NO. _____

IN THE

Supreme Court of the United States

THE SCHOOL OF THE OZARKS, INC. D/B/A COLLEGE OF THE OZARKS,

Petitioner,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; MARCIA L. FUDGE, IN HER OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; DEMETRIA MCCAIN, IN HER OFFICIAL CAPACITY AS PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR FAIR HOUSING & EQUAL OPPORTUNITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Housing Act (FHA) prohibits sex-based discrimination in housing policy or speech, and it applies to college dorms. As recently as 2020, the Department of Housing and Urban Development (HUD) denied that "sex" in the FHA's non-discrimination provision covers gender identity, allowing schools like Petitioner College of the Ozarks to assign dormitories based on biological sex and to communicate that policy to its students. All that changed in 2021. In response to an Executive Order from President Biden declaring that the FHA now prohibits discrimination "on the basis of gender identity," HUD issued a Directive mandating "full enforcement" of this new prohibition. President Biden characterized the Directive as a "rule change" that "finally" enforced the FHA.

HUD declined to provide notice and comment, as both the FHA and APA require. But when the College challenged the Directive, the lower courts dismissed, holding that the College suffered no Article III injury because there was no imminent threat of enforcement and the College had not articulated a concrete injury. The questions presented are:

1. Whether a notice-and-comment violation, on its own, can establish Article III standing for a regulated entity within the applicable zone of interests, as the Fifth, Sixth, Ninth, D.C. and Federal Circuits have held, or whether an additional injury is required, as the Eighth Circuit held here.

2. Whether a regulated entity has Article III standing to challenge an illegal regulation where the entity (a) arguably falls with the rule's plain scope, and (b) there is a risk of enforcement.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner is The School of the Ozarks, Inc. doing business as College of the Ozarks. Petitioner is a non-profit corporation with no parent company or stock.

Respondents are Joseph R. Biden, Jr., in his official capacity as President of the United States; U.S. Department of Housing & Urban Development; Marcia L. Fudge in her official capacity as Secretary of the U.S. Department of Housing & Urban Development; Demetria McCain, in her official capacity as Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity of the U.S. Department of Housing & Urban Development.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit, No. 21-2270, *The School of the Ozarks, Inc. d/b/a College of the Ozarks v. Biden, et al.*, judgment entered July 27, 2022, en banc review denied September 30, 2022. Mandate issued October 7, 2022.

U.S. District Court for the Western District of Missouri, No. 6:21-cv-03089, judgment entered June 7, 2021.

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The district court's order dismissing Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction and dismissing Plaintiff's Complaint is unreported but available at 2021 WL 2301938 (W.D. Mo. June 4, 2021) and reprinted in the Appendix ("App.") at App.24a.

The district court's judgment is reprinted in the Appendix at App.35a.

The Eighth Circuit's opinion affirming the district court's order is reported at 41 F.4th 992 (8th Cir. 2022) and reprinted at App.1a. The Eighth Circuit's order denying rehearing en banc is unreported but available at 2022 WL 4589688 (8th Cir. Sept. 30, 2022) and reprinted at App.23a.

STATEMENT OF JURISDICTION

The Eighth Circuit entered judgment on July 22, 2022. Lower courts had jurisdiction under 28 U.S.C. 1331, 1346(a), and 1361. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

Article III, § 2, ¶ 1 of the United States Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States … to Controversies to which the United States shall be a Party.

INTRODUCTION

In the words of dissenting Judge Grasz below, "This case highlights the corrosive effect on the rule of law when important changes in government policy are implemented outside the normal administrative process," App.16a, that is, without required notice and comment. Yet the panel majority blessed that corrosion, holding that because Petitioner College of the Ozarks had not yet faced enforcement proceedings, it lacked standing to challenge an unlawful government rule change. That decision conflicts with decisions of five circuits and with this Court's standing precedents and warrants review.

In February 2021—without notice or comment—the Department of Housing and Urban Development (HUD) issued a "Directive" redefining the sex discrimination provisions in the Fair Housing Act (FHA) to include gender identity. App.36a–41a. The Directive mandated "full enforcement" by federal officials and external enforcement grantees. App.40a. President Biden precipitated this action by issuing an executive order calling for the FHA to be reinterpreted, App.42a–45a, and he hailed the Directive's issuance as a "rule change." App.51a.

This rewriting of the FHA was an immediate problem for College of the Ozarks. The College is a Christian educational institution, and while students need not be of a particular religion to attend, they must agree to follow the College's code of conduct, including dormitory policies. Because the College's faith teaches that sex is based on male-female biology, not gender identity, the College assigns its dorms, roommates, and intimate spaces by sex and communicates that policy to students.

The College sued, bringing claims under the First Amendment and Religious Freedom Restoration Act (RFRA) and also alleging that HUD's failure to engage in the notice-and-comment process violated both the FHA and the Administrative Procedure Act (APA). That failure is significant, because the government admits that the Directive does not discuss or consider student housing at religious colleges, or how the Directive would interact with other statutes like Title IX or RFRA. CA8 Appellees' Br.20, 23, 27–29.

Yet the district court dismissed the College's complaint, and a 2-1 Eighth Circuit panel affirmed, holding that the Directive only affects government enforcers, not regulated entities; does not say how RFRA or the Free Exercise Clause may limit the Directive's enforcement; and thus does not create an "imminent threat" to the College. App.8a–13a. Most concerning, the majority held that being deprived of a procedural right—notice and opportunity for comment—is not an injury in fact unless the regulated entity can show an additional "concrete harm." App.12a.

The latter conclusion conflicts directly with decisions of the Fifth, Sixth, Ninth, D.C., and Federal Circuits. For example, in *Texas* v. *EEOC*, 933 F.3d 433 (5th Cir. 2019), Texas similarly sued under the APA, challenging an agency's guidance about employers' use of criminal records in hiring. The Fifth Circuit correctly held that Texas suffered a "procedural injury jeopardizing its concrete interests": a "violation of the APA's notice-and-comment requirements." *Id.* at 447. That court did not require Texas as a regulated entity to prove any additional harm.

Similarly, in *Sierra Club* v. *EPA*, 699 F.3d 530 (D.C. Cir. 2012), the Sierra Club filed an APA challenge against the EPA, which had declared that the agency satisfied certain obligations imposed on it by the Clean Air Act. After determining that Sierra Club members lived within zones affected by the agency's regulations (or lack thereof), the D.C. Circuit held that the Club had standing, since the APA's notice-and-comment requirements "are plainly designed to protect the sort of interest alleged." *Id.* at 533. Other circuits are to the same effect, and this Court should resolve the 5-1 circuit split.

The Eighth Circuit's "imminent threat" requirement is just as much of an outlier as its heightened standard for a regulated entity to challenge the government's failure to provide notice and comment. When a regulated entity falls within the scope of a new, unlawful regulation, and the government does not disavow an enforcement action, this Court and the courts of appeal routinely hold that the regulated entity has both standing to challenge the regulation and redress in the form of a court ruling. That conflict should also be resolved.

Besides destroying uniformity in the circuits' regulatory standing jurisprudence, the holding below is deeply troubling. "An agency's issuance of a guidance document that fails to adhere to the proper administrative procedures … skirts the rule of law and undermines our values." App.16a–17a (Grasz, J., dissenting). "This is especially true where regulated entities" like the College "are placed under a sword of Damocles but are denied access to the courts because the sword has not yet fallen." App.17a. This Court should grant the petition, reverse, and remand for a merits determination.

STATEMENT OF THE CASE

A. College of the Ozarks

College of the Ozarks is a Christian undergraduate institution in Missouri, founded in 1906. V. Compl. ¶ 30. As a Christian college, it allows all students to have a debt-free education by not charging tuition. *Id.* ¶ 35. A student need not be of a particular religion, sexual orientation, or gender identity to study or live at the College, provided the student agrees to abide by the College's religiously informed code of conduct. *Id.* ¶¶ 42–44, 54–67. Under the College's policies and code of conduct, a student's sex is the student's biological sex determined at birth, and students agree to refrain from sexual conduct outside a marriage between one man and one woman. *Id.* ¶¶ 70–72.

The College's code of conduct specifies that residence halls are single sex and assigned by biological sex, not gender identity. V. Compl. ¶¶ 80–91. In student housing, the College limits access to halls, communal showers, and bathrooms by biological sex. *Ibid.* The College regularly communicates these policies to existing and aspiring students. *Id.* ¶¶ 92–111.

As explained below, the government's rule change now deems the College's housing policies to be discriminatory and its speech unlawful. By interpreting the FHA to address sexual orientation and gender identity, the government forces colleges to allow males to occupy female dorms—and qualify for roommate selection—when they identify as female. The government also forbids the College from communicating its housing policies—and from even saying that it would prefer its own policies to the government's new policies.

Were the College to comply with the government's new edict, the College would suffer immeasurable harm to its religious exercise, its free speech, and its students' privacy interests. V. Compl. ¶¶ 249–55. Abandoning its code of conduct and opening female intimate spaces to biological men jeopardizes the College's ability to function, harms students, and dissuades them from attending the College. *Ibid.* The College would also incur regulatory compliance costs including the time, money, and speech necessary to change its policies, statements, trainings, and signage, and to renovate its buildings. *Id.* ¶ 252.

Yet if the College disregards the government's rewritten FHA, it can expect that, as the Directive requires, the FHA will be "fully enforce[d]" against the College. App.36a–38a, 40a. This includes investigations, enforcement actions, and litigation that will likely impose costly discovery and legal fees, millions in penalties and punitive damages if the FHA is upheld, and even criminal penalties against the College and its employees. V. Compl. ¶¶ 158–180, 259. And the College's liability under the Directive grows each day as the College continues to speak about and apply its housing policies. *Id.* ¶¶ 105–111.

B. The FHA regulatory scheme

Congress enacted the Fair Housing Act in 1968 and amended it in 1974 to prohibit housing discrimination based on race, religion, national origin, or sex. 42 U.S.C. 3604(a) & (b); 24 C.F.R. 100.50(b)(1)–(3). The FHA and its implementing regulations also restrict the speech of covered entities, prohibiting any "statement[s]" and "notice[s]" expressing a policy or rule of prohibited discrimination. 42 U.S.C. 3604(c), 24 C.F.R. 100.50(b)(4)–(5).

The FHA applies to "dwelling[s]" throughout the nation—even if the owner receives no federal funds. 42 U.S.C. 3602(b); 24 C.F.R. 100.20. Courts and the Department of Justice have thus applied these laws to private college student housing. E.g., *United States* v. *Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974, 983 (D. Neb. 2013). Anyone can file a complaint and trigger a government investigation into an alleged FHA violation, and anyone can bring a private lawsuit, even "testers," who are funded by HUD to test for compliance with the law but have no interest in obtaining housing. 42 U.S.C. 3610(a)(1)(A)(i), 3613, 3614; 24 C.F.R. 103.9 et seq.

Penalties for violating the FHA and its implementing regulations include significant civil fines and investigatory demands. E.g., 42 U.S.C. 3611–14; 24 C.F.R. 103.215, 180.671, 180.705. The FHA and its regulations provide for unlimited compensatory and punitive damages, as well as fines of $23,011 for a first violation, $57,527 for a second violation, and $115,054 for a third or continuing violation. 24 C.F.R. 180.671. The FHA also threatens criminal penalties, including prison time, if an incident involves the use of force, 42 U.S.C. 3631, such as if security staff must enforce a housing policy.

C. The regulatory change and threat

For decades, courts consistently held that the FHA does *not* address sexual orientation or gender identity. E.g., *Smith* v. *Avanti*, 249 F. Supp. 3d 1194, 1201 (D. Colo. 2017) (sexual orientation or gender identity); *Lath* v. *Oak Brook Condo. Owners' Ass'n*, No. 16-CV-463-LM, 2017 WL 1051001, at *4 n.5 (D. N.H. Mar. 20, 2017) (sexual orientation); *Thomas* v. *Osegueda*, No. 2:15-CV-0042-WMA, 2015 WL

3751994, at *4 (N.D. Ala. June 16, 2015) (same); *Thomas* v. *Wright*, No. 2:14-CV-01604-RDP, 2014 WL 6983302, at *3 (N.D. Ala. Dec. 10, 2014) (same); *Ordelli* v. *Mark Farrell & Assocs.*, No. 3:12-CV-1791-SI, 2013 WL 1100811, at *2 (D. Or. 2013) (same); *Miller* v. *270 Empire Realty LLC*, No. 09-CV-2857, 2012 WL 1933798, at *5 (E.D.N.Y. 2012) (same); *Fair Hous. Ctr. of Washtenaw Cnty., Inc.* v. *Town & Country Apts.*, No. 07-10262, 2009 WL 497402, at *3 n.1 (E.D. Mich. Feb. 26, 2009) (same); *Swinton* v. *Fazekas*, No. 06-CV-6139T, 2008 WL 723914, at *5 (W.D.N.Y. Mar. 14, 2008) (same); *Smith* v. *Mission Assocs. Ltd. P'ship*, 225 F. Supp. 2d 1293, 1299 (D. Kan. 2002) (same); *Neithamer* v. *Brenneman Prop. Servs., Inc.,* 81 F. Supp. 2d 1, 4 (D.D.C. 1999) (same).

