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 United States District Court for the Western District of Missouri — (6:21-cv-03089-RK)
Honorable Roseann A. Ketchmark

BRIEF FOR *AMICUS CURIAE* AMERICA FIRST LEGAL FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

GENE P. HAMILTON
Counsel of Record
VICE-PRESIDENT AND GENERAL COUNSEL
AMERICA FIRST LEGAL FOUNDATION
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org

Attorney for Amicus Curiae

FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, *Amicus Curiae* America First Legal Foundation declares the following:

America First Legal Foundation has not issued stock to the public, has no parent company, and no subsidiary. No publicly-held company owns 10% or more of its stock, as the America First Legal Foundation is a nonprofit organization and has issued no stock.

Dated August 9, 2021

Respectfully submitted,

s/ Gene P. Hamilton
Gene P. Hamilton

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INTEREST OF *AMICUS CURIAE*[1]

America First Legal Foundation (AFL) is a nonprofit organization promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

AFL has a substantial interest in this case. Religious liberty is one of the founding freedoms of this Nation—a freedom explicitly protected by the First Amendment of the Constitution. The Plaintiff in this case is one of many honorable religious institutions of higher education vital to the history and traditions of the American people. Longstanding, sincerely held, mainstream religious beliefs should not be the basis for government discrimination, and AFL will vigorously defend those rights from governmental discrimination—particularly of the type present in this case. Additionally, AFL has an interest in ensuring that the Executive Branch does not abuse the Administrative Procedure Act as it appears to have done in this case.

[1] *Amicus curiae* certifies that all parties have consented to the filing of this brief, that no party or counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* contributed any money intended to fund this brief's preparation or submission.

SUMMARY OF ARGUMENT

On January 20, 2021, President Biden issued Executive Order 13988, declaring a policy of preventing and combating discrimination because of sexual orientation and gender identity. *See* Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021). On February 11, 2021, the *Acting* Assistant Secretary for Fair Housing & Equal Opportunity at the U.S. Department of Housing and Urban Development (HUD)—apparently believing she was vested with legislative powers under Article I, as well as the statutory authority of the Secretary, and without so much as going through notice and comment—issued a memo (the HUD Directive) implementing Executive Order 13988, mandating that the denial of housing due to sexual orientation and gender identity constitutes discrimination on the basis of "sex" in violation of the Fair Housing Act (FHA). *See* Joint Appendix 78-80 (JA).

According to the memo, in addition to reliance on President Biden's Executive Order, HUD's Office of General Counsel read the Supreme Court of the United States' decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—a case involving discrimination under Title VII of the Civil Rights Act of 1964—and unilaterally determined that it applied to an entirely different body of law, despite the Supreme Court not rendering such an explicitly broadly sweeping decision in *Bostock*.

The Acting Assistant Secretary's edict is unlawful for at least two reasons: (1) HUD did not provide an opportunity to provide notice and comment, as required under both the Administrative Procedure Act (APA) and the FHA; and (2) the HUD Directive is arbitrary and capricious.

The FHA is explicit that the HUD Secretary "shall give public notice and opportunity for comment with respect to all rules made under [the FHA]." 42 U.S.C. § 3614a. This applies to all FHA rules, both legislative and interpretive.

The APA exempts interpretive rules from notice and comment "except when notice . . . is required by statute," which the FHA does. The Supreme Court has held as much in two cases dealing with other statutes—Medicare and car safety—and in each, the general provisions of the APA gave way to the specific provisions of those statutes. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810 (2019); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983). A third Supreme Court case dealt specifically with the FHA, in which the Court left untouched the Fifth Circuit's holding that FHA's rulemaking provision includes interpretive rules. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 567 (2015). Other circuits agree, and district courts exploring this issue have likewise held that Section 3614a requires notice and comment for HUD's actions regarding what housing decisions are prohibited by the FHA.

