UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEAH CROSS, Plaintiff, v. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al., Defendants.	Case No. 25-cv-3702 (TNM)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND STAY

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INTRODUCTION

Defendants question this Court's jurisdiction by describing Ms. Cross as a member of the public who has no personal stake in the discretionary law enforcement decisions of the Equal Employment Opportunity Commission ("EEOC" or "Commission"). But this case does not challenge the EEOC's discretionary law enforcement decisions—such as whether to pursue litigation after conciliation fails in a particular case. Instead, it challenges an agency directive that became effective September 15, 2025 (the "Disparate Impact Rule"), which eliminates discretion by forbidding EEOC staff from investigating or conciliating any charges premised solely on a disparate-impact theory of discrimination, regardless of the factual merits of those charges. Because Title VII of the 1964 Civil Rights Act requires the EEOC to investigate all charges within its jurisdiction to the point of determining whether there is reasonable cause to believe that the charge is true, 42 U.S.C. § 2000e-5(b), and because the Age Discrimination in Employment Act ("ADEA") requires the EEOC to attempt conciliation of all age discrimination charges within its jurisdiction, 29 U.S.C. § 626(d)(2), the directive against any investigation or conciliation of disparate-impact charges violates Title VII and the ADEA. And Ms. Cross has a personal stake in challenging this unlawful action because the directive required the EEOC to prematurely close the investigation of her charge without issuing a cause or no-cause finding, depriving her of the full administrative process to which she is statutorily entitled.

Defendants further contend that the Disparate Impact Rule is not a final agency action because its instructions on "charge processing" carry no legal consequences, and that Ms. Cross has an adequate alternative remedy because she can sue Amazon in district court. Both arguments misapprehend the nature of Ms. Cross's challenge. Ms. Cross is not seeking judicial review of the EEOC's investigation of her charge. Rather, she challenges the rule that required her investigation, and an unknown number of other investigations, to be closed for an unlawful reason. Her ability

to sue Amazon for discriminating against her in 2022 does not remedy the injury she suffered in 2025 when the EEOC abruptly dismissed her charge, without reaching a reasonable-cause determination on its merits, under a rule that requires all further investigation and conciliation of disparate-impact charges to cease.

When Defendants eventually, and cursorily, address the substantive merits of Ms. Cross's Administrative Procedure Act ("APA") claims, they frame the Disparate Impact Rule as a decision to "deprioritize" disparate-impact investigations. Opp. 28, ECF 12. This eyebrow-raising understatement fails to engage either with the governing statutory text outlining the EEOC's investigative and conciliation obligations, the reliance interests implicated by 60 years of consistent EEOC practice, or the mandatory language of the Disparate Impact Rule. *See* EEOC Mem. at 3, ECF 2-3 ("You cannot continue to investigate . . . disparate impact liability"); *id.* at 4 ("EEOC cannot facilitate the resolution of a pending charge of discrimination that is premised solely on disparate impact liability through conciliation."). A categorical ban on performing functions required by statute cannot be dismissed as simple deprioritization.

The other preliminary-relief factors also favor Ms. Cross, and the requested relief affecting nonparties is "necessary to prevent irreparable injury." 5 U.S.C. § 705. Defendants suggest that Ms. Cross can obtain the same information that she might have gleaned from a complete EEOC investigation later through litigation, and thus that her harm is not irreparable, but having this information before commencing litigation is uniquely valuable because it can affect how litigation is framed and even help Ms. Cross to assess whether to file suit at all. Regarding the balance of equities and public interest factors, the only interest Defendants say an injunction would impede is the EEOC's ability to implement the President's priorities regarding disparate impact. There are other lawful ways that the EEOC can effectuate those priorities without depriving workers of all

races, sexes, religions, and national origins of one of the most powerful tools at their disposal for investigating employer policies whose discriminatory impacts would otherwise all too often evade review. Finally, Defendants' arguments about universal injunctions are misplaced. Ms. Cross seeks a stay under section 705 of the APA, which contemplates "wholesale, rather than party-specific, stays of agency action." *Cabrera v. DOL*, --- F. Supp. 3d ---, 2025 WL 2092026, at *8 (D.D.C. July 25, 2025), *appeal docketed*, No. 25-5340 (D.C. Cir. Sept. 24, 2025).

ARGUMENT

I. Plaintiff is likely to establish standing.

A plaintiff seeking preliminary injunctive relief must demonstrate "a substantial likelihood" of standing as part of the requirement of demonstrating a likelihood of success on the merits. *Elec. Priv. Info. Ctr. v. U.S. Dep't of Com.*, 928 F.3d 95, 104 (D.C. Cir. 2019) (citation omitted). Here, Ms. Cross can establish a substantial likelihood of all three elements of standing: the premature closure of her charge has injured her, and continues to injure her, in concrete and particularized ways; those injuries are fairly traceable to the EEOC's Disparate Impact Rule; and a decision vacating the rule, as well as the other interim relief that Ms. Cross seeks, would redress the harms she is suffering.

A. Plaintiff is not challenging the exercise of the EEOC's enforcement discretion.

Seeking to avoid judicial review of their rule, Defendants analogize this case to *United States v. Texas*, 599 U.S. 670 (2023), where the Supreme Court stated that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* at 677 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973)). The analogy might have some force if Ms. Cross were seeking to require the EEOC to bring a legal action against Amazon. *See id.* at 676 (explaining that Texas and Louisiana sought a judicial order requiring the Department of Homeland Security to arrest more noncitizens). But this

case has nothing to do with prosecutorial functions, and the analogy fails out of the gate. Ms. Cross is not challenging the EEOC's prosecutorial discretion, but rather its issuance of a rule that removes an entire category of charges from the normal investigation and conciliation process. Moreover, the EEOC closed her charge based on that rule, giving her a direct and personal stake in the outcome.

