No. 22-816

# 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., PRESIDENT OF THE UNITED STATES, ET AL.

*Respondents.*

*On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit*

## BRIEF OF *AMICI CURIAE* MOUNTAIN STATES LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER


Kimberly S. Hermann
Braden H. Boucek
Celia Howard O'Leary
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, Georgia 30075
Tele: (770) 977-2131
khermann@southeasternlegal.org
bboucek@southeasternlegal.org
coleary@southeasternlegal.org

Erin M. Erhardt
*Counsel of Record*
William E. Trachman
Kaitlyn D. Schiraldi
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Tele: (303) 292-2021
Fax: (877) 349-7074
eerhardt@mslegal.org
wtrachman@mslegal.org
kschiraldi@mslegal.org


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*Attorneys for Amici Curiae*

## QUESTIONS PRESENTED

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.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**STATUTES**

**REGULATIONS**

**OTHER AUTHORITIES**

## IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues that are vital to the defense and preservation of individual liberties: the right to speak freely, the right to own and use property, and the need for limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.) (*amici curiae* in support of petitioners); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (*amici curiae* in support of petitioner).

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to protect our First Amendment rights. This aspect of its advocacy is reflected in regular

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[1] Pursuant to Rule 37.2, counsel timely notified the parties of its intent to file. Pursuant to Rule 37.6, no party or parties counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission and no other person other than the *amici curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

representation of those challenging overreaching governmental actions in violation of their freedom of speech and religion. *See, e.g.*, *303 Creative*, 142 S. Ct. 1106 (*amici curiae* in support of petitioners); *Kennedy*, 142 S. Ct. 2407 (*amici curiae* in support of petitioner); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (*amici curiae* in support of petitioners).

MSLF and SLF have an abiding interest in the protection of the freedoms set forth in the First Amendment. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions. *Amici* are profoundly committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment.

To secure these interests, MSLF and SLF file this *amici curiae* brief urging this Court to grant the petition for writ of certiorari.

## SUMMARY OF THE ARGUMENT

This Court's precedents establish that there are two sexes, and that the differences between the two sexes are based on biology. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring: '*[T]he two sexes* are not fungible[.]'") (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (emphasis added); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an *immutable* characteristic determined solely by the accident of birth[.]") (emphasis added); *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) ("[T]he mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("[O]nly women can become pregnant[.]"); *accord Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2346 (2022) (dissenting opinion of JJ. Breyer, Sotomayor, and Kagan) ("[A] majority of today's Court has wrenched this choice from *women* and given it to the States.") (emphasis added).

These foundational premises are important because the Fair Housing Act ("FHA") forbids engaging in certain forms of "sex" discrimination. *See* 42 U.S.C. § 3601 *et seq*. It is silent, however, with respect to the word "gender," much less "gender identity." Even *Bostock*, upon which the Department

of Housing and Urban Development's ("HUD") Memorandum heavily relies, speaks only to the limited propositions that, in the employment context, discrimination on the basis of homosexuality constitutes sex discrimination and that a man who now identifies as a woman may generally not be treated worse than a woman who still identifies as a woman, and vice versa. *Bostock v. Clayton Cty.,* 140 S. Ct. 1731, 1746 (2020) ("By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today."); *id.* at 1739 ("The only statutorily protected characteristic at issue in today's cases is 'sex'—and that is also the primary term in Title VII whose meaning the parties dispute.").

Nevertheless, HUD's Memorandum mandates that schools acknowledge any number of fluid, newly-minted gender identities and sexual orientations in order to comply with a basic non-discrimination mandate regarding "sex." *See* U.S. DEP'T OF HOUSING AND URBAN DEV., IMPLEMENTATION OF EXECUTIVE ORDER 13988 ON THE ENFORCEMENT OF THE FAIR HOUSING ACT 2 (Feb. 11, 2021)[2] ("HUD Memorandum") ("Effective immediately, [HUD's Office of Fair Housing and Equal Opportunity] 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."). This is a gross error of law, and Petitioners are directly injured by HUD's

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[2] https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf

assertion of what it means to discriminate based on sex.

