No. 22-816

In the Supreme Court of the United States

THE SCHOOL OF THE OZARKS, INC.,
DBA COLLEGE OF THE OZARKS, *Petitioner,*

v.

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

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a notice-and-comment violation, on its own, can establish Article III standing for a regulated entity within the applicable zone of interests, as the Fifth, Sixth, Ninth, D.C. and Federal Circuits have held, or whether an additional injury is required, as the Eighth Circuit held here.
2. Whether a regulated entity has Article III standing to challenge an illegal regulation where the entity (a) arguably falls with the rule's plain scope, and (b) there is a risk of enforcement.

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

The executive branch's redefinition of the term "sex" to include sexual orientation and gender identity across a range of federal statutes poses a grave and imminent threat, not just to Petitioner, but to religious colleges across the country. They are at risk of lawsuits, not only over housing policies, but also over employment practices and other administrative decisions in which they consider religiously based views of sex and gender. Yet the panel majority below held that Petitioner lacked Article III standing to challenge the agency mandate here. *Amicus* writes to emphasize the danger religious colleges face when such mandates fail to explicitly exempt religious conduct, and when federal courts refuse to hold them to account.

Religious colleges have long relied on religious exemptions enacted by Congress to fulfill their mission of providing faith-based education to their students. These exemptions are critical to these schools' right to provide students with a coherent religious education. For example, they allow colleges to provide housing that complies with religious commandments regarding sex and gender; to hire faculty who abide by the religious tenets of the organization; and otherwise to administer their curricular and cocurricular programs in a manner consistent with the faith.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members and counsel, made any monetary contribution toward the brief's preparation or submission. The parties were given notice at least 10 days before the filing of the brief.

Despite this historical practice, the agency's mandate is devoid of any such religious exemptions. And the lower courts uncritically accepted the agency's assertion that it has not previously charged religious colleges for sex discrimination under the Fair Housing Act for conduct that would be specifically exempt under Title IX. But at no point did the agency state it will *continue* to do so after the executive branch's redefinition of sex in both statutes.

This omission poses an acute threat to religious colleges that now face the impossible decision of either risking enforcement by following their religious precepts or abandoning their precepts to avoid enforcement. This harm is not distant or improbable. It is imminent.

That is why this case is of great concern to *amicus*, the Council for Christian Colleges and Universities ("CCCU"), a higher education association of more than 185 Christian institutions in the United States and around the world. CCCU's mission is to advance the cause of Christ-centered higher education and to help its institutions transform lives by faithfully relating scholarship and service to biblical truth. Agency mandates that fail to provide religious exemptions threaten the ability of religious colleges, including *amicus*'s members, to provide a faith-based environment for their students to grow and develop into valuable citizens and advocates for their faith. Indeed, such mandates jeopardize religious colleges' very purpose. And the Court should grant review to ensure they have adequate means to seek protection under federal law.

STATEMENT

In January 2021, President Biden issued an executive order reinterpreting the meaning of "sex" in federal antidiscrimination statutes, including Title IX and the Fair Housing Act, to include gender identity and sexual orientation. Pet. 42a-43a. The Acting Assistant Secretary of the Office of Fair Housing and Equal Opportunity ("FHEO") swiftly issued a memorandum implementing this change and directing the Office to "investigate all complaints of sex discrimination" under the new interpretation. Pet. 36a-41a. Despite the Administrative Procedure Act's requirements, the agency did not provide a notice and comment period.

That action was of more than passing concern to Petitioner College of the Ozarks, a private Christian college. It follows a religious code of conduct defining biological sex as one's "God-given, objective gender" notwithstanding any "internal sense of 'gender identity'" and maintains single-sex residence halls consistent with that belief. Pet. 5a. To preserve those religion-based policies and practices, the College sued Respondents under the Administrative Procedure Act and the First Amendment's Free Speech and Free Exercise Clauses. Pet. 6a.

Although the government did not move to dismiss, the district court dismissed the complaint on the ground that Petitioner failed to establish an injury for Article III standing. Pet. 24a-35a. A divided panel of the Eighth Circuit affirmed. Pet. 1a-22a.

REASONS FOR GRANTING THE PETITION

Agency mandates like the one at issue here pose a grave threat to religious colleges. On its face, the mandate declares that conduct regularly engaged in by many religious colleges violates the Fair Housing Act and directs agency personnel to fully enforce violations of the agency's new interpretation of that law. Yet religious colleges have long relied on religious exemptions to fulfill their missions by making housing, hiring, and other university decisions based on the tenets of their respective faiths. The agency here not only failed to acknowledge any such exemptions; it repeatedly refused to say whether they would apply.