Defendants' attempt to paint the Disparate Impact Rule as a mechanism for exercising the EEOC's prosecutorial discretion blinks reality in several respects. First, while the memorandum setting forth the Disparate Impact Rule mentions that "[t]he Commission is not commencing, developing, or continuing to pursue litigation advancing disparate impact causes of action," EEOC Mem. at 2, Ms. Cross does not challenge this statement of litigation priorities, as such prosecutorial decisions do fall within the EEOC's enforcement discretion. *See* 42 U.S.C. § 2000e-5(f)(1) (authorizing the EEOC to file civil actions under Title VII); 29 U.S.C. §§ 626(b), (c)(1) (same as to the ADEA). What Plaintiff does challenge is the Disparate Impact Rule's directives about EEOC investigations, which are distinct from, and not mere preludes to, prosecutions. Indeed, very few investigations result in prosecutions.[1] And unlike the decision of whether to initiate litigation, the EEOC's duty to conduct an investigation of a Title VII charge is "both mandatory and unqualified." *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1346 (D.C. Cir. 1999).

Second, the Disparate Impact Rule did not establish discretionary "procedures to reach [a] determination" of whether or not reasonable cause exists for each charge the EEOC investigates, as required by 42 U.S.C. § 2000e-5(b). Opp. 11. To the contrary, the rule created a new category of administrative closure specific to charges "premised solely on disparate impact liability" and

[1] EEOC, Enforcement and Litigation Statistics (2025), https://perma.cc/6WNM-WYJN (noting between 91 and 143 EEOC-initiated cases filed in each of the last three fiscal years).

required the closure of all pending charges in this category unless the investigation up to that point supported "a no cause finding," in which case the charge could be closed in that manner instead. EEOC Mem. at 2. By definition, then, charges administratively closed pursuant to the Disparate Impact Rule fall outside of the standard investigative structure in which investigators reach a determination of reasonable cause, or no cause, based on the circumstances of the charge, the applicable law, and the evidence gathered in the investigation. Charges like Ms. Cross's that were administratively closed based on the rule were closed categorically, without discretion, and without consideration of the merits of each individual charge, simply because of the theory of discrimination they alleged. *Id.* ("No later than COB September 30, 2025, every pending charge of discrimination premised solely on disparate impact liability shall be administratively closed.").

Plaintiff is not asking this Court to "micromanage" how the EEOC investigates disparate-impact charges going forward. Opp. 10. She merely seeks vacatur of a rule that removed all disparate-impact charges from the normal investigative process and subjected them to automatic dismissal. Vacating the rule, and restoring the status quo that existed before the Disparate Impact Rule went into effect, would allow the EEOC to apply the same discretion to investigation of disparate-impact charges that it applies to all other discrimination charges within its jurisdiction.

Third, Defendants concede that *Texas* does not foreclose standing where an agency has adopted a policy abdicating its responsibility to enforce a statute. Opp. 12. They argue that there is no such abdication here because "the EEOC continues to investigate [other kinds of] Title VII cases." *Id.* (citing *Texas*, 599 U.S. at 683). However, courts retain jurisdiction where, as here, an agency adopts a policy of non-enforcement with respect to a particular category of cases, even if the agency continues to enforce a given statute outside that category of cases. For example, in *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808 (D.C. Cir. 1998), the D.C. Circuit reviewed an

agency's policy of not enforcing a statutory bar on employing ships in domestic trade "in certain instances"—even though the agency continued to enforce the statute as to ships outside that category. *Id.* at 812. Here, Ms. Cross has standing because the EEOC has adopted a rule that abdicates its duty to investigate a defined category of cases—those premised solely on disparate-impact liability—contrary to its statutory obligation to investigate all charges until it reaches a reasonable-cause determination.

Finally, far from being just another "member of the public" challenging the non-prosecution of third parties, Opp. 10, as a charging party, Ms. Cross is herself "an object of the action (or forgone action) at issue," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). As such, "there is ordinarily little question that the action . . . has caused [her] injury" and that a judicial order setting aside that action will redress the injury. *Id.* at 561–62; *see also EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 599–600 (1981) ("The parties to an [EEOC] proceeding are hardly members of the 'general public' . . . ."). The Disparate Impact Rule caused the EEOC to close Ms. Cross's charge without following Title VII's required investigative process culminating in a cause or no-cause determination, and this statutory violation was a particularized injury to Ms. Cross—that is, it affected her "in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation omitted). And because that statutory violation deprived, and continues to deprive, Ms. Cross of the benefits and opportunities associated with the EEOC's administrative process, such as the prospect of an EEOC-facilitated conciliation and the ability to access the fruits of the EEOC's investigation, her injury is also concrete.

B. The unlawful, premature conclusion of Plaintiff's EEOC investigation is a cognizable injury in fact.

Defendants offer a bevy of arguments about why the EEOC's actions did not cause a legally cognizable injury to Ms. Cross. None has merit.

