No. 26-02110

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FreeState Justice,

Plaintiff-Appellant,

v.

Equal Employment Opportunity Commission et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the District of Maryland
Case No. 25-cv-02482, Hon. George Levi Russell III

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, FreeState Justice, who is Plaintiff-Appellant, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
   YES ☐ NO ☑

2. Does party/amicus have any parent corporations?
   YES ☐ NO ☑

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES ☐ NO ☑

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?
   YES ☐ NO ☑

5. Is party a trade association? YES ☐ NO ☑

6. Does this case arise out of a bankruptcy proceeding?
   YES ☐ NO ☑

7. Is this a criminal case in which there was an organization victim?
   YES ☐ NO ☑

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INTRODUCTION

Congress created the Equal Employment Opportunity Commission ("EEOC") to administer and enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*—the primary federal law prohibiting employment discrimination on the basis of race, color, religion, national origin, and sex (including sexual orientation or gender identity). In Title VII, Congress instructed the EEOC to process charges of workplace discrimination filed by employees. That mandate has never wavered.

But now, for the first time since the agency's inception, the EEOC asserts that it is free to ignore that congressional command, even when a charge of discrimination on its face states a basis for concluding that unlawful discrimination has occurred, solely because the charging party belongs to a particular class protected by Title VII. Instead of investigating or otherwise processing certain charges of discrimination brought by transgender charging parties, the EEOC is automatically, categorically classifying them as meritless and subject to dismissal, or in some instances holding the charges without issuing a Notice of Right to Sue.

That policy (the "Trans Exclusion Policy") is unlawful. The EEOC may not categorically refuse to investigate workplace discrimination or

otherwise process a charge on a basis that is itself discriminatory. The policy deprives workers who bring these charges of an important set of federal protections designed to address unlawful discrimination that the EEOC provides to all other workers. And it deprives Plaintiff-Appellant FreeState Justice of a core avenue of redress for its transgender clients who have been subjected to workplace discrimination.

Below, the EEOC did not deny FreeState's allegations as to its handling of charges of discrimination brought by transgender workers. Instead, it mischaracterized FreeState's legal claims as a challenge to the EEOC's case-by-case decisions about prioritizing individual discrimination charges or litigation decisions in particular matters. According to the EEOC, its boundless enforcement discretion precludes all judicial review of any enforcement policies, even those that (as alleged here) are contrary to statute and unconstitutional. In a terse opinion, the district court adopted this faulty premise and concluded that it had no authority to review the EEOC's actions.

The decision below is wrong as a matter of law. The EEOC's discretion, though undoubtedly broad, does not extend to defying Congress's mandate to process charges or adopting a policy that is itself discriminatory. Under the logic of the decision below, the EEOC could

refuse to investigate all discrimination charges brought by Black individuals, or Catholics, or people with disabilities, or men, or pregnant women, and the courts could do nothing to stop it. No precedent of the Supreme Court or this Court requires such a startling result.

Agency discretion does not permit the EEOC to engage in the very invidious discrimination it was created to combat. This Court should reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case because it raises federal questions. 28 U.S.C. § 1331. Specifically, FreeState brought claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; and under the court's equitable jurisdiction over constitutional claims challenging actions of federal officials, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

This appeal is taken from the final judgment dismissing FreeState's claims entered in the district court on June 12, 2026, *see* JA67, and timely appealed on August 10, *see* JA68. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Did the district court commit reversible error by holding that the EEOC has unreviewable discretion to refuse to investigate and otherwise process charges of discrimination based on the protected characteristics of the individuals who filed them, here transgender individuals?

STATEMENT OF THE CASE

A. The EEOC is required to process charges of workplace discrimination.

Congress vested the EEOC with "[p]rimary responsibility for enforcing Title VII" through "'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 61-62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)). Charge-filing is a mandatory prerequisite for anyone asserting rights under Title VII before filing suit in court. 42 U.S.C. § 2000e-5(f)(1); *see Ft. Bend Cnty. v. Davis*, 587 U.S. 541, 543 (2019). The process begins when a person files a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(b).

Filing a charge triggers several steps, some of which Congress entrusted to the EEOC's discretion and some of which it did not. Within ten days of a charge being filed, the EEOC "shall serve a notice of the

charge" on the employer, including details related to the "date, place and circumstances" of the alleged discrimination. 42 U.S.C. § 2000e-5(b). Then, the EEOC "shall make an investigation" of the charge and a "determination on reasonable cause as promptly as possible." *Id.* § 2000e-5(b); *see Mach Mining, LLC v. EEOC*, 575 U.S. 480, 483 (2015).

Investigations generally begin with obtaining position statements from employers in response to the charge allegations. JA14. These may include narrative rebuttals to the claims, declarations from persons with knowledge, and charging parties' personnel files. JA14. EEOC investigators may also interview management representatives or other employees; request employer policies and procedure documents, personnel files of other employees, and evidence about other employees that may shed light on whether discrimination occurred; and conduct on-site visits. JA14. The EEOC may also offer free mediation with an EEOC mediator and/or more informal settlement discussions before or during the investigation.[1] JA13-14.

[1] On receiving the charge, before undertaking any investigation, EEOC staff typically categorize the charge as an "A" charge (likely to result in a reasonable-cause determination), "B" charge (additional information required), or "C" charge (sufficient information obtained to conclude that a reasonable-cause determination is unlikely). JA13. "C" charges may be dismissed at intake or soon thereafter. JA13. For "A" and "B" charges, the

If the EEOC finds reasonable cause to believe that discrimination occurred, it "shall endeavor to eliminate" the unlawful practice through "informal methods," including conciliation. 42 U.S.C. § 2000e-5(b). If conciliation fails, the EEOC may file a lawsuit in federal court against the employer. *Id.* § 2000e-5(f)(1). If the EEOC does not file a lawsuit itself, it must issue the charging party a Notice of Right to Sue. *Id.*

If the EEOC determines that there is no reasonable cause, it must dismiss the charge and issue the charging party a Notice of Right to Sue. *Id.* § 2000e-5(b), (f)(1).[2] The EEOC provides a mechanism for a charging party or their representative to obtain their case file (containing the employer's position statement and any evidence the employer or anyone else produced to the EEOC) for up to ninety days after receiving a Notice of Right to Sue, or after filing suit against the employer.[3]

EEOC may offer the charging party and the employer voluntary mediation before initiating an investigation, allowing some parties satisfactory resolution before the EEOC even begins its investigation. JA13-14. These measures come at no cost to charging parties and their representatives. JA13.

[2] If the EEOC does not complete its administrative processing of the charge within 180 days, the charging party may request a Notice of Right to Sue. 42 U.S.C. § 2000e-5(f)(1).