Indeed, as recently as 2020, HUD said that "to consider biological sex in placement and accommodation decisions in single-sex facilities" is "permitted" by the FHA. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811, 44,812 (July 24, 2020).

That all changed when, on the day that he took office, President Biden issued an Executive Order specifying that the Fair Housing Act, among other statutes, prohibits discrimination based on sexual orientation and gender identity, and he ordered agencies to implement the policy. Exec. Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021), App.42a–45a. Only three weeks later—without notice or comment—HUD issued a "Directive" titled "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act" (Feb. 11, 2021). App.36a–41a.

The Directive does not mince words. It first notes that President Biden's Executive Order "directs every federal agency to assess all agency actions taken under federal statutes that prohibit sex discrimination and to fully enforce those statutes to combat discrimination based on sexual orientation and gender identity." App.36a–37a. The Directive then explains that HUD "has concluded that the Fair Housing Act's sex discrimination provisions … prohibit discrimination because of sexual orientation and gender identity." App.37a. As a result, the Directive continues, HUD's enforcement officials were required to "fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity." *Ibid.*

The Directive accuses many "civic institutions"—including "the workplace," "the marketplace," and, most pertinent here, "places of education"—of denying "persons the freedom to express a gender that defies norms." App.37a. And the Directive declares that "this discrimination is real *and urgently requires enforcement action*." *Ibid.* (emphasis added). Indeed, the Directive commits HUD to the "eradication" of contrary policies like the College's. App.41a.

Eight times, the Directive demands "full" enforcement of its new standard. App.36a–41a. And it orders HUD's investigatory office to "accept for filing *and investigate* all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." App.39a (emphasis added). It also instructs state and local agencies that accept HUD funds to enforce the FHA to ensure it applies to "gender identity and sexual orientation." App.40a.

The Directive next addresses organizations that receive grants to provide FHA testers who pose as prospective renters or buyers. It requires these groups, too, to "interpret sex discrimination under the Fair Housing Act to include discrimination because of sexual orientation and gender identity." App.40a. And the Directive expects these organizations to "support" "the full enforcement of the Fair Housing Act by … detecting discriminatory conduct through investigation and testing[ ] and assisting persons to file complaints and obtain relief through legal and administrative forums." *Ibid.*

In sum, the Directive promises to collaborate with its state and local and testing partners "to *fully engage our fair housing enforcement*, advocacy, and public education efforts across the housing market *to prevent and combat discrimination because of sexual orientation and gender identity*." App.41a (emphasis added).

To commemorate National Fair Housing Month, President Biden trumpeted the Directive as a "rule change" made "to ensure that the law finally guards against discrimination targeting LGBTQ+ Americans." V. Compl. ¶¶ 212–13. Yet no advance public notice or an opportunity for comment was issued before promulgating the directive. *Id.* ¶¶ 2, 222. That omission was illegal three ways. The FHA requires notice and comment for "all rules" promulgated about it, including interpretive rules like the Directive. See 42 U.S.C. 3614a. The APA requires comment on all legislative or substantive rules. 5 U.S.C. 553(b)–(d). And when HUD issued the Directive, a federal APA regulation required notice and comment for "significant guidance documents," 24 C.F.R. 11.1(b) (2020), which the Directive is.

D. The aftermath

The Directive requires the College to reverse its housing policies for 1,300 students. V. Compl. ¶¶ 229–46. And, unless the Directive is enjoined, it makes the College cease statements of its policies, preventing it from following through on ongoing plans and communications for student housing consistent with its religious beliefs. *Id.* ¶¶ 5, 8, 106, 229–46. This jeopardizes the College's ability to function, causes emotional harm to students who rely on the College's housing policies, and dissuades Christian students from attending the College. *Id.* ¶ 250.

E. Proceedings below

The College filed suit in April 2021 and moved for a preliminary injunction. The District Court denied a preliminary injunction and, without a motion from the Government, dismissed the case for lack of standing. App.24a–34a. That court recharacterized the Directive as a non-binding policy statement that presents no credible enforcement threat. App.30a–32a.

A 2-1 Eighth Circuit panel affirmed. Addressing the FHA and APA's notice-and-comment requirements, the majority said that the College lacked Article III standing to vindicate its rights. The majority described HUD's actions as merely violating a "procedural right unconnected to the [College]'s own concrete harm." App.12a (cleaned up). "[T]he absence of notice and opportunity to comment" on the Directive "does not endanger a concrete interest of the College," according to the panel, since the Directive "does not require HUD to determine that the College's housing policies violate federal law," *ibid.*, only to launch an investigation if someone complains.

The majority also said that the College lacks standing to challenge the Directive's substance because the Directive has no impact on the entities it regulates; it "does not direct the College to do anything, and it does not expose the College to any legal penalties for noncompliance," App.11a—other than six-figure fines and possible criminal penalties if HUD *does* charge that the College's policies and communications violate the Directive's new FHA gloss.

In support, the majority highlighted that the Directive "says nothing of how the Religious Freedom Restoration Act or the Free Exercise Clause may limit enforcement of the Fair Housing Act's [new] prohibition on sex discrimination as applied to the College." App.9a. In short, although the College could still face a time consuming and costly HUD investigation, the College will be able to raise affirmative defenses that may save it from HUD-imposed penalties.

Relatedly, the majority believed it only "speculative that HUD will file a charge" because the College is eligible for Title IX's exemption for religious educational institutions. App.9a. (The majority, like the government, did not say that Title IX's exemption *actually* exempts the College from the FHA—a separate statute that does not contain a blanket exemption of religious groups.[1]) Finally, the majority said the College's injury was not redressable because a holding that the Directive is unlawful would not stop a HUD investigation of alleged gender identity discrimination. App.16a.

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[1] The FHA only allows religious organizations to limit occupancy to members of the same religion, 42 U.S.C. 3607(a).

Judge Grasz dissented. App.16a. In his view, the majority's "holding overlooks an injury the College has *already suffered*—the deprivation of its right to notice and comment." App.18a. He explained that the "FHA requires notice and comment for 'all rules' under its purview—including interpretive rules." *Ibid.* (citing 42 U.S.C. 3614a). Such rules "simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties." *Ibid.* (citations omitted). The Directive "states what HUD thinks the statute means and instructs affected parties of their duties. These are the hallmarks of an interpretative rule." App.19a (citation omitted). Accordingly, the Directive "is subject to the FHA's notice and comment requirement." *Ibid.* And "at minimum," the Directive is "a significant guidance document" for which the APA required notice and comment under then-applicable agency regulations, 24 C.F.R. 11.1(b) (2020). App.20a.

Either way, Judge Grasz continued, the College's "complaint plausibly alleged HUD deprived the College of its right to notice and comment. Such deprivation constitutes an injury in fact sufficient for standing if the notice and comment right was 'designed to protect some threatened concrete interest of' the College." App.21a (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). Moreover, the "College has a concrete interest in complying with the FHA as interpreted by HUD. Notice and comment rights would have helped ensure the College was 'treated with fairness and transparency after due consideration and industry participation.'" App.21a (citation omitted).

Judge Grasz also would have held that the College had standing to challenge the Directive directly. "Put simply," he explained, "if the government acts as the [Directive] facially requires, it is only a matter of time before the government concludes the College's housing policy violates the FHA. The law should not require the College to wait for this to come to fruition." App.17a–18a (citing *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014)). "Nor," he continued, must the College rely on the government's suggestion at oral argument that it had not enforced the FHA against religious institutions in the past based on HUD's historic practice of following Title IX's religious exemption—"an exemption not even mentioned in the broad language of the enforcement directive." App.18a.

As for redressability, said Judge Grasz, a "party deprived of its notice and comment right, as here, 'can assert that right without meeting all the normal standards for redressability and immediacy.'" App.21a (quoting *Lujan*, 504 U.S. at 572 n.7). The requirement "is satisfied 'if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.'" App.21a–22a (quoting *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007)). "Here, the College shows 'some possibility' that enjoining the [Directive's] enforcement would prompt HUD to reconsider" it. App.22a. And of course, if a court were to hold that HUD's reinterpretation of the FHA were wrong, that would alleviate any risk of investigation, fines, and imprisonment that the College and its officials currently face.

The Eighth Circuit denied en banc review. App.23a.

REASONS FOR GRANTING THE WRIT

The FHA's and APA's notice-and-comment mandates are critical to promoting fair, effective, and efficient agency action. By requiring an agency to notify the regulated community and allow comment on a proposed action before it takes effect, Congress ensures that agencies have adequate information and consider a diversity of views, making sure that regulatory evolution takes place in a sound and publicly accountable process.

An agency's failure to follow the required process has a "corrosive effect on the rule of law." App.16a (Grasz, J., dissenting). Bypassing compulsory notice and comment "skirts the rule of law and undermines our values," leading to regulated entities being "placed under a sword of Damocles" yet "denied access to the courts because the sword has not yet fallen." App.17a (Grasz, J., dissenting).

That problem is exacerbated if courts hold that regulated entities lack standing to challenge such unlawful agency actions. Doing so injures the concrete interests of regulated entities who desire to participate in the agency's rulemaking and interpretive processes. And it also incentivizes agencies to bypass notice-and-comment requirements in the future. Without a notice-and-comment process or any judicial review of that omission, an agency may reasonably believe that acting outside the rules "immuniz[es] its lawmaking from judicial review." *Appalachian Power Co.* v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000). And a right to notice and comment that cannot be judicially enforced is no right at all.

The Eighth Circuit adopted a rule that a regulated entity must have a *concrete injury* in addition to its *procedural injury*, not just a concrete *interest* that its procedural right is designed to protect. That rule conflicts with that of five circuits which have held that regulated entities or others have suffered a concrete injury when they are within the applicable zone of interests and deprived of the notice-and-comment process. Such entities need not state an additional injury to vindicate their rights. The whole purpose of notice and comment is to allow regulated entities like the College to participate in agency policymaking with the potential to influence it: the injury is being denied participation. This Court should grant the petition, resolve the 5-1 circuit split, and reverse the court of appeals.

The College also has standing to directly challenge the Directive under this Court's precedents. There "is ordinarily little question" that standing exists where an entity is the "object of the [challenged] action," such as when an injury arises from the government regulating the entity. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). The College easily meets the "object of" test this Court set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153–54 (1967). The College's injury is also redressable by a favorable court ruling. And the imminence of the College's injury is heightened by the FHA's threat to the College's free-speech interests.

Certiorari is warranted.

I. This Court should grant review to resolve a 5-1 circuit split over regulatory standing.

A. The FHA and APA both required HUD to complete the notice-and-comment process before issuing the Directive.

The Directive had to undergo notice and comment before HUD issued it for three independent reasons. *First*, the FHA requires a notice-and-comment process for "all rules" under its jurisdiction—including interpretive rules. 42 U.S.C. 3614a. (In contrast, the APA exempts interpretive rules from the notice-and-comment requirement "[e]xcept when notice or hearing is required by statute." 5 U.S.C. 553(b). The FHA requirement is one of those exceptions.) "[I]nterpretive rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties." *Nw. Nat'l Bank* v. *U.S. Dep't of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990) (cleaned up). The Directive satisfies that definition.

Second, HUD regulations in effect when the Directive was issued required notice and comment for any policy statement that interpreted novel legal issues or implemented presidential priorities. 24 C.F.R. 11.1(b), 11.2, 11.8 (2020). And the government has never disputed that those regulations required notice and comment here, even for a policy document.