This Court should grant certiorari for four reasons. First, the original meaning of "sex" under the FHA was never meant to encompass anything other than two binary sexes; thus, the HUD Memorandum is far outside the scope of HUD's regulatory or administrative authority. Second, HUD badly misread *Bostock*. Third, HUD's Memorandum chills speech, which violates the First Amendment. And fourth, the HUD Memorandum violates the Major Questions Doctrine because it radically alters the meaning of a statutory term, thereby affecting innumerable stakeholders in the wake of failed federal legislation.

## ARGUMENT

### I. The Original Meaning of "Sex" Under the Fair Housing Act Has Never Encompassed Gender Identity or Sexual Orientation.

The key directive of the FHA is simple: "[I]t shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). HUD officials have stated that "[t]he original Fair Housing Act was enacted in 1968 in response to widespread housing discrimination against people of color." Dana Rudolph, *HUD clarifies LGBT housing*

*discrimination protections*, KEEN NEWS SERVICE (July 7, 2010).[3]

On August 22, 1974, Congress amended the FHA to include the word "sex."[4] *See* S. 3066, 93rd Cong. (1974) ("Prohibits discrimination based upon . . . sex under programs funded by this title."). In 1974, the dictionary defined "sex" as "either of two divisions of organisms distinguished respectively as male and female[.]" THE MERRIAM-WEBSTER DICTIONARY 663 (1974). The same dictionary defined a "woman" as "an adult female person[.]" *Id.* at 805. In short, for Congress, in 1968 and 1974, subjective notions of gender identity were not remotely part of the meaning of the words that they used.

Then-President Ford knew what "sex" meant when he signed into law the bill that amended the FHA, stating, "[b]y prohibiting discrimination on the basis of sex in making mortgage loans, this measure will also enable millions of *hardworking women* and married couples to obtain the mortgage credit to which their economic position clearly entitles them." Gerald R. Ford, Statement on the Housing and Community Development Act of 1974 (Aug. 22, 1974)[5] (emphasis added).

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[3] https://keennewsservice.com/2010/07/07/hud-clarifies-lgbt-housing-discrimination-protections/

[4] *August 22, 1974*, NATIONAL FAIR HOUSING ALLIANCE, https://fhact50.org/cool_timeline/august-22-1974-fair-housing-act-amended-to-include-sex/ (last visited Mar. 27, 2023).

[5] https://www.presidency.ucsb.edu/documents/statement-the-housing-and-community-development-act-1974

In 1974, "the word *transgender* was hardly in use. The [first version of the Equality Act], which only covered sexual orientation, didn't get a hearing for six years and faced opposition once it did, including allegations that being gay was an 'abomination.'" Katy Steinmetz, *Why Federal Laws Don't Explicitly Ban Discrimination Against LGBT Americans*, TIME MAGAZINE (Mar. 21, 2019)[6]; *see also* Equality Act of 1974, H.R. 14752, 93rd Cong. (introduced in House, May 14, 1974) ("Prohibits discrimination on account of sex, marital status, or sexual orientation in federally assisted programs, and in housing sales, rentals, financing, and brokerage services."); Equality Act of 1974, H.R. 15692, 93rd Cong. (introduced in House, June 27, 1974) (same).

One of the original purposes of adding sex to the FHA was "aimed at landlords who create an untenable living environment by demanding sexual favors from tenants[,]" referring to "[w]omen, particularly those who are poor" as the victims.[7] Additionally, the sponsor of the FHA's amendment stated, "'[t]he assumption that men could perform these [home ownership] tasks while women could not is just the sort of discrimination based on sex that we are talking about.'" ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11C:1 (2022) (citing *Hearings on S. 1604 Before the Subcommittee on Housing and Urban Affairs of the Senate Banking, Housing, and Urban Affairs Committee*, 93rd Cong.

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[6] https://time.com/5554531/equality-act-lgbt-rights-trump/.

[7] *The Fair Housing Act*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/crt/fair-housing-act-1 (last visited March 27, 2023).

