No. 14-5076

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

BRIEF FOR APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

The district court correctly applied well-established principles of law when it dismissed plaintiff's case for lack of subject matter jurisdiction, and the government thus does not believe that oral argument is necessary. If this Court determines that oral argument would be helpful to its resolution of the appeal, however, the government stands ready to present argument.

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STATEMENT OF JURISDICTION

Plaintiff's amended complaint invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361. ROA.290-291. On August 20, 2014, the district court granted defendants' motion to dismiss and issued a final judgment dismissing plaintiff's case for lack of subject matter jurisdiction. ROA.870-871. Plaintiff filed a timely notice of appeal on August 25, 2014. ROA.872. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiff, the State of Texas, challenges the Equal Employment Opportunity Commission's (EEOC or Commission) Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, No. 915.002 (April 25, 2012) (EEOC Guidance or Guidance). Texas sought relief pursuant to the Declaratory Judgment Act and the Administrative Procedure Act (APA). The district court dismissed the case for lack of subject matter jurisdiction. The questions presented on appeal are as follows:

1. Whether the district court correctly held that it lacked subject matter jurisdiction because the EEOC Guidance is not final agency action under the APA.

2. Whether the district court correctly held that it lacked subject matter jurisdiction because Texas lacks standing to challenge the EEOC Guidance.

3. Whether the district court correctly held that it lacked subject matter jurisdiction because Texas's challenge to the EEOC Guidance is not ripe.

STATEMENT OF THE CASE

A. Nature Of The Case And Factual Background.

In the present action, plaintiff, the State of Texas, filed suit against the Chair of the EEOC and the Attorney General of the United States in their official capacities challenging the EEOC Guidance under the APA. See Am. Compl. ¶¶ 1-3, ROA.289-290. The Guidance sets forth the EEOC's views on the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to an employer's use of criminal history records in employment decisions. See Guidance, ROA.311-365; see also District Court slip opinion ("op.") 2, ROA.864. Texas sought a declaratory judgment affirming "its right to maintain and enforce its laws and policies that absolutely bar convicted felons (or certain categories of convicted felons) from serving * * * [in] any [ ] job the State and its Legislature deem appropriate." Am. Compl. ¶43, ROA.304. Texas also sought an injunction against enforcement of the EEOC Guidance. *Id.* ¶44, ROA.304. Texas further requested that the court invalidate the EEOC Guidance as an unauthorized substantive rule issued without notice and comment in violation of the APA. *Id.* ¶¶48-49, ROA.304-305.[1]

[1] In Count Three of its Amended Complaint, Texas also challenged the constitutionality of Title VII to the extent that it allows disparate impact claims

Defendants moved to dismiss Texas's case in its entirety for lack of subject matter jurisdiction. ROA.497. The district court granted the motion based on its determinations that Texas lacked standing to challenge the EEOC Guidance, that the Guidance was not final agency action, and that Texas's claims were not ripe. Op. 6-8, ROA.868-870.

B. Statutory And Regulatory Background.

1. Relevant Provisions of Title VII.

In 1972, Congress amended Title VII of the Civil Rights Act of 1964 to, *inter alia*, extend the statute's coverage to state and local government employers. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). The EEOC plays a more limited role in implementing Title VII with respect to states, however, than it does with respect to private employers. Although the EEOC investigates charges of discrimination filed against state employers and may engage in conciliation efforts, the agency cannot bring an enforcement action against a state. See 42 U.S.C. § 2000e-5(f)(1).

a. To initiate the administrative process under Title VII, a state employee or job applicant must file a charge with the EEOC within 180 or 300 days of the

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against states. Am. Compl. ¶52, ROA.305. Texas abandoned that claim in district court by failing to respond to defendants' arguments (see ROA.508; ROA.528; ROA.656-665; ROA.835), and did not raise the issue in its opening brief on appeal. See Pl. Br. 2 (statement of issues); 16-61. Rather, Texas appeals solely the district court's holding that it lacked subject matter jurisdiction over Texas's challenges to the EEOC Guidance. See *id.* Thus, only Texas's claims based on the Guidance are at issue here.

allegedly unlawful employment practice. 42 U.S.C. § 2000e-5(b), (e)(1). The EEOC then investigates the charge, and, "as promptly as possible" makes a determination as to whether there is reasonable cause to believe that the employer violated Title VII. 42 U.S.C. § 2000e-5(b). If the Commission does not find reasonable cause, it must dismiss the charge and "promptly" provide notice (commonly referred to as a right-to-sue letter) to the state employee or applicant, who may file suit in district court within 90 days of receiving the notice. 42 U.S.C. § 2000e-5(b), (f)(1).

If the Commission does find "reasonable cause to believe that the charge is true," it initiates informal conciliation with the state employer, in which it attempts to facilitate settlement. See 42 U.S.C. § 2000e-5(b). But if such conciliation fails, the EEOC cannot bring an enforcement action against the State. 42 U.S.C. § 2000e-5(f)(1). Rather, the EEOC "shall take no further action" after the conclusion of conciliation efforts and "shall refer the case to the Attorney General who may bring a civil action" against the State in district court. 42 U.S.C. § 2000e-5(f)(1).[2] The civil action would be a *de novo* determination of the State's liability, if any, under Title VII. See *Chandler* v. *Roudebush*, 425 U.S. 844-45 (1976).

[2] Alternatively, if "within one hundred and eighty days from the filing of [the] charge" the Commission has not entered into a conciliation agreement or the Attorney General has not filed a civil action, the Commission, or, where applicable, the Attorney General, must provide notice to the employee or applicant, who may file suit in district court within 90 days of such notice. 42 U.S.C. § 2000e-5(f)(1).

b. In Title VII, Congress included a specific provision regarding the statute's effect on state law liabilities and duties:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter*.

42 U.S.C. § 2000e-7 (emphasis added). Under Title VII, "unlawful employment practice[s]" include practices that create a disparate impact because of a protected characteristic such as race or sex and that are not job-related and consistent with business necessity:

> It shall be an unlawful employment practice for an employer --
> * * * * *
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2). Title VII further provides that a plaintiff establishes an "unlawful employment practice based on disparate impact" if he "demonstrates that [an employer] uses a particular employment practice that causes a disparate impact on the basis" of a protected characteristic and the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

c. Although Congress granted the EEOC express authority to promulgate procedural regulations to implement Title VII, the Commission lacks authority to issue substantive rules and regulations. See 42 U.S.C. § 2000e-12(a); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991).

2. EEOC Guidance.

In April 2012, the EEOC issued the "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII" that is the subject of this action. Guidance, ROA.311-365. The Guidance sets forth the EEOC's views on how an employer's use of criminal history in making employment decisions may implicate Title VII prohibitions against discrimination. See Guidance at 1, ROA.314. As the EEOC explained, "[a]n employer's use of an individual's criminal history in making employment decisions *may, in some instances*, violate the prohibition against employment discrimination *under Title VII*[.]" *Id.* (emphasis added). With respect to disparate impact liability under Title VII, the Commission stated that "[a]n employer's neutral policy (*e.g.*, excluding applicants from employment based on certain criminal conduct) *may* disproportionately impact some individuals protected under Title VII, and *may* violate the law *if not job related and consistent with business necessity*." *Id.* (emphasis added).

The agency noted that, during an investigation, in assessing whether an employer's practice has a prohibited disparate impact, it engages in a fact-based

inquiry: It (i) identifies the "particular policy or practice" at issue, (ii) reviews statistical data on whether the practice has a disparate impact on a protected class, and, (iii) if necessary, determines whether facts demonstrate that the practice is "job-related and consistent with business necessity." Guidance at 9-15, ROA.322-328.

The EEOC issued the Guidance to "consolidate and update" the agency's prior guidance documents containing its non-binding interpretation of Title VII's applicability to employers' use of criminal history in employment decisions. See Guidance, ROA.311. As the agency explained, "[i]n light of employers' increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments," it "decided to update and consolidate" in the 2012 Guidance "all of its prior policy statements about Title VII and the use of criminal records in employment decisions." *Id.* at 3, ROA.316. The Guidance "builds on longstanding court decisions and existing guidance documents" that the EEOC had "issued over twenty years ago." *Id.* at 1, ROA.314. These prior guidance documents show that the EEOC has long held the view that policies that exclude applicants based on criminal history records may violate Title VII. ROA.646-650 (EEOC Policy Statement on the Issue of Conviction Records under Title VII (Feb. 4, 1987); Policy Statement: Conviction Records – Statistics (July 29, 1987)).

