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; U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; MARCIA L. FUDGE, IN HER OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; DEMETRIA MCCAIN, IN HER OFFICIAL CAPACITY AS PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR FAIR HOUSING & EQUAL OPPORTUNITY,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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REPLY ARGUMENT SUMMARY

The government's opposition is founded on the fiction that HUD's 2021 Directive was a nothing-burger—a trivial, non-binding policy statement that changes nothing and affects no one. That position is undermined by the Directive's language and history.

For decades, federal courts held that the FHA does *not* address gender identity. Pet.7–8. As recently as 2020, HUD itself confirmed that entities regulated under the FHA were "permitted" "to consider biological sex in placement and accommodation decisions in single-sex facilities." Pet.8.

All that changed in 2021. In quick response to President Biden's Executive Order declaring that the FHA now prohibits gender-identity discrimination, HUD issued the Directive to announce "full" enforcement of this new interpretation. Pet.App.36a–41a. The President correctly called it a "rule change." Pet.App.51a. The Directive commands not just HUD but state agencies, local agencies, and grant recipients whose FHA testers sue private entities. Pet.App.39a–40a. As the target of this full enforcement, regulated entities must comply. Indeed, HUD's stated purpose is nothing less than the "eradication of housing discrimination" based on gender identity. Pet.App.41a. This necessarily includes housing policies that, like the College's, assign dormitories based on sex, not identity. The Directive never even hints that religious entities are exempt through a separate statute, Title IX, an issue that notice-and-comment rulemaking must discuss. Cf. *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

No matter how the government downplays it, such a legal revolution—paired with an enforcement order to HUD and countless third parties—is a substantive change. At bare minimum, it constitutes an interpretive rule. Either way, notice and comment were required before HUD could issue the Directive. Pet.17–18; 42 U.S.C. 3614a; 24 C.F.R. 11.1(b), 11.2, 11.8; 5 U.S.C. 553.

Once it is clear that HUD was required to engage in the notice-and-comment process, it is equally clear this Court's review is necessary. There is a 5–1 circuit split over whether deprivation of notice and comment is an injury sufficient for Article III standing. Pet.20–27. And this Court's precedents establish that when an entity like the College is the object of a regulation, there "is ordinarily little question" that the entity has standing to challenge the regulation. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). Accord Pet.28–35.

The outpouring of amici shows that if agencies can make new rules without notice and comment or judicial review, it endangers regulated entities in every sphere and threatens the rule of law. When HUD can unilaterally rewrite the FHA and bypass notice and comment simply by characterizing that rewrite as a "policy statement," then no executive agency will bother with rulemaking. All judicial review will be deferred until *after* most of the regulated community silently absorbs the rule's burdens or exits the field, and an outlier is forced into endless and expensive enforcement proceedings. Only the Court's immediate review can stop this practice, which has become this Administration's hallmark. Certiorari or summary reversal is warranted.

REPLY ARGUMENT

I. HUD was required to engage in the notice-and-comment process before rewriting the FHA.

The Directive rewrites the FHA and commits officials and third parties to "full" enforcement of its changes. Pet.7–10. The government's efforts to downplay the Directive's effects are to no avail.

First, the government suggests the 2021 Directive merely "reaffirms prior HUD policy stating that the Department will accept and investigate" FHA complaints "based on gender identity." Opp.i. This rewrites history. The Directive admits HUD policy was "insufficient," "limited" and "inconsistent," and "fail[ed] to fully enforce" the FHA in this way. Pet.App.36a–41a.

Next, the government says the Directive "imposes no legal obligations on petitioner and does not determine how the FHA's prohibition on sex discrimination would apply to a housing provider that asserts a religious objection." Opp.i. Yet the Directive "fully" demands "eradication" of policies that "discriminat[e]" based on gender identity, Pet.App.41a—like assigning dormitories based on sex. Directives that govern field enforcement and lead regulated parties to believe they must comply are binding. *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

The government says institutions like the College might be able to claim a religious exemption under Title IX. Opp.4. But neither the FHA nor the Directive says that. And from this litigation's inception, HUD has *refused* to say that the College is exempt or that

the FHA incorporates Title IX *sub silentio*. Instead, the government below declared that the College's dormitory policies and speech are "discrimination," Pet.30, just like the Directive says.

