No. 22-816

In the Supreme Court of the United States

THE SCHOOL OF THE OZARKS, INC., DBA COLLEGE OF THE OZARKS, PETITIONER

v.

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner, a private religious college, filed this action seeking to enjoin a February 2021 memorandum issued by the U.S. Department of Housing and Urban Development (HUD), on the ground that the memorandum violates the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and other statutory and constitutional provisions. The memorandum reaffirms prior HUD policy stating that the Department will accept and investigate Fair Housing Act (FHA) complaints of sex discrimination based on gender identity and sexual orientation and directs HUD entities to "fully enforce" the FHA. The district court dismissed petitioner's claims, holding that petitioner lacks Article III standing. The court of appeals affirmed.

The question presented is whether petitioner has standing to obtain pre-enforcement review of an agency statement of policy that imposes no legal obligations on petitioner and does not determine how the FHA's prohibition on sex discrimination would apply to a housing provider that asserts a religious objection to compliance with the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 41 F.4th 992. The order of the district court (Pet. App. 24a-34a) is not published in the Federal Supplement but is available at 2021 WL 2301938.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2022. A petition for rehearing was denied on September 30, 2022 (Pet. App. 23a). On November 30, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including February 27, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Background

1. The Fair Housing Act (FHA or Act), 42 U.S.C. 3601 *et seq.*, makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(a). The FHA also prohibits "discriminat[ion] * * * in the provision of services or facilities in connection" with the sale or rental of a dwelling "because of" a prohibited basis. 42 U.S.C. 3604(b); see 42 U.S.C. 3604(d) and (e), 3605 (other prohibitions on discrimination). And the Act makes it unlawful to make or publish "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on" those same prohibited bases. 42 U.S.C. 3604(c).

FHA enforcement may proceed in multiple ways. An individual may file an administrative complaint with the Department of Housing and Urban Development (HUD), or HUD itself may initiate such a complaint. 42 U.S.C. 3610(a)(1). If the complaint is within the jurisdiction of a state or local agency certified by HUD to process such complaints—*i.e.*, a Fair Housing Assistance Program (FHAP) agency—HUD usually refers the complaint to that agency for processing under state or local law. 42 U.S.C. 3610(f). Otherwise, assuming the complaint satisfies jurisdictional requirements, HUD "shall" investigate the allegations (after providing notice to the housing provider) and attempt to conciliate the dispute. 42 U.S.C. 3610(a)(1)(B)(iv) and (b)(1)-(5). Absent resolution through conciliation, if HUD

concludes—after consideration of any applicable defenses—that "reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur," HUD "shall" issue a charge of discrimination for further proceedings before an administrative law judge (ALJ); the agency's final decision is reviewable in a court of appeals. 42 U.S.C. 3610(g)(2)(A), 3612(b)-(k). If HUD, the complainant, or the respondent so elects, the charge will instead be referred to the Department of Justice to be litigated in a civil action in district court. 42 U.S.C. 3610(g)(2)(A), 3612(a) and (*o*).

Alternatively, an individual may bring a civil action directly in district court without pursuing relief through HUD or a FHAP. 42 U.S.C. 3613(a)(2). The Attorney General may also bring civil lawsuits alleging certain types of "pattern or practice" claims, with or without a referral from HUD. 42 U.S.C. 3614(a). To further assist with enforcement efforts, Congress created the Fair Housing Initiatives Program (FHIP), which extends grants to qualified fair housing organizations to assist victims of housing discrimination and to conduct, among other things, investigative, testing, educational, and outreach activities. 42 U.S.C. 3616a.

2. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance, including in college and university housing. Title IX does not "prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. 1686. Title IX also contains a specific exemption for educational institutions "controlled by a religious organization" to the extent the application of Title IX's nondiscrimination mandate

"would not be consistent with the religious tenets of such organization." 20 U.S.C. 1681(a)(3). Institutions may inform the Department of Education that they claim Title IX's religious exemption and receive an "assurance" from the Department that the institution qualifies for the exemption. 34 C.F.R. 106.12(b). HUD has never filed a charge of discrimination under the FHA against an educational institution for a housing practice or policy covered by a Title IX religious exemption. Pet. App. 9a-10a.