C. District Court Proceedings.

1. On November 4, 2013, Texas filed the present action in the United States District Court for the Northern District of Texas against the EEOC and Jacqueline Berrien, in her official capacity as the then-Chair of the EEOC. [3] Complaint, ROA.7. Texas filed an Amended Complaint on March 18, 2014, adding Eric H. Holder, in his official capacity as Attorney General of the United States, as a defendant. Am. Compl., ROA.289.

Texas alleged that (1) the Guidance is contrary to Title VII and improperly preempts state law; (2) the EEOC exceeded its authority under Title VII by issuing the Guidance; and (3) the Guidance is a substantive rule that was issued without notice and comment under the APA.[4] See Am. Compl., ROA.302-305. Texas stated that it "employs hundreds of thousands of people," and that, "[f]or many state jobs, state law and longstanding hiring policies impose absolute bans on hiring convicted felons (or in some instances persons convicted of certain categories of felonies)." *Id.* ¶23, ROA.296. Texas sought a declaration of its "right to maintain and enforce its

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[3] Pursuant to Fed. R. App. P. 43(c)(2), the current Chair of the EEOC, Jenny R. Yang, is automatically substituted for former Chair Jacqueline Berrien.

[4] As noted *supra* n.1, in Count III of the Amended Complaint, Texas also challenged the constitutionality of Title VII to the extent that it allows disparate impact claims against states. Am. Compl. ¶52, ROA.305. Because Texas abandoned that claim in district court and has not raised it on appeal, we do not address it here. See *supra* n.1.

law and policies that absolutely bar convicted felons (or certain categories of convicted felons) from serving * * * [in] any [] job the State and its Legislature deem appropriate." *Id.* ¶43, ROA.304. Texas alleged that while "there is no risk that [it] could incur" liability for disparate treatment based on such policies, the policies pose a risk of enforcement actions against the State based on the provisions of the Guidance addressing disparate impact under Title VII. See *id.* ¶¶ 31-32, ROA.299. Texas also sought an injunction against enforcement of the EEOC Guidance by the EEOC or the Attorney General, and against the issuance of right-to-sue letters to private parties based on the Guidance. *Id.* ¶44, ROA.304. Texas further requested that the court invalidate the Guidance as an unauthorized substantive rule issued without notice and comment in violation of the APA. *Id.* ¶¶48-49, ROA.304-305.

2. Defendants filed a motion to dismiss the First Amended Complaint for lack of subject matter jurisdiction. ROA.497. Defendants argued that the Guidance was not final agency action under the APA, the State lacked standing, and the State's challenge to the Guidance was not ripe for review. See ROA.501-530. Defendants explained that the Guidance did not qualify as final agency action because it lacked legal consequences and did not impose any obligations on employers. ROA.513-519. Defendants also argued that Texas lacked standing because it could not show that the Guidance causes it actual or imminent injury-in-fact. ROA.519-523. Defendants further contended that Texas's challenge to the Guidance was not ripe because it did

not present purely legal questions, and resolution of the legality of the hiring practices of particular Texas state agencies for certain jobs would depend on the facts and circumstances of each case. ROA.523-528.

3. On August 20, 2014, the district court granted defendants' motion to dismiss. Op. 1-8, ROA.863-870. Because Texas had not alleged that the Department of Justice had taken any enforcement action against it based on the Guidance (and the EEOC had not and could not bring such an action), the court explained that it could not "find a 'substantial likelihood' that Texas would face future Title VII enforcement proceedings" arising from the Guidance. Op. 7, ROA.869. The court thus determined that Texas's allegations were too speculative to support standing. *Id.* The court further held that "[f]or the reasons argued by the Defendants, Texas ha[d] not shown that the Guidance is a final agency action," and Texas had failed to demonstrate that its claims were "not seeking a premature adjudication in the abstract without any actual facts and circumstances relating to the employment practices at issue." See op. 7-8, ROA.869-870. Accordingly, the court dismissed Texas's case for lack of subject matter jurisdiction.

SUMMARY OF ARGUMENT

The district court properly rejected Texas's attempt to obtain pre-enforcement review of a non-binding policy guidance that imposes no legal obligations or consequences on Texas or any other employer. As the district court correctly

determined, it lacked subject matter jurisdiction because the Guidance is not final agency action, Texas lacks standing to challenge the Guidance, and Texas's case is not ripe for review. This Court can affirm the district court's judgment on any of these independently sufficient grounds.

1. To qualify as judicially reviewable "final agency action" under the APA, an agency action must "mark the consummation of the agency's decisionmaking process," and it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations omitted). The EEOC Guidance that Texas challenges here is just that – guidance. It has no legal consequences, nor does it impose any obligations on Texas, its state agencies, or other employers. The Department of Justice has enforcement authority with respect to state employers, and neither the Department nor the courts are bound by the EEOC's views as set forth in the Guidance. In any event, any potential obligations with respect to the use of criminal history in employment decisions are imposed by Title VII itself, not the Guidance.

The district court thus correctly held that the Guidance does not constitute final agency action under the APA. Texas's reference to the Guidance as the "Felon-Hiring Rule" cannot change the reality that the Guidance is not a rule, nor does it require employers to take *any* action, much less hire felons. The Guidance does not reach any conclusions about the validity of Texas's employment policies. Although

Texas alleges that it has been harmed by the Guidance, the State has not identified any penalties, sanctions, or legal requirements imposed on it by the Guidance. And in any hypothetical future court action against a state agency – whether filed by the Department of Justice or a private individual – the court would assess *de novo* the validity of the State's employment policies under Title VII itself, not the Guidance. In short, where, as here, an agency's statement of its views has no legal consequences, it does not constitute final agency action

2. For similar reasons, the district court also properly held that Texas lacks standing to challenge the EEOC Guidance. Texas has failed to demonstrate that it has suffered or will suffer any injury-in-fact stemming from the Guidance. To the contrary, as the district court recognized, Texas's allegations of injury are purely speculative. Indeed, Texas has not identified any Department of Justice enforcement actions against Texas or any other state employer based on the use of criminal history records. Moreover, even assuming *arguendo* Texas had sufficiently alleged an injury-in-fact, it would not be traceable to the Guidance. In any potential court action challenging Texas's or any other employer's use of criminal history records in making employment decisions, the court would determine whether the employer violated relevant provisions of Title VII, not whether it violated the Guidance.

3. Finally, the district court correctly held that Texas's legal challenge to the Guidance is not ripe for review. If a challenged agency action is not a "final agency

action," *a fortiorari*, it also is not ripe for review. See *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 411 n.11 (5th Cir. 1999). In addition, for the same reasons that Texas lacks standing, its claim is not ripe: because the Guidance has not caused Texas any injury, nor is injury imminent, there is no sufficiently ripe case or controversy upon which to base Article III jurisdiction. But even if the final agency action and standing points were not dispositive, Texas's claims would not be ripe because they do not involve pure questions of law suitable for judicial review in the abstract. Rather, as the Guidance makes clear, facts and context matter in analyzing whether an employer's use of criminal history records in making a particular employment decision might violate Title VII.

Judicial review thus should await an actual case or controversy where such context-specific factual questions can be answered. Moreover, because the Guidance has no legal consequences, and Texas has not shown, nor can it show, any actual or imminent injury traceable to the Guidance, Texas will not suffer any hardship from not obtaining review at this time.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a case for lack of subject matter jurisdiction. *Peoples Nat'l Bank* v. *Office of the Comptroller of the Currency*, 362 F.3d 333, 336 (5th Cir. 2004).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED TEXAS'S CHALLENGE TO THE EEOC GUIDANCE FOR LACK OF SUBJECT MATTER JURISDICTION.

