No. 21-2270

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE SCHOOL OF THE OZARKS, INC., d/b/a COLLEGE OF THE OZARKS,

Plaintiff-Appellant,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; MARCIA L. FUDGE, in her official capacity as Secretary of the U.S. Department of Housing and Urban Development; JEANINE M. WORDEN, in her official capacity as Acting Assistant Secretary for Fair Housing & Equal Opportunity of the U.S. Department of Housing and Urban Development,

Defendants-Appellees.

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

MOTION FOR AN INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

The School of the Ozarks, Inc., d/b/a College of the Ozarks, is a nonprofit corporation with no parent company or stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

Plaintiff College of the Ozarks needs urgent relief to stop the government from threatening crippling penalties against it and other private religious colleges unless they open girls' dormitories to males and cease speaking about their housing policies. In February, with no public notice or opportunity for comment, the government issued a "directive" redefining the Fair Housing Act (FHA) to prohibit sexual orientation and gender identity discrimination and mandating "full enforcement" nationwide, including for college student housing. Addendum 9–12 (Add).

When the College sought protection from this mandate, the district court denied an injunction and *sua sponte* dismissed the case as non-justiciable, declaring that the Directive is a non-binding policy statement. Add1–7. That is error. The Directive is reviewable final agency action that imposes immediate obligations on the College coupled with threats of crippling fines and even criminal prosecution. The College has standing and is likely to succeed on the merits. This Court should issue an injunction pending appeal.

BACKGROUND

Congress enacted the Fair Housing Act (FHA) in 1968 to prohibit discrimination based on race, religion, and national origin, and amended it in 1974 to prohibit sex discrimination. 42 U.S.C. § 3604(a) & (b); 24 C.F.R. § 100.50(b)(1)–(3). The FHA and its regulations prohibit speech deemed discriminatory, including any "statement[s]" and "notice[s]"

expressing a policy of or preference for discrimination. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.50(b)(4)–(5).

The FHA applies to all "dwellings," even if the owner receives no government funds. 42 U.S.C. § 3602(b); 24 C.F.R. § 100.20. Courts have applied the FHA to college housing. *United States v. Univ. of Nebraska at Kearney*, 940 F. Supp. 2d 974, 983 (D. Neb. 2013).

For decades, courts unanimously held that the FHA does not address sexual orientation or gender identity. ECF 2-1 at 17–18 (collecting cases). As recently as 2020, the U.S. Department of Housing and Urban Development (HUD) issued public guidance saying that "to consider biological sex in placement and accommodation decisions in single-sex facilities" is "permitted by the Fair Housing Act."[1]

But, on taking office, President Biden ordered the government to enforce the FHA as *if* it covers gender identity and sexual orientation. ECF 1-3 at 2–3. Three weeks later, with no public notice or opportunity for comment, HUD issued what it labeled a "directive," extending the FHA to sexual orientation and gender identity and ordering HUD officials and federally funded states and nonprofits to "fully enforce" this standard nationwide to "eradicat[e]" discrimination. Add9–12. The Directive applies both prospectively and retroactively one year. *Id.* President Biden called the Directive a "rule change." ECF 1-14 at 2.

[1] Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811, 44,812 (July 24, 2020).

The FHA includes broad enforcement mechanisms, including complaints, investigations, and lawsuits. Compl. ¶¶ 158–77. Its penalties include unlimited compensatory and punitive damages, 42 U.S.C. §§ 3612(g), 3613(c), and cumulative fines of six figures and beyond. 24 C.F.R. § 180.671. The FHA also provides criminal penalties, including prison time, if an incident involves the threat of force, such as if security staff enforce a prohibited housing policy. 42 U.S.C. § 3631.

The government funds "testers" who test for compliance with the FHA, and who may file complaints and bring lawsuits—even if they lack a personal interest in obtaining housing. 42 U.S.C. §§ 3610(a)(1)(A)(i), 3613, 3614; 24 C.F.R. § 103.9, et seq. Those testers include a federal grantee in Missouri. ECF 1-7, 1-8.

As a private religious college, the College of the Ozarks houses 1,300 students under policies that the government now deems unlawful. Compl. ¶¶ 31, 75. Students need not be of a particular religion to study or live at the College, but they must agree to follow the College's religiously informed code of conduct. Compl. ¶¶ 42–44. Under the code, sex is determined at birth and based on biology, not gender identity. Compl. ¶¶ 56–59. This code governs the College's single-sex residence halls, including their communal showers, restrooms, and visitation policies. Compl. ¶¶ 80–91. Students also may not engage in sex outside marriage between a man and a woman. Compl. ¶ 226. The College communicates these policies daily. Compl. ¶¶ 5, 8, 92–111.

