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

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

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INTRODUCTION

Congress created the Equal Employment Opportunity Commission (EEOC or Commission) through Title VII of the 1964 Civil Rights Act and required it to receive and investigate charges filed by aggrieved individuals alleging unlawful employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. §§ 2000e-2, 2000e-5. Filing a charge with the EEOC is the first step in what the Supreme Court has described as "an integrated, multistep enforcement procedure," under which the EEOC is "required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977). If the EEOC finds reasonable cause, the agency must then "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(d)(2) (imposing same conciliation obligation on the EEOC for all charges filed under the Age Discrimination in Employment Act (ADEA)).

On September 15, 2025, the EEOC issued a directive ("the Disparate Impact Rule") purporting to abdicate its responsibility to investigate or conciliate an entire category of discrimination charges: those Title VII and ADEA charges premised on a theory of disparate impact. Disparate-impact discrimination occurs when a facially neutral policy disproportionately harms individuals based on a protected characteristic such as sex, race, or age. The Supreme Court has long recognized this form of discrimination under both Title VII and the ADEA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (addressing Title VII); *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (addressing the ADEA).[1] But now, despite disparate-impact

[1] The Supreme Court has recognized disparate-impact liability under other statutes as well. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 576 U.S. 519, 532–40 (2015) (Fair Housing Act); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (Americans with

discrimination being unlawful under both statutes and thus within the category of discrimination charges that the EEOC must investigate and conciliate, the Disparate Impact Rule required EEOC staff to administratively close all Title VII and ADEA charges "premised solely on disparate impact liability" by September 30, 2025. EEOC Memorandum, ECF 2-3, at 2.[2] For charges that involve both allegations of intentional discrimination and disparate-impact-based discrimination, the EEOC instructed its employees to stop "investigat[ing] the portion of the case that involves disparate impact liability." *Id.* at 3. The agency used similarly categorical language regarding conciliation of disparate-impact charges under Title VII and the ADEA, stating that the "EEOC cannot facilitate the resolution of a pending charge that is premised solely on disparate impact liability through conciliation." *Id.* at 4.

The Disparate Impact Rule announced in this memorandum is a final agency action that violates the Administrative Procedure Act in four ways. *First*, it is contrary to law because it prohibits investigation or conciliation of allegations of disparate impact that the EEOC is required by statute to investigate and conciliate, and it purports to end all investigative activities on disparate-impact charges—a category of charges over which the EEOC unquestionably has jurisdiction—not based on the particular facts or evidence supporting those charges, but solely on the legal theory of discrimination they alleged. *Second*, it is arbitrary and capricious because no reasonable explanation was given for abandoning the EEOC's 60-year practice of investigating and conciliating disparate-impact charges. Nor did the EEOC appear to consider the reliance interests of charging parties who benefit from the EEOC's investigative findings and conciliation

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Disabilities Act). However, the EEOC's Disparate Impact Rule is limited to disparate-impact charges under Title VII and the ADEA. EEOC Mem. at 1–2 & n.2.

[2] Names and other identifying details have been redacted from this memorandum to protect those individuals' privacy.

processes or of employers who might prefer those informal resolutions to class action lawsuits filed by private plaintiffs and their counsel. *Third*, it was issued in excess of the EEOC's authority under Title VII because it is a substantive rule that alters the rights and interests of private parties, yet the EEOC only has procedural rulemaking authority under Title VII. *Finally*, the rule was enacted without observance of procedure required by law because the EEOC neither engaged in notice-and-comment rulemaking nor maintained a quorum, and thus lacked authority to conduct votes, when the Disparate Impact Rule went into effect.

Plaintiff Leah Cross is one of the private parties whose rights have been detrimentally altered by this agency action. Ms. Cross filed a charge of discrimination with the EEOC and the Colorado Civil Rights Division in May of 2023 against her former employer, Amazon.com, Inc. (Amazon), alleging a theory of sex discrimination based on disparate impact. Declaration of Valerie Collins (Collins Decl.) ¶ 2 and Ex. A. The charge was assigned to the EEOC for investigation, *id.* ¶ 6, and interactions between Ms. Cross's counsel and her assigned investigator suggested that the investigation was being actively pursued. *Id.* ¶ 7 and Ex. C ("The Commission is very interested in moving forward with Ms. Cross's case."). Then, on September 24, 2025, the investigator told Ms. Cross's counsel that the investigation would be closed pursuant to the EEOC's new Disparate Impact Rule, and Ms. Cross received a dismissal notice five days later. *Id.* ¶¶ 9–11 and Ex. E. This notice informed Ms. Cross that the "administrative[]" dismissal was not based on the merits of her charge, but that she would nonetheless need to file suit on her Title VII disparate-impact claim within 90 days. *Id.* As a result, Ms. Cross and all others who received dismissal notices based on the new Disparate Impact Rule must now scramble to file suit without the benefit of a completed EEOC investigation of the factual merits of their claims, or the possibility of an EEOC-facilitated conciliation process with their employers if that investigation

results in a determination of reasonable cause.

Under 5 U.S.C. § 705, the Court may stay the challenged agency action and "issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings." Here, to prevent irreparable injury, the Court should exercise this authority by, at a minimum, staying the EEOC's Disparate Impact Rule, and also tolling the 90-day filing periods for all right-to-sue notices issued pursuant to that rule, requiring the EEOC to notify all affected individuals of this tolling, and giving them the option of having their EEOC investigations resumed so that they may benefit from the full "integrated, multistep [EEOC] enforcement procedure" to which they are entitled. *Occidental*, 432 U.S. at 359.

