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NOTE

“The sword has not yet fallen”: Is Administrative Guidance Jeopardizing Constitutional Rights?

School of the Ozarks, Inc. v. Biden, 41 F.4th 992 (8th Cir. 2022).

C. Claire Hausman*

I. INTRODUCTION

The Office of Fair Housing and Equal Opportunity (“FHEO”) has a duty to investigate sex-based discrimination in housing.¹ In accordance with recent Supreme Court precedent—which held that Title VII’s prohibition on “sex” discrimination necessarily includes discrimination on the basis of gender identity and sexual orientation—FHEO broadened its definition of sex-based discrimination in an internal memorandum published February 11, 2021.² This memorandum directed officers to investigate discrimination in housing based on gender identity and sexual

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¹ *About FHEO*, U.S. DEP’T OF HOUS. AND URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo [<https://perma.cc/DV5S-BN3E>] (last visited Mar. 27, 2023) (“The mission of the Office of Fair Housing and Equal Opportunity (FHEO) is to eliminate housing discrimination, promote economic opportunity, and achieve diverse, inclusive communities by leading the nation in the enforcement, administration, development, and public understanding of federal fair housing policies and laws. The laws implemented and enforced by FHEO include: The Fair Housing Act . . .”). According to the Fair Housing Act, “it shall be unlawful— (b) to discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling. . . because of. . . sex. . . .” 42 U.S.C. § 3604.

² Jeanine M. Worden, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act*, U.S. DEP’T OF HOUS. AND URBAN DEV. (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf [<https://perma.cc/GDF2-8MMR>].

orientation.³ The change unnerved a private Christian college, College of the Ozarks, located in Missouri.⁴ Fearing that this internal memorandum threatened its ability to place students in dorms based on their biological sex, the school sued the U.S. Department of Housing and Urban Development (“HUD”) and the Biden administration, claiming its constitutional rights were abridged.⁵ The district court found, and the Eighth Circuit affirmed, that College of the Ozarks lacked standing to bring the suit against the defendants.⁶

College of the Ozarks’ Title IX exempt status created an unsurpassable bar for the court, which concluded that the college’s injury was not imminent.⁷ It was unclear whether HUD would enforce this memorandum against the college, and thus, the college’s injury was too speculative.⁸ This holding effectively requires the college to wait until it is adequately injured and its constitutional rights abridged to bring suit.⁹ The court’s reasoning is contrary to the policy considerations underlying the standing doctrine, as it prolongs the plaintiff’s injury under the mere hope it becomes more concrete. The plaintiff must sit idly by and wait for the sword to fall. By the time the sword has fallen, the plaintiff’s rights are taken and pre-enforcement review is no longer possible.

This Note explores the Article III standing requirement as it relates to agency rulemaking and the need for an imminent injury. Part II discusses the facts of *School of the Ozarks, Inc. v. Biden*. Part III analyzes the standing and ripeness doctrines, as well as HUD’s enforcement powers and judicial review of agencies. Part IV delves further into the Eighth Circuit’s legal analysis in the case at issue. Finally, Part V reflects on the imminent harm requirement and the difficulty of applying it to agency action.

³ Jeanine M. Worden, *supra* note 2 (“Effective immediately, FHEO shall accept for filing and investigate all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation, that meet other jurisdictional requirements. Where reasonable cause exists to believe that discrimination because of sexual orientation or gender identity has occurred, FHEO will refer a determination of cause for charge. . . .”).

⁴ *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 995 (8th Cir. 2022).

⁵ *Id.* at 996–97.

⁶ *Id.* at 1001.

⁷ *Id.* at 1000–01.

⁸ *Id.*

⁹ *Id.* at 1002.

II. FACTS AND HOLDING

College of the Ozarks assigns its students to single-sex dorms based upon their biological sex, regardless of their gender identity.¹⁰ The college believes in "God-given, objective gender, whether or not it differs from [students'] internal sense of 'gender identity.'"¹¹ While the college does not require its students to practice the school's religious ideals, all students must follow the religiously-inspired code of conduct set forth by the college.¹²

College of the Ozarks took issue with the FHEO internal memorandum published on February 11, 2021.¹³ This internal memorandum instructed the FHEO officials to accept and investigate complaints of sex discrimination, including discrimination based on sexual orientation and gender identity.¹⁴ Believing itself to be a likely target of such an investigation due to its stance on sex and gender, College of the Ozarks sued President Biden, HUD, HUD's cabinet-level secretary, and the Principal Deputy Assistant Secretary for FHEO (collectively "defendants").¹⁵ College of the Ozarks requested a preliminary injunction against the defendants' enforcement of the memorandum.¹⁶

College of the Ozarks brought constitutional claims against the defendants, asserting that the enforcement of the internal memorandum would violate its free exercise and free speech rights.¹⁷ Additionally, College of the Ozarks claimed that the defendants violated the Administrative Procedure Act and the Religious Freedom Restoration Act by issuing the memorandum without notice and comment as 5 U.S.C. § 706(2)(D) requires.¹⁸

¹⁰ *Id.* at 996. As School of the Ozarks, Inc. is the corporation that owns College of the Ozarks, it is listed as the plaintiff in this litigation. *See* Plaintiff's Verified Complaint, 2021 WL 8322682, *Sch. of the Ozarks, Inc. v. Biden*, 2021 WL 2301938 (W.D. Mo. June 4, 2021), *aff'd*, 41 F.4th 992 (8th Cir. 2022) (No. 6:21CV03089) ("The college is a four year liberal arts co-educational college . . . It is a non-profit corporation incorporated in the state of Missouri as The School of the Ozarks, and it does business as College of the Ozarks.").

¹¹ *Sch. of the Ozarks, Inc.*, 41 F.4th at 996.

¹² *Id.*

¹³ Jeanine M. Worden, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Sch. of the Ozarks, Inc.*, 41 F.4th at 993.

¹⁶ *Sch. of the Ozarks, Inc. v. Biden*, 2021 WL 2301938 at *2 (W.D. Mo. 2021) (slip copy).

¹⁷ *Sch. of the Ozarks, Inc.*, 41 F.4th at 997.

