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Courts Address the Finality Requirement To Determine Whether an Agency's Action Is Ripe for Review

I. OVERVIEW

The Equal Employment Opportunity Commission (EEOC), an agency tasked with enforcing Title VII of the Civil Rights Act of 1964 (Title VII), has recently asserted that hiring practices barring convicted felons from employment opportunities violate employment discrimination laws because they disproportionately affect racial minorities, a Title VII protected group.[1] In accordance with this interpretation of Title VII, the EEOC issued Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Guidance). As described by the United States Court of Appeals for the Fifth Circuit, the Guidance affirms the EEOC's position that "categorical bans on the hiring of felons can constitute a violation of

1. *See* Texas v. EEOC, 827 F.3d 372, 376 (5th Cir. 2016); *see also* 42 U.S.C. § 2000e-2 (2012) (prohibiting employers from engaging in hiring practices that limit the employment opportunities of any individual based on "such individual's race, color, religion, sex, or national origin").

Title VII when they disproportionately affect blacks and Hispanics."[2] The Guidance includes two detailed safe harbor provisions that exempt employers from liability for screening out convicted felons if they can "demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity."[3] Therefore, when an employer's hiring practice disproportionately discriminates against racial minorities by limiting the employment opportunities of convicted felons and the employer cannot show that its policy falls within one of the two safe harbors, the employer will be in violation of Title VII.[4] However, the EEOC's power to enforce Title VII is statutorily limited to civil actions against private employers and does not extend to complaints brought against state governments.[5] The EEOC may investigate a state government's alleged Title VII violation, but it can take no subsequent enforcement measures beyond recommending the case for prosecution by the Attorney General based on its findings.[6]

The State of Texas maintains hiring policies that bar convicted felons from employment across many state agencies.[7] Following the issuance of the Guidance, Texas filed suit against the EEOC for declaratory and injunctive relief, claiming that the Guidance violates the Administrative Procedure Act (APA).[8] The EEOC moved to dismiss the complaint on the grounds that (1) Texas lacked standing because it incurs no injury when the EEOC is unable to enforce the Guidance on a state government; (2) because no legal proceedings had been instigated against Texas, the claim was not ripe; and (3) the court lacked subject matter jurisdiction under the APA because the Guidance was not a "final agency action."[9] The district court granted the EEOC's motion to dismiss on all three grounds, and Texas appealed.[10] After issuing its decision in favor of Texas, the Fifth Circuit withdrew its opinion, citing its similarity to the facts in the

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2. *Texas*, 827 F.3d at 376-77.

3. *Id.* at 377 (quoting U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) [hereinafter GUIDANCE]).

4. *See id.* at 376-77.

5. *See id.* at 376; *see also* 42 U.S.C. § 2000e-5(f) (directing the EEOC to refer alleged employment discrimination cases to the Attorney General for prosecution).

6. *See Texas*, 827 F.3d at 376.

7. *See id.*

8. *Id.* at 377.

9. *Id.* at 375-77.

10. *Id.* at 377.

United States Supreme Court's recent decision in *Army Corps of Engineers v. Hawkes Co.* and its desire for the district court to apply *Hawkes* to the facts here.[11] Nonetheless, as discussed below, critical issues concerning standing and final agency action exist here and are distinguishable from *Hawkes*. Notwithstanding the subsequent decision in the Supreme Court, the Fifth Circuit *held* that the Guidance amounted to final agency action because it creates legal consequences, and as an object of the Guidance, Texas has standing to seek relief. *Texas v. EEOC*, 827 F.3d 372 (5th Cir. 2016).

