No. 21-2270

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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; 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)

APPELLANT'S OPENING BRIEF

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This appeal is about whether the federal government may—without notice or public comment—issue a "directive" that requires private religious colleges to open female showers, restrooms, and dorm rooms to biological males who assert a female gender identity.

In early February 2021, the government issued what it called a "directive" and "rule change" that redefined the Fair Housing Act's sex-discrimination provisions to include sexual orientation and gender identity. Without notice or comment, the Directive ordered agency officials and external enforcement grantees to "fully enforce" this new standard immediately—and retroactively for one year—including against private religious colleges' housing policies and speech. These laws impose crippling punishments for violations, including six-figure civil penalties, unlimited punitive damages, and even prison time.

Plaintiff-Appellant College of the Ozarks challenged the Directive under the Administrative Procedure Act, the First Amendment, and other laws. After a hearing, the court below denied a preliminary injunction and *sua sponte* dismissed the case as non-justiciable, finding the Directive to be a non-binding policy statement.

Because of the important constitutional rights at stake, and because of the Directive's far-reaching public-policy ramifications, the College respectfully requests oral argument of 20 minutes per side.

CORPORATE DISCLOSURE STATEMENT

The School of the Ozarks, Inc., d/b/a College of the Ozarks, is a nonprofit corporation with no parent company or stock.

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INTRODUCTION

Plaintiff-Appellant College of the Ozarks seeks to stop the government from threatening it and other private religious colleges with crippling penalties unless they open girls' dormitories to males and cease speaking about their religiously informed housing policies. In February 2021—without notice or comment—the government issued a "directive" redefining the sex discrimination provisions in the Fair Housing Act (FHA) to include sexual orientation and gender identity, and mandating "full enforcement" by government officials and external enforcement grantees to "eradicat[e]" this "discrimination." Joint Appendix 78–80 (JA). President Biden hailed the Directive as a "rule change." JA38–39.

When the College sought protection from this mandate, the government admitted that it views the College's policies and speech as unlawful, but claimed that the First Amendment provided no protection. The district court denied an injunction and *sua sponte* dismissed the case as non-justiciable, concluding that the Directive is a non-binding policy statement that presents no credible threat of enforcement and thus is not reviewable final agency action. JA485–91.

That is error. Unlike a nonbinding policy statement, the Directive announces a new legal standard that commits the agency and creates consequences for the public. Policy statements govern open-ended matters of agency discretion, but the Directive announces a definitive interpretation of a legal mandate. Policy statements do not require

anything of officials or the public, and they leave officials free to consider alternate legal interpretations, but the Directive requires full enforcement of its view of the FHA and leaves agency officials and enforcement programs no freedom to adopt a different interpretation. The Directive thus is a final agency action subject to review.

The Directive also mandates *full* enforcement of its new view of the FHA—enforcement that the Directive itself says never previously occurred. Regulated entities thus face a credible threat of enforcement from the Directive, including against their speech. The government admits that it regulates the College's policies and speech, making the College the object of the Directive. Yet the Directive underwent no notice and comment that would have highlighted its deficiencies, including trampling free speech and religious exercise. Not only does the College have standing to bring its challenge, but it is also likely to succeed on the merits and deserves preliminary injunctive relief.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361 because the College raised claims against the federal government under the Administrative Procedure Act, the First Amendment, the Religious Freedom Restoration Act, and other constitutional provisions and federal laws. JA485–86.

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) because the district court entered an order on June 4, 2021, denying a preliminary injunction and dismissing all claims. JA485. The district court issued a final judgment on June 7, 2021, JA492, and the College filed its notice of appeal the same day. JA493.

STATEMENT OF THE ISSUES

1. Justiciability and Cause of Action. The Fair Housing Act and its regulations prohibit sex discrimination and prohibit speech expressing a policy of, or preference for, sex discrimination. 42 U.S.C. § 3604; 24 C.F.R. § 100.50. The Directive extended these provisions to sexual orientation and gender identity, mandating "full enforcement," including on college dorms. Can the Directive be challenged by a private religious college that seeks to keep and to speak about its religiously informed code of conduct and its single-sex student housing based on biological sex, not gender identity?

- *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019)
- *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021)
- *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011)
- *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016)

2. Notice, Comment, and Reasoned Decision-making. The Fair Housing Act requires notice and comment for "all rules." 42 U.S.C. § 3614a. The Administrative Procedure Act (APA) independently subjects substantive or legislative rules to notice and comment. 5 U.S.C. § 553(b)–(d). A Fair Housing Act regulation required notice and comment for policy statements, too. 24 C.F.R. §§ 11.1(b), 11.8. The APA also requires courts to set aside agency action that is arbitrary, capricious, or

an abuse of discretion. 5 U.S.C. § 706 (2)(A). Did the government violate these requirements of reasoned decision-making when the government skipped notice and comment and never considered private colleges' religious rights, reliance interests, or possible alternatives?

- *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982)
- *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424 (8th Cir. 1992)
- *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020)
- *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020)

3. Statutory Authority. The Fair Housing Act addresses discrimination because of "sex," 42 U.S.C. § 3604. Does the Directive lack statutory authority because the Fair Housing Act does not address sexual orientation or gender identity and because the Constitution's clear-notice canon bars the Directive's new interpretation of the Act?

- *Bond v. United States*, 564 U.S. 211 (2011)
- *Bond v. United States*, 572 U.S. 844 (2014)
- *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020)
- 20 U.S.C. § 1686

4. First Amendment. The College of the Ozarks seeks to keep and to speak about its religiously informed sexuality and dorm policies and code of conduct, under which student housing is separated by biological sex regardless of gender identity, and students agree to refrain from sex outside of marriage between one man and one woman. Does the Directive violate the First Amendment when it (a) censors colleges from saying that its dorms are separated by biological sex or that dorm occupants must abide by its code of conduct, (b) coerces colleges to adopt other views that would need to be communicated, and (c) compels colleges to use pronouns contrary to biological sex in housing contexts?

- *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019)
- *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)
- *Rodgers v. Bryant*, 942 F.3d 451 (8th Cir. 2019)

5. Appointments Clause. Did the Directive violate the Appointments Clause when it was signed by an acting career official who was neither confirmed by the Senate nor supervised by any Senate-confirmed officer?

- *Edmond v. United States*, 520 U.S. 651 (1997)
- *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018)
- *United States v. Eaton*, 169 U.S. 331 (1896)

STATEMENT OF THE CASE

I. The government reinterpreted the Fair Housing Act and mandated "full enforcement."

Congress enacted the Fair Housing Act (FHA) in 1968 to prohibit discrimination based on race, religion, and national origin in housing, and it amended the Act in 1974 to prohibit sex discrimination. 42 U.S.C. § 3604 (a) & (b); 24 C.F.R. § 100.50(b)(1)–(3); JA24–31 (collecting operative provisions). The FHA and its regulations prohibit "statement[s]" and "notice[s]" expressing a policy of, or preference for, discrimination in housing. 42 U.S.C. § 3604 (c); 24 C.F.R. § 100.50 (b)(4)–(5).[1]

The FHA applies to all "dwellings," even if the owner receives no government funds. 42 U.S.C. § 3602(b); 24 C.F.R. § 100.20. Courts and the government have long applied the FHA to college housing. JA25; *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974, 983 (D. Neb. 2013).