1228 (1973) (statement of Senator William E. Brock, principal sponsor)). "For example, refusals to rent to 'single women' or 'working mothers' would be unlawful if the defendant is willing to rent to single men or working fathers." *Id.*

Thus, in 1974, when Congress amended the FHA to include "sex," it could not have meant sexual orientation and gender identity.

Indeed, "[t]he FHA *does not specify that sexual orientation and gender identity are protected characteristics*, and there is an insufficient patchwork of state statutory and administrative protections." Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After Bostock v. Clayton County*, 69 U. KAN. L. REV. 409, 410 (2021) (emphasis added). For instance, "[s]ome cities and states chose to explicitly protect against discrimination on the basis of sexual orientation as early as the 1970s. Federally, however, protection has been scarce." Nick Adjami, *HUD Announces New Approach to Sexual Orientation and Gender Identity Discrimination Under the Fair Housing Act*, EQUAL RIGHTS CENTER (Mar. 9, 2021).[8]

"[T]he first courts to hear FHA claims of sexual orientation and gender identity discrimination dismissed them out of hand, often with little analysis." Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After Bostock v. Clayton County*, 69 U. KAN. L. REV. at 425 (citing *Swinton v. Fazekas*, No. 06-cv-6139T, 2008

[8] https://equalrightscenter.org/hud-lgbtq-fair-housing/

WL 723914, at *5 (W.D.N.Y. Mar. 14, 2008) ("Discrimination based on sexual orientation is not covered under the Federal Housing Act[.]"); *Miller v. 270 Empire Realty LLC*, No. 09-cv-2857, 2012 WL 1933798, at *5 (E.D.N.Y. Apr. 6, 2012) ("[Plaintiff's] FHA claims are not, nor could they be, based on [plaintiff's] sexual orientation.")). This lack of analysis was most likely due to a commonsense interpretation of the meaning of the term "sex," and a basic understanding of how Congress holds the power of changing laws.[9]

In 2010, under the Obama administration, HUD issued a Memorandum recognizing that "the federal Fair Housing Act (the Act) *does not specifically address discrimination on the bases of sexual orientation, gender identity, or gender expression*." Memorandum from John Trasvina, Assistant Secretary for Fair Housing and Equal Opportunity, Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression 1 (June 15, 2010)[10] (emphasis added). Notably, the 2010 Memorandum only required a "thorough review" of an allegation based on sexual orientation or gender identity, and an assessment to determine if the discrimination fell into "one or more of the protected

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[9] To be sure, some district courts have begun expanding the application of the FHA to gender identity. *See, e.g.*, *Kummerow v. Ohawcha.org*, No. 21-cv-635-wmc, 2022 WL 873599, at *4 (W.D. Wis. Mar. 24, 2022) (presuming that gender identity discrimination is covered by the FHA under HUD's guidance and after *Bostock*). This is an additional reason for the Court to grant a writ of *certiorari* here to clarify the scope of its prior decision.

[10] https://www.fhcci.org/wp-content/uploads/2011/12/HUD-Memo-on-LGBT-discrimination-6-15-2010.pdf

classes" such as disability or sex. *Id.* The 2010 Memorandum further explained that a gay man, evicted for having HIV/AIDS, could raise a *disability* claim, just as a woman lacking feminine characteristics who was discriminated against could raise a claim of *sex* discrimination based on sex-stereotyping. *Id.* Both disability and sex are protections explicitly named by Congress under the FHA. HUD understood its congressional bounds.

In 2015, a federal district court in Alabama walked through the FHA's language and guidance documents, concluding that "[t]hese types of expanded protections for such individuals under the FHA [are] directly rooted in non-conformity with male or female gender stereotypes, and *not directly derivative of sexual orientation as an independent ground for protection*." *Thomas v. Osegueda*, No. 2:15-cv-0042-wma, 2015 WL 3751994, at *3 (N.D. Ala. June 16, 2015) (emphasis added). The district court evaluated whether "HUD's interpretation of its authority square[d] with the statutory language of the FHA[,]" noting that it was not "the product of formal rulemaking[.]" *Id.* The court acknowledged that sex was undefined but stressed that "HUD's expanded definition of 'sex' under § 3604(b) does not broadly include all types of discrimination based on sexual orientation, but rather discretely includes discrimination for *gender nonconformity*." *Id.* (emphasis added). The claimant was unsuccessful because he did "not petition under a theory of gender non-conformity but rather relie[d] on sexual orientation as the sole basis for discrimination separate and independent from gender." *Id.* at *4.