Contrary to the College's code, the Directive forces colleges to let males occupy female dorms—and qualify for roommate selection—if they claim a female gender identity. ECF 2-1 at 19–20; ECF 20 at 17–21. And because the FHA and HUD ban discriminatory statements and notices, the Directive censors colleges' speech, banning them from saying that student housing is separated by biological sex and coercing them to say the opposite. ECF 2-1 at 26–28; ECF 20 at 28–29. The Directive thus forces the College to choose between harming its students and violating its religious beliefs or risking massive fines, investigatory burdens, lawsuits, and criminal penalties. Compl. ¶¶ 229–64. This is especially urgent as the fall semester approaches. Compl. ¶ 106.

The College sought a temporary restraining order and preliminary injunction against the Directive. ECF 1&2 (Apr. 15, 2021). The district court denied the motion from the bench, ECF 21 (May 19, 2021), and the College moved for an injunction pending appeal, ECF 22 (May 25, 2021). The district court then issued a short opinion denying an injunction and *sua sponte* dismissing the case as non-justiciable, declaring that the Directive is a non-binding policy statement. Add1–7 (ECF 24 (June 4, 2021)). The clerk entered judgment, Add8 (ECF 25 (June 7, 2021)), and the district court then denied an injunction pending appeal on the same grounds, ECF 29 (June 9, 2021).

ARGUMENT

I. The College has standing to challenge the Directive.

A. The Directive threatens imminent injury and causes irreparable harm that an injunction would redress.

Standing exists when (1) a regulated entity is threatened with imminent injury; (2) a causal connection exists between the injury and the challenged regulation; and (3) a favorable decision is likely to redress the injury. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749–50 (8th Cir. 2019). "[T]here is ordinarily little question" that standing exists where an entity is the "object of the [challenged] action," such as when an injury arises from the government's regulation of the entity. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). The College is the object of the Directive and meets all three standing criteria.

The Directive threatens both imminent injury and irreparable harm. The Directive *immediately* forces the College to choose between three injuries: (1) obey the Directive and abandon the College's religious policies and speech; (2) refuse the Directive and risk crippling government penalties; or (3) cease providing student housing. Compl. ¶¶ 229–73.

The Directive threatens these injuries because it binds internal and external enforcement programs to its interpretation of the FHA. ECF 19 at 11, 24. No prior court decision or agency decision required this: prior HUD actions were, in the Directive's own words, "limited" and "insufficient," and "fail[ed] to fully enforce" HUD's new view. Add11. And

as recently as 2020, HUD said that the FHA allows separating housing by biological sex. ECF 20 at 3–5.

The government does not dispute that the Directive adds sexual orientation and gender identity to the FHA's categories and regulations, including its prohibitions on speech. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.50(b)(4)–(5). Nor does the government deny that the Directive's plain text requires agency officials and external enforcement programs, including States, to "fully enforce" this mandate against all regulated entities, including colleges. Add9–12.

The government openly argued below that the College's housing and visitation policies, and even its speech to students about sexuality, are in the crosshairs of the Directive. The government views the College's statements about its housing policies to "indicate a discriminatory and unlawful preference." ECF 19 at 41–42. Under the Directive, the FHA covers a student who "might someday experience housing discrimination on the basis of sexual identity or sexual orientation." Add15. Likewise, the Directive covers "a cisgender student who may experience housing discrimination when she brings transgender friends or family members to the dorm simply because those friends or family members do not conform to the college's views on sexuality" under its visitation policies. Add17. The Directive even covers a transgender student who, despite agreeing to the College's code of conduct, claims to be "denied housing or experiences a hostile housing environment from college administrators

on the basis of gender stereotype" from the College's religiously informed speech about sexuality. Add16. That is why the government told the College to consider changing its housing policies and "accommodat[ing]" biological males who identify as females, or else risk penalties. ECF 19 at 20, 44–45.

The district court sidestepped these facts and said any injury or restriction on speech is caused by extending *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020) to the FHA. Add4–7. But *Bostock* did not interpret the FHA, and the Supreme Court disavowed that it was ruling on any "other laws" or that its holding encompassed intimate spaces. 140 S. Ct. at 1753. Interpreting the FHA to encompass gender identity and sexual orientation—and binding enforcers to act on this interpretation—was the Directive's work, not *Bostock*'s. And, by assuming that *Bostock* should be extended to the FHA, the court improperly gave an advisory opinion about the merits, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), rather than assume the College would prevail, *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016). An injunction against the Directive will therefore redress the injury of threatened government enforcement.