3. For more than a decade, HUD has accepted and investigated FHA complaints alleging that the respondent engaged in prohibited sex discrimination by discriminating on the basis of sexual orientation or gender identity. In 2009, HUD "announced a series of proposals to ensure that HUD's core housing programs are open to all, regardless of sexual orientation or gender identity." News Release, HUD, *Obama Administration to Ensure Inclusion of the LGBT Community in HUD Programs* (Oct. 21, 2009), https://perma.cc/8PEW-P9YY. In 2010, HUD issued guidance "address-[ing] housing discrimination based on sexual orientation and gender identity." News Release, HUD, *HUD Issues Guidance on LGBT Housing Discrimination Complaints* (July 1, 2010), https://perma.cc/ADR6-R5AR. HUD stated that it would treat gender-identity discrimination "as gender discrimination under the [FHA]" and, as appropriate, would "retain its jurisdiction over complaints filed by LGBT individuals or families" to "'combat all aspects of gender discrimination.'" *Ibid.*

In 2016, in response to comments on an FHA rule concerning harassment, HUD reaffirmed that claims of discrimination based on sexual orientation or gender

identity should be investigated as potential sex discrimination. See 81 Fed. Reg. 63,054, 63,058-63,059 (Sept. 14, 2016). HUD noted this interpretation in other rulemakings as well. See 81 Fed. Reg. 64,763, 64,770 (Sept. 21, 2016); 77 Fed. Reg. 5662, 5663, 5671 (Feb. 3, 2012). Also in 2016, HUD issued guidance to its Office of Fair Housing and Equal Opportunity (FHEO) regional directors stating that "[d]iscrimination because of real or perceived gender identity is sex discrimination under the [FHA]," and instructing FHEO offices to accept for filing "all otherwise jurisdictional complaints" alleging discrimination because of real or perceived gender identity or sexual orientation. C.A. App. 364-365.[1]

4. In June 2020, this Court held that the prohibition on discrimination "because of * * * sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), encompasses discrimination based on sexual orientation or gender identity. *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1739-1743 (2020). The Court explained that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741.

In January 2021, President Biden issued Executive Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021). Pet. App. 42a-45a. The Executive Order noted *Bostock*'s interpretation of Title VII and stated that the decision's reasoning may also apply to other federal laws

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[1] Petitioner observes (Pet. i, 8) that in 2020, HUD published a notice of proposed rulemaking proposing that providers of temporary and emergency shelters be permitted "to consider biological sex in placement and accommodation decisions in single-sex facilities." 85 Fed. Reg. 44,811, 44,812 (July 24, 2020). But the proposed rule would have been applicable to a limited set of facilities, some of which are not covered by the FHA, see *ibid.*, and it was never finalized.

prohibiting sex discrimination, including the FHA. *Id.* at 42a-43a. The order directed federal agencies to review existing policies under those statutes and consider whether additional steps should be taken. *Id.* at 43a-44a.

In February 2021, HUD's Acting Assistant Secretary for Fair Housing and Equal Opportunity issued the Memorandum at issue in this case. Pet. App. 36a-41a. The Memorandum is addressed to entities responsible for enforcing the FHA—the FHEO, FHAP agencies, and FHIP grantees—and explains that the FHA's sex-discrimination provisions "are comparable to those of Title VII" and "likewise prohibit discrimination because of sexual orientation and gender identity." *Id.* at 37a. The Memorandum also details HUD's past guidance and directives to FHEO offices described above. *Id.* at 38a. It notes, however, that there had been "limited enforcement of the [FHA's] sex discrimination prohibition" based on sexual orientation and gender identity. *Ibid.*

The Memorandum accordingly instructs the FHEO "to administer and fully enforce the [FHA] to prohibit discrimination because of sexual orientation and gender identity," Pet. App. 37a, by "accept[ing] for filing and investigat[ing] all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation, that meet other jurisdictional requirements," *id.* at 39a. The Memorandum also instructs state and local FHAP agencies and FHIP grantees to interpret the FHA consistent with *Bostock* for purposes of their own programs. *Ibid.*

The Memorandum does not address any particular fact pattern, and it does not require the FHEO or FHAP agencies to reach a specific enforcement decision

in any case or class of cases they investigate. Nor does the Memorandum address how the FHA's sex-discrimination prohibition interacts with Title IX's religious exemption or other statutory and constitutional protections of religious liberties, including the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*; cf. *Bostock*, 140 S. Ct. at 1754 ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.").