The government dismisses HUD's 2020 notice of proposed rulemaking, Opp.5 n.1, which confirmed that regulated entities are "permitted" "to consider biological sex in placement and accommodation decisions in single-sex facilities," Pet.8. But that guidance carries no less weight than the prior administration's statements HUD uses to allege a "decade" of contrary policy. Opp.4. See *Howmet Corp.* v. *EPA*, 614 F.3d 544, 552 (D.C. Cir. 2010) (while preamble language is not regulatory, it informs an agency's characterizations of prior law). The Directive is a change.

The government describes the Directive as merely a "statement of policy" to "HUD offices and affiliates." Opp.11. By this logic, agencies could evade all APA requirements and judicial review just by "reminding" enforcement officials of "existing" law. In any event, the government admits the Directive is addressed to non-HUD entities—private, state, and local entities such as "the FHEO, FHAP agencies, and FHIP grantees." Opp.6. One hallmark of a rule is its binding effect outside the government. *Appalachian Power*, 208 F.3d at 1022 (agency action binding where it "insist[s] State and local authorities comply").

The government then doubles down on HUD's failure to consider religious exemptions such as those codified in RFRA or Title IX. Opp.7. But the Directive's failure to consider religious exemptions is not a feature, it's a bug. *Little Sisters*, 140 S. Ct. at 2384 (failure to consider RFRA in an action subjects the agency to APA "arbitrary and capricious" claims);

Dep't of Homeland Sec. v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913–14 (2020) (agency must discuss and weigh reliance interests). There is no "regulate first, consider religious freedom later" exception to the APA.

Finally, the government asks the Court to ignore President Biden's April 2021 formal acknowledgement that the Directive was a "rule change." Opp.23 n.3; Pet.App.50a–53a. But the President reiterated again last month that his "administration issued a *rule change* in 2021 to ensure that" the FHA "*finally*" includes gender identity. The White House, Statement from President Joe Biden on the 55th Anniversary of the Fair Housing Act (Apr. 11, 2023), https://bit.ly/3MI1xcE (emphasis added). The government rightly viewed that statement as an admission because someone edited it after the fact to eliminate the words "rule change." See https://bit.ly/3IOVcdh.

None of the government's arguments change the reality that on eight occasions, the Directive demands "full" enforcement of its new legal standard. Pet.9; Pet.App.36a–41a. Or that the Directive promises HUD will collaborate with its state and local and testing partners "to fully engage our fair housing enforcement … to prevent and combat discrimination because of … gender identity." Pet.App.41a.

All of this shows notice and comment was required. First, at minimum, the Directive is an interpretive rule, stating what the "agency thinks the statute means." *Gen. Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). The FHA requires notice and comment for "all rules," including interpretive rules. 42 U.S.C. 3614a. Thus, HUD

violated the College's right to comment no matter the government's preferred label. Contra Opp.23.

Second, the APA required notice and comment because the Directive is a substantive rule, binding the agency and external entities to a new legal standard. See *Cmty. Nutrition Inst.* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam). The government calls the Directive a "general statement[ ] of policy or interpretive rule[ ]." Opp.23. That ignores the Directive's admitted newness, its application outside the government, and its repeated call for "full" enforcement against regulated entities' behavior.

Third, HUD regulations in effect at the time the Directive issued required notice and comment where documents "[r]aise novel legal or policy issues arising out of legal mandates," 24 C.F.R. 11.2(d)(4)—such as *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020)—or implement "the President's priorities," 24 C.F.R. 11.2(d)(4)—such as President Biden's Executive Order. The government says the Directive does not meet those criteria, Opp.23, but fails to give any reason why. The government also says the notice-and-comment requirement might not be "enforceable in court," *ibid.*, an argument left unexplained and never raised earlier in this litigation. Accordingly, notice and comment were required thrice over.

II. The government cannot explain away the substantial and mature circuit split over the first question presented.

With that background, the circuit split is clear. The Fifth, Sixth, Ninth, D.C., and Federal Circuits have all held that being deprived of notice and comment is itself a concrete injury sufficient for Article III standing. Pet.20–25. And the government fails to distinguish those precedents on their facts.

