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 REPLY BRIEF

RYAN L. BANGERT
GREGGORY R. WALTERS
ALLIANCE DEFENDING FREEDOM
15100 N 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbangert@ADFlegal.org
gwalters@ADFlegal.org

Counsel for Plaintiff-Appellant

JOHN J. BURSCH
MATTHEW S. BOWMAN
JULIE MARIE BLAKE
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
jbursch@ADFlegal.org
mbowman@ADFlegal.org
jblake@ADFlegal.org

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INTRODUCTION AND SUMMARY OF ARGUMENT

It is clear what HUD *should* have done in this case. To publish a "directive" and "rule change" that creates new protected classes to be fully enforced on all regulated entities nationwide, it should have followed the normal, legally required rulemaking process under the Administrative Procedure Act (APA) and Fair Housing Act (FHA), allowing advance public comment and weighing competing interests. Such a process might even have been complete by now. Instead, driven by the politics of an inauguration day Executive Order, HUD rushed this Directive three weeks later, without considering any competing interests or collateral damage.

Now religious colleges face crippling investigations and fines unless they stop speaking about single-sex housing and open their girls' dormitories to males. The government, having tried to bully the public into compliance by skirting its rulemaking obligations, changed course when sued. It convinced the District Court that this rule is somehow less than binding, and it obtained both a denial of the College's injunction motion and a *sua sponte* dismissal of all the College's claims.

But the College of the Ozarks has standing to challenge this Directive. The Directive creates a mandatory legal standard with new protected classes under the FHA, binds external entities, and requires "full enforcement" for the first time. A full enforcement mandate necessarily affects regulated entities. Indeed, in arguments below the

government insisted the Directive does govern the College's policies and speech. *See* Aplt.Br. 22–23. This demonstrates more than a credible threat of enforcement.

For similar reasons, the Directive is subject to judicial review under the APA, as it mandates a new standard of behavior on enforcement officials. The government's reliance on *Bostock* as eclipsing the Directive is misplaced—there the Court disavowed that it was ruling outside of Title VII or regulating intimate spaces (e.g., dorm rooms and showers). The Directive *extends* *Bostock*, and extending FHA regulations constitutes a legislative rule.

If the government can avoid judicial review of this binding standard on external entities, agencies will re-label all their rules to create a new category: "binding policy." Agencies could create legal obligations and mandate full enforcement without the bothersome public input, reasoned decision-making, or judicial review involved in rulemaking. And those rules, as here, could freely restrict or compel speech. This would thwart the Free Speech Clause, the APA's presumption of reviewability, and the FHA's own requirement of public notice and comment, 42 U.S.C. § 3614a.

ARGUMENT

I. The College's challenge is justiciable.

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

The College has standing—and its challenge is ripe—because it cannot be seriously disputed that the College is the object of the

government's new FHA legal standard and its enforcement mandate. Aplt.Br.21–25.

First, the Directive is directed at housing providers, including colleges, because it purports to add new protected FHA classes to regulate *all* housing policies and speech. Gov.Br.20, 27. By the Directive's plain text, the government obligates internal and external enforcers to "fully enforce" its interpretation to "eradicat[e]" all contrary housing policies nationwide. JA80; Gov.Br.2, 7, 10, 18, 25. When specifically asked about religious college dorms, HUD's Secretary agreed that "*it is the law*" that "College of the Ozarks' dorm and bathroom policies based on strongly held religious beliefs place them in violation of HUD's directive." Aplt.Br.15–16.

Second, the Directive requires the College "to make significant changes" in its "everyday business practices," *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 153–54 (1967), because under the Directive, the government requires the College to abandon its religiously informed policies and speech. The threat of government enforcement forces the College to choose every day 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. In response, the government does not say that the College need not make this choice, nor does it disavow the College's risk of liability through enforcement proceedings.

Third, if the College fails "to observe" the Directive, it is "quite clearly exposed to the imposition of strong sanctions," *id.*, because the government seeks to force compliance through six-figure fines, unlimited damages, intrusive investigations, government lawsuits, and criminal penalties. In response, the government does not dispute that these sanctions are on the table in enforcement proceedings.

