgate *only* "suitable procedural regulations." 42 U.S.C. § 2000e-12(a).

2. Because Title VII disables the EEOC from issuing substantive regulations, the Commission instead promulgated a multi-volume "Compliance Manual." As late as 2006, that Manual's entire treatment of felon-hiring policies comprised four paragraphs spanning

just over one page of text. *See* ROA.238-39 [EEOC, Compliance Manual § 15-VI.B.2, at 15-29 to -30 (Apr. 19, 2006)]. And its entire analysis of categorical no-felons policies constituted a single sentence: "A blanket exclusion of persons convicted of any crime . . . would not be job-related and consistent with business necessity." ROA.239.

Given the EEOC's conclusory treatment of the issue, federal courts disregarded the Commission's attempt to render felon-hiring bans unlawful. *See, e.g.*, *El v. SEPTA*, 479 F.3d 232, 243-44 (3d Cir. 2007) (the EEOC's views on no-felon policies are "not . . . entitled to great deference"). In fact, the federal courts routinely disregarded the EEOC's Compliance Manual as unpersuasive. *See, e.g.*, *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013); *Kentucky Retirement Systems v. EEOC*, 554 U.S. 135, 150 (2008); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991).

B. The Felon-Hiring Rule

1. The EEOC promulgated the Felon-Hiring Rule in response to judicial decisions disregarding its efforts to outlaw no-felons policies. *See* Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment

Decisions Under Title VII ("Felon-Hiring Rule Q&A"), *available at* www1.eeoc.gov//laws/guidance/qa_arrest_conviction.cfm? (noting that the EEOC adopted Felon-Hiring Rule because the Third Circuit in *El* criticized the Compliance Manual for providing no "legal analysis"); EEOC, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, No. 915.002 (Apr. 25, 2012) ("Felon-Hiring Rule" or "Rule"). In an attempt to earn the deference that courts previously denied, the EEOC expanded its one-sentence discussion in the Compliance Manual into a 52-page, 167-footnote Felon-Hiring Rule.

The EEOC explained its concern that "African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population." ROA.322 [Rule at 9]. Therefore, the EEOC worried, if an employer categorically refused to hire *all* felons (whatever their races), the no-felons policy would have an unintentional "disparate impact" on African-Americans and Hispanics. ROA.323. To cure that disparate impact, the EEOC directed the Nation's employers to abandon their no-felon policies and ignore any state laws to the contrary. Instead, the EEOC directed employers to make "individualized assessments" to ensure that its felon-hiring

practices do not "deprive[] a disproportionate number of Title VII-protected individuals of employment opportunities." ROA.331-33, 323. The EEOC promised to bring investigatory and enforcement actions against any employer that refused to make such individualized assessments, and instead used no-felons policies as an "absolute bar to employment" for all applicants of whatever race. ROA.352 [Rule at 39 n.90]. And it further cautioned that, in a federal enforcement action, "[a]n employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact." ROA.323.

2. The EEOC also clarified that its new Rule dramatically expanded employers' obligations in two ways. First, the Rule explained that no employer of any kind is safe from the EEOC's felon-hiring requirements. For example, the Rule specified that even a preschool could not categorically refuse to hire all job applicants convicted of "indecent exposure" in the last two years. *See* ROA.337. Rather, even in that extreme example, the EEOC would conduct an investigation and put the burden on the preschool to prove that the categorical no-indecent-exposure policy either (i) did not have a disparate impact on the basis of race, or (ii) could be justified by job-relatedness and

business necessity. ROA.337. And if the preschool evidence did not satisfy the EEOC, the Commission would force the preschool to remedy the "unlawful employment practice" by hiring only the racial minorities excluded by the no-indecent-exposure policy. ROA.337; ROA.296 [First Amended Complaint ("FAC") ¶ 22].

Second, the Rule purports — for the first time — to preempt state laws that ban employers from hiring felons. As the EEOC itself admitted in its Q&A document accompanying the new rule:

> ***How does the [Felon-Hiring Rule] differ from the EEOC's earlier policy statements?***
>
> . . .
>
> The [Felon-Hiring Rule] says that state and local laws or regulations are preempted.

Felon-Hiring Rule Q&A, *supra*.

3. Notwithstanding the EEOC's expansions of its felon-hiring regulations, it adopted the Rule without allowing the public to see it or comment on it. As one of the EEOC commissioners complained on the record, "[t]here is absolutely no justification for totally excluding the American people from this process or for this blatant failure to be transparent in how we conduct our business." Transcript, Apr. 25,

2012, *available at* www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm (Commissioner Barker).

C. The EEOC's Abusive Enforcement

1. Shortly after the EEOC promulgated the Felon-Hiring Rule, the Sixth Circuit affirmed a sanctions award against the Commission for its abusive, groundless, and frivolous enforcement of the Rule. *See EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013). The EEOC alleged that a temporary-staffing company named Peoplemark unlawfully refused to hire a woman named Sherri Scott, "a two-time felon with convictions for housebreaking and larceny." ROA.295 [FAC ¶ 20]. In an attempt to prove that Peoplemark's hiring policy created a disparate impact, the EEOC conducted a three-year investigation of the company and subpoenaed 18,000 pages of corporate documents. ROA.295. Its investigation uncovered nothing, and Peoplemark's decision not to hire Sherri Scott proved prudent when she returned to prison in the middle of the EEOC's investigation for a third felony conviction (this one for felonious assault). *EEOC v. Peoplemark, Inc.*, No. 1:08-cv-907, 2011 WL 1707281, at *3 n.2 (W.D. Mich. Mar. 31, 2011). The 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 the EEOC by dismissing its complaint with prejudice, awarding Peoplemark over $750,000 in fees and costs, and concluding that the EEOC's conduct "falls between frivolous and insulting." *Id.* at *5, *11 n.8, *12. The Sixth Circuit affirmed and concluded that the EEOC's allegations were "*groundless*" and "*frivolous*." *Peoplemark*, 732 F.3d at 592.

Similarly, the EEOC sued a trade-show-and-convention company called Freeman for refusing to hire felons. *See* ROA.295-96 [FAC ¶ 21]. In the course of that lawsuit, the EEOC committed numerous discovery violations. ROA.295-96. Then the federal district court threw out the EEOC's disparate-impact claims because they were based on "a plethora of errors and analytical fallacies," and the EEOC's supposed proof was "completely unreliable." *EEOC v. Freeman*, 961 F. Supp. 2d 783, 793 (D. Md. 2013).

2. Other victims have avoided the EEOC's abusive tactics, but only by settling quickly. For example, the EEOC accused the soda company Pepsi of creating an unlawful "disparate impact" by refusing

to hire approximately 300 individuals with criminal backgrounds. ROA.296. [FAC ¶ 22]. The EEOC ordered Pepsi to cure the *unintentional* disparate impact by committing *intentional* discrimination — namely, by hiring only the African-American felons. ROA.296.

