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

AMICUS CURIAE BRIEF FOR EEO LEADERS IN SUPPORT OF APPELLANT FREESTATE JUSTICE AND IN SUPPORT OF REVERSAL

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RULE 29(a)(4)(A) STATEMENT OF *AMICUS*

EEO Leaders is a non-profit organization. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of EEO Leaders. In accordance with Fed. R. App. P. 29(a)(4)(E), *Amicus Curiae* EEO Leaders states that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus* or its members—contributed money that was intended to fund preparing or submitting the brief.

RULE 29(a)(4)(D) STATEMENT OF INTEREST OF *AMICUS*

Amicus Curiae EEO Leaders is a non-profit organization composed of former high-ranking officials who served at the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") and the Office of Federal Contract Compliance ("OFCCP"). EEO Leaders includes former EEOC Chairs, Commissioners, and General and Legal Counsels who served at the EEOC during the years 2003 to 2025, and who were instrumental in developing and advancing the Commission's interpretation and enforcement of Title VII's prohibition of discrimination because of sex, in particular as it applies to LGBTQ individuals. [1]

[1] The EEO Leaders are: **Charlotte A. Burrows**, EEOC Commissioner 2015-2025; EEOC Chair 2021-2025; **Pam Coukos,** OFCCP Senior Advisor, 2011-2016; **Chai Feldblum**, EEOC Commissioner 2009-2019; **Karla Gilbride**, EEOC General

During that time, in its adjudicative role in deciding discrimination complaints brought by federal employees, the Commission issued two major decisions holding (1) that transgender individuals are protected from discrimination by Title VII, *Macy v. Department of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012); and (2) that denying transgender employees the use of bathrooms that align with their gender constitutes a violation of the statute, *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015).

During the tenure of some individual members of the EEO Leaders, the Commission on April 29, 2024, following a notice-and-comment period, approved by a majority vote and published its Enforcement Guidance on Harassment in the Workplace, *available at* https://perma.cc/8CEA-HZK8. The Guidance addressed the longstanding federal legal protections for LGBTQ employees and explained the application of Title VII's prohibition on sex harassment against LGBTQ workers consistent with federal-court precedents across the country, in particular, the

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Counsel, 2023-2025; **Stuart Ishimaru**, EEOC Commissioner 2003-2012; EEOC Acting Chair 2009-2010; **P. David Lopez**, EEOC General Counsel 2010-2016; **Peggy R. Mastroianni**, EEOC Legal Counsel 2011-2017; **Carol R. Miaskoff**, EEOC Associate Legal Counsel 2017-2021; EEOC Legal Counsel 2021-2024; **Jocelyn Samuels**, EEOC Commissioner 2020-2025; EEOC Vice Chair 2021-2025; **Jenny R. Yang**, OFCCP Director 2021-2023; EEOC Commissioner 2013-2018; EEOC Vice Chair 2014; EEOC Chair 2014-2017.

Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020).[2]

In this case, FreeState Justice ("FreeState") challenges Chair Andrea Lucas's recent decision to deny transgender individuals the full panoply of EEOC investigative services. *Amicus* submits this brief to explain that Chair Lucas's decision is contrary to the Agency's historic position on the scope of Title VII's prohibition of sex discrimination, contrary to controlling Supreme Court precedent, contrary to the Fifth Amendment guarantee of Equal Protection of the laws, and contrary to EEOC's statutory mandate to investigate all charges of prohibited discrimination in employment.

The EEOC has historically argued that individuals aggrieved by the handling of their charges cannot obtain judicial relief under either Title VII, 42 U.S.C. § 2000e-5, or the Administrative Procedure Act, 5 U.S.C. § 706. *Amicus* offers its views to demonstrate the profound difference between the Commission's individual decisions to dismiss particular charges and Chair Lucas's categorical policy decision to deny equal treatment to a particular demographic group, which FreeState

[2] The Commission rescinded this Guidance on January 22, 2026. https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance

challenges here. *Amicus* submits that this distinction will aid the Court in determining the justiciability of FreeState's claims against the EEOC.