For decades, courts unanimously held that the FHA does *not* address sexual orientation or gender identity. JA287–90 (collecting cases). As recently as 2020, the U.S. Department of Housing and Urban Development (HUD) said that "to consider biological sex in placement and accommodation decisions in single-sex facilities" is "permitted" by

[1] This background is drawn from the College's verified complaint. JA7–257. As a signed affidavit, the verified complaint is a source of evidence supporting the motion for a preliminary injunction. *Timber Automation, LLC v. FiberPro, LLC*, 2020 WL 5878211, at *8 n.4 (W.D. Ark. Oct. 2, 2020).

the FHA. JA379.[2]

Yet on taking office, President Biden ordered the government to enforce the FHA as *if* it covers sexual orientation and gender identity.[3] Three weeks later—without notice or opportunity for public comment—an acting career employee issued what HUD labeled a "directive," extending the FHA to sexual orientation and gender identity. JA78–80. The Directive ordered HUD officials and federally-funded enforcement programs (including most states) to "fully enforce" the new standard nationwide—both prospectively, and retroactively for one year—to "eradicat[e]" this "discrimination." *Id*. In the Federal Register, President Biden explained that the Directive was a "rule change" that "finally" "improved upon" the FHA. JA38-39, 198.

The FHA provides broad enforcement mechanisms, including complaints, investigations, and lawsuits. *E.g.*, 42 U.S.C. § 3611–3614; 24 C.F.R. § 103.215, 180.671, 180.705; JA31–33. Its penalties include unlimited compensatory and punitive damages, 42 U.S.C. §§ 3612(g), 3613(c), and huge civil penalties: fines of $21,663 for a first violation, $54,157 for a second violation, and $108,315 for a third or continuing violation. 24 C.F.R. § 180.671. The FHA also provides criminal

[2] 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).

[3] Exec. Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021) (JA81–84).

punishments, including prison time, if an incident involves the threat of force, such as if security staff enforce a prohibited housing policy. 42 U.S.C. § 3631; JA33.

The Directive's mandate applies to federally funded "testers," including a Missouri grantee, JA162, 165-66, who test for compliance with the FHA, file complaints, and bring lawsuits—even if they lack a personal interest in obtaining housing. JA28–29, 37. Further anyone can file a complaint and trigger a government investigation, or bring a private lawsuit, so long as they "pose as renters," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). 42 U.S.C. §§ 3610(a)(1)(A)(i), 3613, 3614; 24 C.F.R. § 103.9, et seq.

II. The government repudiated HUD's contradictory past guidance.

The Directive is a marked change. The Directive explained that HUD's past positions had left "uncertainty," were "insufficient," "limited," and "inconsistent, and "failed to fully enforce" the Directive's view that the FHA addresses sexual orientation and gender identity. *Id*. The government's now-repudiated past guidance was the following:

- A 2009 HUD press release that proposed requiring grantees to comply with state and local laws on sexual orientation or gender identity.[4]

[4] Press Release, HUD, Obama Administration to Ensure Inclusion of the

- A 2010 HUD press release that said that internal "guidance" "treat[s]" sex-stereotyping claims as gender discrimination.[5]
- A 2012 rulemaking preamble declaring "[s]exual orientation and gender identity are *not* identified as protected classes in the Fair Housing Act," and that the FHA only prohibits "discrimination against LGBT persons in certain circumstances."[6]
- A 2016 preamble to a non-FHA rule, which said the FHA addresses gender identity, and an internal "guidance" sent late that year to some (not all) HUD enforcement components describing complaint processing for gender-identity claims.[7]
- And a 2020 rule preamble affirming that the FHA does *not* prohibit single-sex housing by biological sex.[8]

LGBT Community in HUD Programs (Oct. 21, 2009), https://go.usa.gov/x6Pjh.

[5] Press Release, HUD, HUD Issues Guidance on LGBT Housing Discrimination Complaints (July 1, 2010), https://archives.hud.gov/news/2010/pr10-139.cfm.

[6] Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,661, 5,666 (Feb. 3, 2012) (emphasis added).

[7] Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763, 64,770 (Oct. 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); JA364–66.

[8] 85 Fed. Reg. at 44,812.

III. The Directive threatens the College of the Ozarks with crippling penalties.

The College of the Ozarks is a Christian undergraduate institution in Missouri. Since 1906, it has helped students attend college despite significant financial need. JA10, 12. The College's Christian mission is essential to its purpose, curriculum, and policies. JA13–14, 86–127.

Students need not be of a particular religion to study or live at the College, but they must agree to follow the College's religiously informed code of conduct. JA14, 132. Under that code, sex is determined at birth and based on biology, not gender identity, JA17, 133, and students agree not to engage in sex outside marriage between a man and a woman, JA17–19, 41, 133. This code governs the College's single-sex residence halls, including communal showers, restrooms, dorm rooms, and roommate selection, as well as its pronoun usage and visitation policies. JA20–21, 133. The College communicates these policies daily to 1,300 students. JA8–9, 12–13, 19, 21–24.

The government now considers the College's housing policies and speech to be unlawful. By interpreting the FHA to address sexual orientation and gender identity, the government forces colleges to let males occupy female dorms—and qualify for roommate selection—when they claim a female gender identity. JA41–42, 291–92, 392–96. And because the FHA and its regulations prohibit "discriminatory" statements, the Directive censors the College's speech, banning it from

saying that its student housing is or should be separated by biological sex, and coercing the College to adopt contrary policies. JA42–44, 298–300, 403–04.

Were the College to comply with the government's new mandate, the College would suffer immeasurable harm to its religious exercise, its free speech, and its students' privacy interests. JA44–47, 302–03. Abandoning its code of conduct and opening female private spaces to biological men jeopardizes the College's ability to function, harms students, and dissuades them from attending the College. *Id.* The College would also incur regulatory compliance costs of time, money, and speech were it to comply, because it would have to change its policies, statements, trainings, and signage, and even renovate its buildings. JA45.

Conversely, if the College disregards the government's rewritten FHA, the Directive threatens "full enforcement." This includes investigations, enforcement actions, and litigation that could impose costly discovery and legal fees, millions in penalties and punitive damages, and criminal penalties against the College and its employees. JA31–33, 38, 46. The College's liability under the Directive grows exponentially each day as the College continues to speak about and apply its housing policies. JA23.

IV. The College sought to stop the government from reinterpreting the FHA and enforcing its Directive.

The College challenged the Directive in federal court on nine grounds. JA7–70. It pleaded that the Directive is unlawful because it:

- skipped notice and comment, JA48–51;
- was arbitrary and capricious, JA53–55;
- lacked statutory authority and was contrary to law, JA51–53;
- violated the First Amendment's freedom of speech, assembly, and association, JA59–62;
- violated the Appointments Clause, JA57–59;
- failed to follow the Regulatory Flexibility Act, JA56–57;
- violated the structural principles of federalism, JA62–65;
- violated the Religious Freedom Restoration Act, JA65–67; and
- violated the First Amendment's free exercise of religion, JA67–70.

The College sought injunctive and declaratory relief against the Directive as an unlawful interpretation of the FHA and also argued that, even had the government adopted a permissible interpretation of the Fair Housing Act or HUD regulations, it may not be lawfully enforced against the College. JA70–73. On both grounds, the College sought to enjoin enforcement by the government, its enforcement partners, and its testers of a sexual-orientation or gender-identity FHA theory against student housing policies based on biological sex. *Id*. The College's injunction

request relied on its first five claims—each of which provides straightforward, dispositive legal issues. JA258–304.

V. The government said the College's policies and speech were neither lawful under the FHA nor protected by the First Amendment.

In response, the government opposed any relief. JA305.[9] The government confirmed that it considers the College's policies and speech unlawful under the FHA. It condemned the College's speech as "indicat[ing] a discriminatory and unlawful preference"—and argued the College's speech is not protected *at all* under the First Amendment. JA356–57; Opp.14, 16, 21.

Below, the government elaborated the many ways it believes the Directive applies to the College:

- The government said that to avoid liability the College must consider "accommodat[ing]" biological males who identify as females. JA335, 359–60.
- The government said the Directive should not be enjoined because the College's students "might someday experience housing discrimination on the basis of sexual identity or sexual orientation." JA462.

