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

REPLY BRIEF OF APPELLANT

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ARGUMENT

On April 25, 2012, the EEOC took a formal vote and adopted a 52-page, 167-footnote document. This document—which we have called the Felon-Hiring Rule—sets out the EEOC's view that Title VII prohibits categorical bans on hiring convicted criminals. The Rule purports to preempt contrary state law, sets out an onerous compliance regime for employers, and compels the EEOC's staff to launch investigations and assess liability in accordance with its prescriptions. The EEOC continues to insist that this Rule is beyond judicial review. It is not.[1]

I. THE FELON-HIRING RULE CONSTITUTES FINAL AGENCY ACTION

The EEOC does not contest that the Felon-Hiring Rule is the consummation of its decisionmaking process. Accordingly, the Rule is

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[1] Because the district court dismissed all of Texas's claims on standing, mootness, and finality grounds, the merits of the claims are not at issue here. Nevertheless, the EEOC makes the baseless suggestion that "Texas abandoned [its constitutional] claim in district court." EEOC Br. 8 n.4. First, Texas pled that claim in both its original complaint and its first amended complaint. *See* Compl. ¶¶ 41-43 (Count III); FAC ¶¶ 51-53 (Count III). Second, the State specifically opposed EEOC's efforts to dismiss that claim. *See* Opp. to MTD at 12 (opposing EEOC's efforts to authorize "unconstitutional damages actions . . ., which infringe Texas's sovereign immunity"); Opp. to MTD FAC at 2 ("incorporat[ing] its prior opposition by reference"). And third, Texas specifically refuted arguments that EEOC made only against the State's constitutional claim. *See* MTD FAC at 22 ("Count III Is Unripe Because There Would Be No Hardship To Withholding Review."); Opp. to MTD FAC at 9 (arguing "there can be no doubt about the hardship that would be imposed on the State by delaying review").

reviewable under the APA if "legal consequences will flow" from it. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Rule meets that test several times over.

A. The Felon-Hiring Rule Binds The Agency And Its Staff

The EEOC dedicates 20 pages of its brief—the bulk of the argument section—to denying that the Rule has legal consequences. Its central argument is that the Rule does not "impose any obligations on Texas, its stage agencies, or other employers." EEOC Br. 11. As we will demonstrate in the next section, that is mistaken. But it is also beside the point.

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 90, 94 (1997) (emphasis added). In other words, the Rule is reviewable if it binds the EEOC itself to the position that race-neutral refusals to hire felons can constitute unlawful employment practices. And the Rule indisputably does.

As we explained in our brief, courts have consistently found final agency action whenever an agency intends to bind its own staff. *See* Br.

51, 56 (collecting cases); *see, e.g.*, *NRDC v. EPA*, 643 F.3d 311, 319-20 (D.C. Cir. 2011) ("guidance" document is reviewable because it constrains administrative staff's discretion). These cases are simply an application of the *Syncor* principle, and the EEOC does not dispute our interpretation of them.

We also explained, and the EEOC once again does not contest, that the Felon-Hiring Rule binds the Commission's staff. Br. 56; *see* EEOC Br. 17 (acknowledging that the Rule "provide[s] guidance to . . . Commission staff"). The Rule is expressly directed at "EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions," ROA.316 [Rule at 3], and it is replete with mandatory language. *See, e.g.*, ROA.323 [Rule at 10] (stating that "the Commission will assess the probative value of an employer's applicant data" in assessing disparate impact, "will closely consider" the employer's reputation in the community, and "will determine the persuasiveness" of other forms of evidence "on a case-by-case basis"); *id.* ("An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact."); ROA.325 ("EEOC would find

reasonable cause to believe that his employer violated Title VII"); *see generally* Br. 53-55.

This is enough to resolve the finality question (and, as we will show below, it largely satisfies standing and ripeness, as well). The Felon-Hiring Rule binds the EEOC itself, and that is sufficient for final agency action. As such, the EEOC's elaborate analysis of whether the Rule has legal consequences for Texas or other employers, *see, e.g.*, EEOC Br. 20-21, is immaterial.

B. The Felon-Hiring Rule Has Legal Consequences For Texas And Other Employers

In any event, the Rule also constitutes final agency action because it does have material consequences for regulated entities, in at least five different ways.

1. Safe harbors. As the opening brief explained, safe harbors are viewed as probative of final agency action. Br. 56. "When '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 v. United States*, 578 F.3d 1, 9 (D.C. Cir. 2009) (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)).[2]

The Felon-Hiring Rule contains two safe harbors. It describes "[t]wo circumstances in which the Commission believes employers will consistently meet the 'job related and consistent with business necessity' defense." ROA.327 [Rule at 14]. 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.