The government says that it did not direct regulated entities to do anything, Gov.Br.2, 17–18, 28, 35, 40–41. This argument fails for two reasons. First, even if the Directive only committed HUD officials and external enforcers to impose a legal standard, that alone would make the Directive a rule, and it would be subject to review because it necessarily affects the legal interests of regulated entities. In reality, however, it is not possible to view this mandate of "full enforcement" as something other than a mandate of full *compliance*. The Directive demands "eradication" of regulated activity including the College's speech and housing actions. There is nothing ambiguous about whether entities must comply. "Full enforcement" is meaningless if regulated entities need not comply, since enforcement would have no possible target. The government's approach would eliminate APA review of rulemaking altogether, as agencies could simply re-label their compliance rules as enforcement mandates and skip notice and comment procedures.

Second, the government reinforced the College's standing when, in proceedings below, it voluntarily gave example after example of gender-

identity discrimination the College could already be committing in its dorms in violation of the Directive, in an effort to prevent an injunction against its "full enforcement" of the Directive on the College. Gov.Br.28–29; *see* Aplt.Br.21–23. The government objects to the implications of its arguments, but it cannot avoid them. The government's elaboration of misdeeds the College may already be committing constitutes a concession that the Directive actually governs single-sex dorm policies implemented by religious colleges. Nothing is "hypothetical" about the College's single-sex dorms, its religious views rejecting gender-identity ideology, its speech about those views and its housing policies, or the fact that the Directive imposes a gender-identity nondiscrimination mandate right on top of the College's behavior. For standing purposes, this cements a credible threat of enforcement.

Separately, the government also imposed a ripe procedural harm on the College by skipping public comment in which it could have raised its concerns. *Iowa League of Cities v. EPA,* 711 F.3d 844, 871 (8th Cir. 2013). The government does not dispute that skipping a required comment opportunity to dissuade the government from threatening an imminent injury is not a ripe harm. Gov.Br.31.

B. The College has pre-enforcement standing for its free-speech interests.

The College independently has pre-enforcement standing under Article III because the government threatens its free speech. Aplt.Br.25–

30. A pre-enforcement challenge is justiciable when the plaintiff's intended activity is "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).

Even though the district court disregarded this "forgiving" and "lenient" pre-enforcement standard—adopting its own "rigorous" standard under which the government gets to investigate and censor the College's speech—on appeal, the government does not contend that the district court got the Article III standard right. Gov.Br.32,36–37. Instead, the government says that the College does not meet the real pre-enforcement factors, but it offers no good reasons why.

First, the College intends to engage in an activity "arguably affected with a constitutional interest" because the College's housing policies and speech are core protected religious speech and exercise. Aplt.Br.49–52, 56–57. In response, the government says that the College has no protected speech *at all*. Gov.Br.2, 14, 33–35. Yet simultaneously, it admits religious liberty and various constitutional protections "may be at play." Gov.Br.2, 14, 29.

Second, the College's speech and policies are more than "arguably" proscribed—the Directive seeks to "eradicat[e]" them. It finds unlawful any distinctions involving sexual orientation or gender identity. This necessarily includes the College's speech about its code of conduct and

single-sex housing. In response, the government nowhere disavows that the College's speech and policies are covered. Gov.Br.28–29.

Third, "a substantial" or a "credible" threat of enforcement exists because the Directive repeatedly demands "full" enforcement, with no exceptions noted. JA78–80; Gov.Br.10, 25. In response, the government does not disavow full enforcement. Nor can the government point to any history of disuse approaching desuetude, since the Directive was only two months old when the College sued. The recency of a legal action supports standing, even where years have passed since a law's enactment. *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (four years since law was amended).

Contrary to the Directive's plain text, the government denies any "plausible basis" for enforcement against housing providers, including religious colleges. Gov.Br. *passim*. It asserts that the Directive did not specifically "address whether there will ever be any enforcement actions against plaintiff or any other housing provider." Gov.Br.20

But the Directive explicitly says that "this discrimination is real and *urgently requires enforcement action*." JA78 (emphasis added). The Directive repeatedly requires "full" enforcement—which necessarily encompasses *every* housing provider. JA78–80. This makes the College incur potential liability for its speech each day, jeopardizing it now. Thus, the College need not await prosecution and "the consummation of

threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

The government claims that no injury or hardship exists before enforcement proceedings, including because the College has not ceased its speech. Gov.Br. *passim*. Yet, if the three pre-enforcement factors are met in a speech challenge, "the threatened enforcement" creates a "sufficiently imminent" Article III injury. *Susan B. Anthony List*, 573 U.S. at 158–59. "[T]wo types of injuries may confer Article III standing": (1) self-censorship caused by government chill *or* (2) the risk of potential liability from engaging in protected activity that the government seeks to prohibit and prosecute. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (quotation omitted). The College need not succumb to government censorship and cease speaking to be allowed to challenge the Directive.

