APPEAL NO. 21-2270

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; Demetria L. McCain, in her official capacity as Principal Deputy 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
Case No. 6:21-cv-03089

APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION AND FRAP 35(B) STATEMENT

The panel majority's decision upholds a federal agency action that "skirts the rule of law and undermines our values," leaving Petitioner the School of the Ozarks (the College) under a "sword of Damocles" of threatened agency enforcement. SlipOp.14 (Ex. A) (Grasz, J., dissenting) (discussing *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013)).

The U.S. Department of Housing and Urban Development (HUD) issued a "directive" in February 2021, that for the first time prohibits sexual-orientation and gender-identity discrimination under the Fair Housing Act (FHA) and mandates "full enforcement." JA78–80. Despite these mandates, HUD denied the public and the College—an entity regulated under the FHA—the right to notice and an opportunity to comment guaranteed by both the FHA and the Administrative Procedure Act (APA). If the decision stands, the College must either violate its religious beliefs and free speech rights by housing males who identify as females in female dorms or risk intrusive federal investigations and significant enforcement penalties.

En banc review is necessary to protect the uniformity of this Court's decisions and to resolve conflicts between the decision and Supreme Court and other Circuits' precedent.

First, the decision conflicts with this Court's own opinions and those of the Supreme Court and Fifth and D.C. Circuits, all recognizing

Article III injury when a regulated party is denied its procedural right to notice and comment. *Iowa League of Cities*, 711 F.3d at 871; *Hous. Auth. of City of Omaha v. U.S. Hous. Auth.*, 468 F.2d 1 (8th Cir. 1972); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019); *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012).

Second, the decision improperly decides factual and merits issues against the College in rejecting its standing arguments. Contra *Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016); *Huizenga v. Indep. Sch. Dist. No. 11*, 44 F.4th 806, 811–12 (8th Cir. 2022) (per curiam); *FEC v. Cruz*, 142 S. Ct. 1638 (2022).

Third, the decision fails to apply this Court's "lenient" Free Speech Clause standing doctrines. *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).

This case involves questions of exceptional importance: religious liberty, free speech, participatory government, and the major questions doctrine. Yet the panel majority held that the College lacks standing because it "overlooks an injury the College has *already suffered*—the deprivation of its right to notice and comment." SlipOp.15 (Grasz, J., dissenting). The Court should grant en banc rehearing, reverse, and resolve the intra- and inter-circuit conflicts.

BACKGROUND

I. The government imposed a new FHA requirement and mandated its "full enforcement."

The Fair Housing Act prohibits housing discrimination based on sex. 42 U.S.C. § 3604. The FHA and its regulations also prohibit speech ("statement[s]" and "notice[s]") that the FHA deems discriminatory. *Id.* § 3604(c); 24 C.F.R. § 100.50(b)(4)–(5). The FHA applies to college dorms. *See United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974 (D. Neb. 2013).

As recently as 2020, HUD denied that the FHA covers gender identity, saying the FHA "permit[s]" placement of persons in facilities based on "biological sex."[1] Yet President Biden issued an executive order requiring HUD to "fully enforce" the FHA as if it does. JA82.

Without notice to the public and an opportunity to comment, HUD issued what it called a "directive." JA78–80. The Directive mandated "full enforcement" of this new prohibition. *Id.* HUD confirmed the standard was new, saying prior statements by HUD had left "uncertainty," were "insufficient," "limited," and "failed to fully enforce" any ban on gender-identity discrimination. JA79, 191–93. The Directive requires all entities enforcing the FHA—including outside the federal government—to "fully

[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).

enforce" the ban. JA79–80. President Biden called the Directive a "rule change" that "finally" enforced the FHA. JA198.

The Directive contains no mention of exceptions for religious liberty. JA78–80. The FHA has an exception allowing religious entities to restrict housing to "persons of the same religion," but not exempting those entities from the statute itself. 42 U.S.C. § 3607. In contrast, Title IX of the Education Amendments of 1972 fully exempts religious educational entities from that law's sex-discrimination ban to the extent it violates their religious tenets. 20 U.S.C. § 1681(a)(3). Title IX's exemption does not purport to exempt entities—including colleges and universities—from the FHA or other statutes, and HUD has never said it does.

II. The College sued because the Directive compels it to violate its religious exercise and free speech rights.

The College of the Ozarks is an undergraduate institution in Taney County, Missouri that has pursued its Christian educational mission since 1906. JA10–14. Students need not be of a particular religion, but they must agree to follow the College's code of conduct, including dormitory policies. JA14, 132. The College states that sex is based on male-female biology, not gender identity, and that students must agree not to engage in sex outside of marriage between a man and a woman, JA17–19, 41–42, 133. Those views necessitate that the College have single-sex residence halls, roommate selection, intimate and communal

spaces, and visitation policies. JA20–21, 41–42. The College regularly communicates this policy to its 1,300 students. JA8–9, 21–24.

Complying with the Directive would fundamentally compromise the College's religious mission, free speech, and student privacy. JA44–47, 302–03. But if it does not comply, the Directive triggers complaints, investigations, lawsuits, and substantial fines because the College separates its dorms by biological sex and communicates that policy to students. *E.g.*, 42 U.S.C. § 3611–3614; 24 C.F.R. § 103.215, 180.671, 180.705.