But the APA would also require notice and comment here anyway because the HUD Directive is a legislative rule. The APA does not define interpretive rules, but the Supreme Court has specified that an interpretive rule simply "advis[es] the public of the agency's construction of the statutes and rules which it administers and lacks the force and effect of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (internal quotations omitted).

The D.C. Circuit additionally holds a rule has the force and effect of law if without it there would not be an adequate legislative basis for an enforcement action. *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Interpretive rules do not alter the rights or interests of parties, only reminding affected parties of existing duties. The D.C. Circuit's approach has been adopted in various jurisdictions.

The HUD Directive is legislative, having force and effect of law, providing a predicate essential to enforcement, and impacting the rights and interests of the College and its students. Yet HUD did not give notice or provide opportunity for public comment, promulgating it without the procedure required by law, and so this Court must vacate it.

The HUD Directive must also be vacated because it is arbitrary and capricious.

The APA makes federal agencies accountable to the public by subjecting their actions to judicial review, requiring reasoned decision making and consideration of all relevant factors when taking action. Courts will generally vacate agency actions that do not adequately provide reasoned decision making or fail to consider relevant factors.

Notice gives interested persons an opportunity to participate in the rule making through submitting comments. An agency must consider and respond to significant comments received during the period for public comment. The basic rule is an agency must defend its action based on the reasons it gave when it acted. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

Agencies must examine relevant data and show a rational connection between the facts found and the choice made. *State Farm*, 463 U.S. at 56. An agency's view of the public interest may change, but the agency must furnish a reasoned analysis for any new actions. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). The Supreme Court has stated that "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

HUD failed to make a connection between the facts found and the decision made. It provided no notice, no chance for comment, and no rule in proper form containing HUD's reasoning. Action is arbitrary and capricious if the agency failed to consider any important aspect of the problem, as HUD did. *Regents*, 140 S. Ct. at 1911; *State Farm*, 463 U.S. at 43.

One example is HUD's failure to consider if the Directive violated the Religious Freedom Restoration Act (RFRA), under which federal rules cannot burden religious liberty unless the Government shows it is the least restrictive means to achieve a compelling interest. The Supreme Court has recently vacated rules for violating RFRA, reasoning that agency actions that do not overtly consider RFRA's requirements or discuss RFRA when formulating their solution might be arbitrary and capricious. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84 (2020).

Nor did HUD consider reliance interests—whether religious or otherwise—or consider alternatives. The Supreme Court recently faulted an agency for not considering reliance interests, holding that omission alone rendered its action arbitrary and capricious, as did failing to address serious reliance interests on prior longstanding policy. *See Regents*, 140 S. Ct. at 1911.

The College of the Ozarks necessarily and justifiably relied upon the continuity of FHA rules and the expectation of notice and the opportunity to

participate in any possible future changes. An unexplained departure from prior agency practice is arbitrary and capricious. *See Brand X*, 545 U.S. at 981. Because HUD was not writing on a blank slate, it was required to consider reliance interests. *See Encino Motorcars*, 136 S. Ct. at 2126. HUD's failure to do so was arbitrary and capricious.

ARGUMENT

I. THE HUD DIRECTIVE IS SUBJECT TO NOTICE AND COMMENT.

Several foundational facts of this case are uncontested. The U.S. Department of Housing and Urban Development (HUD) administers the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (FHA). On January 20, 2021, President Biden issued Executive Order 13988, declaring a policy of combating and preventing discrimination because of sexual orientation and gender identity. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan 25, 2021). Section 2(b) of the order directs all agencies to take rulemaking actions as necessary to implement that policy, including a reference to following relevant statutory requirements for rulemaking. *See id.*

On February 11, 2021, HUD issued a memorandum entitled "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act." Joint Appendix 78-80 (JA). HUD refers to the document as a "directive," Exh. A at 3, and the issuing official—the *Acting* Assistant Secretary

for Fair Housing & Equal Opportunity—declared the mandate, "I am directing [HUD] to take the actions outlined in this memo to administer and fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity." *Id.* at 1.

