No. 21-2270

In the United States Court of Appeals For the Eighth Circuit

THE SCHOOL OF THE OZARKS, INC., *et al.*,
Plaintiff-Appellant,

v.

JOSEPH R. BIDEN JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *et al.*,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Missouri, The Honorable Roseann Ketchmark

BRIEF FOR THE STATES OF MISSOURI, ALABAMA, ARKANSAS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE SCHOOL OF THE OZARKS AND REVERSAL

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STATEMENT OF THE *AMICI CURIAE*'S INTEREST

The Attorneys General of Missouri, Alabama, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Montana, Nebraska, South Carolina, Tennessee, Texas, Utah, and West Virginia are the chief legal officers of their States and have the authority to file briefs on behalf of the states they represent pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2).

"[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself" "to protect the States from overreaching by Congress." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). Today, Congress often empowers federal agencies to exercise extraordinary legislative power with little meaningful oversight, raising the risk that the federal bureaucracy may "invade the rights of the individual States, or the prerogatives of their governments." *Id.* (citing The Federalist No. 46, p. 332 (B. Wright ed. 1961)). Federal actions that violate the substantive and procedural statutes that prescribe the exercise of legislative power intrude upon State sovereignty.

Through their Attorneys General, the *Amici* States are well

positioned to explain that the Department of Housing and Urban Development has transgressed this boundary here. This case involves an expansion of federal power and the balancing of antidiscrimination interests with religious beliefs. The *Amici* States enforce antidiscrimination statutes while at the same time "ensur[ing] that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018). The federal action involves housing, an area of traditional State concern, and the States also have housing organizations, educational institutions, and localities that will be expected to comply with HUD's new Directive. *Amici* States urge the Court to apply traditional standing requirements and reverse the district court's error-laden decision, which applies a selectively narrow view of religious organizations' standing to challenge federal rules that directly interfere with the free exercise of their faith.

SUMMARY OF ARGUMENT

In an extraordinary decision, the district court held that a Christian college that assigns students by their biological sex to single-sex dorms lacks standing to challenge HUD's new interpretation of the Fair Housing Act that directly exposes the School to liability, both from federal enforcers and private litigants. Why? Because according to the court, the School failed to show any of the elements required for Article III standing. The court explained that out of respect for its proper role and avoiding "judicial activism," it was "unwilling to decide a Constitutional issue not before it to invalidate legislative or executive actions." Ironically, the court's concern for its constitutional boundaries caused it to overlook the Complaint's five counts alleging statutory violations and the preliminary injunction motion's alleged violations of the Administrative Procedure Act.

The School's pre-enforcement suit raises serious challenges to expansive and potentially boundless Executive action that tramples religious liberties. Despite allegations that the School is subject to the FHA and that HUD's memo changes the School's legal liability, the district court concluded that the School lacked an injury-in-fact because

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the School was not presently "being investigated, charged, or otherwise subjected to any enforcement action." District courts should be impartial but not blind. The Directive is clear: the days of "limited enforcement" are over and HUD will "fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity." The School need not wait for HUD to knock on its door before asking a court to declare that its faith-based housing policies do not violate the FHA.

The district court's decision is even more concerning because the unlawful agency action severely burdens religious freedoms. HUD's decision to issue its new Directive without notice-and-comment violated the APA and the FHA's procedures. The Directive clearly purports to bind HUD's agencies and its state and local partners to enforce HUD's interpretation of *Bostock*'s reading of Title VII's sex-discrimination prohibition. But in issuing this new legislative rule, HUD failed to consider important First Amendment issues that directly affect any such enforcement, and HUD's reading is faithless to *Bostock* in this regard. The absence of such discussion and its failure to mention religious practices at all shows that HUD is not relying on *Bostock* or its analysis

for its new Directive. The APA requires more than mere lip service, and the district court should be reversed.

ARGUMENT

I. The HUD Directive is a legislative rule seeking to evade judicial review.

The district court dismissed the case, in part, because it found that under the HUD memo the new Directive did not have "the legal authority to define or modify its rights or obligations under the FHA." Doc. 24 at 7. It did so without analyzing the Directive or grappling with the APA or the FHA's requirements. The Complaint makes specific allegations that the Directive is a substantive rule requiring notice-and-comment under both statutes, but the district court failed to address these at all. Dismissing the case was error.

A rule "includes 'nearly every statement an agency may make.'" *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 893 (D.D.C. 1997). The APA defines "rule," in part, as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). There are primarily two types of rules, legislative and

interpretative. The primary difference between the two "is the legal base upon which the rule rests." *United Technologies Corp. v. EPA*, 821 F.2d 714, 719–20 (D.C. Cir. 1987). Only legislative rules must be promulgated through notice and comment. 5 U.S.C. § 553(b); *see also* 42 U.S.C. § 3614a (procedure for implementing FHA rules on discrimination).