Amicus files this brief with the consent of all parties.

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BACKGROUND AND SUMMARY OF THE ARGUMENT

FreeState Justice sued the EEOC and Chair Andrea Lucas for injunctive and declaratory relief, challenging Chair Lucas's decision to stop processing charges of gender-identity discrimination that allege harassment, retaliation, or discrimination in terms and conditions of employment. JA 57. The district court dismissed FreeState's complaint on the ground that FreeState lacks standing to challenge the Commission's discretionary enforcement decisions, relying on *United States v. Texas*, 599 U.S. 670 (2023), and *Cross v. United States Equal Employment Opportunity Commission*, 810 F. Supp. 3d 88 (D.D.C. 2025). JA 65-66.

The district court's reliance on *Texas* and *Cross* was misplaced. The *Texas* Court's explication of the general rule that an agency's decision not to enforce the law is a discretionary, unreviewable decision is inapplicable here because the EEOC's decision did not flow from a permissible exercise of its discretion. *Texas*, 599 U.S. at 677. The Commission's obligation to investigate charges is mandatory, not discretionary. 42 U.S.C. § 2000e-5(b) (the Commission "shall make an investigation"). While the decision to truncate an investigation of an individual charge may be shielded from challenge, and the EEOC has properly advanced that argument when sued by dissatisfied charging parties, a categorical decision not to investigate charges filed by members of a particular protected group is not an

exercise of discretion, but an act of prohibited discrimination under Title VII and the Equal Protection Clause.

Chair Lucas's policy shift dictating the wholesale dismissal of charges of harassment, retaliation, and discrimination in terms-and-conditions brought by transgender workers is reviewable because it reflects a shift in enforcement based on an interpretation of the law, not a one-off operational decision. The new policy reflects a seismic change in the EEOC's interpretation of the meaning and scope of sex discrimination, and the EEOC has advanced no legally or logically coherent explanation for its shift, other than an adherence to the transphobic views of the current administration. The new policy cannot be squared with *Bostock* and its progeny, and offends the Equal Protection Clause as well.

The Court should reverse the dismissal of FreeState's claim and remand for a trial on the merits of its challenge to Chair Lucas's new charge-processing policy.

ARGUMENT

I. Neither *Texas* and *Cross*, nor cases rejecting charging parties' attacks on the sufficiency of EEOC investigations, support dismissal of FreeState's complaint.

As a rule, courts have jurisdiction to review agency actions that violate statutory or constitutional requirements, as Chair Lucas's new transgender nonenforcement policy does. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Elecs. of*

N.C., Inc. v. Se. Power Admin., 774 F.2d 1262, 1267 (4th Cir. 1985). The district court erroneously ignored this bedrock rule and relied on a recent decision about changed immigration enforcement policies of the Trump administration as the basis for its dismissal of FreeState's claim. The court erred.

A. The complaints in *Texas* and *Cross* are distinguishable from FreeState's claim.

The district court principally relied on *United States v. Texas*, 599 U.S. 670, 673-676 (2023) to support its conclusion that it lacked subject matter jurisdiction over FreeState's challenge to Chair Lucas's policy decision not to process charges filed by transgender individuals. JA 63-65. The *Texas* decision addressed challenges to the Department of Homeland Security's immigration enforcement guidelines and held the agency had unreviewable discretion over its decision whether to prosecute a case. *Id.* at 676. However, as FreeState has cogently explained, the *Texas* Court acknowledged several limitations on the general rule that enforcement decisions are committed to agency discretion, some of which provide a basis for the court's jurisdiction in this case. Appellant's brf. at 31-43. In short, as FreeState explains, among other relevant distinctions, the EEOC's new policy did not reflect an exercise of prosecutorial discretion like that challenged in *Texas* because it violated Title VII's requirement that EEOC investigate all charges of employment discrimination, 42 U.S.C. § 2000e-5(b), which the Supreme Court has identified as a mandatory duty. *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 483, 486 (2015). Brf. at 39-41.

