No. 22-816

In the Supreme Court of the United States

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

Petitioner,

v.

JOSEPH R. BIDEN JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE, ETHICS AND PUBLIC POLICY CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., REASON FOUNDATION, TAXPAYERS PROTECTION ALLIANCE, AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a notice-and-comment violation, on its own, can establish Article III standing for a regulated entity within the applicable zone of interests.

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INTEREST OF *AMICI CURIAE*[1]

Amici are six organizations that have diverse views and focus on a variety of legal and policy issues. All either submit public comments on proposed rules as institutions or employ scholars who have submitted public comments in their personal capacity. *Amici* thus have a strong interest in ensuring that the right to public notice and comment is preserved for all.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual Cato Supreme Court Review.

Cato has a strong interest in enforcing separation-of-powers principles and protecting the right to access federal court when citizens have been harmed by improper administrative proceedings. Moreover, Cato scholars frequently submit comments to agencies engaged in notice-and-comment rulemaking. Cato thus has a strong interest in protecting the right to participate in that procedure.

The Ethics and Public Policy Center (EPPC) is a nonprofit research institution founded in 1976 and dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy, law, culture,

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission. All parties were timely notified of *amici*'s intent to file this brief.

and politics. EPPC's programs cover a wide range of issues, including government accountability, judicial restraint, religious liberty, and personhood and identity.

EPPC has a strong interest in protecting the right to participate in the agency rulemaking process and in preserving its own opportunities to help shape public policy. In recent years, EPPC has become an active participant in the agency rulemaking process, providing comments on proposed rules and educating others on how to engage.[2] EPPC thus has a strong interest in protecting its own and others' rights to participate in the rulemaking process.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

NFIB Legal Center has a strong interest in ensuring agencies adhere to the appropriate rulemaking process. For example, in calendar year 2022, NFIB submitted 26 comment letters to agencies advocating on behalf of small businesses in the face of increased

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[2] *See* https://eppc.org/engagement-on-agency-actions/.

or amended regulatory burdens. NFIB submitted one petition for agency rulemaking. In 5 of the 26 rules NFIB commented on, the SBA's Office of Advocacy sent letters to the relevant agency identifying flaws in the agency's analysis or legal deficiencies in the rule. By its involvement here, NFIB Legal Center seeks to maintain the right of regulated entities, like small businesses, to participate in the rulemaking process.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason Magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

The Taxpayers Protection Alliance (TPA) is a non-profit, non-partisan organization dedicated to educating the public through the research, analysis, and dissemination of information on the government's effects on the economy. TPA, through its network of taxpayers, will hold politicians accountable for the effects of their policies on the size, scope, efficiency, and activity of government. TPA and its staff also seek to educate the public about government transparency and openness in the United States and around the world.

TPA has a strong interest in ensuring the American individuals, organizations, and businesses can continue to hold government agencies and officials accountable. Public comment periods offered by regulatory agencies are critical to accomplish this task. TPA has submitted dozens of public comments to agencies, urging particular action or increased transparency on the part of government. It is important to TPA's mission that regulated entities have an opportunity to provide input and feedback before any regulation is undertaken.

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual freedom. To that end, it has sponsored scholarship and filed briefs opposing laws that interfere with constitutionally protected liberties, delineating the proper procedures for government to follow in issuing regulations, and ensuring that there's judicial review in both of these types of cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Administrative Procedure Act (APA), if federal agencies choose to create policy prospectively, they are typically required to do so through "notice-and-comment rulemaking." This process guarantees interested parties an opportunity to influence the development of such rules that have the force and effect of law.

Of course, there are exceptions. The APA generally allows agencies to create certain rules without going through the requirements of notice and comment, such

as for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" and when there is "good cause" found that the normal rulemaking process is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). Rules promulgated through the notice-and-comment process are sometimes referred to as "legislative rules," and those made without such procedures are called "nonlegislative rules." *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1312–17 (1992). Those exceptions, however, can be superseded by statute. 5 U.S.C. § 553(b).

The Fair Housing Act (FHA) eliminates many, if not most, of those exceptions for the U.S. Department of Housing and Urban Development (HUD) when HUD promulgates rules under the authority of the FHA. And yet, in response to an executive order by President Biden, HUD ignored the FHA and issued a "Directive" in 2021 without notice and comment. That Directive ordered HUD to change how it enforces the FHA's prohibition against sex discrimination in housing. The Directive demands full enforcement against allegations of discrimination in housing because of "sexual orientation" or "gender identity."