D. This Lawsuit

1. The State of Texas employs hundreds of thousands of people, and many of its constituent agencies have obligations under state law to categorically refuse to hire all felons. To take just a few examples, under Texas law, "[a] person who has been convicted of a felony is disqualified to be an officer" for any law-enforcement agency anywhere in the State. TEX. OCC. CODE § 1701.312(a). For certain law-enforcement jobs — like the Texas State Troopers, employed by the Texas Department of Public Safety ("DPS") — even a misdemeanor conviction is a categorical bar to employment. ROA.296-97 [FAC ¶ 24]. Likewise, pursuant to state law and policy:

- The Parks and Wildlife Department ("PWD") may not hire any game warden convicted of any felony (or even a class A misdemeanor) under any circumstances. ROA.298 [FAC ¶ 29].

- The Texas Department of Aging and Disability Services ("DADS") may not hire certain felons under any circumstances. ROA.297 [FAC ¶ 25].
- The General Land Office ("GLO") may not hire certain felons under any circumstances to work in Texas State Veterans Homes. ROA.297 [FAC ¶ 26].
- The Texas Juvenile Justice Department ("JJD") may not hire certain felons under any circumstances to work in its correctional institutions or programs. ROA.298 [FAC ¶ 27].
- The Texas Lottery Commission ("TLC") may not hire anyone under any circumstances who committed any felony in the last ten years. ROA.298 [FAC ¶ 28].
- And school districts may not hire certain felons under any circumstances. ROA.298 [FAC ¶ 30].

At least two felons have sued or attempted to sue the State of Texas for its failure to abide by the Felon-Hiring Rule. William R. Smith is an African-American who applied to work as a DPS "Customer Service Representative," a position that would have given him access to a statewide database containing identifying information for 26 million Texans (including their names, addresses, dates of birth, social security numbers, and copies of their birth certificates). ROA.302 [FAC ¶ 37]. In his job application, Mr. Smith disclosed that he previously was convicted of a felony for the unauthorized use of a motor vehicle. ROA.302. Consistent with state law and its policy judgment that

convicted felons should not have access to sensitive information regarding every man, woman, and child in the State, DPS categorically refused to consider Mr. Smith's application and rejected it without using any of the "individualized" factors that the EEOC's rule commands. ROA.302. Because DPS refused to accede to the EEOC's unlawful interpretation of Title VII, the EEOC gave Mr. Smith a "right to sue" letter on December 23, 2013. ROA.302.

Similarly, Beverly Harrison is an African-American who applied to work for the Dallas County school system as either a crossing guard or bus monitor. ROA.838 [NAACP Mot. ¶ 3]. Given her felony conviction for aggravated assault, however, the school district apparently refused to hire her. ROA.838. Then Harrison and the NAACP moved to intervene against the State and to support the Felon-Hiring Rule's power to preempt the state laws that barred Ms. Harrison from working in a school. ROA.838.

2. To vindicate its state laws, Texas filed suit for declaratory and injunctive relief in the United States District Court for the Northern District of Texas. The State requested (a) an order under the Declaratory Judgment Act that the EEOC's Felon-Hiring Rule is an

unlawful attempt to preempt the no-felons policies required by Texas law; (b) an order under the Administrative Procedure Act that the Felon-Hiring Rule is facially invalid; and (c) an order that the "disparate impact" theory codified by the Felon-Hiring Rule is an unconstitutional attempt to abrogate state sovereign immunity. ROA.302-06 [FAC ¶¶ 38-53]. The State sued both the EEOC (which promulgated the Felon-Hiring Rule and conducts abusive investigations of employers' failures to abide by it) and the Attorney General of the United States (who is statutorily charged with enforcing the Felon-Hiring Rule against States, *see* 42 U.S.C. § 2000e-5(f)(1)). ROA.290 [FAC ¶¶ 3-5].

The EEOC moved to dismiss, arguing that this case is not justiciable because the Felon-Hiring Rule has no substantive content. In particular, the defendants argued that the Rule merely represents the EEOC's "unremarkable" musings, which have no "legal consequences." ROA.507 [Memorandum in Support of Motion to Dismiss First Amended Complaint ("MTD FAC") at 1]. The EEOC argued that it alone gets to pick its targets, and the Nation's employers

are powerless to do anything about the Rule unless and until the federal government sues them. ROA.507-10 [MTD FAC at 1-4].

While the EEOC was arguing that its Felon-Hiring Rule is meaningless in this case, it simultaneously attempted to enforce the Rule against a large employer in a different case in Southeast Texas. The employer objected by quoting the defendants' pleadings from this case. *See* ROA.858 (reminding the EEOC that it told the district court in this case that the Felon-Hiring Rule is ineffectual). The "Lead Systemic Investigator" for the EEOC's Houston Field Office responded in writing and disagreed with the characterization of the Felon-Hiring Rule as meaningless:

> At this stage, your only misunderstanding that warrants a reply concern [*sic*] the [Felon-Hiring Rule]. After all, we would be remiss to allow your confusion to harm your client on this score. . . . [I]t is hoped you will not mislead your client into believing it would be a good policy for it to ignore the enforcement guidance on criminal convictions. Yet that might be the effect of your ideas about this matter as, for example, you have mischaracterized that guidance as "ineffectual".
>
> My recommendations will be forwarded to enforcement management as my efforts to obtain relevant evidence have not, apparently, induced you to be more cooperative.

ROA.861-62.

3. The district court said nothing about the EEOC's double-speak. The court instead held that the State lacked Article III standing to challenge the Felon-Hiring Rule unless and until the federal government chooses to target a state employer for an enforcement action. ROA.869. In a single sentence without any analysis, the district court also found that Texas's suit is not ripe and that the Felon-Hiring Rule does not constitute final agency action reviewable under 5 U.S.C. § 704. ROA.869-70.

In holding that a regulated entity *never* can seek pre-enforcement review of an agency's regulation, the district court said nothing about the *Abbott Labs* doctrine, *see Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), the inveterate standards that have allowed pre-enforcement challenges for more than two generations, or the dozens of Supreme Court and Fifth Circuit decisions allowing pre-enforcement challenges. The district court also said nothing about the hardship associated with forcing the Nation's employers to wait until they're the victims of "*frivolous*" and "*groundless*" allegations of racism before they can challenge the EEOC's purported authority to make the allegations in the first place. *Peoplemark*, 732 F.3d at 592. And the district court did

not explain how the Felon-Hiring Rule is not "final agency action" when the EEOC finally and formally adopted it by a 4-1 vote and used it — while this suit was pending in the district court — to disabuse another Texas employer of its belief that the Rule is "ineffectual." ROA.861-62.

The State timely appealed.

SUMMARY OF THE ARGUMENT

I.A. The State has standing for several reasons. First, Texas employs hundreds of thousands of people, and it receives thousands of job applications every year. In processing those job applications, the State's agencies routinely apply the no-felons policies required by state law and prohibited by the Felon-Hiring Rule. That conflict makes the State an "object" of the Commission's administrative action and easily satisfies the standing requirements of Article III. Any doubt about the concreteness of the State's injury is resolved by the fact that the EEOC already has launched a "charge of discrimination" against DPS for categorically refusing to hire felons.

Moreover, the State has standing because the EEOC cannot attempt to both change the State's hiring policies and nonetheless object to the State's standing to challenge that attempt. Both the D.C.

Circuit and the Seventh Circuit have rejected the EEOC's have-and-eat-its-cake strategy, and this Court should do so too.