The process by which an agency promulgates prospective measures to implement Congress's legislation is codified in the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA). One major component of implementing statutes is promulgating rules. The APA defines "rule making" as the process of "formulating, amending, or repealing a rule." *Id.* § 551(5). A "rule" is broadly defined as a "statement of general or particular applicability and future effect," one that is designed to "implement, interpret, or prescribe law or policy." *Id.* § 551(4).

For the reasons the College of the Ozarks sets forth in its opening brief, the HUD Directive is a rule under the APA, subject to all the requirements of rulemaking set forth in relevant statutes.

A. All FHA rules are subject to notice and comment, including both legislative and interpretive rules.

The HUD Directive is a rule subject to notice and comment under a provision of the FHA which declares without qualification: "The Secretary [of HUD] may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary *shall* give public notice and opportunity for comment with respect to *all* rules made under

this section." 42 U.S.C. § 3614a (emphases added). The language is clear. HUD *shall*, which is mandatory language. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). HUD must give notice *and* the opportunity for public comment. These requirements apply to *all* FHA rules. A close examination of Section 3614a confirms it must conform to the plain meaning of those words. It follows that the HUD Directive was promulgated unlawfully, and thus must be vacated and set aside. *See* 5 U.S.C. § 706(2).

As a general matter, interpretive rules are not subject to notice and comment. *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995). However, there are exceptions. The APA is explicit: "*Except when notice . . . is required by statute*, this subsection does not apply . . . to interpretive rules." *Id.* § 553(b)–(b)(A) (emphasis added). Contrast the APA here with the FHA, which requires notice and comment for all FHA rules, doing so explicitly in 42 U.S.C. § 3614a. This therefore includes interpretive rules.

The Supreme Court recently explained the correct approach for this Court to follow in *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019). That case "hinge[d] on the meaning of a single phrase in the notice-and-comment statute Congress drafted specially for Medicare in 1987." *Id.* at 1810. Because Medicare has its own notice-and-comment provision for rules promulgated to implement that program—a provision that included certain types of rules but not others—the Court looked to

the words of that statute to determine whether notice and comment were required in that case. *See id.* at 1808–10. The Court further explained, "the law requires the government to provide the public with advance notice and a chance to comment on any 'rule, requirement, or other statement of policy' that 'establishes or changes a substantive legal standard governing . . . the payment of services.'" *Id.* at 1810 (quoting 42 U.S.C. § 1395hh(a)(2)) (ellipsis in original).

The parties in *Allina* likewise debated which rules were encompassed in the program-specific statute and how that provision differed from the standard requirements of the APA. *Id.* at 1811. The Government argued that the two categories were substantive and interpretive as in the APA, while the challengers argued that 42 U.S.C. § 1395hh(a)(2) distinguished substantive rules from procedural. *Id.* Ultimately, the Supreme Court reaffirmed its prior holdings that "[u]nder the APA, 'substantive rules' are those that have the 'force and effect of law,' while interpretive rules are those that merely 'advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015)) The Court concluded that the Federal Government had violated its statutory notice-and-comment obligations. *Id.* at 1817.

The Supreme Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) is also instructive. The Court in *State Farm*

examined ongoing rulemaking, revisions, and rescissions of car safety standards. *Id.* at 34–40. As in *Allina*, *State Farm* dealt with a specific statutory provision for rulemaking—a 1974 statute codified at 15 U.S.C. § 1392(b)—with the APA governing the aspects of the rulemaking process that were not specified in the 1974 statute. *See id.* at 36, 41. *State Farm* rejected the argument that revoking a safety standard should be reviewed under the APA standard that would apply to an agency's declining to promulgate a rule. *Id.* at 41. The Court held, in part, that 15 U.S.C. § 1392(b) stated that the statute's rulemaking provision specified that it also applied to an agency's revoking a previous standard. *Id.* at 41.