In light of the Directive, Petitioner, the College of the Ozarks, reasonably feared that HUD would require it to reverse its policy of separating residence halls based on biological sex. For that reason, the College challenged the Directive in court. But the court below refused to hear the case on the merits, holding that the College did not have standing.

The sole issue before this Court is whether HUD can avoid judicial review of its decision to ignore the procedural requirements of the APA and FHA. HUD argues that its failure to go through notice-and-comment rulemaking in creating department policy set forth in the Directive did not inflict a cognizable "procedural injury" on the College sufficient to establish standing, an argument with which the lower court agreed.

The lower court was wrong. The procedural requirements of notice-and-comment rulemaking are legal obligations and exist for a reason. They hold agencies accountable to the public and foster reasoned decisionmaking. They introduce a democratic element into administrative processes and create a basis by which agency rules can be invalidated when they are "arbitrary and capricious."

All interested persons, but especially regulated parties, benefit from this process. The right to notice-and-comment rulemaking is not a bare and meaningless procedural right. When agencies circumvent notice-and-comment rulemaking, it imposes real costs on parties, and public policy suffers. The violation of that procedural right is itself sufficient to establish Article III standing for interested parties, like the College here.

HUD, like all agencies, might often prefer to avoid the accountability and deliberation of notice-and-comment rulemaking. And if courts continue to deny judicial review by improperly invoking doctrines of justiciability, agencies will only be more emboldened to skirt these safeguards. Instead, courts should review such claims on the merits, and they can do so without

unjustifiably burdening the ability of agencies to promulgate important rules.

As both Petitioner and Judge Grasz (dissenting below) note, "This case highlights the corrosive effect on the rule of law when important changes in government policy are implemented outside the normal administrative process." Pet. at 2. This Court should grant certiorari to ensure that agencies follow the APA's requirements when making rules and important policy choices that can affect all aspects of American life.

ARGUMENT

As Petitioner has argued, HUD was required to issue its Directive through the notice-and-comment process outlined in the APA. *See* 42 U.S.C. § 3614a (requiring HUD to promulgate "all rules" issued under its jurisdiction through the notice-and-comment process); 5 U.S.C. § 553(b) (establishing the notice-and-comment process for agency rules with limited exceptions). The court below did not hold otherwise. Instead, the court held that Petitioner did not have standing to challenge the denial of the right to submit comment *even if* that denial was unlawful. But that decision misapplied and misunderstood this Court's standing doctrine.

To be sure, this Court has held that a plaintiff must have standing in order to challenge an agency's directive. *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021).[3] But when agencies violate a "procedural right" that is

[3] To establish standing, plaintiffs must show that they "suffered an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and would likely be 'redressed by a favorable decision.'" *Collins*, 141 S. Ct. at 1779 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

granted by statute and designed to "protect [a plaintiff's] concrete interest," that violation is "special" and results in relaxed standing requirements. *See Lujan*, 504 U.S. at 572 n.7 (noting that, for example, such circumstances may not require "meeting all the normal standards for redressability and immediacy").

Pre-enforcement challenges, like the one brought by Petitioner, help guarantee that parties can challenge allegedly unlawful agency rules before incurring the costs of complying with those rules. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 153 (1967). When an agency refuses to follow a legally required procedure, that "procedural injury" may increase "the risk of future harm to some party." Christopher T. Burt, *Procedural Injury Standing After* Lujan v. Defenders of Wildlife, 62 U. Chi. L. Rev. 275, 85 (1995). That is why, to establish standing to bring a pre-enforcement challenge, it is enough to show "some possibility" that vacating the rule "will prompt the [agency] to reconsider the decision" to issue the rule in its current form. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (plaintiffs are "not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority").

Far from being a "procedural right *in vacuo*," *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009), the notice-and-comment process mandated by the APA and FHA protects parties and the general public from injury. Certiorari here is warranted to protect the interests promoted by the notice-and-comment process and to clarify that courts must ensure agencies do not evade legally mandated procedural protections.

I. THE PETITION RAISES AN IMPORTANT QUESTION ABOUT WHEN AGENCY EVASION OF THE NOTICE-AND-COMMENT PROCESS ESTABLISHES STANDING.

