No. 21-2270

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The School of the Ozarks, Inc.,
Plaintiff-Appellant,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States; U.S. Department of Housing and Urban Development; Marcia L. Fudge, in her official capacity as Secretary of the U.S. Department of Housing and Urban Development; Jeanine M. Worden, in her official capacity as Acting Assistant Secretary for Fair Housing & Equal Opportunity of the U.S. Department of Housing and Urban Development,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Missouri—Springfield, Case No. 6:21-cv-03089-RK Judge Roseann A. Ketchmark, United States District Judge

BRIEF FOR INSTITUTE FOR FAITH AND FAMILY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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August 4, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Institute for Faith and Family makes the following disclosures:

(1) For non-government corporate parties please list all parent corporations: NONE.

(2) For non-government corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

DATED: August 4, 2021

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Appellate Case: 21-2270 Page: 2 Date Filed: 08/04/2021 Entry ID: 5062338

TABLE OF CONTENTS

Appellate Case: 21-2270 Page: 4 Date Filed: 08/04/2021 Entry ID: 5062338

TABLE OF AUTHORITIES

CASES

Appellate Case: 21-2270 Page: 5 Date Filed: 08/04/2021 Entry ID: 5062338

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Institute for Faith and Family is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com.

AUTHORITY TO FILE *AMICUS* BRIEF

Amicus curiae has obtained written consent from all parties to file this brief. Fed. R. App. P. 29(a).

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Counsel for *amicus* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The College challenges Executive Order 13,988 Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("the Executive Order" or "EO") and related agency actions, including the Directive issued by the U.S. Department of Housing & Urban

Appellate Case: 21-2270 Page: 11 Date Filed: 08/04/2021 Entry ID: 5062338

Development (Feb. 11, 2021), Implementation of Executive Order 13,988 on the Enforcement of the Fair Housing Act[1] (the "Directive").

The EO dictates that "*laws that prohibit sex discrimination* . . . prohibit discrimination on the basis of *gender identity or sexual orientation*, so long as the laws do not contain sufficient indications to the contrary" (emphasis added). This broad language sweeps in Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.) and the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), along with their implementing regulations and related actions.

The EO and Directive are on a collision course with the purposes and worldview of the College. "Worship is an integral part of life at College of the Ozarks and all of our classrooms reinforce a Christian Worldview." https://www.cofo.edu ("Worship and Worldview"). The College does not condone transgender or homosexual ideology but teaches that sex is given by God at birth, regardless of a person's internal sense of "gender identity," and sexual relationships should occur only within the marriage of one man and woman. Complaint, ¶58, (citing Genesis 1:27, Leviticus 18:22, Matthew 19:4, Romans 1:26–27, and 1 Corinthians 6:9–10); and ¶59 (citing Genesis 1:28 and 2:24, Exodus 20:14, Proverbs 5:15–23, Matthew 19:5, 1 Corinthians 6:12–20 and 7:2–5, and 1 Thessalonians 4:3).

[1] The Fair Housing Act is the commonly cited name for Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. § 3601 et seq.

Appellate Case: 21-2270 Page: 12 Date Filed: 08/04/2021 Entry ID: 5062338

College policies for dormitories, showers, bathrooms, and other private areas are segregated according to biological sex, consistent with the school's religious doctrine.

ARGUMENT

I. THE COLLEGE HAS STANDING IN THIS PRE-ENFORCEMENT CASE WHERE PROTECTED EXPRESSION IS AT STAKE.

The District Court ignored the broad sweep and rushed execution of the Executive Order and the Directive. Both demanded immediate action but glossed over the implications for religious liberty, speech, association, and privacy. Consequences for the College are potentially catastrophic.

The College seeks pre-enforcement review, a "hold your tongue and challenge now" approach (*Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)) that "promotes good public policy by breeding respect for the law" rather than demanding that speakers undergo prosecution as a prerequisite to challenging questionable laws. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 488 (8th Cir. 2006). Compliance with the EO and Directive would require the College to violate core religious doctrine and implement massive changes to its campus housing policies. The College unquestionably has legal standing under the lenient standard applicable to pre-enforcement challenges involving protected expression.