In *Texas* v. *EEOC*, 933 F.3d 433 (5th Cir. 2019), the Fifth Circuit recognized that Texas "suffered multiple injuries." Opp.19. But the court said that "*[b]eyond*" the injuries the government notes in its opposition, Texas had *also* "adequately established that it suffered a procedural injury jeopardizing its concrete interests": an APA notice-and-comment violation. 933 F.3d at 447 (emphasis added). That infringement undercut Texas's interest in maintaining compliance with its laws, *ibid.*, just as the Directive increases the College's regulatory burden and exerts substantial pressure to change its housing policy and speech. Pet.21.

Dismas Charities, Inc. v. *DOJ*, 401 F.3d 666 (6th Cir. 2005), did not turn on allegations of lost revenue. Contra Opp.20. Noting that Article III requires a showing that procedural rights "protect some threatened concrete interest," 401 F.3d at 678 (citation omitted), the Sixth Circuit said a notice-and-comment deprivation injures one's interests in "the chance to argue to the [agency] that its policy is wrong before the policy is adopted," *id.* at 677. Like Dismas's "interest in continuing to provide services to the BOP," the College's interest in maintaining its dormitory policy and speech "is certainly concrete." *Ibid.*

Turning to *East Bay Sanctuary Covenant* v. *Trump*, 932 F.3d 742 (9th Cir. 2018), the government appears to concede that the College is within the FHA's zone of interests but argues that "is not enough to confer standing in the absence of a concrete injury." Opp.21. That is just another way of saying the College is not the object of the FHA and the Directive's regulation. But a landlord like the College is undeniably an object of the statute and HUD's reinterpretation thereof. Anyway, at best, this criticism makes the split 4–2 instead of 5–1.

Sierra Club v. *E.P.A.*, 699 F.3d 530 (D.C. Cir. 2012), proves the College's point. The D.C. Circuit did *not* hold that the notice-and-comment process would redress the Club members' asserted injury based on exposure to hazardous air pollutants. Contra Opp.21. The court's vacatur would only require EPA "to entertain and respond to the Club's claims," making the alleged harm "potentially redressable." *Id.* at 533. So too here, where, absent the government's consideration of religious objections, the College is exposed to the hazardous penalties of HUD's reinterpreted FHA.

Finally, in *Salmon Spawning & Recovery Alliance* v. *U.S. Customs & Border Patrol*, 550 F.3d 1121, 1130 (Fed. Cir. 2008), the Federal Circuit held that the plaintiffs' aesthetic and recreational interests were sufficient to establish an injury-in-fact. But *in addition* ("moreover"), the court held that the plaintiffs' procedural rights—a consultation process akin to the notice-and-comment process—was also sufficient for standing. *Id.* at 1132. "[B]ecause consultation could require the defendants to more actively enforce the import ban, consultation could protect the plaintiffs' interests in the survival of the ESA-listed salmon, and

it is precisely this interest which the procedure was designed to protect." *Ibid.* Likewise, the notice-and-comment process here could require the government to protect religious liberty and the College's dormitory policy and speech. If aesthetic and recreational interests establish standing, how can First Amendment interests fall short? The right to raise such interests is precisely what the FHA and APA's notice-and-comment procedures were designed to protect.

In sum, while the government tries to factually distinguish the circuit cases that have addressed the issue, the legal principles are the same. Other circuits to have addressed the issue do not require a plaintiff to allege an additional injury, only that a plaintiff's concrete interests were adversely impacted by loss of notice and an opportunity to comment. The Eighth Circuit takes a different approach. That conflict cannot stand.

The government's backup position is that certiorari is not warranted because the College will lose on the merits. Opp.22–23. According to the government, notice and comment is not required whenever an agency labels a directive a policy statement, even if the directive rewrites an important federal statute in a politically controversial way that will impact thousands of regulated entities. Opp.22–23. As explained in section I, *supra*, that is simply wrong. Moreover, "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975). The Court should grant the petition and reconcile the courts of appeal.