The district court correctly dismissed Texas's APA claims for lack of subject matter jurisdiction. As the district court held, Texas's claims should be dismissed because Texas lacks standing, because the EEOC Guidance is not final agency action, and because the case is not ripe for review. Any of these grounds alone is a sufficient basis upon which to dismiss Texas's claims. Because the analysis of whether the EEOC Guidance constitutes final agency action is jurisdictional and is logically antecedent to the standing inquiry and is dispositive of the ripeness question, we begin with that issue. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999) ("a federal court [may] choose among threshold grounds for denying audience to a case on the merits").

A. The EEOC Guidance Is Not Final Agency Action.

Under the APA, a court may review only "final agency action." 5 U.S.C. § 704; see *Peoples Nat'l Bank*, 362 F.3d at 336. Section 702 of the APA creates a cause of action and waives sovereign immunity for actions against federal agencies arising under the general federal question jurisdiction statute, 28 U.S.C. § 1331. *Alabama-Coushatta Tribe of Texas* v. *United States*, 757 F.3d 484, 488-89 (5th Cir. 2014). Although the "requirement of 'finality' comes from § 704," it "has been read into § 702 in cases

where review is sought pursuant only to the general provisions of the APA." *Id.* at 489. This Court thus has held that where, as here, a plaintiff challenges federal agency action absent a specific authorization in a substantive federal statute, "[t]here must be 'final agency action' in order for a court to conclude that there was a waiver of sovereign immunity" under Section 702 of the APA. *Id.* Accordingly, if "there is no 'final agency action,' a federal court lacks subject matter jurisdiction."[5] *Peoples Nat'l Bank*, 362 F.3d at 336. And, "[a]s the party asserting federal jurisdiction," Texas "bears the burden of demonstrating that jurisdiction is proper." *Stockman* v. *FEC*, 138 F.3d 144, 151 (5th Cir. 1998). Texas cannot meet this burden here.

To qualify as "final," an agency's action must (1) "mark the 'consummation' of the agency's decisionmaking process," *and* (2) it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations omitted). An agency action is not final unless it satisfies both requirements. *National Pork Producers Council* v. *EPA*, 635 F.3d 738, 756 (5th Cir. 2011) ("that the guidance letters can meet the first *Bennett* prong is not enough"; "[t]o meet the second *Bennett* prong, the guidance letters must affect [petitioners'] rights or obligations or create new legal consequences").

[5] Texas thus errs by stating that "[d]efendants are wrong to characterize Section 704 as jurisdictional." See Pl. Br. 46 n.2 (citing D.C. Circuit cases). Because the "final agency action" requirement is read into Section 702 where, as here, review is sought pursuant to general APA provisions, this Court has held that the final agency action requirement is jurisdictional. *E.g.*, *Peoples Nat'l Bank*, 362 F.3d at 336.

1. The EEOC Guidance Does Not Create Legal Consequences.

a. The EEOC Guidance does not determine employers' rights or obligations. Nor do any legal consequences flow from the Guidance. To the contrary, as its title suggests, the EEOC Guidance is just that – guidance that sets forth the Commission's views on how employers' use of criminal history records in employment decisions may implicate Title VII prohibitions against discrimination. See Guidance at 1-3, ROA.314-316. Any legal consequences resulting from an employer's use of criminal history records would flow from Title VII and court decisions interpreting the statute, not from the Guidance itself. See, *e.g.*, *Luminant Generation Co., LLC* v. *EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (Clean Air Act and state implementation plan, *not* challenged EPA notices, "set forth [petitioner's] rights and obligations"). Under the Guidance, Texas has "no new legal obligation imposed on it" and has "lost no right it otherwise enjoyed." See *id.* The Guidance therefore cannot qualify as final agency action. *Id.*; *Belle Co., LLC* v. *United States Army Corps of Eng'rs*; 761 F.3d 383, 390 (5th Cir. 2014) (agency action non-final if it "does not of itself adversely affect complainant") (internal quotations omitted), *pet. for cert. filed*, 83 U.S.L.W. 3291 (Oct. 28, 2014); *Peoples Nat'l Bank*, 362 F.3d at 337 (same).

As courts have recognized, where an agency "merely expresses its view of what the law requires of a party, even if that view is adverse to the party," the agency's action is non-final. *AT&T* v. *EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001); see

Luminant, 757 F.3d at 442 n.7. In contrast to a substantive rule that itself binds regulated parties and imposes legal obligations absent any further agency action or court ruling, the Guidance, standing alone, has no such legal effect. See *Luminant*, 757 F.3d at 442 & n.7; *National Pork Producers Council*, 635 F.3d at 756 (EPA interpretation of environmental statute to require permit for discharge of manure or litter through ventilation fans not final agency action because statute itself prohibited discharge). And, in contrast to an agency order that requires a party to take particular actions, the Guidance does not "state that [Texas] is in violation of [Title VII], much less issue an order to [Texas] to comply with any terms in the [Guidance] or take any steps" to comply with the law. *Belle Co.*, 761 F.3d at 393.

b. Texas argues (Br. 53-57) that the Guidance contains mandatory language that renders it a final agency action. But Texas ignores the context of the language that it cites. The EEOC's intent in promulgating the Guidance was to "build[] on longstanding court decisions and policy documents that were issued over twenty years ago." See Guidance at 3, ROA.316. And the agency did so by providing guidance to employers, individual applicants and employees, and Commission staff regarding the agency's views on how Title VII applies to employers' use of criminal history records. *Id.* The Guidance does not prohibit any particular employer policy with respect to the use of criminal history records; it merely sets forth the agency's views on

considerations that would inform a determination in its reasonable-cause findings and in any potential future agency enforcement action against non-state employers.

Texas's partial, out-of-context quotations of allegedly mandatory language (Br. 53-55) belie its contention that legal consequences flow from the Guidance. Much of the language that Texas cites (Br. 53-55) appears in the context of hypothetical examples the EEOC provided for discussion purposes that illustrate potential issues that could arise under Title VII with respect to employers' use of criminal history in employment decisions. See Guidance at 7-24, ROA.320-337.

Texas's first citation (Br. 53) to the phrase "EEOC would find reasonable cause to believe that discrimination occurred," for example, omits the beginning of the sentence, which shows that the agency would only find such reasonable cause if, after investigation, it confirmed the facts alleged by a hypothetical complainant. See Guidance 7-8, ROA.320-321 ("*If* Nelson filed a Title VII charge alleging disparate treatment based on national origin *and* the EEOC's investigation confirmed these facts"). The omitted part of the quotation makes clear that the Guidance itself would not be the basis for any reasonable cause finding.[6] Rather, the "EEOC would find reasonable cause" based only upon the contingent future events of a charge filed *under*

[6] The missing language also makes clear that the quotation is taken from the section of the Guidance that addresses disparate treatment discrimination, which is not relevant to Texas's challenge. See Am. Compl. ¶ 31, ROA.299.

Title VII and an EEOC investigation of that charge that confirmed the facts alleged by the complainant.[7] Moreover, even if EEOC, after investigating, found reasonable cause, the agency's finding would not constitute final agency action. *AT&T*, 270 F.3d at 974-76.

This example is illustrative of how the Guidance does not – nor does it purport to – make definitive determinations of whether particular employer policies violate Title VII. That can only be done in the context of an actual enforcement action or court proceeding, which would involve the application of Title VII, not the Guidance. Indeed, as the EEOC explained prior to the subsection of the Guidance addressing disparate impact, its intent was simply to "discuss considerations that are relevant to assessing whether criminal record exclusion policies or practices are job related and consistent with business necessity." Guidance at 12, ROA.325. And other examples cited by Texas (Br. 53-54) that merely state that the EEOC will "assess" or "consider"

[7] Several other quotations on which Texas relies are similarly misleading. Texas repeatedly quotes a portion of a sentence, omitting the context that shows that the phrase quoted is conditional, not absolute. See, *e.g.*, Pl. Br. 54 (quoting "EEOC would find reasonable cause * * * " from ROA.325, but omitting preceding contingent "if" clause that limits context to "based on these facts" and if "disparate impact based on race were established"); Br. 55 (quoting "EEOC concludes that there is reasonable cause * * *" from ROA.330, but omitting context of four previous sentences leading to that conclusion); Br. 55 (quoting "EEOC finds reasonable cause * * *" from ROA.333, but omitting qualification "because the targeted exclusion *was not job related and consistent with business necessity based on these facts*") (emphasis added); Br. 55 (quoting "EEOC finds that the policy is [unlawful]" from ROA.334, but omitting preceding contextual findings in hypothetical investigation).

certain factors or "determine the persuasiveness of such evidence on a case-by-case basis" thus reflect the fact that the Guidance provides information regarding case-specific factors the agency would consider in assessing whether a practice has an unlawful disparate impact. See Guidance at 10-12, ROA.323-325. The key point is that the agency is not prescribing or prohibiting specific employment policies or actions; rather, it is offering its nonbinding view of the types of considerations that would apply when a court ultimately determines whether an employer's use of criminal history records violates the underlying statute.