B. Proceedings Below

1. Petitioner is a private religious college. Pet. App. 5a. "In accordance with [its religious] beliefs," petitioner "maintains single-sex residence halls" and assigns students to residence halls based solely on their sex assigned at birth. *Ibid.* In 2018, petitioner received an assurance from the Department of Education that its religious beliefs qualify it for an exemption from Title IX, including for its housing policies. Letter from Candice Jackson, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Jerry C. Davis, President, College of the Ozarks (Jan. 2, 2018), https://perma.cc/SX74-2G5F; see Pet. App. 10a.

Two months after the Memorandum's issuance, petitioner filed this action in district court seeking to "set aside" the Memorandum and enjoin its "enforcement." Pet. App. 6a; see *id.* at 27a. Petitioner's complaint included claims under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, RFRA, and the First Amendment. Pet. App. 25a-26a. Petitioner sought a temporary restraining order and preliminary injunction. *Id.* at 24a.

The district court denied petitioner's motion and dismissed the case for lack of Article III standing. Pet.

App. 24a-34a, 35a. The court found that the Memorandum has not caused any "actual or imminent" injury to petitioner, because it does not "impose[] any restriction, requirement, or penalty" on the school; petitioner had not alleged that it was subject to an FHA enforcement action; and the Memorandum does not address *Bostock*'s application to "any specific factual setting" or address how HUD would "consider[] potential exemptions" for religious entities. *Id.* at 30a; see *id.* at 33a. The court further determined that petitioner failed to plausibly allege causation and redressability because "[a]ny potential liability [petitioner] incurs for violating the FHA would flow directly from the Act itself, as well as applicable case law including *Bostock*, and not from the Memorandum." *Id.* at 31a; see *id.* at 31a-32a.

2. The court of appeals affirmed. Pet. App. 1a-22a.

a. Like the district court, the court of appeals held that petitioner's allegations of injury were too speculative to support Article III standing. Pet. App. 9a-10a, 12a. The court explained that the Memorandum does not "require that HUD reach the specific enforcement decision that [petitioner's] current housing policies violate federal law." *Id.* at 9a. The court emphasized that the Memorandum "says nothing of how [RFRA] or the Free Exercise Clause may limit enforcement of the [FHA's] prohibition on sex discrimination as applied to [petitioner]." *Ibid.* And the court further determined that petitioner's claimed injury "lacks imminence" because HUD has never filed a charge of sex discrimination against a college with a housing policy covered by a religious exemption under Title IX. *Id.* at 9a-10a; see *id.* at 14a.

The court of appeals rejected petitioner's theory that it has standing because it is the "object" of the

Memorandum. Pet. App. 10a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The court explained that this theory "overlooks that the Memorandum is an internal directive to HUD agencies, not a regulation of private parties." *Id.* at 11a. The court also rejected petitioner's argument that it had shown an injury based on an alleged violation of its First Amendment speech rights, observing that petitioner "fail[ed] to allege either an actual chilling of speech or a credible threat of enforcement that justifies self-censorship." *Id.* at 15a; see *id.* at 13a-15a.

In the alternative, the court of appeals concluded that any injury would not be redressable by the relief petitioner sought. Pet. App. 15a-16a. The court found that an injunction against the Memorandum would not redress petitioner's claimed harm—the possibility of an enforcement action—because the FHA obligates HUD to investigate complaints, HUD would be required to "consider the meaning of the [FHA] in light of *Bostock*" regardless, and HUD "retains the authority and responsibility to carry out the same enforcement activity based on the statute alone." *Id.* at 16a.