And in all events, the State has standing to challenge any federal regulation that purports to preempt state law. The Rule expressly purports to preempt state law no-felons policies, like those required by Texas law, and as a result, the State has Article III standing to defend its laws.

I.B. The district court reached the opposite result because, in its view, no regulated entity ever has standing to bring a pre-enforcement challenge against *any* regulation. That result is foreclosed by decades' worth of precedent, and no decision supports it.

II.A. The State's claims are ripe. This is a facial challenge to the EEOC's rule, and as such, it is quintessentially fit for review. And delaying review would impose significant hardships on the State. Without federal court intervention, the defendants will be able to continue to use the threat of enforcement to bully employers into abandoning their no-felons policies. No tenet of the ripeness doctrine countenances that result.

II.B. The defendants' only argument to the contrary is that "further factual development" is necessary to determine whether and to what extent the State's no-felons policies create unlawful disparate impacts. But the entire point of this lawsuit is that the federal government is not entitled to put the State to that proof. To the contrary, the Felon-Hiring Rule is facially invalid, and the State can refuse to hire felons (consistent with state law), regardless of whether the EEOC thinks such refusals create disparate impacts. Who's right is a pure question of law — not one of fact — and thus the case is ripe for review.

III.A. Lastly, the Felon-Hiring Rule is a "final agency action" made reviewable by 5 U.S.C. § 704. An unbroken line of cases dating back decades holds that "guidance" documents are reviewable to the extent they bind the agency's staff or force regulated entities to change their behavior. The Felon-Hiring Rule does both.

III.B. The defendants contend that the Felon-Hiring Rule is not a "final agency action" because it is not a "legislative rule" that carries the "force of law." But no court has ever held that Section 704 allows review of only "legislative rules." Indeed, were it otherwise, agencies

like the EEOC could promulgate self-proclaimed "guidance" documents, use them to bully regulated entities, and *forever* avoid judicial review of their coercive efforts. Congress enacted the APA to foreclose that result.

ARGUMENT

I. THE STATE HAS STANDING

A. The State's Injuries Are Concrete, Traceable, And Redressable

1. The State easily satisfies the constitutional minimum for standing to challenge the EEOC's Felon-Hiring Rule. 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 when 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. Here, there is no doubt that the State of Texas is "an object of the [EEOC's] action." The State employs hundreds of thousands of people, *see* ROA.296-99 [FAC ¶¶ 23-30], and as an employer, the State is squarely the "object" of the Felon-Hiring Rule, *see, e.g.*, ROA.321-33 [Rule at 8-20] (purporting to prohibit all employers

from using categorical no-felons policies). In fact, the EEOC singled out employers like the State of Texas who categorically refuse to hire felons pursuant to state "laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct." ROA.337 [Rule at 24]. Because the State-*qua*-employer is an "object" of the EEOC's action, all three of the constitutional standing requirements are satisfied. *See Lujan*, 504 U.S. at 561-62.

Moreover, the State is "seeking to enforce a procedural requirement" — namely, the EEOC's compliance with the APA's notice-and-comment provisions — "the disregard of which could impair a separate concrete interest of theirs" — namely, the State's interest in following the no-felon policies mandated by state law. *Id.* at 572. Indeed, because the APA's notice-and-comment provisions give the State "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.

2. The standing inquiry does not turn on the imminence of future federal enforcement actions against Texas under the Felon-Hiring Rule. That is because the State is injured *now*:

> 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 truck drivers' 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 truck drivers 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. Federal Motor Carrier Safety Admin., 656 F.3d 580, 586 (7th Cir. 2011); *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)).

The Felon-Hiring Rule is aimed squarely at Texas and its blanket, no-felon-hiring policies. *See, e.g.*, ROA.337 [Rule at 24]. The EEOC cannot now turn around and pretend that the Rule has no meaning, and that the State is uninjured by it.

3. Even if the EEOC or DOJ *could* avoid judicial review by forswearing any future enforcement actions against Texas and its

constituent agencies, neither defendant has done so. As in *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 543 (5th Cir. 2008), "nowhere in the record does the [EEOC] suggest that it will refrain from enforcing the [Rule] against Plaintiff[]." If anything, this case is even easier than *Roark & Hardee* because the plaintiff there filed suit before the defendant enforced the relevant provisions of the ordinance against *anyone*; it only had promulgated "guidelines" that suggested it intended to do so in the future. *Id.* at 543-44 & n.10. By contrast, when Texas filed suit here, the EEOC already had launched hundreds of investigations and enforcement actions under its Felon-Hiring Rule — including at least one that resulted in a $750,000 sanctions award against the Commission. ROA.293, 295 [FAC ¶¶ 16, 20].

And after the State filed suit, the EEOC sent a "charge of discrimination" to DPS for categorically refusing to hire a convicted felon named William R. Smith. ROA.302, 370 [FAC ¶ 37 & Ex. C]; *see Roark & Hardee*, 522 F.3d at 543 (finding standing where defendant sent plaintiff a similar "notice[]"). The EEOC also gave Mr. Smith a "right-to-sue" letter for the State's alleged noncompliance with the Felon-Hiring Rule. ROA.372 [FAC Ex. D].

Moreover, other convicted felons have used the Felon-Hiring Rule against the State, even aside from the EEOC's right-to-sue process. For example, Beverly Harrison was convicted of aggravated assault (a third-degree felony) and subsequently applied to work as either a crossing guard or bus monitor in the Dallas Independent School District. ROA.838 [NAACP Mot. ¶ 3]. Consistent with state law and sound policy considerations — but inconsistent with the Felon-Hiring Rule — the school district apparently rejected Ms. Harrison's job application without affording her an "individualized assessment." ROA.838. In response, Ms. Harrison and the NAACP moved to intervene against the State in this case. ROA.837; *see* 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1920 (3d ed. & 2014 supp.) (noting there is no difference between an intervenor and a party that brings its own claim). The conflict between the State and private parties (like Mr. Smith and Ms. Harrison) is more than sufficient to support the State's standing to defend its law. *Cf. Diamond v. Charles*, 476 U.S. 54, 64 (1986) (noting that a "conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III").

4. In all events, the State is injured whenever a federal agency purports to preempt state law. *See, e.g.*, *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 372 (7th Cir. 1997) (State has standing where it "complains that a federal regulation will preempt one of the state's laws"); *Alaska v. United States 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"); *cf. Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607-08 (1982) (stating, in the context of state standing in *parens patriae* actions, that States have an "interest in securing observance of the terms under which it participates in the federal system").

And according to the EEOC, it is the Felon-Hiring Rule — not Title VII — that purports to preempt Texas's no-felons policies. While the defendants told the district court that the EEOC "has embraced the same basic view of the law with respect to criminal-record exclusions for 25 years," ROA.509 [MTD FAC at 3], the EEOC's own website advises the public that the Felon-Hiring Rule represents the first time since

Title VII's enactment that the Commission ever has purported to preempt States' facially neutral no-felons policies:

> **How does the [Felon-Hiring Rule] differ from the EEOC's earlier policy statements?**
>
> . . .
>
> The [Felon-Hiring Rule] says that state and local laws or regulations are preempted by Title VII if they [cause an unlawful disparate impact].