Texas argues (Br. 55), however, that the EEOC "went out of its way to condemn categorical no-felons policies like Texas's in mandatory terms." In support, Texas cites the EEOC's statement that "[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." Guidance at 16, ROA.329 (emphasis added). But Texas's conclusion does not follow from this statement. The Guidance does not "condemn policies like Texas's" since Texas does not allege that it excludes individuals with a history of "any criminal conduct" from "all employment opportunities" in the State. To the contrary, as Texas's amended complaint makes clear, only certain state agencies exclude individuals with a history of particular (not any) criminal conduct. See Am. Compl. ¶¶ 24-30, ROA.296-299. Nor

does the Guidance direct employers to perform an individualized assessment of every applicant; rather, it explicitly acknowledges that "Title VII does not require individualized assessment in all circumstances" (Guidance at 2, ROA.315); *id.* at 14, ROA.327 ("Title VII thus does not necessarily require individualized assessment in all circumstances."); *id.* at 18, ROA.331 (same). In short, the Guidance does not categorically ban any of Texas's (or other employers') policies that bar individuals with felony convictions from performing particular jobs.

In any event, even if there were mandatory, directive language in the Guidance, it would not create any legal obligations. The relevant legal obligation not to discriminate on the basis of protected characteristics derives from Title VII, not the Guidance. As the Guidance makes clear on its face, it merely reflects the EEOC's non-binding, longstanding view that an employer's use of criminal history in making employment decisions *may*, under certain circumstances, violate Title VII. See Guidance at 1, ROA.314.

2. Court Of Appeals Precedent Supports The Conclusion That The Guidance Is Not Final Agency Action.

a. The district court's holding that the Guidance is not final agency action is also consistent with the precedent of this Court and other courts of appeals. Agency guidance documents that merely restate prohibitions from the underlying statute "neither create new legal consequences nor affect" employers' "rights or obligations"

and thus are not "reviewable final actions." *National Pork Producers Council*, 635 F.3d at 756. Here, the Guidance does "not change any rights or obligations" applicable to employers with respect to the use of criminal history records in employment decisions. See *id.* As this Court explained, if no "legal consequences will flow" from the Guidance itself, but would occur only upon future contingent events (such as an adverse judgment after future enforcement proceedings under Title VII), then the Guidance is not final agency action. *Luminant Generation Co.,* 757 F.3d at 442 & n.7.

Moreover, even if the EEOC had never issued the Guidance, Texas state agencies would still be subject to Title VII's prohibition against disparate impact discrimination. See 42 U.S.C. § 2000e-2(a)(2), (k)(1)(A)(i). And prior policy statements by the EEOC had already made clear the agency's longstanding view that an employer's use of criminal history records in employment practices may, in certain circumstances, violate Title VII. See ROA.646-650. In this respect, the Guidance is easily distinguishable from agency action that imposes penalties for non-compliance, creates new permitting or licensing requirements, or requires compliance with specific non-statutory mandates. See, *e.g.*, *Belle Co.*, 761 F.3d at 391-92 (Army Corps of Engineers' jurisdictional determination not final agency action because it does not impose penalties, require compliance or impose new permitting requirement; plaintiff would have been required to obtain proper permits under Clean Water Act even if Corps had not issued determination).

The D.C. Circuit's decision in *AT&T* v. *EEOC*, *supra*, is particularly instructive. In that case, plaintiff AT&T sued the EEOC, seeking a declaration that the company's pension calculation policy did not violate the Pregnancy Discrimination Act (PDA). *AT&T*, 270 F.3d at 974. The court held that even where the EEOC's Compliance Manual "state[d] the Commission's view that the policy followed by AT&T violates the Act," and where the EEOC had already sued "two other similarly situated employers" with the same policy, there was no final agency action. *Id.* at 976. As the court explained, the Commission "has not inflicted any injury upon AT&T merely by expressing its view of the law – a view that has force only to the extent the agency can persuade a court to the same conclusion." *Id.*

Moreover, even if the EEOC had concluded that AT&T's policy violates the PDA, the Compliance Manual did not require it to file suit. 270 F.3d at 976. Although the Commission sent Letters of Determination to two AT&T employees "stating that in its view AT&T had unlawfully discriminated" against them and informed the company that if conciliation failed, it would refer the matter to its legal department, *id.* at 974-75, the court concluded that there was no final agency action because "to allow AT&T to institute litigation with the Commission over the lawfulness of its policy would be to preempt the Commission's discretion to allocate its resources as between this issue and this employer, as opposed to other issues and

other employers, as well as its ability to choose the venue for its litigation, as the statute contemplates." *Id.* at 976.

This case is even further removed from final agency action. Here, as set forth above, the EEOC Guidance (which is analogous to the EEOC Compliance Manual, see ROA.589-645) does not state that Texas's policies regarding the use of criminal history records violate Title VII. To the contrary, the Guidance makes clear that a determination regarding whether an employer's policy on the use of criminal history records violates the statute depends on the facts and circumstances of each case. And here, even if the EEOC were to conclude that Texas has violated Title VII, not only is the Commission not bound to file suit, it lacks the statutory authority to do so. See 42 U.S.C. § 2000e-5(f)(1). And even if the Department of Justice were to file suit, the court would determine, in a *de novo* action, whether Texas violated Title VII, not whether it violated the Guidance. Moreover, unlike in *AT&T*, Texas does not cite any findings by the EEOC that the State's use of criminal history records violates Title VII. Cf. *AT&T*, 270 F.3d at 974-75.

But even if the Guidance did conclude that Texas state agencies' policies excluding individuals with felony convictions from certain positions violate Title VII, the Guidance still would lack legal consequences. If the EEOC were to receive a charge of discrimination from an applicant who was denied employment pursuant to a Texas state agency policy excluding individuals with a particular criminal history, it

would open an administrative investigation (as it would with any charge). Such an administrative investigation is not a sufficient "legal consequence" to constitute final agency action, however. *E.g.*, *Jobs, Training & Servs., Inc.* v. *East Texas Council of Gov'ts*, 50 F.3d 1318, 1324 (5th Cir. 1995) ("an agency's initiation of an investigation does not constitute final agency action") (internal quotations omitted); see *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980) (initiation of administrative complaint not sufficient to constitute final agency action; burden of responding "is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action").

If, after investigation, the EEOC did not find reasonable cause, it would issue a right-to-sue letter, which would not be a final agency action. See *Newsome* v. *EEOC*, 301 F.3d 227, 232 (5th Cir. 2002) (issuance of right-to-sue letter not final agency action); *Borg-Warner Protective Servs. Corp.* v. *EEOC*, 245 F.3d 831, 836 (D.C. Cir. 2001) (same; EEOC's right-to-sue letter "even further removed" from final agency action than administrative complaint: "rather than initiating proceedings, it merely informed [employee] that he had a right to bring a complaint"). Moreover, Title VII (not the Guidance) requires the EEOC to provide an individual with notice of the right to sue. See 42 U.S.C. § 2000e-5(b), (f)(1).