¹⁸ *Sch. of the Ozarks, Inc.*, 2021 WL 2301938 at *1. "[T]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall. . . (2) hold

The U.S. District Court for the Western District of Missouri evaluated College of the Ozarks' claims and request for a preliminary injunction.¹⁹ After engaging in careful review of the plaintiff's claims, the court held that College of the Ozarks failed to establish standing.²⁰ The court found that the college was unable to show all three elements necessary for standing, due in large measure to the speculative nature of its injury.²¹ Thus, the court dismissed College of the Ozarks' case, including its motion for preliminary injunction.²²

College of the Ozarks appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, alleging that the district court erred in determining that it lacked standing to bring its claims against defendants.²³ The Eighth Circuit reviewed *de novo* whether College of the Ozarks met the Article III standing requirements.²⁴ The Eighth Circuit affirmed the district court's decision.²⁵ The court held that College of the Ozarks failed to show standing to bring suit against defendants because the memorandum did not create an imminent threat of injury, as the alleged future injury was "conjectural and hypothetical," and because the injunction requested by College of the Ozarks would not redress the alleged injuries to its free speech and free exercise rights.²⁶

III. LEGAL BACKGROUND

A plaintiff suing a federal agency for abridging its constitutional rights must demonstrate that the court has jurisdiction to hear the case, which in turn requires the plaintiff to show it has standing to bring its claims.²⁷ The federal government assigns each agency a specific duty and enforcement power.²⁸ In order to show its injury is imminent, caused by the agency's conduct, and able to be redressed by the court, the plaintiff must demonstrate that the agency's enforcement had a specific impact on

unlawful and set aside agency action, findings, and conclusions found to be . . . (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(d).

¹⁹ *Sch. of the Ozarks, Inc.*, 2021 WL 2301938 at *1.

²⁰ *Id.* at *3.

²¹ To have standing, the court must find the plaintiff has suffered an injury-in-fact, this injury was caused by the defendant's conduct, and that the injury is able to be redressed with a favorable court decision. *Lujan v. National Wildlife Federation*, 504 U.S. 555, 560 (1992); *Sch. of the Ozarks, Inc.*, 2021 WL 2301938 at *3.

²² *Sch. of the Ozarks, Inc.*, 2021 WL 2301938 at *4.

²³ *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 997 (8th Cir. 2022).

²⁴ *Id.*

²⁵ *Id.* at 1001.

²⁶ *Id.* at 999.

²⁷ *Lujan*, 504 U.S. at 560.

²⁸ *Kasten v. Saint-Gobain Performance Plastic Corp.*, 563 U.S. 1, 14–15 (2011).

the plaintiff itself.²⁹ HUD is tasked to protect those who are discriminated against in housing.³⁰ The Supreme Court's recent decision in *Bostock* has further expanded this enforcement power. It is only through this lens that one may understand the elements College of the Ozarks must prove to show that it has standing and its claim is ripe for review.

A. HUD Enforcement and Bostock

The U.S. Department of Housing and Urban Development was established through the U.S. Housing Act of 1937 to encourage housing and community development.³¹ Throughout the twentieth century, HUD worked to protect families in their efforts to establish and preserve homes.³² With the passage of the Fair Housing Act of 1968, Congress outlawed most housing discrimination and HUD gained enforcement powers.³³ HUD was directed to prevent discrimination based on race, religion, and national origin in the housing market.³⁴ To carry out this obligation, Congress established FHEO as an office within HUD and authorized it to investigate Fair Housing violation complaints.³⁵ If HUD's Secretary has reason to believe there is a violation, he submits the information to the Attorney General and charges may be filed.³⁶

Under the Fair Housing Act, one cannot publish statements that are discriminatory in nature in one's efforts to sell or lease a dwelling.³⁷ Additionally, one cannot represent that a dwelling is not available for sale or rent due to an interested party's "race, color, religion, sex, familial status, or national origin."³⁸ These restrictions upon the lease or sale of a

²⁹ *Lujan*, 504 U.S. at 561–62.

³⁰ *Questions and Answers About HUD*, U.S. DEP'T OF HOUS. AND URBAN DEV., <https://www.hud.gov/about/qaintro> [<https://perma.cc/2D28-H2AR>] (last visited Mar. 7, 2023) ("HUD's business is helping create a decent home and suitable living environment for all Americans, and it has given America's communities a strong national voice at the Cabinet level.").

³¹ *HUD History*, U.S. DEP'T OF HOUS. AND URBAN DEV., https://www.hud.gov/about/hud_history [<https://perma.cc/YP6D-XPBH>] (last visited Mar. 7, 2023).

³² *Questions and Answers About HUD*, *supra* note 30 ("HUD's business is helping create a decent home and suitable living environment for all Americans, and it has given America's communities a strong national voice at the Cabinet level.").

³³ *Id.*

³⁴ Lawrence L. Thompson, *A History of HUD*, MONARCH HOUSING, 8–9 (2006), <https://monarchhousing.org/wp-content/uploads/2007/03/hud-history.pdf> [<https://perma.cc/V7HB-XN35>]; Later updates to the Civil Rights Act outlaw discrimination based on sex, familial status, and disability. 42 U.S.C. § 3604.

³⁵ Thompson, *supra* note 34.

³⁶ Thompson, *supra* note 34; 42 U.S.C. § 3610.

³⁷ 42 U.S.C. § 3604(c).

³⁸ *Id.* § 3604(d).

dwelling are enforced by FHEO and any violation may result in liability.³⁹ However, the Fair Housing Act recognizes an exemption to its requirements for religious organizations.⁴⁰ This exception allows a religious organization to discriminate on the basis of religion, unless membership in the religion is limited to members of a certain race or ethnicity.⁴¹ Sex is not mentioned as part of the Fair Housing exemption for religious organizations.⁴²

A separate federal law, Title IX, protects individuals' access to educational opportunities.⁴³ This federal statute demands that all schools offer equal access to educational opportunities irrespective of sex.⁴⁴ Schools controlled by religious organizations, however, are exempt from Title IX and may therefore legally discriminate in education programs or activities on the basis of sex.⁴⁵

Private religious university housing sits at the crossroads of both statutory schemes. Because one statutory scheme specifically protects discrimination on the basis of sex, but the other does not, it is unclear whether such a university may do so without violation of federal law.⁴⁶

Serving as a crucial impetus to this question, in *Bostock v. Clayton County*, the Supreme Court of the United States announced that sex-based discrimination in employment includes discrimination based on gender identity and sexual orientation.⁴⁷ Justice Gorsuch, writing for the majority, explained that sex is a necessary component of gender identity and sexual orientation discrimination:

Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.⁴⁸

Because discrimination based upon sex is a necessary feature of discrimination based on sexual orientation and gender identity, both are

³⁹ *Id.* § 3610.