STATUTORY BACKGROUND

I. The EEOC's Processing of Title VII and ADEA Charges

Although individuals have a private right of action to pursue claims of employment discrimination under Title VII and the ADEA, they may not do so without first filing a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 U.S.C. § 626(d)(1) (ADEA). Proceedings before the EEOC begin when "a charge is filed by or on behalf of a person claiming to be aggrieved." 42 U.S.C. § 2000e-5(b). Once a charge is received, the Commission is statutorily required to serve notice of the charge on the respondent employer within ten days, and then "*shall* make an investigation" of the charge. *Id.* (emphasis added). The investigation may include requests for information, witness interviews, and employer on-site inspections. 29 C.F.R. §§ 1601.15–16.[3]

[3] *See also* EEOC Compliance Manual 602, Evidence (1988), https://perma.cc/K4Q9-ZYEZ; Quality Practices for Effective Investigations and Conciliations (2015), https://perma.cc/5ZFJ-BWZE.

The purpose of an EEOC investigation "is to determine whether there is reason[able cause] to believe . . . [the charge's] allegations are true." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 71 (1984). Under Title VII, the EEOC's next steps diverge depending on whether the investigation results in a "reasonable cause" determination. If no reasonable cause is found, the EEOC "shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action." 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.19. However, "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.21. If such conciliation efforts are unsuccessful, the Commission then may either file suit itself or issue a right-to-sue notice to the person who filed the charge. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28.

The EEOC's obligations are similar with respect to the ADEA. One key difference is that the EEOC is statutorily required to engage in conciliation efforts for every ADEA charge, not just those where the investigation results in a reasonable cause finding. 29 U.S.C. § 626(d)(2) ("Upon receiving such a charge, the Commission *shall* . . . promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.") (emphasis added).

The EEOC's procedural regulations for processing Title VII charges suggest other reasons a Title VII charge might be dismissed early in the investigative process, separate from a dismissal based on lack of reasonable cause "to believe that an unlawful employment practice has occurred or is occurring." 29 C.F.R. § 1601.19(a). Specifically, the regulations call for dismissal "[w]here a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses" that the charge "is not timely filed, or otherwise fails to state a claim" under Title VII.

Id. § 1601.18(a). A list of definitions available on the Commission's website labels this type of dismissal an "administrative closure" and provides examples of when such a closure may occur: where the charging party and respondent lack an employer-employee relationship, where the respondent has fewer than the number of employees that would trigger statutory coverage, or where the charging party withdraws their charge. EEOC Definitions of Terms, Administrative Closure (2020), https://perma.cc/K34R-P3A2.[4] The investigation can also be dismissed if the charging party requests a right-to-sue notice, but the statute prohibits a party from doing so until 180 days (in the case of Title VII) or 60 days (in the case of the ADEA) has elapsed to give the EEOC an opportunity to investigate. *See* 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d)(1).

II. Disparate Impact-Based Discrimination Under Title VII and the ADEA

The EEOC, the Supreme Court, and Congress have all long recognized disparate impact as a cognizable theory of discrimination under Title VII. The EEOC did so as early as 1966, when it established its first guidelines on employment testing procedures stating that employment tests must validly measure ability to perform the job in question lest they unintentionally perpetuate barriers to opportunity rooted in historical discrimination and unequal access to education.[5] In 1970, the EEOC issued more comprehensive Uniform Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (Aug. 1, 1970), which are now codified at 29 C.F.R. Part 1607.

The Supreme Court recognized the viability of disparate-impact liability under Title VII in a series of cases, beginning with *Griggs*, 401 U.S. at 433—which addressed a written exam and high school diploma requirement that disproportionately excluded Black candidates—and continuing in *Dothard v. Rawlinson*, 433 U.S. 321, 329–32 (1977)—which addressed minimum

[4] Charges also may be dismissed or withdrawn pursuant to a negotiated settlement or mediation facilitated by the EEOC early in the investigation process. 29 C.F.R. § 1601.20.

[5] EEOC History, 1964 – 1969, https://www.eeoc.gov/history/eeoc-history-1964-1969.

height and weight requirements that disproportionately disqualified women. *See also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 987, 991 (1988) (holding that subjective decisionmaking procedures, as well as objective policies like employment tests and selection criteria, can give rise to disparate-impact liability). In these early cases, the Court anchored the disparate impact concept in the provision of Title VII that makes it unlawful to "limit, segregate, or classify" employees or applicants "in any way that would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2).

In the Civil Rights Act of 1991, Congress added a new provision to Title VII, 42 U.S.C. § 2000e-2(k), which codified the framework for establishing disparate-impact discrimination claims and defenses. To establish a prima facie case, the plaintiff must (1) identify a specific employment practice, and (2) demonstrate that the practice causes a disparate impact on the basis of one of Title VII's protected characteristics. Once this prima facie case is established, the burden shifts to the employer to prove that the practice is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the employer meets this burden, the plaintiff may still prevail by showing that an alternative employment practice exists that would serve the employer's legitimate interests with less discriminatory effect, and that the employer refused to adopt it. *Id.* § 2000e-2(k)(1)(A)(ii); *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

As with Title VII, both the EEOC and the Supreme Court have a long history of recognizing disparate-impact liability under the ADEA. The EEOC first offered guidance on that topic just three years after taking over enforcement of the ADEA from the Department of Labor under President Carter's Reorganization Plan No. 1 of 1978.[6] Final Interpretations: Age Discrimination

[6] Reorganization Plans, https://perma.cc/T68J-3MAP.

in Employment Act, 46 Fed. Reg. 47,726 (Sept. 29, 1981) (explaining that ADEA regulations have been "rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity"). The Commission most recently amended these disparate-impact regulations in 2012, and they remain codified at 29 C.F.R. § 1625.7.

When the Supreme Court weighed in on the disparate-impact question in *City of Jackson*, it relied heavily on its precedent in *Griggs* and the fact that the ADEA contains parallel language to that in Title VII, outlawing employment practices that "limit, segregate, or classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of age. 544 U.S. at 233 (quoting 29 U.S.C. § 623(a)(2)). In addition, the ADEA contains a provision declaring permissible practices that would otherwise be unlawful under the statute "where the differentiation is based on a reasonable factor other than age." *Id.* § 623(f)(1). Four justices in *City of Jackson* concluded that this statutory text constitutes further evidence of congressional intent to codify disparate-impact liability in the ADEA (albeit more narrowly than under Title VII) by providing that a prohibited practice could be based on a neutral factor other than age and still violate the statute if that factor was not "reasonable." 544 U.S. at 240 (plurality opinion).