First, Defendants posit that Ms. Cross "lacks standing to challenge anything related to the ADEA" because her claims against Amazon alleged sex discrimination. Opp. 12. But "once a litigant has standing to request invalidation of a particular agency action, [she] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006) (citation modified). Here, Ms. Cross has standing to challenge the Disparate Impact Rule, which caused her injury when her Title VII charge was dismissed prematurely. That rule is contrary to law because, among other reasons, it violates the EEOC's mandatory conciliation obligations under the ADEA. 29 U.S.C. § 626(d)(2). Under the APA, 5 U.S.C. § 706(2)(A), vacatur of the rule in its entirety is the appropriate remedy. *See Abigail All. for Better Access to Dev. Drugs v. Eschenbach*, 469 F.3d 129, 135–36 (D.C. Cir. 2006) (finding that members of organization representing terminally ill people had standing to challenge Food and Drug Administration policy limiting access to experimental drugs in its entirety, rather than only as to the specific drugs they sought to access).

Second, Defendants cite *Texas* for the proposition that Ms. Cross lacks standing to challenge the EEOC's dismissal of lawsuits when she is not a defendant in those lawsuits. Opp. 12. This is a complete non sequitur, for Ms. Cross does not challenge the dismissal of any lawsuits.

Third, Defendants argue that the EEOC's obligation to conduct investigations "is not designed to protect the interest of" charging parties like Ms. Cross, but rather the public interest in preventing employment discrimination. Opp. 13. As a preliminary matter, this argument flows from a questionable premise: that the EEOC's failure to investigate Title VII claims, in violation of 42 U.S.C. § 2000e-5(b), is a procedural-rights violation. Defendants do not explain why the investigation mandate should be so conceived, and some courts have concluded otherwise. *See, e.g.*, *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 829 (6th Cir. 2019) (invalidating private

agreement that purported to shorten pre-suit limitations period under Title VII because "[a]ny alterations to the statutory limitation period necessarily risk upsetting [Title VII's] delicate balance" by "encouraging litigation that gives short shrift to pre-suit investigation and potential resolution of disputes through the EEOC"); *see also Martini*, 178 F.3d at 1346–47 (invalidating EEOC regulation that allowed charging parties to request right-to-sue notices when charge had been pending with agency for less than 180 days, because this regulation undermined the mandate in 42 U.S.C. § 2000e-5(b) that the EEOC investigate all charges). In holding that the EEOC investigative process may not be shortened by private agreement or regulation, these courts recognize that the process has substantive value and serves Congress's objective of identifying and remedying discriminatory employment practices.

Putting this procedural-rights question to the side, the fact that the EEOC controls the investigation after a charge is filed and pursues it in the public interest does not mean that the person whose charge initiated that investigation has no interest in it. If the investigation leads to an EEOC lawsuit, the charging party has the right to intervene in that suit. 42 U.S.C. § 2000e-5(f)(1). The charging party also has the right to request a copy of the investigative file for their charge, even though other members of the public have no such right of access. *Associated Dry Goods Corp.*, 449 U.S. at 598–603; *Shipman v. Nat'l R.R. Passenger Corp.*, 76 F. Supp. 3d 173, 182–84 (D.D.C. 2014). More fundamentally, the "integrated, multistep enforcement procedure" of which EEOC investigations are a part, *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977), is designed to protect the right, established by Title VII, to be free from discrimination in the workplace. This is the same right that aggrieved individuals like Ms. Cross invoke when they enlist the EEOC's assistance by filing a charge. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (holding that for a filing with the EEOC to constitute a charge, "it must be

reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee").

Fourth, Defendants contend that Ms. Cross has no cognizable injury stemming from how the EEOC conducted its investigation of her charge, or from the investigation's outcome. Opp. 14–15. But Ms. Cross is not challenging anything about the way the EEOC investigated her charge in the two years prior to the enactment of the Disparate Impact Rule. Nor is she challenging the "outcome" of the investigation in the way found not to be cognizable by the cases Defendants cite. *See Dillard v. D.C. Coll. Access Program*, No. CV 23-538, 2024 WL 864198, at *4 (D.D.C. Feb. 29, 2024) (rejecting plaintiff's argument that the EEOC's investigation was too short to be adequate and thus amounted to no investigation at all, and that the resulting no-cause dismissal was invalid). Instead, Ms. Cross challenges the Disparate Impact Rule, which prohibits further investigation or conciliation of disparate-impact charges and required the closure of all pending investigations of such charges without reaching a finding of either reasonable cause or no cause, as Title VII requires, 42 U.S.C. § 2000e-5(b), or engaging in conciliation efforts, as the ADEA requires, 29 U.S.C. § 626(d)(2).

Because the administrative closure of Plaintiff's charge was a downstream consequence of the Disparate Impact Rule, and is not itself the agency action that she challenges under the APA, Defendants' reliance on *Smith v. Casellas*, 119 F.3d 33 (D.C. Cir. 1997) (per curiam), is unavailing. In *Smith*, the D.C. Circuit held that Congress has not created "a cause of action against the EEOC for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge." *Id.* at 34. For one, *Smith* is facially inapposite because Plaintiff does not assert a cause of action against the EEOC under Title VII or common law, as that plaintiff attempted to do; rather, she invokes the cause of action created by the APA. *See* 5 U.S.C. § 702.

Moreover, nothing in *Smith* suggests that the EEOC can flout its statutory obligations by instructing its investigators to stop investigating entire categories of discrimination, like religious accommodation claims under Title VII, because the current president disfavors those claims, and that a charging party injured by such a rule would have no recourse to challenge the EEOC's unlawful action under the APA.

Finally, Defendants erect a couple of feeble straw men. They suggest that Plaintiff asserts an informational injury that she lacks standing to pursue, Opp. 16, but she asserts no such injury.[2] They then point out that she cannot assert the injuries of third parties, *id.* at 16–17, which she also does not do.