Finally, the court of appeals rejected petitioner's claim of standing based on the alleged deprivation of a procedural right to notice and comment before the Memorandum's issuance. Pet. App. 12a. The court explained that "a plaintiff cannot establish injury in fact on the basis of a procedural right unconnected to the plaintiff's own concrete harm." *Ibid.* (quoting *Lujan*, 504 U.S. at 573 n.8) (internal quotation marks omitted). And the court concluded that, "[l]ike the Memorandum itself, the absence of notice and opportunity to comment regarding the Memorandum does not endanger a concrete interest of [petitioner], because the Memorandum

does not require HUD to determine that [petitioner's] housing policies violate federal law." *Ibid.*

b. Judge Grasz dissented. Pet. 16a-22a. He would have found that petitioner had demonstrated a procedural injury based on HUD's issuance of the Memorandum without notice-and-comment rulemaking, *id.* at 18a-22a, and he also believed that petitioner had demonstrated an imminent injury because "the complaint alleges [petitioner's] housing policy violates the government's interpretation of the FHA," *id.* at 17a-18a.

ARGUMENT

Petitioner contends (Pet. 28-35) that the court of appeals erred in determining that it lacks Article III standing to challenge the HUD Memorandum in a pre-enforcement action. Petitioner further contends (Pet. 17-27) that the court erred in holding that it must demonstrate a concrete harm stemming from the Memorandum to establish standing to bring a procedural notice-and-comment challenge. The court of appeals correctly held that petitioner lacks standing on either theory, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

A. Petitioner's Claim Of Standing To Bring Substantive Challenges To The Memorandum Does Not Warrant Review

To establish Article III standing, a plaintiff bears the burden of demonstrating three elements. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and

internal quotation marks omitted). "Allegations of possible future injury" are not sufficient; rather, "[a] threatened injury must be 'certainly impending.'" *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (citation omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (brackets, citation, and ellipsis omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). The court of appeals correctly applied those principles in holding that petitioner lacks standing to bring its substantive challenges to the Memorandum. And petitioner does not contend that this aspect of the court's decision conflicts with any decision of another court of appeals. Further review is not warranted.

1. "The Memorandum does not impose any restrictions on, or create any penalties against, entities subject to the Fair Housing Act." Pet. App. 9a. Instead, it is a statement of policy addressed to the HUD offices and affiliates responsible for enforcing the FHA. See *id.* at 36a. The Memorandum instructs those entities to "accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation" and to "fully enforce the [FHA] to prohibit discrimination because of sexual orientation and gender identity." *Id.* at 37a-39a.

In issuing that instruction, the Memorandum clarified HUD's approach to the FHA's prohibition on sex discrimination based on this Court's recent decision in *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), which interpreted the materially identical text of Title VII. But the Memorandum broke no new ground in directing HUD offices and affiliates to accept and

investigate FHA complaints alleging sex discrimination in the form of discrimination based on sexual orientation or gender identity. To the contrary, HUD had been accepting such complaints for more than a decade. See pp. 4-5, *supra*.

In issuing general instructions to HUD offices and affiliated entities, the Memorandum does not itself require petitioner or any other housing provider to do or refrain from doing anything. Pet. App. 9a. Nor does it purport to determine any entity's FHA liability in any specific setting—such as a school providing student housing—much less in settings where statutory and constitutional religious-liberty protections may apply. *Ibid.* As the court of appeals noted, the Memorandum's general commitment to combatting discrimination on the basis of sexual orientation and gender identity "does not * * * require that HUD reach the specific enforcement decision that [petitioner's] current housing policies violate federal law," and "says nothing of how [RFRA] or the Free Exercise Clause may limit enforcement of the [FHA's] prohibition on sex discrimination" against entities like petitioner. *Ibid.*

As a result, the courts below correctly concluded that petitioner's claim of injury stemming from the Memorandum's issuance is "speculative," "conjectural," and "hypothetical." Pet. App. 9a, 12a; see *id.* at 30a-31a. Put simply, petitioner has not alleged facts demonstrating "that the likelihood of future enforcement is 'substantial.'" *California* v. *Texas*, 141 S. Ct. 2104, 2114 (2021) (quoting *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 164 (2014)). Petitioner has not alleged any past, current, or threatened enforcement of the Memorandum or the FHA against it or any similarly situated college. Pet. App. 10a, 14a-15a. Indeed, as the court of

appeals emphasized, HUD has *never* filed a charge of sex discrimination based on a housing policy against an educational institution where, as here, the Department of Education has recognized that institution's entitlement to a religious exemption under Title IX. *Id.* at 10a, 14a; see pp. 3-4, *supra*.