The *Texas* Court acknowledged that a party may well have standing to challenge agency action where the agency has "wholly abandoned its statutory responsibilities to make arrests or bring prosecutions." 599 U.S. at 689. Chair Lucas's policy went beyond exercising the EEOC's discretion to choose appropriate cases for litigation, to unlawfully abandoning the Commission's statutory responsibility to investigate viable charges brought by transgender individuals. Thus, the EEOC's new policy went beyond a prosecutorial decision not to pursue certain claims, but also deprived transgender charging parties of significant benefits, including the opportunity for mediation before the commencement of an investigation. Brf. at 41-43.[3]

B. Disgruntled charging party suits do not support dismissal of FreeState's claim.

Courts routinely dismiss challenges brought by charging parties who are aggrieved by the EEOC's handling of their charges, holding that they cannot state a claim for relief largely because they have the recourse of suing their employers and

[3] Similarly, the D.C. district court decision in *Cross v. EEOC*, 810 F. Supp. 3d 88 (D.D.C. 2025), relied on by the district court here, does not support its decision to decline jurisdiction. Appellant's Brf. at 43, n.9. *Cross* challenged an EEOC decision to dismiss a charge that alleged the disparate impact of a company policy. We believe the court erred in concluding that it lacked jurisdiction to review that claim, but, as relevant here, *Cross* is distinguishable because it did not challenge a policy that categorically denied statutory rights to a protected group based only on their protected status.

thus are not harmed by the EEOC's negligence or malfeasance. *See*, *e.g.*, *Newsome v. EEOC*, 301 F.3d 227 (5th Cir. 2002); *Ward v. EEOC*, 719 F.2d 311 (9th Cir. 1983). Courts emphasize that allowing such cases to proceed would "dissipate the limited resources of the [EEOC] in fruitless litigation with charging parties." *Ward*, 719 F.2d at 313. These cases do not support the denial of jurisdiction in this case because they involved individualized, discretionary decisions rather than the adoption of a blanket discriminatory policy.

1. EEOC's exercise of control over its investigations is reviewable when it refuses to investigate charges based on the protected status of the charging parties.

To be sure, the EEOC often has appropriately asserted agency discretion to preclude judicial review of the handling of specific discrimination charges. *See*, *e.g.*, *Dini v. EEOC*, No. 22-16197, 2023 WL 1791879 (9th Cir. Jan. 26, 2023); *McCall v. Yang*, 179 F. Supp. 3d 92 (D.D.C. 2016). Without exception, these cases challenged the scope or sufficiency of an individual EEOC investigation, which courts consider to be within the discretion of the agency. *See Martin v. EEOC*, 19 F. Supp. 3d 291 (D.D.C. 2013). None of these cases, nor any that we have discovered, involved a decision by the EEOC to flatly abdicate its duty to investigate charges simply because of the protected status of the individual. EEO Leaders strongly endorses the argument advanced by FreeState in this case that such a categorical policy decision to flout the statutory and constitutional rights of a discrete category of individuals

protected by Title VII is not a lawful exercise of discretion and must be subject to judicial oversight.

2. Chair Lucas's decision to refuse categorically to process charges alleging harassment, retaliation, or discrimination in terms and conditions of employment filed by transgender individuals does not reflect the exercise of permissible discretion.