Felon-Hiring Rule Q&A, *supra.*

The EEOC's effort to run away from its own website is consistent with its desire to tell the Nation's employers one thing and to tell this Court the exact opposite. But that's not how the APA works. If an agency wants to change its position, it must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Commission cannot rewrite history, deny the novelty of the Felon-Hiring Rule's purportedly preemptive effect, and then claim that no one has standing to challenge the about-face. *Cf. Allina Health Services v. Sebelius*, --- F.3d ---, 2014 WL 1284834, at *4 (D.C. Cir. Apr. 1, 2014) ("[A]gencies may not pull a surprise switcheroo on regulated entities." (internal quotation marks omitted)).

B. The District Court's Contrary Conclusion Was Wrong

The district court ignored all of the foregoing and held that the State lacks standing to challenge the Felon-Hiring Rule unless and until "an[] enforcement action has been taken against [the State]." ROA.869. As explained above, that is wrong on its terms because at least two individuals have tried to enforce the Rule against the State.

In all events, as far as our research reveals, no court in the history of the Nation ever before has held that a regulated entity lacks standing to challenge a rule before enduring an enforcement action. To the contrary, the whole point of the Declaratory Judgment Act ("DJA") is to create a mechanism for *pre-enforcement* review of government action. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring) ("[M]y reading of the legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred . . . ."). And it is well-settled that DJA jurisdiction attaches to an "actual controversy" — viz., to "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and

reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Take for example *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007). There the Court took it as a given "that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat — for example, the constitutionality of a law threatened to be enforced." *Id.* at 128-29. The Court emphasized that the DJA plaintiff need not even take action to violate federal law — much less need it wait for federal enforcement — before seeking declaratory relief. *Id.* at 129 (citing, inter alia, *Terrace v. Thompson*, 263 U.S. 197, 216 (1923); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Ex parte Young*, 209 U.S. 123 (1908); *Steffel*, 415 U.S. at 480 (Rehnquist, J., concurring)). Rather, the Court held that the DJA plaintiff establishes standing under Article III merely by pointing to the "dilemma" of governmental "coercion": "The dilemma posed by that coercion — putting the challenger to the choice between abandoning his rights or risking prosecution — is 'a dilemma that it was the very purpose of the

Declaratory Judgment Act to ameliorate.'" *Id.* (quoting *Abbott Labs.*, 387 U.S. at 152).

The State's standing in this case follows *a fortiori* from *MedImmune*. The plaintiff in that case had standing, even though it paid certain patent royalties under protest and without risking a patent-infringement suit. Here, the State's dilemma (and hence its Article III standing) is even starker in two respects. First, it cannot simply abandon its rights and forswear the no-felons policies required by state law. *Cf. Abbott Labs.*, 387 U.S. at 152. And second, the coercive prospect of the federal government accusing the State of Texas of race discrimination is much stronger than a private party sending a royalty-demand letter to another private party. *Cf. MedImmune*, 549 U.S. at 129-30. The coercive effects of the EEOC's racism allegations are all the greater because of the Commission's track record of abusive, "*frivolous*," and "*groundless*" enforcement tactics. *Peoplemark*, 732 F.3d at 590.

Neither the defendants nor the district court can identify a single decision by any court that requires a regulated entity to await its own

enforcement action as the price of admission to federal court. To the contrary, that result is foreclosed by decades of DJA precedents.

II. THE STATE'S CLAIMS ARE RIPE

Without any analysis and with only half a sentence, the district court also held that the State's claims are not ripe for review. ROA.870. That result conflicts with at least five decades of controlling precedent, and it should be reversed.

A. The State's Claims Are Presumptively Reviewable, And The Defendants Do Not Attempt To Rebut That Presumption

For at least fifty years, the Supreme Court has held that it is the agency's burden to prove that a statute precludes pre-enforcement review of its rule:

> The first question we consider is whether Congress . . . intended to forbid pre-enforcement review of this sort of regulation promulgated by the [agency]. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

Abbott Labs., 387 U.S. at 139-40. The Court emphasized that the agency's burden is particularly heavy because the availability of pre-enforcement review "ha[s] been reinforced by the enactment of the

Administrative Procedure Act, which embodies the basic presumption of judicial review." *Id.* at 140. The Court further held that the APA "manifests a congressional intention that [its judicial-review provisions] cover a broad spectrum of administrative actions," and that the APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Id.* at 140-41 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). This Court's precedents likewise reflect the *Abbott Labs* presumption of reviewability. *See*, *e.g.*, *Save The Bay, Inc. v. Administrator of EPA*, 556 F.2d 1282, 1293 (5th Cir. 1977) ("A long-standing and strong presumption exists that action taken by a federal agency is reviewable in federal court.").

Where, as here, Congress did nothing to prohibit the State from seeking pre-enforcement review of the Felon-Hiring Rule, the ripeness inquiry all but disappears, and pre-enforcement review is "the norm." *See, e.g.*, *Owner-Operator*, 656 F.3d at 586 ("In the decades since *Abbott Laboratories*, pre-enforcement review of final rules has become the norm."). To create an exception to that norm, the EEOC must prove that the issues somehow are not fit for judicial review and that the balance of hardships somehow tips in the EEOC's favor. *Abbott Labs.*,

387 U.S. at 149; *Sabre, Inc. v. Department of Transp.*, 429 F.3d 1113, 1119-20 (D.C. Cir. 2005); *Owner-Operator*, 656 F.3d at 586-87. The Commission cannot meet that standard.

1. The State's claims are fit for review

a. First, the State's claims are fit for review because they are purely legal, facial challenges to the Felon-Hiring Rule. The fitness-for-review question turns on whether the case "would benefit from further factual development" and "whether judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479-80 (2001). These considerations protect "the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985).

Here, Texas is *not* seeking a declaration that its no-felon policies "are, and always will be, lawful hiring practices" because they never create statistical disparities in "the relevant labor market." ROA.141-

42 [Memorandum in Support of Motion to Dismiss ("MTD") at 14-15]. Rather, the State is seeking a declaration that no-felon policies never can create unlawful disparate impacts because (a) they always are justified by business necessity and job-relatedness (Count I); (b) Congress specifically disclaimed the EEOC's authority to promulgate a contrary rule (Count II); and (c) the private-party disparate-impact suits contemplated by the EEOC's Felon-Hiring Rule are unconstitutional (Count III). None of those claims "require[] the Court to answer various factual questions." ROA.142 [MTD at 15].

To the contrary, there are only two facts that matter. First, state law and policy require many Texas employers to impose categorical bans against convicted felons who apply for jobs. *See* ROA.296-99 [FAC ¶¶ 23-31]. And second, the Defendants believe that the State's policies are unlawful because they never allow the State to make "individualized" and race-conscious assessments of job applicants that the EEOC somehow thinks Title VII requires. *See* ROA.331-33 [Rule at 18-20]. Thus, the case poses a conflict of two mutually incompatible interpretations of Title VII. As the D.C. Circuit held in the same situation:

> [T]he substantive issues [plaintiff] raises are undoubtedly 'purely legal' in the relevant sense. They turn on questions of statutory construction, and the interpretations chosen by the [agency] and proposed by [plaintiff] both constitute bright-line rules, impervious, so far as appears, to factual variation. This in itself largely answers the question whether delay might afford additional 'concreteness'; it would not.

