No. 21-2270

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE SCHOOL OF THE OZARKS, INC., d/b/a 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; JEANINE M. WORDEN, in her official capacity as Acting Assistant Secretary for Fair Housing & Equal Opportunity of the U.S. Department of Housing and Urban Development,

Defendants-Appellees.

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

REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

The Directive jeopardizes the College's speech, its biologically separate dorms, and the students who live there. Hailed by President Biden as a "rule change," the Directive is the culmination of agency deliberation and an emphatic mandate of "full" nationwide *enforcement* —all without public notice and comment, or any consideration of religious exemptions, statutory authority, or free speech. The APA, the FHA, and HUD's rules require much more.

ARGUMENT

I. Past HUD guidance was contradictory and non-binding.

The Directive creates a definitive sexual-orientation and gender-identity standard and demands full enforcement of that standard by federal and state agencies. It is thus a binding rule announcing a new legal standard.

The government asserts that the Directive does not create a new standard because it "merely reaffirms prior HUD policy." Opp. 1, 6–7, 11, 13. But that's the opposite of what HUD said just last year, when it issued guidance saying that "to consider biological sex in placement and accommodation decisions in single-sex facilities" is "permitted by the Fair Housing Act." Mot. 2 (quoting 85 Fed. Reg. 44,811, 44,812).

The Directive itself characterizes past guidance as leaving "uncertainty," being "insufficient," "limited," and "inconsistent, and

"fail[ing] to fully enforce" HUD's new view of the FHA. ECF 1-12 at 2–4; Add10–11. The Directive is right about HUD's contradictory history:

- A 2009 HUD press release proposed requiring grantees to comply with state and local laws. Opp. 6.
- Then, a 2010 HUD press release described internal "guidance" "treat[ing]" sex-stereotyping claims as gender discrimination. *Id.*
- But a 2012 rulemaking preamble admitted "[s]exual orientation and gender identity are not identified as protected classes in the Fair Housing Act," and said the FHA only prohibits "discrimination against LGBT persons in certain circumstances."[1]
- A 2016 preamble to a non-FHA rule said that the FHA addresses gender identity,[2] and 2016 "guidance" sent to some, but not all, of HUD's internal enforcement components said the FHA addresses gender identity and discussed complaint processing. Opp. 7–8; ECF No. 19-1.
- Then a 2020 rule preamble said the opposite, explaining the FHA does *not* prohibit single-sex housing by biological sex. 85 Fed. Reg. at 44,812.

In contrast, the Directive creates a definitive sexual-orientation and gender-identity FHA standard, repeatedly demands full enforcement,

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[1] *Id.* (discussing 77 Fed. Reg. 5662, *see id.* at 5,666).

[2] *Id.* (discussing 81 Fed. Reg. 63,054, *see id.* at 64,770; discussing 81 Fed. Reg. 63,054, *see id.* at 63,058-59).

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applies to the entire HUD enforcement apparatus—including outside enforcement state agencies—and operates retroactively. No wonder President Biden characterized it as a significant rule change.

The government *post hoc* rationalization cannot be used to avoid judicial review of this agency action. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909–10 (2020).

II. The College has standing to challenge the Directive.

A. The Directive threatens imminent injury that an injunction would redress.

The College faces far more than a credible threat of enforcement under the Directive. Mot. 5–11.

The government's arguments to the contrary are not plausible on the Directive's face. Opp. 2, 11–13, 15–16. Eight times the Directive demands "full" *enforcement* and implementation of its new FHA standard. Add10–12. Zero times does it leave room for covered entities not to comply. The government concedes that courts apply the FHA to college housing, Mot. 2, and that the FHA reaches both conduct and speech, Opp. 3. The FHA provides for sky-high fines and damages, complaints, investigations, and lawsuits. Opp. 3; Mot. 3. Criminal penalties are available if an incident involves the threat of force, as may occur if security personnel are involved. Mot. 3.

Moreover, below the government described how the College must comply with the Directive's sexual orientation and gender identity

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mandate in its housing and visitation policies and speech. Mot. 6–7. The government even offered various "examples of discrimination claims" to show how, under the Directive's view, policies like the College's are allegedly unlawful. Opp. 14; Add15–17.

In short, the Directive demands full nationwide enforcement with no exceptions. The government cannot tenably contend the Directive does not present a credible threat of enforcement to an entity the government says the FHA covers.