The EEOC has long relied on Priority Charge Handling Procedures ("PCHP") to expedite handling its huge charge inventory. Under these procedures, the EEOC classifies charges into three groups: "A" charges are those that fall within EEOC's enforcement plans and/or will probably lead to a cause finding; "B" charges are those that appear to have some merit but require additional evidence to determine whether additional investigation is likely to lead to a cause finding; and "C" charges are dismissed because the agency concludes that further investigation will likely not lead to a cause finding. 2 Fair Employment Practices § 12:25. The EEOC has provided illustrative examples of Category C charges: (1) EEOC lacks jurisdiction; (2) charge fails to state a claim; (3) charge is self-defeating; (4) there is no direct or circumstantial evidence presented despite charging party's being in a position to have such evidence; (5) allegations not credible; and (6) untimely charges. *Id.*

The EEOC has argued in this case that its decision to classify transgender charges as C Category charges is within its discretion as an application of its PCHP policy. It is critical to note that in previous assessments of charges under the PCHP,

the EEOC made an individualized determination based on the factual content of the charge whether it met the criteria for being dismissed as a "C" charge. Chair Lucas's policy categorically classifies the charges of a particular class of individuals as not meriting investigation, without regard to the factual content of the allegations if they involve claims other than hiring, firing, or failure to promote. Thus, the classification is not based on the content of the charge, as contemplated by the PCHP, but on the identity of the charging party. This scheme flouts the EEOC's statutory mandate, the substantive protections of Title VII, and the Equal Protection Clause. It is not an exercise of discretion, but a flagrant, and perverse, act of discrimination.

II. Chair Lucas's policy shift dictating the wholesale dismissal of transgender charges is reviewable under controlling precedent in this Circuit.

In *Casa De Maryland v. Department of Homeland Security*, 924 F.3d 684 (4th Cir. 2019), this Court held that the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals (DACA) policy was subject to judicial review. *Id.* at 701. Although the government argued that the rescission was a discretionary enforcement decision exempt from review, this Court recognized the rescission was an "expression of a broad or general enforcement policy based on the agency's legal interpretation" and thus subject to review. *Id*. (citing *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 811-12 (D.C. Cir. 1998). In *OSG*, the D.C. Circuit held that jurisdiction exists under the Administrative Procedure Act where

the challenged action is a general policy of refusing to enforce a provision of substantive law, and not a "single-shot non-enforcement decision." 132 F.3d at 811-12 (internal citation omitted). In *Casa De Maryland*, this Court reviewed the DACA policy rescission under the APA and concluded it was arbitrary and capricious in part because the agency provided no reasoned explanation for its decision and did not account for the reliance interests affected by its decision. 924 F.3d at 704-05. The logic of *Casa De Maryland* compels the conclusion that Chair Lucas's policy shift on processing of transgender charges is subject to judicial review, and that it will not likely withstand that review when the case is remanded to the district court.

A. The new policy on transgender charges reflects a profound change in the EEOC's enforcement of the law against sex discrimination.

1. History of EEOC's position and application of *Bostock*.

The EEOC first articulated its position on discrimination against transgender individuals in an *amicus* brief it filed in *Pacheco v. Freedom Buick GMS Truck*, No. 7:10-CV-116, 2011 WL 13234884 (W.D. Tex. 2010), supporting a transgender woman who had been fired because she had transitioned from male to female. 42 U.S.C. § 2000e-4(g) (EEOC authorized to represent the Commission as *amicus curiae*); *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501, 510-511 (D.C. Cir. 1973) (EEOC attorneys authorized to represent agency as *amicus*). Under the EEOC's internal rules, Commissioners must approve all *amicus* briefs, and they approved the filing of this brief in October 2011. *See* Resolution Concerning the Commission's

Authority to Commence or Intervene in Litigation (March 10, 2020) (memorializing past practice), *available at* www.eeoc.gov. In *Pacheco*, the EEOC advanced two primary arguments. *See* EEOC Brief, 2011 WL 5410751 (Oct. 17, 2011). First, the brief noted that under the reasoning of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), discrimination against a transgender individual because the individual does not conform to gender norms or stereotypes is discrimination "because of sex" under Title VII. Second, following the reasoning in *Schroer v Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), the brief stated that discrimination because an individual intends to change, is changing, or has changed his or her sex is likewise prohibited by the plain language of Title VII. While the district court denied the EEOC's motion to file its brief as moot, 2011 WL 13234884 at *1, the brief served as a preview of the reasoning the EEOC would subsequently flesh out in its decision in *Macy v. Department of Justice,* EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012), a federal sector case decided by the Commission in its adjudicative role.