The College sued in April 2021, bringing claims under the First Amendment, Religious Freedom Restoration Act (RFRA), Administrative Procedure Act (APA), and other provisions, and moving for a preliminary injunction. JA7–73, 258. The District Court for the Western District of Missouri, Judge Ketchmark, denied the motion and *sua sponte* dismissed. JA485–92. The court recharacterized the Directive as a non-binding policy statement that presents no credible enforcement threat. *Id.*

On July 27, 2022, the panel majority affirmed. The majority held that, despite the Directive's repeated promise of full enforcement, it presents no credible threat because HUD has never enforced it on a religious college exempt under Title IX. SlipOp.8–9. The majority held that depriving the College of notice and comment under the APA did not establish standing because the College's concrete injury was speculative. *Id.* at 10. The majority also rejected the College's standing under the Free Speech Clause, for derivative reasons. *Id.* at 11–12.

Judge Grasz dissented. He lamented "the corrosive effect on the rule of law when important changes in government policy are implemented outside the normal administrative process." *Id.* at 13. He pointed out that the Title IX exemption does not appear to apply, the Directive never mentions that exemption, and that HUD insists on full enforcement as a new requirement. *Id.* at 14, 16–17. Judge Grasz explained that the College has an "injury in fact sufficient for standing" because its right to notice and comment is "designed to protect some threatened concrete interest," namely, "a concrete interest in complying with the FHA as interpreted by HUD." *Id.* at 17 (quoting *Iowa League of Cities*, 711 F.3d at 870–71, and *Lujan*, 504 U.S. at 573 n.8).

ARGUMENT

I. A regulated party deprived of notice and comment has standing to protect its interests.

The Supreme Court, this Court, and the Fifth and D.C. Circuits have held that a procedural injury is an Article III injury if the party has a concrete interest in the process it was denied. When a binding rule's standard and enforcement encompasses a party, that party has a concrete interest in commenting on the rule; therefore, depriving it of notice and comment gives it standing to sue. *Iowa League of Cities* held this, following *Lujan* and *Summers*. The panel majority's decision conflicts with these cases and also creates a circuit conflict.

In *Iowa League of Cities*, this Court held that "the 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.'" 711 F.3d at 870–71 (quoting *Lujan*, 504 U.S. at 573 n.8). Regulated parties "have a concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them." *Id.* at 871. Congress "undoubtedly designed" the notice and comment procedures "to protect the concrete interests of such regulated entities." *Id.* And notably, the substantive statute's separate command of notice and comment reinforces this injury. *Id.* (relying on the Clean Water Act's notice and comment requirement). Regulated entities can challenge general rules issued to enforce the FHA. *Hous. Auth. of City of Omaha*, 468 F.2d 1.

The rule is the same in the Fifth and D.C. Circuits. In *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), Texas sued the EEOC under the APA, challenging the agency's guidance regarding employers' use of criminal records in hiring. In addition to other injuries, the Fifth Circuit held that Texas suffered a "procedural injury jeopardizing its concrete interests": a "violation of the APA's notice-and-comment requirements." *Id.* at 447. And this was true even though the EEOC claimed its guidance was not a final agency action—an argument that "erroneously conflates the finality analysis with standing"—and that the guidance did not

"compel Texas to do anything." *Id.* at 448. It "would strain credulity to find that an agency action targeting current 'unlawful' discrimination . . . —and declaring presumptively unlawful the very [practices employed]—does not require action immediately enough to constitute an injury-in-fact." *Id.*

Likewise, in *Sierra Club v. EPA*, 699 F.3d 530 (D.C. Cir. 2012), the Sierra Club filed an APA challenge against the EPA, which had declared that the agency met certain obligations that the Clean Air Act imposed on it. After determining that the Sierra Club's members lived within zones affected by the agency's regulations (or lack thereof), the D.C. Circuit held that the Club had standing, since the APA's notice-and-comment requirements "are plainly designed to protect the sort of interest alleged." *Id.* at 533.

Here, the College has the same procedural injury as in *Iowa League of Cities*, *Texas*, and *Sierra Club*. The Directive is a binding rule—it "conclusively dispos[es] of certain issues" by using mandatory language to require "full enforcement" of a nondiscrimination standard whose existence was previously "insufficient," "limited," and "inconsistent." *Iowa League of Cities*, 711 F.3d at 862; JA79, 191–93. The FHA also requires notice and comment for "all rules," an even more robust mandate than the APA's. 42 U.S.C. § 3614a. Deprivation of that FHA procedural right is "an injury the College has *already suffered*." SlipOp.15 (Grasz, J., dissenting).

As a regulated entity, the College's procedural right to notice and comment is designed to protect its concrete interests, including:

(1) whether the FHA bans gender-identity discrimination;

(2) whether HUD orders that ban to be "fully enforced"; and

(3) whether and how HUD will apply any religious exemptions.

The Directive makes protecting these interests urgent. The College does not let males live in or visit female dorms, and vice versa, even if they claim a different gender identity, and the College communicates these polices to students daily. The Directive says it covers *all* FHA entities, of which the College is one. It requires "full" enforcement, not partial enforcement, and says nothing about exemptions—including religious liberty. The Directive says the clarity of its standard and its commitment to full enforcement are both new, which history confirms. When parties "must either immediately alter their behavior or play an expensive game of Russian roulette," they have standing to sue. *Iowa League of Cities*, 711 F.3d at 868.

