IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

STATE OF TENNESSEE *et al.*, Plaintiffs, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *et al.*, Defendants.	Civil Action No. 3:24-cv-00224 Judge Charles E. Atchley, Jr. Magistrate Judge Debra C. Poplin

DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Within hours of taking the oath of office, President Donald J. Trump issued an executive order, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025). Executive Order 14,168 directs agencies to adopt essentially the same legal interpretation the Plaintiff States advance in this litigation, as the States themselves readily acknowledge. Mem. in Supp. of Pls.' Mot. for Summ. J., Vacatur & Permanent Inj. ("Br.") at 1, ECF No. 103. And it directs the Equal Employment Opportunity Commission ("EEOC") to rescind the very document the States challenge—the *Enforcement Guidance on Harassment in the Workplace* ("Guidance")—or at least the portions of that document to which the States object.

The only question that remains in this case is whether the States are entitled to judicial relief before the EEOC regains a quorum to reconsider the Guidance. They are not. This Court lacks jurisdiction to consider this case for the same reason it always has: the States lack Article III standing to bring this pre-enforcement challenge. At summary judgment, plaintiffs must support their claim to standing as to each defendant with evidence. Here, however, the States have not demonstrated that they suffer a sufficiently concrete and imminent injury that is traceable to the EEOC or redressable by a proper order of this Court. First, the States have not met their burden to show that any of them have laws that conflict with the Guidance. Second, the States fail to demonstrate that they will imminently incur any administrative costs to comply with the Guidance or face an enforcement action due to the Guidance. The States offer even less with respect to the Department of Justice ("DOJ") Defendants. DOJ is the only federal entity with authority to bring Title VII litigation against a State or local governmental entity. Yet, the Guidance was not a DOJ document. And the States do not establish that any DOJ defendant has otherwise adopted the Guidance.

Even assuming the Court has jurisdiction, the Guidance is not reviewable. The Administrative Procedure Act authorizes judicial review only of final agency action. The Guidance at issue here is no such final action. No legal consequences flow from the Guidance. It does not purport to establish of its own force any rule of law that regulated entities must follow. Rather, it sets forth the prior

administration's (now renounced) position on legal requirements flowing from other legal sources: Title VII and judicial precedent interpreting that statute. Because the Guidance binds neither the EEOC nor regulated parties, it is unreviewable.

In all events, the States are not entitled to the broad relief they seek. They cannot explain why vacating the challenged portions of the Guidance and declaratory relief would be insufficient to remedy any proven injury. And the federal government's changed position on the underlying interpretative question the States seek to present demonstrates that the strong medicine of injunctive relief is unnecessary.

For these reasons, the Court should deny the States' motion for summary judgment and grant Defendants' cross-motion.

BACKGROUND

I. STATUTORY BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The EEOC is tasked with implementing this statutory prohibition. If the EEOC receives a charge claiming that an individual is aggrieved by an unlawful employment practice, the EEOC investigates that charge. *Id.* § 2000e-5(b). After completing the investigation, the EEOC decides whether there is reasonable cause to believe that the charge is true.

If the EEOC does not find reasonable cause, it must dismiss the charge and issue a right-to-sue notice to the complaining employee or applicant. 42 U.S.C. § 2000e-5(b)–(f)(1). If the EEOC finds that there *is* reasonable cause to believe that the charge is true, then the agency must attempt to resolve the charge through informal conciliation. *Id.* § 2000e-5(b). If conciliation fails with respect to a charge involving a State employer, the EEOC must refer the matter to DOJ, which conducts an independent review and then decides whether to bring a *de novo* action in federal court or instead issue a right-to-sue notice. *Id.* § 2000e-5(f)(1).

II. THE 2024 GUIDANCE

The Guidance is a 189-page document that "addresses how harassment based on race, color, religion, sex, national origin, age, disability, or genetic information is defined under EEOC-enforced statutes and the analysis for determining whether employer liability is established." Guidance at 2, Compl. For Declaratory & Injunctive Relief, Ex. B, Enforcement Guidance on Harassment in the Workplace, ECF No. 1-2. It was designed to "communicate[ ] the Commission's position on important legal issues," but is not a "survey of all legal principles that might be appropriate in a particular case." *Id.* at 3, 9. Instead, it focuses on "the three components of a harassment claim" under EEOC-enforced statutes: (1) whether the harassing conduct was based on an individual's legally protected characteristic; (2) whether the harassment resulted in discrimination with respect to a term, condition, or privilege of employment; and (3) whether there is a basis for holding the employer liable for the conduct. *Id.* at 9.