Defendant Marcia Fudge, the HUD Secretary, reiterated only last week that the College of the Ozarks' policies are illegal under the Directive:

> Rep. Smith: Madam Secretary, do you believe that College of the Ozarks' dorm and bathroom policies based on strongly held religious beliefs place them in violation of HUD's directive?
> Secretary Fudge: …What I do believe is that it is the law. *Bostock*, *Bostock* ruled, from the Supreme Court, says it is the law, and I am sworn to uphold the law.[3]

These restrictions on the College's speech, Mot. 1–2, 19–22, show far more than a "substantial risk" of enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The government cannot mandate

[3] Testimony of Marcia Fudge, U.S. House Comm. on the Budget, Hr'g on U.S. Dep't of Housing and Urban Development's Fiscal Year 2022 Budget at 29:06 (June 23, 2021), https://budget.house.gov/legislation/hearings/us-department-housing-and-urban-development-s-fiscal-year-2022-budget. Secretary Fudge claimed she would not violate free speech rights, but as explained below the government denies that the College has any free speech rights here.

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full enforcement of a new legal standard, explain that the College's policies are now unlawful, then deny a credible threat of enforcement.

The government contends the Directive was silent about student housing. Opp. 2, 8–9, 13–14. But the Directive is not silent: it imposes "full" and universal enforcement, and the government concedes college housing is regulated. When an organization can "reasonably expect" that its policies "will be perceived by the Department as a violation," it has shown a "sufficiently distinct and palpable injury" to warrant pre-enforcement review. *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1118 (D.C. Cir. 2005).

The government also contends that harm is speculative because it has not yet filed FHA complaints against a religious college exempt from Title IX. Opp. 1–2, 8–9, 13–14, 21. But the Directive rejects HUD's past "limited" FHA enforcement, and the government never says that Title IX exemptions apply to the FHA—indeed, since HUD ignored its notice and comment obligations under the APA, it never even considered the possibility. Opp. 5, 11–12, 16, 20–21.

B. *Bostock* does not immunize the Directive.

The government says that any threatened injury is not traceable or redressable because its new mandate comes from the FHA after *Bostock*, not the Directive. Opp. 1, 10–17.

But *Bostock* disclaimed that its holding applied outside Title VII or to intimate spaces. Mot. 7. Moreover, a claim of statutory authority is a

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merits defense not to be assumed at the standing stage. Standing and statutory authority "concepts are not coextensive." *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699–700 (8th Cir. 2021). Instead, the relevant inquiry is whether the alleged injury can be traced to the officials' "allegedly unlawful conduct," "not to the provision of law that is challenged." *Collins v. Yellen*, No. 19-422, 2021 WL 2557067, at *12 (U.S. June 23, 2021).

Because the government believes the FHA is the source of its mandate, the government also contends that enjoining the Directive would not preclude the government from enforcing this view of the FHA. Opp. 14–15. But standing exists to challenge an agency's enforcement of statutes imposing unwanted legal obligations. *California v. Texas*, No. 19-1019, 2021 WL 2459255, at *9 (U.S. June 17, 2021). The College challenges a final agency action that is binding and legislative in force. Mot. 11–13. Even if it were true that HUD could take some *other* final agency action to enforce the commands of the Directive, that does not show an injunction of *this* final agency action gives the College no relief—it does. Future agency action would also be challengeable, and in the meantime, the College would not operate under this retroactive enforcement mandate against its religious policies and speech.

No case holds that a final agency rule cannot be challenged if a statute allegedly required the standard, nor that federal enforcement of a statute is not fairly traceable to the enforcement agency. The

government has no response to *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011), which held that the availability of other causes of action does not undermine relief against government enforcement officials to redress a discrete portion of the alleged injury. Opp. 12. And whether the Directive is right that the FHA prohibits the College from separating housing by biological sex is a merits question that cannot be assumed in the government's favor for standing purposes.

The government admits that an injunction against the Directive "would interfere with" and "impair" its "administration of the FHA." Opp. 22. Precisely. The College's challenge to the Directive is a challenge to the legality of the agency's final rule, which is the basis for its interpretation and enforcement of the FHA to address sexual orientation and gender identity. Mot. 7; ECF 2 at 3–4.

III. The Directive is reviewable final agency action.

Contradicting President Biden's characterization of the Directive as a "rule change," ECF 1-14 at 2, the government says that the Directive is non-binding policy guidance because the FHA mandates the Directive's interpretation. Opp. 17–18. As with standing, this improperly conflates the existence of a cause of action with the rule's statutory authority. *Supra* Pt.II.B.

Anyway, the Directive meets the characteristics of final agency action: the government does not dispute that the Directive is the consummation of the decision process, nor can it dispute the Directive's

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own words that it is binding.[4]

An action that binds agency officials to a new substantive standard is not mere policy guidance. *S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003). A "general statement of policy" would simply "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (internal citation omitted). In contrast, when the government requires "its reviewing agents to utilize a different standard of review" or imposes "a presumption of invalidity when reviewing certain operations, its measures would surely require notice and comment" as a rule, "as well as close scrutiny to insure that it was consistent with the agency's statutory mandate." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987).