In addition, even if petitioner could establish a cognizable injury in fact, the court of appeals also correctly held that it cannot satisfy the causation and redressability elements. The FHA's prohibition on sex discrimination and HUD's obligation to investigate complaints and potentially bring charges are not products of the Memorandum; they are in the statutory text itself. Pet. App. 16a; see p. 2, *supra*. Even if the Memorandum were vacated or enjoined, HUD would "retain[] the authority and responsibility to carry out the same enforcement activity based on the statute alone." Pet. App. 16a. Any alleged injury is thus neither fairly traceable to the Memorandum nor redressable by a judicial decision setting aside or enjoining the Memorandum.

2. Petitioner's contrary arguments are "based on a misunderstanding of the Memorandum." Pet. App. 9a. Petitioner asserts that the Memorandum "proscribe[s]" its housing policies, Pet. 28 (quoting *Susan B. Anthony List*, 573 U.S. at 159), and "places [it] squarely within the FHA's and third-party enforcers' cross hairs," *ibid.* But the Memorandum does not make any determination that housing policies like petitioner's—or, for that matter, the policies of any educational institution—violate the FHA. Indeed, the Memorandum "does not specifically address the subject of housing for students at colleges and universities" at all. Pet. App. 5a.

Petitioner is similarly mistaken in asserting that the Memorandum "commits HUD to the 'eradication' of

* * * policies like [petitioner's]." Pet. 9 (citation omitted). The Memorandum merely states a general aspiration to "forge a path to the eradication of housing discrimination for all." Pet. App. 41a. Again, such general pronouncements—like promises to "fully enforce" the FHA, see Pet. 29-30 (citation omitted)—do not speak to whether HUD considers housing policies adopted by a religious educational institution to constitute actionable discrimination to begin with, especially in light of the protections bestowed on such entities by other federal statutes and the Constitution.

Petitioner also asserts (Pet. 28) that "there is no shortage of third parties eager to challenge the College's religious beliefs." But to support that assertion, petitioner cites a suit by third parties against *the Department of Education*, as well as a Title IX complaint filed against petitioner by an individual student. See Pet. 28-29. Petitioner does not claim that the Department of Education has acted on the student's complaint. In any event, only HUD's history of FHA enforcement is relevant to this pre-enforcement challenge to a HUD Memorandum regarding the FHA.

Petitioner seeks to excuse its inability to point to any past or current enforcement of the FHA's sex-discrimination prohibition against it or a similarly situated college by asserting (Pet. 33) that the Memorandum "is new, so no historical enforcement could exist." That is not persuasive. As noted, HUD's policy of accepting and investigating FHA complaints of sexual-orientation and gender-identity discrimination has co-existed with

petitioner's housing policies for more than a decade. See pp. 4-5, *supra*; see also Pet. App. 10a, 14a.[2]

Petitioner's reliance (Pet. 29) on the proposition that where a plaintiff is an "object of the [agency's] action," there is "ordinarily little question that the action * * * has caused him injury," is also misplaced. *Lujan*, 504 U.S. at 561-562. To begin with, petitioner is not the "object" of the Memorandum, which is "an internal directive to HUD agencies" and affiliates, "not a regulation of private parties." Pet. App. 11a. Unlike the agency actions at issue or discussed in the decisions on which petitioner relies (Pet. 29, 32), the Memorandum "does not direct [petitioner] to do anything," "does not expose [petitioner] to any legal penalties for noncompliance," and does not otherwise carry any legal consequences for petitioner. Pet. App. 11a. And this Court has made clear that even a plaintiff that *is* the object of a challenged statute or regulation cannot establish standing based on future enforcement unless it shows "that the likelihood of future enforcement is 'substantial,'"

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[2] Petitioner also relies (Pet. 30 & n.2) on congressional testimony by Secretary Marcia Fudge post-dating the district court's decision. But "standing is to be determined as of the commencement of suit," *Lujan*, 504 U.S. at 570 n.5, and regardless, the Secretary's testimony was consistent with the government's position here. When asked whether petitioner's housing policies "place them in violation of HUD's directive," the Secretary answered that "[t]he Bostock rule from the Supreme Court says it is the law and I am sworn to uphold the law." *U.S. Department of Housing and Urban Development's Fiscal Year 2022 Budget: Hearing Before the House Comm. on the Budget*, 117th Cong., 1st Sess. 18 (2021). Secretary Fudge then "commit[ted]" that HUD "will not violate anyone's Constitutional rights." *Ibid.*

California, 141 S. Ct. at 2114 (citation omitted)—a showing that petitioner failed to make here.