The EEOC's response is puzzling. It insists that these provisions "do not qualify as safe harbors" because of their "equivocal language." EEOC Br. 31. In other words, they merely promise that "the Commission *believes* employers will *consistently*" be free of liability, instead of, perhaps, "the Commission is *certain* that employers will *invariably*" be free of liability. *Id.* But there is nothing in *Cohen*—and the EEOC cites no other authority—to suggest that absolute certainty is required for the creation of a safe harbor. And 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,

[2] The D.C. Circuit reheard *Cohen* en banc on other grounds and affirmed. *See* 650 F.3d 717, 735 (2011).

those provisions were clearly put in place *precisely* so that employers would use them as a norm to guide their actions. *See* ROA.316 [Rule at 3] (explaining that "[t]he Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes").[3] This is enough to make the Rule reviewable.

2. Preemption. Another obvious legal consequence of the Felon-Hiring Rule is that it purports to preempt state laws that are inconsistent with the EEOC's understanding of Title VII. 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.337 [Rule at 24]. 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.337 [Rule at 24].

[3] The Rule also contains the opposite of safe harbors—norms employers can rely on to know what will *not* protect them from liability. *See, e.g.*, ROA.323 [Rule at 10] ("An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact.").

The EEOC can hardly argue that this is not an important legal consequence, so its only recourse is to argue that it is a consequence of *Title VII itself*, and not of the Felon-Hiring Rule. This argument fails.

It is always the underlying statute that ultimately authorizes the preemption. *See Wyeth v. Levine*, 555 U.S. 555, 573 (2009). The question, therefore, is whether the regulation *purports* to preempt state law, or whether it "merely restate[s]" the underlying statutory prohibition. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (cited on this point by EEOC Br. 21-22).

There are two clear indications that the Felon-Hiring Rule is not merely restating Title VII here. First, the EEOC itself acknowledges that this interpretation is novel. The EEOC's website contains a "question and answer" document, which includes a topic devoted to what is *new* about the Rule: "How does the [Felon-Hiring Rule] *differ* from the EEOC's earlier policy statements?"[4] And how is the Felon-Hiring Rule different? Because it preempts state law, says the EEOC: "[The Rule] says that state and local laws or regulations are preempted

[4] EEOC, Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, http://www1.eeoc.gov//laws/guidance/qa_arrest_conviction.cfm (as of Feb. 9, 2015), *available at* https://web.archive.org/web/20141109155606/http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm (archived Nov. 9, 2014 version; same).

by Title VII if they [cause an unlawful disparate impact]." Try as it might, EEOC Br. 40-41, the EEOC cannot escape this clear statement.

The more profound problem is that the Felon-Hiring Rule is actually in deep conflict with Title VII, as the Department of Justice explained in its amicus brief in *Board of Education of New York City School District v. Gulino*, 554 U.S. 917 (2008) ("*Gulino* Amicus," ROA.785).

The Felon-Hiring Rule declares that a business's compliance with a state law banning disparate impact "does not shield the employer from Title VII liability." ROA.337 [Rule at 24]. This assertion is based on 42 U.S.C. §2000e-7. ROA.337, 365 [Rule at 24 & n. 166]. But that is not what Title VII provides. As the Solicitor General explained in the *Gulino* amicus brief, §2000e-7 "has little or nothing to do with the question" of liability under Title VII. ROA.806. Instead, "[s]ection 2000e-7 addresses [the] fundamentally different question [of] when a person can be held *liable* under *state* law, and it limits the circumstances in which Title VII provides a defense." ROA.806; *see* 42 U.S.C. §2000e-7 (stating that Title VII does not "exempt or relieve any person from [state law liability], other than any such law which

purports to require or permit the doing of any act which would be an unlawful employment practice [thereunder]"). Contrary to the Felon-Hiring Rule, Section 2000e-7 "does not address . . . whether a person can be held liable under *Title VII* for compliance with a state law." ROA.806.

The federal government got it right the first time. *See* ROA.801-03 (explaining that interpreting Title VII to preempt facially neutral state laws would "result . . . in [a] reworking of the federal-state balance," undermine "basic notions of fairness and causation," conflict with the business-necessity defense, and impose "great legal uncertainty" on employers who would not know whether to comply with state laws). The federal government can change its mind. But it cannot credibly claim that the Rule does not stake out new territory, or that it simply restates the terms of Title VII.

3. Requirements of employers. In addition to its preemptive effect, the Rule erects an elaborate compliance regime for employers. In mandatory and categorical terms, it condemns policies "requiring an automatic across-the-board exclusion from all employment opportunities because of any criminal conduct." ROA.329 [Rule at 16].