⁴⁰ *Id.* § 3607.

⁴¹ *Id.* § 3607(a).

⁴² *Id.* § 3607.

⁴³ 20 U.S.C.S. § 1681.

⁴⁴ *Id.*

⁴⁵ *Id.* §1681(a)(1–3).

⁴⁶ *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 999 (8th Cir. 2022).

⁴⁷ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

⁴⁸ *Id.* at 1742.

incapsulated in Title VII's prohibition of "sex discrimination."⁴⁹ While the *Bostock* Court's broad statutory interpretation was limited to Title VII, other federal statutes, including the Fair Housing Act and Title IX, contain identical language.⁵⁰ Thus, the decision attracted widespread media attention and legal analysis, as journalists and legal scholars alike recognized the likely extension of this decision into other areas of law, including that of housing.⁵¹

On January 20, 2021, the first day of his presidency, President Biden enacted Executive Order 13988, "Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation."⁵² This executive order directed all agencies to review their regulations and policies that prohibit sex-based discrimination and determine the best course to fully implement *Bostock*.⁵³ President Biden pointedly identified the Fair Housing Act as subject to the legal ramifications of *Bostock*, writing, "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination – including . . . the Fair Housing Act. . . along with [its] implementing regulations – prohibit discrimination on the basis

⁴⁹ *Id.*

⁵⁰ Compare 42 U.S.C. § 2000e-2 ("It shall be . . . unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's . . . sex.*") (emphasis added), with 20 U.S.C. § 1681, ("No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance. . . .") (emphasis added); and 42 U.S.C. § 3604 ("[I]t shall be unlawful to . . . discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . *because of . . . sex*") (emphasis added).

⁵¹ See James Esseks, *Supreme Court Says Firing Workers Because They Are LGBTQ is Unlawful Discrimination*, ACLU (June 15, 2020), <https://www.aclu.org/news/lgbtq-rights/supreme-court-says-firing-workers-because-they-are-lgbtq-is-unlawful-discrimination> [<https://perma.cc/P7FK-A6PB>]; Ronn Blitzer, *Supreme Court rules gay workers protected from job discrimination, in big win for LGBT rights*, FOX NEWS (June 15, 2020), <https://www.foxnews.com/politics/supreme-court-rules-gay-workers-protected-from-job-discrimination-in-big-win-for-lgbt-rights> [<https://perma.cc/8CHZ-Y7U4>]; A Q&A with Professor Eskridge on *Landmark SCOTUS Decision on LGBTQ Rights*, YALE LAW SCH. (June 16, 2020), <https://law.yale.edu/yls-today/news/qa-professor-eskridge-landmark-scotus-decision-lgbtq-rights> [<https://perma.cc/8EN5-UVET>] ("[B]ecause other sex discrimination laws have language similar to that in Title VII, the Court's reasoning gives a boost to claims by sex and gender minorities . . . that those laws protect them against discrimination. Such laws include Title IX, which conditions federal funds for education on the recipient's not discriminating 'on the basis' of sex, and the Affordable Care Act, which bars sex discrimination as well.").

⁵² Exec. Order No. 13988, 86 FR § 7023 (2021).

⁵³ *Id.*

of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”⁵⁴

In response to this executive order, the acting secretary for FHEO published an internal memorandum on February 11, 2021.⁵⁵ This internal memorandum reflected upon HUD’s objectives and FHEO’s duty to “ensure that all people peacefully enjoy a place they call home, where they are safe and can thrive, free from discrimination and fear.”⁵⁶ Determining that *Bostock*’s reasoning was applicable to the Fair Housing Act, the acting secretary directed FHEO to accept for filing and investigate all complaints of gender identity- and sexual orientation-based discrimination.⁵⁷ Where reasonable cause existed to believe that discrimination had occurred, FHEO was to refer a cause for charge to the attorney general.⁵⁸ Interestingly, neither President Biden’s executive order, nor the assistant secretary’s internal memorandum, discussed a religious exemption to the new definition of sex-based discrimination.⁵⁹ However, before such a religious entity may bring suit, it must demonstrate that the court has the capability to hear its claims.⁶⁰

B. Standing and Ripeness for Judicial Review

The Constitution limits the federal judiciary’s jurisdiction to “cases and controversies.”⁶¹ This restriction has developed into the doctrine of standing, obligating a court to determine if a litigant is entitled to have the court decide the merits of his dispute.⁶² The plaintiff bears the burden to prove standing.⁶³ At the pleading stage, the facts required to show standing are quite low, as the court is to rely on the plaintiff’s factual allegations and “presum[e] that general allegations embrace those specific

⁵⁴ *Id.*

⁵⁵ Worden, *supra* note 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Exec. Order No. 13988, 86 FR § 7023 (2021); Worden, *supra* note 2.

⁶⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁶¹ U.S. CONST. art. 3, § 2, cl. 1.

⁶² *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 997 (8th Cir. 2022) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (“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.”)).

⁶³ *Lujan*, 504 U.S. at 561 (“The party invoking federal jurisdiction bears the burden of proving standing. . . . [E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.”).

facts that are necessary to support the claim."⁶⁴ At summary judgment, however, the plaintiff must set forth specific facts to show there is a genuine issue of material fact.⁶⁵

In *Lujan v. Defenders of Wildlife*, the Supreme Court set forth the constitutional test for standing.⁶⁶ The plaintiff must first assert an "injury in fact," a violation of a legally protected right which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."⁶⁷ When the alleged harm has not yet occurred, the plaintiff must show that the harm is "certainly impending" or that "there is a substantial risk that the harm will occur."⁶⁸ Second, there must be a causal link between the asserted injury and the defendant's conduct.⁶⁹ In other words, the injury must be fairly traceable to the defendant's conduct and not caused by a third party not participating in the litigation.⁷⁰ Finally, it must be likely that the injury will be redressed by a favorable court decision.⁷¹

In *Lujan*, the Court also commented upon the specific type of suit where the plaintiff takes issue with governmental action or inaction:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.⁷²

⁶⁴ *Id.*; see also *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 878 (11th Cir. 2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)) ("[W]hen standing becomes an issue on a motion to dismiss, general factual allegations of injury resulting from the defendant's conduct may be sufficient to show standing. However, when standing is raised at the summary judgment stage, the plaintiff must 'set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken as true.'")