If the EEOC did find reasonable cause and conciliation failed, the agency would refer the case to the Attorney General. The subsequent decision whether to

file suit would be made by the Department of Justice, which is not bound by the EEOC's reasonable cause determination. See 42 U.S.C. § 2000e-5(f)(1) (after referral by EEOC, Attorney General "may bring a civil action"). The Department of Justice does not file suit in every case referred by the EEOC. And even if the Department were to file suit in a particular case, that lawsuit would not convert the EEOC Guidance into final agency action. In any potential court proceeding, the court would determine *de novo* whether the employer violated Title VII.

b. In contrast, the line of D.C. Circuit cases upon which Texas relies (Br. 47-51) is distinguishable because the agency guidance or notices in those cases *did* impose legal consequences. In *Cohen* v. *United States*, 578 F.3d 1 (D.C. Cir. 2009), *vacated in part on other grounds*, 599 F.3d 652 (D.C. Cir. 2010), for example, the IRS Notice at issue created a legal right to a refund payment. *Id.* at 8. The Notice also changed the legal obligations of service providers by directing them to stop collecting certain taxes, thus "altering their legal obligations." *Id.* Because the Guidance does not provide applicants or employees with any rights outside those granted by Congress in Title VII itself, this portion of the *Cohen* analysis is inapposite here.[8]

[8] Nor do Texas's citations (Br. 48) to *Syncor Int'l Corp.* v. *Shalala*, 127 F.3d 90 (D.C. Cir. 1997) and *American Bus Ass'n* v. *United States*, 627 F.2d 525 (D.C. Cir. 1980) support its position. In *Syncor*, the agency notice for the first time required certain radiopharmaceuticals to comply with specific provisions of the Federal Food, Drug, and Cosmetic Act. 127 F.3d at 92. And in *American Bus Ass'n*, the agency action was

Texas's reliance (Br. 49-50) on *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000), is similarly unavailing. In that case, the D.C. Circuit addressed EPA Guidance that announced the position the agency "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. Unlike the EEOC Guidance at issue here, the EPA guidance thus created "obligations on the part of the State regulators and those they regulate." *Id.* at 1023. As the Court noted, "[t]hrough the Guidance, EPA has given the States their marching orders and EPA expects the States to fall in line[.]" *Id.* (internal quotations omitted). Texas cannot point to anything comparable in the EEOC Guidance that would be binding on it as a regulated party.

Indeed, in determining whether an agency action is final under the APA, the "most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). In *Appalachian Power*, the D.C. Circuit held that the EPA Guidance was final agency action because "the entire Guidance, from beginning to end – except the last paragraph – reads like a ukase. It commands, it requires, it

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"unequivocally couched in terms of command" and "prescribe[d] a binding norm." 627 F.2d at 532 (internal quotations omitted).

orders, it dictates." 208 F.3d at 1023. But where, as here, agency guidance does not create new obligations or rights, and simply provides the agency's position on a matter, it is not final agency action, even if it were to make it more likely that a future proceeding would be resolved adversely to a party subject to the underlying statute. See *National Mining Ass'n*, 758 F.3d at 252 (EPA guidance not final agency action; though "Final Guidance may signal likely future permit denials by EPA," it does not impose "legally binding requirements"); *Center for Auto Safety* v. *National Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006) ("no doubt that" NHTSA guidelines reflect agency's "views on the legality of regional recalls" but "this does not change the character of the guidelines from a policy statement to a binding rule").

Finally, *Barrick Goldstrike Mines Inc.* v. *Browner*, 215 F.3d 45 (D.C. Cir. 2000), and *Better Gov't Ass'n* v. *Department of State*, 780 F.2d 86 (D.C. Cir. 1986), upon which Texas further relies (Br. 50-51), are also distinguishable. In *Barrick*, the challenged EPA guidance had legal consequences because it required the mining company to "keep track of its movement of waste rock and report the movements as releases of toxic substances." 215 F.3d at 48. The EEOC Guidance at issue here, in contrast, imposes no new requirements or obligations on employers. In *Better Gov't Ass'n*, federal agencies had already relied upon Department of Justice guidance in denying the FOIA

fee waiver requests at issue in the appeal. 780 F.2d at 89-90.[9] In the present case, by contrast, Texas does not, nor can it, point to any comparable actions by either the EEOC or the Department of Justice based on the Guidance. Moreover, any possible court action would be based on Title VII itself, not the Guidance.

* * * * *

In sum, "the case law is clear that [the courts] lack authority to review claims under the APA where an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *Center for Auto Safety*, 452 F.3d at 808 (internal quotations omitted). Here, as in *AT&T* and in the D.C. Circuit's subsequent decision in *Center for Auto Safety*, the agency's position is "nothing more than a privileged viewpoint in the legal debate," because the "guidelines do not purport to carry the force of law." *Id.* Just like the NHTSA guidelines on the legality of regional recalls that the D.C. Circuit held were non-final in *Center for Auto Safety*, the EEOC Guidance "ha[s] not been published in the Code of Federal Regulations";

[9] Precedent from other circuits also does not support Texas's position. Cf. Pl. Br. 51-53. In *Manufactured Housing Inst.* v. *EPA*, 467 F.3d 391 (4th Cir. 2006), the court addressed an EPA policy that was subject to notice-and-comment rulemaking and was published in the Federal Register, and held that the agency's intent to bind parties was self-evident. *Id.* at 397-98 ("EPA's threats levied against at least two States regarding their submetering oversight programs show that States are not free to treat this EPA policy as a mere suggestion"). And in *Atchison, Topeka & Santa Fe Ry.* v. *Pena*, 44 F.3d 437 (7th Cir. 1994) (en banc), *aff'd*, 516 U.S. 152 (1996), the Seventh Circuit considered a series of agency letters, including one published in the Federal Register, which "compell[ed] railroads to alter their operations to comply" with agency directives "or face stiff penalties." *Id.* at 441.

"do[es] not define 'rights or obligations'; and it "read[s] as *guidelines*, not binding regulations." *Id.* at 808-09.

Indeed, the Guidance does not "command [Texas] to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of immediate compliance nor of defiance." *Fairbanks N. Star Borough* v. *United States Army Corps of Eng'rs*, 543 F.3d 586, 593-94 (9th Cir. 2008) (internal quotations omitted). Although EEOC enforcement guidance is entitled to deference based on a court's view of its power to persuade (see *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)), courts have consistently recognized that such guidance lacks the independent force of law. *E.g.*, *Greenlees* v. *Eidenmuller Enterprs., Inc.*, 32 F.3d 197, 200 (5th Cir. 1994) ("usual deference afforded to agency interpretations is attenuated when applied to the EEOC, because Congress did not confer on the EEOC authority to promulgate rules or regulations under title VII"); see *Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2443 & n.4 (2013) (noting that EEOC Guidance entitled to deference only to extent it "has the power to persuade"; rejecting "nebulous definition of a 'supervisor' advocated in the EEOC Guidance"). Accordingly, in "any later enforcement action, [Texas] would face liability only for non-compliance with [Title VII's] underlying statutory commands, not for disagreement" with the Guidance. *Fairbanks N. Star Borough*, 543 F.3d at 594.

c. Texas's argument also "conflates a potential *practical* effect with a *legal* consequence." *Fairbanks N. Star Borough*, 543 F.3d at 596. Even if the Guidance made it more likely that an individual state employee or job applicant would file a charge in the first instance or that the EEOC would refer a charge to the Department of Justice, the Guidance does not "augment the [EEOC's or the Department of Justice's] legal authority to pursue enforcement action"; "[t]o the contrary, [Texas's] legal obligations * * * have always arisen solely on account of" Title VII. *Id.*

Texas asserts (Br. 56), however, that the Guidance creates two safe harbors, which is characteristic of final agency action. This assertion is erroneous. Because they are couched in equivocal language, the two examples that Texas cites do not qualify as safe harbors. See Guidance at 2, 14, ROA.315, ROA.327 (there are "[t]wo circumstances in which the Commission *believes employers will consistently* meet the 'job-related and consistent with business necessity' defense) (emphasis added). Indeed, the Guidance does not, nor can it, guarantee that an employer will not be liable in the event of a lawsuit. Accordingly, the Guidance states only that the Commission "believes" that certain practices will "consistently" meet statutory requirements. *Id.*