The panel majority similarly claims the Directive "does not direct the College to do anything," SlipOp.9. This is wrong on the facts and the law. If "private parties have 'reasonably [been] led to believe that failure to conform will bring adverse consequences,'" they have standing to sue. *Iowa League of Cities*, 711 F.3d at 864. A mandate of "full enforcement" and "eradication" of certain behavior necessarily requires regulated entities to comply, otherwise there would be no one to enforce the rule

against. This is especially true when the Directive is announced in a press release and presidential speech. JA191–93, 197–99. HUD intends through the Directive's clear text to convince regulated entities that failure to conform will bring adverse consequences.

Lujan affirms that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy," 504 U.S. at 572 n.7. Yet the panel majority required an improper level of immediacy in suggesting standing would not exist unless the Directive specifically "require[d] HUD to determine that the College's housing policies violate federal law" in question. SlipOp.10. And the panel required a level of redressability inapplicable to procedural injury claims. Compare SlipOp.12–13 to SlipOp.17–18 (Grasz, J., dissenting).

In essence, the panel majority required that the College have a *concrete injury* separate from its *procedural injury*, not just a concrete *interest* that its procedural right is designed to protect. SlipOp.10 (wrongly asserting the College sought to establish standing based on a "procedural right unconnected to the plaintiff's own concrete harm") (quoting *Lujan*, 504 U.S. at 573 n.8). This misstates *Lujan*'s standard. *Lujan* was rebutting an argument from the dissenting justices that a procedural injury "satisfies the concrete-injury requirement *by itself, without any showing* that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure

observed)." *Lujan*, 504 U.S. at 573 n.8 (emphasis added). The Court was not requiring a *separate* concrete harm, merely rejecting a freestanding assertion of a procedural right with no connection to an interest that right protects. To be sure, a challenger must have *some* stake in the challenged administrative action, and the College does here.

However, *Lujan* insisted it did "*not* hold that an individual cannot enforce procedural rights [if] the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Id.* The Court then gave examples of even unregulated parties who can assert procedural injuries, such as whale watchers and people living near a development challenging environmental rules even where those rules do not require the plaintiffs to do anything. *Id.*

The panel majority also misconstrues *Summers*. There, environmental groups challenged a Forest Service rule, and the Court agreed both that "the recreational or even the mere esthetic interests of the plaintiff" can "suffice" to challenge the rule's procedural failures. 555 U.S. at 494. The facts showed the plaintiffs alleged only general recreational interests in the nation's 190 million acres of national forests, not any "particular" location where the rule would impact their recreational enjoyment. *Id.* at 495. *On that basis*, the Court construed their claim as based on "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*." *Id.* at 496.

Conversely, the College alleges specific and direct threats from the Directive, a much stronger case of concrete interest than "the recreational or even the mere esthetic interests" that *Summers* said can sustain standing. The College is regulated under the FHA; the government says the College is regulated by the Directive; and the College has a specific situation—its dorms and dorm policies in Point Lookout, Missouri—where it has an interest in the Directive not applying.

Summers recognized that "standing existed" for those same plaintiffs to challenge the Forest Service rule's application to a particular situation, the "Burnt Ridge Project," because they pled recreational interests in that specific land area. *Id.* at 497. Here, the College presented interests in specific dorms located at a specific address squarely covered by the Directive, yet the panel said that was insufficient. En banc review is necessary to resolve the conflict created by the majority's "separate concrete harm" requirement.

II. The panel majority improperly resolved facts and merits issues against the College in conflict with precedent of this Court and the Supreme Court.

This Court should also grant en banc review because the panel majority improperly construed facts against the College and presumed it would not succeed on its claims, in conflict with precedent of this Court and the Supreme Court.

"For standing purposes, [courts] accept as valid the merits of appellees' legal claims." *Cruz*, 142 S. Ct. at 1647. And this "court 'presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *Huizenga*, 44 F.4th at 811–12 (quoting *In re SuperValu, Inc.*, 870 F.3d 763, 769, 773 (8th Cir. 2017)).

The decision conflicts with these standards in two ways. First, the panel majority claimed the College faces no credible threat of enforcement because of Title IX's religious exemption. SlipOp.8–12. But Title IX does not purport to exempt entities from the FHA, and HUD has never said that the College's Title IX exemption applies to the Directive. On the contrary, the College alleged that the Directive applies to it, JA41–42, and HUD confirmed this by insisting before the District Court that the Directive applies to the College's sex-separated dorm policies. For example, HUD argued that the College could violate the Directive by "den[ying] housing" to a student who identifies as transgender, and that "the college's views on sexuality" could violate the Directive when students who identify as transgender seek to violate the College's sex-separate dorm-visitation rules. JA463–64. Yet the panel majority asserted the Directive "does not make the College's housing policies unlawful without regard to legal protections for religious liberty." SlipOp.12. That holding has no basis in the Directive's text and improperly construes the facts and merits claims against the College.

The panel majority likewise rejected the College's allegations that the Directive is new. The panel majority incorrectly described the gender-identity mandate as if it has existed "between 2012 to 2020." SlipOp.8, 12. This assumption is a key premise of the majority's holding that the College faces no credible threat of enforcement, because supposedly HUD had this mandate for eight years but never enforced it against Title-IX exempt entities. *Id.* Yet the College alleged that the Directive's ban on sexual-orientation and gender-identity discrimination under the FHA is a "rule change" and a new extension of the FHA. JA38, 41, 46. The Directive confirms this, saying that prior statements by HUD under the FHA were "insufficient," "limited," and "fail[ed] to fully enforce" a ban on sexual-orientation or gender-identity discrimination. JA79, 191–93. Even President Biden called the Directive a "rule change." JA198.