C. The College challenges government enforcement of either the Directive or the statute.

If the FHA were read to encompass sexual orientation and gender identity—which no court has held and which *Bostock* said its holding did *not* encompass[1]—the College's same claims would support relief against enforcement of the statute and its regulations. Aplt.Br.31–35. The complaint says that the College challenges government enforcement of the Directive, and alternatively, that if the FHA itself includes the

[1] *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1753 (2020).

Directive's standard, the College challenges government enforcement of the statute and its regulations. JA71. The College's injunction request has parallel scope. JA260–61.

The government says that the College's policies and speech conflict with how it reads the FHA, so it should be allowed to investigate and charge the College. Gov.Br.3, 11–15, 17–18, 20–23, 25–31, 35, 37, 41. It embraces the district court's view that the FHA is the sole cause of any injury after *Bostock*, so that no injury or speech restriction is traceable to threatened government enforcement of this FHA interpretation, or redressable by enjoining government enforcers. *Id.*

But the government's claim of statutory authority does not negate the College's standing to challenge the government's enforcement. Standing exists when the injury can be traced to the officials' "allegedly unlawful conduct" of enforcing "the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). As this Court has held, regulated entities have standing to enjoin officials who "possess the authority to enforce the complained-of" statutes, regulations, and directives, *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 779 (8th Cir. 2019), including when the government claims that a statute requires the agency action, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749 (8th Cir. 2019).

Because the College challenges both HUD's final agency action in the Directive, and in the alternative, enforcement of the FHA and its

regulations to the extent the court were to deem them to impose the Directive's standard, Aplt.Br.7, 13, 33–34, the College has standing either way. Unlike in *California v. Texas*, 141 S. Ct. 2104, 2115, 2119 (2021), where the government lacked any authority to enforce the challenged statutory provision and did not enforce it at all, and where the provision had no penalty, tax, or other enforcement mechanism, here HUD says it has authority to enforce these provisions, and that it will fully enforce them. Gov.Br.25.

This relates to another error in the government's standing analysis, in which it improperly conflates standing and APA doctrines, and assumes in its favor the merits questions at issue under the APA and after *Bostock*. Aplt.Br.31–33; Gov.Br.22, 26. The government cannot negate causation and redressability for standing just by saying that it correctly interpreted the statute and therefore its Directive is a mere policy statement. That approach assumes the merits in the government's favor, both as to the FHA and the status of the Directive under the APA. The government cannot evade review of its legal mandates by assuming its view of the merits. The College's view is that *Bostock* never interpreted the FHA, the FHA does not address sexual orientation or gender identity (let alone to satisfy the clear notice canon), and the Directive imposes a new binding standard. Aplt.Br.44–48. These must be assumed in the College's favor in assessing standing.

The government also says that causation and redressability are absent because the Directive merely "bolsters" and "connects" past FHA enforcement policies and does not impose new requirements. Gov.Br. *passim*. But the Directive itself denied this, saying past enforcement was "limited" and "insufficient," and "fail[ed] to fully enforce" HUD's current view. JA78–80. The government ignores these contradictory and inconsistent data points. Aplt.Br.9–10. Regardless, no total historical disuse approaching desuetude exists. On the contrary, the Directive rejects incomplete and unenforced past policies to create a new requirement of "full" enforcement. Gov.Br.25–26. An injunction against ongoing government enforcement of this mandate thus would redress the threatened injury of government sanctions—which is why the government acknowledges that an injunction against the Directive would interfere with its FHA administration. Gov.Br.52–53.

The government next argues, for the first time, that the Directive did not bind enforcement agencies, grantees, or housing providers to do or refrain from doing anything, because the FHA and past policy already bound everyone. Gov.Br.25–26, 41–42. But this position contradicts the Directive's plain text saying what external enforcers "must" do, and the government agrees they have such an obligation. Aplt.Br.36–37; Gov.Br.2, 7, 10, 17–18, 25.