Texas's argument (Br. 55-56) that the Guidance "prohibits Texas from disqualifying felons under *state* law, even when the exact same hiring policy would be lawful if imposed under *federal* law," also fails to advance its position. Any preemption of state law arises only because of Title VII itself. See 42 U.S.C. § 2000e-7. In fact,

the page of the Guidance to which Texas cites quotes directly from Section 2000e-7 of Title VII and makes clear that the Guidance does not require anything more than what is required under Title VII. Guidance at 24, ROA.337 ("state and local laws or regulations are preempted by Title VII *if they 'purport[] to require or permit the doing of any act which would be an unlawful employment practice' under Title VII*") (quoting 42 U.S.C. § 2000e-7) (emphasis added). This quotation also demonstrates that the Guidance is not purporting to prohibit any state policy that excludes felons; rather, it merely repeats the relevant language from Title VII itself. See Guidance at 24, ROA.337

3. Texas's Responses To Defendants' Arguments In District Court Are Unpersuasive.

Texas also responds to arguments that defendants made in support of their motion to dismiss in district court. Texas's responses are equally unavailing here.

a. First, Texas mischaracterizes defendants' position as follows: "[T]he Commission's only argument is that the Rule is not final *agency action* * * * 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)." Pl. Br. 57 (internal quotations omitted). Texas attempts to knock down a straw man. Defendants did not argue that *Chevron* deference is the *sine qua non* of final agency action; rather, defendants contended (and continue to contend) that the Guidance does not satisfy the test under Supreme Court

and Fifth Circuit precedent for determining what constitutes final agency action. The fact that the EEOC lacks authority to promulgate substantive rules that would be entitled to *Chevron* deference is one reason why the Guidance is not final agency action, but it is not the only reason and defendants have not argued otherwise.

b. Second, Texas contends that it is "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." Pl. Br. 59-60 (quoting *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986)). Texas misses the point. As set forth above, under the express terms of the APA, a court may review only "final agency action." 5 U.S.C. § 704. While there is a presumption of judicial review where the prerequisite of final agency action has been met, there is no presumption that any particular agency action is final. See *Japan Whaling Ass'n*, 478 U.S. at 230 n.4. Defendants' argument is that Texas cannot satisfy the prerequisites to obtaining judicial review under the APA, not that there is another statute that precludes review. Indeed, Texas bears the burden of establishing that the Guidance is final agency action. *Stockman*, 138 F.3d at 151 (party asserting federal jurisdiction "bears the burden of demonstrating that jurisdiction is proper"); *Peoples Nat'l Bank*, 362 F.3d at 336 (final agency action is jurisdictional requirement).

c. Finally, Texas argues (Br. 42-43, 60-61) that defendants' position in this case is inconsistent with the amicus brief filed by the United States recommending that the Supreme Court deny certiorari in *Board of Education of City School District* v. *Gulino*, 554 U.S. 917 (2008). In *Gulino*, the petition for certiorari addressed whether a local school board could be held liable under Title VII's disparate impact provision when it complied with a facially-neutral state licensing requirement for teachers. See U.S. Br. at I, ROA.787. In its brief, the United States did not take a position on the merits question that would be relevant in this case – *i.e.*, Title VII's application to a State's employment practices vis-à-vis its own employees. Indeed, the government's brief in *Gulino* noted that the case did "*not* concern Title VII's application to a State's own employment practices." U.S. Br. at 15 n.7, ROA.807 (emphasis added). The government did note in *Gulino* that while "Title VII does not regulate the States' exercise of their traditional sovereign powers where * * * their own employees are not concerned," the law's "prohibitions against intentional discrimination and disparate impacts govern a State's employment practices concerning its own employees." *Id.*

Most important, however, *Gulino* does not address the final agency action, standing and ripeness issues that are relevant here. Indeed, the *Gulino* case does not even mention the APA, but rather advanced the government's views as to the proper interpretation of Title VII. U.S. Br. at 6-18, ROA.798-810. Here, because the district

court properly dismissed Texas's case for lack of subject matter jurisdiction, this Court need not interpret Title VII on the merits, and *Gulino* is inapposite.

B. Texas Lacks Standing To Challenge The Guidance.

This Court can also affirm the district court's judgment on the alternative ground that Texas lacks standing. The standing inquiry overlaps substantially with the final agency action and ripeness analysis in this case: "The many doctrines that have fleshed out the case or controversy requirement – standing, mootness, ripeness, political question, and the like – are founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Mississippi State Democratic Party* v. *Barbour*, 529 F.3d 538, 544 (5th Cir. 2008) (internal quotations omitted). These "doctrines state fundamental limits on federal judicial power in our system of government." *Id.* (internal quotations omitted).

1. To have standing under Article III, Texas must allege an "injury in fact" that is "actual or imminent, not conjectural or hypothetical," that is "fairly traceable" to the challenged action, and that is likely to be redressed by the relief requested. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted). Texas does not satisfy these requirements. As set forth above, no legal consequences flow from the Guidance, nor does it impose any obligations on employers. The Guidance therefore does not inflict any harm on Texas. The underlying prohibitions derive from Title VII itself, which has prohibited disparate impact discrimination ever

since it was first enacted. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). While the Guidance sets forth the EEOC's interpretation of the meaning of certain Title VII provisions, and will be entitled to deference under *Skidmore* v. *Swift*, *supra*, based on a court's view of its power to persuade, it is ultimately Title VII – not the Guidance – that controls, prohibits, and directs employers' actions.

Indeed, the Guidance does not force employers to change their behavior. The present case highlights that fact. The EEOC's interpretation and Texas's laws have co-existed for decades, and the State has failed to allege any change in its behavior, laws or policies, and it has failed to cite any Department of Justice enforcement actions taken against it as a result of its policies involving the use of criminal history records in hiring. See Am. Compl. ¶23, ROA.296 (referring to "state law and longstanding hiring policies" that "impose absolute bans on hiring convicted felons"); *id.* ¶¶ 24-30 (citing state laws and policies). Instead, Texas's complaint cites only EEOC enforcement efforts against private-sector third parties. See Am. Compl. ¶¶ 17-22, ROA.294-296.[10] As noted, Title VII precludes the EEOC from bringing court enforcement actions against state employers.

[10] As we demonstrate *infra* pp. 38-39, Texas's citation (Br. 44) to the EEOC's issuance of a right-to-sue letter to a private individual alleging discrimination by a Texas state agency after the EEOC noted that it was "unable to conclude that the information obtained establishes violation of the statutes," (ROA.372), also does not support Texas's standing. And Texas's reliance (Br. 45) on a court action filed by former school employees against a school district similarly cannot support Texas's

2. Texas's repeated citations to *EEOC* v. *Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013), to support its alleged fear that the EEOC will conduct an "abusive investigation" and make "frivolous" and "groundless" allegations (see Pl. Br. 15, 28, 34, 37, 41, 44) are particularly inapt. In *Peoplemark*, the court addressed whether the district court had abused its discretion in awarding attorney's fees against the EEOC. 732 F.3d at 591. The case was litigated from 2008-2010, before the Guidance was even issued. See *id.* at 587-89. The 2012 Guidance therefore had nothing to do with the agency's underlying conduct or the court's decision in *Peoplemark*. Nor did the court base any part of its decision to affirm the award of attorney's fees on the Commission's pre-suit investigation, which, in any event, occurred in 2007, well before the Guidance was issued. *Id.* at 592 n.4.

Texas also misses the point (Br. 19) when it cites the Supreme Court's statement in *Lujan*, *supra*, that where the petitioner is "an object of the [agency's] action," there is "ordinarily little question that the action * * * has caused him injury[.]" *Lujan*, 504 U.S. at 561-62. But this proposition assumes a final agency action from which legal consequences flow – the prototypical example being a substantive, legislative rule promulgated after notice and comment and intended to be binding. As demonstrated, the Guidance here does not have any such effect, and thus

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standing here, nor does it support Texas's argument that its claim is ripe. See *infra* p. 49.

has not caused Texas any injury, nor will it injure Texas in the future. By contrast, in *Roark & Hardee LP* v. *City of Austin*, 522 F.3d 533 (5th Cir. 2008), upon which Texas relies (Br. 22), this Court considered the effect of an ordinance that contained penalty provisions for non-compliance. *Id.* at 542-43. Thus, parties could be punished for violating the ordinance. Similarly, in *Owner-Operator Indep. Drivers Ass'n* v. *Federal Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011), the parties had standing because they could be punished for violating the challenged rule itself. See *id.* at 586.