The Guidance "presents the overarching legal standards that are applied to particular circumstances in evaluating whether the [Equal Employment Opportunity] laws have been violated and the employer is liable." *Id.* at 96. Its contents "do not have the force and effect of law, are not meant to bind the public in any way, and do not obviate the need for the EEOC and its staff to consider the facts of each case and applicable legal principles when exercising their enforcement discretion." *Id.* at 9. The Guidance does not "prejudge the outcome of a specific set of facts presented in a charge filed with the EEOC." *Id.* The facts of any particular charge "may implicate other rights or requirements" under the U.S. Constitution, the Religious Freedom Restoration Act, or any religious defenses to discrimination claims under Title VII itself. *Id.* (citing 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2)). The EEOC considers those defenses "on a case-by-case basis." *Id.*

The States' challenge here is limited to a portion of one subsection of the Guidance that states that harassment can be unlawful if it is based on an individual's "gender identity." *See* Br. at 8 (citing Guidance at 17). That discussion is presented in a section of the Guidance that describes "conduct that can, but does not necessarily always, constitute or contribute to unlawful harassment." Guidance at 10. "[W]hether specific harassing conduct violates the law," the Guidance explains, "must be

assessed on a case-by-case basis" to determine if all elements of a harassment claim are satisfied. *Id.*

Substantively, the challenged portion of the Guidance cites the Supreme Court's decision in *Bostock v. Clayton Co.*, 590 U.S. 644 (2020), and states that "[s]ex-based discrimination under Title VII includes employment discrimination based on sexual orientation or gender identity." Guidance at 18. The Guidance goes on to state that, while *Bostock* was itself limited to "allegations of discriminatory discharge," other "courts have readily found post-*Bostock* that claims of harassment based on one's sexual orientation or gender identity are cognizable under Title VII." *Id.* at 111 (citing cases). It then provides examples of "harassing conduct" that it asserts courts have found may, in certain circumstances, contribute to unlawful harassment, including among other examples "harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex," "repeated and intentional . . . misgendering," and "the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." *Id.* at 18 (cleaned up).

Consistent with its internal procedures for the issuance of significant guidance documents, the EEOC adopted the Guidance after notice and comment. *Id.* at 91–92; *see* 29 C.F.R. § 1695.6; Proposed Enforcement Guidance on Harassment in the Workplace, 88 Fed. Reg. 67,750 (Oct. 2, 2023). As did the final Guidance, that notice explained that the "contents of the final guidance document will not have the force and effect of law and are not meant to bind the public in any way." 88 Fed. Reg. at 67,751.

III. EXECUTIVE ORDER 14,168

On January 20, 2025, President Donald J. Trump issued an executive order, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025). The position stated in the President's executive order is the position of the United States, notwithstanding any prior position taken by the Defendants in this case. Among other items, Executive Order 14,168 directs the EEOC to rescind the Guidance document the States here challenge or such portions of it that are inconsistent

with the interpretation expressed in the executive order. *See* Exec. Order 14,168 § 7(c)(iv).

On January 28, 2025, President Trump removed two EEOC Commissioners; two other Commissioners remain in office. *See* EEOC, *The State of the EEOC: Frequently Asked Questions*, https://perma.cc/P6Y9-SZBC. The Commission therefore lacks a quorum to rescind the Guidance. *Id.* EEOC Acting Chair Andrea Lucas has indicated that she intends for the Commission to reconsider the portions of the Guidance at issue in this case once a quorum is established. *See* Press Release, EEOC, *Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace* (Jan. 28, 2025), https://perma.cc/EK23-Y6R9 (quoting Acting Chair Lucas's statement that the "EEOC must rescind the guidance and protect the sex-based privacy and safety needs of women").

LEGAL STANDARDS

To obtain summary judgment, the States must show "that there is no genuine dispute as to any material fact and" they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Application of this standard depends on which party bears the burden of proof. *Trs. of Iron Workers Defined Contribution Pension Fund v. Next Century Rebar, LLC*, 115 F.4th 480, 489 (6th Cir. 2024). States bear the burden to establish that this Court has subject-matter jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). They must, therefore, "produce evidence that would conclusively support [their] right to a judgment." *Iron Workers*, 115 F.4th at 489 (citation omitted). This includes evidence supporting their assertion of Article III standing. At the summary judgment stage, plaintiffs "can no longer rest on . . . mere allegations" of injury, "but must set forth by affidavit or other evidence specific facts" supporting their claims of injury. *Lujan*, 504 U.S. at 561 (citation omitted).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THE STATES' CLAIMS