The government also says that the College faces no threat from government-funded external enforcers. Gov.Br.18. But injunctions

against government enforcement usually includes the government's funded agents. Fed. R. Civ. P. 65 (d)(2)(B). The government offers no evidence to show that its St. Louis tester agency would never travel south or coordinate regionally. The lack of such disavowal is understandable, since the grantee says it works across the state and elsewhere.[2]

The government next says that the College lacks standing to halt government enforcement of its FHA interpretation because, even if the government were enjoined, private parties could seek to enforce the same interpretation. Gov.Br. 14–15, 21, 30. But the possibility of private enforcers *bolsters* standing, because the threat to the College is multiplied. See Aplt.Br.34–35. Plus, under stare decisis, an appellate precedent in the College's favor would apply in the circuit.

D. The case is ripe.

For similar reasons, this case presents ripe, purely legal questions about the College's specific policies and speech. Aplt.Br.26, 30–31.

In response, the government says that any injuries are non-existent and speculative until the government determines the College's specific liability for damages in after-the-fact complaint proceedings for individual violations. Gov.Br. *passim*. But neither the district court nor the government identify any unknown facts needed to say whether the

[2] Metropolitan St. Louis Equal Housing and Opportunity Council, Housing Discrimination Inquiry, https://ehocstl.org/discrimination-inquiry/ (last accessed Sept. 22, 2021) (offering HUD, Missouri, and Illinois complaint forms).

College's policies and speech—which are set forth in the complaint—conflict with the government's FHA mandate. A general expression of intent to enforce is enough, *Jones v. Jegley*, 947 F.3d 1100, 1103–04 (8th Cir. 2020), and the government has made much more than that here.

The government also says that its full enforcement threat does not cause justiciable injuries because the College has not shown that FHA enforcers have gone after college housing exempt from Title IX—yet. Gov.Br. *passim*. This assertion is a red herring for three reasons.

First, even an abandoned mandate creates a substantial threat of enforcement if the regulated entity's activity is within the mandate's plain terms. And here, the Directive on its face requires the "eradication" of the College's policies. Aplt.Br.29–30. Injury exists for a target or object of the government's speech prohibitions when they direct an entity to change its operations—or risk enforcement actions. *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 485, 487 (8th Cir. 2006). No prior enforcement cases need have been brought. *United Food & Com. Workers Int'l Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 427–28 (8th Cir. 1988).

Second, disuse approaching desuetude can weigh against pre-enforcement review, but no such dormancy exists here. The Directive requires "full enforcement," with retroactive liability for the last year, and literally *no* mention of exemptions, religious or otherwise. There is no disuse present on the face of the Directive. Nor can the government

point to a history of non-application of the Directive to religious colleges, since the Directive is less than a year old, and the Directive itself claims that enforcement prior to February 11, 2021, was limited, insufficient, and failed to meet the new "full" enforcement mandate.

Third, it's possible that if a mandate is unclear, *and* if the government in litigation makes an unchangeable disavowal of enforcement or a binding unchangeable commitment to recognize exemptions, the concession might weigh against pre-enforcement review. But in addition to the Directive being clear, the government has repeatedly refused to disavow application or enforcement of the Directive to the College or other religious educational institutions. Aplt.Br.15–16.

Make no mistake: the government does not say—and in this case has repeatedly *refused* to take the position—that Title IX actually exempts the College (or any school) from the FHA, a separate statute, or that RFRA actually protects the College's behavior as set forth in the complaint. To the contrary, the government admits that it never considered religious exemptions—something the APA required it to do. Gov.Br.20, 23, 27–29. It will only say that enforcers need not "reach a specific enforcement decision in any particular case" and must consider each case's facts or "any defenses available," "which may include (for example) a housing provider's assertion that a practice otherwise barred by the FHA is permitted by federal statutory or regulatory protections for religious liberties." Gov.Br.10–11, 26–29, 39.

This is not a disavowal—not even close. Saying that enforcers must "consider" whatever legal argument a party asserts does not change the fact enforcers have no discretion to apply standard different than the one the Directive says they "must" fully enforce. The Directive's mandate references no exceptions. The government cannot negate it merely by asserting in litigation that perhaps, in the future, some religious exemption from some other statute *might* (or might not) be considered. Notably, in the one instance in this case where the government was forced to take a position on the College's protections outside the FHA, it has insisted no protection exists, saying the College's speech is unprotected under the First Amendment. Gov.Br.2, 14, 33–35. The government cannot have it both ways: announce a mandatory, universal standard to elicit compliance by all regulated entities and appease its political base, and then avoid judicial review by vaguely stating in court that the standard is somehow less than binding or might involve considering other factors. The government refuses to say Title IX or RFRA actually protect the College from the Directive, and the College can challenge this new standard.

