**No. 21-2270**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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THE SCHOOL OF THE OZARKS, INC.,

*Plaintiff- Appellant,*

*v.*

JOSEPH R. BIDEN JR., *ET AL.*,

*Defendants- Appellees.*

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

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# ***Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Plaintiff-Appellant School of the Ozarks**

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## CORPORATE DISCLOSURE STATEMENT

Counsel for *Amicus Curiae* certifies that Mountain States Legal Foundation is a 501(c)(3) nonprofit corporation, has no parent companies, subsidiaries, or affiliates, and that no publicly held company owns more than 10 percent of its stock.

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## INTEREST OF *AMICUS CURIAE*[1]

Founded in 1977, Mountain States Legal Foundation ("MSLF") is a nonprofit public interest legal foundation based in Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of the freedom of speech and association, the right to own and use property, the free enterprise system, and limited and ethical government. In order to secure these rights, MSLF cares deeply about due process and access to the federal courts to secure the liberties in the First Amendment of the Constitution and writes here to offer its expertise.

## SUMMARY OF ARGUMENT

This case should have been resolved on the merits without a detour to this Court. To be sure, every federal court must assure itself of Article III standing. But pre-enforcement challenges present thorny issues regarding First Amendment harm—for a speaker self-silencing is *itself* a recognized injury. In this case, the College of the Ozarks ("College") must remain silent on advocating for its religious beliefs, and the District Court should have heard its claims.[2] Therefore, this Court should vacate and remand for further proceedings.

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[1] *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). Counsel for all parties have consented to MSLF's participation as *Amicus Curiae*. Fed. R. App. P. 29(a)(2).

[2] The School of the Ozarks operates as the College of the Ozarks. "College" is used throughout for clarity.

The freedom of speech is fragile in the face of government regulation. That is why pre-enforcement review—along with other lower pleading standards for speech claims—is so often necessary to protect this core right. The Supreme Court has long recognized that self-censorship—being too afraid to speak—is itself injury in fact for Article III standing. And the test for whether self-silencing has occurred is similarly permissive, especially at the motion to dismiss stage. It is better to err on the side of hearing a case, than leaving fundamental constitutional rights constrained.

The College provided a comprehensive Verified Complaint. It detailed its current speech (with exhibits). The complaint described the new government directive and how it impacted the College's existing speech and planned future speech. And it described how it will engage in self-censorship and modify its messaging to comply with the law. But the District Court below rejected these well-pled facts in a single footnote, not grappling with the First Amendment's modified standing requirements. Therefore, this Court should clarify the standard and remand the case for further proceedings consistent with the First Amendment and Article III.

## ARGUMENT

The College of the Ozarks, based in Missouri, is a Christian undergraduate school with a code of conduct centered upon its religious beliefs. JA 14 ¶¶ 39–48. The code includes conveying the College's views on biological sex and requiring separate dormitory arrangements. JA 21–24, ¶¶ 92–111. But a new directive from

the United States Department of Housing and Urban Development ("HUD"), JA 78–80, modified the government's regulation of housing arrangements like those of the College—and the speech conveying those beliefs.

On these alleged facts, *inter alia*, the College filed a Verified Complaint in the District Court for the Western District of Missouri, including a claim based on the First Amendment's protections of free speech, assembly, and association. JA 59–62, ¶¶ 365–89 (Claim Six). But the court below dismissed the case based on a belief it lacked Article III standing. JA 487–88. The College's free speech claims expired in a footnote located in the Order's conclusion:

> Even if Plaintiff had established standing and this Court had jurisdiction, the Memorandum does not carry the force of law because it has no legal consequences of its own accord. Rather, it is a general statement of policy. The Memorandum thus does not violate the First Amendment as it does not restrict speech.

JA 491 n.2. But that cursory analysis is not quite right.

At the outset, it is important to remember that this Court reviews standing determinations *de novo*. *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 484 (8th Cir. 2006). Granting a motion to dismiss is serious, for it shuts the courthouse door. Pre-enforcement challenges have long been a mainstay in the First Amendment context, part of a panoply of tools that lessen standing requirements under Article III. And pre-enforcement challenges exist so often in the speech context because self-censorship is *itself* an injury in fact.