Third, the APA itself required notice and comment if the Directive is a substantive rule, which it certainly is. When an agency binds itself to a legal standard, leaving officials no enforcement discretion, it creates a substantive rule and must do so only through notice and comment. *Cmty. Nutrition Inst.* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per

curiam). As this Court has emphasized, an agency "can't evade its notice-and-comment obligations" where its action "established or changed a 'substantive legal standard.'" *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1810, 1817 (2019).

Here, the Directive purports to bind HUD employees and outside enforcers to a new FHA interpretation, one that "prohibit[s] discrimination because of sexual orientation and gender identity." App.37a. The Directive describes "this discrimination" as "real" and "urgently requir[ing] enforcement action." *Ibid.* The Directive described prior, "limited enforcement" of the FHA as "insufficient," and it required FHA officials and state and local agencies to administer the FHA consistent with the Directive. App.38a. In contrast to the past, the Directive required "full" enforcement by government officials on all housing providers, and therefore it governs the College as an FHA-regulated entity—the targets of HUD enforcement. No wonder President Biden called the Directive a "rule change" that "finally" enforced the FHA. Proclamation No. 10,177, 86 Fed. Reg. 19,775 (Apr. 11, 2021). App.50a–53a.

In sum, there is no real dispute that (1) HUD had to engage in the notice-and-comment process before finalizing the Directive, and (2) HUD failed to do so. And in any event, this Court "accept[s] as valid the merits of" the College's legal claims "[f]or standing purposes." *FEC* v. *Cruz*, 142 S. Ct. 1638, 1647–48 (2022).

B. The notice-and-comment process protects regulated entities like the College.

To counterbalance agency desires to move quickly to change the law, Congress often imposes rules of process that safeguard the voice of those affected by agency decisions and ensure that agencies regulate in both an informed and well-reasoned manner. A notice-and-comment requirement is one such rule, reflecting Congressional intent that regulated entities be given a chance to help shape the significant administrative changes that govern their operations. *E.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").

Courts have recognized the importance of such procedural guardrails. By giving regulated entities a voice, notice-and-comment requirements "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *MCI Telecomms. Corp.* v. *FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (cleaned up). Such requirements "assure that the agency will have before it the facts and information relevant to a particular administrative problem" before making dispositive decisions. *Ibid.* (cleaned up). These benefits are equally true for college administrators faced with changed FHA rules governing dormitories as they are for financial companies that desire input before unelected bureaucrats change banking rules, or for manufacturers or farmers entitled to a notice-and-comment process before agency modifications to environmental laws.

C. The Fifth, Sixth, Ninth, D.C., and Federal Circuits have held that being deprived of notice and comment is itself a concrete injury sufficient for Article III standing.

Other circuits have had no trouble concluding that the deprivation of a notice-and-comment right is an injury for Article III standing.

Fifth Circuit. In *Texas* v. *EEOC*, 933 F.3d 433 (5th Cir. 2019), Texas sued the EEOC under the APA, challenging the agency's guidance on employers' use of criminal records in hiring. The EEOC had issued the guidance without engaging in the notice-and-comment process that the APA requires for rules. The Fifth Circuit held that, along with other injuries, Texas had "adequately established that it suffered a procedural injury jeopardizing its concrete interests." *Id.* at 447. Nowhere did the Fifth Circuit require Texas to show a *separate* injury beyond denial of the right to notice and comment, as the Eighth Circuit did here. The point was that Texas suffered a concrete harm from the deprivation of a procedural right when the EEOC issued guidance that implicated Texas's existing course of conduct.

The Fifth Circuit went on to explain that the "redressability requirement is lighter when the plaintiff asserts deprivation of a procedural right." 933 F.3d at 447. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Ibid.* (quoting *Massachusetts*, 549 U.S. at 518). Texas was harmed because there was some possibility the EEOC would

have regulated in a different manner had Texas been given the benefit of the notice-and-comment process.

Like HUD here, the EEOC maintained that Texas had no immediate injury because the EEOC's guidance did "not compel Texas to do anything." 933 F.3d at 448. The Fifth Circuit rejected that argument: "it would strain credulity to find that an agency action targeting current 'unlawful' discrimination among state employers—and declaring presumptively unlawful the very hiring practices employed by state agencies—does not require action immediately enough to constitute an injury-in-fact." *Ibid.*

The same is true of HUD's Directive, which declares presumptively unlawful the very dormitory and communication policies that the College has a concrete interest in maintaining. The College is harmed because there is some possibility that HUD will regulate differently if the College is given the benefit of the notice-and-comment process.

Sixth Circuit. To the same effect is *Dismas Charities, Inc.* v. *U.S. Dep't of Just.*, 401 F.3d 666 (6th Cir. 2005). There, the operator of community correction centers under contract with the federal Bureau of Prisons (BOP) sued to challenge the Department of Justice's change in policy for designating the place of incarceration for federal offenders without first engaging in the required notice-and-comment process. The Sixth Circuit held that Dismas had standing "on the ground that notice and comment rulemaking was required before the policy could be put into effect." *Id.* at 677.

"First, Dismas has Article III standing because … "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." 401 F.3d at 677 (quoting *Lujan*, 504 U.S. at 572 n.7). "The procedural requirements of notice and comment prior to rulemaking, assuming that they are applicable, certainly protect concrete interests of Dismas." *Ibid.* They give the company "the chance to argue to the BOP that its policy is wrong before the policy is adopted, and [that] interest in continuing to provide services to the BOP is certainly concrete." *Ibid.* Accordingly, "Dismas has Article III standing … because a plaintiff can enforce procedural rights 'so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Id.* at 677–78 (quoting *Lujan*, 504 U.S. at 573 n.8).

"Second, [contractors] like Dismas are arguably within the zone of interests protected by the notice and comment rulemaking requirements of the APA." *Dismas*, 401 F.3d at 678. "[O]ne of the central purposes of the requirement of notice and comment is to give those with interests affected by the rules the chance to participate in the promulgation of the rules." *Ibid.* Contractors like Dismas "are certainly at least arguably within the zone of interests." *Id.* at 679.

The same is true of the College. The College has a concrete interest in maintaining its existing policies. The Directive threatens those policies, declaring them unlawful. Because the College is at least arguably within the zone of interests the notice-and-comment requirements protect, the College has standing.

Ninth Circuit. The rule is likewise in the Ninth Circuit. In *East Bay Sanctuary Covenant* v. *Trump*, 932 F.3d 742 (9th Cir. 2018), non-profit organizations that represented asylum applicants challenged a new rule—one that prohibited grants of asylum to certain southern border applicants—without the requisite APA notice-and-comment process. Although the organizations lacked third-party standing to represent asylum seekers, and the rule did not govern the organizations themselves, the court *still* concluded the organizations had standing for their procedural injury.

Under the APA's "generous review provisions," the zone-of-interests test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." 932 F.3d at 768 (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987)). In fact, "a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority." *Id.* at 769 (quotation omitted).

"This is particularly true for claims brought under the APA's notice-and-comment provisions." 932 F.3d at 769 (citing *Mendoza* v. *Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014)). Accordingly, the organizations had standing to "challenge the absence of notice-and-comment procedures." *Ibid.*

Here, the College is likewise within the zone of interests protected by the APA's and FHA's notice-and-comment requirements. So, the College has standing to challenge HUD's violation of those requirements.

D.C. Circuit. In *Sierra Club* v. *EPA*, 699 F.3d 530 (D.C. 2012), the Club filed an APA challenge alleging that the EPA failed to engage in the notice-and-comment process before declaring that the agency had met certain Clean Air Act obligations. After determining that the Club's members lived within zones affected by the agency's regulations (or lack thereof), the D.C. Circuit held that the Club had standing.

"The Club seeks a vacatur of the [EPA's] Determination," the court explained, so that, before any such determination becomes final, it can make its case directly to the EPA through the notice-and-comment process "as to why the agency's conclusion" is wrong and should be reconsidered. 699 F.3d at 533. "If correct on the merits, as we must assume for standing purposes, such a challenge presents a clearly redressable injury: some Sierra Club members" were affected by the agency's decision, and the court's "vacatur will require EPA … to entertain and respond to the Club's claims about the necessary scope and stringency of the standards." *Ibid.* "[T]he APA's notice-and-comment requirements … are plainly designed to protect the sort of interest alleged." *Ibid.*

So too here. The College seeks a vacatur that will require HUD to entertain and respond to the College's claims about the Directive's application to religious colleges and universities who have sincere religious objections to housing men who identify as women in female-only dormitories. Granting the College that relief allows the parties to "develop a record that will render [HUD]'s legal and technical decisions more transparent and thereby facilitate substantive review." 699 F.3d at 534. The College has standing.

Federal Circuit. Finally, the Federal Circuit, in a substantively identical context, applied the same standing principle in *Salmon Spawning & Recovery Alliance* v. *U.S. Customs & Border Patrol*, 550 F.3d 1121 (Fed. Cir. 2008). There, environmental groups sued and alleged that federal agencies and officials violated the Endangered Species Act by allowing prohibited importation of endangered salmon from Canada into the United States without first engaging in the consultation process that section seven of the Act requires—a procedural injury.

Reversing a dismissal for lack of standing, the Federal Circuit noted that "plaintiffs' section 7 claim is attempting to enforce a procedural right. Such rights can be asserted 'without meeting all the normal standards for redressability and immediacy,' as long as 'the procedures in question are designed to protect some threatened concrete interest of [the plaintiff] that is the ultimate basis of his standing.'" 550 F.3d at 1132 (quoting *Lujan*, 504 U.S. at 572 n.7, 573 n.8). "[B]ecause consultation could require the defendants to more actively enforce the import ban, consultation could protect the plaintiffs' interests in the survival of the ESA-listed salmon, and it is precisely this interest which the procedure was designed to protect." *Ibid.* The groups' "claim alleging a violation of the procedural requirements of section 7(a)(2) satisfies the redressability prong of standing."). *Ibid.* (citation omitted).

Here, the College likewise seeks to protect its threatened concrete interest in maintaining its housing policies and communications about them without fear of increased or "full" enforcement of HUD's legal theory in the Directive. The College has standing.

D. The College does not assert a procedural right *in vacuo*.

In reaching the contrary conclusion, the panel majority below cited this Court's decision in *Summers* v. *Earth Island Institute* and characterized the College's alleged procedural injury as occurring in a vacuum: "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." App.12a (quoting 555 U.S. 488, 496 (2009)). But "this case does not involve the kinds of purely procedural rights at issue in [*Summers*], which involved decisionmaking procedures … that did not 'require [or] forbid any action on the part of' the plaintiffs." *Cawthorn* v. *Amalfi*, 35 F.4th 245, 253 (4th Cir. 2022) (quoting *Summers*, 555 U.S. at 493). "Here, in contrast," the FHA's refusal to engage in the notice-and-comment process precludes the College "'from doing [some]thing' in the real world." *Ibid.* (quoting *Trump* v. *New York*, 141 S. Ct. 530, 536 (2020) (per curiam)). That preclusion "gives the challengers the requisite personal stake in this appeal." *Ibid.* (citing *Salazar* v. *Buono*, 559 U.S. 700, 711–13 (2010)).

The panel majority also erred in relying on this Court's comment in *Lujan* that a plaintiff cannot establish injury in fact based on "a 'procedural right unconnected to the plaintiff's own concrete harm.'" App.12a (quoting *Lujan*, 504 U.S. at 573 n.8). As noted above, numerous circuits recognize standing in situations like the College's by *relying* on *Lujan*. The difference between this case and *Lujan* is that, in *Lujan*, the individuals asserting a lack of process "live[d] (and propose[d] to live) at the other end of the country from the dam" at issue. 504 U.S. at 572 n.7.

In contrast, the Directive governs the College's conduct directly. When HUD modifies its housing rules to nullify the College's policies and denies the College any opportunity to comment and potentially influence the outcome, the College is invoking a procedure "designed to protect some threatened concrete interest of [the College's] that is the ultimate basis of [its] standing." 504 U.S. at 573 n.8.

* * *

To reiterate, the Eighth Circuit adopted a rule that a regulated entity's concrete interest in maintaining a course of conduct is insufficiently connected to a notice-and-comment right to constitute an injury in fact. App.12a. That rule cannot be reconciled with *Summers*, *Lujan*, or the many circuit authorities discussed above. The College presented interests in specific dorms, located at a specific address that the Directive squarely covers. Yet the panel said that was insufficient to challenge the FHA's violation of notice-and-comment requirements.