In *Macy,* the EEOC held that when "an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim" in violation of Title VII. 2012 WL 1435995 at *7. The EEOC emphasized that this is so regardless of whether the employer discriminates "because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that

the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person." *Id*.

The EEOC also explained that proving sex stereotyping was only one evidentiary route to establishing sex discrimination, and that a transgender plaintiff could also prevail by proving that an employer "was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman." *Id*. at *10. This evidence does not depend on stereotyping and is akin to discriminating against someone who changes their religion. *Id*. at *11. The EEOC emphasized it was not creating a new class of protected individuals but merely holding that discrimination against one who is transgender is "by definition" discrimination because of sex. *Id.*

In 2015 the EEOC further defined the contours of prohibited discrimination against transgender individuals in its federal sector decision on the claim of Tamara Lusardi, who alleged her agency violated Title VII when "it restricted her from using the common female restroom, and a team leader []intentionally and repeatedly referred to her by male pronouns and made hostile remarks." *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *1 (Apr. 1, 2015).

The EEOC held that Lusardi had proved she was "subjected to disparate treatment on the basis of sex when she was denied equal access to the common

female restroom facilities" and that she had also established her agency's liability for subjecting her to a hostile work environment by preventing her from using the common female restroom facilities and allowing a team leader to intentionally refer to her by male names and pronouns and make other hostile remarks. *Id.* at *13. The EEOC held that "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment" because "Title VII prohibits discrimination whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort." *Id.* at *9 (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) ("it would be totally anomalous" for "preferences and prejudices of the customers to determine whether the sex discrimination was valid"); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052 (D. Ariz. 1999) (rejecting bona fide occupational qualification ("BFOQ") customer preference defense for refusing to hire male massage therapist).

2. The EEOC consistently applied its interpretation of the prohibition on sex discrimination after its decisions in *Macy* and *Lusardi.*

The EEOC authorized the filing of at least seven amicus briefs between 2014 and 2018 articulating its consistent position that Title VII prohibits discrimination against transgender individuals. It filed two such briefs in the Fifth Circuit: *Brandon v. The Sage Corp.*, 808 F.3d 266 (5th Cir. 2015), 2015 WL 1906285 at *10 (EEOC

Brief) (arguing that discriminating against an individual because of their transgender status is "inherently animated by gender stereotypes"); and *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019), 2018 WL 3878952 (EEOC Brief in Support of Neither Party) (arguing that discrimination based on transgender status is sex discrimination because the employer would not have taken the same action if the plaintiff had presented as the opposite sex; analogizing to religious discrimination; and relying on a stereotyping theory).

The EEOC filed other *amicus* briefs in federal district courts, including *Eure v. Sage Corp.*, 61 F. Supp. 3d 651 (W.D. Tex. 2014), 2018 WL 3878952 (EEOC Brief) (arguing that gender stereotyping evidence is not necessary if the plaintiff can show a negative outcome happened because of their transgender status); *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015), 2014 WL 8060914 (EEOC Brief) (making the point that refusal to hire a transgender woman because of her identity is sufficient to state a claim without any specific evidence of gender stereotyping); *Dawson v. H & H*, No. 4:14cv00583, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015), 2015 WL 10960800 (EEOC Brief) (arguing transgender discrimination is cognizable as sex discrimination under Title VII); *Jamal v. Saks & Co.*, 4:14cv02782 (S.D. Tex.; dismissed Mar. 10, 2015), 2015 WL 5723864 (EEOC Brief) (arguing transgender discrimination is cognizable as sex discrimination and that Jamal's charge satisfied the administrative prerequisites for a suit alleging

transgender discrimination); and *Robinson v. Dignity Health,* No. 16-cv-3035, 2016 WL 7102832 (N.D. Cal. Dec. 6, 2016) (granting stay), 2016 WL 11517056 (EEOC Brief) (arguing that employer's refusal to pay for treatment for gender dysphoria states a plausible claim of sex discrimination under Title VII).