Article III's "case or controversy" standard requires a "personal stake in the outcome" (*Warth v. Seldin*, 422 U.S. 490, 498 (1975)), an "injury in fact" caused by

the defendant's conduct and redressable by a favorable decision. *See Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016). As interpreted in this circuit, causation in a pre-enforcement challenge "requires the named defendants to possess authority to enforce the complained-of provision." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017), quoting *Dig. Recognition Network v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015). Here, HUD Defendants are directed to adopt the Executive Order and the Directive as binding policy and to employ the definition of sex outlined in those documents in their administration of federal regulatory programs, conduct of agency rulemakings, and other agency actions. Complaint ¶ 29. Redressability is present because a favorable decision "will relieve a discrete injury" of threatened enforcement against the College. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (citation omitted).

Injury. The difference between "an abstract question" and a "case or controversy" "is one of degree, . . . not discernible by any precise test." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-298 (1979), citing *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). There must be a "realistic danger of sustaining a direct injury" (*Babbitt*, 442. U.S. at 298); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749-750 (8th Cir. 2019) ("actual or imminent, not conjectural or hypothetical"); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (same). The plaintiff need not "await the consummation of threatened injury

to obtain preventive relief." *Babbitt*, 442 U.S. at 298, quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

This Circuit defines an "injury in fact" as "the actual or imminent invasion of a concrete and particularized legal interest." *Kuehl v. Sellner*, 887 F.3d 845, 850 (8th Cir. 2018) (citations omitted). But the requirement is "somewhat relaxed" in pre-enforcement challenges involving the First Amendment. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-158 (2014). It is a lenient, "forgiving standard." *Id*. at 162; *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021). Injury may be established by allegations of "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," coupled with "a credible threat of prosecution thereunder.'" *SBA List*, 573 U.S. at 159-60 (2014), quoting *Babbitt*, 442 U.S. at 298; *Turtle Island Foods*, 992 F.3d at 699; *Telescope Media*, 936 F.3d at 749. A "general expression of intent" in the complaint is sufficient. *Jones v. Jegley*, 947 F.3d 1100, 1103 (8th Cir. 2020); *see also Ark. Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998); *Constitution Party of S.D. v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011) ("general factual allegations of injury resulting from the defendant's conduct" suffice at the pleading stage (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992)). The court must "assume that the allegations in the complaint are true and view them in the light most favorable to [plaintiff]." *Jones v. Jegley*, 947 F.3d at

1103; *see also Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 689 (8th Cir. 2003); *Lujan*, 504 U.S. at 561. In responding to a motion to dismiss at the pleading stage, the court must "presume that general allegations embrace those specific facts that are necessary to support the [plaintiff's] claim." *Sabri v. Whittier Alliance*, 833 F.3d 995, 998 (8th Cir. 2016), quoting *Wieland v. United States HHS*, 793 F.3d 949, 954 (8th Cir. 2015) (quoting *Lujan*, 504 U.S. at 561).

Self-censorship. Where protected expression is at issue, "[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); *see also Jones v. Jegley*, 947 F.3d at 1103; *Telescope Media*, 936 F.3d at 749-750. The decision to self-censor should be "objectively reasonable." *281 Care Comm*., 638 F.3d at 627, quoting *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009).

Credible threat of enforcement. The College reasonably anticipates enforcement against its policies. The Fair Housing Act prohibits discrimination in dwellings on the basis of *sex*. The EO and Directive declare that "*sex*" must include sexual orientation and gender identity. The federal government has applied the FHA to student housing at public and private colleges and universities. *See, e.g., United States v. Univ. of Nebraska at Kearney*, 940 F. Supp. 2d 974, 983 (D. Neb. 2013). It is not necessary, "[t]o establish injury in fact for a First Amendment challenge," for the school to "actually [be] prosecuted or threatened with prosecution." *Gaertner*,

439 F.3d at 487; *281 Care Comm.*, 638 F.3d at 627. Enforcement of a recently enacted statute (or in this case, an agency rule) is presumed. *Gaertner*, 439 F.3d at 486, citing *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) ("When dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.") Even representation by officials that they have "no present plan" to enforce a law "does not divest plaintiffs of standing" because "the [government's] position could well change." *Gaertner*, 439 F.3d at 485-486, citing *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir. 1988). In *United Foods*, there were sworn affidavits expressing "no present plan to enforce" the statutes at issue, but the court explained that "present intentions may not be carried out, and it is not certain that changes in leadership or philosophy might not result in reinstitution of the challenged policy." *Id*. *See also Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019) (two beggars had standing to challenge anti-loitering law even though the state had sworn in open court not to enforce the statute against them).