Article III standing is "a bedrock constitutional requirement," "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated." *United States v. Texas*, 599 U.S. 670, 675 (2023) (citation omitted). "For a plaintiff to get in the federal courthouse door and obtain a judicial determination of what the governing law is, the plaintiff . . . must have a 'personal stake' in the dispute." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367,

379 (2024) (citation omitted). This foundational requirement applies even when a plaintiff's "legal objection is accompanied by a strong moral, ideological, or policy objection." *Id.* at 381. "[T]he standing requirement [thus] implements 'the Framers' concept of the proper—and properly limited—role of the courts in a democratic society,'" whereby "courts do not opine on legal issues in response to citizens who might 'roam the country in search of governmental wrongdoing.'" *Id.* at 379–80 (citations omitted). And a plaintiff—even a State plaintiff—"does not have standing to challenge a government regulation simply because the plaintiff believes that the [federal] government is acting illegally." *Id.* at 381; *see Texas*, 599 U.S. at 675.

To establish standing, a plaintiff must prove that (1) it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical," (2) the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (cleaned up). "And standing is not dispensed in gross; rather plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek[.]" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

A. The States Fail to Meet Their Burden To Establish Any Redressable Injury Traceable to the Guidance

Here, the States lack standing because they cannot establish that the Guidance causes them any legally cognizable injury. That is because the Guidance reflects the EEOC's then-extant interpretation of Title VII and judicial opinions interpreting that statute; it does not itself purport to be a source of law. *See Arizona v. Biden*, 40 F.4th 375, 383 (6th Cir. 2022). The Guidance does not prejudge any particular case or conclude that any employment practice related to dress codes, pronouns, or sex-separated bathrooms is *per se* unlawful. *See* Guidance at 10 (explaining that "[t]he terms 'harassment' and 'harassing conduct' refer to conduct that can, but does not necessarily always, constitute or contribute to unlawful harassment"); *contra* Br. at 8. Instead, the Guidance says that *some courts* have considered applications of those kinds of practices and concluded that they may, in some

circumstances, contribute to a viable hostile work environment claim. *See* Guidance at 111 (describing what certain "courts have . . . found post-*Bostock*"). Because the Guidance merely explains at a high level of generality how the EEOC viewed Title VII law at the time the Guidance was issued, it is not itself a source of legal requirements that injures the Plaintiff States. *See Arizona*, 40 F.4th at 383.

The States counter that the Court accepts "as valid the merits" of a plaintiff's claim for "standing purposes." Br. at 13–14 (quoting *Kentucky v. Yellen*, 54 F.4th 325, 349 n.16 (6th Cir. 2022)). That is true, so far as it goes. But Defendants' standing argument is not dependent on the conclusion that the Guidance is lawful or a correct statement of the law. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). Indeed, the position of the United States is that the challenged portions of the Guidance should be rescinded when the EEOC is able to do so. Even if the EEOC was wrong about what Title VII required, the States still lack standing because any such error has caused them no harm. A plaintiff "may not sue based only on an asserted right to have the Government act in accordance with law." *See All. for Hippocratic Med.*, 602 U.S. at 381 (citation omitted). Here, the States' theory of standing hinges on just such a generalized grievance, and this Court is not required to accept the States' "view" that "the Guidance prohibits" EEOC staff from exercising their enforcement discretion in ways that do not align with the interpretation expressed therein. *Arizona*, 40 F.4th at 385.

The States offer essentially three theories of injury, but none is sufficient. First, they make the perfunctory argument that the Guidance impinges on their sovereign interest to enforce their State laws. *See* Br. at 12. Their summary judgment brief does not cite any such laws. Nor does it demonstrate how the Guidance interferes with the States' sovereign interests in seeing any laws enforced. Instead, the States cite only this Court's preliminary injunction decision in *Tennessee v. Department of Education* and the Sixth Circuit's affirmance with respect to Department of Education guidance documents. Br. at 12 (citing *Tennessee v. Dep't of Educ.*, 615 F. Supp. 3d 807, 823 (E.D. Tenn. 2022) ("*Tennessee I*") and *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 591–95 (6th Cir. 2024) ("*Tennessee II*")). Those decisions addressed distinct agency documents, not at issue here. The "plausible conflict" this Court found sufficient to show a substantial likelihood of standing for purposes of a preliminary injunction in the Department of Education case does not automatically apply to the Guidance. *See*

Tennessee I, 615 F. Supp. 3d at 822. By failing to identify in their summary judgment brief the laws they assert conflict with the Guidance, the States at a minimum fail to meet their "burden to establish standing by setting forth specific facts." *Murthy v. Missouri*, 603 U.S. 43, 67 n.7 (2024) (citation omitted). Even if those arguments appear elsewhere, "judges are not like pigs, hunting for truffles buried in the record." *Id.* (cleaned up). The States, therefore, do not meet their burden of showing that the State laws conflict with the Guidance.