"The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Congress has granted HUD some statutory power to promulgate rules. 42 U.S.C. § 3614a. But when HUD chooses to exercise that power, Congress has also placed HUD in a "two-way dialogic commitment, in which government decision-makers may not simply ignore the arguments raised by citizens." Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. Miami L. Rev. 149, 150 (2012).

This dialogic requirement is marked by several well-known procedures under the APA. For instance, the notice-and-comment rulemaking process includes a "general notice of proposed rulemaking." 5 U.S.C. § 553(b). To meaningfully alert the public of an expected regulatory action, the notice "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). This is followed by a "comment period," in which the agency must "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). Together, both notice and the comment period exist "to make criticism or

formulation of alternatives possible." *Home Box Office, Inc.*, 567 F.2d at 35–36.

At the end of the comment period and "consideration of the relevant matter presented," any final rule published in the Federal Register must be a "logical outgrowth" of the proposed rule. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–82 (D.C. Cir. 2009).[4] Further, a final rule must be accompanied by a "concise general statement of [the rule's] basis and purpose." 5 U.S.C. § 553(c). This requirement includes an obligation "to identify and respond to relevant, significant issues raised during those proceedings." *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012).

These procedures are not mere formalities. The notice-and-comment process facilitates the important democratic value of allowing interested parties and the public to participate in deliberative lawmaking. This participation is critical to the creation of rational rules that are not "arbitrary or capricious." And public participation guards against imposing unnecessary compliance costs on regulated parties due to harms in a rule that an agency could have been alerted to.

A. The Notice-and-Comment Process Affords Interested Persons a Fair Process and a Voice.

The notice-and-comment process provides several crucial benefits to interested persons during agency

[4] The "logical outgrowth" test requires an agency to issue an additional notice and solicit further comments whenever an agency "changes its mind about a critical element of a proposed rule." Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 473–74 (2013).

rulemaking. First among them, the process promotes "fairness" by "affording interested persons notice and an opportunity to comment." *Chrysler Corp.*, 441 U.S. at 316. Without the democratizing elements of notice and comment, rulemaking in the administrative system would "go relatively unchecked by the public." James Yates, *Good Cause Is Cause for Concern*, 86 Geo. Wash. L. Rev. 1438, 1442 (2018). "[M]eaningfully representative democratic procedures" such as notice and comment help legitimize agency action. This is not only because of the general assumption that *all* lawmaking should follow some democratic process, but also because those procedures have intrinsic value for interested persons.

Regardless of a particular comment's effect on the outcome of the rulemaking process, the opportunity to comment accords a voice to interested parties through the "obligation of government to attend and respond." Weinberg, *supra*, at 162–63, 174; *see also* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 Admin. L. Rev. 343, 346 (2009) ("Social psychology also has shown that fair procedures that reinforce the legitimacy of the administrative state strengthen individuals' normative commitment to obey the law.").

This obligation to "attend and respond" to the concerns of interested persons is exemplified by two procedural demands: an agency's responsibility to respond to all "relevant, significant issues raised during" the comment period, *N.C. Growers' Ass'n*, 702 F.3d at 769, and the requirement that final rules must be a "logical outgrowth" of the preceding notice of proposed rulemaking. *See Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991). The former requirement ensures

that agencies do not ignore the concerns of interested parties, since failure to respond to such concerns can result in the invalidation of the action. *See, e.g.*, *Bloomberg L.P. v. SEC*, 45 F.4th 462, 476–78 (D.C. Cir. 2022) (invalidating the SEC's decision to approve new reporting requirements proposed by FINRA because the Commission neglected to give a reasoned explanation in response to Bloomberg's concerns about the costs that FINRA, as well as market participants, will incur from the requirement); *Hewitt v. Comm'r of IRS*, 21 F.4th 1336, 1338 (11th Cir. 2021) (similarly finding that the agency erred by not adequately responding to comments); *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 741–45 (D.C. Cir. 2019) (same). And the latter requirement likewise ensures that agencies give interested parties a voice for concerns on all "critical element[s]" of a proposed rule. *See* Hickman, *supra* n.3, at 473–74.

Together, these procedural protections respect the fundamental right of those who are affected by public policy to have a fair process for and a voice in its creation. When that right is denied, interested persons are denied the voice that notice and comment was designed to afford.