The government contends the Directive lacks the force of law. Opp. 18. But agency action that "has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability," is reviewable. *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 446 (5th Cir. 2019). The agency treats the Directive as "controlling in the field," "it treats the document in the same manner as it treats a legislative rule," "it bases enforcement actions on the policies or interpretations formulated in the

[4] Nor does the government address the College's non-APA causes of action. Mot. 11–13.

document," and "it leads private parties or State [enforcement] authorities to believe that it will declare [actions] invalid unless they comply." *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

The government also suggests that the Directive is not binding *on the College*. But announcing a new legal standard, insisting on "full" enforcement, and declaring it will "eradicat[e]" newly identified "discrimination," unavoidably means that entities *covered by* the standard must comply. That is what "enforcement" is: a threat to covered entities that they must comply or face consequences. The government cannot use illegal procedures to impose universal, unyielding regulations, then avoid judicial review simply by labeling it "enforcement." The APA provides no such escape hatch.

IV. The College is entitled to injunctive relief pending appeal.

A. The Directive unlawfully skipped notice and comment.

The government's dispute about whether notice and comment was required is derivative of its view, rebutted above, that the Directive is non-binding policy guidance. Opp. 18–19. But the government does not dispute that HUD regulations require notice and comment, even for a significant guidance document. Mot. 14–16. That alone justifies relief under 5 U.S.C. § 706(2)(D).

The government also contends that, in Congress' FHA requirement

of notice and comment for "all rules" under 42 U.S.C. § 3614a, Congress silently incorporated the APA's notice-and-comment exceptions. But courts must give effect to every word and clause of the law. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Given the "salutory purposes" of public notice and comment, courts recognize exceptions "'only reluctantly.'" *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982). Here, no reason to create an extra-textual exception exists, whether the Directive is legislative or interpretive, because Section 3614a applies to "all rules."

B. The Directive ignored the impact on religious colleges.

The government admits the Directive never considered harm to private religious colleges and their reliance interests; possible alternatives or exemptions; or the Directive's interaction with "Title IX, or other statutory or constitutional protections of religious rights, including the Religious Freedom Restoration Act (RFRA)." Opp. 9, 13. Nor did it consider *any* "particular settings such as student housing" or *any* "specific circumstances" for "educational institutions," or "how "to 'accommodat[e]' the free exercise rights of those with" religious objections. Opp. 9, 13–14, 19–20. And so, because it rested only on its view that prior policy was unlawful, the Directive violated the APA's requirements of reasoned decision making under *Regents*. 140 S. Ct. at 1909–13; Mot. 16–17.

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The government alternatively says that these issues could be deferred to its adjudication of complaints. Opp. 16–17, 20–21. But the Directive says nothing about considering these issues later, and the APA provides no "regulate-first-ask-questions-later" exception. These *post hoc* rationalizations cannot justify the Directive. *Regents*, 140 S. Ct. at 1912–15.

C. The Directive lacks statutory authority under the clear-notice canon.

The government contends that the clear-notice rule does not apply when the "Plaintiff is not a State." Opp. 21. The motion cites several cases rebutting this notion, to which the government did not respond. Mot. 18–19.

D. The Directive censors and compels protected speech.

The government says the FHA, not the Directive, imposes the speech burdens identified here. Opp. 14, 16, 21. This argument ignores that the Directive requires enforcement *of the FHA and HUD's FHA regulations* using the Directive's new standard.

The government does not dispute that the College will be censored and compelled in its speech, nor does the government contend that the Directive passes strict scrutiny and is not overbroad. Mot. 19 –22. Instead, the government says that the First Amendment does not protect colleges' speech *at all*. Opp. 14, 16, 21. But the First Amendment protects even "speech expressing ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744,

1764 (2017).

Here, the College's "religious and philosophical" positions are "are protected views" entitled to "neutral and respectful consideration." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727, 1729 (2018). The College's "First Amendment interests are especially strong" because its housing policies and speech, including the use of pronouns, derive from the College's core religious beliefs. *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021).

E. Equity favors relief.

Equity thus favors urgent relief. Mot. 22.

CONCLUSION

This Court should enter an injunction pending appeal.

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/s/ Julie Marie Blake

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June 28, 2021

CERTIFICATE OF COMPLIANCE

This reply complies with the requirements of Fed. R. App. P. 27(d) because the motion does not exceed 2,600 words.

This reply also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this reply has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Julie Marie Blake
Julie Marie Blake

Dated: June 28, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, the above reply brief supporting a motion for an injunction pending appeal was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Julie Marie Blake
Julie Marie Blake