Second, the States fare no better with their theory that they are injured by the "costs of complying" with the Guidance. Br. at 12. Plaintiffs do not meet their burden of showing that any State has or will imminently sustain any administrative costs to comply with the EEOC's former non-binding interpretation of Title VII. In fact, the States' declarants at the preliminary injunction stage expressly stated that in Virginia, Tennessee, Alaska, Georgia, Mississippi, Nebraska, Ohio, and South Dakota, the State employers follow a "case-by-case approach" when a transgender employee has concerns about which bathroom to use or the use of proper pronouns and, when these circumstances arise, the State employers "will work with all affected employees to achieve a solution." *See* ECF No. 33-1 at 3 (Tennessee); *see* ECF No. 33-2 at 3 (Alaska); ECF No. 33-4 at 3 (Georgia); ECF No. 33-6 at 3 (Mississippi); ECF No. 33-7 at 3 (Nebraska); ECF No. 33-8 at 2 (Ohio); ECF No. 33-9 at 3 (South Dakota); ECF No. 33-10 at 3 (Virginia). Plaintiffs do not acknowledge these State policies in their brief, and do not purport to show how this approach is inconsistent with the interpretation of harassment laws expressed in the Guidance such that compliance would require a monetary cost.

Compliance costs, moreover, are a cognizable injury-in-fact only when the costs are necessary to avoid a credible threat of enforcement. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending."). Here, the States have not established any threat of government enforcement against them that is "actual or imminent." *Id.* (citation omitted). The States' theory of injury ignores the many necessary steps between issuance of the EEOC's Guidance and any initiation of an actual enforcement proceeding under Title VII by DOJ. The employer must first engage in conduct that is

impermissible under the EEOC's interpretation of Title VII. A victim of discrimination must then file a charge with the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1). The EEOC must then investigate the charge. *See id.* If the EEOC finds reasonable cause to believe that discrimination has occurred, it must "endeavor to eliminate any such alleged . . . employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b). And if that fails, the EEOC must refer the matter to DOJ. *Id.* § 2000e-5(f)(1). DOJ must then decide whether to bring an action or issue a right-to-sue notice to the private individual. *Id.* Given this multi-step process, the question whether any particular set of facts will ultimately be deemed to violate Title VII is a deeply fact-intensive inquiry that is difficult to assess *ex ante*. *See Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 81 (1st Cir. 2001) (determining whether a hostile work environment exists "necessarily entail[s] a fact-specific assessment of all the attendant circumstances."). This all undercuts the States' fear that they face a threat of enforcement. *See Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 850–51 (6th Cir. 2024) (explaining that the unclear application of a law to "fluid and future facts" undermines the credibility of feared enforcement (citation omitted)).

The EEOC's limited enforcement authority with respect to the States also distinguishes this case from the Sixth Circuit's decision in *Tennessee II*. The EEOC lacks the authority "to suspend or terminate federal" funding or otherwise unilaterally impose penalties "if it doesn't achieve voluntary compliance" with its views of the law. *Tennessee II*, 104 F.4th at 589. Therefore, the States have not met their burden of showing that any harm from the Guidance is "certainly impending." *Id.* at 590 n.9 (quoting *Clapper*, 568 U.S. at 410).

The States respond that "a single 'member of the Commission'" may "initiate a charge." Br. at 14 (quoting 42 U.S.C. § 2000e-5(b)). They explain that one commissioner who voted in favor of the Guidance and "signed on to a statement opposing" several of President Trump's executive orders remains on the Commission. *Id.*; *see* Br. at 11 (quoting Jocelyn Samuels (@JSamuelsEEOC), X (Jan. 21, 2025, 4:33 PM), https://perma.cc/E7WT-HUCD).[1] The cited statement, however, does not refer

[1] The social media account the States cite appears to belong to former EEOC Commissioner

to the Guidance, name any Plaintiff State, or rely on any of the workplace practices the States say they will not adopt. An "entity's assertion that it intends to enforce its laws in the abstract—and not against the specific conduct that the plaintiff plans to undertake—does not meaningfully increase the risk of enforcement." *Christian Healthcare Ctrs.*, 117 F.4th at 850. So the cited statement does little to advance the States' argument that they face any credible enforcement threat.[2]