Teva Pharms. USA, Inc. v. Sebelius, 595 F.3d 1303, 1308-09 (D.C. Cir. 2010) (internal citation and alteration omitted); *see also, e.g.*, *Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 287-88 (5th Cir. 2012) (facial attack on a regulation raises a "purely legal" question and is therefore ripe).

b. It is too late for the EEOC's lawyers to manufacture the need for further factual development by asserting nuances that the Commission itself rejected in the Felon-Hiring Rule. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (rejecting the agency's interpretation of its own rule as "nothing more than a convenient litigating position," and a "*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack" (internal quotation marks and alteration omitted)). For example, the Commission's first motion to dismiss asserted (ROA.143) that "[n]o one wants a child predator working at a school" — presumably in an effort

to seem reasonable and offer one (if only one) safe harbor for Texas's categorical no-felon policies. But the EEOC's Felon-Hiring Rule says the exact opposite.

The rule offers the hypothetical example of "Elijah," an African American man who wants to bring a disparate-impact suit against a preschool for refusing to hire him on account of his felony conviction for "indecent exposure two years ago." ROA.337 [Rule at 24]. Even on those facts, the Felon-Hiring Rule says that the preschool *cannot* impose a categorical ban against hiring convicted sex offenders like Elijah. ROA.331-33. To the contrary, the EEOC would "conduct[] an investigation" — thus raising the specter of the Commission's frivolous and sanctionable enforcement tactics, *see Peoplemark*, 732 F.3d at 592 — and force the preschool to carry its burden to prove "the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children." ROA.337 [Rule at 24]. And if the preschool cannot carry its burden to show that (a) Elijah would have "regular contact" with the children and that (b) Elijah's indecent-exposure conviction is sufficiently recent to be probative of his

riskiness as a child predator, the EEOC staff would be bound by the Felon-Hiring Rule to find an unlawful employment practice. *See* ROA.328, 330, 337 [Rule at 15, 17, 24]. While the EEOC's lawyers now appear to recognize the commonsense proposition that "[n]o one" would want Elijah to work in the preschool under any set of circumstances, ROA.143 [MTD at 16], the Felon-Hiring Rule says otherwise.

2. The balance of hardships tips decidedly in the State's favor

a. The EEOC has pointed to no institutional interest in delaying resolution of this case. "[T]he court has — in accordance with the [APA's] presumption of reviewability — repeatedly held that absent institutional interests favoring the postponement of review, a petitioner need not show that delay would impose individual hardship to show ripeness." *Sabre*, 429 F.3d at 1120. In *Sabre*, the Department of Transportation asserted jurisdiction over certain "ticket agents," and it stated that it would take "appropriate actions" in the future to enforce the law against unlawful "ticket agents." *Id.* at 1117. Sabre sought pre-enforcement review, and the department objected on ripeness grounds because it was unclear whether Sabre was covered by the rule, and even it if was, what "appropriate actions" the department might

want to take. *Id.* at 1119. The D.C. Circuit rejected the ripeness objection because "[t]he Department has failed to offer plausible reasons why it has an institutional interest in postponing review." *Id.* at 1120. While Sabre had no obligation to show "hardship," it nonetheless could do so: in particular, Sabre claimed that "a high probability of adverse government action" against it as a "ticket agent" would force Sabre to abandon "marketing plans, which it could otherwise implement presumably at considerable profit." *Id.* at 1118-20.

This is an *a fortiori* case. There is no dispute whether the State of Texas is regulated by the Felon-Hiring Rule. *Cf. id.* at 1118 (noting whole dispute was whether Sabre fell within the ambit of department's "ticket agent" rule). There is no dispute whether the State of Texas is in violation of the Felon-Hiring Rule. *Cf. id.* at 1117 (noting department's view that Sabre remained "free to operate its business as it wishes"). Plus, there is no dispute that the State of Texas stands to lose much more than Sabre did, and that the State's "hardship" is thus much higher. While Sabre faced only the potential for "appropriate actions" from a department that threatened an unspecified portion of the company's profit margins, *id.*, the State faces the promise of

investigations by an EEOC with a proven track record of "*frivolous*" and "*groundless*" enforcement tactics, *Peoplemark*, 732 F.3d at 592; the reputational harm associated with allegations of racial discrimination; and unconstitutional damages actions by individuals like William R. Smith and Beverly Harrison, which infringe the State's sovereign immunity.

b. Moreover, the Felon-Hiring Rule places the State and its constituent agencies on the horns of a dilemma, which is more than sufficient to obviate any ripeness concerns. For example, in *Roark & Hardee*, this Court held that the challenged ordinance was ripe for judicial review because it forced owners and operators of public places to choose between complying with an allegedly invalid law or to risk a fine. 522 F.3d at 545; *see also Abbott Labs.*, 387 U.S. at 152 ("These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate."); *Ohio Forestry*, 523 U.S. at 734 ("hardship" can arise from purely legal harms or the harm of being "force[d] . . . to modify

[one's] behavior in order to avoid future adverse consequences"); *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) ("If Texas cannot challenge the Procedures in this lawsuit, the State is forced to choose one of two undesirable options: participate in an allegedly invalid process that eliminates a procedural safeguard promised by Congress, or eschew the process with the hope of invalidating it in the future, which risks the approval of gaming procedures in which the state had no input."); *Reckitt Benckiser v. EPA*, 613 F.3d 1131, 1136-41 (D.C. Cir. 2010) (holding ripe agency's letter asserting authority to bring future enforcement proceedings because it creates "compliance 'dilemma'" for the company).

The dilemma caused by the Felon-Hiring Rule is even starker because the EEOC is trying to do much more than levy a fine. The whole point of its Felon-Hiring Rule is to coerce the State into abandoning the hiring policies adopted by the Texas Legislature by threatening frivolous allegations of discrimination and abusive enforcement actions in "high-profile" cases. ROA.301 [FAC ¶ 35]; *see Owner-Operator*, 656 F.3d at 586-87 (finding ripeness where the point of the rule is to force regulated entities to change their behaviors); *Clean*

Air Implementation Project v. EPA, 150 F.3d 1200, 1205 (D.C. Cir. 1998) (finding ripeness where agency action forces petitioners to "change their behavior or risk costly sanctions"). That effort to modify the State's behavior independently suffices to make the case ripe.

c. Against all of that, the EEOC can point to no "institutional interest" in delaying resolution of this case. *Sabre*, 429 F.3d at 1120. An agency plausibly can invoke the ripeness doctrine if its rule is tentative or preliminary: "the [ripeness] doctrine enables agencies to deliberate and craft policy free of judicial interference until administrative action has a direct and immediate impact. Judicial intervention into agency decisionmaking at an earlier stage denies the agency an opportunity to correct its own mistakes and to apply its expertise." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (internal quotation marks omitted). But those concerns are inapposite here. The EEOC admits that it already has deliberated and (by an on-the-record 4-1 vote) formalized its policy choice in the Felon-Hiring Rule. And far from "correct[ing] its own mistakes," the EEOC has doubled down on the rule after the Third Circuit dismissed the Commission's interpretation of Title VII as "terse" and "provid[ing]

nothing of substance." *El*, 479 F.3d at 248. Thus, there is no evidence that the EEOC will recognize the error of its ways and rescind the Felon-Hiring Rule without federal-court intervention.