The EEOC has acted on the understanding that disparate impact is a cognizable theory of discrimination on numerous occasions in both its law enforcement and advisory roles. For example, the EEOC has issued guidance on the use of criminal background screenings in employment applications, including a discussion of potential disparate-impact liability,[7] litigated

[7] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act* (2012), https://perma.cc/38H3-BY5W.

cases challenging physical abilities tests as adversely impacting women[8] and most recently issued technical assistance describing how reliance on software algorithms and artificial intelligence in the job application process can expose employers to disparate-impact risk.[9]

FACTUAL BACKGROUND

I. Leah Cross's Employment Experience and Disparate Impact Charge

Leah Cross delivered packages for Amazon for several months during 2022, before her employment was terminated for failure to meet Amazon's delivery quotas. Collins Decl. Ex. A; Cross Decl. ¶ 2. Those delivery quotas, and the surveillance to which drivers are subjected by cameras inside their company-provided vehicles, frequently require that drivers go more than five hours without a bathroom break. Collins Decl. Ex. A; Cross Decl. ¶ 3. When Ms. Cross attempted to stop during her shift to use a bathroom, she would receive a call from a supervisor asking her why she was stopping or reprimanding her for deviating from her assigned route. Collins Decl. Ex. A; Cross Decl. ¶ 6. On one occasion when Ms. Cross called a dispatcher to ask if she could deviate from her route to find a bathroom that carried feminine hygiene products, she was told "not to break [her] route." *Id.* In order to meet Amazon's delivery quotas, many male Amazon drivers resort to urinating in bottles inside delivery vehicles, a practice so common that Ms. Cross often observed urine-filled bottles outside delivery loading areas and removed such bottles that had been left inside the delivery van from the previous shift. Cross Decl. ¶ 4. Because of her typical female

[8] EEOC, *EEOC Sues CSX Transportation for Company-Wide Sex Discrimination* (Aug. 2, 2017), https://perma.cc/4QPC-GVL8; EEOC, *Walmart, Inc. to Pay $20 Million to Settle EEOC Nationwide Hiring Discrimination Case*, JD Supra (Sept. 14, 2020), https://perma.cc/9BM2-YCJ5.

[9] EEOC, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (2023), https://tinyurl.com/mr35znt7. This technical assistance document is no longer available on EEOC's website, and links to its previous location yield a "page not found" error message.

anatomy (e.g., internal urethra), Ms. Cross found it difficult to urinate in a bottle inside her vehicle, and also did not consider this to be a safe or hygienic way to meet menstrual needs. Collins Decl. Ex. A; Cross Decl. ¶ 5–6.

In May of 2023, Ms. Cross filed a charge of discrimination with the Colorado Civil Rights Division (CCRD), alleging disparate-impact-based sex discrimination under Colorado law and Title VII on behalf of herself and a class of female drivers. Cross Decl. ¶¶ 7–9; Collins Decl. ¶¶ 2–3 and Ex. A. Specifically, her charge asserted that Amazon's delivery quotas, and the corresponding need to either go long periods without using a bathroom or to urinate inside the delivery vehicle, have an adverse impact on female drivers' ability to remain employed or to avoid discipline related to Amazon's pace-of-work requirements. *Id.*

Under a work-sharing agreement between the EEOC and CCRD, CCRD transferred Ms. Cross's charge to the EEOC's Denver Field Office for investigation in January of 2024. Collins Decl. ¶ 6. As part of its investigation, the EEOC received a position statement from Amazon and interviewed Ms. Cross in early 2025. *Id.* ¶¶ 6–7. When scheduling the interview, the assigned EEOC investigator stated that the EEOC "was very interested in moving forward with Ms. Cross's case." *Id.* ¶ 7 & Ex. C.

II. The EEOC's Disparate Impact Rule and Closure of Ms. Cross's Charge

In April 2025, President Trump issued Executive Order 14281, entitled Restoring Equality of Opportunity and Meritocracy. 90 Fed. Reg. 17,537 (Apr. 28, 2025). This executive order criticized the concept of disparate impact as "divisive" and instructed federal agencies to "deprioritize the enforcement of all statutes and regulations to the extent they include disparate-impact liability." *Id.* at 17,538. It also instructed the EEOC Chair and the Attorney General to "assess all pending investigations, civil suits, or positions taken in ongoing matters under every Federal civil rights law within their respective jurisdictions, including Title VII of the Civil Rights

Act of 1964, that rely on a theory of disparate-impact liability, and [to] take appropriate action with respect to such matters consistent with the policy of this order." *Id.* The order provided, however, that it "shall be implemented consistent with applicable law." *Id.* at 17,539.

Following issuance of the executive order, the EEOC took several immediate actions to retreat from enforcing disparate-impact claims. First, it sought to dismiss a lawsuit it had filed the year before alleging that the Sheetz convenience store chain maintained an inflexible criminal background screening policy that adversely impacted Black, multiracial, and indigenous job applicants.[10] Second, it sent a memorandum to state and local agencies with whom it partners in investigating employment discrimination, such as CCRD, *see* 42 U.S.C. § 2000e-8(b), informing them that it would no longer pay those agencies the customary fee for any disparate-impact charges they investigate.[11]

Then, through a memorandum to agency staff, effective September 15, the EEOC issued the Disparate Impact Rule, requiring staff to close all disparate-impact charges by September 30. EEOC Mem. at 2. The new rule explicitly told agency staff that they "cannot continue to investigate . . . disparate impact liability." *Id.* at 3. In addition, the rule prohibited reaching a reasonable cause determination or entering into conciliation discussions on charges alleging 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.").