Understanding "sex" to encompass sexual orientation and gender identity cannot be said to have been the status quo. Otherwise, President Biden would not have issued an Executive Order requiring this new protection under the FHA. Exec. Order No. 13,988, 86 Fed. Reg. 7,023, 7,023 (Jan. 20, 2021).

But unilaterally asserting, without so much as an opportunity for public comment, a new interpretation of "sex" is disastrous, since "[t]he FHA applies to 'dwelling[s]' throughout the nation—even if the owner receives no federal funds. . . . Courts and the Department of Justice have thus applied these laws to private college student housing." Br. for Pet'r, at 7, *Sch. of the Ozarks v. Biden* (No. 22-816). Additionally, "the government has long taken the view that the FHA covers private college dormitories." *Id.* at 30*; see also* School of the Ozarks Complaint at 13 ¶¶ 74–75, *Sch. of the Ozarks, Inc. v. Biden*, No. 6:21-03089-cv-rk, 2021 WL 2301938 (W.D. Mo. June 4, 2021) ("About 1,500 students are enrolled in the College. Of those, the College houses about 1,300 students.").

The idea of nonbiological gender identity—which encompasses not just females and males, but also students who identify as neither or both—is *not* found in the text of the FHA, and HUD cannot summon it out of thin air.

## II. The HUD Memorandum Badly Misreads *Bostock*.

HUD's rationale for its Memorandum relies primarily on the Supreme Court's decision in *Bostock*. However, HUD's reading of *Bostock* is far too broad. *See Neese v. Becerra*, No. 2:21-cv-163-z, 2022 WL 16902425, at *1 (N.D. Tex. Nov. 11, 2022) ("In his *Bostock* dissent, Justice Alito foresaw how litigants would *stretch* the majority opinion like an elastic blanket to cover categories, cases, and controversies expressly not decided.").

Notedly, *Bostock*'s holding relied on the assumption that sex was binary and biologically determined. It was not based on a broad conception of "gender identity" or "sexual orientation." *Bostock*'s key passage is the following:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

140 S. Ct. at 1741–42; *see also* U.S. Dep't of Educ., Office for Civil Rights, Annual Report to the

Secretary, the President, and the Congress, at 27 (2021)[11] ("The Court's holding stated that it was assuming that sex referred to an employee's biological sex, but in fact the Court's holding in *Bostock* relies on that assumption, by noting that the employee who identifies as female is biologically male[.]"); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2023 WL 111875, at *7 (S.D. W.Va. Jan. 5, 2023) ("It is beyond dispute that, barring rare genetic mutations not at issue here, a person either has male sex chromosomes or female sex chromosomes."); *id.* at *9 ("[T]ransgender girls are biologically male. Short of any medical intervention that will differ for each individual person, biological males are not similarly situated to biological females for purposes of athletics.").

It is unclear if even HUD understands the full scope of its Memorandum. Are schools prohibited from considering whether students possess male genitalia when placing such students in female dormitories, particularly if the student identifies as female but otherwise presents as male in physiology, with no intent to undergo hormone therapy or surgery? Must sororities and fraternities—generally single-sex organizations—admit individuals who assert that their gender identity is consistent with the sex of the other members of the organization? Must schools ensure that Greek Life is available for all non-binary students, with each gender identity being afforded at least one house?

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[11] https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf

The HUD Memorandum seems to embrace a host of earth-shattering changes by casually declaring that the FHA covers gender identity discrimination now—because this Court allegedly made it so—without ever defining the term "gender identity" or acknowledging the proliferation of genders, identities, and pronouns associated with that mandate.