Once the underbrush of Defendants' misplaced arguments is cleared away, Plaintiff's actual theory of standing remains unscathed. The Disparate Impact Rule required charges premised solely on disparate-impact liability to be administratively closed if the investigation to that point had not reached a no-cause finding. EEOC Mem. at 2. The EEOC administratively closed Ms. Cross's charge pursuant to that rule, without issuing either a cause or no-cause finding. Collins Decl. ¶ 9 & Ex. E, ECF 2-4. Thus, Ms. Cross was deprived of the possibility of the EEOC-facilitated conciliation procedure that would have followed a cause determination. *See Coal. of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1016 (D.C. Cir. 2022) (inability to compete for government benefit was cognizable injury for Article III purposes). She was also deprived of whatever information the EEOC's further investigation might have uncovered about

[2] An informational injury occurs when a plaintiff is deprived of information that, on their view of the law, a statute requires the government or a third party to disclose. *See FEC v. Akins*, 524 U.S. 11, 21 (1998). While the EEOC has established a practice of providing charging parties with the contents of their investigative files upon request, and the Supreme Court has found this practice to be lawful, *Associated Dry Goods*, 449 U.S. at 598–603, no statute requires that the EEOC obtain any particular information through an investigation or disclose any particular information to a charging party.

Amazon's practices, information that both the Supreme Court and an experienced employment lawyer who submitted a declaration in this case have identified as valuable in assessing and developing potential litigation regardless of whether the investigation ends in a cause or no-cause finding. Sellers Decl. ¶¶ 8–10, ECF 2-5; *see also Associated Dry Goods*, 449 U.S. at 602 ("Pointless litigation burdens both the parties and the federal courts, and it is in the interest of all concerned that the charging party have adequate information in assessing the feasibility of litigation."). The unlawful truncation of Ms. Cross's investigation injured her in concrete and particularized ways, and those injuries are fairly traceable to the EEOC's Disparate Impact Rule.

C. This Court has the power to redress Plaintiff's injuries.

Defendants' challenges to redressability reprise many of their arguments about prosecutorial discretion discussed in part I.A above, Opp. 17–18, and they miss the mark for the same reasons. Defendants also suggest that Plaintiff can seek prospective relief only if she plans to imminently file another EEOC charge. Opp. 18–19. This suggestion is incorrect.

Plaintiff seeks tolling of her filing deadline, Proposed Order ¶ 3, ECF 2-6, and the ability to request that the EEOC vacate her dismissal notice and reopen her investigation, *id.* ¶ 5. All of these forms of equitable relief, which the Court has the power to grant, *see* 5 U.S.C. § 705, would redress the injuries that Plaintiff has suffered, and continues to suffer, from having her investigation prematurely ended and her 90-day filing deadline triggered.

Moreover, first staying and later vacating the Disparate Impact Rule would ensure that these injuries do not recur if Ms. Cross seeks to have the investigation of her charge reopened, only to have it administratively closed again outside of Title VII's cause-or-no-cause framework. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185–86 (2005) ("For a plaintiff who is injured . . . due to illegal conduct ongoing at the time of suit, a sanction

that effectively abates that conduct and prevents its recurrence provides a form of redress."). Plaintiff has a substantial likelihood of establishing all three elements of standing.

II. Plaintiff is likely to succeed on the merits of her APA claims.

A. The Disparate Impact Rule is reviewable under the APA.

Defendants mount three threshold challenges under the APA before turning to the merits. All three repeat basic misunderstandings of Plaintiff's claims, the Disparate Impact Rule, or both, and none prevents this Court's review.

1. The Disparate Impact Rule is a final agency action.

Contending that the Disparate Impact Rule affects no legal rights, Defendants focus their finality attack on the second prong of the two-part test established in *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Opp. 20. Defendants' argument centers on *Borg-Warner Protective Services Corp. v. EEOC*, 245 F.3d 831 (D.C. Cir. 2001), where the EEOC issued a reasonable-cause determination and pursued conciliation regarding a mandatory arbitration provision that the employer required its employees to sign. *Id.* at 832–33. The employer then filed an action against the EEOC under the APA, seeking a judicial declaration that the employer's arbitration agreement was lawful under Title VII and an injunction "forbidding the EEOC from issuing determinations to the contrary." *Id.* (internal quotation marks omitted). The district court dismissed the complaint, and the D.C. Circuit affirmed, finding that the EEOC's reasonable-cause determination was not final agency action because it merely started the conciliation process and informed the employee of his rights. *Id.* at 836. Citing *Borg-Warner*, Defendants argue that because a reasonable-cause determination is not a final agency action, neither are the "intermediate steps leading to that decision," like "how the Commission investigates and processes charges." Opp. 21.

There are two large problems with this argument. First, the Disparate Impact Rule does not concern "intermediate steps leading to" reasonable-cause determinations; it mandates that for

disparate-impact charges, there will henceforth be no determinations of reasonable cause, let alone intermediate investigative steps leading to reasonable-cause determinations. EEOC Mem. at 2. Second, Ms. Cross is not challenging "how the Commission investigates and processes charges." She is challenging the Disparate Impact Rule that directs EEOC staff to cease investigating a particular category of charges altogether.