That Texas also claimed that its procedural rights were violated under the APA does not change the result. Cf. Pl. Br. 20. Texas must still show that defendants' conduct caused its injury and that such injury is redressable by a favorable court judgment. Indeed, "deprivation of a procedural right without some concrete interest that is affected by the deprivation * * * is insufficient to create Article III standing." *Mabary* v. *Home Town Bank, N.A.*, 771 F.3d 821, 823 (5th Cir. 2014) (internal quotations omitted). Texas lacks this necessary concrete interest here.

As the district court recognized (op. 7, ROA.869), Texas's reliance on the EEOC's issuance of a right-to-sue letter to a private individual who filed an administrative charge is misplaced. Cf. Pl. Br. 22. The fact that the EEOC sent the claimant the right-to-sue letter after an investigation in which the agency was "unable to conclude that the information obtained establishes violation of the statutes," (Am. Compl., Ex. D, ROA.372), does not give the State standing to sue the federal

government. Moreover, it is Title VII, not the Guidance, which requires that the EEOC give notice to individual applicants or employees of their right to file a civil action if, after investigation of the charge, the agency does not have reason to believe that Title VII has been violated. 42 U.S.C. § 2000e-5(b), (f)(1). In fact, under Texas's theory of the case, it would have standing to sue the EEOC for a declaratory judgment based on Title VII's requirement that the EEOC issue a right-to-sue letter even when, after investigation, the agency *did not* find reasonable cause that the employer committed a statutory violation. The requisite case or controversy in such circumstances is between the individual claimant and the employer, *not* the government and the employer.

Texas further argues (Br. 23) that Article III standing requirements are satisfied in this case because a private individual who alleged that her employment with the Dallas County Schools was terminated based on state law criminal history policies moved to intervene in this case. See Mtn. to Intervene at 2, ROA.838. But that argument makes no sense. Any adversity between the job applicant and Texas over state law employment policies cannot confer standing on Texas to sue federal government agencies in an APA challenge to federal agency guidance.[11]

[11] Indeed, the applicants for intervention recognized this fact by requesting that the district court stay consideration of their motion to intervene pending its disposition of defendants' motion to dismiss. Mtn. to Intervene at 4, ROA.840. The potential intervenors noted that they "strongly agree[d] with Defendants that this case

Texas also contends (Br. 24-25) that the EEOC's website shows that it is the Guidance, rather than Title VII, which preempts state policies that exclude felons from certain state jobs. Texas cites a heading on the EEOC website that asks "[h]ow does the [Guidance] differ from the EEOC's earlier policy statements?" Texas then uses ellipses to omit the website's response that the listed "differ[ences]" reflect "more in-depth analysis" than the agency's prior policy guidance, rather than departures from existing understandings. Pl. Br. 25; see Questions and Answers About the EEOC's Enforcement Guidance at 2, ROA.815. Texas also quotes only one item from the website's list of points, and omits the portion of the quotation that quotes and cites Title VII itself. See Pl Br. 25. When quoted in full, the EEOC's statement reads as follows: "The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they 'purport[] to require or permit the doing of any act which would be an unlawful practice' under Title VII. 42 U.S.C. § 2000e-7." ROA.815. This passage does not support Texas's claim that it is the Guidance, not Title VII, that "purport[s] to" preempt state law. To the contrary, the EEOC's website quotes and cites the relevant provision of Title VII itself when discussing preemption.

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should be dismissed on jurisdictional grounds." *Id.* When the district court granted the motion to dismiss for lack of subject matter jurisdiction, it thus mooted the motion to intervene.

Accordingly, the EEOC website's questions and answers, when read in context and without omissions, are entirely consistent with the Guidance and defendants' position: Title VII preempts state laws that conflict with federal statutory requirements. See 42 U.S.C. § 2000e-7; see generally U.S. Const. Art. VI, cl. 2 (Supremacy Clause). The cases that Texas cites for the proposition that "the State is injured whenever a federal agency purports to preempt state law" are therefore inapposite. Pl. Br. 24 (citing cases). The Guidance neither has the force of law nor purports to preempt state law.

In short, Texas is not currently suffering any consequences from the Guidance; nor has it shown that such consequences are imminent. See op. 7, ROA.869. As the district court correctly concluded, "standing cannot be premised upon mere speculation." *Id.* By mischaracterizing the district court's decision as holding that "a regulated entity lacks standing to challenge a rule before enduring an enforcement action," (Br. 26), Texas knocks down another straw man. The district court did not purport to make broad assertions of administrative law regarding pre-enforcement review. To the contrary, the court simply properly applied Article III case-or-controversy requirements in dismissing Texas's case for lack of subject matter jurisdiction.

The relevant point is that the Guidance *is not a rule*. Nor is Texas facing "governmental 'coercion'" from the Guidance to change its state policies or risk

sanctions or penalties.[12] Cf. Pl. Br. 27. Any future enforcement would be of Title VII, not the Guidance, and the EEOC cannot enforce the Guidance against the State.

C. Texas's Challenge To The Guidance Is Not Ripe For Review.

Because the Guidance is not final agency action, and because Texas lacks Article III standing, this Court need not reach ripeness to affirm the district court's judgment. As we demonstrate below, however, Texas's claims also are not ripe for judicial review.

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (internal quotations omitted). The ripeness requirement applies equally to actions for declaratory relief: "In hornbook form, a declaratory action must be ripe in order to be justiciable, and is ripe only where an 'actual controversy' exists." *Shields* v. *Norton*,

[12] Texas's reliance (Br. 27-28) on *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118 (2007), for the proposition that it has standing based on "coercion" from the EEOC thus is unavailing. The Guidance does not impose any penalties or sanctions, nor does it impose any requirements that would be enforceable in court. Moreover, in *MedImmune*, there was a clearly defined dispute between the parties: "Petitioner asserts that no royalties are owing * * * and alleges *(without contradiction)* a threat by respondents to enjoin sales if royalties are not forthcoming." 549 U.S. at 128. Here, in contrast, Texas faces no such threat from the EEOC or the Department of Justice; and, even if there were a future court action against Texas, there are numerous factual questions that would need to be answered to determine whether the use of criminal history records in the particular case constituted disparate impact discrimination in violation of Title VII. See *infra* pp. 45-47.

289 F.3d 832, 835 (5th Cir. 2002). The constitutional component of the ripeness doctrine "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union* v. *Foster*, 205 F.3d 851, 857 (5th Cir. 2000). Accordingly, a party's claim "is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (internal quotations omitted).

The ripeness and standing inquiries overlap in this respect. *Lopez* v. *City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) ("doctrines of ripeness and standing often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury") (internal quotations omitted); see *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014) ("doctrines of standing and ripeness 'originate' from the same Article III limitation" and, in some cases, "'boil down to the same question'"). In addition, "to find a case ripe," this Court requires the plaintiff to establish four factors: (1) the issues are purely legal; (2) the issues are based on final agency action; (3) the controversy "has a direct and immediate impact on the plaintiff"; and (4) the litigation "will expedite, rather than delay or impede, effective enforcement by the agency." *Texas Office of Pub. Utility Counsel* v. *FCC*, 183 F.3d 393, 411 n.11 (5th Cir. 1999).

Here, the Court need not go any further to hold that Texas's case is not ripe. As demonstrated above, Texas lacks standing because it has not suffered any injury-in-fact, and its allegations of future injury are too speculative. Thus, Texas cannot demonstrate that its case is ripe in the constitutional sense – *i.e.*., it does not satisfy the Article III case-or-controversy requirement since "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300 (internal quotations omitted). Moreover, because the Guidance is not final agency action, Texas cannot establish the second ripeness factor required by this Court. *Texas Office of Pub. Utility Counsel*, 183 F.3d at 411 n.11; *Jobs, Training & Servs.,* 50 F.3d at 1325.