"Expanding the footprint of a regulation by imposing new requirements . . . is the hallmark of legislative rules." *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). "The critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). But when "the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Even though a document might interpret a statute, as most federal guidance documents do, if the agency "bases enforcement actions on the policies or interpretations formulated in the document ... then the agency's document is for all practical purposes binding." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). "When an agency creates

a new 'legal norm based on the agency's own authority' to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule." *Iowa League of Cities*, 711 F.3d at 873.

The HUD memo clearly creates a new legal norm and bases its enforcement decisions on it. The agency claims to reinterpret what discrimination on the basis of sex means in the context of the FHA, but the agency relies solely on the Executive Order 13988's directive to do so. Although EO 13988 purports to be relying on Supreme Court precedent to reinterpret the FHA, the decision in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), interprets a provision of Title VII, not the FHA. The Executive Order does not analyze the text, history, or statutory scheme of the Fair Housing Act. It merely announces that "laws that prohibit sex discrimination—including … the Fair Housing Act, as amended (42 U.S.C. §§ 3601 et seq.), … along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." 86 Fed. Reg. 7023. The President does not identify what contrary indications are sufficient. And neither does the HUD memo.

Instead, the HUD memo explicitly requires its own agencies, state and local agencies, and private organizations to enforce a new, atextual prohibition on gender identity and sexual orientation discrimination. HUD Memo, at 2. HUD also orders its enforcement arm, the FHEO, to "conduct all other activities involving the application, interpretation, and enforcement of the Fair Housing Act's prohibition on sex discrimination." *Id.* It also provides that state and local laws are not "substantially equivalent" to the FHA for complaint-processing purposes unless those existing laws are "administered consistent with *Bostock*." HUD memo at 2. It thus places enormous pressure on States and localities to adopt its own erroneous interpretation of *Bostock*. HUD also requires all Fair Housing Initiative Program (FHIP) grant recipients to interpret sex discrimination the same way. In sum, the Directive relies on its own authority, establishes a new legal norm, and bases enforcement actions on that legal norm. This legislative rule binds not only HUD, but many of its state, local, and private partners.

This Court should also note that President Biden's Proclamation on National Fair Housing Month stated that "[j]ust 2 months ago my Administration issued a *rule change* to ensure that the [FHA] finally

guards against discrimination targeting LGBTQ+ Americans." Ex. M, Doc. 1-14 (emphasis added). HUD failed to follow statutory procedures when issuing a substantive rule, and the district court erred in dismissing the case.

II. Imposing new liability for gender identity and sexual orientation discrimination without evaluating the burden on religious freedoms is inconsistent with *Bostock* and the APA.

The School alleges that HUD issued this Directive without considering how it would affect religious organizations. Assuming, as the Court must, that this is true, it is a fatal omission that renders the rule substantively arbitrary and capricious. The Supreme Court has noted the difficulty in applying antidiscrimination law to devout business owners and organizations because "religious and philosophical objections to gay marriage are protected views." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018). In *Bostock*, the Court was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution." 140 S. Ct. at 1754. Such a failure to consider the impact on First Amendment freedoms in the context of imposing a new anti-discrimination policy is manifestly arbitrary and capricious.

The First Amendment's sweeping promise that no law shall "prohibit[] the free exercise" of religion is fundamental to our society. Our constitutional system embraces "a spirit of freedom for religious organizations, [and] an independence from secular control or manipulation," so that they may decide "free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). The Court has explained that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). In addition, Congress has layered on further protections, including by allowing religious organizations to limit the "sale, rental or occupancy of dwellings … to persons of the same religion." 42 U.S.C. § 3607(a).[1]

At the same time, protecting classes of individuals from unlawful discrimination is a legitimate state interest, and this interest can conflict

[1] This provision may not apply in the School's circumstances because it limits housing based on its own religious beliefs, and not what beliefs the renter holds.

with devout business owners expressing and exercising their religious beliefs. *See Masterpiece Cakeshop,* 138 S. Ct. 1719, 1728 (2018). The federal government, no less than the States, may not ask such business owners to compromise their beliefs if they "want[] to do business in the state." *Id.* at 1729. Governmental bodies that fail to show due respect for and are dismissive of a person's free exercise rights face running afoul of the First Amendment. *Id.* The Constitution "commits government itself to religious tolerance," even when enforcing antidiscrimination laws. *Id.* at 1731.