B. The Notice-and-Comment Process Benefits Interested Persons by Improving the Content of Rules.

The notice-and-comment process also benefits interested persons by promoting "informed administrative decisionmaking" and reducing the likelihood of arbitrary and capricious rules. *See Chrysler Corp.*, 441 U.S. at 316. A crucial tenet of our republican system is that government action should not be captive to the arbitrary will of a powerful faction. Public policy

should not be dictated by a single interest group, but rather should attempt to advance the public interest as a whole. *See* The Federalist No. 51 ("In the extended republic of the United States . . . a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."); *cf. Mathews v. Eldridge*, 424 U.S. 319, 334–35, 344 (1976) (reasoning that the key factor in determining whether a given process is due an individual is the extent to which the asserted procedural right increases the accuracy of the government's determination.). Thus, all policymakers—whether in legislatures or agencies—are legitimized in part by their institutional capacity to "refine and enlarge the public views." *See* The Federalist No. 10.

Notice-and-comment rulemaking helps to foster "deliberative decisionmaking aimed at furthering public rather than private values." Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1554 (1992). Even when they have high-minded motivations, agency decisionmakers, like all decisionmakers, "routinely start the day with incomplete information, unexamined biases, and a limited sense of the possible." Weinberg, *supra*, at 160. Notice-and-comment rulemaking counteracts these biases and helps to "increase the substantive quality of decisions," because it encourages input from a much broader group with different sets of knowledge and interests. *See id.* at 159. Both the regulated parties and the beneficiaries of a proposed rule have direct knowledge of their own needs—knowledge that an agency may not have. And notice-and-comment rulemaking also helps gather input from a greater number of agency staff members and offices than the more informal procedures for creating

"interpretive rules" or "policy statements." Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 Ohio St. L.J. 251, 303–04 (2009). In short, the solicitation of information from all interested persons helps expand the "limited sense" of decisionmakers. Weinberg, *supra*, at 160

Moreover, because a notice of a proposed rule must "include sufficient information about the data and reasoning upon which the agency relied in developing its proposed rules," the public is able to provide more constructive critiques. Hickman, *supra* n.3, at 474. Studies have shown that agencies will constructively respond to comments, such as by improving the evidentiary basis for a rule. *See generally* Mia Costa, Bruce A. Desmarais, & John A. Hird, *Public Comments' Influence on Science Use in U.S. Rulemaking: The Case of EPA's National Emission Standards*, 49(1) Am. Rev. Public Admin. 36 (2019). Public input thus facilitates "logical and thorough consideration of policy." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 542 (2003).

Finally, the opportunity for so-called "hard look" judicial review improves the quality of rules. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Corp.*, 463 U.S. 29 (1983), this Court held that agencies must articulate the basis for their policy decisions. The Court endorsed the "reasoned decisionmaking" requirement, also known as the "hard look" doctrine. *Id.* at 43. That doctrine "calls on agencies, as a condition of judicial validation of their policy decisions, to engage in the type of decisionmaking that tends to produce rational decisions."

Bressman, *supra*, at 528 n.313. "Robust public participation," among other things, "enhances the later process of judicial review by bringing to light technical issues that generalist judges might not otherwise spot, thereby enabling courts to engage in meaningful scrutiny of the resulting rules." David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L. J. 276, 318 (2010). That scrutiny is critical to the promulgation of well-reasoned rules.

Whether out of expediency or a desire to avoid responding to concerns from interested parties, HUD bypassed notice-and-comment rulemaking in issuing its Directive. As a result, the College and all other interested persons lost out on the benefits of that process. Congress created the procedural right to notice-and-comment rulemaking to protect the interests of parties like the College—parties whose input would have been valuable to the rulemaking process. The right to participate in that process and to help shape reasoned policymaking is far from a "procedural right *in vacuo*." And the deprivation of that right is an injury that establishes standing.

C. Rules That Are Created Without Notice-and-Comment Impose Compliance Costs on Regulated Entities.

Notice-and-comment rulemaking "allows affected parties, who participate in the formulation of the rule, to anticipate the rule and plan accordingly." Bressman, *supra*, at 542. Despite protests that nonlegislative rules—like HUD's Directive—carry no legal force on their own, *see, e.g.*, Gov't CA Br. at 21, *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992 (8th Cir. 2022) (No. 21-2270), these rules "as a practical matter can quite

readily impose binding standards or obligations upon private parties." Anthony, *supra*, at 1360; *see also* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 263 (2018) (contending that all nonlegislative rules—whether "interpretive rules" or "policy statements"—can have a practically binding effect). The decision to either challenge, follow, or ignore such rules imposes real costs on parties. Since the notice-and-comment process has the potential to avert those costs by altering the content of a nonlegislative rule, the benefits of that process are just as critical for nonlegislative rules as they are in other rulemaking contexts.