The district court also believed that the College's injury is not redressable because private parties can seek to enforce the same interpretation of the FHA on the College. Add5–6. But standing is "bolstered" when the "authority to file a complaint" "is not limited to a

prosecutor or an agency." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). Moreover, a favorable judgment would relieve the College of a real government enforcement threat, and that is enough—it need not negate every injury from every source. *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011). "[D]enying prompt judicial review would impose a substantial hardship"—forcing the College "to choose between refraining" from speech or engaging in that speech and "risking costly [enforcement] proceedings and criminal prosecution." *Susan B. Anthony List*, 573 U.S. at 167–68.

B. The College need not wait for a HUD complaint investigation or a DOJ lawsuit.

The district court ignored the First Amendment standards for pre-enforcement review—and thus failed to consider whether the College met them. Add4–6. Instead, the district court applied a "rigorous standard" under which no standing exists until the government first investigates and charges the College. *Id.*

But the standard for First Amendment pre-enforcement challenges is both "forgiving" and "lenient," *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699–700 (8th Cir. 2021), and under *Telescope Media* the College need not "wait for an actual prosecution or enforcement action before challenging a law's constitutionality," 936 F.3d at 749–50. The First Amendment protects the College's statements about its student housing policies. Compl. ¶¶ 226, 234–35; *infra* Pt.III.A.4. Because the

College has "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by," or "arguably proscribed" by, the Directive, "there exists a credible threat of prosecution thereunder." *Telescope Media*, 936 F.3d at 749–50; *see Susan B. Anthony List*, 573 U.S. at 158–59, 162.

The College's speech and policies are more than "arguably proscribed" by the Directive. The College must immediately cease telling students, current and prospective, about its policies. The Directive demands full enforcement and binds all enforcement agencies. Add9–12. The district court was wrong to posit that any threat was speculative because the Directive did not detail "how HUD will determine FHA liability based on *Bostock* in any specific factual setting or considering potential exemptions." Add4–5. The government presented a panoply of hypotheticals under which it would punish the College for not complying with the Directive's FHA interpretation. *Supra* Pt.I.A. Just as when the government reinterpreted Title IX through informal action on a similar theory, *see Texas v. United States*, 201 F. Supp. 3d 810, 819–23 (N.D. Tex. 2016), schools face a credible threat of enforcement under the FHA as the Directive interprets it.

The College thus has standing to challenge the threat to its policies and speech. The College's student policies are intertwined with the College's speech and educational mission, and so all "are affected with a constitutional interest too, regardless of the precise legal theory."

Telescope Media, 936 F.3d at 749–50.

Below, the government asserted that no credible enforcement threat exists because HUD has not yet brought an FHA charge against a college that also possesses a religious exemption under Title IX. ECF 19 at 2–3, 6–7, 11, 16–17, 20. But the Directive is only four months old—a lack of enforcement history is irrelevant. And a regulated entity has standing to seek to restrain government enforcement of laws that arguably infringe on speech "even when those statutes have never been enforced." *281 Care Comm.*, 638 F.3d at 628, 631. Only an unchangeable policy forswearing future enforcement, or a long history of disuse approaching desuetude, might lessen the Directive's credible threat. *Id*. In fact, this Court has found standing even where the government swore off enforcement in court. *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019). And here, the government insists the Directive *does* impact the College's religiously informed policies concerning sex, gender identity, and visitors. Add15–17. Moreover, the government nowhere admits that exemptions found in Title IX, a separate statute, *actually* protect colleges from the FHA.

The government's new Directive also negates any potentially protective effect of Title IX. Under the government's reading of Title IX, colleges can have male and female sports, but males who identify as females must be allowed to compete as females.[2] ECF 1-15, 1-16. So too

[2] Executive Order No. 14021, Guaranteeing an Educational Environment

with single-sex restrooms, ECF 1-17 at 2, and single-sex housing. HUD insists that even in a "single-sex" facility, "placement and accommodation of individuals in facilities that are permitted to be single-sex must be made in accordance with the individual's gender identity."[3] And it reaffirmed this position during this litigation.[4] It is no consolation to tell the College it can still have "female" dorms provided it lets biological males who identify as female live there.