This pronouncement obviously tends to coerce any employer who has a policy of this type—such as the Texas Department of Public Safety or other Texas agencies, Br. 10-11—to change that policy.

The EEOC's response is that this provision of the Felon-Hiring Rule may not rule out *Texas's* policies. EEOC Br. 20. Even if true, this is a non-sequitur; the rule is a final agency action if it has legal consequences for *any* employer, not Texas specifically.

And even if Texas's categorical bans on hiring felons are somehow consistent with the prohibition on "automatic across-the board exclusion from all employment opportunities," they are surely at odds with other aspects of the Rule. In order to justify a criminal-conduct exclusion that has a disparate impact,[5] the Rule requires employers 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 [Rule at 14] (emphasis added). That language is aimed squarely at the policies of employers such as Texas's agencies, which exclude entire categories of felons (or all felons) from entire categories of

[5] These exclusions may routinely have a disparate impact. *See* ROA.323 [Rule at 10] (explaining that "national data" suggests that "criminal record exclusions have a disparate impact based on race and national origin" and therefore "provides a basis for the Commission to further investigate").

jobs (or all jobs). Br. 10-11. Moreover, the rule requires an elaborate individual assessment whenever a candidate is screened out due to a conviction; except perhaps if the employer has developed a particularly impressive "targeted criminal records screen," which "would need to be narrowly tailored to identify to identify criminal conduct with a demonstrably tight nexus to the position in question." ROA.327 [Rule at 14].

In short, the Rule exposes employers to potential liability unless they create an intricate compliance apparatus. That is a legal consequence justifying judicial review. The EEOC once again tries to escape this conclusion by attributing the requirements to Title VII, rather than the Rule. EEOC Br. 22. But, once again, Title VII itself contains none of these requirements. This elaborate compliance scheme is at best EEOC's *interpretation* of Title VII, which is the very decision demanding review.[6]

4. The intent of the rule. In assessing finality, courts have focused on whether the agency action is meant to affect the behavior of

[6] The EEOC also argues that the same general concepts could be found in its "prior policy statements," EEOC Br. 22. But by its own terms, the Rule "update[s]," "builds on," and ultimately "supersede[s]" all such previous documents. ROA.316 [Rule at 3].

regulated entities. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (noting that EPA "has given the States their 'marching orders' and EPA expects the States to fall in line"); *Manufactured Housing Inst. v. EPA*, 467 F.3d 391, 397-98 (4th Cir. 2006) ("States are not free to treat this EPA policy as a mere suggestion").

The Rule none-too-subtly threatens employers with Title VII liability. *See, e.g.*, ROA.327 [Rule at 14] (noting that "the use of individualized assessments can help employers avoid Title VII liability"); ROA.337 [Rule at 24] (explaining that even a preschool is potentially subject to liability for refusing to hire a sex offender who recently pleaded guilty to indecent exposure).

Moreover, there is unique evidence that the EEOC believes employers are bound by the Rule's requirements. In an incident the EEOC does not address in its brief, a lawyer for a regulated entity actually pointed the EEOC to its filings in this case when the EEOC attempted to enforce the Rule against his client. Br. 14 (citing ROA.858). The "Lead Systemic Investigator" for the EEOC's Houston field office responded, noting that he "would be remiss to allow your

confusion to harm your client on this score." ROA.861. He further "hoped" the lawyer "will not mislead your client into believing it would be a good policy for it to ignore the enforcement guidance on criminal convictions." ROA.861. The investigator concluded that his "recommendations will be forwarded to enforcement management," because his "efforts to obtain relevant evidence have not, apparently, induced you to be more cooperative." ROA.862. It could hardly be clearer that the EEOC intended for the Rule to function—and uses the Rule — as a means of extracting compliance from regulated employers. And this threat is all the more effective in light of the EEOC's undisputed record of abusive, "*frivolous*," and "*groundless*" enforcement tactics. *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 592 (6th Cir. 2013); *see* Br. 8-10.

5. Precedent. The relevant case law overwhelmingly supports our position. The opening brief identified at least eight court of appeals cases deeming an agency action to be final on facts either similar to, or more difficult than, the ones here. Br. 53. The EEOC's efforts to distinguish those cases are cursory and unpersuasive. For instance, it notes that *Appalachian Power* involved a guidance setting out the

position EPA "plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, [and] a position EPA officials in the field are bound to apply." 208 F.3d at 1022 (quoted at EEOC Br. 27). But EEOC fails to explain how that differs from this case. Apart from the different subject regulated, *Appalachian Power*'s description applies fully here. As explained above, the EEOC plans to follow the rule in its investigations; it will insist regulated entities comply with the rule; and its officials in the field are bound to apply it.