[9] *See also* Gov't Opposition to Motion for Injunction Pending Appeal (8th Cir. June 21, 2021) (Opp.).

- The government said the College's policies and speech could violate the Directive because a transgender student could be "denied housing" or experience "a hostile housing environment from college administrators on the basis of gender stereotype" because of the College's speech. JA463.
- The government said the College's policies could violate the Directive because "a cisgender student" "may experience housing discrimination when she brings transgender friends or family members to the dorm simply because those friends or family members do not conform to the college's views on sexuality." JA464.
- The government also questioned whether the College's opposition to compliance with the Directive is "really compelled" by its religion and whether its code of conduct is really "enforced," saying HUD investigations must be allowed to explore these issues. JA460–61, 464.

Defendant Marcia Fudge, the HUD Secretary, then testified to Congress that she believes the College's policies are illegal:

> 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: Thank you for the question, Mr. Ranking Member. What I do believe is that it is the law. *Bostock* … says it is the law, and I am sworn to uphold the law.[10]

This view tracks the government's reinterpretations of other sex-discrimination laws. In federally funded single-sex housing not subject to the FHA, like emergency shelters, HUD prohibited gender-identity discrimination and ordered that the "placement and accommodation of individuals in facilities that are permitted to be single-sex must be made in accordance with the individual's gender identity," not biological sex.[11] Likewise, the Department of Education's recent reinterpretation of Title IX says that colleges can have male and female sports, but males who identify as females must be allowed to compete as females. JA201–03, 205–53; *see also* JA255–57 (restrooms).

The government did not dispute that the Directive was definitive

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[10] 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 the government denies that the College has any free speech rights.

[11] 81 Fed. Reg. at 64,765, 64,767–68; Press Release, U.S. Dep't of Housing & Urban Dev., HUD Withdraws Proposed Rule, Reaffirms Its Commitment to Equal Access to Housing, Shelters, and Other Services Regardless of Gender Identity (Apr. 22, 2021), https://bit.ly/3isVVEu.

and that enforcement programs were required to "fully enforce" its view of the FHA. JA191-93, 326, 339, 341–42, 353, 447.

Notwithstanding all these ways the government maintained that the College was violating the FHA as interpreted by the Directive, the government represented that, because the FHA, via *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), addresses sexual orientation and gender identity, the Directive was merely a policy statement that itself does not bind the College. The government thus denied that its officials presented a credible threat of enforcement.

VI. The district court denied a preliminary injunction and dismissed the case.

The district court denied an injunction and *sua sponte* dismissed the case as non-justiciable on the theory that the Directive is a non-binding policy statement. JA5, 482–83, 485–91. In its view, justiciability, even in a First Amendment case, is a "rigorous" standard. JA498–90. It believed that any injury flows from the FHA after *Bostock*, not from a threat of government enforcement of the Directive, and so it said that the College lacked standing (and ripeness) until the government investigates and charges the College. JA485–91.

Even though no motion to dismiss was filed, and the parties briefed only some of the College's claims, the court dismissed the entire complaint. JA485–91.

STANDARD OF REVIEW

This Court reviews dismissals under Rules 12(b)(1) and 12(b)(6) de novo. *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015); *United States ex rel. Ambrosecchia v. Paddock Labs., LLC*, 855 F.3d 949, 954 (8th Cir. 2017). It assumes that the complaint's allegations are true and views the record in the light most favorable to the plaintiff. *Rodgers v. Bryant*, 942 F.3d 451, 454 (8th Cir. 2019).

Four factors govern whether to grant a preliminary injunction: "(1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to other litigants; and (4) the public interest." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). The most important factor is the appellant's likelihood of success on the merits. *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

This Court reviews preliminary injunction denials for an abuse of discretion, including for an error of law. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012). The Court makes "a fresh examination of crucial facts" when a preliminary injunction appeal raises constitutional claims. *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995).

SUMMARY OF ARGUMENT

The government's Directive jeopardizes the College's speech, its sex-separated dorms, and the students who live there—all without public notice and comment, or any consideration of religious exemptions, statutory authority, or free speech.

The College has standing and its challenge is ripe. It faces a credible threat of enforcement because the Directive mandates "full enforcement," laments that full enforcement of its new legal standard has never yet occurred, and says nothing about religious or free-speech protections. This threat forces the College to choose between harming its students and violating its religious beliefs, or risking massive fines, investigatory burdens, lawsuits, and criminal penalties. JA41–46.

The Directive is also a final agency action subject to review. President Biden accurately hailed the Directive as a "rule change"; it is the culmination of agency deliberation; and it imposes legal consequences by requiring full enforcement, both inside and outside HUD, to "eradicat[e]" newly defined discrimination. Full enforcement of a new standard means that regulated entities must comply or risk enforcement actions.

This rule change is unlawful for at least five reasons. *First*, the Directive skipped notice and comment, required by the FHA itself, the APA, and HUD's own rules. *Second*, the Directive is arbitrary and capricious because it fails to consider speech and religious liberty

concerns, the reliance interests of private colleges, and any alternatives. *Third*, the government lacks statutory authority because the FHA does not encompass sexual orientation and gender identity. *Fourth*, the government violates the First Amendment by restricting and compelling speech by content and viewpoint. *Fifth*, the Directive violated the Appointments Clause because it was not issued by a Senate-confirmed principal officer, or even an inferior officer supervised by a principal officer.

If the FHA were read to prohibit sexual orientation and gender identity discrimination—which *Bostock* said its holding did *not* encompass—the same claims would support relief against government enforcement of the statute and regulations. And the College has standing to pursue its other claims, including for its religious exercise, that the district court dismissed *sua sponte*.

This Court should reverse the district court and enjoin the Directive.

ARGUMENT

I. The College's challenge is justiciable.

The College has standing—and its challenge is ripe—because the government's interpretation and enforcement of the FHA forces the College to choose between abandoning its beliefs and risking devastating government penalties. U.S. Const. art. III, § 2. By its plain wording, the Directive mandates full enforcement of a legal standard, and it binds enforcers to eradicate the College's policies. The Directive is thus a final agency action, not a mere consequence-free policy statement.

A. The College is the object of the government's action.

Standing exists when (1) a regulated entity is threatened with imminent injury; (2) a causal connection exists between the injury and the challenged regulation; and (3) a favorable decision is likely to redress the injury. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749–50 (8th Cir. 2019).

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). 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 v. Gardner*, 387 U.S. 136, 153–54 (1967).

The College meets these criteria.

First, the government confirmed that the Directive and its new legal standard apply to the College. JA460–64. 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 programs to "fully enforce" this interpretation to "eradicat[e]" "discriminatory" housing policies. JA80. Prior HUD policies did not achieve the Directive's mandates: they were "limited" and "insufficient," and "fail[ed] to fully enforce" HUD's new view. JA78–80. And, as to the Directive's scope, the government has long taken the view that the FHA covers dorms at private colleges. JA25.

Below, the government doubled down on ways in which it believes the Directive regulates the College's religious speech and housing policies. It said 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 members to the dorm."

JA335, 356, 359–60, 460–64; Statement of the Case, Pt.V. HUD's Secretary even told Congress that the College's policies were "in violation" of the government's new interpretation of the FHA. *Supra* at n.9.

The College, for its part, engages in activities the government finds to fall within the Directive. The College has student-housing policies considered discriminatory under the government's view of the FHA because it (a) separates student housing, visitation, and intimate facility use by biological sex regardless of a student's claim of gender identity, and (b) regulates the conduct of student occupants according to the College's views on sexuality. The College implements and communicates those policies, and its underlying religious reasons, to students every day.