The Eighth Circuit was wrong to require regulated entities within the zone of interests protected by a statute requiring notice-and-comment procedures to show a harm *in addition to* those entities' concrete interest in maintaining conduct threatened by a policy change made without the requisite process. By granting the petition, the Court can restore circuit uniformity and require HUD to do its job: conduct the notice-and-comment process before rewriting the FHA.

II. The College has standing under this Court's precedents to challenge the Directive itself.

Independent of its procedural injury, the College has pre-enforcement standing under this Court's precedents to sue and enjoin enforcement of the Directive on the merits. All the College need establish is (1) an injury in fact, (2) a causal connection between the injury and the Directive, and (3) that a favorable decision is likely to redress the College's injury. *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338 (2016). Although an alleged injury in fact must be "actual or imminent, not conjectural or hypothetical," *id.* at 339 (citation omitted), the College need not wait for a HUD enforcement action to challenge the Directive's validity. See *Susan B. Anthony List*, 573 U.S. at 158–59. Rather, all the College need do at the motion-to-dismiss stage is allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [government directive], and [that] there exists a credible threat of prosecution thereunder." *Id.* at 159.

The College easily satisfies these prerequisites. The College's policy of assigning its dormitories based on biological sex, and its communication of that policy to current and prospective students, falls under the Directive's proscription that the College may not "discriminate" in its dormitory policy based on "gender identity." App.37a. That places the College squarely within the FHA's and third-party enforcers' cross hairs. And there is no shortage of third parties eager to challenge the College's religious beliefs. *E.g.*, *Hunter* v. *U.S. Dep't of Educ.*, No. 6:21-cv-00474-AA (D. Or.) (action brought by dozens of LGBTQIA+ students nationwide alleging the invalidity of the Department of Education's application of Title IX's

religious exemption to sexual and gender minority students who attend private religious colleges and universities that receive federal funding). In fact, one of the plaintiffs in *Hunter* filed a Title IX sexual-orientation and gender-identity complaint against the College's housing policy with the Department of Education, notwithstanding Title IX's religious exemption. Elizabeth Redden, *Christian College Sues to Keep LGBTQ+ Housing Policy*, Inside Higher Ed (Sept. 8, 2021), https://bit.ly/3IOEjzr. The government has not informed the College that it ever dismissed this complaint.

The analysis is even simpler because of the regulatory context. There "is ordinarily little question" that standing exists where an entity is the "object of the [challenged] action," such as when an injury arises from the government regulating the entity. *Lujan*, 504 U.S. at 561–62. Entities are the object of a regulation (1) when "the regulation is directed at them in particular"; (2) when "it requires them to make significant changes in their everyday business practices"; and (3) when, "if they fail to observe the [new] rule they are quite clearly exposed to the imposition of strong sanctions." *Abbott Lab'ys*, 387 U.S. at 153–54. The College satisfies these criteria.

First, the government confirmed below that the Directive and its new legal standard apply to the College. 5/19/2021 Hr'g Tr. on Pls.' Mot. for TRO and P.I. at 55–59, ECF No. 23. The Directive imposes its interpretation on the FHA and its regulations; those rules, in turn, prohibit discriminatory housing policies and speech. 42 U.S.C. 3604(c); 24 C.F.R. 100.50(b)(4)–(5). The Directive binds internal and external enforcement officials to "fully enforce" this

interpretation. App.40a. And the government has long taken the view that the FHA covers private college dormitories. V. Compl. ¶¶ 121–24.

Below, the government also declared that the College's policies and speech "indicate a discriminatory and unlawful preference," cause "housing discrimination on the basis of sexual identity or sexual orientation," "den[y] housing" to transgender students, create "a hostile housing environment from college administrators on the basis of gender stereotype," must "accommodate" transgender students, and impose "housing discrimination when [a student] brings transgender friends or family to the dorm." Defs.' Opp'n to Mot. for TRO and P.I. at 20, 41, 44–45, ECF No. 19; 5/19/2021 Hr'g Tr. on Pls.' Mot. for TRO and P.I. at 55–59, ECF No. 23; CA8 Appellant's Br.14–17.

And, when asked at a Congressional hearing whether the College's dormitory policies were "in violation" of the Directive, HUD Secretary Marcia Fudge answered that the Directive "is the law. The *Bostock* rule from the Supreme Court says it is the law and I am sworn to uphold the law."[2]

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[2] Testimony of Marcia Fudge, U.S. House Comm. on the Budget, Hr'g on U.S. Dep't of Hous. and Urban Development's Fiscal Year 2022 Budget (June 23, 2021), https://bit.ly/3Snd3eP. Secretary Fudge then said she would not violate anyone's free speech rights. *Id.* But the government denies that the College has any free speech rights.

Second, the Directive forces the College to choose immediately between three injuries: (1) obey the government and abandon the College's religious policies and speech; (2) refuse the government and risk crippling investigations and penalties; or (3) cease providing student housing. V. Compl. ¶¶ 229–70.

Third, the government's threatened sanctions are strong. The FHA provides for six-figure fines, unlimited damages, intrusive investigations, and government lawsuits. V. Compl. ¶¶ 158–77. Criminal penalties are available if an incident involves the threat of force, as may occur if security personnel must physically remove a biological male from a female dormitory. 42 U.S.C. 3631.

And while the government labels the Directive a non-binding policy memorandum for litigation purposes, the Directive on its face binds officials and enforcement grantees to its interpretation of the FHA. Failure of regulated entities in general—and the College in particular—to comply could bring potential liability and enforcement. App.36a–41a.

Accordingly, the College has standing to sue under this Court's precedents as the object of agency action.

The College also has standing to bring a pre-enforcement action to challenge the Directive's infringement of the College's speech. As noted, the College's speech and policies are not just "arguably proscribed" by the Directive's new interpretation of the FHA, the government itself has said so.

The panel majority erred by holding that the Memorandum only binds HUD and does not "require that HUD reach the specific enforcement decision

that the College's current housing policies violate federal law." App.9a. But most regulations do not require a liability finding, yet pre-enforcement review is the preferred course. *Abbott Lab'ys*, 387 U.S. at 148–54. And in reviewing federal agency action, "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 600 (2016) (cleaned up). Agency action is "immediately reviewable," even if the order correctly implemented a statutory requirement and even if it "would have effect" only "when a particular action was brought." *Id.* at 599–600. The "APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett* v. *EPA*, 566 U.S. 120, 129 (2012). Again, this is especially true in First Amendment cases, in which administrative decisions that purport to control future adjudications "demand[ ] prompt judicial scrutiny." *Action for Children's Television* v. *F.C.C.*, 59 F.3d 1249, 1259 (D.C. Cir. 1995).

The panel majority also posited that "[RFRA] or the Free Exercise Clause may limit enforcement of the Fair Housing Act's prohibition on sex discrimination as applied to the College," App.9a, and that it is speculative whether HUD will charge the College given that "the agency has never filed such a charge against a college for sex discrimination based on a housing policy that is specifically exempted from the prohibition on sex discrimination in education under Title IX of the Civil Rights Act," App.9a–10a. That was wrong.

To begin, the Directive is new, so no historical enforcement could exist. On its face, the Directive requires "full enforcement" eight times, App.36a–41a—plus the "eradication" of policies like the College's, App.41a—and the government has never disavowed enforcement against the College.

In addition, HUD can take invasive steps short of a charge. The College faces the imminent threat of investigation, including written questions, demands for documents, and interviews with faculty, staff, and students—no matter what HUD ultimately decides about RFRA and Free Exercise defenses.

As for HUD accepting those defenses, HUD admits it never considered them when it wrote the Directive, so that's speculative. While Title IX has a religious exemption, the FHA does not.[3] And there are no guidance documents directing HUD officials to grant FHA exemptions based on Title IX's text. The FHA and Title IX are, after all, separate statutes.

The bottom line is that the government has never said that Title IX's exemption *actually* protects the College (or any religious school) from the FHA. And due to the lack of notice and comment, the Directive does not consider the possibility. CA8 Appellees' Br. 20, 23, 27–29. The Directive's failure to "overtly consider" these privacy and religious freedom interests renders it fatally flawed. *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). And the fact the College may ultimately prevail under a religious defense does not remove a present injury.

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[3] As explained in footnote 1, the FHA only allows religious organizations to limit occupancy to members of the same religion. 42 U.S.C. 3607(a).

Separately, the panel majority believed that any injury or speech restriction is not traceable to the Directive—and therefore not redressable—because HUD must construe the FHA consistent with *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020). App.16a. But *Bostock* limited its holding to Title VII and said it was not addressing intimate spaces. 140 S. Ct. at 1753. At a minimum, the Directive is an extension of *Bostock*, meaning the threat to the College's interests is traceable to (and redressable from) HUD's threatened enforcement of the Directive, not *Bostock*.

Moreover, if the FHA is read as the Directive interprets it, the College's same claims would support relief. The complaint challenges (1) HUD enforcement of the Directive, *and* (2) if the FHA includes the Directive's standard, HUD's enforcement of the statute and its regulations. V. Compl., p. 65, Prayer for Relief. Standing exists when the injury can be traced to the officials' "allegedly unlawful conduct" of enforcing "the provision of law that is challenged." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1779 (2021). That's this case.

Finally, by assuming that *Bostock* might be extended to the FHA, the Eighth Circuit violated this Court's admonition that standing is a litigant's right "to have the court *decide the merits* of … particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). When an "answer to [a merits] question would necessarily resolve the standing issue," courts recognize standing so that the merits can be resolved. *Day* v. *Bond*, 500 F.3d 1127, 1137 (10th Cir. 2007); accord *Griswold* v. *Driscoll*, 616 F.3d 53, 56 (1st Cir. 2010) (exercising jurisdiction where "the dispositive questions of standing and statement of cognizable claim are difficult to disentangle.").

Here, the proper course is to acknowledge the College's standing and remand this matter to the district court. If, on appeal, the Eighth Circuit or this Court holds that the Directive is a misapplication of *Bostock* and a misinterpretation of the FHA, then the College's injuries will have been redressed. All of Article III's prerequisites have been satisfied, and the case should move forward.

III. This case is an ideal vehicle for resolving the questions presented.

This case is an excellent vehicle to decide both questions presented. First, the record is clear. All the facts in the complaint must be accepted as true, and the College has alleged a sufficient injury-in-fact for Article III standing.

Second, a lawsuit alleging that an agency's policy abridges free speech is an ideal context to consider the questions presented. Threats to free speech are the paradigm for pre-enforcement review, and HUD believes the College's speech violates the FHA as interpreted by the Directive.

Third, the issues presented will not benefit from further percolation. The en banc Eighth Circuit chose not to reconsider its outlier decision, refusing to find a procedural injury despite the College's concrete interest in maintaining its existing polices. In so doing, the court of appeals ensured that litigants aggrieved by agency actions will face one standing rule in the Eighth Circuit and a very different rule in five others. Had the College been in any of those circuits, its claims would have gone forward.

Finally, the scope of the questions presented are not limited to religious colleges. Congressional gridlock incentivizes agencies to issue "guidance" documents like the Directive. Yet in the areas of finance, environmental law, securities, and more, the decision below guts statutorily mandated notice-and-comment requirements by ensuring there is rarely a regulated entity who can sue to enforce the requirement.

That result has mammoth implications. If HUD gets away with rewriting the FHA via the Directive, it has no incentive to ever go through the rule-making process. That eliminates judicial review until *after* an enforcement proceeding is complete and the regulated entity has already been harmed. As a practical matter, that means all judicial review of APA rule making is eradicated. And that is an even more radical rewrite of the APA than the Directive is of the FHA. Immediate review is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2023

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 21-2270

The School of the Ozarks, Inc., doing business as College of the Ozarks,

Plaintiff - Appellant,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States; U.S. Department of Housing and Urban Development; Marcia L. Fudge, in her official capacity as Secretary of the U.S. Department of Housing and Urban Development; Demetria L. McCain, in her official capacity as Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity of the U.S. Department of Housing and Urban Development,[1]

Defendants - Appellees.

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[1] Ms. McCain is substituted for Jeanine M. Worden under Federal Rule of Appellate Procedure 43(c). The complaint sued Worden in her official capacity as Acting Assistant Secretary, but that office is now vacant, and under the Department's Order of Succession, the Principal Deputy Assistant Secretary exercises the powers and performs the duties of the Assistant Secretary.