HUD applies a greatly overbroad interpretation of *Bostock* that is not faithful to the opinion itself. The Court's holding was limited to "[f]iring employees because of a statutorily protected trait." 140 S. Ct. at 1753. It explicitly declined to consider "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII." *Id.* Due to the manifest concerns about religious freedom, the Court expressly noted Title VII's statutory exemption for religious organizations and that the "First Amendment can bar the application of employment discrimination laws" to some claims. *Id.* at 1754 (citing *Hosanna-Tabor*, 565 U.S. at

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188). The Court further noted that the Religious Freedom Restoration Act of 1993 acts as a "super statute, displacing the normal operation of other federal laws, [and] might supersede Title VII's commands in appropriate cases." *Id.* at 1755.

HUD's repeated insistence that it relied on *Bostock* rings hollow. One would think that such reliance would require interpreting the FHA's statutory scheme and history and explaining how RFRA, as a "super statute," informs HUD's enforcement priorities. One could also see where HUD might have noted that the First Amendment and the Court's precedents in *Hosanna-Tabor* and *Masterpiece Cakeshop* may limit HUD's authority to "fully enforce" the sex discrimination prohibition. The HUD memo's only passing reference to the Constitution is its description of the FHA's purpose, and it never mentions religion, faith, or beliefs. This shows a complete failure to consider a pervasive issue that directly affects the HUD's enforcement of gender identity and sexual orientation discrimination.

The HUD memo recognizes that its new Directive departs from its previous interpretation of discrimination on the basis of sex. Its failure to consider well-known First Amendment protections is fatal.

III. The School has standing to challenge HUD's new Directive authorizing new categories of liability before facing an enforcement action.

The School's pre-enforcement challenge to HUD's new interpretation of the FHA's sex discrimination prohibition is entirely proper. The district court failed to analyze this case as a pre-enforcement challenge, and erroneously required the School to allege a current, versus a prospective, injury. The court also overlooked binding Eighth Circuit precedent confirming that regulated parties have standing to challenge unlawful agency action that burdens them. The School's well-pleaded complaint deserves more than the district court's cursory attention, and the dismissal should be reversed.

A. The School has plausibly alleged an injury-in-fact substantial risk of a prospective injury

The School has an imminent injury: the threat of enforcement actions and investigations by HUD and private parties that have been invited to sue the School on this new category of liability. It cannot be that the School must risk defending itself and its religious beliefs in potentially multiple venues (administrative hearings, suits by different parties with differing claims on same theory) from actions spurred on by HUD's invalid rule erroneously interpreting the FHA. By inviting

complaints on this liability theory and mandating enforcement, HUD has created a substantial risk of litigation for the School. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (*SBA List*) (stating that an "allegation of a future injury" is imminent when "there is a substantial risk that the harm will occur").

A party has standing to sue when faced with a prospective injury "where the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). A threatened injury "is both immediate and real" when compliance with a law "is coerced by the threat of enforcement." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 508 (1972); *see also SBA List*, 573 U.S. at 158 (2014). "Therefore, '[p]laintiffs have standing to challenge the facial validity of a regulation notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them.'" *Keller v. City of Fremont*, 719 F.3d 931, 947 (8th Cir. 2013) (alteration in original) (quoting *Gray v. City of Valley Park*, 567 F.3d 976, 984 (8th Cir. 2009)).

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The Court in *SBA List* explained that a future injury is imminent where "the threatened injury is certainly impending, *or* there is a substantial risk that the harm will occur." 573 U.S. at 158 (emphasis added) (internal quotation marks omitted). "[A]dministrative action, like arrest or prosecution, may give rise to sufficient harm to justify pre-enforcement review." *Id.* at 159. Because plaintiffs who demonstrate a "realistic danger" of harm from a statute meet this requirement, *see Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988), the Court recognized that plaintiffs who "allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" can demonstrate a substantial risk of harm if they can show an "actual and well-founded fear that the law will be enforced against [them]," *SBA List* , 573 U.S. at 159.

Here, the School has adequately alleged that there is a substantial risk of future harm, and therefore it faces a "real, immediate, and direct" negative impact. Specifically, the School wishes to maintain its dorm policies, which are "affected with a constitutional interest" since they are informed by the College's religious beliefs. *Id.* But doing so also means that the School opens itself up to penalties. *See, e.g.*, Compl., Doc. 1, at

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27 (noting penalty amount per violation). Or the School risks abandoning its deeply held beliefs and incurring out-of-pocket costs to adapt housing and other facilities to comply with HUD's new instructions.

The district court further erred in dismissing the Complaint on all claims arising out of alleged APA violations. The School seeks to have the memo rescinded because HUD violated the APA by "dodg[ing] the APA's notice and comment procedures and *de facto* implement[ing] new legislative rules regulating members' activities under the [statute]." *Iowa League of Cities v. EPA*, 711 F.3d 844, 870 (8th Cir. 2013). Binding Eighth Circuit law holds that a "violation of a procedural right can constitute an injury in fact 'so long as the procedures in question are designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of his standing.'" *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 at n.8 (1992)). As in *Iowa League of Cities*, the School has a concrete interest in following lawful requirements and "avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them." *Id.* at 871. This easily satisfies the injury-in-fact requirement, and this procedural injury alone warrants reversal of the district court's erroneous decision on standing.