But even assuming *arguendo* that Texas could demonstrate an imminent injury and final agency action, it cannot establish that its claims are fit for judicial decision. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967) (to determine if a case is ripe for review, court must evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration").[13] Texas's challenge to

[13] Although the Supreme Court recently questioned whether, if a plaintiff has "alleged a sufficient Article III injury," a court could hold a case nonjusticiable "on grounds that are prudential rather than constitutional," it declined to "resolve the continuing vitality of the prudential ripeness doctrine." *Susan B. Anthony List*, 134 S. Ct. at 2347 (internal quotations omitted). As demonstrated, Texas failed to allege a sufficient Article III injury, and its case thus must be dismissed regardless of whether the prudential ripeness doctrine remains valid. But even assuming *arguendo* that Texas had satisfied Article III requirements, its case should be dismissed because its claims

the Guidance is not fit for review because it does not raise purely legal questions. To the contrary, facts and context matter under the Guidance and under Title VII.

Indeed, the numerous hypothetical examples that the agency included in the Guidance to help illustrate how Title VII principles potentially could apply to employer uses of criminal history records – each with different facts and circumstances – underscore just how much the specific factual context matters. Relevant factual questions include, for example, whether the particular policy regarding the use of criminal history records has a disparate impact in the relevant geographic labor market; whether the hiring practice at issue disqualifies all individuals convicted of a crime or applies only to a subset of crimes during a particular time period; and whether the employer's use of criminal history is job-related and consistent with business necessity. The answers to these questions can vary depending on which state agency's employment policy is at issue, the particular job, and the particular employee or applicant to whom the policy was applied. Moreover, factual context is also relevant to determining the circumstances in which

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are not fit for judicial decision. Because the Court did not overrule its prudential ripeness decisions, they remain controlling law here. See, *e.g.*, *Abbott Labs.*, 387 U.S. at 149; *Toilet Goods Ass'n* v.. *Gardner*, 387 U.S. 158, 164 (1967). Moreover, the ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," (*National Park Hospitality Ass'n*, 538 U.S. at 808), and it is not clear which aspects of the doctrine, if any, are entirely prudential. In any event, Texas has waived the argument that this Court should decline to apply prudential ripeness concerns by failing to raise it. See Pl. Br. 31-46 (fully briefing fitness-for-review and balance-of-hardship issues).

individualized assessments may be required by Title VII in the first instance. Guidance at 2, ROA.315 ("Title VII does not require individualized assessment in all circumstances"); *id.* at 14, 18, ROA.327, ROA.331 (same).

Judicial review thus must await a real case or controversy with actual facts about a non-hypothetical offense (*e.g.*, What was the offense? When did it occur?), a non-hypothetical applicant (Has the applicant rehabilitated herself? What other facts are relevant to the applicant's suitability for employment?), and a non-hypothetical job (How and to what extent would job requirements be affected by a particular applicant's criminal record?).

2. Texas contends, however, that its claims are fit for review "because they are purely legal, facial challenges" to the Guidance. Pl. Br. 31. According to Texas, "there are only two facts that matter" – (1) that "state law and policy require many Texas employers to impose categorical bans against convicted felons who apply for jobs," and (2) that "Defendants believe that the State's policies are unlawful" because they do not allow individualized assessments of job applicants. Pl. Br. 32. But as explained above, the Guidance does not require individual assessments in all cases. Nor does the Guidance assume that a categorical ban for certain jobs based on a particular criminal history would violate Title VII. To the contrary, the facts and circumstances in which hiring occurs will inform the result of each case.

For example, even a blanket prohibition on hiring individuals who have been convicted of felonies does not violate Title VII unless it actually has a disparate impact on the basis of a protected characteristic. See Guidance at 10, ROA.323 (employer can use regional or local data to show no disparate impact). And, with respect to this case, the specific hiring practice of the state agency is also relevant, since different Texas state agencies have different policies. See Am. Compl. ¶¶ 23-31, ROA.296-299. Moreover, even if a policy does have a disparate impact, it does not violate Title VII if it is job-related for the particular job at issue and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In fact, the example that Texas cites (Br. 34-35) from the Guidance regarding a hypothetical criminal-records restriction on hiring by preschools actually supports defendants' position. According to the Guidance, even if an employer imposed criminal-records restrictions on the hiring of preschool teachers that had a disparate impact, that policy would be valid: "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." Guidance at 24, ROA.337. Accordingly, if an applicant to a preschool with a criminal conviction filed a charge of discrimination, the EEOC, after undertaking an investigation (required by Title VII, not the Guidance, when a charge is filed), "would

not find reasonable cause to believe that discrimination occurred." *Id.* (emphasis added).

This example is illustrative of how, as the Guidance explains, the determination of whether particular employment screens are valid or invalid under Title VII will turn on the particular facts and circumstances of the case. Texas's challenge to the Guidance therefore does not present purely legal questions and is not ripe for review.

3. Finally, because the Guidance does not impose any requirements on Texas or have any legal consequences, there is no hardship to Texas to withholding review at this time.[14] Cf. Pl. Br. 35-39. Texas's citations (Br. 44-46) to a right-to-sue letter issued to a state employee and to a lawsuit filed by private plaintiffs against a local school district do not support the State's position.

For the same reasons that the EEOC's issuance of a right-to-sue letter to a private individual who filed an administrative charge under Title VII does not support Texas's standing or claims of injury, it does not support Texas's claim of hardship stemming from the Guidance. See *supra* pp. 38-39. In fact, the particular right-to-sue

[14] Texas also continues to confuse pre-enforcement judicial review of an agency's final substantive rules with what it seeks in the present case, which is review of non-binding policy guidance that creates no new legal obligations. See Pl. Br. 35-36. Texas's reliance on *Sabre, Inc.* v. *Department of Transp.*, 429 F.3d 1113 (D.C. Cir. 2005), is therefore misplaced. In contrast to Texas's challenge here, that case involved a petition for review of a final agency rule that raised purely legal issues. *Id.* at 1115, 1119-20.

notice at issue here reveals that the EEOC was "unable to conclude that the information obtained establishes violations of [Title VII]." Am. Compl., Exh. D, ROA.372. Texas could fully defend its policy under Title VII in federal court – where, in any event, the Guidance is not binding – if an individual decides to file suit after receiving a right-to-sue letter.[15]

Texas's citation to *Waldon* v. *Cincinnati Public Schools*, No. 1:12-cv-677 (S.D. Ohio) is equally unavailing. Contrary to Texas's implication (Br. 45-46), the *Waldon* case was not filed by the Department of Justice; rather it was brought by former Cincinnati public school employees. See Docket, *Waldon* v. *Cincinnati Public Schools*, No. 1:12-cv-677 (S.D. Ohio). And the ripe case or controversy in *Waldon* is over whether the employer violated Title VII, not over whether it violated the EEOC Guidance. In fact, the EEOC considered the issues in *Waldon* in 2009, over two years before it promulgated the Guidance. ROA.820-821.

In sum, application of both the constitutional and prudential aspects of the ripeness doctrine lead to the same conclusion: Texas's challenge to the Guidance is not ripe for judicial review.

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[15] Texas's citation (Br. 39-40) to *El* v. *SEPTA*, 479 F.3d 232 (3d Cir. 2007), is also entirely misplaced because that court was addressing whether the EEOC's pre-Guidance administrative reasonable cause finding with respect to a particular claimant's charge could create a genuine issue of material fact in a subsequent court action. *Id.* at 248. Contrary to Texas's characterization (Br. 39), the court was *not* describing EEOC policy or interpretation of Title VII generally. See *id.*

* * * * *

As demonstrated above, the district court correctly dismissed Texas's case for lack of subject matter jurisdiction because (1) the EEOC Guidance is not final agency action; (2) Texas lacks standing under Article III; and (3) the case is not ripe for review. This Court thus may affirm the district court's judgment on any or all of these independently-sufficient grounds.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2015, I electronically filed the foregoing Brief For Appellees with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. I further certify that on this 8th day of January, 2015, I served the foregoing Brief For Appellees on counsel of record for plaintiff-appellant by electronic service via the CM/ECF system:

s/ Stephanie R. Marcus
Stephanie R. Marcus

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I hereby certify that the foregoing brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. 32(a)(6). The word processing program (Microsoft Word 2010) used to prepare the brief reports that the brief is 12,591 words long. The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with Garamond, 14 point font.

I further certify, pursuant to Fifth Circuit ECF Filing Standard A(6) that

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