B. The Defendants' Counterarguments Are Meritless

1. Defendants' only counterargument is that their Rule somehow does *not* require "individualized assessments" for all job applicants. ROA.527 [MTD FAC at 21]. Again, that's wrong. The Felon-Hiring Rule says that an employer may be able to show job-relatedness and business necessity if it can prove — after an EEOC investigation and to the EEOC's satisfaction — two things:

> The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). *The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity.*

ROA.315 [Rule at 2] (emphasis added); *accord* ROA.327 [Rule at 14]. Then, exhibiting the sort of double talk that already has become Defendants' theme in this litigation, the EEOC's very next sentence asserts: "Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include

individualized assessment is more likely to violate Title VII." ROA.315 [Rule at 2]; *accord* ROA.327 [Rule at 14].

To the extent those contradictory commands make any sense, they appear to say that some employer on some set of unarticulated hypothetical facts might be able to convince unidentified EEOC investigators to exercise their administrative grace and bless an employer's no-felons policy even though it does not include individualized assessments. That's hollow solace both because it does not save an employer from facing an abusive EEOC investigation and fending off "*frivolous*" and "*groundless*" allegations of racism, *Peoplemark*, 732 F.3d at 592, and because the Felon-Hiring Rule does not offer a single example of an employer that can avoid a disparate-impact investigation using a blanket no-felons policy like the ones pleaded in the FAC. To the contrary, the Felon-Hiring Rule provides that a governmental employer ("County Y") is subject to an EEOC investigation and a finding of disparate-impact liability based on nothing more than its decision to follow state law and "reject[] Chris's application as soon as it learns that he has a felony conviction." ROA.337 [Rule at 24]. The Texas Department of Public Safety ("DPS")

likewise follows state law and automatically rejects applications from convicted felons like "Chris," ROA.302 [FAC ¶ 37]; it is far too late for the EEOC to rewrite its Rule and pretend that both "County Y" and DPS get off scot-free.

2. As ironic as it is for the EEOC to defend the Felon-Hiring Rule by abandoning it, none of its machinations bear on ripeness. This case presents a purely legal question: Whether the State of Texas can continue to follow its facially neutral blanket no-felons policies, or whether the State must abandon those facially neutral policies (as the EEOC purports to require for the first time on page 24 of the Felon-Hiring Rule).

It is true that, over time, the defendants have given polar-opposite answers to that legal question, but defendants' schizophrenia does not change the purely legal nature of the inquiry. For example, in 2008, DOJ told the Supreme Court 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." Br. of United States as Amicus Curiae 9, *Board of Education of New York City School District v. Gulino*, 554 U.S.

917 (2008) (mem.), (emphasis added) ("*Gulino* Amicus," ROA.785). In that case, a class of African-American and Latino educators brought a disparate-impact challenge against a facially neutral state law that prohibited public schools from employing teachers that failed certain licensing exams. Echoing almost verbatim the State's arguments in this case, DOJ argued in *Gulino* that compliance with a facially neutral state employment law — there, a prohibition on unlicensed teachers; here, a prohibition on convicted felons — *always* satisfies "business necessity." ROA.801-02. Having convinced the Court not to grant certiorari in *Gulino* on the ground that Title VII does not vitiate facially neutral hiring qualifications required by state law, DOJ cannot credibly claim that Title VII vitiates facially neutral hiring qualifications required by state law. *See New Hampshire v. Maine*, 532 U.S. 742, 749-56 (2001).

But even if the defendants *could* switch horses, their desire to give different answers to a purely legal question is not the sort of "further factual development" contemplated by the ripeness doctrine. ROA.523 [MTD FAC at 17] (citing *Opulent Life Church*, 697 F.3d at 286). To the contrary, the whole point of this suit is that the Felon-Hiring Rule is

facially invalid — irrespective of the factual circumstances in which EEOC or DOJ might invoke it. Texas has the right to categorically bar all felons from employment by the Department of Public Safety, for example — and the EEOC has no right to launch abusive investigations and to demand that DPS carry its burden to prove job-relatedness and business necessity according to the EEOC's view of the relevant "facts and circumstances." ROA.526 [MTD FAC at 20]; *Peoplemark*, 732 F.3d at 592.

3. And there can be no doubt about the hardship that would be imposed on the State by delaying review. DPS already has received one charge of discrimination under the Felon-Hiring Rule — from a convicted felon named William R. Smith who wanted a job involving access to sensitive personal information for all 26 million Texans. *See* ROA.370 [FAC Ex. C]. If the EEOC were as committed to walking away from its Felon-Hiring Rule as it suggested to the district court, it would have dismissed Mr. Smith's charge for failure to state a claim. *See* ROA.372 [FAC Ex. D at 1] (allowing the EEOC to find that "[t]he facts alleged in the charge fail to state a claim under any of the statutes enforced by EEOC."). But that's not what the EEOC did. Rather, it

was "unable to conclude that the information obtained establishes violations of the statutes," but it emphasized that "[t]his does not certify that [DPS] is in compliance with the statutes." ROA.372 [FAC Ex. D at 1]. So it gave Mr. Smith the right to sue DPS on his own.

And notwithstanding Defendants' assurances below, they have in fact issued probable-cause findings against governmental employers who follow no-felons policies required by state law. *Cf.* ROA.512 [MTD FAC at 6] (asserting the opposite). In 2007, for example, the State of Ohio passed a facially neutral statute that is materially identical to the ones referenced in the FAC; it prohibited schools from hiring or employing convicted felons. *See* OHIO REV. CODE § 3319.391. Consistent with state law, the Cincinnati Public Schools ("CPS") fired everyone (regardless of race) who had a disqualifying felony conviction. As a reward for its faithful implementation of Ohio's facially neutral law, CPS received the following condemnation from the EEOC: "The Commission finds that the evidence substantiates that the Charging Party was discriminated against because of his race as alleged and that Blacks as a class were discriminated against." ROA.818. The EEOC referred the charges to DOJ, *see* ROA.820-21 and almost five years

later, CPS *still* is defending itself against allegations that it discriminated against "Blacks as a class" — all because it followed a facially neutral state law that disqualified felons in the exact same way that Texas law does. *See Waldon v. Cincinnati Public Schools*, No. 1:12-cv-677 (S.D. Ohio). It is remarkable that both the defendants and the district court knew about *Waldon* and nonetheless agreed that the case should be dismissed on the theory that cases like *Waldon* don't exist.[1]

III. THE FELON-HIRING RULE CONSTITUTES FINAL AGENCY ACTION

Finally, without any analysis and with only half a sentence, the district court held that it lacked jurisdiction[2] because the Felon-Hiring

[1] It is impossible for anyone other than DOJ or the EEOC to know how many other cases like *Waldon* exist within Defendants' administrative files. The State thinks the answer to that question is irrelevant; but to the extent the Court disagrees and concludes that the ripeness turns on the contents of Defendants' administrative files, the proper remedy is to order jurisdictional discovery — not to dismiss the complaint. *See, e.g.*, *McAllister v. F.D.I.C.*, 87 F.3d 762, 766 (5th Cir. 1996) ("When a district court makes factual determinations decisive of a motion to dismiss for lack of jurisdiction, it must give plaintiffs an opportunity for discovery and a hearing that is appropriate to the nature of the motion to dismiss."); *In re MPF Holdings US LLC*, 701 F.3d 449, 457 (5th Cir. 2012) (explaining that jurisdictional discovery may be warranted where jurisdictional issue "turns on a disputed fact").