Disparate-impact charges that were already pending on the rule's effective date had one of three possible fates: (1) the charge could be administratively closed, and a right-to-sue notice

[10] Alexandra Olson & Claire Savage, *Sheetz Racial Discrimination Case is on the Chopping Block as Trump Rewrites Civil Rights*, Assoc. Press (June 7, 2025), https://perma.cc/3XTP-BZRW.

[11] Niko Gallogly, *E.E.O.C. Tells State Regulators It Won't Back Some Discrimination Claims*, N.Y. Times (May 27, 2025), https://perma.cc/9C9X-G33X.

issued, with the notation "other," *id.*; (2) the charge could be closed as "no cause," and a right-to-sue notice issued, if the investigation to date supported such a determination, *id.*; or (3) an investigator could petition their supervisor to allow them to continue investigating the charge under an intentional discrimination, or disparate-treatment, theory, *id.* at 2–3.

Ms. Cross's charge fell into the first of these three categories. On September 24, the investigator assigned to her charge told Ms. Cross's counsel during a phone conversation that the charge would be closed pursuant to the EEOC's new rule against investigating allegations of disparate-impact discrimination, unless Ms. Cross chose to voluntarily withdraw it. Collins Decl. ¶ 9. Ms. Cross responded through counsel that she would not withdraw her charge and that the EEOC should continue to investigate it, as Title VII requires. *Id.* ¶ 10 & Ex. D. On September 29, a closure and right-to-sue notice was placed in Ms. Cross's online file. *Id.* ¶ 11. This notice indicated that the closure was "administrative[]" and that it did "not reflect a determination on the merits." *Id.* Ex. E. The notice also warned that Ms. Cross must file suit within 90 days of its effective date to preserve her right to bring a claim under Title VII. *Id.*

LEGAL STANDARD

The Administrative Procedure Act (APA) authorizes courts, "to the extent necessary to prevent irreparable injury," to "issue all necessary and appropriate process" to "preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. A party seeking a stay under § 705 must satisfy the same four-factor test as a party seeking a preliminary injunction. *Coal. for Humane Immigr. Rights v. Noem*, --- F. Supp. 3d ---, 2025 WL 2192986, at *12 (D.D.C. Aug. 1, 2025); *Cabrera v. DOL*, --- F. Supp. 3d ---, 2025 WL 2092026, at *2 (D.D.C. July 25, 2025). To obtain a preliminary injunction, "the moving party must show: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the preliminary injunction were not granted; (3) that an injunction would not substantially injure other interested parties; and (4)

that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citations omitted). As in actions seeking to enjoin the government, the final two factors—balancing the equities and the public interest—merge in actions for preliminary relief under 5 U.S.C. § 705. *Pursuing Am.'s Greatness v. Fed. Elec. Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016); *Cabrera*, 2025 WL 2092026, at *7.

ARGUMENT

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

The APA directs courts to "hold unlawful and set aside" final agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), that are "in excess of statutory jurisdiction [or] authority," *id.* § 706(2)(C), or that were taken "without observance of procedure required by law," *id*. § 706(2)(D). Here, the EEOC's Disparate Impact Rule issued through its September 15 memorandum is unlawful four times over: It contradicts the requirements of Title VII and the ADEA; it is arbitrary and capricious; it exceeds the EEOC's statutory authority, because Congress only granted the EEOC authority to issue procedural regulations under Title VII; and it was issued without engaging in required notice-and-comment procedures or EEOC-specific rulemaking procedures.

A. The Disparate Impact Rule is a discrete, final agency action.

As a threshold matter, the EEOC's Disparate Impact Rule—embodied in its September 15 memorandum—constitutes a discrete and final agency action because it resulted in the mandatory (and unlawful) closure of Ms. Cross's and other pending disparate-impact charges. The memorandum set forth a "rule"—that is, an "agency statement of general applicability and future effect," 5 U.S.C. § 551(4)—governing how both pending and future disparate-impact charges would be handled. Plaintiff thus challenges a "specific agency action[], as defined in the APA." *See NTEU v. Vought*, 149 F.4th 762, 783 (D.C. Cir. 2025) (quoting *Biden v. Texas*, 597 U.S. 785,

809 (2022)). The closure of Ms. Cross's charge was one example of the Disparate Impact Rule's implementation, as the memorandum stated in no uncertain terms that charges like hers, premised solely on disparate-impact liability and without a no-cause finding, were to be administratively closed by September 30. *See Drs. for Am. v. OPM*, --- F. Supp. 3d ---, 2025 WL 1836009, at *17 & n.10 (D.D.C. July 3, 2025) (requiring the government to restore webpages that it had removed under unlawful directives and holding that it "must reverse the implementation of those directives that caused the plaintiffs' injuries").

The EEOC memorandum is also a final agency action because it "mark[s] the consummation of the agency's decisionmaking process" and determines "rights or obligations" or is an action "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted). The memorandum marked the consummation of the agency's decisionmaking because it established deadlines by which final action on pending charges must be taken. EEOC Mem. at 2 (requiring all administrative closures to be effectuated by September 30 and right-to-sue notices issued by October 31).

With respect to the action's legal consequences, the memorandum imposed obligations on agency personnel, removing their discretion to continue investigating disparate-impact charges and to make determinations on each charge based on its facts, instead requiring them to close such charges, while also imposing a categorical ban on any new disparate-impact investigations. *See Biden*, 597 U.S. at 808–09 (holding that memorandum terminating previous program constituted final agency action by "forbidding [agency staff] from continuing the program in any way from that moment on"). The memorandum also imposed legal consequences on Ms. Cross and other aggrieved individuals whose disparate-impact charges were dismissed pursuant to—and as required by—the memorandum's Disparate Impact Rule. Because of that rule's implementation,

Ms. Cross and others whose charges were dismissed now face a 90-day countdown to file suit to avoid forever losing their right to pursue their Title VII or ADEA claims in court.