Because the Directive applies to the College despite Title IX, HUD does not disclaim enforcement but says the Directive applies to the College. And because no ban or enforcement regime existed before February 2021, HUD's past nonenforcement cannot negate a newly created credible threat of enforcement. By construing these facts and elements of the College's claim against it to reject its standing, the panel majority conflated standing and the merits in conflict with well-settled precedent.

III. The decision conflicts with the free speech standing doctrines of this Court and the Supreme Court.

The panel majority's decision also conflicts with precedent governing standing to bring a free-speech challenge. The FHA and its regulations—and therefore the Directive that mandates their full enforcement—restrict and compel speech by prohibiting "statement[s]" and "notice[s]" deemed discriminatory. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.50(b)(4)–(5). By calling for full enforcement of the FHA and its regulations, the Directive threatens the College with punishment for telling students and the public that their dorm residency, visitation, and housing conduct policies are sex-specific without regard to gender identity.

Again, the panel majority improperly construed Title IX's religious exemption, contending "HUD has never filed charges of housing discrimination against a college that is exempt from prohibitions on sex discrimination in housing under Title IX." SlipOp.11–12. But this Court's free speech standing cases make clear that a person whose conduct is arguably proscribed by a rule "need not wait for an actual prosecution or enforcement action before challenging a law's constitutionality." *Telescope Media*, 936 F.3d at 749 (applying *Susan B. Anthony List*, 573 U.S. at 158–59). "[S]ociety's interest in having the [rule] challenged" supports standing for regulated entities in free speech cases. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016).

In requiring more, the panel majority again applied the wrong standard. The pre-enforcement standard for constitutional challenges is "forgiving" and "lenient." *Turtle Island Foods*, 992 F.3d at 699–700. But the panel majority insisted on an enforcement history for a mandate that did not previously exist and concluded that non-enforcement was likely based on a Title IX exemption that does not purport to apply. This is the opposite of "lenient" scrutiny.

In APA cases, too, this Court does "not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities*, 711 F.3d at 867. And the Supreme Court reiterates, "[P]arties need not await enforcement proceedings before challenging final agency action." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 600 (2016).

IV. This case raises issues of exceptional importance about religious liberty, free speech, public participation in rulemaking, and the major questions doctrine.

A federal agency has rewritten and demanded enforcement of a 50-year-old statute to force religious colleges to house in women's dorms those men who identify as female and to cease speaking about their sex-specific housing policies. Agencies must consider religious liberty when imposing binding obligations, but HUD ignored that concern in this Directive. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020). HUD argued here that the

Directive applies to the College, JA463–64, and has refused to say the College is exempt, despite the Supreme Court's reiteration that agencies cannot extend statutes to major questions unless Congress provides "a *clear* delegation." *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (emphasis added).

In sum, the Directive illustrates the "corrosive effect on the rule of law" when agencies legislate and deny the public their right to participate. SlipOp.13 (Grasz, J., dissenting). The College has standing and is entitled to a merits ruling. En banc rehearing is warranted.

CONCLUSION

The College respectfully asks the en banc Court to grant the petition and reverse the District Court's decision.

Respectfully submitted this 9th day of September, 2022.

By: s/ Matthew S. Bowman

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CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,847 words, excluding the parts of the Petition exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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

Dated: September 9, 2022

s/ Matthew S. Bowman
Matthew S. Bowman
Attorney for Appellant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing Petition with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which will send notification of such filing to all parties.

Date: September 9, 2022

s/ Matthew S. Bowman
Matthew S. Bowman
Attorney for Appellant-Petitioner

EXHIBIT A

United States Court of Appeals
For the Eighth Circuit

No. 21-2270

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; Demetria L. McCain, in her official capacity as Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity of the U.S. Department of Housing and Urban Development,[1]

Defendants - Appellees.

Institute for Faith and Family; America First Legal Foundation; Mountain States Legal Foundation; State of Missouri; State of Alabama; State of Arkansas; State of Indiana; State of Kansas; State of Kentucky; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of Tennessee; State of Texas; State of Utah; State of West Virginia; Hannibal-LaGrange University; Missouri

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[1]Ms. McCain is substituted for Jeanine M. Worden under Federal Rule of Appellate Procedure 43(c). The complaint sued Worden in her official capacity as Acting Assistant Secretary, but that office is now vacant, and under the Department's Order of Succession, the Principal Deputy Assistant Secretary exercises the powers and performs the duties of the Assistant Secretary.

Baptist University; Southwest Baptist University; Christian Life Commission of the Missouri Baptist Convention,

Amici on Behalf of Appellant(s).

Appeal from United States District Court
for the Western District of Missouri - Springfield

Submitted: November 17, 2021
Filed: July 27, 2022

Before COLLOTON, GRASZ, and KOBES, Circuit Judges.

COLLOTON, Circuit Judge.

College of the Ozarks, a private Christian college in Missouri, brought this action to challenge the lawfulness of a memorandum issued by an acting assistant secretary of the United States Department of Housing and Urban Development. The College moved for a temporary restraining order and preliminary injunction. The district court[2] ruled that the College lacked standing to establish a case or controversy and dismissed the action for lack of jurisdiction. The College appeals, and we affirm.

I.