Moreover, a Title IX complaint challenging the College's housing policies *has* now reportedly been filed with the federal Department of Education by a former student.[3] The government has not dismissed this

[3] Elizabeth Redden, *Christian College Sues to Keep LGBTQ+ Housing*

complaint, much less has it said the College is exempt from the Directive. Injunctive relief is therefore even more urgent.

II. The College has APA and equitable causes of action.

Under the APA's strong presumption in favor of judicial review, the government's new legal standard and enforcement per the Directive is a reviewable final agency action, because it committed government and external enforcers to new FHA interpretation and enforcement, which, on pain of huge penalties, obliges regulated entities to comply with new rights of occupants. Aplt.Br.35–39.

In the *Federal Register*, the President called the Directive what it is: a "rule change" that "finally" "improved upon" the FHA. JA38–39, 198. Yet in the posture of litigation, the government makes the post hoc assertion that the Directive is just a nonbinding policy statement continuing past policies. Gov.Br.1–2, 10, 22–23, 25, 27, 41.

The government's semantic redescription cannot be reconciled with the Directive's plain text. The Directive is not an advisory or discretionary policy statement, but a new FHA interpretation to add protected classes and to require enforcers to "eradicate" contrary policies and speech. Gov.Br.20.

Policy, INSIDE HIGHER ED (Sept. 8, 2021), https://www.insidehighered.com/news/2021/09/08/christian-college-sues-over-biden-fair-housing-act-directive.

The government does not dispute that the Directive consummates the agency's decision-making process, and that its enforcers have no freedom to depart from its legal interpretation. Gov.Br.40–42. And the government does not dispute that the Directive's practical purpose is to make everyone in and out of government comply by granting dorm residents new rights, or risk full government enforcement. Gov.Br.25. Instead, the government relies mainly on nomenclature, eschewing the Directive's own self-reference as a "directive" and repeatedly calling it merely a "Memorandum," hoping to avail itself of an APA exception for policy statements. Gov.Br.41–43. This litigation label contradicts the Directive's plain wording, obvious practical purpose, and everything the President and officials praised about it.

The Directive does not meet the criteria for a mere policy statement. Aplt.Br.35–39. Policy statements govern open-ended matters of agency discretion and do not make officials enforce substantive standards. In contrast, the Directive directs full enforcement of a new legal standard not found in the FHA or its regulations. Policy statements do not bind or commit officials—but the Directive requires enforcers to implement this interpretation. Policy statements let enforcers reconsider and reject the policy's validity or depart from it in individual cases—but HUD enforcers lack any freedom to enforce a different FHA interpretation and they must eradicate all contrary policies. Policy statements have no practical consequences for the public—but the Directive makes regulated entities

comply nationwide or risk full enforcement sanctions. When "a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion," "it is a binding rule of substantive law." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666–67 (D.C. Cir. 1978). Full stop.

An agency action like the Directive that makes categories of occupants newly eligible for beneficial federal protections, *State v. Biden*, 10 F.4th 538 (5th Cir. 2021), is thus far "more than a non-enforcement policy" left to unreviewable agency discretion. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020).

The government claims that, even if its enforcers must enforce this interpretation, the agency itself created no consequences, because any injury flows from the FHA or *Bostock,* not HUD; the agency does not control judicial interpretation of the FHA; and courts review the final liability of regulated entities for damages and sanctions. Gov.Br.11, 13–15, 17–20, 23, 25–27, 41–44.