II. The Directive is reviewable final agency action.

The College's claims are reviewable under the Administrative Procedure Act (APA). The APA provides judicial review of "agency action," and provides for relief pending review. 5 U.S.C. § 702, 705–06. This Court adopts a presumption of reviewability under the APA. *Tamenut v. Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (per curiam).[5]

Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

[3] Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763, 64,765 (Sept. 21, 2016); *see also id.* at 64,767–68.

[4] Press Release, U.S. Dep't of Housing & Urban Dev., HUD Withdraws Proposed Rule, Reaffirms Its Commitment to Equal Access to Housing, Shelters, and Other Services Regardless of Gender Identity (Apr. 22, 2021), https://bit.ly/3isVVEu.

[5] Alongside the APA, the College also sought injunctive relief under an equitable cause of action. Compl. ¶¶ 14–15; ECF No. 2-1 at 21; ECF No. 20 at 15–16. This claim gives a direct right to sue for injunctive relief under the Constitution and to halt ultra vires agency action even if it falls outside the APA. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 189–90 (D.C. Cir. 2006); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90, 693 (1949).

Agency action is final and reviewable if: (1) the agency's action is the "'consummation' of the agency's decisionmaking process"; and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

The Directive is reviewable. *First*, the Directive consummates the decision-making process: it shuns tentative and advisory language for definitive, mandatory terms. It covers "all" FHA applications; "require[s]" officials and enforcement programs to comply; "urgently requires enforcement action"; and orders that the new standard be "fully" enforced. ECF 1-2. Past guidance was "limited," "insufficient," and "inconsistent," making a new Directive "necessary." *Id.* at 2.

Second, the Directive determines obligations and creates legal consequences for the agency, external enforcement programs, and regulated entities. The Directive adopts a universal FHA interpretation that leaves no freedom for officials or enforcement programs to adopt a different one. ECF 19 at 11, 24. The government communicated the Directive nationwide and sent new contract terms to external enforcement grantees, including States, requiring them to enforce the Directive "fully." Compl. ¶¶ 1, 187–213. No entity subject to the FHA can view the Directive as inconsequential when the Directive binds all enforcers to "eradicat[e]" non-compliant housing policies. Add12.

The district court reasoned that because the FHA imposes a gender

identity and sexual orientation nondiscrimination requirement, the Directive's imposition of the same requirement is *per se* non-binding policy guidance with no consequences of its own. Add4–7. Not so. The Directive interprets the FHA to prohibit certain actions not stated in the FHA or its regulations—policies that the College and others have had for time immemorial. *Infra* Pt.III.A.3. Under the APA's practical approach, any agency action that "has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability," is reviewable. *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 446 (5th Cir. 2019). Full enforcement of the FHA, as the Directive commands, requires the College to alter its conduct or expose itself to liability. It is reviewable.

Just like under Article III, under the APA, "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (cleaned up). Agency action imposing a legal standard and ordering enforcement is "immediately reviewable," even if the order correctly implemented a statutory requirement and "would have effect" only "when a particular action was brought." *Id.* "[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett v. EPA*, 566 U.S. 120, 129 (2012).

III. The College is entitled to injunctive relief pending appeal.

Injunctive relief pending appeal is warranted when the balance of equities favors the applicant, considering "(1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to other litigants; and (4) the public interest." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). "The most important factor is the appellant's likelihood of success on the merits." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (per curiam).

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

1. The Directive unlawfully skipped public notice and comment.

The Directive was issued without the required public notice and comment and therefore must be set aside as being "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

The Directive had to undergo public notice and comment for three reasons. First, the Fair Housing Act requires notice and comment for "all rules"—no exceptions. 42 U.S.C. § 3614a. Second, the APA independently subjects substantive or legislative rules to notice and comment and delays their effective date 30 days. 5 U.S.C. § 553(b)–(d). Third, a HUD regulation required the Directive to undergo public notice and comment even if not a rule, because it interprets law and implements presidential priorities. 24 C.F.R. §§ 11.1(b), 11.8.