There are at least two ways that nonlegislative rules can impose costs on parties. First, the text of such rules can leave little room for discretion by the agency or the regulated parties. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (reasoning that some nonlegislative rules fail to "leave[] the agency and its decisionmakers free to exercise discretion" and are thus practically binding); *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000) (same). If such rules either incorrectly interpret statutes or impose arbitrary policy goals, regulated parties will almost certainly sustain unjustified costs because of this lack of discretion. Some such costs are inevitable whether the regulated parties choose to comply (shouldering unnecessary compliance costs) or to ignore or challenge the rule (incurring costs of legal challenges, agency enforcement actions, and penalties). *See* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 Ohio St. L.J. 85, 121–22 (1997).

Second, the costs on interested parties are exacerbated by the deference that courts often give to such rules. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that an agency's statutory interpretations announced in nonlegislative rules are due *Skidmore* deference); *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) (noting that even nonlegislative rules can possibly receive *Chevron* deference). Judicial deference regimes increase the likelihood that erroneous interpretations of law or irrational policy choices by agencies will be upheld by courts when challenged. This in turn increases the costs of challenging such rules. As a result, it is even more important for interested parties to reap the benefits of notice-and-comment rulemaking *before* a rule is issued.

HUD's Directive here is an example of a nonlegislative rule that is, for all intents and purposes, binding. While HUD may have strategically chosen to avoid providing specifics on how it will implement the Directive, the Directive's text leaves little room for agency discretion in pursuing enforcement of complaints that educational institutions have discriminated against individuals on the basis of sexual orientation or gender identity in housing practices. "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act" (Feb. 11, 2021), App.36a–41a. The Directive describes HUD's previous approach to discrimination based on sexual orientation or gender identity as "limited" and "insufficient." App. at 38a. It calls out institutions of education for allegedly perpetuating "injustices" in housing. *Id.* at 37a. And the Directive insists on full enforcement of the FHA.

The costs for the College in anticipating the Directive's application to its housing policy are obvious. The Directive's forceful instructions for the agency to shift its enforcement priorities put the College to a precarious choice: either change its policy, challenge the Directive, or ignore the Directive and face likely penalties and the costs of defending its own policy. Indeed, the College is bearing the costs of this legal challenge. Regardless of the merits of the Directive's command, the College and all interested parties would have benefitted from notice-and-comment rulemaking for this rule. HUD's evasion of that process is a "procedural injury" sufficient for standing.

II. CERTIORARI IS WARRANTED TO ENSURE THAT AGENCIES FOLLOW NOTICE-AND-COMMENT RULEMAKING WHEN LEGALLY REQUIRED.

The risk that agencies like HUD will continue to circumvent notice-and-comment rulemaking is grave. But it is also unsurprising. Bressman, *supra*, at 544. Agencies are inevitably incentivized to avoid notice-and-comment rulemaking in circumstances where they believe they can avoid judicial review and accountability. As such, certiorari is warranted to ensure that courts, like the Eighth Circuit, do not casually accept agencies' assertions that the denial of notice-and-comment rulemaking imposed no injury and created no standing.

Absent strong judicial enforcement, perverse incentives will continue to push agencies toward the same shortcut that HUD took here. Indeed, it is frequently in an agency's own short-term interest to avoid notice-and-comment rulemaking and the deliberation and accountability it brings. Rulemaking procedures can

force agencies to choose "between altering their preferred policy decisions and implementing preferred policies at a higher political cost," and can require "agencies to provide reasoned responses to public criticism, which is subject to additional public criticism and judicial review." Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 Admin. L. Rev. 65, 78–79 (2015). It is therefore to be expected that agencies will often find it more convenient to circumvent the notice-and-comment process to quickly achieve their policy goals. *See* James R. Copland, *The Unelected: How an Unaccountable Elite is Governing America* 77–78 (2020) (arguing it has become "all too easy for agencies to avoid the rulemaking process established by Congress and effectively to rule by fiat"); Leor Sapir, *Regulate Now, Explain Later: Understanding the Civil Rights State's Redefinition of "Sex"* 35 (Aug. 2020) (Ph.D. dissertation, Boston College) ("In practice . . . agencies have come to use guidance letters and other 'interpretations' as a means of producing desired regulatory goals without going through rulemaking procedures.").[5]