[3] *See* EEOC, Section 83 Disclosure of Information in Charge Files, https://perma.cc/V6U4-2GWH. The charging party or their representative may also request the investigative file under the Freedom of Information

To help fulfill its enforcement responsibilities, the EEOC contracts with Fair Employment Practices Agencies ("FEPAs")—state and local agencies that enforce their own employment-discrimination laws. JA15. Through work-sharing agreements, the EEOC pays FEPAs to also assume responsibility for processing charges of violations of federal workplace civil-rights protections. JA15.

The EEOC process described above—intake of the charge of discrimination, service of the charge on the employer, an investigation, an attempt at conciliation if the EEOC finds reasonable cause, and issuance of a Notice of Right to Sue—is mandatory. 42 U.S.C. § 2000e-5(b); *McLane Co. v. EEOC*, 581 U.S. 72, 75 (2017); *Mach Mining*, 575 U.S. at 486 (noting that "the word 'shall' admits of no discretion") (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002)). Although the EEOC retains discretion as to how it conducts any given investigation, Title VII leaves no room for the agency to refuse to conduct one. While the EEOC may generally decide which matters to take to federal court and litigate in the public interest, the agency does not have discretion when it comes to investigating or otherwise processing charges of

Act. *See* 5 U.S.C. § 552; EEOC, Freedom of Information Act, https://perma.cc/5SKU-T4VC.

workplace discrimination. *Compare* § 2000e-5(f)(1) (providing that after investigation and conciliation failure, the EEOC "*may* bring a civil action against any respondent not a government, governmental agency, or political subdivision") (emphasis added), *with* § 2000e-5(b) (providing that the EEOC "shall" investigate charges).

The benefits to charging parties of the EEOC's mandatory process, regardless of outcome, are many. No investigation means no investigative file of EEOC-gathered evidence concerning the strength of the claims and no opportunity for EEOC-sponsored mediation or conciliation, let alone the possibility of EEOC-led and EEOC-funded litigation. And it means, in some cases, no exhaustion of claims and no Notice of Right to Sue—leaving the charging party hamstrung and unable to go to federal court at all.

B. The EEOC has ceased processing certain Title VII charges filed by transgender workers.

In 2020, the Supreme Court confirmed that Title VII's bar on sex-based discrimination encompasses discrimination based on sexual orientation and gender identity. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 683 (2020). The EEOC had taken this position in federal-sector decisions beginning as early as 2012. *See Macy v. DOJ*, No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012) (discrimination based on employee's

transgender status is sex discrimination in violation of Title VII); *see also Lusardi v. Dep't of the Army*, No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015) (repeated and intentional use of pronouns inconsistent with employee's gender is sex discrimination).

For over ten years, then, the EEOC fulfilled its mandatory process with respect to charges of discrimination brought by transgender workers on the same terms as all other workers. *See* JA15-17.

But now, the EEOC has dramatically changed course. *See* JA17-28. On January 20, 2025, President Trump issued an executive order instructing federal agencies to effectively do away with all existing civil rights and other legal protections for transgender people. *See* Exec. Order No. 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 30, 2025); *see also* JA17. Days later, then-Acting Chair Andrea Lucas announced the agency's plans to fulfill the goals of the executive order and "roll[] back" the former administration's so-called "gender identity agenda." JA18-19.

Thereafter, Chair Lucas and the EEOC ceased protecting transgender workers' civil rights and foreclosed transgender workers from fully participating in the EEOC's charge processing. *See* JA20, JA25. The

EEOC ceased processing all charges related to sexual-orientation and gender-identity discrimination, including harassment. JA25-26. It instructed several EEOC Administrative Judges not to issue orders in cases involving claims of discrimination on the basis of sexual orientation or gender identity without consulting EEOC headquarters. JA26. It directed all EEOC intake supervisors to automatically designate all incoming charges of gender-identity discrimination as meritless "C" charges suitable for immediate dismissal. JA26. The EEOC also stopped paying state FEPAs for conducting intakes of or undertaking charge processing with respect to charges related to "gender identity" or "transgender status." JA27.

Moreover, in an about face, the EEOC moved to dismiss with prejudice the cases it was litigating on behalf of transgender or non-binary workers alleging unlawful discrimination including harassment based on gender identity (and one involving only a claim of retaliation filed by a transgender worker). JA20-25. And it held that Title VII does not protect transgender workers from discrimination and harassment in the form of access to bathrooms consistent with their gender identity. *See Selina S. v. Driscoll*, No. 2025003976 (EEOC Feb. 26, 2026).

As things stand today, under its Trans Exclusion Policy, the EEOC carries out its mandatory process for transgender workers only in the limited contexts of charges alleging discrimination in hiring, firing, and promotions—and then only when those claims are brought in isolation, without accompanying harassment, retaliation, or any other types of claims. JA26-27. Meanwhile, cisgender workers continue to receive the full EEOC charge process and other enforcement protections against discrimination, harassment, retaliation, and all other forms of discrimination Title VII covers. JA29. Under its Trans Exclusion Policy, the EEOC is denying transgender charging parties the full protections of the mandatory EEOC process from which all other charging parties benefit. JA29.

C. The EEOC's Trans Exclusion Policy harms FreeState.

FreeState serves Maryland's LGBTQ+ population by providing free legal services, legislative advocacy, and education and outreach programming. JA29-30. Its mission is to ensure that LGBTQ+ people are free to live authentically, with safety, dignity, and respect. JA30.

One of FreeState's core services is helping clients who have experienced workplace discrimination file EEOC charges to address and remedy that discrimination. JA30. Before the Trans Exclusion Policy,

FreeState advised transgender clients who had experienced employment discrimination to file EEOC charges of discrimination, helped them initiate the process, and helped them navigate its subsequent stages. JA30. FreeState drafted charges; supported charging parties through mediation; reviewed the investigative file, including employer position statements and other documents produced by the EEOC; drafted employee responses to employer position statements; prepared its clients for and joined interviews with the assigned EEOC investigator; joined conciliation negotiations and advised clients about the terms of settlement offers; and provided guidance about the costs and benefits of litigation. JA30. For matters that did not settle, FreeState would seek pro bono legal assistance for its clients. JA30-31.

Since the Trans Exclusion Policy took effect, FreeState has ceased advising its transgender clients to file charges of discrimination with the EEOC. JA31. While FreeState's clients can file charges of discrimination with the Maryland Commission on Civil Rights ("MCCR"), Maryland's FEPA, MCCR's charge processing is not an equal substitute for the EEOC's. JA31-32. For example, the state-agency process tends to take longer and provides charging parties with less, or no, information from

its investigation; MCCR's investigations also result in fewer resolutions. JA31-32.