The EEOC litigated several enforcement actions in transgender cases between 2014 and 2024, all of which were approved by Commission vote or under the General Counsel's delegated authority. Most notable was its litigation in Michigan and the Sixth Circuit against R.G. &. G.R. Harris Funeral Homes, Inc., one of three cases consolidated in the Supreme Court for decision in *Bostock*. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd*, *Bostock*, 590 U.S. at 683.

Aimee Stephens was a funeral director at Harris Funeral Homes who presented as male when she was hired and was fired after she informed her employer she would be living and working as a woman. The EEOC sued Harris Funeral Homes for sex discrimination. Agreeing with the EEOC on all points, the Sixth Circuit first held that the decision to fire Stephens because she was no longer going to "represent himself as a man" and "wanted to dress as a woman" falls "squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith [v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)] forbid." *Harris Funeral Homes*, 884 F.3d at 572. The court concluded that Harris engaged in improper sex stereotyping when it fired

Stephens for wishing to appear or behave in a manner that contradicted its perception of how she should appear or behave based on her sex. *Id*. at 574.

The court also held that discrimination on the basis of transgender and transitioning status violates the plain language of Title VII. *Id*. at 574-75. The court reasoned that it is "analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Id*. at 575. The court also agreed the analysis could be framed in terms of an analogy to discrimination against someone who changed their religion, noting that sex motivates the employer's decision "if an employee's attempt or desire to change his or her sex leads to an adverse employment decision." *Id*. at 576. Thus, the court explicitly held that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." *Id*. at 577.[4]

[4] The EEOC also pursued claims on behalf of transgender individuals in *EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-cv-02421-T-35AEP (M.D. Fla. April 9, 2015) (settled April 2015), *Broussard v. First Tower Loan, LLC*, 150 F. Supp. 3d 709 (E.D. La. 2015) (intervenor), *EEOC v. Rent-A-Center East, Inc.*, 264 F. Supp. 3d 952, 954 (C.D. Ill. 2017), *EEOC v. Deluxe Fin. Servs., Inc.*, No. 15-cv-2646 (D. Minn. Jan 20, 2016)(consent decree entered), *EEOC v. Bojangles,* No. 5:16-cv-654, 2017 WL 6988550 (E.D. N.C. Dec. 04, 2017) (jury verdict and consent decree issued in hostile environment and termination case involving transgender woman), *and EEOC v. T.C. Wheelers*, No. 1:23cv00286, 2024 WL 894480 (W.D. N.Y. 2024) (jury verdict for EEOC where pizza restaurant harassed an employee

The Supreme Court echoed and endorsed the EEOC's and Sixth Circuit's reasoning in its decision in *Bostock*, which held unequivocally that discrimination on the basis of transgender status constitutes prohibited discrimination on the basis of sex. 590 U.S. at 655.

In 2024, buttressed by the Supreme Court's favorable ruling in *Bostock*, the EEOC filed seven cases challenging discrimination and harassment against transgender and non-binary individuals: *EEOC v. Boxwood Hotels, LLC*, No. 1:24-cv-00902 (W.D.N.Y. Sept. 25, 2024) (alleging hostile work environment created by slurs, anti-transgender statements, and misgendering); *EEOC v. Harmony Hospitality, LLC*, No. 1:24-cv-00357 (M.D. Ala. June 13, 2024) (manager ordered employee to work night shifts because he needed to be hidden because his appearance did not always conform to male gender stereotypes; he was fired when the manager learned he identifies as a non-binary male); *EEOC v. Starboard Group, Inc.*, No. 3:24-cv-02260 (S.D. Ill. Oct. 1, 2024) (alleging former transgender employees of a Wendy's franchise were harassed by misgendering, graphic sexual comments, invasive questions, and denial of access to the bathroom consistent with their gender identity); *EEOC v. Sis-Bro, Inc.*, No. 3:24-cv-00968 (S.D. Ill. Mar. 28,

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because of his gender identity by asking questions about his genitalia, telling him he was not a real guy, and equating his being transgender to pedophilia).