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 penalties; or (3) cease providing student housing. JA41–47.

Third, the government's threatened sanctions are strong. The FHA provides for six-figure fines, unlimited damages, intrusive investigations, and government lawsuits. JA31–33. Criminal penalties are even available if an incident involves the threat of force, as may occur if security personnel are involved. JA31–33, 38.

In court, the government labeled the Directive a non-binding policy memorandum, but it agreed that the Directive bound officials and

enforcement grantees to its interpretation of the FHA, and it agreed that failure of the public in general—and the College in particular—to comply could bring potential liability and enforcement. JA7, 30–31, 35–40, 78–80, 326, 339.

Accordingly, the College has standing to sue as the object of agency action, just like when educational providers had standing to sue when the government sent a "Dear Colleague" letter to impose a similar standard on federally funded educational facilities. *Texas v. United States*, 201 F. Supp. 3d 810, 819–23 (N.D. Tex. 2016). There, as here, an agency announced new guidelines under which colleges must "alter their policies concerning students' access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations." *Id*. These standards require new forms of regulatory compliance, which "satisfies the injury in fact requirement." *Id*. The College faces regulatory compliance injuries from the government, including a mandate to abandon its religious beliefs, allow men in female private spaces, and incur costs of time, money, and speech to change its policies, trainings, signage, and buildings. JA45.

The government also imposed a ripe procedural harm by depriving the College and others of the chance to advocate for their interests through public comment, which could have helped the College gain protection for its housing policies and speech. *Iowa League of Cities v. EPA,* 711 F.3d 844, 871 (8th Cir. 2013). When a plaintiff is the subject of

agency action, it "can show a cognizable injury if it has been deprived of 'a procedural right to protect [its] concrete interests.'" *Texas v. EEOC,* 933 F.3d 433, 447 (5th Cir. 2019) (citation omitted).

B. The College's free-speech interests independently establish pre-enforcement standing.

Under Article III's standing and ripeness doctrines, a pre-enforcement challenge is independently justiciable if the plaintiff intends to engage in an activity "arguably affected with a constitutional interest" but "arguably" proscribed by a statute, and "a substantial" or a "credible" threat of enforcement exists. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 160 (2014); *Telescope Media*, 936 F.3d at 749.

1. The Directive imposes a credible threat of enforcement.

The First Amendment protects the College's statements about its student housing policies. JA42–44, 298–300, 403–04; *infra* Pt. III.D & III.F. But the College's speech and policies are more than "arguably proscribed" by the government's new interpretation of the FHA—the government itself gave examples below about how the College's policies and speech likely run afoul of the Directive. *Supra* Pt.I.

Indeed, the College faces far more than a "credible threat of enforcement." Eight times the Directive demands "full" enforcement of its standard from all enforcement programs inside and outside HUD to "eradicat[e]" newly prohibited behavior. JA78–80. Zero times does it

leave room for covered entities not to comply. By definition, a mandate to fully enforce a new legal standard with which regulated entities must comply presents a "credible threat of enforcement." It could not be otherwise. If regulated entities need not comply with the new standard, enforcers have nothing to enforce, and no one against whom to enforce it.

Below, the government said that the Directive is a nonbinding policy statement because its "full enforcement" mandate somehow binds the *enforcers* but not the *regulated entities*. JA342; Opp.18. But that reasoning would allow the government to avoid judicial review of all regulations that demand the "eradication" of public conduct. That theory does nothing to negate a credible threat of enforcement on covered entities.

The College's student policies are intertwined with the College's speech and educational mission, and so, under this standard, all "are affected with a constitutional interest . . . regardless of the precise legal theory." *Telescope Media*, 936 F.3d at 750.

This case also presents ripe, purely legal questions. The government has admitted what it now finds to violate the FHA under the Directive, and the verified complaint provides detailed facts—including copies of the College's policies and descriptions of its ongoing speech, JA8, 17–21, 25–27, 29–30, 41–44, 59–62, 68, 133. Further factual development is unnecessary and would not "significantly advance [the court's] ability to deal with the legal issues presented." *Nat'l Park Hospitality Ass'n v.*

Dep't of Interior, 538 U.S. 803, 812 (2003) (citation omitted); *Abbott Lab'ys*, 387 U.S. at 149–54.

The College thus "need not wait for an actual prosecution or enforcement action before challenging a law's constitutionality." *Telescope Media*, 936 F.3d at 749. When government action threatens speech, any "concern that constitutional adjudication be avoided whenever possible" is "outweighed by society's interest in having the statute challenged." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (citation omitted).

Likewise, 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 Engr's v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (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 1815. 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).

2. The district court applied the wrong legal standard.

The district court ignored free-speech standards for pre-enforcement review—and thus failed to consider whether the College met

them. JA498–90. Instead, the district court applied a "rigorous" standard under which no standing or ripeness exists until the government first investigates and charges the College for its speech. *Id.*

But the pre-enforcement standard for constitutional challenges is "forgiving" and "lenient." *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699–700 (8th Cir. 2021). Showing a credible enforcement threat is an "extremely low" bar. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003).

The district court posited that any threat was speculative before complaint proceedings because the Directive did not detail "how HUD will determine FHA liability based on *Bostock* in any specific factual setting or considering potential exemptions." JA488–89. But neither do most regulations, and yet pre-enforcement review is the preferred course. *Abbott Lab'ys,* 387 U.S. at 148–54. This is especially true in First Amendment cases: 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).

Further, neither the district court nor the government specified what facts need developing, and the government already knows enough facts about the College to allege that its policies are unlawful. 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).

In *Telescope Media*, for instance, filmmakers had standing to bring a free speech challenge to a Minnesota nondiscrimination law because the state "view[ed] their actions as a violation." *Telescope Media Grp.*, 936 F.3d at 750. The First Amendment protects filmmaking, and Minnesota "publicly announced" that its statute "requires all private businesses," including filmmakers, "to provide equal services for same- and opposite-sex weddings." *Id.* at 750. Minnesota "even employed 'testers' to target noncompliant businesses," and it had sued a wedding venue provider. *Id*. This Court thus had "little doubt" that the filmmakers faced a credible threat of enforcement and it had "no doubt" that this threatened "injury would be traceable to" the state law and "would be redressed by a judicial decision enjoining Minnesota from enforcing the law against them." *Id.* at 749.

So too here. The government cannot mandate full enforcement of a legal standard, explain that the College's policies are unlawful, and then deny a credible threat of enforcement.

In short, no further information is needed to see what the Directive requires on its face: the "eradication" of the College's policies, with "full enforcement," no exceptions. JA80. Any remaining future contingencies do not affect the legal questions before the court, *Nat'l Org. for Marriage,*

Inc. v. Walsh, 714 F.3d 682, 691–92 (2d Cir. 2013), especially not the College's overbreadth challenge that does not depend on particular facts.

3. Past enforcement against Title IX entities is irrelevant.

Below, the government denied a credible enforcement threat by claiming that HUD has yet to bring an FHA charge against a college with a religious exemption from Title IX. JA317–18, 321–22, 326, 331–32, 335. This argument is misdirected.

First, the Directive is new, so no historical enforcement could exist. And the Directive requires enforcers to fully enforce its view of the FHA to correct HUD's prior limited and inconsistent enforcement. JA78–80.

Second, a regulated entity has standing to defend itself from laws arguably restraining speech "even when those statutes have never been enforced." *281 Care Comm. v. Arneson*, 638 F.3d 621, 628, 631 (8th Cir. 2011). Only an unchangeable disavowal of future enforcement, or a long history of disuse approaching desuetude, *might* lessen the laws' credible threat, *id.*, although sometimes in-court assurances of non-enforcement are not enough, *Rodgers*, 942 F.3d at 455, such as "when a course of action is within the plain text" of a mandate, *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 778 (8th Cir. 2019).