B. The Disparate Impact Rule is contrary to law.

The Disparate Impact Rule violates the EEOC's obligations under Title VII and the ADEA in two ways. First, going forward, the Disparate Impact Rule forbids EEOC employees from investigating or conciliating charges of disparate-impact discrimination. The EEOC, however, is required by statute to investigate all Title VII charges and to attempt conciliation of all ADEA charges and those Title VII charges where it makes a determination of reasonable cause. Second, the rule requires pending disparate-impact charges to be closed not for a permissible reason, such as lack of jurisdiction or lack of a reasonable cause determination, but solely based on the theory of discrimination alleged.

The rule's forward-looking prohibition on investigating or conciliating disparate-impact charges is directly at odds with the statutory language making such investigation and conciliation mandatory. *See* 42 U.S.C. § 2000e-5(b) (Commission "shall make an investigation" of Title VII charges); 29 U.S.C. § 626(d)(2) (Commission "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation" upon receiving an ADEA charge). Courts have similarly described the EEOC's investigative and conciliation responsibilities as mandatory. *Occidental*, 432 U.S. at 359 (the EEOC is "required to investigate the charge"); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (describing the EEOC's "duty" to attempt conciliation); *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1348 (D.C. Cir. 1999) (describing "section 2000e–5(b)'s express requirement that the Commission investigate every charge filed").

To be sure, "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." *EEOC v. Keco Indus. Inc.*,748 F.2d 1097, 1100 (6th Cir. 1984). But what the EEOC may not do is to "fail[] to conduct any . . . investigation at all."

EEOC v. Sterling Jewelers Inc., 801 F.3d 96, 102 (2d Cir. 2015). And that is precisely how the memorandum instructs EEOC staff to proceed with respect to disparate-impact charges. It is no more lawful for the EEOC to provide this directive than it would be if the agency were to order its staff to stop investigating racial harassment claims or sex discrimination claims based on pregnancy. If a type of discrimination is cognizable under the statutes that the EEOC enforces, as disparate-impact discrimination is, the EEOC *must* investigate a charge alleging that form of discrimination if it arises under Title VII and seek to conciliate it if it arises under the ADEA.

The second unlawful aspect of the Disparate Impact Rule is that it categorically cut short investigations before the EEOC determined, based on the facts of each charge, whether there was reasonable cause to believe discrimination had occurred. Title VII allows the EEOC to stop investigating charges and to issue a right-to-sue notice without engaging in conciliation if the investigation fails to find reasonable cause, 42 U.S.C. § 2000e-5(b), but this is by definition an individualized and fact-based inquiry. Although some charges can be quickly dismissed when an interview with the complainant or other basic investigative procedure suggests to a reasonable investigator that the charge lacks merit, a dismissal after such a short investigation, resulting in a no-cause finding under 29 C.F.R. § 1601.19, is still a disposition based on the facts of that particular charge. Even the cursory dismissals described in 29 C.F.R. § 1601.18, where the charge appears on its face to be untimely or otherwise not to state a claim, are based on the specifics of the charge and why it fails to meet requirements for statutory coverage, such as a minimum number of employees. *See* 42 U.S.C. § 2000e(b) (establishing 15-employee threshold for Title VII coverage); 29 U.S.C. § 630(b) (establishing 20-employee threshold for ADEA coverage).

While some disparate-impact charges, considered on their individual merits, may fail to meet minimum statutory prerequisites, or fail to satisfy the reasonable-cause threshold, this is not

why the EEOC, through the Disparate Impact Rule, ordered pending disparate-impact charges, including Ms. Cross's, to be dismissed. *See* Collins Decl. Ex. E (noting that Ms. Cross's charge closure "does not reflect a determination on the merits"). Instead, it ordered these charges to be dismissed because, and only because, they were "premised solely on disparate impact liability." EEOC Mem. at 2. This is not a permissible reason for dismissing a charge, and the EEOC's instruction that charges be dismissed on this basis was contrary to law.

C. The Disparate Impact Rule is arbitrary and capricious.

Agency action will be set aside as arbitrary and capricious when it does not reflect a rational consideration of consequences and alternatives. The APA "requires agencies to engage in 'reasoned decisionmaking.'" *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). To do so, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation modified). Courts reviewing agency action for compliance with this standard "consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation modified). Where an agency fails "to consider or to adequately analyze the . . . consequences of" its actions, it has failed to engage in reasoned decisionmaking. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). Thus, courts must hold unlawful any agency action that is "not 'reasonable and reasonably explained.'" *Ohio v. EPA*, 603 U.S. 279, 292 (2024) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)).

Here, the sole justification for jettisoning half a century of EEOC policy by closing pending disparate-impact investigations and prohibiting the investigation or conciliation of such charges going forward is that Executive Order 14281 expressed a presidential policy critical of disparate-

impact liability. But the EEOC could have just as easily acted on that executive order by deprioritizing disparate impact through decisions committed to agency discretion, like which charges to pursue for litigation after conciliation has failed. *See* 42 U.S.C. § 2000e-5(f)(1). Indeed, Executive Order 14281 explicitly called for implementation "consistent with applicable law[.]" 90 Fed. Reg. at 17,539. Thus, it was unreasonable for the EEOC to rely on the executive order to take actions that contravene its investigative and conciliation obligations under Title VII and the ADEA. *See Drs. for Am.*, 2025 WL 1836009, at *19 (finding agency action motivated by desire to comply with executive order to be arbitrary and capricious when it went beyond what the executive order required).