The Trans Exclusion Policy deprives FreeState and its clients of the benefits of the EEOC's process. JA32. That process is not just a perfunctory precursor to a private lawsuit; rather, Congress established it as one of the "thoroughgoing remedies" to address the "'complex and pervasive' problem" of unlawful discrimination. *Shell Oil*, 466 U.S. at 69. This process can not only lead to relief for individual clients, but also frequently includes broader improvements and policy changes for an entire workplace, set of employers, industry, or region—sometimes even nationwide. JA32. The Policy has thus impaired FreeState's ability to redress workplace discrimination both for its transgender clients, and on behalf of transgender communities in Maryland more broadly, impeding FreeState's ability to carry out a core service in fulfillment of its mission. JA32-33.

The Policy also deprives FreeState of information it would be entitled to receive from the EEOC. JA33. Losing access to that information—employer position statements, interview notes, personnel policies, employee files, and so on, which are typically not available through an MCCR investigation—impairs FreeState's ability to formulate an

informed response to the employer's assertions and present the strongest case possible, which in turn affects the likelihood of settlement. JA32-33. It also impairs FreeState's ability to secure pro bono representation for its clients. *See* JA33.

Additionally, because the Trans Exclusion Policy sends transgender workers the message that the EEOC will not take their charges of discrimination seriously, it disincentivizes transgender people from filing with the EEOC under any circumstance. JA34. Indeed, several potential clients have declined to use FreeState's legal services to file EEOC charges, further impairing FreeState's ability to redress employment discrimination for those individual workers and for transgender and LGBTQ+ communities more broadly. JA34. The Policy also sends employers the message that they will not be held accountable for certain types of discrimination against transgender employees, making it less likely that employers will implement strong protections against gender-identity discrimination. *See* JA34. Consequently, FreeState has had to expend resources on alternative, non-legal but labor-intensive services for its transgender clients who are experiencing workplace discrimination. JA35. Instead of using the EEOC process to attempt to redress discrimination, FreeState can continue serving its transgender

clients only through services such as reviewing résumés and helping with the job-search and application process. JA35. This result harms transgender workers, FreeState, and workplaces across the state that will have fewer incentives and opportunities to ensure work environments free of harassment and other forms of discrimination.

D. District court proceedings

On July 29, 2025, FreeState filed a complaint against the EEOC and Chair Lucas in the U.S. District Court for the District of Maryland. *See* JA05. FreeState alleged that the Trans Exclusion Policy, as described above, forecloses transgender workers asserting any claim tied to gender-identity discrimination (except standalone hiring, firing, or promotion claims) from the mandatory EEOC process. *See* JA28-29. Consequently, FreeState alleged, the Trans Exclusion Policy impairs its ability to advocate for its transgender clients and advance the rights of transgender Marylanders. *See* JA29-36. FreeState alleged that the Trans Exclusion Policy violates Title VII, the Equal Protection Clause of the Fifth Amendment, and the Administrative Procedure Act, and requested that the district court declare the policy unlawful, vacate it under the APA, and enjoin the EEOC from denying transgender workers the same

EEOC process and protections that all other charging parties receive. *See* JA36-44.

The EEOC moved to dismiss, and on June 12, 2026, the district court granted the motion. JA67. The district court "beg[an] and end[ed] its inquiry" with the proposition that "[c]hallenges to the Executive Branch's 'arrest or prosecution policies' seldom qualify" as disputes capable of resolution through the judicial process. JA63 (quoting *United States v. Texas*, 599 U.S. 670, 677 (2023)).

The court held that it lacked subject-matter jurisdiction to decide FreeState's claims. JA65-66. The court acknowledged that FreeState's allegations of the EEOC's gender-identity discrimination were "deeply troubling" but concluded that "the EEOC's decision to alter its investigations of gender identity discrimination claims constitutes a discretionary decision over which the Court lacks authority to review." JA65-66. To reach its decision, the court relied almost exclusively on *United States v. Texas*, 599 U.S. 670 (2023), in which the Supreme Court held that a group of states lacked Article III standing to sue to require DHS to carry out more immigration arrests and detentions. JA63-66. The district court buttressed its decision by reference to another district court case, *Cross v. EEOC*, 810 F. Supp. 3d 88 (D.D.C. 2025), which itself relied

on *Texas* to find that a charging party lacked standing to challenge the EEOC's closing its investigation of her discrimination charge based on its policy ending enforcement of disparate-impact claims. JA65-66.

The district court did not assess any other aspect of FreeState's standing or evaluate the merits of its claims.

SUMMARY OF ARGUMENT

I. The EEOC asserts constitutionally unreviewable discretion to categorically exclude transgender charging parties from the full scope of Title VII protections because they are transgender. Article III does not empower the EEOC to unlawfully carry out the discrimination it was designed to dismantle.

A. The traditional scope of prosecutorial discretion—which shields decisions about resource allocation, public-welfare needs, and other policy issues not suitable for judicial determination—does not reach the Trans Exclusion Policy. As a general matter, Congress may impose non-discretionary duties on the Executive. It did so here through Title VII's instruction that the EEOC "shall make an investigation" of each charge. Moreover, however broad enforcement discretion may be, courts have consistently recognized that agency action that violates the Constitution should not be shielded from judicial review. This principle is reflected in

the parallel body of APA law dealing with agency action committed to agency discretion by law. Similarly, courts have recognized a fundamental distinction between individual "single-shot" enforcement decisions—which are often shielded from judicial review—and categorical policies like the Trans Exclusion Policy—which are not.

B. *United States v. Texas* does not call for a different conclusion. That case did not change the scope of prosecutorial discretion, and the district court erred in relying on it to shield the Trans Exclusion Policy from review. *Texas*'s self-described "narrow" holding was grounded in several factors not present in this case. That decision addressed a request for a judicial order to "bring more" arrests and prosecutions, as opposed to FreeState's request that transgender charging parties not be excluded from the normal charge process; resolved a dispute between states and the federal government implicating federalism concerns not present in this case; arose in the unique context of immigration enforcement; and faced no contrary precedent, unlike the Title VII context where the Supreme Court has recognized the EEOC's mandatory, judicially enforceable obligations. *Texas* itself also recognized additional limitations permitting judicial review of enforcement decisions even when those decisions do implicate otherwise unreviewable agency

discretion. Two of those exceptions apply here, because the Trans Exclusion Policy represents an abdication of the EEOC's statutory duties, and it denies significant and concrete legal benefits to transgender charging parties and to FreeState.

II. FreeState has Article III standing. It has suffered an organizational injury-in-fact caused by the burdens the Trans Exclusion Policy has put on its core, day-to-day activities, and that injury is redressable through vacatur of the policy and the kind of injunctive relief courts are well suited to issue.

For these reasons, the district court's dismissal of the complaint for lack of jurisdiction should be reversed, and the case remanded for further proceedings on the merits.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's dismissal of a complaint for want of Article III standing to sue—and thus for lack of subject matter jurisdiction—under Federal Rule of Civil Procedure 12(b)(1)." *Ali v. Hogan*, 26 F.4th 587, 595 (4th Cir. 2022) (citing *Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 311 (4th Cir. 2009)).