Third, far from disavowing enforcement against the College, the government listed a panoply of ways that it thinks the College's religiously informed policies on sex, gender identity, and visitors are

unlawful. JA356–57, 462–64. And the government has raised no missing facts about the College's policies—the government for instance does not contest that if a public university imposed a ban on biological males occupying or visiting female dorms regardless of gender identity, more facts would be needed to know if that policy violates the Directive. Instead, the government sought to muddy the waters with legal, not factual, issues by hinting that somehow Title IX's religious exemption might (or might not) be relevant to how it will enforce the Directive. But the government never said that Title IX's exemption *actually* protects the College (or any school) from the FHA, a separate statute. Indeed, because the Directive skipped notice and comment, HUD admits that it did not even *consider* the possibility. Opp.5, 11–12, 16, 20–21. The government refuses to say that it will not bring an FHA action against a religious college with a Title IX exemption, and the Directive says nothing about religious exemptions when it repeatedly orders "full enforcement."

C. *Bostock* does not negate the causality and traceability of the government's injury to the College.

The district court reasoned that any injury or restriction on speech from the Directive is not traceable to the government, or redressable by the relief sought here, because the FHA is the sole cause of any injury after *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020). JA488–91. The district court thus deemed the Directive an unreviewable non-binding policy statement. *Id.*

This was legal error. *Bostock* expressly limited its holding to Title VII. *Bostock* said it was not interpreting any "other laws" like the FHA and that its holding did not encompass intimate spaces. 140 S. Ct. at 1753. Interpreting the FHA to encompass sexual orientation and gender identity is, at minimum, an *extension* of *Bostock* beyond its self-imposed boundaries. So, the new threat of government enforcement is traceable to the Directive, not *Bostock*. Because the Directive extends precedent to mandate new legal obligations and enforcement, it is reviewable final agency action that was required to undergo notice and comment under the FHA, the APA, and HUD rules.

An agency cannot avoid judicial review by claiming that its new legal standard was obvious in the statute all along. When an agency uses informal guidance to change its position, its reference to statutory authority does not make the action any less final. *Texas*, 201 F. Supp. 3d at 827–31 (holding the government's informal Title IX Dear Colleague letter to be final agency action subject to judicial review). After all, the whole point of APA review is to see whether an agency improperly read "substantive changes into the regulation under the guise of interpretation." *Children's Health Care v. Centers for Medicare & Medicaid Servs.*, 900 F.3d 1022, 1026 (8th Cir. 2018). That is why, if 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 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 district court's reliance on *Bostock* was also legal error because whether the FHA prohibits the College from separating housing by biological sex is a merits question not appropriately considered in reviewing standing. Standing and statutory authority "concepts are not coextensive." *Turtle Island Foods, SPC*, 992 F.3d at 699. Merits inquiries are inappropriate at the standing stage. *Id.* By assuming that *Bostock* should be extended to the FHA, the district court improperly gave an advisory opinion about the merits, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), rather than assume that the College would prevail, *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016).

The right 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*, 141 S. Ct. 1761, 1779 (2021). No case holds that a final agency action cannot be challenged if the agency claims that a statute required the action. Plus, "[t]ypically," an injury is "'fairly traceable' where "the named defendants ... possess the authority to enforce the complained-of provision.'" *Alexis Bailly Vineyard*, 931 F.3d at 779 (citations omitted). Under this inquiry, the College's asserted injuries from the threat of government enforcement is easily traceable to the

government enforcement officials, so enjoining government enforcement would redress this threat. *Telescope Media Grp.*, 936 F.3d at 749.

Below, the government argued that an injunction against the Directive "would interfere with," "disrupt," and "impair" its "administration of the FHA." Opp.22; JA466. That's the point of the College's request for injunctive relief. The College challenges the agency's action to interpret and enforce the FHA per the Directive, which an injunction would halt, and which makes plain both injury and redressability. JA70–73.

The district court also said that the College's injury is not redressable because private parties could seek to enforce the same interpretation on the College. JA489–90. But the possibility of other enforcers does not undermine relief against government enforcement officials. *281 Care Comm.*, 638 F.3d at 631. To the contrary, standing is "bolstered" when the "authority to file a complaint" "is not limited to a prosecutor or an agency," *Susan B. Anthony List*, 573 U.S. at 164, or if "any person . . . may initiate enforcement," *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct.*, 769 F.3d 447, 452 (6th Cir. 2014). The availability of a private cause of action thus "cuts decisively" in favor of justiciability. *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 551 (W.D. Ky. 2020). A favorable judgment would relieve the College of a real government enforcement threat, which is enough—a judgment need not

negate every injury from every non-governmental source to be proper. *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997). And enjoining the Directive's FHA interpretation would benefit the College vis-à-vis third-party enforcers, too.

II. The College has causes of action for its claims.

In dismissing the College's claims *sua sponte*, the district court erred because the College presents multiple causes of action for which it has standing and on which relief can be granted.

A. The government's directive is reviewable final agency action.

The College has a cause of action under the APA, which provides a "strong presumption favoring judicial review of administrative action." *Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (citation omitted). 5 U.S.C. § 702, 705–06. Agency action is final and reviewable if: (1) the agency's action is the "'consummation' of the agency's decisionmaking process"; and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

Under the APA's pragmatic approach, an action is final if it "committed" the agency to a future route. *Am. Farm Bureau Fed'n*, 836 F.3d at 969. An 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 thus reviewable. *EEOC*, 933 F.3d at 446.

The Directive meets these standard for final agency action. *First*, the Directive consummates the decision-making process: it shuns tentative, interlocutory, or advisory language for definitive orders. It covers "all" FHA applications; "urgently requires enforcement action" from officials and enforcement programs; and directs that its standard be "fully" enforced. JA78–80. That is why the government has not disputed that the Directive consummated the agency's decision-making process.

Second, the Directive determines rights and obligations, and it creates legal consequences for the agency, external enforcement programs, and regulated entities. Any agency action that "bind[s] it and its staff to a legal position" will "produce legal consequences or determine rights and obligations." *EEOC*, 933 F.3d at 441. At its issuance, HUD called the Directive a "directive." JA191–93. A directive *directs* that action be taken—HUD is committed, as the government explained in its press releases. JA38–39, 191–92.

Once this litigation began, though, the government changed course and in briefing sought to label its Directive a non-binding "Memorandum" policy statement. This semantic change cannot transmogrify the Directive's binding quality.

The Directive announces a new legal standard applying the FHA to sexual orientation and gender identity discrimination. 42 U.S.C.

§ 3604(c); 24 C.F.R. § 100.50(b)(4)–(5). The Directive uses the word "enforce" ten times and requires "full" enforcement eight times. JA78–80. The government publicized the Directive nationwide and sent new contract terms to external enforcement grantees, including States, requiring them to enforce the Directive "fully" and "urgent[ly]" to "eradicat[e]" what HUD now considered "discrimination." JA35–40, 78–80, 326, 339, 447.

These elements show the Directive is, on its face, a binding instrument. An agency action is final and binding when the agency "'acts as if a document issued at headquarters is 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 document,'" and "'it leads private parties or State [enforcement] authorities to believe that it will declare [actions] invalid unless they comply.'" *Iowa League of Cities*, 711 F.3dat 863 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000)). And any ambiguity weighs in the College's favor under the "strong presumption favoring judicial review of administrative action." *Salinas,* 141 S. Ct. at 698.