Petitioner also asserts (Pet. 5-6) that the Memorandum chills its speech because the FHA and its regulations prohibit "notice[s]" and "statement[s]" that "indicate[] any preference, limitation, or discrimination based on * * * sex." 42 U.S.C. 3604(c); see 24 C.F.R. 100.50(b)(4). But that "free-speech theory of standing fails essentially for the reasons discussed above: [Petitioner] has not shown that there exists a credible threat that [HUD] will enforce the Fair Housing Act against [petitioner] based on its religiously-based housing policies." Pet. App. 14a. This Court has been clear that a plaintiff cannot claim a concrete injury based on actions it chooses to take in alleged anticipation of government enforcement when that enforcement is not actually "threatened." *California*, 141 S. Ct. at 2115. In any event, petitioner has not alleged that it has actually changed any of its housing policies or altered its speech about its housing policies; to the contrary, petitioner maintains that it "tells and intends to continue telling current and prospective students, parents, and the public" about such policies. Compl. ¶¶ 108-111; see Pet. App. 14a-15a.

3. Petitioner does not contend that the court of appeals' holding that it lacks standing to bring its substantive challenges to the Memorandum conflicts with any decision by another court of appeals. Nor does petitioner otherwise attempt to establish that this aspect of the decision below satisfies this Court's traditional certiorari standards. Instead, petitioner simply seeks review of the court of appeals' application of settled Article III principles to the particular circumstances of this

case. That factbound contention does not warrant further review.

B. Petitioner's Claim Of Standing To Bring A Procedural Challenge To The Memorandum Does Not Warrant Review

Before this Court, petitioner primarily contends (Pet. 15-27) that it suffered a procedural injury because HUD issued the Memorandum without notice and comment, and that this asserted procedural injury establishes standing even absent any showing of Article III injury attributable to the Memorandum itself. But this Court's precedents unequivocally hold that a plaintiff bringing a procedural challenge to agency action must show a cognizable injury from the resulting policy. The court of appeals correctly adhered to that settled law. And none of petitioner's decisions from other circuits conflicts with the decision below or endorses petitioner's theory that a bare procedural injury satisfies Article III even in the absence of any concrete harm.

1. This Court has squarely held that "deprivation 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). Instead, this Court has consistently required a showing that the alleged "'procedural right'" is connected to a "concrete harm." *Lujan*, 504 U.S. at 573 n.8. It is thus hornbook law that a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 341 (2016).

To be sure, this Court has recognized 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." *Lujan*, 504 U.S. at 572 n.7. A plaintiff claiming a notice-and-comment violation, for example, need not show that the agency would have made a different decision had notice and comment been provided. See, *e.g.*, *Narragansett Indian Tribal Historic Pres. Office* v. *FERC*, 949 F.3d 8, 13 (D.C. Cir. 2020). But the Court has never suggested that a plaintiff asserting a procedural challenge is excused from the fundamental requirement to show that the challenged agency action inflicted a concrete injury in fact. To the contrary, the Court has emphatically rejected the suggestion that "'procedural rights'" can create "standing for persons who have no concrete interests affected" by the challenged action. *Lujan*, 504 U.S. at 572 n.7.