III. Regulated entities like the College have standing to challenge the legality of agency actions that directly impact them.

The Directive has immediate, widespread impact on the entities that the FHA regulates, which is why the College also has pre-enforcement standing under this Court's precedents. Pet.28–35. The government says the Directive "does not itself require [the College] or any other housing provider to do or refrain from doing anything." Opp.12. But the government admits that the Directive "instructs the FHEO 'to administer and fully enforce the [FHA] to prohibit discrimination because of sexual orientation and gender identity,'" and to accept for "filing and investigat[ing]" complaints of such discrimination. Opp.6 (quoting Pet.App.37a, 39a). Such an order to "fully enforce" this rewriting of the FHA to "eradicate[e]" the College's behavior is, as *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014), explains, a "credible threat of enforcement."

President Biden's two-time characterization of the Directive as a "rule change" is indicative of that credible threat. The government is dissembling when it says the Directive is not new or binding and that the College has nothing to worry about. This is a classic Article III injury: a new standard of behavior that forces the College to change its policies and stop speaking a particular message.

The government's *post hoc* litigation arguments do not change that reality. Again, the government tries to paint the Directive as meaningless, claiming HUD has been accepting complaints based on gender identity "for more than a decade." Opp.12. But as noted, HUD has not been investigating or fully

enforcing based on those complaints; as recently as 2020, HUD said that the FHA *allows* housing assignments based on sex rather than identity, something the Directive labels discrimination.

The government again relies on HUD's failure to consider RFRA or the Free Exercise Clause in promulgating the Directive. Opp.12. That's a procedural defect and does not change that the scope of enforcement has increased, subjecting the College to investigatory liability that did not exist before.

The government pivots and says the College's harm flows from the FHA itself, not the Directive. Opp.13. That workaround fails because the College filed suit to stop HUD from enforcing the FHA, not merely the Directive, against the College's dormitory policy and speech. V. Compl. at 65 ¶B. An injunction stopping enforcement of the FHA based on gender identity would also halt the Directive. *Fed. Election Comm'n* v. *Cruz*, 142 S. Ct. 1638, 1649–50 (2022).

Next, the government accuses the College of "misunderstanding" the Directive. Opp.13–14. Yet the Directive imposes a clearly enforced prohibition. And for standing, this Court assumes that the College is correct on the merits. *Cruz*, 142 S. Ct. at 1647–48.

The government also pushes the canard that the College cannot point to any "past" enforcement. Opp.14. But the Directive is brand new, and HUD's past position was "limited" and "insufficient." Pet.App.36a–41a. It is inaccurate to say the College's dormitory policy "co-existed" with this policy "for more than a decade," Opp.14–15, when it is only after the Directive's promulgation that HUD takes the position that the College's policy and speech are "discriminatory" and "unlawful." Pet.30.

In sum, the Administration is implementing a sea change in federal law by extending this Court's holding in *Bostock* to every last nook of the federal code. Agencies need never put those post-*Bostock* mandates through notice and comment if they can get away with coercing regulated entities to comply using directives disguised as "policy statements." HUD has not proposed to amend its FHA regulations at 24 C.F.R. Part 100 to add gender identity, but it has imposed the Directive throughout grant notices anyway. *E.g.*, HUD, Fair Housing Initiatives Program—Education and Outreach Initiative for the American Rescue Plan (May 11, 2023), https://bit.ly/43ammU4.

And this is not just a HUD problem. The Department of Education, the Department of Health and Human Services, and other agencies published post-*Bostock* "notices" to permanently change laws they enforce. As Judge Grasz understood, this is "corrosive" to the rule of law and public participation in agency rulemaking. Pet.App.16a. It coerces maximum regulatory compliance while postponing judicial review indefinitely.

The problem is exacerbated by the Administration's head-in-the-sand religious liberty approach. That stance violates *Little Sisters* and, under the Eighth Circuit's approach to standing, immunizes agencies' conduct from review until after a religious entity has been investigated and charged. That places regulated entities like the College in the unenviable position of choosing to either comply or face draconian penalties and years of intrusive investigation. Certiorari or summary reversal is warranted.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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