The distinction between final agency action and a general statement of policy "turns on whether an agency intends to bind itself to a particular legal position." *Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 94 (1997). Policy statements do not purport to commit agency officials. *S.*

Dakota v. Ubbelohde, 330 F.3d 1014, 1028 (8th Cir. 2003). A policy statement leaves agency officials "the discretion and the authority to change its position . . . in any specific case" and "does not seek to impose or elaborate or interpret a legal norm." *Syncor Int'l,* 127 F.3d at 94. Only when an agency "will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself," is it a policy statement. *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974). Making agency officials enforce a new standard is not a policy statement. *Abbott Lab'ys,* 387 U.S. at 151–52.

Under this precedent, the Directive is final agency action, not a non-binding policy statement. The government agrees that it bound itself and its grantees to a legal interpretation, and it agrees that the government left itself and its enforcement grantees no "discretion to depart from the standards in specific applications," *U.S. Tel. Ass'n v. F.C.C.,* 28 F.3d 1232, 1234 (D.C. Cir. 1994). JA191-93, 326, 339, 341–42, 353, 447; Opp.8, 18. The government's practical object was, moreover, to lead private housing providers to believe that failure to comply will bring potential liability and enforcement. JA7, 30–31, 35–40, 78–80, 326, 339 (Add10–12). The government's litigation label of the Directive as a non-binding policy memorandum thus contradicts the Directive's plain wording and everything the President and officials have said about it. The APA does not countenance such post-hoc litigation tactics to evade review.

Below, the government denied that the Directive binds *the College*. Not so. The Directive has "mandatory" language, and "private parties have 'reasonably [been] led to believe that failure to conform will bring adverse consequences.'" *Iowa League of Cities*, 711 F.3d at 864. A mandate that enforces a legal standard necessarily affects regulated entities—otherwise there would be nothing to enforce. *Supra* Pt.I.B.1. In any event, because the Directive commits enforcers, it is a final agency action and so the College need not be an enforcer itself—is enough that the Directive commits *the agency*. *Am. Farm Bureau Fed'n*, 836 F.3d at 969.

Still, the district court reasoned that the Directive *had* to be a non-binding policy statement because, under the district court's view of the merits, any effect on the College would come by force of law from the FHA after *Bostock*, not from the Directive. JA488–90. This is incorrect for the reasons discussed above in Part I.C., especially because the APA exists to review just this type of claim of newfound statutory authority.

B. The government's enforcement is reviewable under the Court's equitable power.

Distinct from the APA, courts of equity have the power to set aside *ultra vires* and unconstitutional federal actions. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90, 693 (1949). The "Supreme Court has long recognized that injunctive relief" apart from the APA can "be available to test the legality of administrative action."

Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Jud. Review § 8304 (2d ed.). And the government in past cases has conceded that there is "an implied private right of action directly under the Constitution to challenge governmental action . . . as a general matter." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491, n.2 (2010).

The College sought review under *Larson*. JA10, 284, 385–86. It was improper for the district court to fail to address this claim based on its view that the Directive is a non-binding policy statement under the APA. This avenue for relief does not depend on meeting the APA's technical requirements. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 189–90 (D.C. Cir. 2006).

III. The College is likely to succeed on the merits.

This Court should reverse the district court's denial of the College's motion for preliminary injunction because the government's new interpretation and enforcement of the FHA and HUD regulations is unlawful on at least five grounds.

A. The government unlawfully skipped public notice and comment.

For three reasons, the Directive had to undergo notice and comment. *First*, HUD regulations required notice and comment for any policy statement that interprets novel legal issues and implements presidential priorities. 24 C.F.R. §§ 11.1(b), 11.2, 11.8. *Second*, the Fair

Housing Act requires notice and comment for "all rules"—no exceptions. 42 U.S.C. § 3614a. *Third*, the APA independently subjects substantive or legislative rules to notice and comment and delays their effective date 30 days. 5 U.S.C. § 553(b)–(d).

The government has never disputed that then-existing HUD regulations required notice and comment, even for a policy document. Opp.18–19. HUD must "follow its own regulations while they remain in force." *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992). That alone justifies relief.

In this litigation the government denied that under 42 U.S.C. § 3614a the FHA requires notice and comment for "all rules" —even though that is what the law says. The government contends that the FHA silently incorporates the APA's notice-and-comment exceptions. Opp.19. But courts must give effect to a law's every word and clause. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Given the "salutory purposes" of 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 exists to write a judicial exception into the FHA.

Moreover, the APA itself requires notice and comment because the Directive is a substantive rule. When an agency binds itself to a legal standard, leaving officials no enforcement discretion, it creates a legislative or 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). 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). For the reasons discussed above in Parts I.C and II.A showing the Directive is binding, limits the discretion of agency officials, and extends reasoning that *Bostock* did not apply to the FHA, the Directive is exactly what President Biden called it: a "rule change." JA38–39.

B. The Directive is arbitrary and capricious for ignoring necessary factors.

The Directive is arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706(2)(A) because it was issued without considering harm to religious colleges, their reliance interests, and alternatives.

"[A]gency action is lawful only if it rests on a consideration of the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (internal citation omitted). Whether the agency action concerns a rule or concerns enforcement, it must address "legitimate reliance" on past policies or legitimate alternative policies. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–15 (2020).

The Directive causes tremendous upheaval for student housing, yet the government admits that it ignored private religious colleges' interests in their single-sex housing policies and codes of conduct. Opp.9, 13. It also did not consider possible 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 the government 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.

HUD was on notice that it should have considered these interests. Outside the FHA, HUD admitted that imposing gender identity nondiscrimination on single-sex housing implicates privacy rights and religious freedom. 81 Fed. Reg. at 64,773. The Directive's failure to "overtly consider" these privacy and religious freedom reliance interests renders it fatally flawed. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

HUD also considered no alternative policies, such as (1) delaying compliance dates; (2) applying the policy prospectively only; (3) grandfathering existing categories of single-sex housing; (4) exempting religious institutions; or (5) crafting privacy exemptions. Nor did HUD consider the FHA's interplay with Title IX. *Infra* Pt.III.C.

Considering these policy concerns "was the agency's job, but the agency failed to do it." *Regents*, 140 S. Ct. at 1914. Instead, it rested on its view that prior policy was unlawful, which violates the APA under *Regents*. *Id.* at 1909–13. The APA provides no regulate-first-ask-questions-later exception and *post hoc* rationalizations cannot justify the Directive. *Id.* at 1912–15.

C. The government lacks statutory authority and violated the clear-notice canon.

The Directive exceeded HUD's statutory authority, 5 U.S.C. § 706(2)(C), because the FHA does not address sexual orientation or gender identity, and the Constitution's clear-notice canon bars the government's new interpretation.

1. The FHA does not address sexual orientation or gender identity.

As every court held for decades, the FHA's text prohibits discrimination based on sex, not sexual orientation or gender identity.[12]

Statutory context confirms that Congress did not prohibit student housing separated by biological sex. Sex was added as a nondiscrimination category to the FHA in 1974. Two years earlier, in Title IX of the Education Amendments of 1972, Congress said that Title IX does not prohibit "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. In its ordinary meaning in 1974, sex means the biological binary of male and female.[13]

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[12] *E.g.*, *Thomas v. Wright*, No. 2:14–cv–01604–RDP, 2014 WL 6983302, at *3 (N.D. Ala. Dec. 10, 2014) (The FHA "does not prohibit discrimination based on sexual orientation in the sale or rental of housing."); *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1201 (D. Colo. 2017) (rejecting argument that the sex stereotyping theory supports an FHA claim based on "status as a transgender" or "sexual orientation or identity"); JA289 (collecting cases).

[13] *E.g.*, Sex, The American Heritage Dictionary of the English Language (1st ed. 1969) ("[t]he property or quality by which organisms are classified according to their reproductive functions").

The FHA says nothing about undoing what Title IX allowed for student housing. In the FHA itself, Congress funds private college single-sex housing through HUD, even though it was commonly separated based on biological sex.[14] The FHA therefore cannot be interpreted to have prohibited separating student housing by biological sex.