These instructions to agency staff are binding and constrain their future actions with respect to disparate-impact charges, distinguishing this case from *Massachusetts Coalition for Immigration Reform v. DHS*, 621 F. Supp. 3d 84 (D.D.C. 2022). In that case, the plaintiffs brought APA challenges to various immigration actions, including a Department of Homeland Security ("DHS") manual on the National Environmental Policy Act ("NEPA"). This Court concluded that the NEPA manual was not final agency action under *Bennett*'s second prong because "[i]ts general instructions do not bind DHS or any of its components to a particular decision," or "command DHS components to invoke an exclusion" from NEPA coverage. *Id.* at 96. By contrast, the Disparate Impact Rule creates an exclusion from the ordinary investigative process, a new "administrative closure" category for disparate-impact charges outside of the cause and no-cause binary, and its mandatory nature absolutely "bind[s]" the EEOC and its employees "to a particular decision." *Id.*; *see also* EEOC Mem. at 2 ("[E]very pending charge of discrimination premised solely on disparate impact liability shall be administratively closed." (emphasis deleted)); *id.* at 3 (for mixed cases, EEOC staff "cannot continue to investigate the portion of the case that involves disparate impact liability").

Finally, by forbidding investigation of disparate-impact charges under Title VII and forbidding conciliation of disparate-impact charges under the ADEA, the Disparate Impact Rule alters—indeed, contradicts—the requirements of those statutes rather than simply clarifying or

explaining them. *See Delaware Valley Reg'l Ctr., LLC v. DHS*, 678 F. Supp. 3d 73, 84 (D.D.C. 2023) (holding that a statement on DHS's website was not final agency action because it "merely repeats what the [statute] already requires"). Because the Disparate Impact Rule marks the consummation of the EEOC's decisionmaking process and has legal consequences for both agency staff and charging parties like Ms. Cross, it is final agency action.

2. Plaintiff has no adequate alternative remedy.

Defendants next claim that judicial review is unavailable under 5 U.S.C. § 704 because Ms. Cross has an adequate alternative remedy: the ability to bring her discrimination claims against Amazon. Opp. 21–22. But the cases on which Defendants rely all arose in the context of plaintiffs who objected to how the EEOC handled their individual discrimination charges. In that context, these cases hold that proceeding against the employer in court under a de novo standard of review provides an adequate remedy for alleged deficiencies such as the EEOC conducting an investigation that was too cursory or too deferential to the employer. *See, e.g.*, *Ward v. EEOC*, 719 F.2d 311, 312 (9th Cir. 1983) (plaintiff sued the EEOC for negligently processing his discrimination charge and conspiring with his employer to deprive him of his constitutional rights).

Here, by contrast, Ms. Cross challenges an EEOC rule abandoning wholesale its statutory responsibility to investigate and conciliate a subset of charges within its jurisdiction, an agency action with wide-ranging prospective effects. Moreover, the injuries that Ms. Cross suffers as a result of this unlawful agency action are different from the injuries she suffered because of Amazon's actions in 2022. The EEOC's actions injure her by depriving her of the full administrative review process set forth in 42 U.S.C. § 2000e-5, including the possibility of a reasonable-cause finding and EEOC-facilitated conciliation. Filing suit against Amazon would not provide Ms. Cross with an adequate remedy for these injuries caused by the EEOC's unlawful

agency action. Nor, in a Title VII case against Amazon, could Ms. Cross obtain judicial review of the lawfulness of the EEOC's rule prohibiting investigation and conciliation of disparate-impact charges. Thus, a private right of action under Title VII is not an adequate alternative remedy and does not preclude judicial review of this APA action.

3. Plaintiff does not challenge action committed to agency discretion by law.

Defendants argue that Plaintiff's claims implicate enforcement decisions committed to agency discretion by law. Opp. 22–27; *see* 5 U.S.C. § 701(a)(2). That argument is wrong.

To begin with, Ms. Cross does not challenge a particular decision not to enforce Title VII (or any other statute) with respect to a disparate-impact charge. She challenges the Disparate Impact Rule, an "affirmative act" by the EEOC to carve out a category of charges from investigation, which the agency took against a backdrop of statutes—Title VII and the ADEA—"that set clear guidelines for" what the agency may and may not do. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971)). In other words, the Disparate Impact Rule does not exercise enforcement discretion; it eliminates it. This case thus falls outside § 701(a)(2)'s "narrow" exception to judicial review under the APA. *Heckler*, 470 U.S. at 838.

Even if viewed as a non-enforcement decision subject to *Heckler*'s presumption of unreviewability, the Disparate Impact Rule would nonetheless be reviewable because the relevant "substantive statute[s] [] provide[] guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833. In *Heckler*, the Court cited as "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability" a provision of the Labor-Management Reporting and Disclosure Act ("LMRDA") stating that "[t]he Secretary [of Labor] shall investigate [a] complaint" filed under that section and then "shall . . . bring a civil action" if

the investigation results in a finding of "probable cause." *Id.* (quoting 29 U.S.C. § 482(b)). Citing *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the *Heckler* Court reiterated its holding there that, in light of this language, the Secretary of Labor's decision not to file suit was judicially reviewable because "[t]he statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Heckler*, 470 U.S. at 834.

The relevant provisions of Title VII and the ADEA are strikingly similar to the LMRDA provision distinguished in *Heckler*. Title VII, for instance, instructs: "Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . the Commission … *shall make an investigation thereof*." 42 U.S.C. § 2000e-5(b) (emphasis added); *see also* 29 U.S.C. 626(d)(2) (similar mandatory language in the ADEA regarding engaging in conciliation). Thus, even if the presumption of unreviewability applied to the Disparate Impact Rule (which it does not), the text of Title VII and the ADEA would easily overcome it.