Institute for Faith and Family; America First Legal Foundation; Mountain States Legal Foundation; State of Missouri; State of Alabama; State of Arkansas; State of Indiana; State of Kansas; State of Kentucky; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of Tennessee; State of Texas; State of Utah; State of West Virginia; Hannibal-LaGrange University; Missouri Baptist University; Southwest Baptist University; Christian Life Commission of the Missouri Baptist Convention,

Amici on Behalf of Appellant(s).

Appeal from United States District Court
for the Western District of Missouri - Springfield

Submitted: November 17, 2021
Filed: July 27, 2022

Before COLLOTON, GRASZ, and KOBES, Circuit Judges.

COLLOTON, Circuit Judge.

College of the Ozarks, a private Christian college in Missouri, brought this action to challenge the lawfulness of a memorandum issued by an acting assistant secretary of the United States Department of Housing and Urban Development. The College moved for a temporary restraining order and

preliminary injunction. The district court[2] ruled that the College lacked standing to establish a case or controversy and dismissed the action for lack of jurisdiction. The College appeals, and we affirm.

I.

On June 15, 2020, the Supreme Court decided *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), concerning Title VII of the Civil Rights Act of 1964. *Bostock* held that the statute's prohibition on employment discrimination "because of sex" encompasses discrimination on the basis of sexual orientation and gender identity. *Id.* at 1741.

The Fair Housing Act, at issue in this appeal, makes it unlawful for certain persons and entities to "make unavailable or deny" a dwelling "because of . . . sex." 42 U.S.C. § 3604(a). In January 2021, President Biden issued Executive Order No. 13,988, which states that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including . . . the Fair Housing Act . . . prohibit discrimination on the basis of gender identity or sexual orientation."

The following month, the Acting Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and Urban Development issued a memorandum to implement the Executive Order. The Memorandum is addressed to the Department's Office of Fair Housing and Equal Opportunity, as well as state and local agencies and private organizations that administer and receive funds through certain programs of the Department.

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[2] The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

The document explains that the Office of General Counsel for the Department "has concluded that the Fair Housing Act's sex discrimination provisions are comparable to those of Title VII and that they likewise prohibit discrimination because of sexual orientation and gender identity."

The Memorandum directs the Office of Fair Housing and Equal Opportunity—the HUD office that enforces the Fair Housing Act—to "accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." The document's stated purpose is to direct the Office to "fully enforce the Fair Housing Act" because discrimination based on sexual orientation and gender identity "is real and urgently requires enforcement action."

The Memorandum explained that over the previous ten years, HUD interpreted the Fair Housing Act to prohibit discrimination on the basis of gender identity and sexual orientation when the discrimination was motivated by perceived nonconformity with gender stereotypes.[3] Yet the Memorandum concluded that this "limited enforcement" was "insufficient to satisfy the Act's purpose" and was "inconsistent" with the broader

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[3] *See* Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Developmental Programs, 81 Fed. Reg. 64,763, 64,770 (Sept. 21, 2016); Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,058-59 (Sept. 14, 2016); Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5661, 5666 (Feb. 3, 2012).

rationale of *Bostock*. Hence, the Department's leadership issued this new directive "to fully enforce" the Act's prohibitions against discrimination based on sex, including sexual orientation and gender identity. The Memorandum addresses discrimination in housing across the entire economy, and does not specifically address the subject of housing for students at colleges and universities.

College of the Ozarks is a Christian undergraduate institution in Missouri. The College admits students of any religion, but all students must agree to follow the College's religiously-inspired code of conduct. As stated in that code, the College teaches that biological sex is a person's "God-given, objective gender, whether or not it differs from their internal sense of 'gender identity.'" The code also states that "sexual relations are for the purpose of the procreation of human life and the uniting and strengthening of the marital bond in self-giving love, purposes that are to be achieved solely through heterosexual relationships in marriage." In accordance with these beliefs, the College maintains single-sex residence halls and does not allow members of one sex to visit the "living areas" of members of the opposite sex. The College therefore prohibits biological males who "identify" as females from living in female dormitories, and vice-versa. The College regularly communicates its housing policies to current and prospective students through a student handbook, an online virtual tour, the school website, and in-person recruitment events.

Allegedly fearing that its housing policies are now unlawful under the Memorandum's interpretation of the Fair Housing Act, the College sued President

Biden, the Department of HUD, the Secretary of HUD, and the Acting Assistant Secretary, seeking pre-enforcement review of the Memorandum. The complaint alleged that the Memorandum, among other things, violates the Administrative Procedure Act, the First Amendment's Free Speech and Free Exercise Clauses, the Appointments Clause of Article II of the Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

The complaint sought injunctive and declaratory relief. Specifically, it asked the district court to "set aside" the Memorandum and issue an injunction against enforcement of the Memorandum by the defendant officials. The complaint sought, among other forms of relief, a declaration that the Fair Housing Act and the implementing regulations do not prohibit discrimination based on sexual orientation or gender identity. The College moved for a temporary restraining order and preliminary injunction.

The district court concluded that it lacked jurisdiction because the College failed to establish Article III standing. The court determined that any alleged injury is not concrete because the College did not show that the Memorandum imposed restrictions on private housing providers such as the College. The court further reasoned that any injury was not caused by the Memorandum because the internal directive does not modify the College's rights or obligations under the Fair Housing Act. The court also concluded that any judicial remedy would not redress any alleged injury because any liability that the College incurs for violating the Fair Housing Act "would flow directly from the Act itself, as well as applicable case law including *Bostock*, and not from the

Memorandum." The College appeals, and we review the district court's decision *de novo*.

II.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation and alteration omitted). To establish Article III standing, a party invoking federal jurisdiction must show (1) that the plaintiff suffered an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is the invasion of a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation omitted). "Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation omitted).

A plaintiff who invokes federal jurisdiction must support each element "in the same way as any other matter" on which it bears the burden of proof. *Lujan*, 504 U.S. at 561. At the pleading stage, therefore, a plaintiff must "allege sufficient facts to support a reasonable inference that [it] can satisfy the elements of standing." *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021).

The closely related doctrine of ripeness originates from the same Article III limitation. *Susan B.*

Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014). The ripeness requirement serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49 (1967). To demonstrate that an alleged dispute is ripe for review, the complainant must show both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. A case is fit for judicial decision when it would not benefit from further factual development and poses a purely legal question not contingent on future possibilities. *Pub. Water Supply v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003). In this case, standing and ripeness essentially "boil down to the same question," and we will address the issue in terms of "standing." *See Susan B. Anthony List*, 573 U.S. at 157 n.5; *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007).

A.

The College first argues that it has suffered an injury in fact because there is an imminent threat under the Memorandum that the government will enforce the Fair Housing Act against the College. This imminent threat of enforcement, says the College, requires it to choose among three injuries: (1) change its housing policies in violation of the College's religious beliefs, (2) refuse to change its housing policies and face sanctions under the Fair Housing Act, or (3) cease providing student housing altogether.

The College cites the Memorandum's call for "full enforcement" of the Act to overcome the insufficiency of past "limited enforcement of the Fair Housing Act's sex discrimination prohibition." The College contends that the Memorandum necessarily directs the agency to bring an allegation of sex discrimination against the College to "eliminate discriminatory housing practices."

This theory of injury fails because it is based on a misunderstanding of the Memorandum. The Memorandum does not impose any restrictions on, or create any penalties against, entities subject to the Fair Housing Act. Rather, the Memorandum directs the Office of Fair Housing and Equal Opportunity to "accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." The Memorandum does not, as the College presupposes, require that HUD reach the specific enforcement decision that the College's current housing policies violate federal law. The Memorandum, for example, says nothing of how the Religious Freedom Restoration Act or the Free Exercise Clause may limit enforcement of the Fair Housing Act's prohibition on sex discrimination as applied to the College. *Bostock* itself, the decision on which the Memorandum is based, refers to the Religious Freedom Restoration Act as a "super statute, displacing the normal operation of other federal laws." *Bostock*, 140 S. Ct. at 1754.

The College's alleged injury also lacks imminence because it is speculative that HUD will file a charge of discrimination against the College in the first place. As explained in the government's brief, the agency has never filed such a charge against a college for sex

discrimination based on a housing policy that is specifically exempted from the prohibition on sex discrimination in education under Title IX of the Civil Rights Act. Title IX provides that its anti-discrimination provision "shall not apply to an educational institution which is controlled by a religious organization," if applying the prohibition "would not be consistent with the religious tenets of" the organization. 20 U.S.C. § 1681(a)(3). In 2018, the assistant secretary for civil rights in the U.S. Department of Education formally advised the College that it is exempt from numerous regulatory provisions on housing and other matters, insofar as they proscribed discrimination based on sexual orientation or gender identity, to the extent that compliance would conflict with the College's religious tenets. Consistent with that exemption, even when HUD interpreted the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity between 2012 and 2020, the Department brought no enforcement action against the College. The College's enjoyment of an exemption under Title IX, and its failure to show that HUD has previously filed discrimination charges against it or similarly situated colleges, substantially undermines its argument that enforcement is imminent now. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013).

Similarly unpersuasive is the College's assertion that it is the "object of the action" in the Memorandum, and that there is thus "little question" that the Memorandum causes injury. *See Lujan*, 504 U.S. at 561-62. Relying on the ripeness decision in *Abbott Laboratories*, the College argues that it is the

object of an agency action because the Memorandum (1) is directed at the College in particular, (2) requires the College to make significant changes to its housing policies, and (3) exposes the College to strong sanctions. *See* 387 U.S. at 154. But this assertion overlooks that the Memorandum is an internal directive to HUD agencies, not a regulation of private parties. The Memorandum does not direct the College to do anything, and it does not expose the College to any legal penalties for noncompliance with the Memorandum. In *Abbott Laboratories*, by contrast, the plaintiff drug manufacturers were the object of a final administrative rule that required them to place a particular name on drug labels. The rule directly regulated the conduct of drug manufacturers and was backed by criminal and civil sanctions if not followed. *Id.* at 152-54.

The College is more like the plaintiff in *Cornish v. Blakey*, 336 F.3d 749 (8th Cir. 2003). There, a memorandum issued by the Department of Transportation (DOT) directed doctors who conducted drug testing how to decide whether a specimen was adulterated. *Id.* at 751. The Federal Aviation Administration (FAA) revoked the plaintiff Cornish's aircraft mechanic certificate when doctors determined that he submitted an adulterated urine specimen. Before the mechanic exhausted his administrative remedies, he brought a challenge to the DOT memorandum in federal court. *Id.* at 752. This court held that the plaintiff "was not even arguably injured by the 1998 DOT memorandum until the FAA relied upon it as a basis for revoking his mechanic certificate," and that "absent the revocation order, Cornish lacks the injury in fact necessary for Article III standing." *Id.* at 752-

53. The College lacks injury for analogous reasons. The HUD enforcement agencies have not relied on the Memorandum to charge the College with sex discrimination under the Fair Housing Act, and any alleged future injury caused by the Memorandum is conjectural and hypothetical.

The dissent favors a different theory of injury—namely, that the College was deprived of a right to notice and opportunity for comment before HUD issued the internal directive. But even assuming that notice and comment was required, a plaintiff cannot establish injury in fact "on the basis of a 'procedural right' unconnected to the plaintiff's own concrete harm." *Lujan*, 504 U.S. at 573 n.8. Like the Memorandum itself, the absence of notice and opportunity to comment regarding the Memorandum does not endanger a concrete interest of the College, because the Memorandum does not require HUD to determine that the College's housing policies violate federal law. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

In sum, the College's alleged injury is too speculative to establish Article III standing. The College, in effect, asks us to assume that the following series of events is imminent: a sex-discrimination complaint will be filed against the College based on claims involving sexual orientation or gender identity; following an investigation, HUD will charge the College with sex discrimination, even though HUD has never enforced the Fair Housing Act's sex-discrimination prohibition against a college whose

housing policies have been exempted from the prohibition on sex discrimination under Title IX; HUD will determine, pursuant to the Memorandum, that the College is not entitled to an exemption under the Religious Freedom Restoration Act or the Free Exercise Clause as discussed in *Bostock*; and the College will therefore be subject to penalties. This is the kind of "highly attenuated chain of possibilities" that "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

B.