Moreover, "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Regents of the Univ. of Cal.*, 591 U.S. at 30 (internal quotation marks omitted); *see also FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (noting "[i]t would be arbitrary or capricious to ignore" serious reliance interests). Here, the EEOC has consistently investigated disparate-impact charges throughout the 60 years of the agency's existence, and many individuals who file charges with the Commission rely on the results of those investigations, including the statistical analyses that the EEOC is able to conduct because of its access to large datasets, to inform the lawsuits they may ultimately choose to file. *See Declaration of Joseph Sellers (Sellers Decl.)* ¶¶ 9–10. Conversely, if the EEOC's investigation reveals that it will be difficult for an aggrieved individual to meet their burden of establishing a causal nexus between a specific employer practice and a disparate impact, 42 U.S.C. § 2000e-2(k)(1)(A)(i), the individual may choose not to proceed with expensive and time-consuming litigation. Sellers Dec. ¶¶ 9–10. Finally, the EEOC's statistical dashboard shows that hundreds of Title VII charges, and nearly a hundred ADEA charges, are

resolved in successful conciliations every year.[12] Because of the EEOC's new Disparate Impact Rule, complainants and employers alike will be deprived of the benefits of such informal resolutions where the underlying charge happens to be premised on a disparate-impact theory. Failing to consider these long-standing reliance interests was arbitrary and capricious.

D. The Disparate Impact Rule is a substantive rule that the EEOC lacks authority to issue under Title VII and that was promulgated without observance of required procedures.

The Disparate Impact Rule is unlawful for two additional reasons, both of which stem from the fact that the rule is a "substantive" or "legislative" rule that has the "force and effect of law." *See Azar v. Allina Health Servs.*, 587 U.S. 566, 573 (2019) (citing *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015)). First, because the EEOC's rulemaking authority under Title VII is limited to issuing "procedural regulations," 42 U.S.C. § 2000e-12(a), the Disparate Impact Rule exceeded the EEOC's statutory authority in violation of 5 U.S.C. § 706(2)(C). Second, to enact substantive rules, the issuing agency must engage in notice-and-comment procedures under 5 U.S.C. § 553, which the EEOC did not do here.

1. The Disparate Impact Rule exceeds EEOC's rulemaking authority under Title VII.

In Title VII, Congress granted the EEOC rulemaking authority but limited that authority to "issu[ing], amend[ing], or rescind[ing] suitable procedural regulations necessary to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a). The Supreme Court and other courts have interpreted the reference to "procedural regulations" to prohibit the EEOC from issuing substantive or legislative rules under Title VII. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *see also Texas v. EEOC*, 933 F.3d 433, 451 (5th Cir. 2019) (modifying a district-court injunction that

[12] EEOC, *Enforcement and Litigation Statistics*, https://perma.cc/927Y-H8XL.

permitted the EEOC to enforce a guidance document only after complying with notice-and-comment procedures, to instead bar it from enforcing that guidance document entirely).

The D.C. Circuit has defined procedural rules as "internal house-keeping measures organizing agency activities." *AFL-CIO v. NLRB*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (internal quotation marks omitted). By contrast, a rule is not procedural if it "encodes a substantive value judgment" or otherwise "alter[s] the rights or interests of parties." *Id.* at 1034–35 (internal quotation marks omitted).

Here, the Disparate Impact Rule codified the substantive value judgment expressed in Executive Order 14281—that disparate impact is a disfavored theory of discrimination—and mandated that the EEOC no longer investigate or conciliate disparate-impact charges in order to effectuate that policy preference. Moreover, the Disparate Impact Rule affects the rights and interests of private parties in several ways. First, for people like Ms. Cross whose investigations were already pending based on a disparate-impact charge, the rule cuts their investigations short before reaching a cause (or no cause) determination, eliminating the possibility of conciliation that would follow from a cause finding. Second, for those who have not yet filed charges, the Disparate Impact Rule deprives them of any investigation whatsoever, and thus necessarily of any attempt at conciliation, if their charge is entirely premised on disparate-impact liability. Third, for people whose charges could be construed as encompassing either a disparate-impact or disparate-treatment theory of liability, or where the charge explicitly asks that both theories be investigated, the rule means that only the disparate-treatment aspect of the charge, and not the disparate-impact aspect, may proceed to an investigation.

All of these changes alter the rights and interests of charging parties, who have until now been able to rely on Title VII's guarantee that the EEOC will investigate their discrimination

claims (so long as they advance a legally cognizable theory and fall within the EEOC's jurisdiction), 42 U.S.C. § 2000e-5(b), and the ADEA's guarantee that the EEOC will attempt conciliation of those claims, 29 U.S.C. § 626(d)(2). And while the burden on substantive rights and interests falls most heavily on aggrieved individuals seeking redress through the EEOC, employers' interests are impacted as well, because respondents to EEOC charges benefit from the confidential investigation and conciliation processes that the EEOC facilitates—processes that the Disparate Impact Rule removes for an entire class of charges. Meanwhile, neither the EEOC's Disparate Impact Rule nor the executive order that prompted it did (or could do) anything to alter the substantive law around disparate impact or to bar private lawsuits based on that theory of liability. Indeed, by issuing right-to-sue notices on all charges premised on disparate-impact liability that may otherwise have been resolved through conciliation, the EEOC's recent actions have in the near term only increased employers' exposure to private litigation based on disparate-impact claims.

Thus, the Disparate Impact Rule was a substantive rule that the EEOC lacked the authority to issue under Title VII, and should be stayed and ultimately vacated on that basis. *See Pharm. Rsch. & Mfrs. of Am. v. HHS*, 43 F. Supp. 3d 28, 35–37 (D.D.C. 2014) (vacating rule under 5 U.S.C. § 706(2)(C) as exceeding agency's rulemaking authority).

2. The EEOC failed to engage in required notice-and-comment and other procedures before issuing the Disparate Impact Rule.

In the alternative, and to the extent that the EEOC had the authority to issue the Disparate Impact Rule, it nonetheless violated the APA's procedural requirements by issuing that rule without first providing the public notice and an opportunity to comment on it. The APA requires that "notice of proposed rule making shall be published in the Federal Register" unless those subject to the rule are personally served or receive notice in some other way. 5 U.S.C. § 553(b).