Just at the postsecondary level, wrapping gender identity into "sex" under the FHA would force colleges to create new separate and equal facilities, such as dormitories, each for men, women, intersex individuals, pansexual individuals, bi-gender individuals, and members of each of the many other currently published gender identities.[12]

Students who identify as "gender fluid" could insist on being moved back and forth between multiple housing units, and potentially sue if any given unit is allocated less in terms of resources. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 621 (4th Cir. 2020) (Wynn, J., concurring) ("[T]ransgender individuals often *defy binary categorization* on the basis of physical characteristics alone.") (emphasis added).

Every school in the United States would be torn between trying to fully dismantle sex-based separation in their housing facilities—including bathrooms, shower facilities, and in-room

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[12] Shaziya Allarakha, M.D., *What Are the 72 Other Genders?*, MEDICINENET (Feb. 2, 2022), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm.

assignments based on gender—or having numerous equal facilities as new genders emerge.

It need not be so. The Department of Education's experience with Title IX after this Court's holding in *Bostock* is particularly instructive in this context. After this Court's decision regarding Title VII was issued in June 2020, the Department of Education announced important distinctions that limited *Bostock*'s application to Title IX. Specifically, the Department's Office for Civil Rights ("OCR") queried its Office of the General Counsel ("OGC"), asking for answers regarding the impact of this Court's analysis. The Office of the General Counsel responded with a memorandum dated January 8, 2021. *See* U.S. DEP'T OF EDUC., OFFICE OF THE GENERAL COUNSEL, MEMORANDUM FOR KIMBERLY M. RICHEY, ACTING ASSISTANT SECRETARY OF THE OFFICE FOR CIVIL RIGHTS RE: *BOSTOCK V. CLAYTON CTY.*, 140 S. CT. 1731 (2020) (2021).[13]

The OGC Memorandum noted that Title IX, unlike Title VII, often *requires* consideration of a student's biological sex—for instance, with respect to comparable facilities for men and women.

**Question 3: How should OCR view allegations that a recipient targets**

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[13] https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf. The OGC Memorandum was later withdrawn but remains available online in OCR's Correspondence portal. Its analysis is persuasive on the issue of Title IX after *Bostock*.

> **individuals for discriminatory treatment on the basis of a person's transgender status or homosexuality?**
>
> **Answer:** Although *Bostock* expressly does not decide issues arising under Title IX or other differently drafted laws, the logic of *Bostock* may, in some cases, be useful in guiding OCR's understanding as to whether the alleged discrimination on the basis of a person's transgender status or homosexuality necessarily takes into account the person's biological sex and, thus, constitutes discrimination on the basis of sex. . . .
>
> However, we emphasize that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person's biological sex, male or female. 20 U.S.C. §§ 1681(a), 1686; 34 CFR §§ 106.32(b), 106.33 [(*comparable facilities for students of each sex)*], 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61. Consequently, we believe a recipient generally would not violate Title IX by, for example, . . . refusing to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality.

*Id.* at 4 (second emphasis added).

But the HUD Memorandum rejects such an approach by insisting that the FHA covers discrimination against literally all gender identities. *Bostock*, of course, was limited strictly to males who identify as female, and vice versa. Similarly, it referred merely to homosexuality, and not to any other sexual orientation. *Contra* U.S. DEP'T OF HOUSING AND URBAN DEV., HOUSING DISCRIMINATION AND PERSONS IDENTIFYING AS LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND/OR QUEER/QUESTIONING (LGBTQ) (2022)[14] ("Examples of housing discrimination because of sex, which includes actual or perceived gender identity and sexual orientation: . . . A tenant is evicted after the housing provider discovers the tenant has dated persons of the same sex and *identifies as bisexual*.") (emphasis added).