The College also advances a second theory of injury—namely, that the Memorandum curtails its First Amendment right to freedom of speech. A plaintiff claiming an abridgment of free speech is permitted to seek pre-enforcement review "under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 159. To establish standing, a complaint must allege that plaintiff has "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (internal quotation omitted). A plaintiff can establish an injury in the First Amendment context in two ways: by identifying protected speech in which it would like to engage but that is proscribed by statute, or by self-censoring to avoid the credible threat of prosecution. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016).

The Fair Housing Act makes it unlawful to "make, print, or publish" a statement regarding the sale or renting of a dwelling that discriminates on the basis of sex. 42 U.S.C. § 3604(c). The College argues that, according to the Memorandum, the Fair Housing Act prohibits the College from communicating its housing policies, because those policies require that biological males and females, regardless of gender identity or sexual orientation, reside in separate dormitories. In asserting a credible threat of enforcement, the College again cites the Memorandum's call for "full enforcement" of the Fair Housing Act to bring about the "eradication of housing discrimination for all."

The College's free-speech theory of standing fails essentially for the reasons discussed above: The College has not shown that there exists a credible threat that the defendants will enforce the Fair Housing Act against the institution based on its religiously-based housing policies. The Memorandum does not make the College's housing policies unlawful without regard to legal protections for religious liberty. HUD has never filed charges of housing discrimination against a college that is exempt from prohibitions on sex discrimination in housing under Title IX. And HUD has never enforced the Fair Housing Act's sex-discrimination prohibition against the College, even though the agency interpreted the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity between 2012 and 2020. Thus, the College's free-speech theory does not allege an injury in fact sufficient to confer Article III standing.

Aside from the lack of a credible threat of enforcement, the College also has not alleged that its

speech has been chilled. The College alleges no self-censorship, but rather avers that it "tells and intends to continue telling current and prospective students" about its religiously-inspired housing policies. Although the complaint states that the Memorandum "chills the speech of colleges," it alleges no facts to support that legal conclusion, and we "are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted). The College has not alleged, for example, that it no longer separates males and females into dormitories based on biological sex, or that it has repealed the portion of the student handbook that communicates its housing policies. The complaint thus fails to allege either an actual chilling of speech or a credible threat of enforcement that justifies self-censorship.

C.

Even if the College had suffered an injury in fact, it must also show that a favorable judicial decision would likely redress its injury. Redressability requires us to examine the "causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). Therefore, even if we assume for the sake of analysis that the College has suffered the injuries it alleges, the College must show that the requested relief would eliminate the alleged threat of imminent enforcement of the Fair Housing Act and prevent any chill of the College's speech.

An injunction against implementing the Memorandum, however, would not stop the Department from investigating all complaints of sex discrimi-

nation against a college, including complaints of discrimination because of gender identity or sexual orientation. Even if HUD were enjoined from enforcing its internal directive, the agency would still be required by statute to investigate sex-discrimination complaints filed against the College. The statute mandates that when a complaint is filed, HUD "shall make an investigation of the alleged discriminatory housing practice." 42 U.S.C. § 3610(a)(1)(B)(iv). With or without the Memorandum, the agency must consider the meaning of the Fair Housing Act in light of *Bostock* and its interpretation of similar statutory language. The College has thus failed to show that enjoining officials from implementing the Memorandum would redress any injury allegedly arising from the internal directive, because the agency retains the authority and responsibility to carry out the same enforcement activity based on the statute alone.

* * *

For these reasons, the judgment of the district court is affirmed.

GRASZ, Circuit Judge, dissenting.

This case highlights the corrosive effect on the rule of law when important changes in government policy are implemented outside the normal administrative process. The normal method for rulemaking requires notice and comment, which in turn "secure the values of government transparency and public participation." *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). An agency's issuance of a guidance document that fails to adhere to the proper administrative procedures may achieve

compliance with the government's desired policy outcomes by in terrorem means, but it skirts the rule of law and undermines our values. This is especially true where regulated entities are placed under a sword of Damocles but are denied access to the courts because the sword has not yet fallen. "An agency operating in this way gains a large advantage"—it enables the agency to quickly amend its rules without following the statutory procedures. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). "The agency may also think there is another advantage—immunizing its lawmaking from judicial review." *Id.*

Here, the College fears the federal government will imminently enforce HUD's interpretation of the Fair Housing Act ("FHA") against the College if the College continues its current housing policy that assigns students to single-sex dorms according to their biological sex. The court dismisses this fear as "speculative" and contends there is no "credible threat of enforcement." *Ante* at pp. 8, 11. It therefore concludes we lack standing to review HUD's Memorandum directing the Office of Fair Housing and Equal Opportunity ("FHEO") and associated entities to "fully enforce" the federal government's interpretation of the FHA. I disagree with the court's conclusions and respectfully dissent.

Viewing the pleadings liberally, the complaint alleges the College's housing policy violates the government's interpretation of the FHA. Put simply, if the government acts as the Memorandum facially requires, it is only a matter of time before the government concludes the College's housing policy violates the FHA. The law should not require the

College to wait for this to come to fruition. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[W]e have permitted preenforcement review under circumstances that render the threatened enforcement sufficiently imminent."). Nor do I believe the College must rely on the government's in-court oral suggestion that it would not enforce its interpretation of the FHA against religious institutions based on its historic practice of following Title IX's religious exemption—an exemption not even mentioned in the broad language of the enforcement directive in the Memorandum. *See Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019) (noting that the government's "in-court assurances [that it will not fully enforce the law] do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future").

That said, my main objection to the court's holding is more fundamental: the holding overlooks an injury the College has *already suffered*—the deprivation of its right to notice and comment. The FHA requires notice and comment for "all rules" under its purview—including interpretative rules.[4] 42 U.S.C. § 3614a. "[I]nterpretative rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties." *Iowa League of Cities*, 711 F.3d at 873 (quoting *Northwest Nat'l Bank v. U.S. Dep't of the*

[4] The Administrative Procedure Act exempts interpretative rules from the notice and comment requirement "[e]xcept when notice or hearing is required by statute." 5 U.S.C. § 553(b). The notice and comment requirement under the FHA falls under this exception.

Treasury, 917 F.2d 1111, 1117 (8th Cir. 1990)).

In my view, HUD's Memorandum is an interpretative rule. The Memorandum explains HUD's interpretation of the FHA's "sex discrimination" language: "HUD's Office of General Counsel has concluded that [the FHA's] sex discrimination provisions . . . prohibit discrimination because of sexual orientation and gender identity." It then thrice directs FHEO and other relevant entities to so "interpret" the FHA's prohibition on sex discrimination. The Memorandum states what HUD thinks the statute means and instructs affected parties of their duties. These are the hallmarks of an interpretative rule. *See Iowa League of Cities*, 711 F.3d at 873. Interestingly, President Biden—author of the Executive Order prompting the Memorandum—characterized the Memorandum as a "rule change." Proclamation No. 10,177, 86 Fed. Reg. 19,775 (Apr. 11, 2021). I agree and therefore believe the Memorandum is subject to the FHA's notice and comment requirement.

But even if we pretend the Memorandum is not what the President says it is, the College has an alternative basis for its procedural right to notice and comment. When HUD issued the Memorandum, a federal regulation required notice and comment for "significant guidance documents." 24 C.F.R. § 11.1(b) (2020). A guidance document included "a statement of general applicability, designed to shape or intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory . . . issue, or an interpretation of a statute." *Id.* § 11.2(a) (2020). And a guidance document was "significant" if it could "reasonably be anticipated to . . . [r]aise novel

legal or policy issues arising out of legal mandates [or] the President's priorities." *Id.* § 11.2(d)(4) (2020). While these regulations under 24 C.F.R. §§ 11.1 and 11.2 have since been revoked, *see* Implementing Executive Order 13992, 86 Fed. Reg. 35,391-01, at 35,392 (July 6, 2021), HUD was required to follow them while they "remain[ed] in force." *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992).[5]

Here, HUD's Memorandum interpreted the FHA's prohibition on sex discrimination. It directed FHEO to "accept for filing and investigate *all* complaints of sex discrimination" based on "gender identity or sexual orientation" (emphasis added). It called HUD's prior FHA enforcement "limited," "insufficient," and "inconsistent" with *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). It sought to rectify denials of "the constitutional promise of equal protection under the law" for transgender individuals "throughout most of American history." It specified its requirements arose from the Supreme Court's *Bostock* decision and President Biden's priorities articulated in Executive Order 13,988. In short, if the Memorandum is not an interpretative rule, it is at minimum a significant guidance document. It strains credulity to say otherwise.

Whether the Memorandum was an interpretative

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[5] As one court recently stated: "Under deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations. When agencies fail to do so, the APA (as developed by case law) gives aggrieved parties a cause of action to enforce compliance." *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020) (internal citations omitted).

rule or a significant guidance document, the complaint plausibly alleged HUD deprived the College of its right to notice and comment. Such deprivation constitutes an injury in fact sufficient for standing if the notice and comment right was "designed to protect some threatened concrete interest of" the College. *Iowa League of Cities*, 711 F.3d at 870–71 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). At this stage of the proceedings, I would conclude the notice and comment right was designed to protect a threatened concrete interest of the College. *See Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) ("In assessing a plaintiff's Article III standing, we must assume that on the merits the plaintiffs would be successful in their claims." (cleaned up and quotation omitted)). The College has a concrete interest in complying with the FHA as interpreted by HUD. Notice and comment rights would have helped ensure the College was "treated with fairness and transparency after due consideration and industry participation." *See Iowa League of Cities*, 711 F.3d at 871. It is plausible at this stage to conclude this notice and comment right was designed to protect this concrete interest. The College therefore plausibly pled both that it suffered an injury in fact and that HUD's failure to follow proper notice and comment procedures caused this injury.

The College also meets the lower showing required for redressability. A party deprived of its notice and comment right, as here, "can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* (quoting *Lujan*, 504 U.S. at 572 n.7). Redressability in such cases is

satisfied "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)). The harmed party, however, need not "show that the agency would alter its rules upon following the proper procedures." *Id.* Here, the College shows "some possibility" that enjoining the Memorandum's enforcement would prompt HUD to reconsider the Memorandum.

The College thus has standing because, if nothing else, it was deprived of its opportunity for notice and comment. I would therefore reverse the district court's dismissal of the College's complaint.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 21-2270

The School of the Ozarks, Inc., doing business as College of the Ozarks

Appellant

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States, et al.

Appellees

Institute for Faith and Family, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:21-cv-03089-RK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 30, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

THE SCHOOL OF THE OZARKS, INC., Plaintiff, v. JOSEPH R. BIDEN JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; et al, Defendants.	)	Case No. 6:21-03089-CV-RK

ORDER

Before the Court is Plaintiff The School of the Ozarks, Inc.'s motion for a temporary restraining order and for a preliminary injunction. (Doc. 2.) The motion is fully briefed. (Docs. 19, 20.) The Court held a hearing May 19, 2021 and **DENIED** the motion. These written reasons follow.

Background

Plaintiff filed its verified complaint on April 15, 2021, largely challenging a memorandum titled "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act"[1]

[1] U.S. Dep't of Hous. & Urban Dev., Implementation of Executive Order 13988 on the Enforcement of the Fair Housing

("Memorandum"). Specifically, the verified complaint (Doc. 1) alleges:

1. the Memorandum is a new legislative rule and should be held unlawful and set aside as an agency action enacted without observance of notice and comment requirements in contravention of 5 U.S.C. § 706(2)(D);
2. the Memorandum should be set aside under 5 U.S.C. § 706(2)(A)-(C), as an agency action "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "contrary to constitutional right, power, privilege, or immunity;"
3. the Memorandum should be held unlawful and set aside under 5 U.S.C. § 706(2)(A) as an agency action that is arbitrary, capricious, or an abuse of discretion;
4. Defendants failed to prepare and make available for public comment an initial and final regulatory flexibility analysis before issuing the Memorandum in violation of 5 U.S.C. § 603(a);
5. Defendant Worden's issuance of the Memorandum violated the Appointments Clause of Article II of the United States Constitution;
6. the Memorandum, its enforcement, or alternatively the Fair Housing Act ("FHA") and

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Act (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

its implementing regulations, violate (a) the First Amendment to the United States Constitution's protections of Freedom of Speech, Assembly, and Association, and (b) the Due Process protection afforded by the Fifth Amendment to the United States Constitution;

7. any application or enforcement of the FHA, U.S. Department of Housing and Urban Development ("HUD") regulations, or the Memorandum to discrimination because of sexual orientation or gender identity exceeds Congress's Article I enumerated powers and transgresses on the reserved powers of the State under the Constitution's structural principles of federalism and the Tenth Amendment;

8. the Memorandum, or in the alternative the FHA, and HUD's implementing regulations, are unlawful under 42 U.S.C. § 2000bb et seq. (the Religious Freedom Restoration Act ("RFRA")); and

9. the Memorandum, or in the alternative the FHA, and HUD's implementing regulations, impose an impermissible burden on Plaintiff's religious exercise, its hybrid exercise of free speech and religion, and its hybrid exercise of freedom of association and religion, and do not withstand strict scrutiny analysis in violation of the First and Fifth Amendments to the United States Constitution.