ARGUMENT

I. The EEOC's categorical exclusion of transgender charging parties from the full scope of the EEOC's charge processing is subject to judicial review.

The district court erred by concluding that the EEOC possesses constitutionally unreviewable discretion to impose a policy categorically refusing to process certain charges of discrimination based on the protected characteristics of the individuals who filed them—here, transgender charging parties. Whatever discretion the EEOC enjoys, there are significant limitations on that discretion that the court below failed to consider. This case does not fall within the scope of that discretion—and so is suitable for judicial review—for three reasons. First, Congress can impose non-discretionary duties on the Executive and did so here: the plain language of Title VII imposes a mandatory duty on the EEOC to process charges in the manner set forth in the statute. Second, courts have the authority to review whether an agency action—including an exercise of enforcement discretion—violates the Constitution. Third, even where courts could not review an agency's case-specific enforcement decisions, courts may review agencies' broad, categorical policy choices.

United States v. Texas does not require a different result. The district court observed that both this case and *Texas* "concern[] federal agency action in response to a new administration's shifting priorities." JA63. Maybe so. But the district court erred by stopping there. Its surface-level comparison ignored the Court's explicit admonition that *Texas*'s holding did not preclude all judicial review of agency enforcement decisions. It ignored the many significant distinctions between the plaintiff states' claims seeking "more" immigration arrests and prosecutions at issue in *Texas* and FreeState's own claims. And it disregarded *Texas*'s own acknowledgement that there are exceptions to the principle of nonreviewability it articulated.

A. The EEOC's decision to categorically exclude transgender charging parties from the full scope of the EEOC process violates Title VII and the Constitution.

Federal agencies have discretion to allocate investigative resources, identify enforcement priorities, and decide which cases to prosecute. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) (Executive Branch has authority over "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law"); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (enforcement of "the Nation's criminal laws" is within the "'special province' of the Executive").

But such discretion "is not 'unfettered.'" *Wayte v. United States*, 470 U.S. 598, 608 (1985). Contrary to what the EEOC asserts here and what the district court sanctioned below, this case does not fall within the traditional scope of unreviewable agency enforcement discretion for three core reasons, each independently sufficient to warrant judicial review: Title VII's express mandate, constitutional constraints on the EEOC's decision-making, and the categorical nature of the Trans Exclusion Policy. At bottom, the EEOC may not categorically refuse the full scope of its Title VII-mandated charge process to transgender workers, depriving one protected group of the full range of benefits and protections of that process that others continue to enjoy.

1. Title VII imposes a non-discretionary duty on the EEOC to carry out its mandatory charge processing.

Title VII's plain text requires the EEOC to process charges of discrimination, including those filed by transgender charging parties, *see Bostock*, 590 U.S. at 662, 663 (discrimination against transgender employees "has always been prohibited by Title VII's plain terms"). That obligation is non-discretionary and the EEOC's failure to fulfill it is subject to judicial review.

Whenever a person files a charge alleging an unlawful employment practice, the EEOC "shall make an investigation thereof." 42 U.S.C.

§ 2000e-5(b). The use of "shall" imposes "a clear duty to act on" the charge filed. *See In re Brown*, No. 26-2230, 2026 WL 3017599, at *7 (4th Cir. Oct. 7, 2026) (relying on precedent establishing that "shall" usually indicates "a nondiscretionary duty to perform").

Indeed, Congress knows how to commit decisions to the EEOC's discretion, and it did not do so with respect to the investigation requirement. For example, it expressly committed the decision whether to litigate a matter in court to the EEOC's discretion. *See* 42 U.S.C. § 2000e-5(f)(1) (providing that after investigation and conciliation failure, the EEOC "*may* bring a civil action against any respondent not a government, governmental agency, or political subdivision") (emphasis added). "Congress's use of the word 'may' in adjacent portions of" Title VII "reinforces the conclusion that it knowingly selected 'the mandatory term "shall"' in crafting" Section 2000e-5(b). *South Carolina v. United States*, 907 F.3d 742, 756 (4th Cir. 2018) (quoting *In re Rowe*, 750 F.3d 392, 396-97 (4th Cir. 2014)).

The Supreme Court has confirmed that the EEOC's adherence to Title VII's mandatory charge process is subject to judicial review and thus not left to agency discretion. In *Mach Mining*, the Court held that the word "shall" in § 2000e-5(b) (the provision of Title VII requiring the EEOC to

attempt conciliation) imposed a mandatory, non-discretionary duty on the EEOC. 575 U.S. at 486. The EEOC's failure to fulfill that duty was thus subject to judicial review. *Id.* at 487-89. So too here. Though the "scope of that review is narrow," *id.* at 495, it is *how* the EEOC conducts any particular investigation that is left to the agency's discretion, not *whether* the EEOC may conduct the investigation at all.

Other appellate decisions confirm the mandatory nature of the EEOC process to which charging parties are entitled. Title VII requires that the EEOC "must discharge certain administrative obligations," including its duties to: "(1) receive a formal charge of discrimination against the employer; (2) provide notice of the charge to the employer; (3) investigate the charge; (4) make and give notice of its determination that there was reasonable cause to believe that a violation of Title VII occurred; and (5) make a good faith effort to conciliate the charges." *EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96, 100 (2d Cir. 2015); *see also EEOC v. Pierce Packing Co.*, 669 F.2d 605, 607 (9th Cir. 1982) (explaining that once a charge is filed the "EEOC next must notify the alleged wrongdoer of the charge, conduct an investigation, and determine whether reasonable cause exists to believe that the charge is true").

Accordingly, several Circuits have confirmed that, whereas the EEOC has discretion as to *how* it processes charges of discrimination, it may not simply refuse to do so. *See Sterling Jewelers, Inc.*, 801 F.3d at 98 ("Under Title VII, courts may review *whether* the EEOC conducted an investigation, but not the sufficiency of an investigation."); *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 805 (5th Cir. 2016); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676 (8th Cir. 2012); *see also EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (holding that "the nature and extent of an EEOC investigation into a discrimination claim"—but not whether the investigation happened at all—"is a matter within the discretion of that agency"); *cf. EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (providing that courts cannot review the sufficiency of an underlying investigation to second-guess the propriety of the EEOC's determination that probable cause to sue exists (or not) in a given matter).

By excluding transgender charging parties from the full set of protections of the charge process, the EEOC violates Title VII's mandate. In line with *Mach Mining*, that refusal (which FreeState need only allege at the motion-to-dismiss stage, and which it has alleged) warrants judicial review.

2. Even otherwise-discretionary agency enforcement actions are subject to review for adherence to constitutional commands.