⁶⁵ FED. RUL. CIV. PRO. 56(e).

⁶⁶ *Lujan*, 504 U.S. at 560–61.

⁶⁷ *Id.*

⁶⁸ *In re SuperValu, Inc.*, 870 F.3d 763, 769 (8th Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)) (some internal quotation marks omitted).

⁶⁹ *Lujan*, 504 U.S. at 560.

⁷⁰ *Id.*

⁷¹ *Id.* at 561.

⁷² *Id.* at 561–62.

Where the plaintiff is the object of the government's inaction or action, standing is often met.⁷³ Nevertheless, the plaintiff must still prove that the injury has in fact occurred or is reasonably imminent.⁷⁴ Thus, the court must first investigate whether the injury is actual or imminent, rather than merely speculative.⁷⁵

Courts have opined several times on the imminence of injury as it relates to agency actions.⁷⁶ In *Iowa League of Cities v. EPA*, Iowa city sewer facilities sued EPA in response to several letters an Iowa senator received from the agency.⁷⁷ These letters demanded change in water treatment processes for municipal sewer facilities that would force the cities to meet a higher standard than required by the Clean Water Act.⁷⁸ The Eighth Circuit held that the plaintiffs met the actual or imminent injury prong of standing, as these letters showed there was an imminent threat that the plaintiffs would have to substantially change their processes or face penalties.⁷⁹ Similarly, in *Bennett v. Spear*, the plaintiffs claimed injury resulting from a biological opinion by the Fish and Wildlife Service.⁸⁰ The plaintiffs alleged the opinion would result in a reduction of their water supply because it would require a minimum amount of water in the lake from which plaintiffs took water to irrigate their land.⁸¹ The government asserted that the mere fact that there would be aggregately less water available did not mean the plaintiffs individually would receive less water.⁸² The Supreme Court disagreed, noting that the plaintiffs put forth sufficient allegations to surpass the motion to dismiss stage as "it [was] easy to presume specific facts under which [they] [would] be injured" given their pleadings.⁸³

These cases demonstrate courts' expectations regarding imminence. A court is often willing to follow the plaintiff's process of analysis as it relates to future injury.⁸⁴ Such injury need not be practically certain;

⁷³ *Id.*

⁷⁴ *Id.* at 560.

⁷⁵ *Id.*

⁷⁶ *Iowa League of Cities v. EPA*, 711 F.3d 844, 870 (8th Cir. 2013), *enforced sub nom.* *Iowa League of Cities v. EPA*, No. 11-3412, 2021 WL 6102534 (8th Cir. Dec. 22, 2021); *Bennett v. Spear*, 520 U.S. 154, 168 (1997); *American Civil Liberties Union v. National Sec. Agency*, 493 F.3d 644, 664 (6th Cir. 2007); *City of Kennett, Missouri v. EPA*, 887 F.3d 424, 431 (2018).

⁷⁷ *Iowa League of Cities*, 711 F.3d at 854.

⁷⁸ *Id.*

⁷⁹ *Id.* at 870.

⁸⁰ *Bennett*, 520 U.S. at 157.

⁸¹ *Id.* at 167.

⁸² *Id.*

⁸³ *Id.* at 168.

⁸⁴ *See id.*

instead, it may be inferred from the text of agency guidance.⁸⁵ Imminence is not a toothless requirement, however, as it necessitates that a plaintiff shows his injury is more than conjectural.⁸⁶ If a plaintiff's future injury is too far removed to be considered foreseeable, a court will not find standing.⁸⁷

The doctrine of ripeness is closely associated with that of standing, as both doctrines are derived from Article III's "cases and controversies" requirement.⁸⁸ A court must find the issue is "ripe" for judicial review to ensure that the court does not entrench itself in "abstract disagreements over administrative policies."⁸⁹ Additionally, ripeness ensures that the effects of such administrative decisions are formalized and that a plaintiff feels the effects in a concrete way before judicial interference.⁹⁰ Similar to the injury-in-fact requirement of standing, the case must "present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."⁹¹

To demonstrate an issue is "ripe" for review, a plaintiff must show that the issues of the case are fit for judicial determination, as well as that he would suffer hardship if the court withheld consideration.⁹² To be fit for determination, the court must find the "issue presented in [the] case is purely legal, and will not be clarified by further factual development."⁹³ For example, in *Abbott Laboratories v. Gardner*, the Court held that this requirement was met where both parties believed the facts of a case were sufficient for court determination and moved for summary judgment.⁹⁴ As for the second prong of the ripeness analysis—whether the plaintiff would suffer hardship if the court withheld consideration—courts may consider actual damages, as well as heightened uncertainty and behavior modification which may result from a deferred decision.⁹⁵ The Eighth Circuit examined such considerations in *Nebraska Public Power Dist. v. MidAmerican Energy Co.*⁹⁶ NPPD and MEC had agreed to share the decommissioning costs of NPPD's nuclear power plant should the plant

⁸⁵ See *Iowa League of Cities v. EPA*, 711 F.3d 844, 867–68 (8th Cir. 2013).

⁸⁶ *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992).

⁸⁷ *A.C.L.U. v. Nat'l Sec. Agency*, 493 F.3d 644, 662–64 (6th Cir. 2007).

⁸⁸ *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000).

⁸⁹ *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148 (1967) *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977).

⁹⁰ *Id.* at 148–49.

⁹¹ *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945).

⁹² *Abbott Lab'ys*, 387 U.S. at 149.

⁹³ *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985).

⁹⁴ See *Abbott Lab'ys*, 387 U.S. at 149.

⁹⁵ *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000).