Moreover, in promulgating the Disparate Impact Rule, the EEOC "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 580 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Such a "statement of a general enforcement policy" is reviewable, even if a "single-shot non-enforcement decision" would not be. *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (emphases omitted); *see Edison Elec. Inst. v. EPA*, 996 F.2d 326, 331, 333 (D.C. Cir. 1993) (holding agency's policy of considering certain violations "reduced priorities" for enforcement was reviewable); *Bonumose, Inc. v. FDA*, 747 F. Supp. 3d 211, 225 (D.D.C. 2024) ("Consistent with th[e] presumption [of reviewability], the D.C. Circuit has observed that 'an agency's statement of a general enforcement policy may be reviewable[.]'" (quoting *Crowley*, 37 F.3d at 676)).

To avoid this well-established caselaw, Defendants retreat to arguing that *how* they investigate and conciliate disparate-impact claims is not subject to review. *See* Opp. 23 ("Title VII does not specify how the Commission should determine that there is reasonable cause underlying a particular charge."); *id.* at 25 ("[T]his Court cannot dictate the Commission's investigative procedures[.]"); *id.* at 26–27 (arguing that the informal conciliation required by the ADEA "necessarily involves the exercise of agency discretion"). This is a sleight of hand. Plaintiff does not seek review of *how* the EEOC investigates or conciliates disparate-impact charges, but *whether* the EEOC will do so at all. The agency may have discretion in the former case, but not the latter.

Similarly, Defendants assert that they satisfy their statutory mandate to "investigate" charges of disparate-impact discrimination when they "determin[e] whether a charge is one of disparate impact." *Id.* at 24. But Title VII requires more than that an EEOC investigator glance at a charge to determine the theory of liability asserted before tossing it in the bin. The agency must conduct sufficient investigation to "determine[] after such investigation that there is [or is not] reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). Identifying that the charge presents a disparate-impact theory does not determine whether there is reason to believe the employer engaged in discrimination. Thus, evaluating whether a charge relies on disparate-impact liability cannot satisfy the agency's statutory mandate to "investigate" charges.

To be sure, the EEOC exercises considerable discretion throughout the enforcement process, in such decisions as which investigative steps to take, how to prioritize among claims, how to conciliate an unlawful practice, and whether to sue a recalcitrant employer. But it may not refuse to investigate disparate-impact charges altogether under Title VII, or refuse to attempt conciliation of disparate-impact charges under the ADEA. The Disparate Impact Rule's wholesale

abdication of the EEOC's responsibilities, in the face of Congress's explicit and mandatory language, is not committed to agency discretion by law under 5 U.S.C. § 701(a)(2).

B. The Disparate Impact Rule is contrary to law and arbitrary and capricious.

Defendants' substantive defense of the Disparate Impact Rule says almost nothing about the text of that rule or the text of Title VII and the ADEA. Instead, their argument largely focuses on the number of charges that the EEOC receives each year and the various resolution categories listed on the agency's website. Opp. 28–29. This foray into data does not help their cause.

Before turning to the data, Defendants suggest that the EEOC satisfied its statutory obligations to Ms. Cross by investigating her charge for two years and then issuing her a right-to-sue notice. Opp. 27–28. Plaintiff does not dispute that the EEOC began a proper investigation but contends that it became improper when the Disparate Impact Rule required the premature dismissal of her charge on September 29, 2025. And while Defendants insinuate that her dismissal was a no-cause finding, Opp. 28 (citing 29 C.F.R. § 1601.19, the EEOC regulation that governs no-cause findings), and that she wished for the Commission to "continue[] investigating until it reaches Plaintiff's alternative, desired result" (presumably a cause finding), *id.*, that both misstates what occurred and misconstrues the relief Plaintiff seeks.

Ms. Cross's dismissal was an administrative closure, not a no-cause finding, as the EEOC told Ms. Collins and as the notice makes clear. Collins Decl. ¶ 9 (recounting conversation with investigator in which she was told that because of the new directive on disparate-impact charges, the charge would be administratively closed, unless Ms. Cross voluntarily withdrew it); Ex. E ("The investigation of your charge has concluded, and your charge is being administratively closed."). The language in Ms. Cross's notice differs from that used in right-to-sue notices based on no-cause findings. *See* Procedural Regulations under Title VII, ADA and GINA; Procedures—Age Discrimination in Employment Act, 85 Fed. Reg. 65,214, 65,216 (Oct. 15, 2020) (revising

language of Dismissal and Notice of Rights document for no-cause findings, where previous version stated: "Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes" and new version states: "The EEOC will not proceed further with its investigation, and makes no determination about whether further investigation would establish violations of the statute."). Moreover, Ms. Cross is not seeking further investigation in order to secure a cause finding. She is seeking vacatur of an unlawful, arbitrary and capricious rule.

Defendants describe the Disparate Impact Rule as a decision to "deprioritize" disparate-impact investigations, and justify this decision based on the large number of charges the EEOC receives. Opp. 28. But calling something a "decision to deprioritize" does not make it so. An actual decision to deprioritize disparate-impact charges might involve instructing staff to spend less time on investigating these charges than other charges, or to turn to them only after completing all work on higher-priority charges. While Plaintiff takes no position on whether such a theoretical deprioritization action would be arbitrary and capricious, that is not what the Disparate Impact Rule does. "Deprioritize" and "eliminate" do not mean the same thing.