The threat of enforcement in this case is enhanced by recent decisions in the Fourth and Eleventh Circuits. Like the EO and the Directive, both courts relied on *Bostock* to hold that Title IX protects against gender identity discrimination. *Grimm*

v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020). The Eighth Circuit, like these two sister circuits, has long accepted that "the Supreme Court's interpretation of Title VII properly informs [the] examination of Title IX." *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011). The threat is real.

Conclusion. Every element of the standard for raising a pre-enforcement challenge is satisfied in this case. The College intends to continue advocating its religious doctrine concerning marriage and sexuality and to enforce its decades-old religiously based policy of segregating on-campus housing according to biological sex. The Directive threatens a "gag" order that arguably proscribes the College's speech and policies. In today's world, LGBT rights are a matter of contentious debate. *Obergefell* and *Bostock* both acknowledged the religious nature of that debate, but despite the Court's promises to respect religious viewpoints, litigation abounds and threatens devastating penalties. The U.S. Supreme Court recently denied the long-pending petition filed by Barronelle Stutzman, a Washington florist who stands to lose all her personal assets because she declined to custom design a floral arrangement for a same-sex wedding that violated her deeply held religious convictions. After the favorable decision in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Court granted Barronelle's first

petition, vacated the Washington State Court ruling, and remanded the case for reconsideration. *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018), vacating *State v. Arlene's Flowers, Inc*., 389 P.3d 543 (Wash. 2017). Unfortunately, the state court defied the Supreme Court's guidance and rehashed its earlier ruling. *State v. Arlene's Flowers, Inc*., 441 P.3d 1203 (Wash. 2019). That necessitated a second petition (U.S. Supreme Court Docket No. 19-333) that remained pending for months before the Court finally denied it. *Arlene's Flowers v. Washington*, 2021 U.S. LEXIS 3574 (July 2, 2021). In this toxic atmosphere where court decisions are clouded with confusion, uncertainty, and delay, it is eminently reasonable for the College to self-censor and forge ahead with its quest for preventative relief.

II. THE EXECUTIVE ORDER AND THE DIRECTIVE ARE ARBITRARY AND CAPRICIOUS.

The District Court hides behinds an alleged intent to eschew "judicial activism." *Sch. of the Ozarks, Inc. v. Biden*, 2021 U.S. Dist. LEXIS 105775. *6 (W.D. Mo. 2021). The court glosses over the constitutional issues allegedly "not before it"—issues the EO and Directive improperly bypassed. *Id*. But the College is not asking the court to engage in "judicial activism." Although a court may not "substitute its judgment for that of the agency" (*FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009)), it must assess whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.

Ct. 1891, 1905 (2020), quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 416 (1971). The court may invalidate action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A. The executive actions are "arbitrary and capricious" because they failed to consider First Amendment rights of speech, religion, and association.

The Administrative Procedure Act creates a "basic presumption" that judicial review is appropriate where an agency action causes one to suffer a legal wrong. *DHS v. Regents*, 140 S. Ct. at 1905, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), 5 U.S.C.S. § 702. The Administration's new rule is "arbitrary and capricious" because of its failure to consider core constitutional liberties, including speech and religion. The Directive is particularly offensive to the Constitution because it stifles *religious* speech, which is "as fully protected . . . as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id*. (internal citations omitted). The Directive itself is discriminatory and violates the Fair Housing Act by imposing a disparate impact on religious schools whose religious doctrine does not conform to the Administration's transgender ideology. *See* Complaint ¶¶310-312. The College's

policies, segregating housing, bathrooms, and other private areas based on biological sex, are an exercise of the religious doctrine it teaches—not an act of arbitrary "discrimination." These policies are imperative to the school's religious mission and message.