Applying those cases to the facts of this case points to the correct result here. *State Farm* and *Allina* each involved rulemaking proceeding from a specific provision in the authorizing statute. Where the statute spoke to any aspect of the rulemaking process, the specific statute controlled. On matters not specified by the authorizing statute, the general provisions of the APA controlled. So too here, where 42 U.S.C. § 3614a requires notice and comment for all FHA rules (both legislative and interpretive), it controls. General APA provisions control all other pertinent aspects of HUD's administration under the APA.

The clearest indication that Section 3614a includes interpretive rules comes from the Supreme Court's review of a Texas case decided just a few years ago. There, the Fifth Circuit held:

> Congress has given HUD authority to administer the FHA, including authority to issue regulations *interpreting* the Act. Specifically, 42 U.S.C. § 3608(a) gives the Secretary of HUD the "authority and responsibility for this Act" and § 3614a provides expressly that "The Secretary may make rules . . . to carry out this subchapter."

Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282 (5th Cir. 2014) (emphasis added) (alterations in original). Affirming the appellate court, the Supreme Court took no issue with the Fifth Circuit's understanding of those provisions of the FHA. In fact, the only mention of the FHA's rulemaking provision at the Supreme Court appears to be when Justice Alito cited 42 U.S.C. § 3614a as the provision that gives HUD rulemaking authority for the FHA, giving no hint that HUD had any FHA rulemaking powers aside from that section or that there were types of FHA rules that were not covered by Section 3614a. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 567 (2015) (Alito, J., dissenting).[2] Section 3614a is the sole authorization for any FHA rules, and therefore covers both legislative and interpretive rules.

The Sixth Circuit came to the same conclusion. That court observed that "the Fair Housing Act was amended to authorize HUD to issue rules to implement the Act," *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1354 (6th Cir. 1995), and that HUD uses this provision's rulemaking authority to *interpret* the words in

[2] The 5-4 split in the Court's decision concerned how to decide the racial disparate-impact claims in that case. *See Inclusive Cmtys. Project, Inc.*, 576 U.S. at 546–47. No Justice expressed any view of the scope of Section 3614a that differed from the Fifth Circuit's.

the FHA. *See id.* ("At that time, HUD issued a regulation reflecting its interpretation of [the FHA term 'other prohibited sale and rental conduct' in] the Act and its application to insurance companies.").

Other federal courts agree that Section 3614a is the rulemaking authority for the FHA. *See, e.g.*, *Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("Section 808(a) of the FHA gives the Secretary of [HUD] the authority and responsibility for administering the Fair Housing Act (FHA) . . . and confers upon the Secretary authority to make rules . . . to carry out this subchapter. 42 U.S.C. § 3614a.") (ellipses in original); *NAACP v. Am. Fam. Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992) (explaining Section 3641a is to "make rules . . . to carry out [the FHA]."); *Ojo v. Farmers Grp.*, 600 F.3d 1205, 1208 (9th Cir. 2010) (same); *Mountain Side Mobile Est. P'ship v. Sec. of HUD ex rel. VanLoozenoord*, 56 F.3d 1243, 1248 (10th Cir. 1995) (same).

As the U.S. District Court for the District of Columbia explained, Section 3614a confers "the authority to issue rules—*following a notice and comment period*—to effectuate the goals of the FHA." *Am. Ins. Ass'n v. HUD*, 74 F. Supp. 3d 30, 32 (D.D.C. 2014) (emphasis added). The D.C. District Court added in another case that "the *only* rulemaking authority that the FHA delegates to HUD is specifically cabined to the procedures necessary to pursue its enforcement

discretion." *United States v. Mid-Am. Apt. Cmtys., Inc.*, 247 F. Supp. 3d 30, 35 (D.D.C. 2017) (emphasis added).