The agency must then give interested persons an opportunity to provide input on the proposed rule, either through written comments or oral testimony. *Id.* § 553(c). To further ensure that affected parties receive sufficient notice of forthcoming agency action, substantive rules must generally be published or served at least 30 days before they take effect. *Id.* § 553(d).

The D.C. Circuit has identified two reasons undergirding notice-and-comment procedures: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to nonrepresentative agencies," and to enable the agency "to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." *Batterton v. Marshall*, 648 F.2d 694, 703–04 (D.C. Cir. 1980) (citation omitted). Because the APA reflects Congress's commitment to public participation in rulemaking, exceptions to its notice-and-comment requirements are limited and are narrowly construed. *See AFL-CIO*, 57 F.4th at 1034–35. One of these exceptions makes notice-and-comment procedures unnecessary for "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). But for the reasons discussed above, this exception for procedural rules does not apply here.

Because the Disparate Impact Rule "trenches on substantial private rights and interests," the EEOC was required to publish notice in the Federal Register and allow for public comment before attempting to make such a change. *See Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (internal quotation marks omitted). In addition, the EEOC issued the Disparate Impact Rule without a majority vote, and it did so when it lacked a quorum of three commissioners and thus could not have engaged in rulemaking by majority vote.[13] The EEOC's failure to comply with the

[13] EEOC, *The State of the EEOC: Frequently Asked Questions* (2025), https://perma.cc/Q5ZC-US6G.

procedures of the APA, or even its own procedures, is an additional basis for vacating the rule as unlawful.

II. Plaintiff will suffer irreparable harm absent the relief requested.

To establish irreparable harm, the party seeking preliminary relief must make two showings: first, "the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm.'" *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). Second, the harm must be "beyond remediation." *Id.* (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). The ticking clock that will force Ms. Cross to bring her Title VII claim in court *in less than three months without the benefit of a full EEOC investigation* establishes both elements of irreparable harm.

First, the harm to Ms. Cross if this Court does not intervene is "certain," and so imminent as to establish a "clear and present need" for preliminary relief. By operation of law, she will lose her right to bring a Title VII claim based on the disparate-impact allegations in her EEOC charge if she does not act by the filing deadline that her right-to-sue notice has triggered. *See* 42 U.S.C. § 2000e-5(f). If she is able to bring that claim in court on or before the filing deadline, she will have to do so without the benefit of a complete and lawful EEOC investigation. Because her investigation was unlawfully cut short before a determination on cause was made, the investigative file that Ms. Cross will be able to request before filing her Title VII claim in court[14] will thus not contain as much information about Amazon's policies and practices, and their effects on other female employees, as it otherwise would have. *See* Collins Decl. ¶ 12 (noting that Ms. Cross had

[14] EEOC, *Disclosure of Information in Charge Files*, https://perma.cc/ULZ5-ZSC4.

received no documents or data from Amazon by the time her charge was administratively closed on September 29); Sellers Decl. ¶ 8 (describing the ability to review the EEOC investigative file as "invaluable" when deciding whether to proceed with litigation).

The prospect of proceeding to court on her disparate-impact claim without a full EEOC investigation is an "actual" harm, not a theoretical one, and it is significant. Ms. Cross has maintained her charge with the EEOC well past the 180 days at which she could have requested a right-to-sue notice because she understands that the Commission possesses investigative tools, by virtue of its status as a nationwide law enforcement agency, that could strengthen her ultimate case against Amazon. Cross Decl. ¶ 11. She has chosen to take the longer but more thorough road of pursuing the EEOC investigation to its conclusion, even though this will likely result in delayed initiation of court proceedings on her disparate-impact claim, because she wishes to bring this claim on behalf of a class of similarly situated female drivers, and the EEOC's investigation could reveal facts about the experiences of other women driving for Amazon that will enable her to better represent that class. *Id.* ¶ 12.

While Ms. Cross is not entitled to any particular outcome from an EEOC investigation, she is statutorily entitled to an investigation of her charge. *Occidental*, 432 U.S. at 359; *Martini*, 178 F.3d at 1348. The deprivation of a statutory entitlement, by itself, can constitute irreparable harm. *See Hi-Tech Pharm. Co., Inc. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (loss of 180-day exclusive marketing period for generic drug could constitute irreparable harm). In cases involving government contracts, the Supreme Court and D.C. Circuit have held that loss of the opportunity to participate in a government program is inherently harmful, even when the outcome of that participation is uncertain. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 668 (1993) (finding Article III standing based on loss of opportunity

to bid on contracts); *Coal. of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1016 (D.C. Cir. 2022) (same). The EEOC's action depriving Ms. Cross of the opportunity to participate in the full EEOC administrative process, including the possibility of conciliation following a cause finding, is similarly injurious.

Further underscoring the importance of the EEOC process from which Ms. Cross was prematurely cut off, several courts have invalidated private agreements that required employees to file suit or initiate arbitration before the EEOC completed its investigation and issued a right-to-sue notice, holding that the EEOC administrative process and its associated time periods are substantive rights that cannot be prospectively waived. *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 828–33 (6th Cir. 2019) (holding such a limitations-shortening agreement unenforceable as to a Title VII claim); *Rumsey v. Int'l Bus. Machs. Corp.*, 2025 WL 2823116, at *8 (D. Mass. Sept. 30, 2025) (same result as to arbitration provision and ADEA claims). Though not binding on this Court, these well-reasoned opinions explain why allowing deviations from the uniform, integrated scheme that Congress created in its laws against workplace discrimination would undermine that scheme and harm its primary beneficiaries, people who seek redress for discrimination they believe they have experienced in the workplace. Ms. Cross believes she experienced disparate-impact discrimination at the hands of her former employer, and she both wants and is statutorily entitled to a full investigation of that allegation by the EEOC. The denial of that right is causing harm to Ms. Cross that is both "actual" and "great." *Newby*, 838 F.3d at 8.