⁹⁶ *Id.* at 1039–40.

be decommissioned in 2004.⁹⁷ NPPD sought declaratory judgment from the court that MEC's payments were non-refundable.⁹⁸ MEC claimed that previous payments must be returned to them should the plant continue to operate beyond 2004.⁹⁹ NPPD argued that the payments were a part of their monthly power costs and did not have to be returned.¹⁰⁰ While MEC argued that the case would not be ripe for review until the NPPD decided whether to continue power plant operations, the court disagreed.¹⁰¹ The Eighth Circuit determined that the likelihood of future harm to plaintiffs was "definite, tangible, and significant," and to delay resolution would force the NPPD to gamble millions of dollars on business operations which were based on an uncertain legal foundation.¹⁰²

Finally, Congress has restricted judicial review of agency action in the Administrative Procedure Act.¹⁰³ This act specifies the types of agency actions that may be reviewed and when a court may hold agency action unlawful.¹⁰⁴ A court may review agency actions only if they are deemed "final," and a court may set aside an agency action as unlawful only when it determines that the action is unconstitutional, violating a right, power, privilege, or immunity.¹⁰⁵ In determining whether an agency action is final, a court must balance the agency's interest in establishing guidance without excessive judicial interference against the public's interest in protection from unlawful rules masquerading as mere guidance.¹⁰⁶ In *Appalachian Power Co. v. EPA*, the District of Columbia Circuit identified the two requirements necessary for an action to be "final."¹⁰⁷ First, the action must be the culmination of the agency's decision-making process, rather than "merely tentative or interlocutory."¹⁰⁸ The *Appalachian* court was not persuaded by EPA's argument that its guidance document was not final because it was subject to change.¹⁰⁹ As all laws are subject to change, the defendant must show more than mere potential for future alteration.¹¹⁰ Second, the agency action must determine rights and obligations, resulting in legal consequences.¹¹¹ In *Bennett v. Spear*, the Supreme Court held that

⁹⁷ *Id.* at 1036.

⁹⁸ *Id.* at 1037.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1039–40.

¹⁰² *Id.* at 1039.

¹⁰³ 5 U.S.C. § 704.

¹⁰⁴ *Id.*; *id.* § 706.

¹⁰⁵ *Id.* § 706(2)(b).

¹⁰⁶ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.D.C. 2000).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

this second prong was met because the Fish and Wildlife Service's biological opinion directly affected the rules of compliance, resulting in potential liability.¹¹²

IV. INSTANT DECISION

In *School of the Ozarks, Inc. v. Biden*, the Eighth Circuit affirmed the district court's determination that College of the Ozarks lacked standing to bring suit against the defendants.¹¹³ In a 2-1 decision, the panel held that the college's asserted injury was not sufficiently imminent and that a favorable decision would not properly redress any injury resulting from the application of FHEO's internal memorandum.¹¹⁴ Thus, the court dismissed College of the Ozarks' claims and motion for preliminary injunction against defendants.¹¹⁵

According to the Eighth Circuit, both the ripeness and standing analyses turned on the same question—whether College of the Ozarks suffered a legally cognizable injury.¹¹⁶ College of the Ozarks put forth two theories of injury to meet standing's injury-in-fact requirement.¹¹⁷ First, College of the Ozarks claimed that FHEO's internal memorandum threatened the school's right to free exercise, as it made the school a likely target of investigation due to its religiously inspired code of conduct.¹¹⁸ The school argued that, by enforcing its housing policy of placing students in dorms based on their biological sex, it would face liability under the new memorandum—which would violate its free exercise rights.¹¹⁹ The court rejected this argument, explaining that the plaintiff misunderstood the internal memorandum.¹²⁰ The internal memorandum itself did not impose restrictions on or create penalties against entities subject to the Fair Housing Act; rather, HUD simply directed the office to accept complaints and investigate.¹²¹ Thus, College of the Ozarks' alleged harm was speculative.¹²² Because FHEO would have to receive a complaint, conduct an investigation, and then determine that the college was subject to liability, any potential harm to the school was too far removed from the

¹¹² *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

¹¹³ *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1001 (8th Cir. 2022).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 995.

¹¹⁶ *Id.* at 998.

¹¹⁷ *Id.* at 998, 1000.

¹¹⁸ *Id.* at 998–1000.

¹¹⁹ *Id.* at 1000.

¹²⁰ *Id.* at 998.

¹²¹ *Id.*

¹²² *Id.* at 1000.

memorandum's directives.¹²³ As further support, the court also credited the defendant's assertion that the office abides by the Title IX exemption for religious schools and has never brought housing discrimination claims against a college controlled by a religious organization.¹²⁴

Second, College of the Ozarks claimed the memorandum curtailed its First Amendment right to free speech, resulting in an injury-in-fact.¹²⁵ As the Fair Housing Act prohibits one from making, printing, or publishing a statement regarding the sale or rent of a dwelling that states one discriminates on the basis of sex, the plaintiff argued such a restriction prevented the school from communicating its housing policies.¹²⁶ Such a restriction, the school argued, would result in a chilling of its free speech.¹²⁷ The court again minimized the potential for future injury to the school.¹²⁸ According to the court, there was no credible threat that HUD would enforce the Fair Housing Act against the plaintiff based on its religiously-inspired housing policies.¹²⁹ Similarly, the court pointed to the school's Title IX exemption as evidence there was no imminent threat of enforcement.¹³⁰

Additionally, the court concluded that even if College of the Ozarks had suffered an injury-in-fact, it would still lack standing, as neither injury could be redressed by judicial decision.¹³¹ Specifically, the court determined that enjoining the implementation of the internal memorandum would not eliminate the injury.¹³² Even if HUD could not enforce this internal directive, it would still be obligated to investigate sex discrimination in housing, as the Fair Housing Act still governs.¹³³ And HUD would still have to "consider the meaning of the Fair Housing Act in light of *Bostock* and its interpretation of similar statutory language" because an injunction against the memorandum would not enjoin enforcement of the Supreme Court's decision.¹³⁴ As HUD maintained the same authority and responsibility to enforce the Fair Housing Act regardless of the internal memorandum, the court could not redress this injury.¹³⁵

¹²³ *Id.*

¹²⁴ *Id.* at 998–99.