But any agency action that commits enforcers to a legal standard to impose on the public is not a mere policy statement. As explained in the opening brief, Aplt.Br.35–39, the Directive possesses all the hallmarks of a legislative rule, not a general statement of policy. It: establishes a new standard of protected classes not found in statute or regulations; imposes binding language ("must") internally and externally; leaves no discretion to impose a different standard;

encompasses "rights and obligations"; repeatedly demands "full" enforcement, which it contrasts with "limited" and "insufficient" past practice; and calls itself a "directive" (later, the President calls it a "rule change"). Many types of final agency actions leave individual liability and sanctions to enforcement proceedings—the fact that they set a substantive rule makes them reviewable. Under the APA's pragmatic approach, an agency's imposition of a substantive standard for the public causes consequences for regulated entities and is subject to judicial review, even if individual penalties and enforcement will occur later, and even if the agency is right about the statute's import or lacks the power to conclusively interpret the law. The government cannot "strong-arm[]" "regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Sackett v. EPA*, 566 U.S. 120, 131 (2012).

Along with the APA, courts have long set aside ultra vires and unconstitutional actions under an implied or equitable cause of action. Aplt.Br.39–40; *e.g.*, *Leal v. Azar*, No. 2:20-CV-185-Z, 2020 WL 7672177, at *6 (N.D. Tex. Dec. 23, 2020). In response, the government does not address Supreme Court precedent and past government concessions on the ongoing availability of this equitable cause of action, even though the government relies on it in its own pre-enforcement challenges. *E.g.*, Complaint, *United States v. Texas*, Civil No. 1:21-cv-796 ¶8 (W.D. Tex. filed Sept. 9, 2021).

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

A. The government skipped notice and comment.

The government never explains why, if the government bound itself to a substantive legal standard, the Directive is not subject to notice and comment. Gov.Br.48. Instead, the government's main response is to say that the Directive is a policy statement. Gov.Br.48. But this is incorrect for all the reasons discussed above.

The Directive is indeed a "rule change," JA38–39. Thus, not only the APA, but the FHA itself requires notice and comment for it as for "all rules." 42 U.S.C. § 3614a. The government denies that "all rules" means "all rules," saying that Congress must have silently incorporated the APA's exceptions to notice-and-comment requirements. Gov.Br.48. But no reason exists to rewrite the FHA with extra-statutory limitations denying public participation in rulemaking.

The government also declines to explain why, since the Directive binds the government itself to a substantive standard, the Directive is not a legislative or substantive rule under the APA. Nor does it explain why the Directive did not fall under the independent notice and comment requirement of then-existing HUD regulations for rules *and* policy statements that interpret novel issues and implement presidential priorities. Aplt.Br.40–42. Those regulations were procedures subject to 5 U.S.C. § 706(2)(D).

B. The government ignored factors that "matter."

The government agrees that it issued the Directive without considering relevant factors, including its harm to religious colleges, their reliance interests, and alternatives. Aplt.Br.42–43.

The government confirms its earlier admissions that it ignored colleges' legal rights or reliance interests in single-sex housing policies and religiously informed codes of conduct. The government stresses that when it issued the Directive it never considered or discussed—

- "any particular" "factual circumstances" or "specific settings such as student housing," educational institutions, religious beliefs, and religious colleges;
- "dormitories, 'bathrooms, locker rooms, or anything else of the kind,'" and
- "legal considerations" like "how the FHA's prohibition of discrimination would interact with other statutory regimes such as Title IX, or other statutory or constitutional protections of religious liberties, including the Religious Freedom Restoration Act (RFRA)."

Gov.Br.11–14, 20, 23, 27–28, 49–50 (citations omitted). The government also does not dispute that it considered no alternative policies, conflicting statutes, or exceptions, preferring instead to consider only full enforcement of its chosen interpretation. *Id*.

What is more, the government now admits that religious liberty and other statutory or constitutional protections "may be at play" in its new FHA interpretation and enforcement. Gov.Br.2, 10–11. The government now agrees that FHA liability requires "an analysis of how Title IX and the FHA relate." Gov.Br.27. And the government now recognizes that these statutory and constitutional facts and contexts "matter." Gov.Br.15.

The government's self-confessed failure to consider these factors that "matter" thus makes its action fatally flawed. RFRA must be considered in rulemaking, *see Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020), and the agency must consider significant issues in reasoned decision making *even where it has statutory authority*. *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021) (citing *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909–15 (2020)).

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

The Directive exceeds HUD's statutory authority because Congress did not end single-sex student housing or religious codes of conduct in the 1974 FHA—let alone unmistakably force colleges to allow males to live and shower with females. No court, including this one, has ever adopted this interpretation, and the government has had many contrary and inconsistent interpretations. Aplt.Br.44–48.