Even as an interpretive rule, the Directive would require notice and comment under the FHA, but given its substantive and legislative nature, it also required notice and comment under the APA and HUD regulations. The court below reasoned that the Directive is not a rule but a non-binding policy document. Add4–7. But 24 C.F.R. §§ 11.1(b) and 11.8 still apply. And the Directive has all the characteristics of a binding rule. Courts consider, for example, the agency's own characterization of the action, *Drake v. Honeywell, Inc.*, 797 F.2d 603, 607–08 (8th Cir. 1986), and HUD called the document a "directive," and President Biden called it a "rule change," ECF 1-14 at 2. Both are correct. Like a rule, the Directive "purports to create substantive requirements" in the form of new FHA requirements. *S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1028 (8th Cir. 2003). It speaks "of what 'is' done or 'will' be done." *Id*. The Directive does not merely recognize *Bostock's* application to the FHA, because *Bostock* did not encompass the FHA. *Infra* Pt.III.A.3. The Directive extends *Bostock* to the FHA, and extending *Bostock*'s reasoning to create new protected classes in a separate statute is a rule. And, like a rule, on its face the Directive binds the agency and external enforcement entities to those requirements, and it requires full enforcement against all entities covered by the FHA in all situations. *Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998).

Even as an interpretive rule, the Directive would require notice and comment under the FHA, but given its substantive and legislative

nature, it also required notice and comment under the APA and HUD regulations.

2. The Directive ignored necessary factors, including the impact on religious colleges.

The Directive is arbitrary and capricious under 5 U.S.C. § 706(2)(A) because it was issued without consideration of its harm to private religious colleges, the colleges' reliance interests, and other possible alternatives. "[A]gency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015). This must include addressing "legitimate reliance" on past policies or legitimate alternative policies. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–13 (2020).

The Directive causes tremendous upheaval for student housing. Yet it ignores any interests of private religious colleges, much less those colleges' reliance on decades of separating student housing based on biological sex. In related contexts, HUD recognized that imposing gender identity nondiscrimination on single-sex housing implicates privacy rights and religious freedom. 81 Fed. Reg. at 64,773. The Directive's failure to "overtly consider" these reliance interests, including privacy and religious freedom interests, renders it fatally flawed. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

HUD also considered no alternative policies, such as (1) delaying compliance dates; (2) applying the policy prospectively only;

(3) grandfathering existing categories of single-sex housing; (4) exempting religious institutions; or (5) crafting privacy exemptions. Nor did HUD consider the FHA's interplay with Title IX. *Infra* Pt.III.A.3.

Considering these policy concerns "was the agency's job, but the agency failed to do it." *Regents*, 140 S. Ct. at 1914.

3. The Directive lacks statutory authority and violates the clear-notice canon.

The Directive lacks statutory authority because the FHA does not prohibit separation of student housing based on biological sex, and the Constitution's clear-notice canon bars the government's new interpretation. 5 U.S.C. § 706(2).

The FHA's text prohibits discrimination based on sex, not sexual orientation or gender identity. ECF 2-1 at 17 n.4 (collecting cases). And statutory context confirms that Congress did not prohibit student housing separated by biological sex. Sex was added as a nondiscrimination category in 1974. Two years earlier, in Title IX of the Education Amendments of 1972, Congress said that Title IX does not prohibit "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Both in Title IX's text and in its ordinary meaning in 1974, sex meant the biological binary of male and female. The FHA says nothing about undoing what Title IX allowed for student housing. The FHA therefore cannot be interpreted to have prohibited separating student housing by biological sex two years later.

Yet the Directive does just that: it interprets "sex" both in the FHA and Title IX to create obligations contrary to 20 U.S.C. § 1686. Prohibiting gender identity discrimination *prohibits single-sex housing*, originally understood as housing separated by biological sex, since colleges must now place males who identify as female in female dorm rooms, and vice versa.

The Constitution's clear-notice canon also compels a narrow reading of the FHA and Title IX. The Constitution limits statutes that impose grant conditions, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24 (1981), or preempt core state police-power regulations, such as over real estate and land use, *Bond v. United States (Bond II)*, 572 U.S. 844, 858 (2014), to the requirements and consequences unmistakably set forth on the statutes' face. *Gregory v. Ashcroft*, 501 U.S. 452, 452 (1991). Congress may not use "expansive language," *Bond II*, 572 U.S. at 857–58, 860, to impose "a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 190 n.11 (1982). These structural principles protect citizens, not just states. *Bond v. United States (Bond I)*, 564 U.S. 211, 222 (2011). And because private parties' "rights in this regard do not belong to a State," a regulated person injured by government action may assert that the action was "taken in excess of the authority that federalism defines." *Id.* at 220. Each statute subject to this canon thus "must be read

consistent with principles of federalism inherent in our constitutional structure" in all applications. *Bond II*, 572 U.S. at 856–60. Here, the 1974 FHA is a spending statute that displaces traditional state real estate, land use, and education regulations, but it did not unmistakably cover sexual orientation and gender identity, let alone force colleges to allow males to live and shower with females.

