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Submitted by Elizabeth Redden on September 8, 2021 - 3:00am

A Christian college in Missouri is continuing a lawsuit challenging [a Feb. 11 memorandum](#) ^[1] saying that the U.S. Department of Housing and Urban Development will administer and enforce the Fair Housing Act to prohibit discrimination based on sexual orientation and gender identity.

The College of the Ozarks argues that the directive “requires private religious colleges to open female showers, restrooms, and dorm rooms to biological males who assert a female gender identity.”

A district court dismissed the college’s case in June, but the college has filed an appeal in the U.S. Court of Appeals for the Eighth Circuit. In [a June 4 ruling](#) ^[2] dismissing the case, U.S. District Judge Roseann A. Ketchmark said that the college had failed to show an actual or imminent harm that would give it standing to sue.

Ketchmark also wrote that any potential liability the college would face for violating the Fair Housing Act “would flow directly from the act itself” and from any relevant case law, not from the HUD memorandum.

The college appealed the ruling to the Eighth Circuit, which [agreed to expedite arguments](#) ^[3] in the case and schedule a hearing date in November. Fourteen Republican state attorneys general submitted a [friend of the court brief](#) ^[4] last month supporting the college’s case. Three Baptist universities in Missouri also filed [an amicus brief](#) ^[5] arguing that private colleges “face an existential threat” under the HUD directive.

The College of the Ozarks argues that the directive is unlawful “for at least five reasons.” Among its arguments, the college says the directive violates the First Amendment and was promulgated in violation of the Administrative Procedure Act [6]. It also argues the Fair Housing Act [7] does not encompass discrimination based on sexual orientation and gender identity.

The college said in a brief submitted to the appellate court that according to its “religiously informed code of conduct ... sex is determined at birth and based on biology, not gender identity, and students agree not to engage in sex outside marriage between a man and a woman. This code governs the College’s single-sex residence halls, including communal showers, restrooms, dorm rooms, and roommate selection, as well as its pronoun usage and visitation policies.”

The College of the Ozarks argued in the brief that it “would suffer immeasurable harm to its religious exercise, its free speech, and its students’ privacy interests. Abandoning its code of conduct and opening female private spaces to biological men jeopardizes the College’s ability to function, harms students, and dissuades them from attending the College.”

“Conversely, if the College disregards the government’s rewritten FHA, the Directive threatens ‘full enforcement,’” the brief states. This includes “investigations, enforcement actions, and litigation that could impose costly discovery and legal fees, millions in penalties and punitive damages, and criminal penalties against the College and its employees,” the College of the Ozarks said in its brief. “The College’s liability under the Directive grows exponentially each day as the College continues to speak about and apply its housing policies.”

“The thing to remember is College of the Ozarks is a religious school that tries to provide a religious education,” said Julie Marie Blake, senior counsel for regulatory litigation for Alliance Defending Freedom, a conservative legal organization that is representing the college. “It is a school that does not charge tuition [8], instead welcoming students who agree to follow its code of conduct. It’s targeted at students with some of the most financial need, and the government should not be threatening the College of the Ozarks with ruinous fines that could be in the six figures or even unlimited that could require it to

close its doors or close the doors to student housing just because it has a religious code of conduct that governs its housing.”

HUD’s media office did not respond to several requests for comment.

In court documents, the Biden administration says the memorandum was intended to bring HUD’s policies in line with the Supreme Court’s reasoning in the Bostock v. Clayton County.^[9] The June 2020 ruling held that the prohibition on sex discrimination in Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation or gender identity.

A legal analysis by HUD concluded that the Supreme Court’s reasoning equally applies to the Fair Housing Act, as the relevant section of Title VII prohibiting sex-based discrimination is "nearly identical" to that of the Fair Housing Act.

In a recent brief, the government argued that the district court's decision to dismiss the suit for lack of standing was correct and noted that the memorandum at issue does not address how the FHA interacts with Title IX of the Education Amendments of 1972, which prohibits sex-based discrimination but includes an exemption for religious institutions, or other statutory or constitutional protections of religious liberties.

"For many of the same reasons that plaintiff lacks standing, its claims also are not ripe," the government said in its brief. "Because the Memorandum has not caused plaintiff any actual or imminent injury, there is no sufficiently ripe case or controversy ... As the district court recognized, facts and context matter in analyzing whether plaintiff’s housing policies might violate the FHA, and in determining how the FHA would interact with Title IX (under which plaintiff has a religious exemption for its housing policies), and with other statutory or constitutional protections of religious rights."

The government also said, “There is no history of HUD seeking to enforce the FHA’s prohibition of sex discrimination against an educational institution subject to Title IX’s religious exemption, and certainly not any institution like plaintiff, which the Department of Education has recognized is entitled to such an exemption.”

The Council for Christian Colleges and Universities, which is not a party to the lawsuit, declined to comment.

Paul Southwick, a lawyer and director of the Religious Exemption Accountability Project, is representing a group of LGBTQ+ current and former students from more than 30 Christian colleges, including the College of the Ozarks, in [a separate lawsuit against the Department of Education](#) ^[10] challenging Title IX's exemption for religious colleges. Southwick said he disagreed with the government's position that the case is not ripe for adjudication and added that one of the plaintiffs in that lawsuit, a former student at College of the Ozarks, filed a Title IX complaint with the Education Department about the college's policies and practices regarding LGBTQ+ students, including its housing policies.

"Beyond that, we know there are transgender students right now who need the housing protection that the government has promised to provide through the Fair Housing Act," Southwick said. "So it is ripe, and it is timely."

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Links

[1] https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf

[2]

<https://adfmmedialegalfiles.blob.core.windows.net/files/CollegeOfTheOzarksDistrictCourtOpinion.pdf>

[3]

<https://adfmmedialegalfiles.blob.core.windows.net/files/CollegeOfTheOzarksExpeditedArgumentOrder.pdf>

[4]

<https://adfmmedialegalfiles.blob.core.windows.net/files/CollegeOfTheOzarksAmicusBriefStates.pdf>

[5]

<https://adfmmedialegalfiles.blob.core.windows.net/files/CollegeOfTheOzarksAmicusBriefHLU.pdf>

[6] https://www.law.cornell.edu/wex/administrative_procedure_act

[7] <https://www.justice.gov/crt/fair-housing-act-1>

[8] <https://www.cofo.edu/Scholarships>

[9] https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

[10] <https://www.insidehighered.com/news/2021/04/06/lgbt-students-sue-education-department-over-title-ix-religious-exemption>