On June 15, 2020, the Supreme Court decided *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), concerning Title VII of the Civil Rights Act of 1964. *Bostock*

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[2]The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

held that the statute's prohibition on employment discrimination "because of sex" encompasses discrimination on the basis of sexual orientation and gender identity. *Id.* at 1741.

The Fair Housing Act, at issue in this appeal, makes it unlawful for certain persons and entities to "make unavailable or deny" a dwelling "because of . . . sex." 42 U.S.C. § 3604(a). In January 2021, President Biden issued Executive Order No. 13,988, which states that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including . . . the Fair Housing Act . . . prohibit discrimination on the basis of gender identity or sexual orientation."

The following month, the Acting Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and Urban Development issued a memorandum to implement the Executive Order. The Memorandum is addressed to the Department's Office of Fair Housing and Equal Opportunity, as well as state and local agencies and private organizations that administer and receive funds through certain programs of the Department. The document explains that the Office of General Counsel for the Department "has concluded that the Fair Housing Act's sex discrimination provisions are comparable to those of Title VII and that they likewise prohibit discrimination because of sexual orientation and gender identity."

The Memorandum directs the Office of Fair Housing and Equal Opportunity—the HUD office that enforces the Fair Housing Act—to "accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." The document's stated purpose is to direct the Office to "fully enforce the Fair Housing Act" because discrimination based on sexual orientation and gender identity "is real and urgently requires enforcement action."

The Memorandum explained that over the previous ten years, HUD interpreted the Fair Housing Act to prohibit discrimination on the basis of gender identity and sexual orientation when the discrimination was motivated by perceived nonconformity with gender stereotypes.[3] Yet the Memorandum concluded that this "limited enforcement" was "insufficient to satisfy the Act's purpose" and was "inconsistent" with the broader rationale of *Bostock*. Hence, the Department's leadership issued this new directive "to fully enforce" the Act's prohibitions against discrimination based on sex, including sexual orientation and gender identity. The Memorandum addresses discrimination in housing across the entire economy, and does not specifically address the subject of housing for students at colleges and universities.

College of the Ozarks is a Christian undergraduate institution in Missouri. The College admits students of any religion, but all students must agree to follow the College's religiously-inspired code of conduct. As stated in that code, the College teaches that biological sex is a person's "God-given, objective gender, whether or not it differs from their internal sense of 'gender identity.'" The code also states that "sexual relations are for the purpose of the procreation of human life and the uniting and strengthening of the marital bond in self-giving love, purposes that are to be achieved solely through heterosexual relationships in marriage." In accordance with these beliefs, the College maintains single-sex residence halls and does not allow members of one sex to visit the "living areas" of members of the opposite sex. The College therefore prohibits biological males who "identify" as females from living

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[3] *See* Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Developmental Programs, 81 Fed. Reg. 64,763, 64,770 (Sept. 21, 2016); Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,058-59 (Sept. 14, 2016); Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5661, 5666 (Feb. 3, 2012).

in female dormitories, and vice-versa. The College regularly communicates its housing policies to current and prospective students through a student handbook, an online virtual tour, the school website, and in-person recruitment events.

Allegedly fearing that its housing policies are now unlawful under the Memorandum's interpretation of the Fair Housing Act, the College sued President Biden, the Department of HUD, the Secretary of HUD, and the Acting Assistant Secretary, seeking pre-enforcement review of the Memorandum. The complaint alleged that the Memorandum, among other things, violates the Administrative Procedure Act, the First Amendment's Free Speech and Free Exercise Clauses, the Appointments Clause of Article II of the Constitution, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

The complaint sought injunctive and declaratory relief. Specifically, it asked the district court to "set aside" the Memorandum and issue an injunction against enforcement of the Memorandum by the defendant officials. The complaint sought, among other forms of relief, a declaration that the Fair Housing Act and the implementing regulations do not prohibit discrimination based on sexual orientation or gender identity. The College moved for a temporary restraining order and preliminary injunction.

The district court concluded that it lacked jurisdiction because the College failed to establish Article III standing. The court determined that any alleged injury is not concrete because the College did not show that the Memorandum imposed restrictions on private housing providers such as the College. The court further reasoned that any injury was not caused by the Memorandum because the internal directive does not modify the College's rights or obligations under the Fair Housing Act. The court also concluded that any judicial remedy would not redress any alleged injury because any liability that the College incurs for violating the Fair Housing Act "would flow directly from the Act itself, as well as applicable case law including

Bostock, and not from the Memorandum." The College appeals, and we review the district court's decision *de novo*.

II.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation and alteration omitted). To establish Article III standing, a party invoking federal jurisdiction must show (1) that the plaintiff suffered an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is the invasion of a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation omitted). "Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation omitted).

A plaintiff who invokes federal jurisdiction must support each element "in the same way as any other matter" on which it bears the burden of proof. *Lujan*, 504 U.S. at 561. At the pleading stage, therefore, a plaintiff must "allege sufficient facts to support a reasonable inference that [it] can satisfy the elements of standing." *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021).

The closely related doctrine of ripeness originates from the same Article III limitation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014). The ripeness requirement serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference

until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49 (1967). To demonstrate that an alleged dispute is ripe for review, the complainant must show both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. A case is fit for judicial decision when it would not benefit from further factual development and poses a purely legal question not contingent on future possibilities. *Pub. Water Supply v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003). In this case, standing and ripeness essentially "boil down to the same question," and we will address the issue in terms of "standing." *See Susan B. Anthony List*, 573 U.S. at 157 n.5; *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007).