In any event, the States do not attempt to quantify or clearly explain their vaguely asserted compliance costs. The States do not contend that their existing human resources staff that reviews and develops policies to ensure that they are consistent with federal nondiscrimination laws are unable to do so with respect to the Guidance in a manner that is consistent with their normal duties. Significantly, the Guidance summarizes the standards for employer liability applicable to claims of harassment on a variety of bases, not just gender identity. *See generally* Guidance at 9–26. The States do not attempt to quantify or distinguish which compliance costs, if any, would be attributable to the narrow part of the Guidance they challenge and those costs attributable to unchallenged portions. Nor do the States contend that they must hire additional staff to review their employment policies or will otherwise suffer a net increase in tangible, monetary costs specifically as a result of the challenged portion of the Guidance. In other standing cases, "entities have identified their precise harms from the defendant's conduct down to the penny." *Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 906 (6th Cir. 2024). Here, however, the States do not provide evidence to support that they have suffered or will suffer even a dollar of monetary harm. Absent a net increase in costs or expenditures, the States cannot rely on "compliance costs" in the abstract as a concrete injury-in-fact. *Cf. Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 237 (5th Cir. 2024) (relying on the need to "hire additional

---

Jocelyn Samuels, who no longer holds office. *See* EEOC, *Commissioners of the EEOC*, https://www.eeoc.gov/history/commissioners-eeoc (listing Jocelyn Samuels's tenure as from 2020-2025). EEOC Commissioner Kalpana Kotagal, who is listed as a co-author of the cited statement, remains in office. *Id.*

[2] To be clear, Defendants do not contend that the States' claim against the EEOC as to the Guidance is moot. Whatever injurious effect the Guidance inflicted on the States remains until it is rescinded. The Defendants instead argue that the Guidance *never* caused any injury because it is not a source of legal requirements that the States must comply with and is non-binding.

compliance staff following the effective date of the Rule"), *cert. granted in part*, 145 S. Ct. 1039 (2025).

Third, the States argue they are "the object of" the "regulatory action" that they challenge. Br. at 12 (citing *Tennessee v. EEOC*, 129 F.4th 452, 457–58 (8th Cir. 2025)). But the Eighth Circuit decision they cite found standing because the plaintiffs were "injured by the imposition of new regulatory obligations" embodied in a legislative rule implementing the Pregnant Workers Fairness Act. *Tennessee v. EEOC*, 129 F.4th at 458. The Guidance, in contrast, is not a "regulatory action" that "compels" the States to do anything or otherwise imposes "new regulatory obligations." *Id.* at 457–58. Any legal requirements addressed in the Guidance flow, if at all, from Title VII and the judicial opinions cited in the Guidance, not the summary of those legal sources contained in the Guidance. The States' claim here is much more like that considered in *School of the Ozarks*, which the Eighth Circuit distinguished in *Tennessee v. EEOC*, 129 F.4th at 458. Like the internal memorandum at issue in *School of the Ozarks*, the Guidance is not a regulation and does not injure the States. *See Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 999–1001 (8th Cir. 2022).[3]

B. The States Fail to Establish Standing as to the DOJ Defendants

In addition to the defects described above, the States nowhere establish that they have standing with respect to the DOJ defendants. The States "'must demonstrate standing for each claim that they press against each defendant.'" *Murthy*, 603 U.S. at 61 (quoting *TransUnion LLC*, 594 U.S. at 431). Yet, they nowhere provide evidence to support that DOJ ever adopted any challenged interpretation of Title VII contained within the Guidance. Nor do they otherwise establish that they face any credible threat of enforcement by DOJ. Indeed, the references the States make to DOJ's enforcement position all align with the States' view of Title VII law. *See* Br. at 10 (citing Mem. of Acting Associate Attorney General to DOJ Civil Rights Division (Feb. 12, 2025), https://perma.cc/B9D3-UJY7). As the States admit, DOJ now disclaims the very interpretations to which the States object. *See id.*; *cf. McKay v.*

[3] In *Tennessee II*, the Sixth Circuit distinguished the agency memorandum at issue in *Ozarks* from a document that told regulated entities that they must investigate forms of sex discrimination that they previously were under no obligation to pursue at the risk of their federal educational funding. 104 F.4th at 590 n.10. That distinction is without a difference here, where the Guidance merely purports to explain case law applying Title VII rather than impose new rules of employer conduct.

Federspiel, 823 F.3d 862, 869–70 (6th Cir. 2016) (explaining that disavowal of enforcement cuts against standing based on threat of enforcement). The States therefore cannot establish that they face any imminent harm traceable to DOJ. Even assuming they have standing to sue the EEOC, they may not obtain relief against the DOJ defendants.