Finally, the harm to Ms. Cross is "beyond remediation." *Id.* If Ms. Cross must file her disparate-impact claim prematurely, she cannot later dismiss that claim and resume proceedings with the EEOC if this Court enters judgment in her favor. By that point, the machinery of litigation will be well underway, with dispositive motions likely having been filed, and perhaps even ruled

upon, and litigation strategy by both parties already having been disclosed. Returning to the status quo ante and expecting the parties to resume their prior postures as participants in an administrative investigation and possible EEOC-facilitated conciliation will be impossible, even if the EEOC's regulations allowed for such a resumption of investigative proceedings. *See* 29 C.F.R. § 1601.21(b)(1) (discussing procedure for reconsidering charge dismissals). In short, once the 90 days triggered by Ms. Cross's unlawfully issued right-to-sue notice expire, "there can be no do-over and no redress." *Newby*, 838 F.3d at 9 (internal quotation marks omitted). Ms. Cross will suffer irreparable harm in the absence of the relief she seeks.

III. The balance of equities and the public interest support preliminary relief.

The final two preliminary-relief factors also support Plaintiff here. "It is well established that the Government 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 218 (D.D.C. 2020) (quoting *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017)). And "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *Cabrera*, 2025 WL 2092026, at *8 (quoting *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009)).

Based on the reasons given for implementing the Disparate Impact Rule in the first place, the only conceivable harm that the EEOC could experience from a stay of that rule would be an inability to implement Executive Order 14281. However, there are many lawful actions that the agency can take to carry out the objectives of that order, from changing its litigation priorities to de-emphasize disparate impact to changing the topics on which it offers guidance and technical assistance. The preliminary relief that Ms. Cross seeks would not interfere with any such discretionary actions.

The Disparate Impact Rule that the EEOC announced in its September 15 memorandum veered far outside the bounds of permissible discretion and caused the EEOC to abandon its

statutory obligations to investigate and conciliate all discrimination claims within its jurisdiction, causing irreparable harm to Ms. Cross and an as-yet-unknown number of other charging parties with disparate-impact claims. If the rule's effects are not stayed, its harms will ripple out to additional claimants beyond those whose charges have already been illegally closed. Anyone who was subjected to a physical test that they believe is unfair because it tests brute strength instead of the ability to perform the job will not be able to ask the EEOC to investigate if that test disproportionately screens out female applicants. Anyone who was denied a job interview by an employer that uses artificial intelligence tools in the job application process will not be able to ask the EEOC to investigate if the algorithm is exhibiting racial bias, without the employer's knowledge, against people with black-sounding names or who attended historically black colleges. And any workers over 40 years of age who were subjected to a reduction in force that disproportionately affected older workers will not be able to ask the EEOC to engage in conciliation discussions with their employer to seek an out-of-court resolution for that disparate-impact claim of age discrimination. *See* Sellers Decl. ¶¶ 3–11 (describing the EEOC's investigative tools, and how the loss of those tools will harm workers with disparate-impact claims, especially given employers' increasing reliance on algorithmic and artificial intelligence systems in screening job applicants).

The EEOC should not be permitted to abdicate its statutory obligation to investigate such practices that are "fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431. The public interest will be advanced by requiring the agency that Congress created to ensure compliance with the nation's workplace civil rights laws, largely through the tools of investigation and voluntary resolution, to immediately resume performing its duties under those laws.

IV. "Necessary and appropriate process" will require tolling of filing deadlines and other interim relief regarding improperly issued right-to-sue notices.

This Court may "issue all necessary and appropriate process" to "preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. It may exercise that authority "to the extent necessary to prevent irreparable injury," *id.*, a phrase that is not limited to encompass only irreparable injury to the plaintiff bringing the APA action. *Coal. for Humane Immigr. Rts.*, 2025 WL 2192986, at *37–38; *see also Cabrera*, 2025 WL 2092026, at *8 (recognizing that neither vacatur under 5 U.S.C. § 706 nor a stay under § 705 is a "party-specific remedy").

Here, ordering the EEOC to stop enforcing the Disparate Impact Rule will not be sufficient to prevent irreparable injury. Because an unknown number of right-to-sue notices have already been issued based on operation of that unlawful rule, and because the recipients of those right-to-sue notices will not necessarily know about the pendency of this proceeding, preserving status and rights will require this Court to order some action with respect to those right-to-sue notices. Thus, this Court's order should not only stay the Disparate Impact Rule prospectively, but should also grant interim relief regarding the "downstream decisions" to send charging parties right-to-sue notices based on the unlawful rule. *Cabrera*, 2025 WL 2092026, at *4.

The precise nature of this relief may be negotiated between the parties prior to the hearing on this motion. As a preliminary matter, Plaintiff suggests that a fair solution would be for this Court to automatically toll the filing deadlines associated with any right-to-sue notices of individuals whose charges were administratively closed pursuant to the Disparate Impact Rule, so that they need not file suit until final judgment in this case determines if their right-to-sue notices were issued pursuant to an unlawful rule. The EEOC should also be required to notify all affected individuals of the pendency of this litigation and of the tolling of their filing deadlines. Affected individuals should also be able to request the resumption of their investigation by the EEOC, and

the EEOC should be required to honor such requests, so that evidence does not become stale and so that they may receive the benefits of their statutorily required EEOC investigation or conciliation process while this case continues. Finally, the EEOC should be required to file with the Court a list of charges affected by implementation of the Disparate Impact Rule, redacted as necessary to comply with the Privacy Act and other applicable laws regarding confidentiality, so that the scope of the rule's effects can be better assessed.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion for a stay under 5 U.S.C. § 705 and require the EEOC to notify all individuals whose charges were administratively closed pursuant to the Disparate Impact Rule, informing them of the pendency of this lawsuit and of the tolling of deadlines associated with their right-to-sue notices.

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Respectfully submitted,

/s/ Karla Gilbride

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