[2] Defendants are wrong to characterize Section 704 as jurisdictional. *See*, *e.g.*, *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (When "judicial review is sought under the APA . . . the requirement of final agency action is not jurisdictional."); *Center for Auto Safety v. NHTSA*, 452 F.3d 798, 805 (D.C. Cir. 2006) (same); *Trudeau v. FTC*, 456 F.3d 178, 184 (D.C. Cir. 2006) (same).

Rule does not constitute final agency action under 5 U.S.C. § 704 ("Section 704"). Again, that is wrong.

A. The Felon-Hiring Rule Is Reviewable Under Section 704

The Supreme Court has held that agency actions are "final" and hence reviewable under Section 704 where they mark the "consummation" of the agency's decisionmaking progress, and "legal consequences will flow" from what the agency did. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Commission does not contest that its Felon-Hiring Rule marks the "consummation" of its rulemaking process, *see* ROA.513 [MTD at 7]; accordingly, its Section 704 objection boils down to whether the rule generates "legal consequences." It does.

1. The courts long have held that agency "guidance" documents like the Felon-Hiring Rule constitute final and reviewable agency actions under Section 704. For example, in *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009), the court held that an IRS "guidance" document entitled "Notice 2006-50" constituted final agency action.[3] That document "announce[d]" the IRS's interpretation of the Tax Code and

[3] The D.C. Circuit subsequently granted rehearing en banc on other grounds and affirmed the panel's decision. *See* 650 F.3d 717 (D.C. Cir. 2011) (en banc); *see also id.* at 735 (noting that the en banc court saw no need to reconsider the panel's analysis under Section 704).

"provide[d] related guidance to taxpayers and collectors." Notice 2006-50, 2006-25 I.R.B. 1141, 2006-1 C.B. 1141, 2006 WL 1452787 (June 19, 2006). That "guidance" included instructions on how taxpayers could seek certain refunds, it established a "safe harbor" for refunds, and it created administrative procedures for aggrieved taxpayers. *See id.* 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; *see also 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."); *American Bus Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980) (similar). Like the 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. *Cohen*, 578 F.3d at 9.

Likewise, the court held that an agency's "guidance" document constituted final agency action in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). There 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. *Id.* at 1022. 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. The court also found irrelevant the fact that EPA included the following disclaimer at the end of its document: "'The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.'" *Id.* (quoting guidance document). Even that disclaimer did nothing to render the guidance non-final under Section 704 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.

The court of appeals yet again held that an administrative guidance document constituted final and reviewable agency action in *Barrick Goldstrike Mines v. Browner*, 215 F.3d 45 (D.C. Cir. 2000). There the agency's guidance interpreted an environmental statute to allow metal-mining companies to release a *de minimis* level of toxic chemicals without triggering various statutory reporting requirements. If Barrick and other mines failed to conform to the statutory interpretation announced in the guidance, the agency could bring enforcement actions against them. *Id.* at 47-48. EPA tried to avoid Barrick's facial challenge to the guidance by walking away from it as non-binding, but the D.C. Circuit sternly rebuked that about-face: "That the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years." *Id.* at 48

(citing, *inter alia*, *Better Gov't Ass'n v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986)); *see also Better Gov't*, 780 F.2d at 93 (rejecting proposition that agency can escape judicial review under Section 704 by labeling its rule an "informal" guidance document). And the court concluded that Section 704's final-agency-action requirement was satisfied because the guidance bound the agency's staff in its application of the *de minimis* exception to Barrick's chemicals. 215 F.3d at 48 ("Here there is no doubt that EPA will refuse to apply the *de minimis* exception to Barrick's waste rock and that its refusal to do so has legal consequences — namely, that Barrick is bound to keep track of its movement of waste rock and report the movements as releases of toxic substances."); *see also NRDC v. EPA*, 643 F.3d 311, 319-20 (D.C. Cir. 2011) ("guidance" document constitutes final agency action reviewable under Section 704 insofar as it restrains administrative staff's discretion).

And, at the risk of belaboring the point, the regional circuits uniformly have interpreted Section 704 likewise to extend to "guidance" documents like the Felon-Hiring Rule. For example, in *Manufactured Housing Institute v. EPA*, 467 F.3d 391 (4th Cir. 2006), the court of

appeals held that a "policy" "memorandum" was reviewable as final agency action based on the agency's threatened enforcement of it. The policy memorandum enunciated a list of factors that States should use to determine, on a "case-by-case" basis, whether a particular housing complex is "large" and thus excludable from a general ban on selling water to tenants. *Id.* at 397. Following a familiar pattern, the agency tried to walk away from the policy in court, shrugging off its guidance as "just a suggestion" that carries no binding effect and that "leaves decisions to the States on a case-by-case basis." *Id.* The court rejected the agency's backpedalling out of hand because "EPA's threats levied against at least two States regarding their [water] oversight programs prove that States are not free to treat this EPA policy as a mere suggestion." *Id.* Given those threats — and the home-builders' "fear of subjecting themselves to EPA regulations" — the court found it "self-evident" that the guidance document "gives rise to legal rights and consequences." *Id.* at 398; *see also Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 441 (7th Cir. 1994) (en banc) (holding that a letter from the agency's chief counsel constituted final agency action because it "made absolutely clear that [agency staff] would enforce the Act in

accordance with its new interpretation, thereby compelling the railroads to alter their operations to comply with the [agency's] directive or face stiff penalties for noncompliance").

2. Compared to *Cohen*, *Syncor*, *American Bus*, *Appalachian Power*, *Barrick*, *NRDC*, *Manufactured Housing*, and *Atchison*, this is an easy case. The Felon-Hiring 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.292-93 [FAC ¶ 13]; ROA.321 [Rule at 8] ("EEOC would find reasonable cause to believe that discrimination occurred."); ROA.323 (EEOC "will" "investigate" "criminal record exclusions"); ROA.323 ("The Commission will assess relevant evidence when making a determination of disparate impact, including [various specific factors]."); ROA.323 ("An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact."); ROA.323 ("[I]n determining disparate impact, the Commission will assess the probative value of an employer's applicant data."); ROA.323 ("[T]he Commission will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records."); ROA.323. ("The Commission will determine the

persuasiveness of such evidence on a case-by-case basis."); ROA.325 ("[A]n exclusion based on an arrest, in itself, is not job related and consistent with business necessity."); ROA.325 ("[E]mployers [may] not [] rely on arrest records" as "proof of criminal conduct."); ROA.325 ("[A]n arrest record standing alone may not be used to deny an employment opportunity."); ROA.325 ("EEOC would find reasonable cause to believe that his employer violated Title VII."); ROA.327 ("To establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, 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.327 ("Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."); ROA.328 ("Absent a validation study that meets the Uniform Guidelines' standards, the [specifically enumerated] factors provide the starting point for analyzing how specific criminal conduct may be linked to particular positions."); ROA.328 ("Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific

crime may be relevant to concerns about risks in a particular position."); ROA.328 ("Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case."); ROA.329 ("[I]t is important to identify the particular job(s) subject to the exclusion."); ROA.330 ("EEOC concludes that there is reasonable cause to believe that the [employer's] policy" violates the Felon-Hiring Rule.); ROA.333 ("EEOC finds reasonable cause to believe that Title VII was violated."); ROA.334 ("EEOC finds that the policy is" unlawful.). And the EEOC went out of its way to condemn categorical no-felons 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.329; *see also* ROA.329 ("EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity."). And an entire section of the Felon-Hiring Rule prohibits Texas from disqualifying felons under *state* law, even when the exact same hiring policy would be

lawful if imposed under *federal* law. *See* ROA.337. In short, "the entire Guidance, from beginning to end . . .[,] reads like a ukase. It commands, it requires, it orders, it dictates." *Appalachian Power*, 208 F.3d at 1023.