II. THE GUIDANCE IS NOT REVIEWABLE FINAL AGENCY ACTION

The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. To be final, the action must (1) represent "the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation omitted). The States' challenge here fails the second part of this test because the Guidance does not "'impose liability' on a regulated party, create legal rights, or 'mandate, bind, or limit other government actors' in the future." *Arizona*, 40 F.4th at 387 (citation omitted).

"Start with the revealing language of" the EEOC's action. *Id.* Much like the enforcement guidelines in *Arizona*, the portions of the Guidance at issue here "do not evoke binding legal effect." *Id.* "Consistent with its label," the Guidance expressly states that it does not have any independent legal effect. *Id.* It does "not have the force and effect of law," is not "meant to bind the public in any way" and does not limit staff "enforcement discretion," which must be applied "on a case-by-case basis." Guidance at 9. It specifically states that "[n]othing in this document should be understood to prejudge the outcome of a specific set of facts presented in a charge filed with the EEOC." *Id.*; *see Arizona*, 40 F.4th at 388 (finding agency guidance that "leaves the exercise of prosecutorial discretion to [agency staff] judgment" was likely unreviewable (citation omitted)). Regardless of the Guidance, EEOC enforcement staff must make a case-specific assessment to determine "whether specific harassing conduct violates the law." Guidance at 10.

The Guidance reflects a "legal analysis of standards for harassment" under the statutes the agency enforces. *Id.* at 8. If the EEOC were to investigate a charge or the Department of Justice were to bring an enforcement action, they would be doing so for alleged violations of Title VII directly. In such an action, the Guidance "has force only to the extent the agency can persuade a court to the

same conclusion." *AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001); *see EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 500–01 (6th Cir. 2006) ("[EEOC] Enforcement Guidance is entitled to respect only to the extent of its persuasive power."). In other words, the Guidance "created no new legal obligations beyond those the [statute] already imposed." *Rhea Lana, Inc. v. Dep't of Lab.*, 824 F.3d 1023, 1028 (D.C. Cir. 2016). "These are telltale signs all of a nonbinding policy statement, not of reviewable agency action." *Arizona*, 40 F.4th at 388.

None of the States' conclusory arguments to the contrary establish that the Guidance has any legal effect. First, they argue that the Guidance "purport[s] to speak authoritatively on specific conduct that constitutes discrimination." Br. at 15 (citation omitted). In fact, however, the challenged portions of the Guidance provide examples of the types of conduct that "can, *but does not necessarily always*, constitute or contribute to unlawful harassment, including a hostile work environment." Guidance at 10 (emphasis added). As the Guidance explains, "[n]ot all harassing conduct violates the law, even if it is because of a legally protected characteristic." *Id.* The challenged portions of the Guidance therefore do not make binding determinations about whether specific conduct is unlawful under Title VII because "whether specific harassing conduct violates the law must be assessed on a case-by-case basis." *Id.* (noting the section of the Guidance that explains whether challenged examples of "harassing conduct" are based on sex "does not address whether such conduct reaches the point of creating a hostile work environment"). Regardless, an agency's "interpretative rules that do not establish a binding norm are not subject to judicial review under the APA" because they are not "finally determinative of the issues or rights to which [they are] addressed." *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (citations omitted).

For this reason, the Guidance differs from the EEOC Technical Assistance Document this Court addressed in *Tennessee I*. The Court concluded that document was final agency action because it took "firm stances regarding what specific employer conduct constitutes impermissible sex discrimination under Title VII." *Tennessee I*, 615 F. Supp. 3d at 832. The Guidance, however, does not take a firm position that requiring compliance with sex-distinct dress codes, misgendering, or denying access to bathrooms consistent with an individual's gender identity necessarily constitutes

impermissible sex discrimination. Rather, it says that whether those types of conduct contribute to unlawful harassment depends on the circumstances. *See* Guidance at 10, 18. That assertion is materially distinct from the more mandatory language in the Technical Assistance Document this Court previously considered. *See Tennessee I*, 615 F. Supp. 3d at 833 (describing document as "explain[ing] that employers' failure to" allow "individuals to use the bathrooms, locker rooms, and showers consistent with their gender identity . . . 'would constitute sex discrimination' under Title VII.").

Second, the States note that the Guidance "consolidates and replaces a bevy of EEOC's prior enforcement guidance." Br. at 16. But the "same would be true for any nonbinding policy statement" or interpretative rule that "brings an end to" former guidance. *Arizona*, 40 F.4th at 388. The fact that one agency document replaces another cannot on its own determine whether legal consequences flow from the later document, and the States make no claim that the prior agency materials the Guidance replaced were themselves final agency actions under the APA.