Even though the principle of agency enforcement discretion is undoubtedly broad, courts have consistently held that agency enforcement action that violates the Constitution, as FreeState alleges the Trans Exclusion Policy does here, should not be insulated from judicial review.

"[S]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints." *Wayte*, 470 U.S. at 608 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)). "[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). "[T]raditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980).

This critical qualification is also reflected in the related body of law concerning the exception to APA reviewability for actions committed to agency discretion. An agency's decision "not to prosecute or enforce,

whether through civil or criminal process," in an individual case is presumptively immune from judicial review under the APA. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). But "[i]t may be presumed that Congress does not intend administrative agencies . . . to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." *Id.* at 839 (Brennan, J., concurring). So even "'agency action [that] is committed to agency discretion by law' is not completely shielded from judicial review." *Elecs. of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985). "[A]n agency decision that violates a statutory or constitutional command . . . is not immune from judicial review," regardless of whether a "lawful exercise" of that agency decision would be immune. *Id.* "[E]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Id.* (quoting *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981)); *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 347 (4th Cir. 2001) ("[I]t is well settled that even if agency action is committed to its discretion by law, a court may still determine whether the action is constitutional."); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting statute to permit constitutional claims in order to

"avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))).

FreeState's claims fall within this important constraint on agency authority. FreeState alleges that the Trans Exclusion Policy violates the Equal Protection Clause of the Fifth Amendment and is contrary to constitutional right under Section 706(2) of the APA because it discriminates against transgender individuals, who are a protected class. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (applying heightened scrutiny to equal-protection claim alleging gender-identity discrimination "because transgender people constitute at least a quasi-suspect class"). The same is true of FreeState's claims, discussed above, that the EEOC runs afoul of Title VII and *Bostock*'s holding that Title VII's bar on sex-based discrimination encompasses discrimination based on sexual orientation and gender identity. 590 U.S. at 683.

3. Categorical policies are reviewable even where case-specific enforcement decisions would not be.

Even if the EEOC might otherwise have discretion (i.e., in the absence of any congressional mandate and where no constitutional questions

were implicated), there is yet another reason judicial review is warranted. Courts have recognized a significant difference between "single-shot" enforcement determinations, which are often shielded from judicial review, and categorical enforcement policies, which are not. *See Casa De Md. v. DHS*, 924 F.3d 684, 699 (4th Cir. 2019) (quoting *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 811-12 (D.C. Cir. 1998)); *see also Heckler*, 470 U.S. at 833 n.4 (noting that its holding on prosecutorial discretion in an individual case did not control reviewability when an agency "'consciously and expressly adopt[s] a general policy'" of enforcement or nonenforcement (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam))). The policy challenged in this case falls on the latter side of that line.

Courts' disinclination to review particular agency enforcement decisions reflects the recognition that those decisions rest on "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan," which "are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607; *see also Heckler*, 470 U.S. at 831.

But judicial review of an agency's "broad or general enforcement policy" to determine whether that policy is unlawful does not implicate the same concerns and does not run the risk of substituting a court's reasoning for an agency's expertise. *Casa De Md.*, 924 F.3d at 699. To the contrary, when an agency's enforcement scheme is challenged based on its constitutionality or whether it comports with underlying statutory directives, as here, those standards provide the relevant law to apply. *See, e.g.*, *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 941 n.11 (D.C. Cir. 1987) ("Here, there is clearly 'law to apply'—the Constitution."). Evaluating an agency's adherence to constitutional or statutory commands is squarely within the judiciary's bailiwick and does not call on courts to second-guess an agency's delicate balancing of policy and budget priorities or other discretionary factors. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

FreeState alleges that the EEOC has adopted an enforcement policy that categorically deprives transgender charging parties of the process and protections it provides all others, and FreeState seeks judicial relief from that unlawful policy. Evaluating the Trans Exclusion Policy does not require any court to second-guess the judgment of EEOC officials about the nature of any particular investigation, determinations about

whether to resolve a particular charge through conciliation or settlement, or whether to take up litigation in a given case. Instead, it requires the court to evaluate whether the Policy violates the plain terms of Title VII, or the Equal Protection Clause—assessments that the court is well equipped and required to adjudicate.

* * * * *

The EEOC does not have discretion to decide whether to process charges of discrimination in the manner set forth in Title VII. And even if it did, the EEOC's discretion in enforcing workplace civil-rights laws does not empower it to deny one group of protected workers the benefit of that process in ways that violate Title VII and the Equal Protection Clause. Under the district court's interpretation, the EEOC could similarly decide not to investigate charges brought by Black charging parties, or women, or people with disabilities, or Christians, or any other protected class. Unreviewable agency discretion does not sweep so broadly.

B. *Texas*'s context-specific holding does not compel a different result.

In *Texas*, a group of states sued the Department of Homeland Security over new guidelines prioritizing immigration enforcement against noncitizens who were suspected terrorists or dangerous criminals or who

had entered the country only recently. 599 U.S. at 674. The plaintiff states argued that the guidelines violated statutory provisions that directed—in the states' view, mandated—the arrests and detentions of a broader range of noncitizens with criminal convictions. In other words, the Court explained, "[t]he states essentially want the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests." *Id.* at 674. The Court rejected the states' arguments, concluding that DHS had discretion over its law-enforcement priorities and ultimate decision-making over when to prosecute defendants who violate the law. *See id.* at 676-81.

While *Texas* confirms that agencies have discretion to decide how to enforce the laws for which they have responsibility, the Supreme Court did not hold that agency nonenforcement decisions are always unreviewable or depart from the material limits on that discretion as described above. *Texas* was by its own terms a "narrow" decision that "maintain[ed] the longstanding jurisprudential status quo," *id.* at 686. Its holding was grounded in factors not present in this case, including the plaintiff states' requested relief, which would compel DHS to make more individual arrests and prosecutions; the federalism implications of that relief; the unique equities involved in immigration enforcement; and an

underlying statute that had never been interpreted to mandate DHS enforcement action. And the Court identified additional limitations on the prosecutorial discretion recognized in *Texas* that would apply here regardless.