A.

The College first argues that it has suffered an injury in fact because there is an imminent threat under the Memorandum that the government will enforce the Fair Housing Act against the College. This imminent threat of enforcement, says the College, requires it to choose among three injuries: (1) change its housing policies in violation of the College's religious beliefs, (2) refuse to change its housing policies and face sanctions under the Fair Housing Act, or (3) cease providing student housing altogether. The College cites the Memorandum's call for "full enforcement" of the Act to overcome the insufficiency of past "limited enforcement of the Fair Housing Act's sex discrimination prohibition." The College contends that the Memorandum necessarily directs the agency to bring an allegation of sex discrimination against the College to "eliminate discriminatory housing practices."

This theory of injury fails because it is based on a misunderstanding of the Memorandum. The Memorandum does not impose any restrictions on, or create any penalties against, entities subject to the Fair Housing Act. Rather, the Memorandum directs the Office of Fair Housing and Equal Opportunity to "accept for filing and

investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." The Memorandum does not, as the College presupposes, require that HUD reach the specific enforcement decision that the College's current housing policies violate federal law. The Memorandum, for example, says nothing of how the Religious Freedom Restoration Act or the Free Exercise Clause may limit enforcement of the Fair Housing Act's prohibition on sex discrimination as applied to the College. *Bostock* itself, the decision on which the Memorandum is based, refers to the Religious Freedom Restoration Act as a "super statute, displacing the normal operation of other federal laws." *Bostock*, 140 S. Ct. at 1754.

The College's alleged injury also lacks imminence because it is speculative that HUD will file a charge of discrimination against the College in the first place. As explained in the government's brief, the agency has never filed such a charge against a college for sex discrimination based on a housing policy that is specifically exempted from the prohibition on sex discrimination in education under Title IX of the Civil Rights Act. Title IX provides that its anti-discrimination provision "shall not apply to an educational institution which is controlled by a religious organization," if applying the prohibition "would not be consistent with the religious tenets of" the organization. 20 U.S.C. § 1681(a)(3). In 2018, the assistant secretary for civil rights in the U.S. Department of Education formally advised the College that it is exempt from numerous regulatory provisions on housing and other matters, insofar as they proscribed discrimination based on sexual orientation or gender identity, to the extent that compliance would conflict with the College's religious tenets. Consistent with that exemption, even when HUD interpreted the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity between 2012 and 2020, the Department brought no enforcement action against the College. The College's enjoyment of an exemption under Title IX, and its failure to show that HUD has previously filed discrimination charges against it or similarly

situated colleges, substantially undermines its argument that enforcement is imminent now. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013).

Similarly unpersuasive is the College's assertion that it is the "object of the action" in the Memorandum, and that there is thus "little question" that the Memorandum causes injury. *See Lujan*, 504 U.S. at 561-62. Relying on the ripeness decision in *Abbott Laboratories*, the College argues that it is the object of an agency action because the Memorandum (1) is directed at the College in particular, (2) requires the College to make significant changes to its housing policies, and (3) exposes the College to strong sanctions. *See* 387 U.S. at 154. But this assertion overlooks that the Memorandum is an internal directive to HUD agencies, not a regulation of private parties. The Memorandum does not direct the College to do anything, and it does not expose the College to any legal penalties for noncompliance with the Memorandum. In *Abbott Laboratories*, by contrast, the plaintiff drug manufacturers were the object of a final administrative rule that required them to place a particular name on drug labels. The rule directly regulated the conduct of drug manufacturers and was backed by criminal and civil sanctions if not followed. *Id.* at 152-54.

The College is more like the plaintiff in *Cornish v. Blakey*, 336 F.3d 749 (8th Cir. 2003). There, a memorandum issued by the Department of Transportation (DOT) directed doctors who conducted drug testing how to decide whether a specimen was adulterated. *Id.* at 751. The Federal Aviation Administration (FAA) revoked the plaintiff Cornish's aircraft mechanic certificate when doctors determined that he submitted an adulterated urine specimen. Before the mechanic exhausted his administrative remedies, he brought a challenge to the DOT memorandum in federal court. *Id.* at 752. This court held that the plaintiff "was not even arguably injured by the 1998 DOT memorandum until the FAA relied upon it as a basis for revoking his mechanic certificate," and that "absent the revocation order, Cornish lacks the injury in fact necessary for Article III standing." *Id.* at 752-53. The College lacks injury for

analogous reasons. The HUD enforcement agencies have not relied on the Memorandum to charge the College with sex discrimination under the Fair Housing Act, and any alleged future injury caused by the Memorandum is conjectural and hypothetical.

The dissent favors a different theory of injury—namely, that the College was deprived of a right to notice and opportunity for comment before HUD issued the internal directive. But even assuming that notice and comment was required, a plaintiff cannot establish injury in fact "on the basis of a 'procedural right' unconnected to the plaintiff's own concrete harm." *Lujan*, 504 U.S. at 573 n.8. Like the Memorandum itself, the absence of notice and opportunity to comment regarding the Memorandum does not endanger a concrete interest of the College, because the Memorandum does not require HUD to determine that the College's housing policies violate federal law. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

In sum, the College's alleged injury is too speculative to establish Article III standing. The College, in effect, asks us to assume that the following series of events is imminent: a sex-discrimination complaint will be filed against the College based on claims involving sexual orientation or gender identity; following an investigation, HUD will charge the College with sex discrimination, even though HUD has never enforced the Fair Housing Act's sex-discrimination prohibition against a college whose housing policies have been exempted from the prohibition on sex discrimination under Title IX; HUD will determine, pursuant to the Memorandum, that the College is not entitled to an exemption under the Religious Freedom Restoration Act or the Free Exercise Clause as discussed in *Bostock*; and the College will therefore be subject to penalties. This is the kind of "highly attenuated chain of

possibilities" that "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

B.