II. BACKGROUND

A. The Standing Requirement

To satisfy the elements of standing under Article III of the U.S. Constitution, a party must show that it has suffered a cognizable injury that is fairly traceable to the defendant and likely redressable by a favorable judgment.[12] When confronted with an issue of standing in a claim against an agency, a court will consider whether the plaintiff is the "object" of the agency rule being challenged to determine if there is a cognizable injury.[13] "Whether someone is in fact an object of a regulation" depends on whether a plaintiff can "demonstrate[] a level of interference as to their lives . . . sufficient to establish standing to challenge the regulation."[14] When the injured party is a sovereign state, courts have found that "being pressured to change state law constitutes an injury [because] 'states have a sovereign interest in the power to create and enforce a legal code.'"[15] For example, in *Texas v. United States*, a federal immigration program required Texas to either

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11. Texas v. EEOC, 838 F.3d 511, 511 (5th Cir. 2016) ("[T]he instant case relate[s] closely to the issue that the Supreme Court decided in *Hawkes*. Given this similarity, and given that the district court has not had the opportunity to apply *Hawkes* to the facts of this case, we conclude that the importance of the issue and the interest of uniformity of our precedent require that we . . . remand this case for further consideration in the light of *Hawkes*."); *see also* Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813, 1815-16 (2016) (holding there were no adequate alternatives to APA review by the judiciary where peat mining companies sought review of an Army Corps of Engineers determination).

12. *See* Duarte v. City of Lewisville, 759 F.3d 514, 517 (5th Cir. 2014).

13. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561-62 (1992).

14. Contender Farms, L.L.P. v. U.S. Dep't of Agric., 779 F.3d 258, 265 (5th Cir. 2015).

15. Texas v. United States, 787 F.3d 733, 749 (5th Cir. 2015) (internal quotation marks omitted) (quoting Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 449 (5th Cir. 1999)); *see also* Massachusetts v. EPA, 549 U.S. 497, 518, 520 (2007) ("It is of considerable relevance that the party seeking review here is a sovereign state and not . . . a private individual.").

subsidize the issuance of new driver's licenses or change its licensing fee structure.[16] The court found that Texas had standing to challenge the program because pressuring a state to alter its law is sufficient to amount to an injury.[17] Thus, standing will exist if an agency rule compels a state to alter its laws because the state will have sufficiently "demonstrated a level of interference" as the "object" of the challenged agency rule.[18]

B. Final Agency Action

Under the APA, only a *final* administrative action is subject to judicial review.[19] Therefore, subject matter jurisdiction in a claim challenging an agency decision rests on whether the decision represents "final agency action."[20] Courts apply the standard expressed in *Bennett v. Spear* to determine finality.[21] Under the *Bennett* Standard, final agency action must be a "'consummation' of the agency's decisionmaking process" and an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[22] The Supreme Court follows a pragmatic and flexible approach to determine whether an administrative action meets the two conditions to become "final agency action."[23]

First, courts have found that whether an agency action represents the "'consummation' of the agency's decisionmaking process" depends on "whether the agency views its deliberative process as sufficiently final to demand compliance with its announced position."[24] Additionally, courts will look to whether the action is "of a merely tentative or interlocutory nature" and whether it "reflect[s] a settled agency position."[25] This determination is relatively easy to make. "Once [an] agency publicly articulates an unequivocal

16. *Texas*, 787 F.3d at 743-44, 748-49.
17. *Id.* at 749.
18. *Contender Farms*, 779 F.3d at 265.
19. *See* Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813-16 (2016).
20. *Id.*
21. *Hawkes*, 136 S. Ct. at 1813; Bennett v. Spear, 520 U.S. 154 (1997).
22. *Bennett*, 520 U.S. at 178 (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).
23. *Hawkes*, 136 S. Ct. at 1815; Abbott Labs v. Gardner, 387 U.S. 136, 149-50 (1967).
24. *Bennett*, 520 U.S. at 178; Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 133 (1948); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986).
25. *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal*, 400 U.S. at 71); Barrick Goldstrike Mines Inc. v. Browner, 215 F.3d 45, 48 (D.C. Cir. 2000); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

position . . . and expects regulated entities to alter their primary conduct to conform to that position," it is reasonable to infer that it has concluded the decision-making process.[26] Moreover, an agency decision can be considered final even if the agency allows ongoing revisions or feedback.[27] Thus, the determination of whether an administrative action is the "'consummation' of the agency's decisionmaking process" rests on whether the agency itself expects to rely on it to demand compliance.[28]