Unlike HUD's Memorandum, *Bostock* does not address employees who are bisexual, or queer or questioning, much less employees who assert other sexual orientations that are unrelated to their specific sex, such as polyamorous individuals, asexual individuals, or individuals who have other non-traditional sexual orientations. *See W. 49th Street, LLC v. O'Neill*, 178 N.Y.S.3d 874, 882, n.11, n.12, 883, 883 n.13, n.14 (N.Y. Civ. Ct. 2022) (expanding *Obergefell*'s rationale to cover polygamy)[15]; *see also*

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[14] https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq

[15] Presumably, polygamous families are also able to allege sexual orientation discrimination under HUD's guidance, such that the School of the Ozarks would be forced to treat them similarly to

Berit Brogaard, *"I am in Love with Trains"*, PSYCHOLOGY TODAY (Sept. 1, 2020)[16] ("Objectophilia, or Object-Sexuality, is a sexual orientation involving an enduring emotional, romantic or sexual attraction toward specific objects. . . . [A] self-identified objectophile[] describes it as 'an orientation just as hetero- and homo-sexuality are orientations of one's innate sexuality.'"); *What are the different types of sexualities?*, MEDICAL NEWS TODAY[17] (last visited Mar. 27, 2023) (listing over 25 sexual orientations, including Demiromantic, Skoliosexual, and Spectrasexual). The idea that *Bostock* impliedly blessed broad mandates covering innumerable sexual orientations, like the one that HUD has apparently imposed on all student housing, is hard to take seriously.[18]

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two-person families. *See* Adriana Diaz, *We're a polyamorous family—and we don't know which 'dad' fathered our kids*, NEW YORK POST (May 9, 2022), https://nypost.com/2022/05/09/were-a-polyamorous-family-and-we-dont-know-which-dad-fathered-our-kids/ ("The families moved into a home early in 2020 and have happily lived as a quad family since.").

[16] https://www.psychologytoday.com/us/blog/the-mysteries-love/202009/i-am-in-love-trains

[17] https://www.medicalnewstoday.com/articles/types-of-sexuality

[18] Shockingly, HUD's Memorandum does not even purport to carve out sexual orientation disorders such as zoophilia or pedophilia. *See* Kyle Munkittrick, *The Future: Where Sexual Orientations Get Kind of Confusing*, DISCOVER MAGAZINE (Dec. 19, 2011), https://www.discovermagazine.com/planet-earth/the-future-where-sexual-orientations-get-kind-of-confusing ("[P]edophilia and zoophilia *are* sexual orientations, but they can never be acted upon without harming someone. Therefore, we should re-categorize these sexual orientations that should never be acted upon as 'sexual orientation disorders,' and they should be treated as such.").

Including all gender identities and all sexual orientations under FHA's umbrella is not merely atextual; it contradicts the initial purpose behind the FHA. HUD's Memorandum would keep schools guessing and force them to go through acrobatics to comply with federal civil rights laws. That hinders FHA's very purpose and turns its provisions and regulations into mush. *See supra* section I; *cf. Neese*, 2022 WL 16902425, at *8 ("If 'on the basis of sex' included 'sexual orientation' and 'gender identity,' as Defendants envision, Title IX and its regulations would be nonsensical."); *B.P.J.,* 2023 WL 111875, at *9 ("As other courts that have considered Title IX have recognized, although the regulation applies equally to boys as well as girls, it would require blinders to ignore that the motivation for the promulgation of the regulation was to increase opportunities for women and girls in athletics.") (internal quotation and citation omitted).

Put simply, the text and purpose of the FHA do not counsel in favor of an overexpansive adoption of *Bostock*, and HUD's interpretation hinders the FHA's statutory purpose.

## III. In Addition to Exceeding the Scope of the Fair Housing Act, HUD's Memorandum Violates the Constitution.

HUD's Memorandum chills the College's speech in violation of the First Amendment, and the College has standing purely due to its self-censoring. Moreover, re-defining—not "interpreting"—sex to encompass sexual orientation and gender identity

runs afoul of the Major Questions Doctrine, which sounds in the separation of powers.

### A. HUD's Memorandum chills speech, and self-censorship constitutes an injury in fact.

HUD's Memorandum unconstitutionally chills speech. The College has two choices regarding speech: "(1) obey the government and abandon the College's religious policies and speech; [or] (2) refuse the government and risk crippling investigations and penalties[.]" Br. for Pet'r, at 31.