2. The court of appeals correctly applied those precedents here. The court had already held, for the reasons discussed above, that the Memorandum does not impose any concrete injury on petitioner. Pet. App. 8a-15a; see pp. 11-16, *supra*. The court therefore concluded that "the absence of notice and opportunity to comment regarding the Memorandum does not endanger" any "concrete interest of [petitioner]." Pet. App. 12a. And the Court recognized that, under *Lujan* and *Summers*, petitioner's lack of any concrete injury forecloses its attempt to satisfy Article III by asserting a procedural injury. *Ibid.*

Petitioner does not and could not dispute that a bare procedural injury is insufficient to satisfy Article III. Instead, petitioner appears to argue (Pet. 26-27) that the Memorandum *does* affect its concrete interests by requiring it to change its housing policies. Petitioner thus asserts (Pet. 27) that the court of appeals erred by

"adopt[ing] a rule that a regulated entity's concrete interest in maintaining a course of conduct is insufficiently connected to a notice-and-comment right to constitute an injury in fact." But the court did no such thing. Instead, it held that the Memorandum does *not* affect petitioner's concrete interest in maintaining its housing policies because the Memorandum does not require petitioner to do or refrain from doing anything, and because petitioner does not face any credible threat of enforcement of the FHA's sex-discrimination provision. Pet. App. 12a; see *id.* at 9a-11a.

3. Petitioner contends (Pet. 20-25) that the court of appeals' holding that it lacks standing to bring its procedural challenge conflicts with decisions of five other courts of appeals. But petitioner misunderstands the decisions on which it relies; in fact, those decisions are entirely consistent with the decision below.

Petitioner first invokes the Fifth Circuit's decision in *Texas* v. *EEOC*, 933 F.3d 433 (2019), which considered a State's challenge to an Equal Employment Opportunity Commission (EEOC) guidance concerning employers' (including state employers') use of criminal records in hiring. *Id.* at 437-439. Petitioner asserts that the Fifth Circuit "did not require Texas as a regulated entity to prove any additional harm" other than the deprivation of notice and comment prior to guidance's issuance. Pet. 3; see Pet. 20. But the Fifth Circuit expressly held that "[b]ecause it is the object of the Guidance *and has suffered multiple injuries as a result*, Texas has constitutional standing." *Texas*, 933 F.3d at 446 (emphasis added).

The Fifth Circuit recognized, consistent with the decision here, that to satisfy Article III, Texas's alleged procedural injury must "jeopardiz[e] its concrete

interests." *Texas*, 933 F.3d at 447; see Pet. App. 12a. And based on the nature of the agency guidance at issue—which the Fifth Circuit understood to "bind[] EEOC staff to an analytical method in conducting Title VII investigations," "direct[] their decisions about which employers to refer for enforcement actions," and "leave[] no room for EEOC staff *not* to issue referrals to the Attorney General when an employer uses a categorical felon-hiring ban"—the Fifth Circuit found that Texas had suffered "at least two injuries": an increase in regulatory burden and "'direct, substantial pressure'" to change state law. *Texas*, 933 F.3d at 443, 446-447 & n.25 (citation omitted). The court also found that the EEOC guidance "undercut[] Texas's concrete interest, as a sovereign state, in maintaining compliance with its laws" by "encourag[ing] employers, to avoid liability, to deviate from state law when it conflicts with the Guidance." *Id.* at 447. None of those factors are present in this case.

The Sixth Circuit's decision in *Dismas Charities, Inc.* v. *DOJ*, 401 F.3d 666 (2005), is likewise consistent with the court of appeals' decision here. In that case, it was undisputed that the challenged agency change in statutory interpretation had "a severe impact" on the plaintiff, resulting in lost revenue of $1,214,599. *Id.* at 671. The Sixth Circuit accordingly held that notice and comment would "certainly protect" the plaintiff's "concrete interests." *Id.* at 677; see *id.* at 677-678 (explaining that the procedures must "protect some threatened concrete interest of [the plaintiff's] that is the ultimate basis of his standing" (citation omitted)).

Petitioner's reliance on the Ninth Circuit's decision in *East Bay Sanctuary Covenant* v. *Trump*, 932 F.3d 742 (2018), is similarly misplaced. Petitioner cites *East*

Bay Sanctuary for the proposition that because petitioner is purportedly "within the zone of interests protected by the APA's and FHA's notice-and-comment requirements," it has standing to challenge HUD's alleged procedural violation. Pet. 23. But petitioner conflates the zone-of-interests test with Article III standing. See *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 125-128 (2014). As *East Bay Sanctuary* itself reflects, a plaintiff must satisfy the elements of Article III standing—which were met by the plaintiffs in that case—*and* the zone-of-interests test. See 932 F.3d at 763-769. Being within the zone of interests contemplated by a statute is not enough to confer standing in the absence of a concrete injury.