The Executive Order, the Directive, and the District Court all ignore the promises in *Obergefell* and *Bostock* to respect religious liberty, speech, and association. "[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015). In *Bostock*, the Court was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution," a "guarantee [that] lies at the heart of our pluralistic society." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). The Court emphasized the "express statutory exception for religious organizations." *Id*. But the District Court ignored the broad sweeping language of the Executive Order and Directive, both executed hastily and demanding immediate action without appropriate concern for religion, speech, association, or privacy. Executive branch officials used *Bostock* as a springboard to coerce sweeping changes that attack not only strong religious convictions but even basic expectations of privacy.

Appellate Case: 21-2270 Page: 21 Date Filed: 08/04/2021 Entry ID: 5062338

B. The executive actions are "arbitrary and capricious" because they are based on an erroneous view of the law.

The agencies should have considered—and this Court should now consider—the applicable statutory protections for religious organizations and relevant case law. The parties do not dispute that the College qualifies for Title IX's religious exemption. 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 exempts an educational institution "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); *see also* 24 C.F.R. § 3.205.

Although the Fair Housing Act also contains a religious exemption (42 U.S.C. § 3607), it does not solve the problems caused by the Directive. The statute allows a religious organization to "limit[] the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to *persons of the same religion*" (§3607(a), emphasis added). That misses the point for a religious school that does not limit admission to students of the same religion but does impose a student code of conduct grounded in the religious doctrine it was established to advocate.

The EO and Directive also failed to consider the "very broad protection for religious liberty" provided by the Religious Freedom Restoration Act, 42 U.S.C. §

2000bb et seq. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020), quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682, 693 (2014). "Placing Congress' intent beyond dispute" (*Little Sisters*, 140 S. Ct. at 2383), RFRA explicitly "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." §2000bb-3(a). In this analogous context, the Court "all but instructed the Departments to consider RFRA going forward." *Little Sisters*, 140 S. Ct. at 2383.

The Directive imposes a radical re-interpretation of the simple word "sex" based on its erroneous understanding of legal precedent, specifically its breathtaking expansion of *Bostock*. The sole question before the *Bostock* Court was whether an employer discriminated "because of sex" by taking action against an employee "simply for being homosexual or transgender." *Bostock*, 140 S. Ct. at 1753. The Court expressly disclaimed deciding whether "other policies and practices might or might not qualify as unlawful discrimination," even under Title VII. *Id*. The Civil Rights Division of the Department of Justice issued a memorandum, based on the same EO at issue here, claiming that Title IX protects transgender students from discrimination based on gender identity in the context of single-sex restrooms. Memorandum from Pamela Karlan, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021) (attached to

Appellant's Complaint as Exhibit P). Like the Directive challenged by Appellant, this Memorandum is based on an erroneous view of the law.

Moreover, this is not a case where an agency holds discretion about whether to prosecute or enforce. *See Heckler v. Chaney*, 470 U. S. 821, 831 (1985); *DHS v. Regents*, 140 S. Ct. at 1906. On the contrary, the EO and Directive demand that a broad swath of anti-discrimination laws reinterpret "sex" to include sexual orientation and gender identity.

C. The executive actions are "arbitrary and capricious" because they failed to consider the expectation of privacy for restrooms, showers, dormitories, and other private facilities.

The EO and Directive fail to address the severe privacy concerns implicated by their actions. The Supreme Court affirmed the continuing need for separate sex-specific privacy facilities when integrating women into the Virginia Military Institute. *United States v. Virginia*, 518 U.S. 515, 556–58 (1996). But the EO and the Directive prohibit not only *discrimination*, but any *distinction* whatsoever between the two sexes. Even if the College may technically reserve certain campus areas for "men only" or "women only," the new rule would require female dormitories to admit biological males claiming to be women, and vice versa. The College would also risk legal liability for enforcing its religiously based code of conduct, because the sexual orientation provisions would demand allowing sexual relations between two men or two women. Other aspects of the code could easily

unravel, including prohibitions on male-female premarital sex and adulterous relationships.