For the College to have Article III standing to bring a First Amendment claim, the HUD directive does not need to "restrict speech" (though it might be proven it does so), it needs only to trigger self-censorship for fear of reasonable prosecution. In its Verified Complaint, the College lays out how it spoke prior to the directive, how it now fears prosecution, and how it therefore self-silences its expression. That is injury in fact for Article III standing to hear the First Amendment claims in full.

## I. Pre-enforcement challenges are essential to protect First Amendment rights.

### a. The First Amendment's protections lessen standing requirements.

"First Amendment freedoms need breathing space to survive." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (Roberts, C.J., controlling op.) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal citation and quotation marks omitted). That is because in the First Amendment context:

> The restraint is not small when it is considered what was restrained. . . . There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede.

*Thomas v. Collins*, 323 U.S. 516, 543 (1945). Therefore "[a]t the heart of the First Amendment lies the principle that each person should decide . . . the ideas and

beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 641 (1994); *Rodgers v. Stachey*, 382 F. Supp. 3d 869, 879 (W.D. Ark. 2019) (citing same). And of course, no party ever has an interest in the enforcement of an unconstitutional law. *See*, *e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (collecting cases).

It is therefore well accepted that "[s]tanding and ripeness restrictions apply in all First Amendment cases but with a looser grip than in other areas of constitutional law." Toni M. Massaro, *Chilling Rights*, 88 U. Colo. L. Rev. 33, 57 (2017). For example, plaintiffs under the First Amendment may bring facial overbreadth claims "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973) (cleaned up).

And civil society groups—charities, civic organizations, trade groups, etc.—can even stand in the shoes of their members "who are not of course parties to the litigation," notwithstanding the Court's typical "insist[ence] that parties rely only on constitutional rights which are personal to themselves." *NAACP v. Ala.*, 357 U.S. 449, 459 (1958); *cf. Americans for Prosperity Found. v. Bonta*, 594 U.S. ___, ___ 141 S. Ct. 2373, 2380 (2021) (noting charity brought challenge on behalf of itself and its donors). Likewise, mere claims for nominal damages can keep a First

Amendment case alive. *Uzuegbunam v. Preczewski*, 592 U.S. ___, ___, 141 S. Ct. 792, 796 (2021) ("This case asks whether an award of nominal damages by itself can redress a past injury. We hold that it can.").

In other words, the Supreme Court has long instructed that First Amendment claims be given every opportunity to be heard. The freedom of speech is so important, and yet so fragile, that the very threat of regulating speech improperly is itself a harm under Article III. This is particularly true where government action results, not in direct prosecution, but *self-censorship* by would-be speakers fearing to break the law. The College has brought claims, *inter alia*, of such self-censorship.

**b. Self-Censorship is injury in fact and its pleading standards are minimal.**

Pre-enforcement challenges based on First Amendment harms are routine because there is a real likelihood that "speakers may self-censor rather than risk the perils of trial." *Ashcroft v. Am. Civil Liberties U.*, 542 U.S. 656, 670–71 (2004). This Court is examining an order dismissing the College's claims of self-censorship in a single footnote. JA 491 n.2. A footnote that did not analyze the real harms of self-censorship and its status as an injury in fact.

Like other forms of standing doctrine, injury-in-fact analysis is lenient under the First Amendment. That is because "[s]elf-censorship can *itself* constitute injury in fact." *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (citing *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393 (1988)) (emphasis added). A

claim of self-censorship is met when a law is aimed directly at the speech of the plaintiff who, "if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution."[3] *Id*. at 392.

Perhaps the most straight forward test for using chill as injury in fact comes from the *en banc* Tenth Circuit:

> We hold that plaintiffs in a suit for prospective relief based on a "chilling effect" on speech can satisfy the requirement that their claim of injury be "concrete and particularized" by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

*Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (emphasis removed).[4] This test has proven useful in the neighboring Seventh Circuit. *E.g., Bell v. Keating*, 697 F.3d 445, 454 (7th Cir. 2012). The case at bar

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[3] Whether the threat is "civil litigation rather than criminal prosecution . . . is of no moment. The fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964)). For standing purposes, therefore, the threat need not be only criminal prosecution, any civil enforcement mechanism will do.