Third, the States argue that the Guidance serves as "a resource for" agencies that investigate and courts that decide harassment issues. Br. at 16. But the fact that the Guidance might be used as a resource for those seeking to understand harassment claims does not make it any likelier that it serves to "impose liability, determine legal rights or obligations, or mandate, bind, or limit other government actors." *Parsons v. U.S. Dep't of Just.*, 878 F.3d 162, 169 (6th Cir. 2017). A legal hornbook or Restatement of the Law is equally designed to be a resource for courts and potential litigants. Like the Guidance, those documents merely explain a view of legal principles; they do not impose them. Instead, it is Title VII itself that imposes liability for employers. While different agencies' staff and other third parties may choose to refer to the Guidance as a resource, the Sixth Circuit has repeatedly cautioned, "harms caused by agency decisions are not legal consequences if they stem from independent actions taken by third parties." *Id.* at 168 (citation omitted); *see also Arizona*, 40 F.4th at 388. Even as to EEOC staff, the non-binding nature of the Guidance means that they must exercise enforcement discretion in analyzing any future harassment charge. For this reason, the Sixth Circuit has held that agency action is not final if it "does not of itself adversely affect [the] complainant but

only affects his rights adversely on the contingency of future administrative action." *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 496 (6th Cir. 2014) (citation omitted); *see also Arizona*, 40 F.4th at 388. That is exactly the case here.

Recent events demonstrate that the EEOC does not view the Guidance as binding, even on itself. The States cite two enforcement lawsuits the EEOC filed during the prior Presidential administration. Br. at 9 (citing EEOC, *EEOC Sues Two Employers for Sex Discrimination* (Oct. 1, 2024), https://perma.cc/WJZ8-XQ9Y). In the States' words, those complaints were "consistent with" the Guidance's "interpretation of Title VII." *Id.* Even if that is so, the fact that an enforcement complaint is consistent with the interpretation expressed in the Guidance does not mean the EEOC was bound by the document. More to the point, however, the States omit that the EEOC has sought to dismiss both cases after issuance of Executive Order 14,168. *See* Stipulation to Stay Pending Deadlines and Dismiss with Prejudice, *EEOC v. Lush Handmade Cosmetics LLC*, No. 5:24-cv-6859 (N.D. Cal. Feb. 14, 2025), ECF No. 25; Pl. EEOC's Mot. to Dismiss EEOC Litigation, *EEOC v. Starboard with Cheese, LLC*, No. 3:24-cv-2260 (S.D. Ill. Feb. 14, 2025), ECF No. 12. Nor does the fact that the EEOC cited the Guidance as persuasive authority along with other case law in certain amicus briefs establish that the Guidance has binding legal effect. *See* Br. at 9. Several of the briefs the States cite do not address gender-identity-based harassment at all. *See id.* But in any case, none of those briefs suggests that the Guidance is itself binding authority, even on EEOC staff.

As noted above, the Sixth Circuit's decision in *Tennessee II* is not to the contrary. The Sixth Circuit there concluded that a document that bound the agency to "fully enforce" a statute in a particular way and which informed regulated parties that they "have a responsibility to investigate and address" discrimination consistent with that view imposed legal obligations on those regulated parties. *Tennessee II*, 104 F.4th at 599 (citations omitted). But the Court found that the Department of Education has "the authority to impose legal consequences on a regulated party" because its enforcement process extends "all the way through from investigation to the revocation of [federal] funds." *Id.* at 601 (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599–600 (2016)). There is no dispute that the EEOC lacks such authority. The EEOC can neither issue binding interpretations

of Title VII nor bring an enforcement action directly against any of the Plaintiff States. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). If the EEOC investigates a charge from an aggrieved employee and determines that it has merit, it would need to refer the case to the DOJ, which is not bound to sue based on the EEOC's views. *See* 42 U.S.C. § 2000e-5(f)(1); *cf. AT&T*, 270 F.3d at 976. And any such action would proceed *de novo* in court. *See Abrams v. Johnson*, 534 F.2d 1226, 1227 (6th Cir. 1976). The EEOC is more similarly situated to the agency in *Parsons*, which "didn't have the power to bind government actors or generate legal consequences," than to the Department of Education, which did. *Tennessee II*, 104 F.4th at 601.