The government's sole defense is that *Bostock* automatically applies to other statutes like the FHA *and* to intimate spaces like housing. Gov.Br.13, 17–18, 20, 25–26, 50–51. This contradicts *Bostock*. In *Bostock*, the Supreme Court rejected that its "decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. The Supreme Court warned that "none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question." *Id*. And the government ignores that, even under Title VII, *Bostock*'s holding excluded intimate spaces: the Court did "not purport to address bathrooms, locker rooms, or anything else of the kind." *Id*. Plus, the Court was "deeply concerned with preserving" religious institutions' freedom. *Id*. at 1753–54.

Nor did *Bostock* consider the "particularly strict" effect of the clear-notice canon when it interpreted Title VII. *Bostock* thus did not displace the constitutional limits on other statutes like the FHA that impose grant conditions, or that preempt core state police-power regulations, or that act in traditional areas of state responsibility—such as over real estate, land use, and education. Just because a federal law addresses sex discrimination does not mean it is "materially identical" to Title VII, and even less does it mean that it incorporates the government's aggressive and retroactive sex stereotyping, sexual orientation, and gender identity theories in every detail. Gov.Br.13, 25. And, under this canon, any

ambiguity requires adopting "the less expansive reading." *Kollaritsch v. Mich. State Univ. Bd. of Trustees*, 944 F.3d 613, 629 (6th Cir. 2019) (Thapar, J., concurring).

Neither the federal government nor the States nor the public were on unmistakable notice of HUD's current FHA interpretation. If they were, HUD would not have issued the Directive to correct this "legal uncertainty." JA192. Nor would HUD have continually certified many state laws "on [their] face" and "in operation" as substantially equivalent to the FHA by having the "same protected classes," 24 C.F.R. § 115.205; JA180–81, such as state laws in Arizona, Arkansas, Georgia, Indiana, Kentucky, Louisiana, North Carolina, Ohio, South Carolina, Tennessee, Texas, and West Virginia, JA 168–78, when these states' laws and practices do *not* address these classes,[4] and when HUD's website admits that divergence.[5] This lack of any prior unmistakable notice is why HUD now demands that these States amend or reinterpret their laws. JA194.

Rather than dispute the applicability of the constitution's clear-notice canon, or claim that the 1974 FHA provided unmistakable notice, the government denies that the College can raise this point about the

[4] Movement Advancement Project, Nondiscrimination laws: Housing, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last accessed Sept. 22, 2021) (surveying all states).

[5] HUD, Housing Discrimination and Persons Identifying As LGBTQ, https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq (last accessed Sept. 22, 2021) (listing states that address these classes).

right interpretation of the FHA. In the government's view, the Constitution's structural principles of federalism only protect States, not citizens. Gov.Br.50.

This too is incorrect. Federalism serves individual liberty, and so the government's position has been rejected by the Supreme Court. Aplt.Br.47. Congress must speak clearly to grant powers of "vast 'economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021) (citation omitted). The Supreme Court thus applies this canon to protect private parties when the government "intrudes into an area that is the particular domain of state law: the landlord-tenant relationship," because Congress must "'enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'" *Id.* (citations omitted).

D. The government tramples free speech.

The government's unprecedented free-speech violations are all but admitted. Aplt.Br.49–52; Gov.Br.51. The government's flawed contention that the College's housing-related speech is wholly unprotected is a distraction from the fact that the government cannot satisfy the applicable Free Speech Clause standards.

The government does not dispute that, by "connecting" the FHA's speech provisions to new protected classes, it seeks to prohibit under the

FHA any statement expressing a policy of or preference for a sexual-orientation or gender-identity limitation, including when colleges assign dorms to students. The government does not dispute that it sweeps into its prohibitions many educational institutions with religiously informed codes of conduct and dormitories based on biological sex. The government does not dispute that it prohibits the College's policies and speech *in support of* its housing policies and code of conduct, and that it allows speech expressing the opposite viewpoint—indeed, it requires the College to adopt, prefer, and express the government's contrary policies. As an example, under the Directive the College cannot use pronouns based on biological sex in its housing, nor can it say it would prefer to use those pronouns—but it can, and must, use a student's preferred pronouns based on gender identity.