2025) (alleging a transgender woman was repeatedly criticized for obtaining gender-affirming care, misgendered, and treated less favorably than colleagues, and harassed by a coworker who exposed his genitals to her, touched her breasts, and made explicit sexual comments to her); *EEOC v. Lush Handmade Cosmetics, LLC*, No. 5:24-cv-06859 (N.D. Cal. Sept. 30, 2024) (alleging years-long pattern of manager making crude and salacious comments related to employees' sex, sexual orientation, and gender identity); *EEOC v. Reggio's Pizza, Inc.*, No. 1:24-cv-08910 (N.D. Ill. Feb. 14, 2025) (alleging a Black transgender woman was discharged after complaining about sex-based and race-based harassment); *EEOC v. Brik Enterprises, Inc.*, No. 2:24-cv-12817 (E.D. Mich. Oct. 25, 2024) (alleging that a fast food company retaliated against a transgender man for complaining about harassment including misgendering and anti-transgender comments, and retaliated against several coworkers who defended the transgender employee).[5]

The EEOC used other enforcement tools to reiterate its consistent view that Title VII prohibits transgender discrimination. The EEOC's Strategic Enforcement Plan for Fiscal Years 2017-2021 identified discrimination based on sexual orientation and gender identity as an evolving area of law that deserved particular

[5] The Commission dismissed these seven enforcement actions in early 2025.

attention.[6] The EEOC further reinforced this position in its Strategic Enforcement Plan for Fiscal Years 2024-2028, which identifies "preventing and remedying discrimination against LGBTQI+ individuals" as a "key priority for the EEOC.[7] Both Enforcement Plans were subject to public comment and a Commission vote, and the 2024-2028 plan remained in effect at the time Chair Lucas adopted the discriminatory policy of declining to serve transgender workers who allege Title VII claims of discrimination in terms and conditions of employment, harassment, and retaliation.

On April 29, 2024, following a notice-and-comment period, the EEOC approved by a majority vote and published its *Enforcement Guidance on Harassment in the Workplace*.[8] The Guidance applied Title VII's prohibition on sex-based harassment to LGBTQ workers consistent with federal-court precedents across the country, in particular the Supreme Court's decision in *Bostock.*

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[6] *Available at*, https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021

[7] *Available at https:*//www.eeoc.gov/sites/default/files/2024-03/23-161_EEOC_SEP_030124_508.pd*f*

[8] *Available at* https://perma.cc/8CEA-HZK8; The Commission subsequently rescinded this Guidance on January 22, 2026. https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance

B. Chair Lucas's new position is legally and logically indefensible under *Bostock* and cases applying its analysis to discrimination claims beyond hiring and firing.

Chair Lucas has asserted that *Bostock* supports claims by transgender individuals if they challenge failure to hire, termination, or failure to promote, but not if they allege harassment. For example, she issued a press release on January 28, 2025, stating that "[s]ex is binary (male and female) and immutable. It is not harassment to acknowledge these truths-or to use language like pronouns that flow from these realities, even repeatedly."[9] Accordingly, Chair Lucas changed EEOC policy on processing of transgender charges, limiting acceptable charges to those alleging discrimination in hiring, promotion, or firing, but the legal basis of the new policy cannot be squared with controlling law.