Empirical evidence supports this supposition. Agencies issue a greater number of rules without notice and comment than they do with those procedures. Franklin, *supra*, at 306. For example, from 1995 to 2012, agencies "avoided the notice-and-comment process on almost 52% of rules." Raso, *supra*, at 91. Agencies commonly justify this choice by attempting to shoehorn agency rules into notice-and-comment exceptions. One example of this strategy is claiming that their rules are exempted "interpretative rules" or "policy statements." Todd D. Rakoff, *The Choice Between*

[5] Available at https://bit.ly/40Mwdxz.

Formal and Informal Modes of Administrative Regulation, 52 Admin. L. Rev. 159, 166 (2000). Another example is invoking the "good cause" exception to notice-and-comment rulemaking as a legal justification. Yates, *supra*, at 1440. And agencies may also attempt to avoid notice-and-comment rulemaking by invoking extremely narrow exceptions found in other statutes. *See* 29 U.S.C. 655(c)(1) (permitting immediate effect of an OSHA emergency temporary standard where a "grave danger" exists in the workplace); *NFIB v. OHSA*, 142 S. Ct. 661 (2022) (noting that of the nine times OSHA invoked this exception, only one was "upheld in full"). Given the motivations to avoid notice-and-comment rulemaking, the Court should be skeptical of a theory of standing that would exempt an agency from judicial review for that choice, even when the agency's legal theory justifying its alleged exemption is wrong.

Further, courts can mitigate agencies' tendency to avoid notice-and-comment rulemaking *without* halting the promulgation of necessary rules. Courts are "skilled at reviewing agency compliance with procedures," just as courts are adept at reviewing litigants' compliance with other procedural rules like the Federal Rules of Civil Procedure. Kyle Schneider, *Judicial Review of Good Cause Determinations under the Administrative Procedure Act*, 73 Stan. L. Rev. 237, 267 (2021). When courts use that expertise to enforce the requirements of notice and comment, agencies pay a higher cost for attempting to avoid the APA's commands. Of course, agencies "do not face litigation risk for avoidance unless they are sued," and, as one would expect, "empirical analysis shows that agency avoidance of rulemaking procedures increases as litigation risk decreases." Raso, *supra*, at 107. Thus, excessive

hurdles to judicial review will decrease the economic cost of circumventing notice and comment. For that reason, courts should not be required to quickly accept agencies' claims that parties lack standing or that an issue is "unripe" for review. If agencies know instead that taking unauthorized administrative shortcuts will put them at greater risk of successful pre-enforcement challenges, they will be more incentivized to afford parties the benefits of notice-and-comment rulemaking in the first place.

Finally, this Court should not be concerned about the effect that robust judicial review will have on agencies' ability to promulgate necessary rules. To be sure, the possibility of judicial review increases the price of agency actions and so "discourage[s] agency action overall." Seidenfeld, *Why Agencies Act*, *supra*, at 301. But there is little empirical evidence suggesting that the procedural requirements imposed by the APA and the courts have inordinately stifled agencies' ability to promulgate rules. *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed*, 1950-1990, 80 Geo. Wash. L. Rev. 1414, 1437–38, 1454–57 (2012). More importantly, because the "costs and benefits of regulation to society differ greatly from the costs and benefits that the agency experiences when it regulates," discouraging agencies from acting inappropriately can "counterbalance[] other influences that might cause agencies to be unduly prone to act when regulation is not warranted." Seidenfeld, *Why Agencies Act*, *supra*, at 321.

In short, agencies are incentivized to, and often do, avoid notice-and-comment rulemaking. Careful scrutiny of agencies' attempts to avoid judicial review puts

institutional pressure on agencies to promulgate rules through proper procedures. This Court should ensure that agencies like HUD cannot easily circumvent the protected "procedural right" to the notice-and-comment process.

CONCLUSION

For the foregoing reasons, and those presented by the Petitioner, this Court should grant certiorari.

Respectfully submitted,

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