III. OPERATING A RELIGIOUS COLLEGE IN ACCORDANCE WITH RELIGIOUS DOCTRINE IS NOT INVIDIOUS, IRRATIONAL, OR ARBITRARY DISCRIMINATION.

The College's speech is not merely incident to discrimination and therefore constitutionally unprotected.[2] The government may argue that statements that indicate a discriminatory and unlawful preference in the sale or rental of housing are "not protected . . . speech." *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991). But this case is not a simple matter of saying "we don't discriminate based on X" or "we don't serve X." The College policies incorporate detailed statements about the institution's religious doctrine concerning marriage and sexuality. The College is not a typical "place of public accommodation" nor is it part of the public housing market. The College does not rent apartments or hotel rooms or other housing facilities to the public. It maintains private accommodations solely for students and faculty. The College's long-established housing policies, separating dormitories according to biological sex, do not disturb FHA's purpose. As the Directive describes it: "At the core of this Department's housing mission is an

[2] The Fair Housing Act makes it unlawful to "make, print, or publish, or cause to be made, printed, or published 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).

endeavor to ensure that all people peacefully enjoy a place they call home." The College dormitories serve the convenience and educational needs of its student body and faculty, not the housing needs of the public.

"Discrimination" requires a clear definition. Employers "discriminate" when they select employees from a pool of applicants. Schools "discriminate" against students in their admissions policies, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Many decisions require selection criteria. Where such criteria are truly irrelevant, it may be wise to enact protection. But it is impossible to eradicate all discrimination.

Anti-discrimination policies have ancient roots. "State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). The Massachusetts law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service to a customer without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995).

Modern anti-discrimination principles expanded over the years. The traditional "places" have moved beyond inns and trains to commercial entities and even membership associations, increasing the potential collision with First

Amendment rights. *Dale*, 530 U.S. at 656. Anti-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty. Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001). Commentators have observed the complex legal questions that arise where statutory protections clash with the free exercise of religion. Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001); *see also* David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

The clash between anti-discrimination principles and the First Amendment is particularly volatile when a morally controversial practice is protected and religious persons or groups are swept within the ambit of the law. Government has no right to legislate a particular view of sexual morality and compel religious institutions and individuals to facilitate it. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*."

Appellate Case: 21-2270 Page: 27 Date Filed: 08/04/2021 Entry ID: 5062338

Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Religious voices have shaped views of sexual morality for centuries. These deeply personal convictions shape the way people of faith live their daily lives, both privately and in public. Advocates of social change with respect to sexuality tend to be "anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant." Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Political power can be used to squeeze religious views out of public debate about controversial social issues, as this case demonstrates.

Action motivated by conscience or religious conviction is not arbitrary, irrational, unreasonable, or invidious discrimination. The law may proscribe the refusal to conduct business with an entire group based on personal animosity or irrelevant criteria. But the First Amendment demands that the government consider religious motivation. The Administration's failure to consider religious liberty "tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *see also Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981).

In the housing context, anti-discrimination laws rightly protect against refusing a tenant based on a truly irrelevant personal characteristic. But the College

is not engaged in the sale or rental of housing to the general public. The policies for its dormitories, segregating students and faculty by biological sex, are rooted in the school's core religious doctrine and do not constitute the type of "discrimination" that may lawfully be proscribed.

CONCLUSION

This Court should reverse the District Court ruling and remand for further proceedings.

Dated: August 4, 2021

Respectfully submitted,

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

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DATED: August 4, 2021

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Appellate Case: 21-2270 Page: 30 Date Filed: 08/04/2021 Entry ID: 5062338

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

This brief contains 4,313 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: August 4, 2021

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Appellate Case: 21-2270 Page: 31 Date Filed: 08/04/2021 Entry ID: 5062338

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2021, I electronically submitted the foregoing *amicus curiae* brief to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: August 4, 2021

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Appellate Case: 21-2270 Page: 32 Date Filed: 08/04/2021 Entry ID: 5062338