Bostock is not to the contrary. In *Bostock*, the Supreme Court rejected "that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. The Court observed 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.* Even under Title VII, the Court did "not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.* The Court was also "deeply concerned with preserving" religious institutions' freedom. *Id.* at 1753–54. Nor did *Bostock* consider the effect of the clear-notice canon when it interpreted Title VII, so it did not displace this substantive canon's constitutional limits on other statutes.

4. The Directive censors and compels speech based on content and viewpoint.

The Directive violates the First Amendment's Free Speech Clause by censoring and compelling the College's speech.

The FHA and HUD's regulations, whose enforcement the Directive

modifies, prohibits speech "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on [sex]." 42 U.S.C. § 3604(c); 24 C.F.R. § 100.50(b)(4)–(5). The Directive, by triggering these provisions to "fully enforce" the FHA, thus prohibits the College's "statement[s]" and "notice[s]" about having or "prefer[ing]" its own housing policies as it rents space to students. *Id.*; Compl. ¶¶ 4, 127, 133, 150–54, 228–46, 365–89.

Consider some statements the Directive prohibits the College from making:

- Posting online its beliefs about sex and gender identity, including that its student housing and visitation are separated by biological sex not gender identity;
- telling students in person or in applications about its housing code;
- posting signs that showers and restrooms in residence halls are separated by biological sex;
- arranging dorm rooms and roommates based on students' biological sex; and
- telling students that the College prefers its policies to the government's Directive.

Compl. ¶¶ 234–40, 433. At the same time, the government allows statements made *against* the College's housing and conduct policies.

The Directive also compels the College's speech. If the College fails

to use a student's preferred pronouns based on gender identity, it is subject to the FHA's anti-hostility and anti-harassment provisions (which the government insists apply to the College under the Directive, Add16). Compl. ¶¶ 225, 239, 241.

This one-sided mandate is a regulation of speech by content and viewpoint, and is subject to strict scrutiny, with its compelling interest and narrow tailoring requirements. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227–30 (2015). No government interest requires censoring religiously informed housing policies. And any government interest that the Directive may serve could be achieved in more narrowly tailored ways. Students can attend many other institutions eager to comply with the Directive instead of a college that openly advocates its views on sexuality. Rather than tailoring itself to specific problems and avoiding protected speech and activities, the Directive encompasses the entire nation, with no exceptions, and seeks the "eradication" of all dissent. Add12.

The government, rather than trying to meet strict scrutiny, asserted that the College's speech about its religiously informed student housing policies is *per se* "not protected speech" because it furthers discrimination. ECF 19 at 41–42. But under this view "wide swaths of protected speech would be subject to regulation." *Telescope Media*, 936 F.3d at 752. And, "as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the

First Amendment." *Id.* at 755.

The Directive is overbroad because it sweeps in speech not just of the College but of many private, religious, educational institutions that separate student housing by biological sex. A preliminary injunction against the entire Directive is appropriate. *Rodgers*, 942 F.3d at 458.

B. Equity favors relief.

Equitable factors also favor urgent relief. ECF 2-1 at 30–32. The College's loss of its freedoms, with resulting harm to its educational mission and its students' privacy, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Without emergency relief, the College must abandon its housing policies and cease talking to students about its preferred policies or face massive fines and investigatory burdens. The government lacks any interest in enforcing unlawful directives, *Vitolo v. Guzman*, No. 21-5517, 2021 WL 2172181, at *4, *8 (6th Cir. May 27, 2021), and the public interest supports preserving the status quo for colleges nationwide.

CONCLUSION

This Court should enter an injunction pending appeal, without bond, with the same scope as the preliminary injunction that the College sought. ECF 2 at 3–4.

Respectfully submitted,

/s/ Julie Marie Blake

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June 11, 2021

CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) because the motion does not exceed 5,199 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Julie Marie Blake
Julie Marie Blake

Dated: June 11, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2021, the above motion for an injunction pending appeal 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 and that a PDF copy of this motion will be emailed to opposing counsel immediately after it is filed.

The College also gave reasonable notice of this motion to the government through its district court and appellate filings, as well as by conferring with the government for its position before filing. The government opposes any relief.

/s/ Julie M. Blake
Julie M. Blake