HUD's Memorandum and FHA forbid the College from making, printing, or publishing "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling" that discriminates based on sexual orientation and gender identity. 42 U.S.C. § 3604(c); HUD MEMORANDUM at 1–3. Those prohibitions apply to "applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling." 24 C.F.R. § 100.75(b).[19]

This is unacceptable because "the College maintains single-sex residence halls and does not allow members of one sex to visit the 'living areas' of

[19] The logical flipside of the coin is that HUD's Memorandum also compels speech. Instead of leaving its housing policies and student handbooks blank, schools will be forced to embrace HUD's newfound definition of "sex." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citation omitted).

members of the opposite sex. The College therefore prohibits biological males who 'identify' as females from living in female dormitories, and vice-versa." *Sch. of the Ozarks*, 41 F.4th at 996. The College also "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." *Id.*

Because "[t]he government [] 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[,]" Br. for Pet'r, at 5, the College's speech is chilled.

Fear of prosecution that results in self-censorship can qualify as an injury. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized without an actual prosecution."); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 474 (7th Cir. 2012) ("The chilling of protected speech may thus alone qualify as a cognizable Article III injury, provided the plaintiffs 'have alleged an actual and well-founded fear that the law will be enforced against them.'") (quoting *Am. Booksellers Ass'n*, 484 U.S. at 393).

The College fears punishment for claiming that sex is binary. It has unsurprisingly brought this lawsuit because its only other choice is to self-censor its institutional speech. If HUD's Memorandum is valid, Petitioner reasonably believes that it will suffer

"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." Br. for Pet'r, at 6. On top of civil penalties, "[c]riminal 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." *Id.* at 31 (citing 42 U.S.C. § 3631). The College has alleged an injury-in-fact to satisfy standing requirements.

Even if this Court disagrees with the College's fear of prosecution, the College has standing to bring a First Amendment claim. This Court recognizes that "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

This Court held that a company had standing even though it did "not claim that its own First Amendment rights have been or will be infringed by the challenged statute." *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984). This Court provided rationale for its analysis:

> Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First

> Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.

*Id.* at 956. Unlike the plaintiff in *Munson* whose First Amendment rights were *not* infringed, the College's rights are *directly* infringed. If plaintiffs in *Munson* met standing requirements, the College must, too.

This Court should thus hold that HUD's Memorandum unconstitutionally chills speech, and that such a constitutional violation satisfies the injury-in-fact requirement for standing.

### B. The Department's interpretation violates the Major Questions Doctrine.

HUD's Memorandum also runs afoul of the Major Questions Doctrine. If Congress wanted the Department to interpret the word "sex" to include all forms of gender identity and sexual orientation, it would have said as much. The Major Questions Doctrine establishes that "administrative agencies must be able to point to clear congressional authorization when they claim the power to make

decisions of vast economic and political significance." *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (internal citation and quotations omitted); *see also id.* at 2628 (Kagan, J., dissenting) (the Court rejected Justice Kagan's alternative view that "[a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems").

A judicial rule that Congress must speak clearly on "major questions" ensures a strict separation of powers between the Executive and Legislative branches. *Id.* at 2617 (Gorsuch, J., concurring); *id.* ("The major questions doctrine works in much the same way to protect the Constitution's separation of powers."). Most recently, in *West Virginia v. EPA*, this Court emphasized that "[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line." *Id.* at 2609 (majority opinion) (internal quotation and citation omitted). The same principles utilized in *West Virginia v. EPA* serve to invalidate HUD's Memorandum.

Our democracy depends on vesting power with the people, in the form of elected representatives, rather than with bureaucracies. *See id.* at 2617 (Gorsuch, J., concurring) ("It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely

unaccountable 'ministers.'") (internal citation omitted).