III. THE STATES ARE NOT ENTITLED TO THE RELIEF THEY SEEK

For the foregoing reasons, this Court lacks jurisdiction and the Guidance is not a reviewable final agency action. But if the Court concludes that the States prevail on any portion of their claims, the Court should at most grant declaratory relief and vacate only those portions of the Guidance the States challenge. The States seek to vacate only "a small portion of the" Guidance, "leaving almost all of EEOC's policies about workplace harassment in place." Br. at 24. The parties therefore appear to agree that any vacatur should run to only those portions of the Guidance that the States here challenge and from which a cognizable injury flows.

The States' requested vacatur nevertheless remains overbroad. Their summary judgment brief focuses on their claim that the Guidance imposes "gender identity-based workplace accommodations" including for "employees' preferred pronouns, dress codes, bathrooms, or locker rooms." Br. at 8; *see also id.* at 17 (arguing that Title VII does not prohibit sex-segregated spaces, sex-based dress codes and pronoun usage). Yet, the State's proposed order asks the Court to vacate the Guidance not only to the extent that it addresses "workplace gender-identity accommodations," but also to the extent it discusses sexual orientation. *See* Proposed Order at 2–3, ECF No. 102-1 (requesting the Court vacate "all other references . . . to 'sexual orientation' or 'gender identity,' including but not limited to, passages defining 'sex' to include 'sexual orientation' or 'gender identity' or providing examples of allegedly unlawful harassment based on those characteristics."). Although their summary judgment brief makes occasional references to sexual orientation discrimination, *e.g.*, Br. at 19, the States do not explain how

their objections to the Guidance's discussion of gender identity extends to claims of harassment based on sexual orientation. Nor do they cite any State laws that purportedly would be burdened by the Guidance's discussion of sexual orientation. Any vacatur should be limited to those portions of the Guidance that are determined to cause injury to the States and for which Plaintiffs have established jurisdiction and reviewability. *See, e.g.*, *Gill v. Whitford*, 585 U.S. 48, 73 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only "the portions of the final rule" that the court decided were unlawful). Here, that would mean those portions of the guidance that discuss gender-identity-based harassment, not sexual orientation.

The States are similarly not entitled to injunctive relief. A permanent "injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). A plaintiff seeking that remedy must establish: "(1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 156–57 (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). "If a less drastic remedy" is sufficient to redress the States' "injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted." *Id.* at 165–66.

Even assuming the States' claims are meritorious, they fail to demonstrate that declaratory relief and partial vacatur are insufficient to afford complete relief. The closest the States get to supporting their need for an injunction is their assertion that the "EEOC 'has enacted similar guidance in the past and may attempt to do so again.'" Br. at 15 (quoting *Texas v. Cardona*, 743 F. Supp. 3d 824, 897 (N.D. Tex. 2024)). But the States must show "more than the mere possibility" that their injury will recur to obtain injunctive relief. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). And to the extent the States seek an injunction prohibiting the Defendants from issuing hypothetical interpretations of Title VII in the future, those interpretations are "purely theoretical" and not properly before the Court. *Faris v. CDC*, No. 3:22-cv-23, 2023 WL 5616070, at *2–3 (W.D. Ky. Aug.

30, 2023). All the more so where the current administration has issued an Executive Order adopting the legal interpretation the States prefer. Any "party aggrieved by a hypothetical future" interpretation would "have ample opportunity to challenge it, and to seek appropriate preliminary relief, if and when such" an interpretation is adopted. *Monsanto*, 561 U.S. at 157.

Finally, there is no occasion for relief to extend beyond the Guidance or to DOJ. "Courts, of course, can only review an agency action under the APA if it is 'final.'" *Tennessee II*, 104 F.4th at 598 (quoting 5 U.S.C. § 704). The States have identified no purported final agency action other than the Guidance that could be the basis for review under the APA. The proper scope of relief is, therefore, limited to the agency action that caused the plaintiffs' injuries. *See Kentucky v. Biden*, 57 F.4th 545, 557 (6th Cir. 2023). And because DOJ did not promulgate or otherwise adopt any challenged portion of the Guidance—and indeed has affirmatively disclaimed the Title VII interpretation challenged here—there is no basis for an injunction to issue against any DOJ official or entity.

CONCLUSION

For the foregoing reasons, the States' motion for summary judgment should be denied and Defendants' cross-motion for summary judgment should be granted.

Dated: May 2, 2025

Respectfully submitted,

YAAKOV M. ROTH
Acting Assistant Attorney General

DIANE KELLEHER
Director, Federal Programs Branch

/s/ Jacob S. Siler
JACOB S. SILER (DC Bar No. 1003383)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street N.W.
Washington, D.C. 20005
Telephone: (202) 343-4556
Facsimile: (202) 616-8460
E-mail: Jacob.S.Siler@usdoj.gov

Counsel for Defendants