But the legal consequences that flow from the Felon-Hiring Rule do not end there. The Commission expressly intended the rule to bind "EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions." ROA.316 [Rule at 3]; *see Cohen*, 578 F.3d at 7 (agency's intent to bind staff makes rule reviewable under Section 704); *Barrick*, 215 F.3d at 48; *Appalachian Power*, 208 F.3d at 1023 (same); *NRDC*, 643 F.3d at 319-20 (same); *Syncor*, 127 F.3d at 94 (same); *American Bus*, 627 F.2d at 532 (similar). Moreover, the EEOC's rule has direct legal consequences — that bind both the Commission's staff and the Nation's employers — because it creates two safe harbors. *See* ROA.315, 327 [Rule at 2, 14]; *Cohen*, 578 F.3d at 9 (finding safe harbors probative of finality of agency action). The fact that the Felon-Hiring Rule directs employers to apply a list of enumerated factors, which the EEOC will review on a "case-by-case basis," ROA.323 [Rule at 10], further supports reviewability of the

Commission's final agency action, *Appalachian Power*, 208 F.3d at 1022-23; *Manufactured Housing*, 467 F.3d at 397. Finally, the EEOC could not avoid the finality of the Felon-Hiring Rule even if it had included a boilerplate disclaimer or an inaccurate label for its action, *see Appalachian Power*, 208 F.3d at 1023; *Barrick*, 215 F.3d at 48; *Better Government*, 780 F.2d at 93; but the fact that the rule does not attempt that feint makes it even easier than the cases above.

B. The Defendants' Counterarguments Lack Merit

1. The defendants do not contest that the Felon-Hiring Rule is "final" within the meaning of Section 704. *See* ROA.513 [MTD FAC at 7] (tacitly conceding finality). Rather, the Commission's only argument is that the Rule is not "final *agency action*," 5 U.S.C. § 704 (emphasis added), because the only reviewable "agency action[s]" are "substantive rules" that "bind a court" in the sense that they are subject to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). ROA.513-19 & 514 n.4 [MTD FAC at 7-13 & n.4]; *see also* ROA.519 n.8 ("An agency document, like the [Felon-Hiring Rule], that expresses a legal view . . . that receives [only]

Skidmore deference[] lacks legal consequences and so is not a final agency action.").

The EEOC is wrong. In *American Trucking*, the Supreme Court unanimously rejected DOJ's efforts to limit the kinds of "agency actions" that are subject to judicial review under Section 704:

> We have little trouble concluding that this ["policy" document] constitutes final agency action subject to review under § [704]. The bite in the phrase "final action" . . . is not in the word "action," *which is meant to cover comprehensively every manner in which an agency may exercise its power*. It is rather in the word "final," which requires that the action under review mark the consummation of the agency's decisionmaking process.

531 U.S. at 478 (emphasis added; citation and internal quotation marks omitted); *accord Abbott Labs.*, 387 U.S. at 140-41 ("The legislative material elucidating that seminal act [*viz.*, the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation." (footnote, citation, and internal quotation marks omitted)). That is the exact opposite of holding, as the EEOC would have it, that Section 704 makes reviewable only that small subset of agency actions that qualify for *Chevron* deference. Indeed, if

the EEOC's view were the law, the Court in *United States v. Mead Corp.* would have determined that the Customs Service's letter rulings did not warrant *Chevron* deference and then dismissed for lack of jurisdiction because the letters were not "final agency actions" in the first place. 533 U.S. 218, 226-27, 230-31 (2001); *see also*, *e.g.*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (finding an informal adjudication constituted "final agency action" without reference to *Chevron*, *Skidmore*, or any other deference doctrine); Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (collecting scores of examples of final and reviewable "agency actions" that do not warrant *Chevron* deference). Defendants cite no case from any court in the history of the Nation that ever has adopted their *Chevron*-only conception of Section 704, and this Court should not be the first.

2. Moreover, for as long as Section 704 has existed, plaintiffs have been presumptively entitled to challenge the lawfulness of federal agency action, and it is the federal agency's burden to prove by "clear and convincing evidence of legislative intention" that Congress intended

to override that presumption. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986); *accord Abbott Labs.*, 387 U.S. at 140-41 (collecting cases). But the only source of legislative intention that Defendants can find is a provision of Title VII that expressly prohibits *the Commission* from adopting substantive rules. *See* 42 U.S.C. § 2000e-12(a) (the EEOC only may issue "procedural regulations"); *Gilbert*, 429 U.S. at 140-46 (1976) (same). It is circular to claim, as Defendants do (ROA.516-17 [MTD FAC at 10-11]), that the Felon-Hiring Rule is not a substantive rule because Congress prohibited the EEOC from promulgating substantive rules. The whole point of this lawsuit is that the EEOC has violated clear statutory commands from Congress (including Section 2000e-12(a)) and promulgated an unlawful substantive rule; the EEOC cannot credibly claim that the very command it violated somehow forever shelters its unlawful conduct from judicial review.

3. Finally, defendants cannot claim that the State's "relevant legal obligation . . . arises out of Title VII," rather than the final agency action the EEOC took in the Felon-Hiring Rule. ROA.514 [MTD at 8]. In 2008, DOJ told the Supreme Court the opposite; it 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." ROA.801 [*Gulino* Amicus at 9]. Of course, the requirements of *Title VII* do not change based on presidential elections and whether the EEOC is playing offense or defense.

It is equally obvious that the defendants can change *their interpretation* of the statute — as they did when the EEOC finally and formally adopted the Felon-Hiring Rule. *Compare* ROA.799-807 (*Gulino* Amicus arguing that facially neutral state-law hiring requirements do not violate Title VII), *with* ROA.337 (Felon-Hiring Rule arguing the exact opposite). But after doing so, defendants cannot deny that the Felon-Hiring Rule is carrying their water; nor can they deny that their administrative efforts to preempt state law constitute "agency action" within the meaning of Section 704, "which is meant to cover comprehensively every manner in which an agency may exercise its power." *American Trucking*, 531 U.S. at 478.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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I certify that, on November 19, 2014, the foregoing brief was served, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon counsel for Defendants-Appellees.

Counsel also certifies that, on November 19, 2014, the foregoing brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

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No. 14-10949 State of Texas v. EEOC, et al
USDC No. 5:13-CV-255

Dear Mr. Potapov,

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