B. Because the Executive Order and HUD's new Directive causes the School's harm, enjoining Defendants from enforcing the new rule provides effective relief.

The district court's reasoning that any harm flows from the Supreme Court's decision in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), and the FHA, rather than the Directive, fails in two ways. First, the *Bostock* decision expressly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. The Court expressly declined to do what the Executive Order and the HUD memo implementing that order do today. Without those executive actions, the School does not face potential enforcement by HUD on this new category of liability. And it is the Executive's failure to consider the burdens on religious institutions in issuing the rule that gives rise to this suit.

Second, by holding that any possible injury arises solely from the FHA, the district court ignored that an injury is fairly traceable to the agency empowered to enforce the statute against the regulated party. *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 779 (8th Cir. 2019) (injury is "'fairly traceable' where 'the named defendants ... possess the authority to enforce the complained-of provision.'") (quoting *Digital*

Recognition Network, Inc. v. Hutchinson, 803 F.3d 952, 958 (8th Cir. 2015)). Here, the Directive takes the additional step of not only authorizing investigations and suits based on this new theory of liability, it mandates those actions and certain grant recipients to interpret and enforce the prohibition on sex discrimination the same way. *Cf. Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 412 (2013) (when law "at most authorizes—but does not mandate or direct—the [action] that respondents fear, respondents' allegations are necessarily conjectural.") (emphasis in original)). Further, the district court's claim that the FHA's text causes the School's injury implicitly rejects the very relief requested: a declaration that discrimination because of sexual orientation and gender identity is not sex discrimination under the FHA.

Closely linked to what causes a plaintiff's injury is whether the district court can grant appropriate relief. It is axiomatic that "no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). Yet, even "the ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Id.* (noting that though "a single dollar cannot provide full redress," partial remedies still satisfy

redressability) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

The School satisfies these standards, but the district court held that it could not provide adequate relief because an injunction "would not [completely] foreclose the possibility that Plaintiff could be held liable for violation of the FHA." *School of the Ozarks v. Biden*, No. 6:21-03089-CV-RK, slip op. at 5 (W.D. Mo. June 4, 2021). The School does not seek to foreclose all liability, only "to [e]njoin the Memorandum and any enforcement of it by Defendants." *School of the Ozarks v. Biden*, No. 6:21-03089-CV-RK, slip op. at 5 (W.D. Mo. June 4, 2021) (alteration in original). That is within the Court's power, even though private "individuals remain free to bring claims for FHA violations." *Id.* This "partial remedy" satisfies the redressability requirement. *Church of Scientology*, 506 U.S. at 13. Indeed, a favorable ruling from this Court would, if not fully effectuate the remedy that the School seeks, provide some remedy by preventing the suits by the HUD memo's recipients.

C. Religious litigants should not be subject to uniquely strict applications of standing.

This is not the first time that district courts in this Circuit have taken an unduly narrow view of religious organizations' standing to sue

to vindicate their sincerely held religious beliefs. For example, a federal court in Missouri found that government employees who objected, on religious grounds, had no standing to challenge health insurance programs offered by their state employer that provided coverage for contraceptives, sterilization, and abortifacients. *Wieland v. U.S. Dep't of Health and Hum. Servs.*, 978 F.Supp.2d 1008, 1016 (E.D. Mo. 2013) *rev'd*, 793 F.3d 949 (8th Cir. 2015). This Court found that the district court had overlooked persuasive evidence and erred as to every standing element. 793 F.3d at 957. A district court in Nebraska likewise found no standing for various religious plaintiffs who objected to rules adopted by HHS to implement the ACA that they claimed would have coerced them into subsidizing services contrary to their religious beliefs. *Nebraska ex rel. Bruning v. U.S. Dep't of Health and Hum. Servs.*, 877 F.Supp.2d 777, 785, 804 (D. Neb. 2012) (requiring allegations that exception to HHS rule did not apply). This case falls into that line of erroneous decisions that impose unduly restrictive burdens on religious plaintiffs seeking to vindicate fundamental rights under the First Amendment.

The School's allegations show a concrete injury that the organization will suffer and the Court can order effective relief. The district court should be reversed.

CONCLUSION

This Court should reverse the dismissal by the district court.

Dated: August 9, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the typeface and formatting requirements of Fed. R. App. P. 29 and 32, and that it contains 3,985 words as determined by the word-count feature of Microsoft Word. The brief has been scanned for viruses and is virus free.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's CM/ECF system.

/s/ D. John Sauer