Defendants also note that only a small fraction of the charges received by the EEOC result in a cause finding. Opp. 28. These statistics do nothing to elucidate whether the Disparate Impact Rule is contrary to law or arbitrary and capricious. Moreover, Table E4a, from which Defendants derive this data, undermines their argument. For one thing, the two separate entries on the chart for no-cause findings and administrative closures reinforce that these are separate analytical categories. *See* Enforcement and Litigation Statistics, *supra* note 1. Similarly, the webpage of definitions accompanying the charts explains that "administrative closures" are charges "closed for administrative reasons without a determination based on the merits," for such reasons as "lack

of jurisdiction due to untimeliness, insufficient number of employees, or lack of employment relationship."[3] This category also includes charges that are voluntarily withdrawn or where the charging party requests their right-to-sue notice. *Id.* Nowhere in this definition, or in the regulation addressing such administrative closures, 29 C.F.R. § 1601.18, does the EEOC state that charges can be administratively closed because the President has expressed dislike for the theory of discrimination alleged.

Turning to reliance interests, Defendants note that approximately 20% of Title VII charges were administratively closed over the past three fiscal years. Opp. 30 (citing Table E4a).[4] During that same three-year period, the claims of 1,447 charging parties were resolved through conciliation—a possibility that will be categorically off-limits for those with disparate-impact claims if the challenged rule remains in effect. *See* Enforcement and Litigation Statistics, *supra* note 1, Table E4a. These are precisely the sorts of "society- and industry-wide" reliance interests that have led courts to find agency action to be arbitrary and capricious. *Scotts Valley Band of Pomo Indians v. Burgum*, -- F. Supp. 3d --, 2025 WL 3034885, at *12 (D.D.C. Oct. 30, 2025).

Finally, Defendants seek to justify their rule by pointing to Executive Order 14281 and its command to "deprioritize enforcement" of disparate-impact claims. Opp. 29. But the Executive Order specifies that it "shall be implemented consistent with applicable law." Exec. Order No. 14281, "Restoring Equality of Opportunity and Meritocracy," 90 Fed. Reg. 17,537, 17,539 (Apr.

[3] EEOC, Definitions of Terms (2020), https://perma.cc/7T7W-J2B4.

[4] Defendants seem to rely on this percentage to support their statement that not all investigative files contain statistical information, but Plaintiff never suggested that all files would contain such information. Plaintiff and her supporting declarant simply noted that statistical information, when available, is helpful to case evaluation, and that it is particularly likely to be present in disparate-impact cases. Cross Decl. ¶ 12, ECF 2-2; Sellers Decl. ¶¶ 9–10.

28, 2025). The executive order thus cannot justify the agency's decision to abdicate its statutory duty to investigate charges within its purview.

C. The Disparate Impact Rule was enacted without observance of procedure required by law.

Responding to Plaintiff's argument that the rule did not undergo required notice-and-comment procedures, Defendants fall back on the assertion that the Disparate Impact Rule affects no legal rights and only involves "decisions [] antecedent to a reasonable-cause determination." Opp. 29–30 (citing *Borg-Warner*, 245 F.3d at 836). As Plaintiff has explained, *supra* II.A.1, the rule in reality takes reasonable-cause determinations (and conciliation proceedings) off the table entirely for disparate-impact charges, which certainly impacts those charging parties' legal rights.

As to whether a quorum of commissioners was required to enact the Disparate Impact Rule, Defendants argue that the EEOC Chair, acting alone, can make decisions regarding the Commission's "administrative operations," and that the Disparate Impact Rule affects only such administrative operations and no rights or interests of private parties. Opp. 31 (quoting 42 U.S.C. § 2000e-4(a)). However, Plaintiff explained at length in her opening memorandum how private rights and interests are implicated by the Disparate Impact Rule, Pl.'s Mem. 20–21, ECF 2-1, and Defendants fail to engage substantively with these arguments.[5]

III. The irreparable harm, balance of equities, and public interest factors all support Plaintiff.

Defendants express skepticism about the irreparable harms Ms. Cross has articulated, deeming it "counterintuitive" that she would want a longer EEOC investigation when it was

[5] Defendants also failed to respond in any way to Plaintiff's likelihood of success as to her third cause of action that the Disparate Impact Rule exceeds the EEOC's statutory authority under Title VII, which only permits the agency to issue procedural regulations. By failing to address this claim in their opposition, Defendants have conceded it. *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) (court may treat unaddressed arguments as conceded).

already underway for two years. Opp. 31. But Ms. Cross has explained that she is willing to wait longer to undertake litigation against Amazon to maximize the information she might be able to derive from an EEOC investigation, so that she can be as effective as possible as a class representative. Cross Decl. ¶¶ 11–13. And while Defendants suggest that Ms. Cross can obtain all information relevant to her claims from Amazon through the civil discovery process in litigation, Opp. 32, this ignores that the information potentially available through the EEOC's investigative file would be especially valuable to her before making decisions about whether to commence litigation and how to frame her claims. *See* Sellers Decl. ¶¶ 8–10.