Under Title VII, it is unlawful for an employer, including the federal government, to subject an employee to a hostile work environment based on sex. *See* 42 U.S.C. § 2000e-16(a); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). In 2020, the Supreme Court recognized that discrimination based on transgender status or sexual orientation is discrimination based on sex, thereby confirming Title VII's protection of LGBTQ+ employees. *Bostock v. Clayton Cty*, 590 U.S. 644,

[9] Press Release, removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace, U.S. Equal Employment Opportunity commission (Jan. 28, 2025), https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace

660 (2020). Since *Bostock*, lower courts have consistently held that Title VII prohibits harassment based on transgender status or sexual orientation. *See, e.g.*, *Crowe v. Averill*, No. 25-1400, 2026 WL 1298100, at *3 (9th Cir. May 12, 2026); *Sharpe-Miller v. Walmart, Inc.*, 181 F.4th 1037, 1055 (10th Cir 2026); *Copeland v. Georgia Dep't of Corr.*, 97 F.4th 766, 775 (11th Cir. 2024); *Eller v. Prince George's Cty. Pub. Schs.*, 580 F. Supp. 3d 154, 172 (D. Md. 2022); *Doe v. City of Detroit, Michigan*, 3 F.4th 294, 300 n.1 (6th Cir. 2021).

Courts have also recognized that *Bostock's* interpretation of the meaning of discrimination because of sex extends to a transgender individual's claim of discrimination in terms and conditions of employment, such as the revocation of work assignments and denial of a tenure transfer. *Patterson v. Kent State Univ.*, 155 F.4th 635, 644 (6th Cir. 2025). Similarly, although there are very few cases at this point, courts have applied the *Bostock* coverage definition of sex discrimination to retaliation claims by transgender individuals, holding that opposition to transgender discrimination is protected activity under Title VII's anti-retaliation provision. *See*, *e.g.*, *Parker v. Strawser Constr., Inc.*, 307 F. supp. 3d 744 (S.D. Ohio 2018) (plaintiff complained about harassment based on transgender status); *Brown v. Chicago Transit Auth.,* 179 F.4th 577, 589 (7th Cir. 2026) (holding advocacy for gender-appropriate bathroom access and campaign for insurance coverage of gender-

affirming surgery are protected activities under Title VII, but rejecting retaliation claim due to inadequate proof of causation).

In short, Chair Lucas's position not only reflects a radical overturning of fifteen years of EEOC's interpretation of the scope of Title VII's prohibition of sex discrimination, but it also reflects a departure from settled, controlling judicial precedent.

C. Chair Lucas's new policy constitutes an indefensible violation of the Equal Protection Clause.

Sex-based classifications are subject to intermediate scrutiny under the Equal Protection Clause. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). This Court has squarely held that discrimination against transgender individuals is subject to intermediate scrutiny both because challenged policies rest on sex-based classifications and because transgender people constitute at least a quasi-suspect class. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (Title IX and Equal Protection challenges to school bathroom policy); *accord Schlacter v. United States*, 804 F. Supp. 3d 592 (D. Md. 2025) (challenge to passport policy requiring M or F sex markers that match "biological sex at birth").

Because Chair Lucas's new policy targets transgender individuals on a basis protected by the Constitution it is not insulated from review by the doctrine of agency discretion.

CONCLUSION

For all these reasons, Chair Lucas's decision to deny the advantages of the EEOC's charge filing processes to transgender individuals is not a matter of agency discretion, and it is therefore subject to judicial review and remediation. *Amicus* respectfully urges the Court to reverse the decision of the district court and remand for further proceedings.

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal rule of Appellate Procedure 32(a)(7)(B) in that, according to the word-count function of the word-processing system used to generate the brief (Microsoft Word), the brief contains 4746 words, exclusive of the portions exempted by Rule 32(f).

/s/ Heidi R. Burakiewicz

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CERTIFICATE OF SERVICE

I certify that on this date, October 30, 2026, the foregoing *Amicus Curiae* Brief has been served upon counsel of record via the court's CM/ECF system.

/s/ Heidi R. Burakiewicz

Heidi R. Burakiewicz

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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