Yet the Directive does just that: it interprets "sex" in the FHA (as the government now does elsewhere in Title IX) to create obligations contrary to Title IX's Section 1686. Prohibiting gender identity discrimination *is actually a ban on single-sex housing*, originally understood as housing separated by biological sex. Colleges must now place males who identify as female in female dorm rooms, and vice versa.

For decades, regulations and guidances have allowed colleges to separate student housing by the biological binary of male and female.[15] HUD's own Title IX regulation characterizes sex this way: "[h]ousing provided by a recipient to students of *one sex*, when compared to that provided to students of *the other sex*, shall be as a whole" proportionate

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[14] *See* Tables 5 & 5a, pg. 228, Evolution of Role of the Federal Government in Housing and Community Development, Subcomm. on Housing and Community Development of the Comm. on Banking, Currency and Housing, 94th Cong. (Oct. 1975) (filed with Pub. L. 93-383 on Aug. 22, 1974), *available on Westlaw under* U.S. Government Accountability Office (GAO) Legislative History, Pub. L. 93-383—part 1.

[15] 45 C.F.R. § 86.32 ("A recipient may provide separate housing on the basis of sex."); HUD Occupancy Handbook, Chapter 3: Eligibility for Assistance and Occupancy, sec. 3-22.B.1 (citing 45 C.F.R. §§ 86.32 and 86.33), https://www.hud.gov/sites/documents/DOC_35645.PDF (last visited July 8, 2021).

and comparable. 24 C.F.R. § 3.405 (emphasis added). It has said this since at least 1975.[16] The FHA did not overturn the longstanding practice that colleges separate student housing by biological sex.

And, as noted above in Part I.C, *Bostock* itself was limited to hiring and firing under Title VII's employment rules, and it expressly disclaimed ruling on other statutes like the FHA or on intimate spaces—and this case involves a different statute governing intimate spaces in *housing*.

2. The Constitution's clear-notice canon compels a narrow reading.

A narrow interpretation of the FHA and its regulations is also compelled by the Constitution's clear-notice canon. Under what former-Professor Barrett called a "time-honored" substantive canon of interpretation,[17] the Constitution limits statutes that preempt core state police-power regulations, such as over real estate, land use, and education, *Bond v. United States (Bond II)*, 572 U.S. 844, 858 (2014), or that impose grant conditions, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24 (1981). Congress must deliberate and resolve each specific term. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985).

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[16] Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities, 40 Fed. Reg. 24,128, 24,148 (June 4, 1975) (promulgating 45 C.F.R. § 86.32).

[17] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 143–150, 173 (2010).

This canon imposes "a particularly strict standard." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Unlike the ordinary clarity required for regular statutes, Congress must make "its intention" "'unmistakably clear in the language of the statute,'" *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991) (citation omitted), measured at the time of enactment, *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). Congress may not use "expansive language," *Bond II*, 572 U.S. at 857–58, 860, to impose "a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 190 n.11 (1982); *Arlington Cent. Sch. Dist. Bd. of Edu. v. Murphy*, 548 U.S. 291, 296 (2006); *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989). Nor may the federal government "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 25.

These structural principles protect citizens, not just states. *Bond v. United States (Bond I)*, 564 U.S. 211, 220, 222 (2011). This "division of power is not about preserving state power, so much as it is about promoting individual liberty." *Ohio v. Yellen*, No. 1:21-CV-181, 2021 WL 2712220, at *10 (S.D. Ohio July 1, 2021). Each statute subject to this canon thus "must be read consistent with principles of federalism inherent in our constitutional structure" in all applications. *Bond II*, 572 U.S. at 856–60.

The Constitution imposes this canon on the FHA because the FHA is a spending statute that displaces traditional state real estate, land use, and education regulations, *e.g.*, 42 U.S.C. §§ 1437a, 5301 et seq., 5308, 12901 et seq.; JA33–34, 184–89—and thus intrudes on an "area[ ] of traditional state responsibility," *Bond II*, 572 U.S. at 2089.

But Congress did not unmistakably address sexual orientation and gender identity in the 1974 FHA, let alone unmistakably force colleges to allow males to live and shower with females. No court had ever adopted this interpretation, and the government had many inconsistent interpretations before the Directive. JA78–80, 191–93. HUD's press release even admitted this past legal "uncertainty," JA191–93, which is why the Directive required States receiving enforcement grants to sign new contract terms, JA32, 35–38, even if that meant amending or reinterpreting state law—something that would not be necessary if the FHA had unmistakably imposed this condition. States and the public were thus not on notice of this mandate from the FHA's unmistakable text. JA32, 36–38, 195.

Because Congress did not "in fact face[], and intend[] to bring into issue" this particular disruption of state and private authority, *United States v. Bass*, 404 U.S. 336, 349 (1971), the Directive's interpretation violates the clear-notice canon.

D. The government censors and compels speech based on content and viewpoint.

The government's new interpretation and enforcement of the FHA violates the First Amendment's Free Speech Clause by censoring and compelling the College's speech by content and viewpoint. U.S. Const., amend. I. Under the Free Speech Clause, the government may not restrict speech because of its content or viewpoint. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). But the FHA and HUD regulations, whose enforcement the Directive modifies, prohibits speech "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on [sex]." 42 U.S.C. § 3604(c); 24 C.F.R. § 100.50(b)(4)–(5). Under the College's code of conduct for housing, sex is determined at birth and based on biology, not gender identity, JA17, 133, and students agree not to engage in sex outside marriage between a man and a woman, JA17–21, 42, 133. By extending the FHA's speech provisions to its new protected classes, the government prohibits the College's speech about having or preferring its own housing policies as it rents space to students. JA8, 25–27, 29–30, 41–44, 59–62, 68.

Consider statements the Directive censors the College from making:

- Posting online its beliefs or code of conduct, including saying that its student housing and visitation are separated by biological sex not gender identity;

- telling students in person or in applications about its code;
- posting signs that showers, restrooms, and dorm rooms in residence halls are separated by biological sex;
- arranging dorm rooms and roommates based on students' biological sex; and
- telling students that the College prefers its policies to the government's Directive.

JA8, 25–27, 29–30, 41–44, 59–62, 68.

At the same time, the government allows statements made *against* the College's housing and conduct policies. The College can tell students it has, or prefers to have, single-sex housing based on gender identity, but the College cannot tell students the College has, or prefers to have, single-sex housing based on biological sex.

The Directive also compels the College's speech. The College must adopt the government's policies, and it must answer, on inquiry, that it provides housing without regard to sexual orientation or gender identity. The College must also use a student's preferred pronouns based on gender identity under the FHA's anti-hostility and anti-harassment provisions, which the government insists apply to the College. JA23, 41, 43, 356–57, 462–64.

The government has not disputed that the College will be censored and compelled in its speech under its view of the FHA. Instead, the government's chief response has been to say the FHA, not the Directive,

imposes these speech burdens. Opp.14, 16, 21. But this argument ignores that the Directive requires enforcement of the FHA and its regulations using the Directive's new standard, and it ignores that the College challenges both the Directive *and* any interpretation or enforcement of the FHA and HUD regulations on a sexual orientation and gender-identity theory. JA70–73.

The government thus seeks to regulate speech by content and viewpoint, and so its enforcement is overbroad, as well as subject to strict scrutiny, with its compelling interest and narrow tailoring requirements. *Reed*, 135 S. Ct. at 2227–30.

The government has never contended that the Directive passes strict scrutiny or that is not overbroad. Instead, the government said that the First Amendment does not protect the College's speech *at all*: in its view, the College's policies and speech are per se "not protected speech" because they further "discrimination." JA356–57; Opp.14, 16, 21. JA356–57; Opp.14, 16, 21.