[4] The test is permissive but will not save poorly drafted complaints. Just last week the Tenth Circuit refused to find standing under the *Initiative & Referendum* test where a plaintiff refused to assert that "its future speech will be any more limited than it would be in the absence" of the law. *Rio Grande Found. v. City of Santa Fe*, ___ F.4th ___, No. 20-2022 slip op. at 7 (10th Cir. Aug. 3, 2021) *available at* https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110556757.pdf. As discussed in Section II, *infra*, the College has alleged it will self-silence and modify its speech. *E.g.*, JA 45, ¶ 252.

largely turns on prong three—how likely the threat of prosecution will be against the College.

This Court has held that for a plaintiff to establish injury in fact on a First Amendment challenge, it need not be "actually prosecuted or threatened with prosecution." *281 Care Comm.*, 638 F.3d at 627 (citing *St. Paul Area Chamber*, 439 F.3d at 487). Indeed, all that a plaintiff must show is "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.'" *Telescope Media*, 936 F.3d at 749 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (modification in *Telescope Media*)). Nor must the government's prosecution be ultimately successful for there to be chilling of speech. The Supreme Court has consistently held that "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (collecting cases).

In this Circuit, a plaintiff bringing First Amendment claims need not always "allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution." *281 Care Comm.*, 638 F.3d at 629. That is because self-silence is itself the harm if it is *because* of the laws on the books. *Id*. at 630–31. All that need be

shown to establish a claim is that the plaintiff is "a target or object" of the prohibition. *St. Paul Area Chamber*, 439 F.3d at 485.

Indeed, the case of *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998), dealing with religious proselytizers, is illustrative. There, the government contended that the plaintiff lacked standing because no one was arrested or threatened with arrest on a hand billing ordinance. *Id*. at 1217. But the members of the church specifically pled that they wished to hand out religious literature and feared prosecution under the city law. *Id*. The government refused to disclaim it would enforce the law. *Id*. This was enough to establish standing to challenge the city's ordinance. *Id*. at 1218. The neighboring Tenth Circuit held similarly in *Aptive Environmental, LLC v. Town of Castle Rock, Colorado*, under the comparable bare facts. 959 F.3d 961, 976 (10th Cir. 2020) (collecting cases since the 1980s).

It is worth nothing how minimal the threat of prosecution need be. As the *Initiative & Referendum* court reasoned:

> A plaintiff who alleges a chilling effect asserts that the very existence of some statute discourages, or even prevents, the exercise of his First Amendment rights. Such a plaintiff by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future.

450 F.3d at 1088–89. And as the neighboring Seventh Circuit held, First Amendment challenges based on chill are not limited to challenges to statutes only—any "'exercise of government power [that is] regulatory, proscriptive, or compulsory in

nature'" can qualify. *Keating*, 697 F.3d at 454 (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (modification in *Keating*).

Agencies themselves can, by regulation or other practice, chill speech, even when they have prosecutorial discretion. The Supreme Court has long recognized that "[a]gencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (collecting cases). Such is what the College does here—argue that the agency's discretion is misplaced and based upon an improper, unconstitutional ground.

And for the purposes of standing, the plaintiff need not even be correct about "whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest." *Initiative & Referendum*, 450 F.3d at 1092. Because "[i]f that were the test, every losing claim would be dismissed for want of standing." *Id*. That is, the question of the law on the merits is independent of whether a challenge has standing. *City of Waukesha v. Envtl. Prot. Agency*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("[I]n reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff and must therefore assume that on the merits the plaintiffs would be successful in their claims.").

In the First Amendment context, what matters for a motion to dismiss is that the plaintiffs have properly alleged that they would speak, but for the government's application of a statute or rule. As discussed below, the College provided a verified complaint full of alleged facts about its current speech, its self-censorship for fear of prosecution, and how it must modify its future conduct. These are harms that fully and adequately satisfy the lowered pleading standards under the First Amendment.

## II. The College properly averred facts that show its speech was chilled and therefore suffered an injury in fact under Article III.