Moreover, when Ms. Cross's investigation was cut short for an unlawful reason based on the Disparate Impact Rule, she was deprived of a statutory entitlement—the full administrative process with its opportunity for informal resolution through the EEOC—that Congress created in Title VII. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (describing conciliation as a "key component" of Title VII's "statutory scheme"). Once this statutory entitlement has been lost, "it cannot be recaptured." *See Hi-Tech Pharm. Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (citation omitted) (explaining why deprivations of "statutory entitlements[]" can constitute irreparable harms even if their "economic" effects can be remedied later). Indeed, the harms to Ms. Cross are even more clearly irreparable than the harms facing the drug company plaintiff in *Hi-Tech*, because loss of the ability to participate in the Title VII administrative process, unlike the prospective economic harms at issue in that case, is not the type of harm that can be remedied later through litigation. *Contra Clevinger v. Advoc. Holdings, Inc.*, 134 F.4th 1230, 1234–35 (D.C. Cir. 2025) (potential loss of customers and reputational harm caused by violation of noncompete agreement were not irreparable because they could be remedied later with monetary damages). And it can never be remedied through litigation against Amazon. *See supra* Part II.A.2.

On the balance of equities, the only harm Defendants identify from the relief Plaintiff seeks is that it would "disrupt the Commission's implementation of the President's directives" regarding disparate impact. Opp. 33. But the EEOC can implement those directives in any number of ways that do not involve a complete ban on all disparate-impact investigations. On the other side of the ledger, the Disparate Impact Rule has stripped statutory rights, and access to potentially valuable information, not just from Ms. Cross but from an unknown number of other charging parties whose disparate-impact charges were administratively closed.[6] Moreover, the rule will make it more difficult for workers and job applicants to challenge workplace policies, such as reliance on artificial intelligence in the hiring process, whose potential discriminatory effects are difficult for an affected individual to discern without engaging in protracted, resource-intensive litigation. *See* Sellers Decl. ¶ 11 (describing effect of the EEOC's discontinuation of disparate-impact investigation as "especially acute" because of employers' increasing reliance on algorithms in screening applicants). The balance of equities and public interest tilt in favor of preliminary relief.

IV. The APA's interim relief provision authorizes the remedies Plaintiff seeks.

Defendants object to the scope of relief Ms. Cross seeks, describing it as a "universal injunction" foreclosed by *Trump v. CASA, Inc.*, 606 U.S. 831, 847 (2025). Opp. 34. But Ms. Cross seeks this relief under 5 U.S.C. § 705, a provision that "authorizes [a] reviewing court to 'postpone the effective date of an agency action or preserve status and rights' full stop, not only as to plaintiffs before the court." *Coal. for Humane Immigr. Rts. v. Noem*, -- F. Supp. 3d --, 2025 WL 2192986,

[6] Defendants posit that Ms. Cross has not "asserted harms on behalf of parties not before this Court." Opp. 33. While Ms. Cross's theory of Article III injury turns only on injuries she has personally suffered, she has previously explained the widespread harms caused by the Disparate Impact Rule, Pl.'s Mem. 27, and this Court can and should consider those harms.

at *37 (D.D.C. Aug. 1, 2025), *appeal docketed*, No. 25-5289 (D.C. Cir. Aug. 11, 2025). (quoting 5 U.S.C. § 705).

Given the effects that the Disparate Impact Rule has already had and will continue to have as filing deadlines near, the "necessary and appropriate process" that § 705 authorizes must extend to all those whose charges were administratively closed. Ms. Cross agrees with Defendants, however, that "some third parties may wish to proceed with judicial de novo review." Opp. 35. This is why she seeks tolling of all affected filing deadlines, rather than rescission of right-to-sue notices, to maximize flexibility for those affected by the Disparate Impact Rule rather than imposing any particular outcome on them.

V. Plaintiff should not be required to post a bond.

Defendants ask this Court to require Ms. Cross to post a bond, Opp. 38, but the relief she seeks need not be conditioned on the posting of security. First, Plaintiff seeks a stay under 5 U.S.C. § 705, which does not contain a bond requirement. *See Am. Fed. of Teachers v. Dep't of Educ.*, 779 F. Supp. 3d 584, 623 n.14 (D. Md. 2025) ("[I]n the U.S. District Court for the District of Columbia, where preliminary relief under the APA is most frequently issued, this principle is so well-established that bond is rarely—if ever—discussed in Section 705 decisions."); *Prairie Prot. Colo. v. USDA APHIS Wildlife Servs.*, No. 19-CV-2537-WJM-KLM, 2019 WL 4751785, at *1 n.2 (D. Colo. Sept. 30, 2019) ("Rule 65(c) requires a court granting an injunction to consider a bond amount, whereas § 705 contains no such requirement.").

Second, as to Plaintiff's request for a preliminary injunction, Federal Rule of Civil Procedure 65(c) "'vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond,' including the discretion to require no bond at all." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) (quoting *DSE, Inc. v. United States*, 169 F.3d

21, 33 (D.C. Cir. 1999)). The equities weigh against any bond here,[7] where an agency has abandoned its statutory obligations, and a bond would merely impose a financial barrier to litigation for a plaintiff seeking to redress her irreparable harm under that same statute. *See League of United Latin Am. Citizens v. Exec. Off. of the President*, No. CV 25-0946 (CKK), 2025 WL 1187730, at *62 (D.D.C. Apr. 24, 2025) (declining to require bond "as a condition of obtaining an injunction against unlawful executive action" where doing so "would risk deterring other litigants from pursuing their right to judicial review of unlawful executive action," and thus "would contravene the interests of justice" (citation modified)).

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiff's memorandum in support of her motion for preliminary injunction and stay, this Court should grant a stay of the Disparate Impact Rule under 5 U.S.C. § 705 and provide the other interim relief described in Plaintiff's proposed order, ECF 2-6.

[7] In the alternative, the Court may order the posting of a nominal bond in the amount of $1.00.

Dated: November 7, 2025

Respectfully submitted,

/s/ Karla Gilbride

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