These rules would include prohibitions such as the HUD Directive. As the Eastern District of New York held, "42 U.S.C. § 3614a authorizes the Secretary of [HUD] to make rules to carry out the statute, and HUD has promulgated regulations that enumerate a number of acts that HUD considers to be prohibited by the [FHA]." *Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427, 442 (E.D.N.Y. 2002). This authority to implement the FHA includes "clarifying some of its key terms," *Equal Rights Ctr. v. Equity Residential*, 2016 U.S. Dist. LEXIS 44027, at *35 (D. Md. Mar. 31, 2016). Other districts agree, declaring that Section 3614a is the basis for HUD to interpret provisions of the FHA as prohibiting housing decisions for either sale or rent. *See, e.g.*, *Neals v. Mortg. Guar. Ins. Corp.*, 2011 U.S. Dist. LEXIS 53183, at *8 (W.D. Pa. Apr. 6, 2011).

All these authorities point in the same direction: 42 U.S.C. § 3614a requires HUD to provide notice and allow the opportunity to comment for both legislative rules and interpretive rules implementing the FHA.

B. The HUD Directive is a legislative rule that would be subject to notice and comment even under the APA.

Even if 42 U.S.C. § 3614a did not cover all rules, the HUD Directive would still require vacatur, because without a statute-specific provision the Directive would be subject to the standard requirements of the APA. This court has made

clear that exceptions to notice and comment are construed narrowly so as not to "carve the heart out of the notice provisions of Section 553." *Hous. Auth. of Omaha v. U.S. Hous. Auth.*, 468 F.2d 1, 9 (8th Cir. 1972). The HUD Directive is a legislative rule rather than an interpretive rule, and as such required notice and comment. *See* 5 U.S.C. § 553(c).

The distinction between the two types of rules is critical here. To expand upon the discussion in *Perez* referenced briefly above, the Supreme Court further explained:

> The term . . . "interpretive rule" is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. . . For our purposes, it suffices to say that the critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.

Perez, 572 U.S. at 96–97 (cleaned up).

The Court has recently elaborated on this distinction, including making it clear that agency actions are subject to this framework even if not technically styled as "rules." An agency action is "the equivalent of a legislative rule" if it "is issued by an agency pursuant to statutory authority and has the force and effect of law," versus issuing "the equivalent of an interpretive rule, which simply advises the public of the agency's construction of the statutes and rules which it

administers and lacks the force and effect of law." *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (internal quotation marks and brackets omitted).

The U.S. Court of Appeals for the District of Columbia Circuit has explored this distinction thoroughly, articulating principles that have informed the decisions of other circuits. In that leading regulatory jurisdiction, a rule has the "force and effect of law" if "in the absence of the rule there would not be an adequate legislative basis for [an] enforcement action." *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). "The critical feature of the procedural exception [to requiring notice and comment] is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 11994) (internal quotation marks omitted). "Ultimately, an interpretive statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties, but only reminds affected parties of existing duties." *Orengo Carabello v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (internal quotation marks omitted).

It is abundantly clear that the HUD Directive is legislative, and that even if not labeled a "rule" by HUD, it is clearly the functional equivalent. The HUD Directive made clear to Plaintiff (and all similar housing providers) that, going

forward, the school had to provide housing that would violate the school's longstanding policy.

The Directive has the force and effect of law. Without the Directive, a lawsuit to enforce the FHA brought by a same-sex or transgender individual against the College would not succeed, but with it, the challenge would. The Directive has a major impact on the rights of the College's students and the interests of the College. It did not remind the College of its duties; it imposed new ones (and serious ones, at that). Those are the hallmarks of a legislative rule.

HUD did not give notice or provide opportunity for public comment for the HUD Directive as mandated by 42 U.S.C. § 3614a. The rule was therefore promulgated "without observance of procedure required by law," 5 U.S.C. § 706(2)(D), and accordingly must be ruled "unlawful and set aside," *id.* § 706(2).