The College also advances a second theory of injury—namely, that the Memorandum curtails its First Amendment right to freedom of speech. A plaintiff claiming an abridgment of free speech is permitted to seek pre-enforcement review "under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 159. To establish standing, a complaint must allege that plaintiff has "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (internal quotation omitted). A plaintiff can establish an injury in the First Amendment context in two ways: by identifying protected speech in which it would like to engage but that is proscribed by statute, or by self-censoring to avoid the credible threat of prosecution. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016).

The Fair Housing Act makes it unlawful to "make, print, or publish" a statement regarding the sale or renting of a dwelling that discriminates on the basis of sex. 42 U.S.C. § 3604(c). The College argues that, according to the Memorandum, the Fair Housing Act prohibits the College from communicating its housing policies, because those policies require that biological males and females, regardless of gender identity or sexual orientation, reside in separate dormitories. In asserting a credible threat of enforcement, the College again cites the Memorandum's call for "full enforcement" of the Fair Housing Act to bring about the "eradication of housing discrimination for all."

The College's free-speech theory of standing fails essentially for the reasons discussed above: The College has not shown that there exists a credible threat that

the defendants will enforce the Fair Housing Act against the institution based on its religiously-based housing policies. The Memorandum does not make the College's housing policies unlawful without regard to legal protections for religious liberty. HUD has never filed charges of housing discrimination against a college that is exempt from prohibitions on sex discrimination in housing under Title IX. And HUD has never enforced the Fair Housing Act's sex-discrimination prohibition against the College, even though the agency interpreted the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and gender identity between 2012 and 2020. Thus, the College's free-speech theory does not allege an injury in fact sufficient to confer Article III standing.

Aside from the lack of a credible threat of enforcement, the College also has not alleged that its speech has been chilled. The College alleges no self-censorship, but rather avers that it "tells and intends to continue telling current and prospective students" about its religiously-inspired housing policies. Although the complaint states that the Memorandum "chills the speech of colleges," it alleges no facts to support that legal conclusion, and we "are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted). The College has not alleged, for example, that it no longer separates males and females into dormitories based on biological sex, or that it has repealed the portion of the student handbook that communicates its housing policies. The complaint thus fails to allege either an actual chilling of speech or a credible threat of enforcement that justifies self-censorship.

C.

Even if the College had suffered an injury in fact, it must also show that a favorable judicial decision would likely redress its injury. Redressability requires us to examine the "causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). Therefore, even if we

assume for the sake of analysis that the College has suffered the injuries it alleges, the College must show that the requested relief would eliminate the alleged threat of imminent enforcement of the Fair Housing Act and prevent any chill of the College's speech.

An injunction against implementing the Memorandum, however, would not stop the Department from investigating all complaints of sex discrimination against a college, including complaints of discrimination because of gender identity or sexual orientation. Even if HUD were enjoined from enforcing its internal directive, the agency would still be required by statute to investigate sex-discrimination complaints filed against the College. The statute mandates that when a complaint is filed, HUD "shall make an investigation of the alleged discriminatory housing practice." 42 U.S.C. § 3610(a)(1)(B)(iv). With or without the Memorandum, the agency must consider the meaning of the Fair Housing Act in light of *Bostock* and its interpretation of similar statutory language. The College has thus failed to show that enjoining officials from implementing the Memorandum would redress any injury allegedly arising from the internal directive, because the agency retains the authority and responsibility to carry out the same enforcement activity based on the statute alone.

* * *

For these reasons, the judgment of the district court is affirmed.

GRASZ, Circuit Judge, dissenting.

This case highlights the corrosive effect on the rule of law when important changes in government policy are implemented outside the normal administrative process. The normal method for rulemaking requires notice and comment, which in turn "secure the values of government transparency and public participation." *Iowa*

League of Cities v. EPA, 711 F.3d 844, 873 (8th Cir. 2013). An agency's issuance of a guidance document that fails to adhere to the proper administrative procedures may achieve compliance with the government's desired policy outcomes by in terrorem means, but it skirts the rule of law and undermines our values. This is especially true where regulated entities are placed under a sword of Damocles but are denied access to the courts because the sword has not yet fallen. "An agency operating in this way gains a large advantage"—it enables the agency to quickly amend its rules without following the statutory procedures. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). "The agency may also think there is another advantage—immunizing its lawmaking from judicial review." *Id.*

Here, the College fears the federal government will imminently enforce HUD's interpretation of the Fair Housing Act ("FHA") against the College if the College continues its current housing policy that assigns students to single-sex dorms according to their biological sex. The court dismisses this fear as "speculative" and contends there is no "credible threat of enforcement." *Ante* at pp. 8, 11. It therefore concludes we lack standing to review HUD's Memorandum directing the Office of Fair Housing and Equal Opportunity ("FHEO") and associated entities to "fully enforce" the federal government's interpretation of the FHA. I disagree with the court's conclusions and respectfully dissent.