Rather than deny or justify this coercion, such as by explaining why it is not content and viewpoint discrimination, or by showing why it satisfies strict scrutiny or is not overbroad, the government says that the College has no free speech protection at all—indeed, that its speech is not actually speech. Gov.Br.2, 14, 33, 51. Its theory is that these burdens come from the FHA, and anything the FHA prohibits is per se "discrimination," "not speech," and "not political speech"—and definitely "not protected speech"—so the government is not violating anyone's First Amendment rights. Gov.Br.29, 33–35, 51.

Modern precedent disagrees. The government has no adequate response to this court's opposite view: that under the government's radical negation of speech rights, "wide swaths of protected speech [involving marriage and human sexuality] would be subject to regulation." *Telescope Media*, 936 F.3d at 752. Nor does the government respond to recent precedent saying that First Amendment interests are strong for speech reflecting the College's core religious beliefs and protected exercise, such as the use of pronouns. *Id.*; *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021). This speech is not "unprotected" but receives strong protection. *Loudoun County Sch. Bd. v. Cross*, No. 210584, slip op. at *9–10 (Va. Aug. 30, 2021) (citations omitted). "[G]ender identity" is a "sensitive political topic[]" and "undoubtedly" a matter of "profound value and concern to the public." *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2476 (2018). Nor did precedent cited by the government consider the Directive or its newly created protected classes under the FHA.

Even less does the government show any historical evidence why the College's religiously informed housing policies and speech are not speech, or are like unprotected categories of speech, such as obscenity or fighting words. Finally, even unprotected or lesser-protected speech is still protected from viewpoint and content discrimination, which apply here. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992); *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017).

E. The government disregards the Appointments Clause.

The government also violated the Appointments Clause because no Senate-confirmed officer, or even an inferior officer supervised by a Senate-confirmed officer, adopted the Directive. Aplt.Br.53–56. Only principal officers can issue legislative rules, and only a principal officer can hold this high position in HUD with no principal officer supervising at the apex. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980–81, 1984–85 (2021).

In response, the government denies that the Appointments Clause controls acting positions. That position would negate the clause, and the government offers no precedent to justify it in this specific situation. Gov.Br.51–52.

F. The government snubs free exercise.

The government violated RFRA and the Free Exercise Clause, yet the District Court *sua sponte* dismissed those claims. Aplt.Br.56–57. In response, the government offers no defense of dismissing those claims.

IV. A preliminary injunction is necessary.

Equity favors urgent relief. Aplt.Br.57–58. The government does not dispute that, if the College is likely to succeed on the merits, the College faces irreparable injury. Gov.Br.45–46, 52. The government instead says that, even though this Court could issue an injunction now, it should instead let the district court decide the College's injunction request—again. Gov.Br.3, 13, 16, 45–47.

There is no need to let the district court consider anything "in the first instance" because it denied an injunction in full before dismissing the case—specifically and improperly rejecting the College's cause of action, merits claims, and injunction request under the guise of standing. JA490. Nothing has changed, except that the government confirmed in testimony to Congress that the College is "in violation," and the government received a Title IX housing complaint against the College. No facts are in dispute that prevent full reversal of the district court's denial of an injunction, and remand would only introduce more unnecessary delay.

Nor does the government dispute that a nationwide preliminary injunction against government enforcement of an unlawful agency action is appropriate until final equitable relief and vacatur can be entered. Indeed, the government itself seeks similar injunctions against mandates that it views as unlawful, without geographic limits, against all private parties in the nation. *See, e.g.*, Complaint, *United States v. Texas*, Civil No. 1:21-cv-796 at 26 (W.D. Tex. filed Sept. 9, 2021).

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction protecting against enforcement of this standard.

Respectfully submitted,

/s/ Matthew S. Bowman

RYAN L. BANGERT
GREGGORY R. WALTERS
ALLIANCE DEFENDING FREEDOM
15100 N 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbangert@ADFlegal.org
gwalters@ADFlegal.org

JOHN J. BURSCH
MATTHEW S. BOWMAN
JULIE MARIE BLAKE
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
jbursch@adflegal.org
mbowman@ADFlegal.org
jblake@ADFlegal.org

Counsel for Plaintiff-Appellant

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I further certify that pursuant to Circuit Rule 28A(h)(2), this brief has been scanned for viruses, and is virus free.

/s/ Matthew S. Bowman
Matthew S. Bowman

Dated: September 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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.

/s/ Matthew S. Bowman
Matthew S. Bowman

Dated: September 23, 2021