Plaintiff's motion for temporary restraining order and preliminary injunction and suggestions in support were filed contemporaneously with the

verified complaint on April 15, 2021. (Docs. 2 and 2-1.) In its motion, Plaintiff sought interim injunctive relief on Claims 1, 2, 3, 5, and 6 of its verified complaint as set forth above. Specifically, Plaintiff asks this Court to:

> [e]njoin the Memorandum and any enforcement of it by Defendants (including their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of this injunction), pending further ruling by this Court. Plaintiff asks that persons subject to this injunction be prohibited from taking any action to enforce or investigate an alleged or actual violation of the directive and its requirements. This includes acts by Defendants that tend to prohibit, penalize, or burden private religious educational institutions because they have or implement student housing policies based on biological sex, because they have or implement codes of student conduct in housing that require sexual relations to be limited to a marriage between one biological man and one biological woman, or because they make any statements or notices about, related to, or substantially equivalent to such policies.

Legal Standard

Standing is a threshold or jurisdictional issue. *See Cook v. ACS State & Local Sols., Inc.*, 756 F.Supp.2d 1104, 1106 (W.D. Mo. 2010). A district court does not have subject matter jurisdiction when a plaintiff lacks

standing. *Nelson v. Maples*, 672 F. App'x 621 (8th Cir. 2017) (citing *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002)). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish the 'irreducible constitutional minimum of standing,' [Plaintiff] must show [it has] '(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged action of [Defendants], and (3) is likely to be redressed by a favorable judicial decision.'" *Yeransian v. B. Riley FBR, Inc.*, 984 F.3d 633, 636–37 (8th Cir. 2021) (quoting *Spokeo*, 136 S. Ct. at 1547).

"An injury-in-fact exists where the plaintiff has sustained, or is in immediate danger of sustaining, a concrete and particularized harm that is actual or imminent, not conjectural or hypothetical." *Philadelphia Indem. Ins. Co. v. Atl. Specialty Ins. Co.*, No. 6:20-CV-03065-MDH, 2020 WL 4819949, at *1 (W.D. Mo. Aug. 19, 2020) (internal quotation marks omitted). Injury is "fairly traceable" to the government action at issue where a causal connection is alleged between the government's action and the plaintiff's injury. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir.2009). "Because redressability is an 'irreducible' component of standing . . . no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (citing Spokeo, 578 U.S. at 338).

Analysis

The Court recognizes the sensitivity and significance of the underlying societal issues of this

case. It is this recognition that warrants the Court's caution in making its ruling here and illustrates the importance of employing judicial restraint. Exceeding the case and controversy limitations set forth in Article III of the Constitution constitutes judicial activism and is not the proper role of this Court. While value judgment can play a part in legislation, it is not the place of judges, whose role is to interpret the law. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074, (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences[,]" whereas the courts' role "is to interpret the words consistent with their ordinary meaning ... at the time Congress enacted the statute."). In keeping with the boundaries limiting the role of the courts, this Court is unwilling to decide a Constitutional issue not before it to invalidate legislative or executive actions.

Article III of the Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies." As the United States Supreme Court has explained, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Id.* (internal quotation marks omitted). Ensuring Article III standing prevents the judicial process from

violating the separation of powers of the political branches. *Id.* In light of this purpose, the standing determination is particularly "rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* (internal quotation marks omitted).

For the reasons below, Plaintiff's motion for temporary restraining order and preliminary injunction is not justiciable as no Article III controversy exists. Plaintiff fails to show the requisite elements of injury-in-fact, causation, and redressability.

I. Injury-In-Fact

The Court finds Plaintiff fails to demonstrate the requisite element of an injury-in-fact. Plaintiff has not sustained, and is not "in immediate danger of sustaining, a concrete and particularized harm that is actual or imminent, not conjectural or hypothetical." *Philadelphia Indem. Ins. Co.*, 2020 WL 4819949, at * (internal quotation marks omitted). Plaintiff's motion fails to show the Memorandum imposes any restriction, requirement, or penalty on private housing providers, including Plaintiff. Plaintiff has not alleged it is being investigated, charged, or otherwise subjected to any enforcement action pursuant to the Memorandum. The Memorandum does not specify how HUD will determine FHA liability based on *Bostock* in any specific factual setting or considering potential exemptions. As such, any injury alleged by Plaintiff is not concrete. Accordingly, Plaintiff's Motion fails to establish

injury-in-fact as required to establish Article III standing.

II. Causation

The Court finds Plaintiff does not show any injury that is "fairly traceable" to the government action at issue in that it fails to plausibly allege any causal connection between the Memorandum and any alleged injury. *Braden*, 588 F.3d at 592. Plaintiff's Motion fails to show the Memorandum has the legal authority to define or modify its rights or obligations under the FHA. The Memorandum reiterates intake procedures for FHA complaints and connects them to the United States Supreme Court's opinion in *Bostock v. Clayton County, Ga.*, 140 S.Ct. 1731 (2020). Moreover, the Memorandum does not specify how HUD will determine FHA liability based on *Bostock* in any specific factual setting or considering potential exemptions. As such, Plaintiff's Motion fails to establish the element of traceability to the action of Defendants fact as required to establish Article III standing. *Yeransian*, 984 F.3d at 637.

III. Redressability

Even if Plaintiff could establish causation, Plaintiff's motion fails for lack of redressability because enjoining Defendants from following or applying the Memorandum would not foreclose the possibility that Plaintiff could be held liable for violation of the FHA.

Any potential liability Plaintiff incurs for violating the FHA would flow directly from the Act itself, as well as applicable case law including *Bostock*, and not from the Memorandum. Enjoining

Defendants from "applying" the Memorandum by accepting and investigating complaints would not foreclose the possibility that Plaintiff could be held liable for FHA violations. Even without the Memorandum, individuals remain free to bring claims for FHA violations through private actions, and courts would remain free to adjudicate them under the statute and *Bostock*, without necessarily involving Defendants. The relief Plaintiff seeks, to "[e]njoin the Memorandum and any enforcement of it by Defendants[,]" would not preclude investigations and enforcement by the recipients of the Memorandum. Such investigations and enforcement may occur independent of the Memorandum, initiated and executed instead pursuant only to the authority of the FHA and the guidance of Executive Order 13988. Simply put, Plaintiff is seeking an advisory opinion from this Court declaring it cannot be liable for housing discrimination. Such an opinion would not shield Plaintiff from all liability and is outside the constitutional authority of the Court. Therefore, because the remedy sought cannot redress Plaintiff's alleged injury, Plaintiff lacks standing. *Uzuegbunam*, 141 S. Ct. at 801.

IV. Standing and Subject Matter Jurisdiction as to Plaintiff's Remaining Claims

Given the context of the above analysis of Plaintiff's claims included in its motion for temporary restraining order and preliminary injunction, the Court *sua sponte* considers its subject matter jurisdiction as to the remaining claims in Plaintiff's verified complaint. *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849 (2019) (courts must consider subject matter jurisdiction *sua sponte*); *Clark v. Baka*, 593

F.3d 712, 714 (8th Cir. 2010) ("We are obligated to consider *sua sponte* our jurisdiction to entertain a case where, as here, we believe that jurisdiction may be lacking.")

Each of Plaintiff's Claims 4, 7, 8, and 9 challenge the Memorandum; any application or enforcement of the FHA, HUD regulations, or the Memorandum to discrimination because of sexual orientation or gender identity; and the FHA, and HUD's implementing regulations as violating federal statutes and the Constitution. However, as with the claims Plaintiff chose to include in its request for interim relief, these claims fail for lack of standing due to Plaintiff's inability to establish an injury-in-fact. Plaintiff has not shown in its verified complaint that it "has sustained, or is in immediate danger of sustaining, a concrete and particularized harm that is actual or imminent, not conjectural or hypothetical." *Philadelphia Indem. Ins. Co.*, 2020 WL 4819949, at *1 (internal quotation marks omitted). Plaintiff has not alleged it is being investigated, charged, or otherwise subjected to any enforcement action pursuant to the Memorandum; any application or enforcement of the FHA, HUD regulations, or the Memorandum to discrimination because of sexual orientation or gender identity; or the FHA, and HUD's implementing regulations. Plaintiff has not plausibly alleged any indication that such potential situation is imminent.

Because Plaintiff fails to establish standing for each of the claims in its verified complaint, this Court lacks subject matter jurisdiction over this case.

Conclusion

After careful consideration of the law, Plaintiff's verified complaint, and the parties' legal briefing and arguments, the Court **ORDERS:**

(1) Plaintiff's motion for temporary restraining order and preliminary injunction is **DISMISSED.**[2]

(2) This case is **DISMISSED.**

IT IS SO ORDERED.

/s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: June 4, 2021

[2] Even if Plaintiff had established standing and this Court had jurisdiction, the Memorandum does not carry the force of law because it has no legal consequences of its own accord. Rather, it is a general statement of policy. The Memorandum thus does not violate the First Amendment as it does not restrict speech.

UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

THE SCHOOL OF THE OZARKS, INC.,

Plaintiff,

V. Case No. 6:21-03089-CV-RK

JOSEPH R. BIDEN JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; et al.,

Defendants.

JUDGMENT IN A CIVIL ACTION

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___X___ **Decision by Court.** This action has been considered and a decision has been rendered by the Court that:

(1) Plaintiff's motion for temporary restraining order and preliminary injunction is DISMISSED.

(2) This case is DISMISSED.

IT IS SO ORDERED.

Dated: June 4, 2021 /s/ Paige Wymore-Wynn
Clerk of the Court

Entered: June 7, 2021 /s/ LaTandra Wheeler
Deputy Clerk

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

ASSISTANT SECRETARY FOR
FAIR HOUSING AND EQUAL OPPORTUNITY

February 11, 2021

MEMORANDUM FOR:
Office of Fair Housing & Equal Opportunity
Fair Housing Assistance Program Agencies
Fair Housing Initiatives Program Grantees

FROM: Jeanine M. Worden, Acting Assistant Secretary for Fair Housing & Equal Opportunity

SUBJECT: Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act

On January 20, 2021, President Biden issued Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. The Executive Order addresses the Supreme Court's recent decision in *Bostock v Clayton County*, which held that the prohibitions against sex discrimination in the workplace contained in Title VII of the Civil Rights Act of 1964 extend to and include discrimination on the basis of sexual orientation and gender identity. Relying on this landmark decision, the Executive Order directs every federal agency to assess all agency actions taken under federal statutes that prohibit sex discrimination and to fully enforce those statutes to combat

discrimination based on sexual orientation and gender identity. HUD's Office of General Counsel has concluded that the Fair Housing Act's sex discrimination provisions are comparable to those of Title VII and that they likewise prohibit discrimination because of sexual orientation and gender identity. Therefore, I am directing HUD's Office of Fair Housing and Equal Opportunity (FHEO) to take the actions outlined in this memo to administer and fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity.

At the core of this Department's housing mission is an endeavor to ensure that all people peacefully enjoy a place they call home, where they are safe and can thrive, free from discrimination and fear. Yet, this ideal remains unrealized for lesbian, gay, bisexual, transgender, and queer-identifying persons, who have been denied the constitutional promise of equal protection under the law throughout most of American history. Courts and governments have routinely withheld legal legitimacy from loving couples because of their sex and denied many persons the freedom to express a gender that defies norms. These injustices have perpetuated across our civic institutions: the workplace, the marketplace, places of education, and many others. But among the most personal and fundamental of these institutions is housing, where, when granted the protection of fair housing law, we all can enjoy the happiness and freedom to love whom we choose and to safely express who we are.