Second, an agency decision is considered final agency action if it imposes rights or obligations or creates legal consequences for a regulated community. This determination often depends on whether the action restricts the agency to a particular procedure to deal with a party's compliance or noncompliance or "genuinely leaves the agency and its decision-makers free to exercise discretion."[29] For example, in *AT&T Co. v. EEOC*, the EEOC issued a compliance manual in which the agency asserted that the denial of employment benefits to women who had missed work during pregnancy before the Pregnancy Discrimination Act of 1979 was passed violated Title VII.[30] The United States Court of Appeals for the District of Columbia found that the EEOC's action was not final because it merely "state[d] the Commission's view" but "d[id] not say whether, how, against which companies, or under what circumstances the Commission will act upon that view."[31] Similarly, in *Luminant Generation Co. v. EPA*, the Fifth Circuit found that a notice of violation issued by the EPA did not represent final agency action because it did "not commit [the] EPA to any particular course of action."[32] Extending the interpretation of what constitutes a binding agency decision from which legal consequences flow, the Supreme Court recently determined in *Army Corps of Engineers v. Hawkes Co.* that an agency decision can create legal consequences by depriving a party of a safe harbor in which an agency is bound *not* to act, regardless of whether the decision binds the agency *to* act.[33] In *Hawkes*, three peat mining companies sought

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26. *Ciba-Geigy*, 801 F.2d at 436.
27. Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 14 (D.C. Cir. 2005).
28. *Bennett*, 520 U.S. at 178 (quoting *Chi. & S. Air Lines*, 333 U.S. at 113); *Ciba-Geigy*, 801 F.2d at 436.
29. Cmty. Nutrition Inst. V. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting Am. Bus. Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980)).
30. AT&T Co. v. EEOC, 270 F.3d 973, 974 (D.C. Cir. 2001).
31. *Id.* at 976.
32. 757 F.3d 439, 442 (5th Cir. 2014).
33. 136 S. Ct. 1807, 1814-15 (2016).

judicial review of an affirmative jurisdiction determination (JD) from the Army Corps of Engineers that subjected their property to regulations under the Clean Water Act.[34] A negative JD would have given the companies a safe harbor in which the EPA is bound by an agreement with the Army Corps to refrain from any enforcement proceedings for a period of five years, creating clear legal consequences for the companies.[35] The Supreme Court found that in depriving the companies of the benefits of the five-year safe harbor, the affirmative JD also created legal consequences and therefore represented final agency action.[36] Thus, a court is likely to determine that "legal consequences will flow" when an administrative action binds the agency to act in a stipulated manner that "affect[s] the regulated community" by ensuring nonenforcement for compliant parties and guaranteeing enforcement for noncompliant ones.[37]

III. COURT'S DECISION

A. Texas Has Standing To Challenge the Guidance

The Fifth Circuit found that Texas had standing to challenge the EEOC Guidance because the regulations would affect its current hiring practices, making Texas an "object" of the Guidance.[38] Because the pressure to change the laws of a sovereign state or incur a penalty as a result of agency action was, in fact, an injury, the Fifth Circuit disagreed with the district court's finding that Texas lacked a cognizable injury in the absence of an enforcement action.[39] While the district court focused primarily on the issue of standing in dismissing Texas's complaint, the Fifth Circuit quickly and unambiguously rejected the argument that the Guidance did not pose an injury to Texas for the purposes of constitutional standing, stating that "[a]n increased regulatory burden typically satisfies the injury in fact requirement."[40] Thus, the court concluded that Texas fulfilled the requirements of Article III standing.

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34. *Id.* at 1812-13.

35. *See id.* at 1814.

36. *See id.*

37. Bennett v. Spear, 520 U.S. 154, 178 (1997) (first quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970); and then quoting AT&T Co. v. EEOC, 270 F.3d 973, 976 (D.C. Cir. 2001)).

38. Texas v. EEOC, 827 F.3d 372, 378-80 (5th Cir. 2016).

39. *Id.* at 379-80; Texas v. EEOC, No. 5:13-CV-225-C, 2014 WL 4782992, at *3 (N.D. Tex. Aug. 20, 2014).

40. *Texas*, 827 F.3d at 378 (quoting Contender Farms, L.L.P. v. U.S. Dept. of Agric., 779 F.3d 258, 266 (5th Cir. 2015)).