In his concurrence in *West Virginia v. EPA*, Justice Gorsuch elucidated several ways that the Supreme Court has historically flagged Major Questions Doctrine issues. Importantly, "this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance,' . . . or end an 'earnest and profound debate across the country[.]'" *Id.* at 2620 (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022); *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)). Also, if the content of bills rejected by Congress are now the content of the agency's regulation, that can be a telling sign. *West Virginia*, 142 S. Ct. at 2620–21.

Congress authorized HUD to carry out provisions of the FHA. But HUD is not authorized to create sweeping new interpretations, particularly when such interpretations have vast economic and political impact.[20] If Congress intended for sex to be non-binary, it wouldn't have "hid[den] elephants in

[20] For instance, one higher education consulting group notes that "[r]enovating an existing residence hall typically runs about $25k–$35k per bed, while new construction runs about $55k–$75k per bed, oftentimes even more." *Student Housing Renovation vs Reconstruction*, CREDO BLOG, (Jan. 18, 2017), https://www.credohighered.com/blog/2010/9/22/new-residence-hall-or-renovation-which-is-the-best-value3f. Thus, renovation or reconstruction for School of the Ozarks' 1,300 residential students could cost at least $32,500,000 and possibly closer to $975,000,000.

mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Contrary to the "history and the breadth of the authority that [the agency] has asserted," the idea of nonbiological, non-binary gender identity is not found in the text of the FHA, nor does it align with the meaning of "sex" in 1974 when the statute was amended. *West Virginia*, 142 S. Ct. at 2608 (internal quotation and citation omitted). *See supra* section I.

Furthermore, HUD's interpretation would end an earnest and profound policy debate across the country about the meaning of "sex" discrimination. *Bostock* merely addressed whether a biological man who identifies as a woman can be fired for such identification consistent with Title VII, or if a man or woman can be fired for being attracted to an individual of the same sex. It is too much, however, to suggest that *Bostock* held that sex discrimination includes all forms of gender identity and sexual orientation discrimination, when the Court has expressly disclaimed any such holding. *See Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at *1 (E.D. Tenn. July 15, 2022) ("The Court was careful to narrow the scope of its holding [in *Bostock*].").

HUD's Memorandum also follows in the wake of failed legislation. As recently as 2022, Congress unsuccessfully attempted to pass the Equality Act, which would have "prohibit[ed] discrimination based on sex, sexual orientation, and gender identity in areas including . . . housing[.]" H.R. 5, 117th Cong. (as

passed by the House, Feb. 25, 2021). Numerous other bills failed as well.[21] "[T]his Court has found it telling when Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action. . . . That [] may be a sign that an agency is attempting to work [a]round the legislative process to resolve for itself a question of great political significance." *West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring) (internal quotations and citations omitted). Thus, HUD's Memorandum violates the Major Questions Doctrine.

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Broad notions of sexual orientation and gender identity are distinct from, and not encompassed within, "sex," as that term is used in FHA. This Court should thus grant certiorari because HUD's Memorandum grossly misinterprets FHA's language and this Court's opinion in *Bostock*, violates the First Amendment, and contravenes the Major Questions Doctrine.



## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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[21] *See*, *e.g.,* H.R. 4286, 117th Cong. (introduced in House, June 30, 2021; S. 787, 116th Cong. (introduced in Senate, Mar. 13, 2019); S. 3503, 115th Cong. (introduced in Senate, Sept. 26, 2018); H.R. 1447, 115th Cong. (introduced in House, Mar. 9, 2017); S. 1328, 115th Cong. (introduced in Senate, June 8, 2017).

Respectfully submitted,

Kimberly S. Hermann
Braden H. Boucek
Celia Howard O'Leary
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, Georgia 30075
Tele: (770) 977-2131
khermann@southeasternlegal.org
bboucek@southeasternlegal.org
coleary@southeasternlegal.org

Erin M. Erhardt
*Counsel of Record*
William E. Trachman
Kaitlyn D. Schiraldi
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Tele: (303) 292-2021
Fax: (877) 349-7074
eerhardt@mslegal.org
wtrachman@mslegal.org
kschiraldi@mslegal.org

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*Attorneys for Amici Curiae*