1.* Texas *was grounded in several factors not present in this case.

a. As explained above, courts have recognized a material difference between executive discretion to make individualized prosecutorial decisions on a case-by-case basis and to align enforcement priorities with resource-allocation, public-safety, or public-welfare needs, on the one hand; and adoption of categorical enforcement policies that are at odds with an explicit statutory mandate and that violate the Constitution by discriminating against persons on the basis of a protected class, on the other. Indeed, *Texas* reinforced rather than undermined the long-established principle that prosecutorial discretion does not foreclose review into whether a decision was based on an unlawful standard. *See id.* at 676-78. The Court stressed that the decision "should in no way be read to suggest or imply that the Executive possesses some freestanding

or general constitutional authority to disregard statutes requiring or prohibiting executive action." *Id.* at 684.[4]

Unlike the states in *Texas*, FreeState does not ask the Court to order the EEOC to "bring more" investigations or enforcement actions. Nor does it seek to compel the EEOC to single out any group of charging parties for more comprehensive investigations, more frequent cause findings, or Commission litigation. Instead, FreeState seeks to enjoin and vacate an illegal policy that categorically excludes transgender charging parties from the full EEOC process and protections afforded to all others.[5]

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[4] The decisions that the Court relied on in *Texas* all involve individuals suing to force the government to prosecute another individual and thus reaffirm the division between case-by-case prosecutorial decisions and policies that implicate statutory and constitutional limits. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 615-19 (1973) (mother could not challenge district attorney's refusal to criminally prosecute her child's father because she lacked a cognizable interest in the criminal prosecution of another individual); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984) (employer lacked interest in enforcement of immigration laws against employees and therefore could not rely on that defense to unfair-labor-practice claims); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750-51, 761, 768 (2005) (individual could not compel police to prosecute violation of restraining order, as "the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance").

[5] FreeState also does not bring claims under the Take Care Clause, U.S. Const. art. II, § 3 (which requires the President to "take Care that the Laws

b. *Texas*, which involved claims brought by the states of Texas and Louisiana to compel executive action, implicated federalism concerns absent here. *See* 599 U.S. at 680 n.3. The *Texas* Court noted that, in addition to general prosecutorial-discretion principles, "the plaintiffs [there were] States, and federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer." *Id.* The Court was hesitant to permit the States to secure standing based on the kind of "indirect effects on state revenues or state spending" that federal policies "frequently generate[.]" *See id.* The Fourth Circuit has subsequently emphasized the unique federalism aspect of the case. *See Maryland v. USDA*, 151 F.4th 197, 210 (4th Cir. 2025) ("Because the interest here is a traditionally federal one, [management of the federal workforce], the States have no judicially cognizable injury under *Texas*. A contrary result would upend our federalist system by ceding federal sovereignty to the states.").

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be faithfully executed"), or Section 706(1) of the APA (requesting a reviewing court to "compel agency action unlawfully withheld"), which the *Texas* plaintiffs did. *See* First Amended Complaint ¶¶ 116, 122, 141-46, *Texas v. United States*, No. 6:21-cv-00016 (S.D. Tex. Oct. 22, 2021), ECF 109. Those claims are much more likely to raise prosecutorial-discretion issues because the requested relief would compel specific enforcement action by the agency—which the *Texas* plaintiffs indeed sought.

Moreover, extending *Texas* here would actually introduce separation-of-powers (i.e., horizontal-federalism) concerns by improperly "vesting in the President a dispensing power"—the power to waive the enforcement of laws. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *Lewis-Williams v. S.F. Bay Area Rapid Transit Dist.*, --- F.4th ----, 2026 WL 2674526, at *13-14 (9th Cir. Sep. 11, 2026) (R. Nelson, J., concurring) (explaining Constitution's departure from English monarchs' assertion of power to suspend and dispense). The Constitution "limits [the Executive's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). The Constitution even offers Congress the opportunity to override a president's veto of a law. U.S. Const. art. I, § 7, cl. 2.

The Trans Exclusion Policy dispenses with the EEOC's Title VII-mandated charge-processing duties. *See supra* I.A.1. If the EEOC were to have unreviewable discretion to impose this policy, it would enjoy the power to suspend, dispense with, and retroactively veto provisions of Title VII at its will (here, by unilaterally carving transgender employees out of the full protections of that law). And there would be no limit to the ways that the EEOC could suspend—without judicial review—

protections for other protected classes. *Texas*, which did "not alter the balance of powers between Congress and the Executive," 599 U.S. at 686, does not supply the justification for such inflation of executive power at Congress's expense.[6]

c. *Texas* is also distinct for the unique immigration-enforcement context in which it arose. The "principle of enforcement discretion over arrests and prosecutions" extended logically to the immigration context, where "the Executive's enforcement discretion implicates not only normal domestic law enforcement priorities but also foreign-policy objectives." 599 U.S. at 679 (internal quotation marks omitted); *see also Arizona v. United States*, 567 U.S. 387, 396 (2012) (describing how discretion in immigration law enforcement may "involve policy choices that bear on this Nation's international relations"). The executive's need to balance such considerations—a task not suited for judicial decision-making, *cf. Heckler*, 470 U.S. at 831—justified application of traditional principles of enforcement discretion in *Texas*. No such considerations are at issue here, especially at the motion-to-dismiss stage where the Court is faced

[6] In fact, the dissent in *Texas* raised concerns about dispensing and suspending powers but ultimately expressed no "firm position" on the historical understanding of the executive's prosecutorial discretion. *See* 599 U.S. at 730-35 (Alito, J., dissenting).

only with questions of law. Indeed, the Fourth Circuit has held that *Texas* does not even reach all challenges to immigration policies. *See Phila. Yearly Meeting of the Religious Soc'y of Friends v. DHS*, 187 F.4th 187, 198 n.5 (4th Cir. 2026) (*Texas* did not bar challenge to immigration policy where "plaintiffs d[id] not challenge the government's authority to arrest and prosecute immigrants").

d. Finally, the Court in *Texas* noted that there was no "precedent, history, or tradition of federal courts entertaining lawsuits of this kind." 599 U.S. at 670. By contrast, as described above, the Supreme Court has held that Title VII—the statute underlying FreeState's challenge—mandates EEOC process and that judicial review is appropriate where a party alleges the EEOC has failed to fulfill its obligations. *See supra* I.A.1. And a well-developed body of APA law permits challenges exactly like FreeState's to agency action not committed to the agency's discretion by law. *See supra* I.A.2.

2. FreeState's claims fall within additional limitations on unreviewable prosecutorial discretion recognized in Texas.

The Supreme Court's decision in *Texas* notably did not adopt an absolute rule precluding judicial review of the sort of agency enforcement decision at issue in that case. As the Court explained, it did "not suggest

that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions." 599 U.S. at 681. It listed five examples of such cases, two of which apply here: First, this is a broad, categorical policy amounting to an agency's abdication of its duties rather than an individual enforcement decision. Second, this is a policy that denies significant and concrete benefits to transgender charging parties.

a. *Texas* acknowledged that "the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." *Id.* at 682. The Court explained that this type of "*Heckler*-style 'abdication'" arguably could "exceed the bounds of enforcement discretion and support Article III standing." *Id.* at 683.