In his dissent, Judge Patrick Higginbotham argued that Texas lacked Article III standing because, absent the EEOC's authority to enforce the Guidance on state employers, there is no case or controversy between Texas and the EEOC.[41] The EEOC can only refer a potential Title VII violation to the Attorney General, who "has no obligation to adhere to the Guidance."[42] Moreover, Judge Higginbotham argues that a preenforcement challenge based solely in the abstract cannot be ripe for review.[43] However, this reasoning fails to address the majority's underlying concern of whether a sovereign state suffers an injury to the very nature of its sovereignty when the action of an agency pressures it to change its laws or incur even a *trivial* penalty.

B. The Guidance Constitutes Final Agency Action

The Fifth Circuit found that because the Guidance imposed legal consequences on Texas, it constituted final agency action, which in turn gave the court subject matter jurisdiction. In reaching this conclusion, the majority repeatedly referenced the binding nature of the Guidance on the EEOC itself, suggesting that the extent to which an agency commits itself "to a specific course of action" is crucial to determining whether there are "legal consequences."[44] The court related the Guidance to "a blanket policy that the EEOC has committed itself to applying with respect to virtually all public and private employers."[45] In response to the EEOC's appeal to the D.C. Circuit's opinion in *AT&T*, the majority, citing the *AT&T* opinion, drew a clear distinction between binding and nonbinding agency action.[46] Unlike in *AT&T* where the agency was not bound to sue AT&T after issuing letters that merely informed the company of its legal opinion, here the EEOC is bound to apply the Guidance to alleged Title VII violations.[47]

The court also rejected the EEOC's contention that because it lacked the authority to directly enforce the Guidance on a sovereign state, the Guidance could not impose legal consequences on Texas.

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41. *Id.* at 390-91 (Higginbotham, J., dissenting).
42. *Id.* at 391.
43. *Id.* at 391-93 ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting Texas v. United States, 523 U.S. 296, 300 (1998))).
44. *See id.* at 380-87 (majority opinion).
45. *Id.* at 382.
46. *Id.* at 386.
47. *Id.*; AT&T Co. v. EEOC, 270 F.3d 973, 975-76 (D.C. Cir. 2001).

First, while it is true that the EEOC lacks the statutory authority to bring an action against a state for failing to abide by the Guidance, the effect of the Guidance was to commit the agency to investigating Title VII breaches and refer a state to the Attorney General for prosecution if any of the provisions of the Guidance were not met.[48] In other words, the EEOC has no choice but to follow its own guidelines in evaluating Texas's hiring practices, and if Texas does not alter its hiring practices, the agency then has no choice but to expose the state to potential liability through referral to the Attorney General.[49] The court also emphasized the similarities between this case and the Supreme Court's decision in *Hawkes*.[50] In both cases, the agencies included safe harbor provisions that shielded qualified individuals from liability.[51] The court suggested that like the safe harbor provision in *Hawkes*, which created legal consequences for those who could not meet its requirements by depriving them of the benefits of nonenforcement, the safe harbor provisions in the Guidance create legal consequences for employers whose hiring practices do not meet the two specified conditions by denying them protection from liability.[52] Following this reasoning, the court concluded that "'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability."[53]

Second, the court asserted that if the Guidance has no legal consequences for Texas simply because the EEOC cannot sue a state directly, then *no* state would be able to challenge *any* rule or action promulgated by the EEOC, regardless of a state's standing to bring a claim.[54] The court sternly rejected "the proposition that whether a blanket agency rule is 'final agency action' turns on the identity of the class of plaintiffs, instead of the nature, character, and effect of the rule in and of itself."[55] Here the court emphasized the need for a

48. *Texas*, 827 F.3d at 381-82.
49. *See id.* at 381-84.
50. *Id.* at 383.
51. *See id.* at 383-84; Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813-14 (2016).
52. *See* 136 S. Ct. at 1813-14; *Texas*, 827 F.3d at 383-84.
53. *Texas*, 827 F.3d at 383.
54. *Id.* at 382.
55. *Id.*

"flexible" and "pragmatic" approach to concluding what constitutes agency action.[56]