The EEOC's effort to distinguish *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000), is equally unavailing. As that case holds, the principle "[t]hat the issuance of a guideline or guidance may constitute final agency action has been settled in this circuit for many years." *Id.* at 48. There, the agency tried to avoid the APA by arguing that its "guidance" document merely restated positions that the agency previously took, regarding a polluter's obligations "to keep track of its movement of waste rock and report the movements as releases of toxic substances." *Id.* The court emphatically rejected that argument.

It explained that the only relevant point under § 704 of the APA is that the agency intended regulated entities to comply with its instructions. *Id.* at 48-49 & n.3. For all of the reasons given above, there can be no doubt that EEOC intended for Texas and other employers to comply with the instructions given in the Felon-Hiring Rule.[7]

Ultimately, the "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; *see* Br. 53-55 (reviewing the Rule's mandatory language). It is therefore reviewable final agency action.

II. THE STATE HAS STANDING

With reviewability under the APA established, Texas's standing to seek that review follows as a matter of course. Texas has standing because it is clearly "an object of the [agency's] action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); Br. 19-20. The

[7] The EEOC's primary response to the weight of the case law is to rely on *AT&T v. EEOC*, a case where AT&T *conceded* that it could point to no specific action that the EEOC had taken. 270 F.3d 973, 975 (D.C. Cir. 2001). Moreover, the *AT&T* court acknowledged that a guidance document constitutes final agency action if it "inflicts injury or forces a party to change its behavior," *id.* at 976 (citing *Appalachian Power,* 208 F.3d at 1022); the court simply held that AT&T failed to plead such injuries.

EEOC's only answer is to say that the argument "assumes a final agency action from which legal consequences flow." EEOC Br. 37. In other words, the EEOC concedes that its argument against standing depends entirely on its argument against finality. Because the latter fails, so does the former.

Similarly, the EEOC does not disagree that the State is invariably injured by regulations that preempt state laws. EEOC Br. 41; *see* Br. 24. Instead it argues that Title VII, rather than the Rule, preempts state laws here. EEOC Br. 41. This argument, too, has already been addressed and disproven. *See supra* Part I(B)(2).

Multiple additional considerations confirm that Texas has standing. First, the stated purpose of the Rule is "to eliminate unlawful discrimination in employment screening." ROA.316 [Rule at 3]. As one court of appeals put it, "it strikes us as odd that the Agency is arguing that it must have a strict rule *now* to [eliminate unlawful discrimination], 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).

Second, there is every reason for Texas to be concerned about liability under the Rule. The EEOC and DOJ have never suggested that they would not launch enforcement actions against Texas pursuant to the Rule, Br. 21-22. Texas has already been sued under the Rule, Br. 23, and the EEOC made an adverse finding against Ohio for implementing a state law materially identical to the relevant Texas laws, Br. 45-46.

Finally, even if there were any question of Texas's ability to meet "the normal standards for redressability and immediacy," those standards are relaxed here because the State is "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Lujan*, 504 U.S. at 572. Specifically, the State seeks to enforce the APA's notice-and-comment provision to protect its concrete interest in following the no-felon policies mandated by state law. Br. 20.

III. THE STATE'S CLAIMS ARE RIPE

The EEOC's ripeness objections are almost entirely derivative of their § 704 and standing objections. The Commission's only *independent* ripeness argument is that the lawfulness of a particular employment decision by a particular employer against a particular employee is a fact- and context-specific inquiry. EEOC Br. 45-46. Perhaps; but that's irrelevant. The only question presented by the State's complaint is whether the EEOC had legal authority to issue the Felon-Hiring Rule in the first place. The outcome of that singular, relevant question has nothing at all to do with the facts of any particular hiring decision.

The EEOC's ripeness objection does highlight, however, its apparent belief that federal agencies cannot be made to answer for their assertions of administrative power unless and until the agency picks its target and enforces the Rule. But that conception of the ripeness doctrine would undermine the entire notion of pre-enforcement judicial review, which lies at the heart of the APA. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 139-40 (1967) (noting that APA reinforced "presumption" of pre-enforcement judicial review, which attaches unless federal

agency can rebut it). And this case is particularly appropriate for pre-enforcement judicial review because the State presents a "purely legal" claim," *id.* at 149—namely, that the EEOC does not have legal authority to regulate employers' refusals to hire felons. Accordingly, EEOC's ripeness objection must be rejected.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that, on February 9, 2015, 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 February 9, 2015, 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/.

Counsel further certifies that 1) 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.

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Dated: February 9, 2015