In reviewing a motion to dismiss, this Court must "assume the allegations in the [verified] complaint are true and view them in the light most favorable to" the College. *Telescope Media*, 936 F.3d at 749.[5] In its seven-page Order, there is no indication that the District Court applied this standard before dismissing the free speech claim of the case. But doing so now shows that the College averred that it engages in speech, the HUD directive impacts that speech, and that the College will modify its behavior—self-silence—rather than risk violating the law. This is enough for Article III standing.

In its verified complaint, the College averred that it "regularly makes statements about its beliefs and polices . . . to students, prospective students, parents,

[5] All that needs to be shown in the four corners of the complaint is "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

and visitors." JA 21, ¶ 92. It attached its Student Handbook and referenced its online campus tour. JA 21–22, ¶¶ 93–96 (referencing Exhibit D, JA 128, and the College's website). Indeed, it alleged nineteen paragraphs of facts connected to its speech on the matter of biological sex and dormitory arrangements. JA 21–24, ¶¶ 92–111. The College cares deeply about separating the living arrangements of the biological sexes.

The complaint continues, focusing on the College's understanding of the HUD directive on its speech and housing policies on campus. JA 42–44, ¶¶ 236–46. Specifically, the College avers that the directive "remains in place and serves both to compel and deter the College's speech," JA 44, ¶ 245, due to the penalties attached for violating the government's application of the statute, *e.g.*, *id*. ¶ 247. More importantly, the directive "would require the College to engage in outlays of time, money, and speech to change its policies, statements, notices, student handbook, housing procedures, schedules, and signage concerning residence halls." JA 45, ¶ 252. The College would continue to speak, but for the new HUD directive.

On these alleged facts, *inter alia*, the complaint includes a claim based on the First Amendment's protections of free speech, assembly, and association. JA 59–62, ¶¶ 365–89 (Claim Six). Specifically, the College claimed free speech chill for itself and similar schools that might seek to engage "in private religious expression through statements, notices, housing applications, housing programs, and student

handbooks governing campus housing on the basis of sex." JA 61, ¶ 381. This is standard overbreadth claims on speech.

Much of this case rests on whether there is a credible threat of prosecution under HUD's directive. The District Court improperly dismissed this count in a three-sentence footnote. JA 491 n.2. The footnote described the HUD directive as "a statement of policy" that is "without the force of law." *Id*. The document itself encourages strict enforcement as a departure from past practice. Specifically, the HUD directive contrasts the "limited enforcement of the Fair Housing Act's sex discrimination prohibition," as "insufficient" and therefore encourages the "filing and investigat[ion of] all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." JA 79.

Not only is the directive saying that it will shift prosecutorial discretion, but it is also arguably *encouraging* filing of complaints. The government has not only failed to disavow enforcement but made statements saying it would vigorously enforce the Administration's interpretation of the Act. In a time where the procedure is the punishment, *Dombrowski*, 380 U.S. at 487, even being investigated is enough to chill the College's speech—as it averred. The Order did not examine the claims of self-censorship or the costs of compliance to carry the government's preferred message. Nor did the Order analyze the standard for free speech injury in fact law,

such as *American Booksellers* or similar pronouncements from the Supreme Court and this Court.

Chill is a fact-based inquiry, *Initiative & Referendum*, 450 F.3d at 1092, and unfortunately, the District Court failed to let the plaintiff develop the facts alleged in its verified complaint. The government got away with claiming that the HUD directive was just a mere policy statement, without any testing of how the directive works or whether it is in fact a regulation promulgated contrary to established law. There are a host of issues presented in this appeal, but what is clear is that self-censorship is itself an injury in fact, and there is Article III standing for those claims. The College should be allowed to develop its case in the District Court below.

## CONCLUSION

This Court should vacate the erroneous order below and remand for further proceedings consistent with the legal authorities described above.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains **3,568** words, as counted by Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

Pursuant to 8th Cir. R. 28A(h)(2), *Amicus* states that the brief has been scanned for viruses using SentinelOne (version 4.2.4.154), and it is virus-free. Pursuant to 8th Cir. R. 28A(h)(3), *Amicus* also states that the electronic copy of this brief was "generated by printing to PDF from the original word processing file."

*/s/ Tyler Martinez*
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Dated: August 9, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of Mountain States Legal Foundation in Support of Plaintiff-Appellant School of the Ozarks using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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