As described above, *see supra* I.A.3, the law distinguishes between case-specific enforcement decisions and broad, categorical policies of enforcement or nonenforcement. Hence, in *Adams v. Richardson*, 480 F.2d at 1161, the prototypical "*Heckler*-style" abdication case referenced in *Texas*, *see* 599 U.S. at 682-83, the court rejected the government's argument that enforcement of Title VI of the Civil Rights Act of 1964 (and its obligation to end segregation in public educational institutions receiving federal funds) was committed to agency discretion. *Adams*, 480

F.2d at 1161-62. The agency's nonenforcement there was reviewable because the agency had "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.* at 1162. The claimants in *Adams* did not challenge a single or even a handful of the agency's specific enforcement decisions, and the court could therefore "interpret the statute and determine whether [the agency] ha[d] correctly construed its enforcement obligations." *Id.*; *see also Heckler*, 470 U.S. at 833 n.4 (referencing *Adams*).

FreeState does not challenge the propriety of any particular charge-processing decision or any single failure to investigate. Instead, FreeState alleges that the EEOC has "consciously and expressly adopted" a "general policy" that amounts to "an abdication of its statutory duty" by categorically depriving transgender charging parties of the process and protections it provides all others, *see Adams*, 480 F.2d at 1162. FreeState asked the district court to "interpret [Title VII] and determine whether [the EEOC] has correctly construed its enforcement obligations," *see id.* Evaluating the Trans Exclusion Policy therefore does not require any court to second-guess the judgment of EEOC officials or wade into any questions about individual charging parties, investigations, conciliations, or litigation—only to decide whether the EEOC's abdication

of its duties violates Title VII and the Equal Protection Clause. *See supra* I.A.

The EEOC cannot "essentially abandon its regulatory function . . . under the guise of unreviewable agency inaction." *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745 (7th Cir. 1986). If *Texas* applies here, so too must its limit on "*Heckler*-style" abdication claims.

b. *Texas* acknowledged that its holding would not necessarily reach a challenge to an enforcement policy that "involves both the Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status[.]" 599 U.S. at 683. The Trans Exclusion Policy denies transgender workers equal access to the substantial benefits of the EEOC charge process. Accordingly, it affects the legal benefits of transgender charging parties and FreeState itself, which depends on the EEOC charge process to provide legal assistance to its transgender clients experiencing workplace discrimination and to yield information that facilitates its broader advocacy on behalf of transgender people. FreeState and its clients therefore have more than "a general legal, moral, ideological, or policy objection" to the Trans Exclusion Policy, *see Vapor Tech. Ass'n v. Wooten*, 184 F.4th 329, 344-45 (4th Cir. 2026).

Indeed, as described above, the EEOC process offers a range of benefits, as the agency is empowered by statute to obtain "'any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by' Title VII and 'is relevant to the charge under investigation.'" *See McLane*, 581 U.S. at 76 (quoting 42 U.S.C. § 2000e-8(a)). The EEOC may, for example, by subpoena "requir[e] the attendance and testimony of witnesses or the production of any evidence," *see McLane*, 581 U.S. at 76 (quoting 29 U.S.C. § 161(1)), or secure employer information about potential comparators, *see McLane*, 581 U.S. at 77-78. If the agency finds probable cause, charging parties may benefit from the availability of mediation, which is often the fastest way to resolve a charge, JA13-14, or informal conciliation, *see Mach Mining*, 575 U.S. at 483. They may obtain monetary relief or policy change at their workplace. *See* JA32. And they may benefit from EEOC-led and -funded litigation. *See* JA14-15.[7] The Trans Exclusion Policy

[7] That charging parties are not guaranteed any specific outcome of the EEOC process because the EEOC has discretion in how it carries out the charge process, how it investigates their claims, and whether it ultimately litigates those claims is not relevant. *See DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 9-10 (2020) (that benefits of Deferred Action for Childhood Arrivals program were contingent on several factors and always revocable did not bar reviewability); *see also id.* at 61 (Thomas, J., concurring in the judgment in part and dissenting in part) ("As a general matter, deferred

deprives transgender charging parties and FreeState alike of these vitally important legal benefits.[8]

For the foregoing reasons, the prosecutorial discretion at issue in *Texas* does not apply here, and even if it did, this case falls within the limitations that *Texas* itself recognized. The district court's reliance on *Texas* was therefore misplaced.[9]

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action creates no rights—it exists at the Government's discretion and can be revoked at any time.").

[8] Even if these benefits accrued exclusively to charging parties and not FreeState, it would be of no moment. This limitation in *Texas* fundamentally depends on whether the Trans Exclusion Policy involves the "provision of legal benefits or legal status," *Texas*, 599 U.S. at 683. The answer "cannot vary depending on who sued the agency; it depends on the rule itself." *Texas v. EEOC*, 933 F.3d 433, 444 (5th Cir. 2019) (in parallel APA context); *see also Regents*, 591 U.S. at 16-19 (not distinguishing among individual, organizational, and government entities who challenged rescission of DACA for purposes of reviewability); *Texas*, 599 U.S. at 683 (citing *Regents* as an example of the legal-benefits exception).

[9] The only other case that the court below relied on, *Cross v. EEOC*, 810 F. Supp. 3d 88 (D.D.C. 2025), was wrongly decided and is of no import here in any event. *Cross* relied on *Texas* to hold that an individual lacked standing to challenge the EEOC's closure of its investigation of her discrimination charge, based on the EEOC's policy deprioritizing disparate-impact claims. *Id.* at 100. Insofar as *Cross* purports to announce that the EEOC may disregard Title VII's mandatory charge process whenever it wishes, it is irreconcilable with Title VII. *See supra* I.A.1. And whereas *Cross* disregarded the distinction between individual enforcement decisions and categorical policies, that distinction is relevant here and reflected in this Court's precedent. *See Casa De Md.*, 924 F.3d at 699. Finally, *Cross* did not implicate the constitutional questions this case raises—it concerned the

II. FreeState has adequately alleged Article III standing.

The court below erred by concluding that FreeState's claims are unreviewable as matters committed to the EEOC's discretion. This Court may reverse on that ground alone. Insofar as this Court finds it appropriate to reach FreeState's affirmative bases for standing, which the district court did not do, FreeState has adequately alleged that it has organizational standing to pursue its claims.

Organizations "have standing 'to sue on their own behalf for injuries they have sustained'" if they "satisfy the usual standards for injury in fact, causation, and redressability." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 393-94 (2024) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982)). Courts "assume[] the merits of a dispute will be resolved in favor of the party invoking [their] jurisdiction in assessing standing." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 99 (4th Cir. 2011); *see also Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017).

A. An organization suffers an injury-in-fact "[w]hen an action 'perceptibly impair[s]'" its "ability to carry out its mission and

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EEOC's discretion in investigating charges based upon the underlying theory of liability (disparate impact), where this case concerns the EEOC's refusal to investigate certain categories of charges when those charges are brought by a protected class of employees.