¹²⁵ *Id.* at 1000.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1001.

¹²⁸ *Id.* at 1000.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1001.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Judge Gratz dissented.¹³⁶ He concluded that College of the Ozarks had standing on the basis of a different theory of injury.¹³⁷ He determined HUD's failure to comply with the notice and comment requirement was sufficient to find an injury-in-fact for the plaintiff.¹³⁸ Judge Gratz stated that HUD violated the procedural rights of College of the Ozarks when it denied the college notice of the impending rule and the ability to voice its objections before the rule was implemented.¹³⁹ The majority disagreed with this view, stating that the violation of a procedural right must still result in a concrete injury.¹⁴⁰ As the majority had determined there was no real threat HUD would enforce the memorandum against the college, there was no concrete harm.¹⁴¹

Judge Gratz also touched upon the difficulty of showing an imminent injury derived from an administrative regulation.¹⁴² Specifically, he noted concern for circumstances such as those in this case, where the parties are coerced to comply with allegedly unlawful action by the threat of enforcement but the court will not review their claims until the enforcement actually occurs:

An agency's issuance of a guidance document that fails to adhere to 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*.¹⁴³

Because College of the Ozarks was subject to HUD's administrative guidance document without sufficient procedure to protect its rights, Judge Gratz believed the school was entitled to have its case heard.¹⁴⁴ Moreover, Judge Gratz emphasized that HUD's memorandum did not mention the religious exemption—an exemption the defendants relied heavily upon when asserting that the college's injury was speculative.¹⁴⁵

Nonetheless, the Eighth Circuit ultimately held that College of the Ozarks lacked standing to sue the defendants because its alleged injury was neither imminent nor redressable by a favorable court decision.¹⁴⁶

¹³⁶ *Id.* at 1001–02 (Gratz, J., dissenting).

¹³⁷ *Id.* at 1004.

¹³⁸ *Id.* at 1001–02.

¹³⁹ *Id.* at 1004.

¹⁴⁰ *Id.* at 1000.

¹⁴¹ *Id.* at 1001.

¹⁴² *Id.* at 1002 (Gratz, J., dissenting).

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ *Id.* at 1003.

¹⁴⁵ *Id.* at 1002.

¹⁴⁶ *Id.* at 1001.

V. COMMENT

The injury-in-fact requirement is essential to standing, as it ensures a court hears an actual dispute with a tangible injury at stake.¹⁴⁷ By demanding that a plaintiff plead more than a mere conjectural or speculative injury, standing creates a needed barrier to litigation. Agencies and Congress alike must be able to establish and flesh out the details of rules and legislation before a court hears a case taking issue with such law. This ensures that the court is hearing not an abstract and illusory case about potential state action, but rather a concrete complaint regarding a tangible injury. However, courts also recognize the risks of allowing a governmental entity too much leeway in determining the substance and application of its rules.¹⁴⁸ To combat this concern, courts have allowed imminent, as opposed to already endured, harm to meet the injury-in-fact requirement.¹⁴⁹ This pre-enforcement review by courts recognizes the risks at play in a strict injury-in-fact requirement: “[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.”¹⁵⁰

Similarly, the doctrine of ripeness considers not only whether the question is purely legal and would not benefit from further factual development, but also the impact upon the parties in withholding judgment.¹⁵¹ With this second prong of the ripeness doctrine, courts recognize that delaying decision-making to create the perfect circumstance for judicial determination may not be justified if such a delay causes further injury to the injured party.¹⁵²

School of the Ozarks, Inc. v. Biden serves as an example of the risks associated with standing and ripeness—these doctrines prevented the college from bringing suit without giving it an adequate alternative to protect itself. Several factors demonstrate that College of the Ozarks may have had standing. When the court failed to recognize the school’s imminent injury, it left the school with two equally poor courses of action, both of which conflict with the policies underlying the doctrine of standing itself.

¹⁴⁷ *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

¹⁴⁸ *Id.* at 159.

¹⁴⁹ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007).

¹⁵⁰ *Id.*

¹⁵¹ *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000).

¹⁵² *Id.* at 1038.

A. *The Court Erred in Determining College of the Ozarks Lacked Standing*

The court concluded that College of the Ozarks faced no imminent injury.¹⁵³ According to the majority, the school could not show that HUD would disregard its past practice of recognizing the Title IX exemption for religious schools.¹⁵⁴ More specifically, the school could not demonstrate that (1) someone would file a complaint against the school for its discriminatory practices, (2) HUD would investigate, and (3) HUD would then decide to enforce the memorandum against College of the Ozarks.¹⁵⁵ Thus, the court concluded, any injury to College of the Ozarks was speculative and outside the purview of the court.¹⁵⁶ Provided with a legally insufficient complaint, the court had no jurisdiction to hear College of the Ozarks' claims.¹⁵⁷

On its face, the logic of this analysis is sound. HUD has not historically enforced the Fair Housing Act's restrictions against religious schools, and College of the Ozarks was unable to put forth any evidence that HUD would do so in this case.¹⁵⁸ Yet, as the dissent noted, in-court assurances that the government will not enforce the law do not rule out the possibility that the government will change its mind and enforce it in the future.¹⁵⁹ Indeed, HUD raised the Title IX exemption only under threat of judicial review.¹⁶⁰

The majority was persuaded by HUD's assertion that it had never enforced the Fair Housing Act against private, religiously-inspired schools and, thus, the court found no imminent risk of injury.¹⁶¹ Under Title IX, such institutions are protected and allowed to discriminate on the basis of sex.¹⁶² However, neither President Biden's Executive Order nor HUD's internal directive mentioned this exemption.¹⁶³ The defendants argued that Title IX is such a powerful and pervasive statute that they clearly would not enforce the Fair Housing Act against College of the Ozarks.¹⁶⁴ But silence is often more powerful than words. HUD's assertion that the Title IX exemption is powerful and pervasive is substantially undermined by

¹⁵³ *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1000–01 (2022).

¹⁵⁴ *Id.* at 998–99.

¹⁵⁵ *Id.* at 1000.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1001.

¹⁵⁸ *Id.* at 1000.

¹⁵⁹ *Id.* at 1002 (Gratz, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 998–99.