II. THE HUD DIRECTIVE IS ARBITRARY AND CAPRICIOUS.

In this case, HUD's failure to abide by the notice-and-comment requirements of 42 U.S.C. § 3614a is not only fatal to the HUD Directive under 5 U.S.C. § 706(2)(D) for violating APA's procedural requirements, it also makes the HUD Directive arbitrary and capricious, and therefore necessitates this Court's vacating the HUD Directive under 5 U.S.C. § 706(2)(A).

A. Notice and comment are vital for a court to assess whether a rule is arbitrary and capricious.

As the primary statute governing agency regulatory processes, the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). The APA requires agencies to engage in "reasoned decisionmaking" when administering policy, *Michigan v. EPA*, 576 U.S. 743, 750 (2015), and to consider all relevant factors, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The APA requires courts to vacate agency actions (including but limited to rules) as arbitrary and capricious if they do not check these boxes. 5 U.S.C. § 706(2)(A).

This goes to the very purpose of notice and comment. Like an answer on a math exam, notice-and-comment requirements make an agency "show its work." Notice is required to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). The material submitted then informs the agency's decision-making process. The "presumption from which judicial review should start" is one "*against* changes in current policy that are not justified by the rulemaking record." *State Farm*, 463 U.S. at 42. "An agency must consider and respond to significant comments received during the period for public comment." *Perez*, 575 U.S. at 96 (citing *Overton Park*, 401 U.S. at 416).

The Supreme Court has recently reaffirmed that "the Government should turn square corners in dealing with the people." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (internal quotation marks omitted). Adherence to formal requirements for administrative action promotes "agency accountability." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986). When promulgating a final rule, the elements of that published rule mandated by 5 U.S.C. § 553(c) include material that is critically important to judicial review. "The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted." *Regents*, 140 S. Ct. at 1909; *see also Chenery Corp.*, 318 U.S. at 95 (holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").

B. The HUD Directive would be invalid as arbitrary and capricious even if it were not a rule.

Going even further, the HUD Directive would be fatally flawed even if it was not a rule at all, because the APA authorizes judicial review of all final "agency action," 5 U.S.C. § 704, of which rules are but one category. The APA goes on to define "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). It is that final agency action impacting the aggrieved party that "provides a focus for judicial review, inasmuch as the agency must have exercised

its power in some manner." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). That occurred here when HUD issued the Directive. Any such "agency action" is what a court must vacate if the action is arbitrary or capricious. 5 U.S.C. § 706(2)(A).

To survive arbitrary-and-capricious review, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Nat'l Parks Conservation Ass'n v. McCarthy*, 811 F.3d 1005, 1010 (8th Cir. 2016) (internal quotation marks omitted). Changing social attitudes have no bearing on HUD's legal requirements when taking final action. "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." *State Farm*, 463 U.S. at 57 (cleaned up). The burden rests on HUD to explain its rationale. "A court may not supply a reasoned basis for the agency's action that the agency itself has not given." *Dolgencorp, LLC v. NLRB*, 950 F.3d 540, 551 (8th Cir. 2020) (internal quotation marks omitted). HUD "must examine the relevant factors and articulate a satisfactory explanation for its action." *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 970 (8th Cir. 2016).

Yet HUD failed to do so by (1) failing to provide notice, with all the information notice would entail, (2) failing to allow for comment, and (3) failing to publish a rule in proper form that would set forth HUD's reasoning for a court to

review. An action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 956 (8th Cir. 2014) (internal quotation marks omitted). There are several important aspects that HUD failed to consider here.

C. HUD did not consider whether the Directive violates RFRA.

One such failure is that HUD did not consider the Directive's implications for religious liberty and whether the Directive runs afoul of federal statute. The Supreme Court has recently decided yet another case concerning federal rules burdening religious liberty for which the agency did not begin by conducting notice and comment, where the question was whether the rule violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (RFRA). These cases were part of a decade of ongoing litigation challenging rules implementing the Patient Protection and Affordable Care Act of 2010, 124 Stat. 119 (ACA). Specifically, one ACA provision requires many employers to provide "preventive care" in their healthcare policies without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4). The ACA does not define "preventive care." So in a line of cases beginning with *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and most recently culminating in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Court has continued to wrestle with this ongoing regulatory effort.