'consequent[ly] drain[s] . . . the organization's resources.'" *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (quoting *Havens*, 455 U.S. at 379). Although an organization may not manufacture injury by expending resources merely advocating against the defendant's actions, *All. for Hippocratic Med.*, 602 U.S. at 395, it can satisfy the injury requirement at this stage by alleging that the defendant's actions impeded its ability to provide "services" or conduct "core business activities," *id.* (citing *Havens*, 455 U.S. at 379).

FreeState has alleged that the Trans Exclusion Policy is significantly impeding its ability to carry out its core, day-to-day activities and advance its interests. JA30-33. Because the EEOC process is no longer of use to many transgender charging parties, FreeState no longer advises its transgender clients to file charges of discrimination with the EEOC. JA31. Accordingly, FreeState can no longer carry out one of its core services for its transgender clients (helping them file and move through the EEOC charge process), and thus has effectively lost an essential tool for providing assistance to its transgender clients experiencing workplace discrimination. *See* JA30-31. FreeState and its clients have lost all the possible benefits of the EEOC process described above—service of a charge on the employer, production of evidence, possibility of settlement

facilitated by the EEOC, broader policy changes, and more. *See supra* I.B.2.

The loss of these concrete benefits impairs FreeState's ability to advance its mission in other ways as well. *See* JA33-35. It deprives FreeState and its clients of information they would otherwise obtain through EEOC investigations, making it more difficult to pursue informal settlement or obtain pro bono representation for its clients. JA33. Losing access to employers' position statements and other EEOC-gathered evidence also deprives FreeState of information that supports its broader advocacy work to identify and eradicate employment discrimination, such as identifying patterns of employer practices or defenses to discrimination allegations. *See* JA34-35. And by disincentivizing employees from utilizing FreeState's legal services to file charges at all, the Policy also reduces the number of people to whom FreeState can provide all types of services. *See* JA34.

Consequently, FreeState is forced to redirect resources to serve its transgender clients. *See* JA35-36. It now must provide alternative non-legal services for transgender people who are experiencing workplace discrimination, including job-search and application assistance to help them secure alternate employment if they cannot obtain redress from

discrimination at their current employer. JA35. In some instances, FreeState has also had to expend resources to file multiple charges of discrimination separately—one at MCCR involving gender-identity claims, and one at the EEOC involving other kinds of claims. JA33. Such splintering requires additional time and resources to undertake and maintain. JA33.

In short, FreeState has alleged that the Trans Exclusion Policy has impaired its ability to offer core services to its transgender clients who have suffered workplace discrimination and undermined its broader advocacy to curtail workplace discrimination against transgender people across the state. *See* JA29-35. The Policy drastically limits, if not eliminates, the usefulness of the EEOC process to FreeState and its transgender clients, making FreeState's representation of its clients more difficult, time-consuming, and less effective; threatens to decrease the number of clients that FreeState is able to serve and represent; and deprives it of information key to its educational and advocacy efforts. It has also required FreeState to redirect resources to keep serving its clients.

These are precisely the sorts of allegations that satisfy organizational standing's injury at the motion-to-dismiss stage. *See, e.g.*, *RNC v. N.C.*

State Bd. of Elections, 120 F.4th 390 (4th Cir. 2024) (state's alleged failure to comply with federal voter security and access law impeded the RNC's voter-outreach work and caused it to divert resources to combatting election fraud in the state, satisfying injury requirement); *see also Ctr. for Taxpayer Rts. v. IRS*, --- F.4th ----, 2026 WL 2635380, at *4-5 (D.C. Cir. Sep. 8, 2026) (organization advancing taxpayer rights satisfied organizational standing where IRS policy of sharing data with DHS resulted in the organization not being able to assist as many taxpayers with education, outreach, or direct services); *PETA v. USDA*, 797 F.3d 1087, 1095-96 (D.C. Cir. 2015) (expenditure of resources to investigate "alternative means" of advocacy regarding avian abuse, including filing complaints with other "local, state, and/or federal agencies," where USDA would not act on its complaints satisfied diversion-of-resources requirement).

B. FreeState has also met its causation burden by demonstrating that its injuries "can be traced to" the EEOC's Trans Exclusion Policy. *RNC*, 120 F.4th at 397. As FreeState has alleged, it was the EEOC's "failure to comply" with Title VII and the Equal Protection Clause that "forced [FreeState] to divert resources," *id.*, and made it necessary for FreeState to engage in "new activities" like providing alternative non-legal services

for transgender people in response to its injuries, *Ctr. for Taxpayer Rts.*, 2026 WL 2635380, at *4; *see also* JA29-30.

C. Redressability is satisfied if "granting the requested relief would at least mitigate, if not eliminate, the alleged harm." *Sierra Club v. Dep't of Interior*, 899 F.3d 260, 285 (4th Cir. 2018). "[R]emoval of even one obstacle to the exercise of one's rights, even if other barriers remain," suffices. *Id.*

FreeState asked the district court to declare that the EEOC may not categorically deny transgender workers the same EEOC process and civil-rights protections that all other workers enjoy, to vacate the Trans Exclusion Policy under the APA, and to enjoin the EEOC from carrying out that policy with respect to transgender charging parties. Granting that requested relief would redress FreeState's injuries by removing a critical obstacle to obtaining the benefits of the Title VII-mandated EEOC process for itself and its clients, *see* JA29-36—the EEOC's categorical bar on transgender charging parties' eligibility for the full scope of those protections—and that is enough to satisfy the redressability requirement.

Critically, FreeState's injuries are redressable regardless of the specific nature of the investigation that the EEOC undertakes in any

particular matter, resolution of a given party's charge of discrimination, or any determination whether or not to initiate litigation on behalf of any particular transgender charging party. FreeState does *not* request that the court order the EEOC to undertake more investigations, or put certain resources into all investigations, or initiate more litigation. It requests only that the court enjoin the EEOC from categorically refusing to process certain charges of discrimination brought by transgender charging parties based on their protected status. The requested relief therefore does not require the federal judiciary to interfere with the scope and manner of the EEOC's investigation of a charge, whether to initiate new litigation based on a charge, or whether to resuscitate any federal lawsuit challenging discrimination against transgender workers that the EEOC sought to withdraw from and dismiss with prejudice.

Instead, FreeState seeks an order that the EEOC's Trans Exclusion Policy is unlawful and set it aside. That would restore the EEOC's lawful enforcement discretion, instead of allowing the agency's illegal abandonment of transgender workers to continue unchecked.

CONCLUSION

The EEOC's considerable enforcement discretion does not extend to discriminating against its own charging parties based on their protected

status. Its decision to do so with respect to transgender people is not shielded from judicial review by the principle of agency enforcement discretion. FreeState therefore has standing, and the district court erred in concluding otherwise. The judgment of the district court should be reversed, and the case remanded from proceedings on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 10,311 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Sarah R. Goetz*

CERTIFICATE OF SERVICE

I certify that on October 23, 2026, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Sarah R. Goetz*