We know this discrimination is real and urgently requires enforcement action. HUD-funded housing

discrimination studies indicate that same-sex couples and transgender persons in communities across the country experience demonstrably less favorable treatment than their straight and cisgender counterparts when seeking rental housing.

Over the past 10 years, the Department has sought to address housing discrimination on the basis of sexual orientation and gender identity to the extent possible in a dynamic public policy and legal landscape. Beginning in 2012, HUD promulgated a series of rules to ensure that every person has equal access to HUD programs without being arbitrarily excluded, regardless of their sexual orientation, gender identity, or marital status. In its 2016 harassment rule, HUD reaffirmed its legal interpretation that the Fair Housing Act's protection from discrimination because of sex included discrimination because of gender identity. Also in 2016, FHEO instructed regional offices that discrimination because of real or perceived gender identity is sex discrimination under the Fair Housing Act, and that discrimination against persons because of sexual orientation may be sex-based discrimination when motivated by perceived nonconformity with gender stereotypes.

This limited enforcement of the Fair Housing Act's sex discrimination prohibition, while a step forward, is insufficient to satisfy the Act's purpose of providing fair housing throughout the United States to the full extent permitted by the United States Constitution. It is also inconsistent with the Supreme Court's interpretation of discrimination because of sex under *Bostock*, and it fails to fully enforce the provisions of the Fair Housing Act to combat

discrimination on the basis of sexual orientation and gender identity in accordance with Executive Order 13988. For these reasons, I have determined that the following actions are necessary.

Effective immediately, FHEO shall accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation, that meet other jurisdictional requirements. Where reasonable cause exists to believe that discrimination because of sexual orientation or gender identity has occurred, FHEO will refer a determination of cause for charge by HUD's Office of General Counsel. Moreover, if discrimination because of gender identity or sexual orientation occurs in conjunction with discrimination because of another protected characteristic, all such bases shall be included within the complaint, investigated, and charged where reasonable cause exists. Similarly, FHEO shall conduct all other activities involving the application, interpretation, and enforcement of the Fair Housing Act's prohibition on sex discrimination to include discrimination because of sexual orientation and gender identity.

This memorandum also affects state and local agencies that enter into agreements with the Department under the Fair Housing Assistance Program (FHAP), pursuant to which such agencies process discrimination complaints under laws that the Department certifies as "substantially equivalent" to the Fair Housing Act. In order for FHAP agencies' laws to remain substantially equivalent, they must be administered consistent with *Bostock*. To be consistent with *Bostock*, the state or local law either must explicitly prohibit

discrimination because of gender identity and sexual orientation or must include prohibitions on sex discrimination that are interpreted and applied to include discrimination because of gender identity and sexual orientation. HUD will provide further instruction and technical assistance to FHAP agencies on the implementation of *Bostock*.

Similarly, organizations and agencies that receive grants through HUD's Fair Housing Initiative Program (FHIP), in carrying out activities under these grant agreements, must interpret sex discrimination under the Fair Housing Act to include discrimination because of sexual orientation and gender identity. FHIP provides funds to public and private not-for-profit entities to conduct various activities to prevent or eliminate discriminatory housing practices. These activities provide important support to the full enforcement of the Fair Housing Act by informing the public about fair housing rights and obligations; detecting discriminatory conduct through investigation and testing; and assisting persons to file complaints and obtain relief through legal and administrative forums. HUD will provide further instruction and technical assistance to FHIP organizations on the implementation of this order.

In accordance with this directive to fully enforce the Fair Housing Act's prohibitions against discrimination because of sex, including sexual orientation and gender identity, FHEO Regional Offices, FHAP agencies and FHIP grantees are instructed to review, within 30 days, all records of allegations of discrimination (inquiries, complaints, phone logs, etc.) received since January 20, 2020. They are instructed to notify persons who alleged

discrimination because of gender identity or sexual orientation that their claims may be timely and jurisdictional for filing.

The Department is committed to delivering the full promise of the Fair Housing Act. Our FHEO offices across the country are open and ready to assist persons who believe they have experienced discrimination because of sexual orientation or gender identity. We will collaborate with our FHIP and FHAP partners, particularly over the next several months, to fully engage our fair housing enforcement, advocacy, and public education efforts across the housing market to prevent and combat discrimination because of sexual orientation and gender identity. I am deeply proud of the Department's commitment to fair housing and the enormous contribution our FHIP and FHAP partnerships bring to the nation's fair housing mission. Together, I know we will forge a path to the eradication of housing discrimination for all.

Federal Register / Vol. 86, No. 14 / Monday, January 25, 2021 / Presidential Documents 7023

Presidential Documents

Executive Order 13988 of January 20, 2021

Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq*.). In *Bostock* v. *Clayton County*, 590 U.S.__(2020),

the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

Sec. 2. *Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation.* (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney

General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency's own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.

(c) The head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy set forth in section 1 of this order. If an agency takes an action described in this subsection or subsection (b) of this section, it shall seek to ensure that it is accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.

(d) Within 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified

pursuant to subsections (b) and (c) of this section, as appropriate and consistent with applicable law.

Sec. 3. *Definition.* "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 4. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

/s/ J. R. Biden Jr.

THE WHITE HOUSE,
January 20, 2021.

HUD.GOV

Home / Program Offices / Office of the Chief Financial Officer (OCFO) / Grants Management & Oversight Division / Grants Information / Funding Opportunities / FY 2020 FHIP Education and Outreach Initiative (EOI) - Tester Training

FHIP Education and Outreach Initiative (EOI) - Tester Training

The Fair Housing Initiatives Program is a significant source of funding for FHIP grantees that conduct fair housing testing in local communities across the country. Fair housing testing refers to the use of testers who, without any bona fide intent to rent or purchase property, obtain a mortgage, seek housing assistance, or engage in other housing related activities, pose as prospective renters, or buyers of real estate, or other applicable roles for the purpose of determining whether housing providers and others are complying with the federal Fair Housing Act.

The Department continues to be vigilant about ensuring that testing performed by testers with FHIP funds adhere to HUD's investigatory standards so that the testing yields credible, objective and admissible evidence to aid in the enforcement of the federal Fair Housing Act. The Department acknowledges that great variation exists in the quality of fair housing testing performed by FHIP grantees. Some grantees have consistently demonstrated that testing produces strong evidence that can be used to forge effective legal challenges to

discriminatory housing practices. Still some grantees exhibit lesser capabilities and uneven or less accomplished track records. HUD recognizes the need to continually improve and standardize the quality of testing provided by testers employed by FHIP grantees.

Preference Points HUD encourages activities in Promise Zones, Opportunity Zones (OZ), or activities in collaboration with HBCUs. HUD may award two (2) points for qualified activities supporting either initiative. In no case will HUD award more than two preference points for these activities.

Funding of up to $250,000 is available through this NOFA. HUD expects to make approximately 1 awards from the funds available under this NOFA.

Funding Opportunity Number: FR-6400-N-71

Opportunity Title: Education and Outreach – Tester Training NOFO

Competition ID: FR-6400-N-71

CFDA No: 14.416

OMB Approval Number: 2529-0033

Opening Date: July 16, 2020

Application Due Date: August 17, 2020

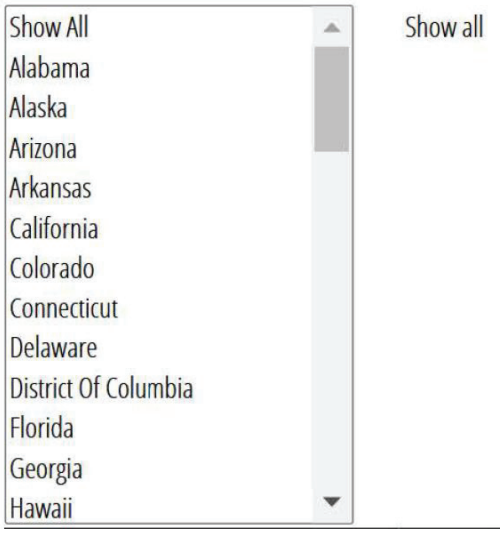
HUD.GOV

CONTACT FHIP ORGANIZATIONS

Contact information for grantees of the Fair Housing Initiatives Program (FHIP)

Organizations that participate in HUD's Fair Housing Initiatives Program (FHIP) may be able to speak to a housing provider on your behalf, conduct an investigation, including testing, to help determine if you experienced discrimination, or otherwise provide you with information and assistance.

Please select a state from the list or from the map below.



Name	Address	City	State	Zip Code	Phone	FHIP Initiative
Metropolitan St. Louis Equal Housing and Opportunity Council	1027 S. Vandeventer Avenue	St. Louis	MO	63110	(314) 534-5800 Ext. 7018	Education and Outreach Initiative (EOI); Private Enforcement Initiative (PEI)

NATIONAL FAIR HOUSING MONTH, 2021

10177

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Exactly 1 week after the assassination of Dr. Martin Luther King, Jr., struck at the soul of our Nation, President Lyndon B. Johnson signed a landmark piece of legislation -- an enduring testament to the ideals of Dr. King that enshrined a portion of his legacy in the lives and laws of the American people. Fifty-three years later, the Fair Housing Act still serves as a powerful statement about who we are as a people: the values of equality, equity, and dignity that we strive to uphold, and the places where we still have work to do to fulfill our full promise as a Nation.

The purpose of the Fair Housing Act was to put an end to inequities in our housing system and eliminate racial segregation in American neighborhoods -- and guarantee that all people in America have the right to obtain the housing of their choice, free from discrimination. The law prohibits discrimination in the sale, rental , and financing of housing, and requires Federal, State, and local governments to proactively dismantle the discriminatory structures that held back people of

color and other underserved populations from equitable access to the neighborhoods of their choice

By helping to create a fairer housing system, the law seeks to do more than just open up American neighborhoods to all Americans. Access to quality housing is about more than having a roof over your head -- it is the foundation for achieving better educational, employment, and health outcomes, as well as one of the most important ways that families build wealth that they can pass along across the generations. The Fair Housing Act was created at a time when Federal and State policies held that dream at arm's length from far too many Black, Brown, Native, and Asian American families through the insidious practices of redlining and lending discrimination.

Over the course of 53 years, the law has made a world of difference in the lives of countless families and communities. We have also improved upon it through the years; as a Senator, I was proud to co-sponsor the 1988 Fair Housing Act amendments that extended the law's protections to Americans with disabilities and families with children, and just 2 months ago my Administration issued a rule change to ensure that the law finally guards against discrimination targeting LGBTQ+ Americans. But the truth of the matter is that we have not fully achieved the goals of the Fair Housing Act -- we still have so much work to do.

Many of our neighborhoods remain as segregated today as they were in the middle of the 20th century, and the racial wealth gap is wider now than it was when the Fair Housing Act was passed. Though our

Nation has come a long way in many regards, our promise will not be fulfilled as long as anyone in America is denied a good home or a fair shot because of who they are. It is our shared duty to work together to ensure that every person has equitable access to all of the opportunities our communities provide -- and that no one faces barriers to getting a good education, having quality health care, eating healthy food, or finding stable employment that allows their family to thrive solely because of where they live. This is a moral responsibility that cannot wait, particularly at a time when the COVID-19 pandemic has further highlighted and exacerbated the lack of safe, affordable places to live for far too many people in America.

To affirm equal opportunity as the bedrock of our democracy -- and to enlist the entire Federal Government to address entrenched disparities in our laws, public policies, and institutions -- I signed an Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government on my first day in office. To ensure that the Federal Government continues to prioritize the right to fair housing and actively enforce our Federal civil rights laws, I also signed a Presidential Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies during my first week as President. My Administration will continue our efforts to close persistent racial gaps in wages, housing, credit, lending opportunities, and access to higher education -- gaps that, if closed, would add an estimated $5 trillion in gross domestic product in the American economy over the next 5

years. We are committed to doing all we can to end unlawful housing discrimination and advance equity for all underserved populations, fulfill the full promise of the Fair Housing Act, and put the American dream within reach of all Americans.

NOW, THEREFORE, I, JOESPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim April 2021 as National Fair Housing Month. I call upon the people of this Nation to help secure freedom and justice for every American by taking action to fulfill the promise made by the Fair Housing Act to ensure everyone has free and fair housing choice.

IN WITNESS WHEREOF, I have hereunto set my hand this eleventh day of April, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.

[FR Doc. 2021-07861 Filed: 4/14/2021 8:45 am; Publication Date: 4/15/2021]