Finally, the court found that the Guidance was a "'consummation' of the agency's decisionmaking process" because it was clear, detailed, and authoritatively communicated how employers could avoid potential liability.[57] The court found that the safe harbor provision laid out a detailed process by which an employer may avoid a Title VII violation, forcing employers to conform with the agency-promulgated definitions and "scope of the 'job related, business necessity' defense."[58] In other words, an employer who follows the rules in the Guidance is protected from a Title VII violation, and an employer who does not follow them may incur a penalty. Thus, the court concludes that in issuing the Guidance, the EEOC "acted definitively by altering both its own obligations and the rights of the regulated entities it oversees."[59]

Judge Higginbotham once more disagreed with the majority, disputing the mandatory nature of the Guidance's safe harbor provisions and again citing the EEOC's lack of enforcement power to argue that the Guidance does not amount to final agency action.[60] According to Judge Higginbotham, the EEOC "issued a general statement of its view of the law," which may "create[] some level of *practical* pressure [but] does not . . . impose[] *legal* consequences."[61] While the majority leaned heavily on the Supreme Court's determination in *Hawkes* that safe harbor provisions create legal consequences, Judge Higginbotham distinguished the instant case from *Hawkes* by pointing out the difference between an agency action that "informs a *specific* party that it is or is not subject to" a regulation and an agency action that merely states "its view of the law."[62]

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56. *Id.*

57. Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Co., 333 U.S. 103, 113 (1948)); *Texas*, 827 F.3d at 385, 387.

58. *Texas*, 827 F.3d at 385.

59. *Id.* at 387.

60. *See id.* at 393-95 (Higginbotham, J., dissenting).

61. *Id.* at 395.

62. *Id.* ("There is a direct engagement [in *Hawkes*] between the two parties . . . that produces a binding determination with salient and valuable consequences. In this case, the EEOC has not taken any action against Texas . . . .").

IV. ANALYSIS

Although the court's conclusion remains sensible, its reasoning contains some significant flaws. First, the court relies on the binding nature of the Guidance to hold that the Guidance represents final agency action but fails to address the added layer of discretion implicated by the EEOC's inability to enforce the Guidance directly on Texas.[63] Second, the majority relies too heavily on what it describes as the Supreme Court's analogous decision in *Hawkes* simply because both cases involve safe harbor provisions.[64]

The court fails to fully consider how the EEOC's lack of enforcement authority over Texas creates an added layer of administrative discretion, which undermines its reasoning in determining whether the Guidance represents final agency action.[65] When determining whether an administrative decision is final, courts will consider whether "an agency merely expresses its view of . . . the law" or informs the regulated community of stipulations they will be *required* to meet in order to be in compliance with the law.[66] When an agency decision requires a regulated entity to meet a condition, this not only legally binds the regulated entity to the obligation of meeting that requirement, but it also legally binds the agency to enforce it. The agency thus loses any discretion it may have had in determining whether or not to enforce the law.

While the Guidance appears to legally bind the EEOC to enforce its view of Title VII on private employers, it only compels the EEOC to investigate a state government's alleged Title VII violation and refer findings to the Attorney General, who can then determine whether to enforce Title VII.[67] This added layer of discretion contradicts the accepted understanding of final agency action because there may be no legal consequences if Texas fails to comply. The majority attempts to bridge this logical gap by suggesting that legal consequences arise when the agency's action "has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to *potential* liability."[68] This interpretation more clearly aligns with an agency offering its view of

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63. *See id.* at 377-87 (majority opinion).
64. *See id.* at 382-84.
65. *See id.* at 377-87.
66. *Id.* at 383; Luminant Generation Co. v. EPA, 757 F.3d 439, 442 (5th Cir. 2014); AT&T Co. v. EEOC, 270 F.3d 973, 974-76 (D.C. Cir. 2001).
67. *See Texas*, 827 F.3d at 376.
68. *Id.* at 383 (emphasis added).

what may or may not subject an employer to liability, rather than executing a final agency action that identifies specific situations in which an employer will *definitely* be liable. Because enforcement of the Guidance will exist at the discretion of the Attorney General, Texas is not faced with a choice between changing its hiring practices or incurring a definite penalty for noncompliance. Thus, using this logic, the Guidance may not be a final agency action as it applies to Texas.