The D.C. Circuit's decision in *Sierra Club* v. *EPA*, 699 F.3d 530 (2012), also lends no support to petitioner's position. There, the D.C. Circuit specifically found that the Sierra Club's members, who "unquestionably live within zones they claim are exposed to" hazardous air pollutants, had a "redressable concrete interest" underlying their claim of a notice-and-comment violation. *Id.* at 533. And a legion of other D.C. Circuit precedents makes clear that plaintiffs asserting procedural violations must point to a cognizable, non-speculative harm caused by the resulting government action—and that the "relaxed" redressability standard for procedural claims "do[es] not apply to the link between the government decision and the plaintiff's injury." *Hawkins* v. *Haaland*, 991 F.3d 216, 224-225 (2021) (citing cases), cert. denied, 142 S. Ct. 1359 (2022); see, *e.g.*, *WildEarth Guardians* v. *Jewell*, 738 F.3d 298, 306 (2013) (same).

Finally, the Federal Circuit's decision in *Salmon Spawning & Recovery Alliance* v. *United States Customs & Border Protection*, 550 F.3d 1121 (2008), is also

readily distinguishable. There, the Federal Circuit found that the plaintiff organizations had adequately asserted an injury in fact under Article III, based on allegations that "the aesthetic, recreational, and environmental interests of their members are being adversely affected and irreparably injured" by the defendants' allowance of prohibited importation of endangered salmon. *Id.* at 1131-1132. Like the Ninth Circuit in *East Bay Sanctuary*, the Federal Circuit also recognized that the zone-of-interests test must be satisfied in addition to a showing of Article III standing. *Id.* at 1130 n.7.

In short, the difference in outcome between those decisions and the present case derives from differences between those plaintiffs' challenges to the agency actions at issue and petitioner's challenge to the Memorandum here—not from any conflict among the circuits about the Article III principles governing procedural claims.

4. Even if the question presented otherwise warranted this Court's review, this case would not be a suitable vehicle to address it. Petitioner's procedural-injury theory would at most give rise to Article III standing to assert its APA notice-and-comment claim—not any of its other challenges to the Memorandum or the interpretation reflected therein. See *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021) (reiterating that "standing is not dispensed in gross," and instead must be demonstrated "for each claim" and "for each form of relief"). And for straightforward reasons, petitioner's notice-and-comment claim would fail on the merits—such that this Court's resolution of petitioner's first question presented would not change the outcome of this case.

Contrary to petitioner's contention (Pet. 17-18), the Memorandum is not a binding substantive rule; rather, it is a general statement of agency policy.[3] Under the APA, agencies need not engage in notice-and-comment rulemaking to promulgate general statements of policy or interpretive rules. 5 U.S.C. 553(b)(3)(A). And while petitioner argues (Pet. 17) that a provision of the FHA required HUD to go through notice and comment, that provision applies only "with respect to all rules made under this section." 42 U.S.C. 3614a. General statements of policy are not "rules made under" Section 3614a.

Petitioner also argues (Pet. 17) that HUD regulations required the agency to undertake notice-and-comment rulemaking even for non-binding statements of policy. See 24 C.F.R. 11.1(b), 11.2, 11.8 (2021). But those regulations, which are no longer in effect, see 86 Fed. Reg. 35,391 (July 6, 2021), described only a "policy of the Department," 24 C.F.R. 11.1(b), to provide for notice and comment when issuing certain types of "significant guidance documents" that met criteria in 24 C.F.R. 11.2(a) and (d). The Memorandum did not meet those criteria, and in any event, those procedural regulations did not provide for HUD's "policy" regarding notice and comment to be enforceable in court.

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[3] President Biden's informal mention of a HUD "rule change" (Pet. 2, 10, 18) in a commemorative proclamation, see Pet. App. 50a-53a, cannot retroactively alter the contents of the Memorandum or imbue it with substantive legal effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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