Amicus will not repeat the arguments made by the College and likely to be made by other *amici* concerning whether the HUD Directive violates RFRA. Instead, we focus on the narrow issue of the impact of the lack of notice and comment on judicial review of the Directive. RFRA "provide[s] very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. Under RFRA, the Federal Government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden . . . is in furtherance of a governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). This statutory protection "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a).

We will not examine here additional cases in which RFRA prevailed over federal rules that burdened religious liberty, many of which are cited in other briefs in this appeal. Instead, *amicus* makes the point that, as in the ACA litigation, it is at minimum quite plausible that the HUD Directive "is capable of violating RFRA." *Little Sisters of the Poor*, 140 S. Ct. at 2383. Given that it was a live issue, HUD needed to explore it and be open to input. HUD's refusal to provide notice to religious housing providers and subsequent refusal to consider their comments before taking final action is inexplicable, unless the agency concluded that it could

not possibly survive a RFRA challenge demanding a religious exemption, and decided it was better to go into the inevitable litigation with no record instead of with a record raising all the religious concerns that HUD then decided not to account for in the contours of its final action. In *Little Sisters of the Poor*, the Court reasoned:

> It is hard to see how the Departments could promulgate rules consistent with these decisions if they did not overtly consider these entities' rights under RFRA. . . . If the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.

Id. at 2383–84.

That reasoning would apply to HUD's actions here in precisely the same manner. And for those same reasons, the HUD Directive is arbitrary and capricious.

D. HUD did not consider religious liberty or other reliance interests, or alternatives to the Directive.

In addition to not considering those possible religious liberty claims, HUD did not consider the related yet separate issue of whether religious housing providers would have relied upon the current state of the law when entering into contracts currently in force. With no notice that HUD was formulating a major change in FHA policy, the College had no way to hedge against imminent disruptions to its residential housing arrangements.

In yet another recent case, the Supreme Court applied that standard to an agency's failure to consider reliance interests when reviewing the decision of Acting Secretary of Homeland Security Duke to end Deferred Action for Childhood Arrivals (DACA). The Court held:

> That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was legitimate reliance on the DACA Memorandum. When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.

Regents, 140 S. Ct. at 1913 (cleaned up).

The College's students "have enrolled in degree programs" and perhaps "even married and had children, all in reliance" on the College's housing policy, *id.* at 1914 (internal quotation marks omitted), and so the College necessarily relied upon continuity of FHA rules for the foreseeable future, and at minimum expected time and opportunity to participate in any possible future change in HUD policy. An unexplained departure from prior agency practice is arbitrary and capricious. *Minnesota v. Ctrs. For Medicare & Medicaid Servs.*, 495 F.3d 991, 998 (8th Cir. 2007). Because HUD "was not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns. . . . That failure was arbitrary and capricious in violation of the APA." *Regents*, 140 S. Ct. at 1915 (internal quotation marks omitted).

CONCLUSION

For these reasons and those set forth by the Plaintiff, the Western District of Missouri should be reversed, and the HUD Directive vacated because HUD failed to provide notice and comment and the Directive is arbitrary and capricious.

Respectfully submitted,

s/ Gene P. Hamilton
GENE P. HAMILTON
Counsel of Record
VICE-PRESIDENT AND GENERAL COUNSEL
AMERICA FIRST LEGAL FOUNDATION
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org

Attorney for Amicus Curiae
America First Legal Foundation

August 9, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

This brief contains 5,916 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: August 9, 2021

s/ Gene P. Hamilton
Gene P. Hamilton

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2021, I electronically submitted the foregoing *amicus curiae* brief to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: August 9, 2021

s/ Gene P. Hamilton
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