¹⁶² 20 U.S.C. § 1681(a)(1–3).

¹⁶³ Exec. Order No. 13988, 86 FR § 7023 (2021); Worden, *supra* note 2.

¹⁶⁴ *Sch. of the Ozarks*, 41 F.4th at 998–99.

the exemption's absence in the memorandum.¹⁶⁵ This memorandum is a directive for the officers who will undertake such investigations.¹⁶⁶ Such a pervasive exemption should be mentioned *somewhere* in an executive department's directive to its officers about when and who to investigate.

Furthermore, College of the Ozarks is squarely within the target group of this internal directive. The college admitted that it discriminated based on sex by requiring students to live in dorms based on their biological sex rather than sexual orientation or gender identity.¹⁶⁷ This admission is directly contrary to HUD's new duty to investigate discrimination based on sexual orientation and gender identity.¹⁶⁸ The majority emphasized that the memorandum did not demand that HUD investigate likely discriminators on its own accord, but it instead merely directed HUD's officials to take complaints.¹⁶⁹ However, under 42 U.S.C. § 3610(a)(1)(A)(i), the secretary may file a complaint on his own initiative.¹⁷⁰ Thus, the likelihood of such a complaint being filed, investigated, and the Fair Housing Act enforced, is not as conjectural and hypothetical as the court asserted. FHEO's main objective is to protect specified classes of individuals from discrimination in housing.¹⁷¹ It is not overly speculative that such an agency would take action against an organization that admittedly discriminates against these protected classes.

Title IX's exemption for religious organizations has also faced greater scrutiny in recent years.¹⁷² Many groups believe religious organizations should not be able to skirt anti-discrimination statutes, regardless of their religious status.¹⁷³ Some have brought suit against these

¹⁶⁵ *Id.* at 998–99.

¹⁶⁶ *Id.* at 996.

¹⁶⁷ *Id.* at 998.

¹⁶⁸ Worden, *supra* note 2.

¹⁶⁹ *Id.*

¹⁷⁰ 42 USC § 3610(a)(1)(A)(i) (“An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary’s own initiative, may also file such a complaint.”); *see* Neshaminy Sch. Dist. v. Pa. Hum. Rels. Comm’n, 257 A.3d 766 (Comm. Ct. of Penn. 2021).

¹⁷¹ *About FHEO*, *supra* note 1.

¹⁷² *See* Amanda Byrk, *Title IX Giveth And The Religious Exemption Taketh Away: How The Religious Exemption Eviscerates The Protection Afforded To Transgender Students Under Title IX*, CARDOZO L. REV. (2015); Cara Duchene, *Rethinking Religious Exemptions From Title IX After Obergefell*, BYU EDUC. & L.J. (2017); Evan Gerstmann, *Should There Be A Religious Exemption For Title IX?*, FORBES (June 11, 2021), <https://www.forbes.com/sites/evangerstmann/2021/06/11/should-there-be-a-religious-exemption-for-title-ix/?sh=4194ed62af9e> [<https://perma.cc/4JP4-L8LH>].

¹⁷³ *See* Hunter v. U.S. Dep’t of Educ. (Hunter I), No. 21-cv-00474-AA, 2021 WL 3861154 (D. Or. Aug. 30, 2021); Matthew Arrojas, *Campus Pride: 180 U.S.*

schools for their discriminatory practices and the federal government based on its enforcement of Title IX's exemption.¹⁷⁴ In *Hunter v. U.S. Department of Education*, for example, a class of LGBTQ+ plaintiffs who applied to, attended, or are currently enrolled at religious colleges sued the Department of Education.¹⁷⁵ The class moved for an injunction requiring the Department of Education to enforce Title IX against these schools, regardless of the religious exemption.¹⁷⁶ The class claimed that the Department of Education facilitated these schools' discrimination by failing to enforce Title IX against them.¹⁷⁷ They also claimed that the religious exemption within Title IX violated the First, Fifth, and Fourteenth Amendments.¹⁷⁸ The United States District Court of Oregon denied this motion, finding that the balance of the equities and public interest did not favor such an injunction.¹⁷⁹ While the court later found that equal protection and substantive due process were not implicated by the religious exemption and dismissed the case, the national attention and critical legal analysis surrounding the case suggest that College of the Ozarks' harm is more imminent than one may initially believe.¹⁸⁰

The *School of the Ozarks* court's analysis must also be examined through the lens of the standard of proof required at this stage of litigation. College of the Ozarks filed a complaint, and the court took the pleadings and began a sua sponte analysis of standing and ripeness.¹⁸¹ Unlike *Abbott Labs*, which was decided at the summary judgment stage, the Eighth Circuit assumed the validity of the plaintiff's pleadings.¹⁸² This is a much lower standard of proof, as a plaintiff may rely merely on its complaint rather than culminate both parties' evidence to demonstrate a genuine issue of material fact.¹⁸³ Even under summary judgment's heightened standard, the *Abbott Labs* Court determined the issue ripe for judicial

College Campuses "Unsafe" for LGBTQ+ Students, BEST COLLEGES, (Oct. 4, 2022), <https://www.bestcolleges.com/news/2021/10/27/campus-pride-worst-list-title-ix-lgbtq/> [https://perma.cc/5PQP-5DVG]; Megan Stewart, *LGBTQIA+ activists protest religious exemptions, argue discrimination*, NEWBERG GRAPHIC, (Oct. 19, 2022), https://pamplinmedia.com/nbg/142-news/560582-448905-lgbtqia-activists-protest-title-ixs-religious-exemptions-argue-discrimination?wallit_nosession=1 [https://perma.cc/F9PV-S27Q].

¹⁷⁴ *Hunter v. U.S. Dep't of Educ. (Hunter II)*, No. 21-CV-00474-AA, 2023 WL 172199 (D. Or. Jan. 12, 2023).

¹⁷⁵ *Id.* at *2.

¹⁷⁶ *Hunter*, 2021 WL 3861154 at *2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *6.

¹⁸⁰ *Hunter*, 2023 WL 172199 at *10–13.

¹⁸¹ *Sch. of the Ozarks*, 41 F.4th at 997–98.

¹⁸² *Id.* at 999.