However, while this reasoning may be problematic in creating certainties for similar challenges in the future, it reaches a necessary conclusion that carries important policy implications. If the court had decided that the Guidance was not final agency action because the EEOC could only refer a potential violation to the Attorney General to enforce, the EEOC may be able to argue that any future action regarding Title VII interpretations would fall into the same category, preventing Texas from challenging the agency's decision. Rather than relying on its somewhat flawed arguments, the court could have reached its decision by elaborating on the well-established "pragmatic" and "flexible" approach to show that the Guidance represents final agency action.[69]

The EEOC's lack of enforcement authority and the discretionary nature of the safe harbor provision place the Guidance in a gray area between conventional interpretations of final agency action and more realistic approaches that consider the overall effect of an agency's action. If an agency can avoid judicial review by appealing to complicated enforcement rules and carefully worded policies that leave just enough agency discretion in place to escape the finality requirement, then the regulated community would have no recourse for legitimate complaints. As the United States Court of Appeals for the Second Circuit observed, "[t]he only satisfactory test is that involving a pragmatic and flexible approach to insure that the ends of justice will be served."[70] The EEOC may be able to argue that the Guidance served as a framework for interpretation of Title VII violations rather than a binding obligation, but the Supreme Court has authorized a level of pragmatism and flexibility to determine "whether the agency's position . . . has a 'direct and immediate . . . effect on the day-to-day business' of the parties challenging the

69. Abbott Labs. v. Gardner, 387 U.S. 136, 149-50 (1967).
70. PepsiCo, Inc. v. FTC, 472 F.2d 179, 192 (2d Cir. 1972).

action."[71] The Guidance directly affects the everyday business of Texas state agencies because it not only asks them to change their policies in order to consider hiring convicted felons, a distinctive group they may have legitimate reasons to find objectionable, but it also imposes lengthy procedures to comply with the safe harbor provisions.[72] The overall effect of the Guidance is to create rights, obligations, and legal consequences for Texas. Regardless of the EEOC's intentions, the court was correct to conclude that Texas has a right to challenge the Guidance and may have reached this conclusion using a "pragmatic" and "flexible" approach.[73]

Second, the similarities between *Hawkes* and the instant case do not actually provide the strong analogy on which the majority relies. The court seems to assume that because safe harbors offer criteria for defining compliance and, therefore, noncompliance, then any agency action that includes a safe harbor represents final agency action.[74] However, while the safe harbor in *Hawkes* refers to a purely factual determination of whether the waters located on a property are or are not subject to the Clean Water Act, the safe harbor provision here refers to a more subjective determination of whether an employer has sufficiently demonstrated that it followed the Guidance.[75] Moreover, while the determination of who falls within the safe harbor in *Hawkes* finalizes the legal consequences for the regulated entity it affects, the determination of whether an employer falls into the Guidance's safe harbor provision must be assessed individually each time an employer denies employment to a convicted felon,[76] which means an employer may be in compliance with the Guidance on some occasions and not others. This distinction not only exposes another discretionary layer to the EEOC's enforcement of the Guidance but also illustrates why safe harbor provisions should be independently evaluated to determine whether they represent final agency action, rather than being subject to a blanket determination that the inclusion of safe harbors in an agency action necessarily speaks to the action's finality. Rather than create a blanket interpretation of safe harbor provisions,

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71. Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986) (citations omitted) (quoting FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239 (1980)).

72. *See Texas*, 827 F.3d at 380-81.

73. *Abbott Labs.*, 387 U.S. at 149-50.

74. *See Texas*, 827 F.3d at 383-84.

75. *Id.*; Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1812, 1814 (2016).

76. GUIDANCE, supra note 3.

the court could have again relied on the "pragmatic" and "flexible" approach to frame its conclusion.[77]

While the court's conclusion, despite its somewhat faulty reasoning, remains sound, there are also contrary policy implications to its decision. Allowing states to challenge agency interpretations of policy that could only be enforced at the discretion of another agency opens the door for increased litigation, impairing an agency's ability to develop policy interpretations to meet changing circumstances and concerns. If Texas has standing to challenge the EEOC's interpretation of a "protected group" before any action is brought against it, then the EEOC may find it more difficult to implement new policy interpretations in the future. This could have far-reaching consequences for people who rely on the EEOC, and various other agencies, to protect their rights and interests.

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77. *Abbott Labs.*, 387 U.S. at 149-50.

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