Viewing the pleadings liberally, the complaint alleges the College's housing policy violates the government's interpretation of the FHA. Put simply, if the government acts as the Memorandum facially requires, it is only a matter of time before the government concludes the College's housing policy violates the FHA. The law should not require the College to wait for this to come to fruition. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent."). Nor do I believe the College must rely on the government's in-court oral suggestion that it would not enforce its interpretation of the FHA against

religious institutions based on its historic practice of following Title IX's religious exemption—an exemption not even mentioned in the broad language of the enforcement directive in the Memorandum. *See Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019) (noting that the government's "in-court assurances [that it will not fully enforce the law] do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future").

That said, my main objection to the court's holding is more fundamental: the holding overlooks an injury the College has *already suffered*—the deprivation of its right to notice and comment. The FHA requires notice and comment for "all rules" under its purview—including interpretative rules.[4] 42 U.S.C. § 3614a. "[I]nterpretative rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties." *Iowa League of Cities*, 711 F.3d at 873 (quoting *Northwest Nat'l Bank v. U.S. Dep't of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990)).

In my view, HUD's Memorandum is an interpretative rule. The Memorandum explains HUD's interpretation of the FHA's "sex discrimination" language: "HUD's Office of General Counsel has concluded that [the FHA's] sex discrimination provisions . . . prohibit discrimination because of sexual orientation and gender identity." It then thrice directs FHEO and other relevant entities to so "interpret" the FHA's prohibition on sex discrimination. The Memorandum states what HUD thinks the statute means and instructs affected parties of their duties. These are the hallmarks of an interpretative rule. *See Iowa League of Cities*, 711 F.3d at 873. Interestingly, President Biden—author of the Executive Order prompting the

[4]The Administrative Procedure Act exempts interpretative rules from the notice and comment requirement "[e]xcept when notice or hearing is required by statute." 5 U.S.C. § 553(b). The notice and comment requirement under the FHA falls under this exception.

Memorandum—characterized the Memorandum as a "rule change." Proclamation No. 10,177, 86 Fed. Reg. 19,775 (Apr. 11, 2021). I agree and therefore believe the Memorandum is subject to the FHA's notice and comment requirement.

But even if we pretend the Memorandum is not what the President says it is, the College has an alternative basis for its procedural right to notice and comment. When HUD issued the Memorandum, a federal regulation required notice and comment for "significant guidance documents." 24 C.F.R. § 11.1(b) (2020). A guidance document included "a statement of general applicability, designed to shape or intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory . . . issue, or an interpretation of a statute." *Id.* § 11.2(a) (2020). And a guidance document was "significant" if it could "reasonably be anticipated to . . . [r]aise novel legal or policy issues arising out of legal mandates [or] the President's priorities." *Id.* § 11.2(d)(4) (2020). While these regulations under 24 C.F.R. §§ 11.1 and 11.2 have since been revoked, *see* Implementing Executive Order 13992, 86 Fed. Reg. 35,391-01, at 35,392 (July 6, 2021), HUD was required to follow them while they "remain[ed] in force." *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992).[5]

Here, HUD's Memorandum interpreted the FHA's prohibition on sex discrimination. It directed FHEO to "accept for filing and investigate *all* complaints of sex discrimination" based on "gender identity or sexual orientation" (emphasis added). It called HUD's prior FHA enforcement "limited," "insufficient," and "inconsistent" with *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). It sought to

[5]As one court recently stated: "Under deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations. When agencies fail to do so, the APA (as developed by case law) gives aggrieved parties a cause of action to enforce compliance." *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020) (internal citations omitted).

rectify denials of "the constitutional promise of equal protection under the law" for transgender individuals "throughout most of American history." It specified its requirements arose from the Supreme Court's *Bostock* decision and President Biden's priorities articulated in Executive Order 13,988. In short, if the Memorandum is not an interpretative rule, it is at minimum a significant guidance document. It strains credulity to say otherwise.

Whether the Memorandum was an interpretative rule or a significant guidance document, the complaint plausibly alleged HUD deprived the College of its right to notice and comment. Such deprivation constitutes an injury in fact sufficient for standing if the notice and comment right was "designed to protect some threatened concrete interest of" the College. *Iowa League of Cities*, 711 F.3d at 870–71 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). At this stage of the proceedings, I would conclude the notice and comment right was designed to protect a threatened concrete interest of the College. *See Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) ("In assessing a plaintiff's Article III standing, we must assume that on the merits the plaintiffs would be successful in their claims." (cleaned up and quotation omitted)). The College has a concrete interest in complying with the FHA as interpreted by HUD. Notice and comment rights would have helped ensure the College was "treated with fairness and transparency after due consideration and industry participation." *See Iowa League of Cities*, 711 F.3d at 871. It is plausible at this stage to conclude this notice and comment right was designed to protect this concrete interest. The College therefore plausibly pled both that it suffered an injury in fact and that HUD's failure to follow proper notice and comment procedures caused this injury.

The College also meets the lower showing required for redressability. A party deprived of its notice and comment right, as here, "can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* (quoting

Lujan, 504 U.S. at 572 n.7). Redressability in such cases is satisfied "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)). The harmed party, however, need not "show that the agency would alter its rules upon following the proper procedures." *Id.* Here, the College shows "some possibility" that enjoining the Memorandum's enforcement would prompt HUD to reconsider the Memorandum.

The College thus has standing because, if nothing else, it was deprived of its opportunity for notice and comment. I would therefore reverse the district court's dismissal of the College's complaint.