¹⁸³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

determination—both parties moved for summary judgment because they believed the facts were sufficient to show they should win the case.¹⁸⁴ Therefore, the Court was left with a purely legal question. Here, too, the question is entirely legal: is College of the Ozarks’ freedom of religion and speech injured by the threat of enforcement of the internal memorandum? Relying on the plaintiff’s pleadings as true, the court had reason to find the issue was ripe for judicial determination.

Similarly, the requirements of standing are a moving goal post. At each stage of litigation, the plaintiff must demonstrate to the corresponding standard of proof that the court has jurisdiction to hear the claims.¹⁸⁵ At the motion to dismiss stage, the standard of proof is the most relaxed and should protect plaintiffs who can show a reasonably imminent threat of harm.¹⁸⁶ This facilitates the policy considerations underlying standing, allowing a plaintiff to seek recourse when he is likely to be injured. Such policy considerations support a finding of standing here, where College of the Ozarks’ constitutional rights are at risk.¹⁸⁷ The court’s determination that the school lacked standing is more offensive when coupled with FHEO’s failure to comply with the required procedural process.¹⁸⁸ College of the Ozarks did not receive notice and was unable to comment upon the change set forth in the internal directive.¹⁸⁹ As the dissent highlighted, this in itself may be sufficient for a finding of standing.¹⁹⁰ It is this harm, together with the other factors in favor of imminence, that suggest the court should have found standing.

B. Without Standing, College of the Ozarks Faces Two Equally Poor Alternatives

The court’s decision that College of the Ozarks was not under imminent threat of enforcement of the internal memorandum undermines the policies of standing. The doctrine of standing balances the interests in immediate adjudication and the need for a concrete injury.¹⁹¹ Here, the court held there was no need for adjudication of College of the Ozarks’ claims as there was no imminent injury.¹⁹² The court dismissed both

¹⁸⁴ *Abbott Lab’s v. Gardner*, 387 U.S. 136, 149 (1967).

¹⁸⁵ *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

¹⁸⁶ *Id.* (“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.”).

¹⁸⁷ *Sch. of the Ozarks*, 41 F.4th at 998.

¹⁸⁸ *Id.* at 1002 (Grasz, J., dissenting).

¹⁸⁹ *Id.* at 1003 (Grasz, J., dissenting).

¹⁹⁰ *Id.* at 1002 (Grasz, J., dissenting).

¹⁹¹ *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016).

¹⁹² *Sch. of the Ozarks*, 41 F.4th at 1000.

alleged harms on the grounds that neither constituted an injury-in-fact.¹⁹³ In its free speech analysis, the court found that College of the Ozarks' speech has not been chilled, as the college continues to follow its religiously inspired housing policies.¹⁹⁴ Because the college did not show that it stopped or planned to stop separating students by biological sex, it had failed to show the sufficient self-censorship required for an imminent harm.¹⁹⁵ Under this reasoning, College of the Ozarks may prove standing only if it disavows its deeply-held religious beliefs and restrains its own free speech. In this scenario, however, the benefit of obtaining standing would be rendered obsolete, as the damage to the school's constitutional rights would already be complete.

College of the Ozarks now faces two equally poor courses of action. The college's first option is to wait, trusting the word of the government that its rights will not be abridged.¹⁹⁶ Relying upon the government's inaction in the past, the college can continue to enforce its religious code, hoping that history is the best predictor of the future. This hope continues to fade as governmental and societal perspectives ignore and even begin to fight against religious protections like those in Title IX.¹⁹⁷ As Judge Gratz recognized in his dissent, this leaves the college unprotected under a sword of Damocles, awaiting its fall.¹⁹⁸

Alternatively, the college can self-censor, surrendering itself to the new policy change and forsaking its religious and free speech rights. This course would allow the school to have standing to bring suit, but the action is contrary to the very policy considerations that underlie the standing doctrine in the first place.¹⁹⁹ Standing is formulated to allow for flexibility, protecting plaintiffs from harm not yet endured, while also giving governmental entities the necessary freedom to establish law.²⁰⁰ Taking this path, the plaintiff would grab the sword which the defendant is wielding and sacrifice itself. This injures the plaintiff just as it would if

¹⁹³ *Id.* at 1000–01.

¹⁹⁴ *Id.* at 1001.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1002 (Grasz, J., dissenting).

¹⁹⁷ See *Hunter*, 2021 WL 3861154 at *10–13; Arrojas, *supra* note 173; Stewart, *supra* note 173.

¹⁹⁸ *Sch. of the Ozarks*, 41 F.4th at 1002 (Grasz, J., dissenting).

¹⁹⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (“ . . . [T]he Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate for legislatures, to executives, and to courts . . . [S]etting apart the “Cases” and Controversies” that are of the justiciable sorts referred to in Article III [serves] to identify those disputes which are appropriately resolved through the judicial process” (internal quotations marks and citations omitted)).

²⁰⁰ *Id.* at 560.

the defendant had acted. Regardless of the actor, the harm is still endured—the constitutional rights are still surrendered.

Courts recognize imminent harm as sufficient to show an injury-in-fact, protecting those who are at risk of injury.²⁰¹ College of the Ozarks acted to protect its right to free exercise and free speech from governmental interference, pursuing litigation and an injunction.²⁰² Both a wait-and-see approach and self-censorship provide inadequate protection to plaintiffs like College of the Ozarks. Both choices may result in an unrecoverable injury, stripping plaintiffs of their unalienable, constitutionally protected rights.

VI. CONCLUSION

The doctrine of standing is carefully crafted to protect defendants and the judiciary from premature lawsuits.²⁰³ But it was also developed to protect plaintiffs from likely injury.²⁰⁴ When an injury is based upon new agency action, it is particularly difficult to determine the likelihood or imminence of harm. Under the Eighth Circuit's approach, a plaintiff must self-injure to create an injury-in-fact. Such a requirement is the same in practical application as an imminent injury. When courts do not recognize this reality, plaintiffs are at significant risk of injury by unchecked agency action without adequate protection.

²⁰¹ *Id.*

²⁰² *Sch. of the Ozarks*, 41 F.4th at 996–97.

²⁰³ *Lujan*, 504 U.S. at 560.

²⁰⁴ *Id.*