But under this view "wide swaths of protected speech would be subject to regulation." *Telescope Media*, 936 F.3d at 752. Content- or viewpoint-based restrictions are "subject to strict scrutiny regardless of the government's benign motive." *Reed*, 135 S. Ct. at 2228. Indeed, 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 and protected exercise. *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021); *infra* Pt. III.F.

What is more, no government interest requires censoring religiously informed housing policies or compelling the College to express views contrary to its religious beliefs. "[R]egulating speech because it is discriminatory or offensive is not a compelling state interest." *Telescope Media*, 936 F.3d at 755. The government lacks any legitimate objective "to produce speakers free" from bias, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578–79 (1995), and so any non-discrimination "interest is not sufficiently overriding as to justify compelling" speech. *Brush & Nib Studio, LC v. City of Phoenix,* 448 P.3d 890, 914–15 (Ariz. 2019) Far from being "always" a "compelling interest," this interest is "comparatively weak" in the context of education and pronouns. *Meriwether*, 992 F.3d at 510. And any government interest could be achieved in more narrowly tailored ways. Students can attend other institutions eager to comply with the Directive.

The Directive is also overbroad because it sweeps in speech of many private, religious, educational institutions that separate student housing by biological sex.[18] A preliminary injunction against the Directive is thus appropriate. *Rodgers*, 942 F.3d at 458.

[18] As of 2018 there were 879 self-identified religiously affiliated degree-granting post-secondary institutions. Table 303.90, "Fall enrollment and

E. The government violated the Appointments Clause.

The Directive also violated the Appointments Clause. U.S. Const., Art. II, § 2, cl. 2. Under this clause, the Senate's advice and consent is required for "Officers of the United States" (principal officers), except "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

This clause requires a Senate-confirmed official to make or supervise significant actions, like the Directive and its enforcement. "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed" through advice and consent. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Only a principal officer confirmed by the Senate can issue a final binding rule or a significant policy document. *Edmond v. United States*, 520 U.S. 651, 663 (1997). And even inferior officers must be "directed and supervised" by officers appointed by advice and consent. *Id.* Just as arbitrators must be principal officers to take "final agency action[s]" and "promulgat[e] metrics and standards" without "any procedure by which the arbitrator's decision is reviewable" by a superior, *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 39 (D.C. Cir.

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number of degree-granting postsecondary institutions, by control and religious affiliation of institution: Selected years, 1980 through 2018" *available at* https://nces.ed.gov/programs/digest/d16/tables/dt16_303.90.asp (last visited April 15, 2021).

2016), the issuance of binding directives on major questions cannot occur through inferior officers. And even less can they be issued through mere career employees unsupervised by a principal officer, *Edmond*, 520 U.S. at 663.

Rather than having a Senate-confirmed official issue or supervise the Directive, the government used the signature of a career employee acting as assistant secretary, with no Senate-confirmed person in even a nominal position of supervision. Defendant Jeanine Worden, who signed the Directive was never appointed as a principal officer by advice and consent, or even administratively as an inferior officer, so as a career civil servant she could not sign a major policy change or rule. JA11–12. Nor were Defendant Worden's actions supervised by a principal officer, another reason why she cannot be considered an inferior officer. Secretary Fudge was not yet confirmed—indeed, no higher-up HUD official at the time, including the Acting Secretary, had ever been confirmed by the Senate. *Id.*

The position held by this career employee—Assistant Secretary for Fair Housing & Equal Opportunity—is a role that can be filled only by a principal officer. An Appointments Clause inquiry looks not only at the individual authority being challenged but also "the extent of power an individual wields in carrying out his assigned functions" overall. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051, (2018). Her position exercises significant duties, such as HUD's power over the FHA, Title VI of the Civil Rights

Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 109 of the Housing and Community Development Act of 1974, the Age Discrimination Act of 1975, the Federal Housing Enterprises Financial Safety and Soundness Act, and their regulations.[19]

The government may suggest that Congress authorized her appointment under the Federal Vacancies Reform Act of 1998, through which career officials assume acting positions, but even if that Act can validly allow Senate-confirmed officers to take on related acting functions, it cannot supersede the constitutional requirement that only "Officers of the United States" exercise significant responsibilities. *Buckley*, 424 U.S. at 126. Although *United States v. Eaton*, 169 U.S. 331 (1896), held that when a "subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official," *Eaton* did not concern the assignment of a *non*-officer to the role of acting principal. In fact, when *Eaton* was decided, the Vacancies Act of 1868 permitted only the first assistant and other heads of departments to take on the duties of a principal officer during a vacancy.[20] If *Eaton* is right that taking on the duties of a principal does not transform an inferior officer into a principal officer who

[19] Consolidated Delegation of Authority for the Office of Fair Housing and Equal Opportunity, 76 Fed. Reg. 73,984 (Jan. 29, 2011).

[20] U.S. Statutes at Large, 40 Cong. Ch. 227, July 23, 1868, 15 Stat. 168.

must be Senate-confirmed, taking on principal duties cannot make a non-officer into an officer.

F. The College has standing for its other claims.

The College also has standing to bring its other claims and is likely to succeed on them. Along with the five arguments raised in its preliminary injunction motion, the College brought claims under the Religious Freedom Restoration Act (RFRA), the First Amendment's Free Exercise Clause, the Regulatory Flexibility Act, and the Constitution's structural principles of federalism. JA56–70.

In particular, the government has impermissibly exempted non-religious actions while refusing to exempt the College's religious exercise, in violation of RFRA and the Free Exercise Clause. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021). FHA and HUD regulations exempt from its sex discrimination provisions private club lodgings, landlord-occupied dwellings with four units or less, and single-family home rentals by owner. 42 U.S.C. §§ 3603, 3604(c), 3607; 24 C.F.R. § 100.10. Because the FHA and HUD regulations are laden with secular exemptions they must satisfy strict scrutiny. *Fulton*, 141 S. Ct. at 1881.

The government may not rely on a "broadly formulated" interest in "equal treatment" or in "enforcing its non-discrimination policies generally," but must establish a compelling interest of the highest order "in denying an exception" to the College. *Id.* at 1879, 1881 (citation

omitted). And of course that compelling interest must also be narrowly tailored. *Id*.

Here, "[t]he creation of a system of exceptions ... undermines the [government's] contention that its nondiscrimination policies can brook no departures." *See id*. at 1881–82. The government grants exemptions to many people, but not to private religious colleges. Private membership clubs are not more important than private religious colleges, and the government may not treat secular activity better than religious activity. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Under the First Amendment and RFRA, that should be the end of the Directive.

IV. A preliminary injunction is warranted to stop irreparable harm to the College.

Equitable factors also favor urgent relief. JA302–04. The College's loss of its freedoms, with resulting harm to its educational mission and its students' privacy, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc.*, 692 F.3d at 870. (en banc). The Directive also forces irreparable financial injuries on the College, JA44–46—none of which are recoverable from the government, *Texas v. United States*, 328 F. Supp. 3d 662, 737 (S.D. Tex. 2018); JA46.

By contrast, the government lacks any interest in enforcing unlawful directives, *Vitolo v. Guzman*, No. 21-5517, 2021 WL 2172181, at *4, *8 (6th Cir. May 27, 2021), and the public interest supports preserving the status quo for colleges, *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021).

Under Section 706 of the APA, the court must set aside an unlawful agency action. When "regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

CONCLUSION

This Court should reverse the district court's dismissal of the case and denial of a preliminary injunction, reinstate the College's lawsuit, and instruct the lower court to enter a preliminary injunction protecting constitutional freedoms.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Julie Marie Blake
Julie Marie Blake

Dated: July 29, 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2021, the above appellant's brief 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.

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