That refusal leaves religious colleges, including many of *amicus*'s members, with an untenable choice: They may continue to act in accordance with their religious convictions, despite an agency mandate that proscribes those actions, knowing they may be followed with onerous investigations, six-figure penalties, unlimited damages, and potentially even criminal sanctions. Or they may abandon those convictions. That choice flouts our nation's respect for religious liberty. While Petitioner has persuasively explained why the courts below were wrong as a legal matter, *amicus* urges this Court to grant review because of the great practical importance of the issues presented for religious colleges throughout the Nation.

I. Religious Exemptions to the Fair Housing Act, Title VII, and Title IX Are Vital to Religious Colleges' Missions.

Religious colleges exist to advance faith and intellect by providing an education that incorporates their various religious traditions "throughout all curricular and co-curricular aspects of the educational experience on [their] campuses."[2] As this Court has recognized, the "*raison d'être*" of such religious schools is the "propagation of a religious faith." *N.L.R.B.* v. *Cath. Bishop of Chicago*, 440 U.S. 490, 503 (1979) (citation omitted).

To fulfill that mission, many religious colleges—including many of *amicus*'s members—must provide an education consistent with scriptural views of sex and gender. Accordingly, they provide single-sex dormitories and permit students to reside only in a dormitory corresponding to their biological sex. For example, Southwest Baptist University's Statement of Faith incorporates The Baptist Faith and Message, which states that God created humans "male and female as the crowning work of His creation," and that the "gift of gender is thus part of the goodness of God's creation."[3] Consistent with that belief, Southwest Baptist University provides sex-specific housing.[4]

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[2] See CCCU, *Our Work and Mission*, https://www.cccu.org/about/.

[3] Southern Baptist Convention, The Baptist Faith & Message 2000, https://bfm.sbc.net/bfm2000/#iii; Southern Baptist University, *Statement of Faith*, https://www.sbuniv.edu/about/statement-of-faith.php.

[4] Southwest Baptist Univ., *Residence Halls*, https://www.sbuniv.edu/campus-life/living/residence-halls/.

Likewise, Belhaven University's Student Handbook states that "Belhaven is committed to both sexual and gender integrity," and explains that its provision of single-sex facilities, including housing and restrooms, is "necessary and important to maintaining the College's commitment to Christian sexual and gender standards."[5] Belhaven thus asks that employees, students, and visitors "use the facilities consistent with their birth sex."[6]

At religious colleges, the right to act consistently with religious tenets is also critical to other aspects of university administration, such as faculty hiring. Wheaton College, for instance, upholds a "legacy of faculty, coaches, residence life leaders, chaplains, and staff who exemplify spiritual journeys grounded in the truth and grace of the gospel," and explains that employing such faculty and staff "is integral to our Christ-centered liberal arts education and our evangelical witness."[7]

Congress has consistently recognized that such decisions are necessary to the provision of a coherent and integrated religious education. And it has protected religious colleges' ability to provide such an education, even in the face of competing interests. Thus, Congress has specified that Title IX's provisions on sex discrimination in education "shall not apply" to religious colleges if their application "would not be

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[5] Belhaven Univ., "The Kilt: Traditional Undergraduate Student Handbook 2022-2023" at 17, https://www.belhaven.edu/pdfs/campus_life/TheKilt.pdf.

[6] Ibid.

[7] Wheaton Coll., *Spiritual Life*, https://www.wheaton.edu/life-at-wheaton/spiritual-life/.

consistent with the religious tenets of such organization." 42 U.S.C. § 1681(3). Similarly, in Title VII—while generally prohibiting religious discrimination in employment—Congress has recognized the right of religious institutions to consider religious membership and conduct in their employment decisions. 42 U.S.C. § 2000e-1(a).[8] And in

[8] Although this case does not raise the issue, there is some conflict among lower courts as to the scope of Title VII's religious exemption. Many courts have recognized that the right to employ persons "of a particular religion" includes the right to employ only persons whose beliefs and conduct are consistent with the employer's religious tenets, and that it does not violate Title VII to refuse to employ an individual who, despite professing affiliation with a faith, violates the precepts of that faith. See, *e.g.*, *Little* v. *Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *Killinger* v. *Samford Univ.*, 113 F.3d 196, 199-200 (11th Cir. 1997) (holding divinity school did not violate Title VII by firing a professor for holding religious views contrary to those of the school's dean, even though professor subscribed to the Baptist Statement of Faith and Message as required by school). A few courts have come to the contrary conclusion, deciding that Title VII protects *only* a religious institution's right to employ co-religionists, and that even that right does not apply if it would "do so in a way that also discriminates against another protected class." *E.g.*, *Starkey* v. *Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1205 (S.D. Ind. 2020).

In an appropriate case, *amicus* urges this Court to clarify that Title VII's religious exemption permits a religious employer to consider employees' religious belief and conduct, not merely their professed religious affiliation. As one court recognized, it is "inconceivable" that Title VII's religious exemption would "purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task." *Larsen* v. *Kirkham*, 499 F. Supp. 960, 966 (D. Utah 1980), *aff'd,* No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982). Interpreting the exemption otherwise would be "an invasion of the province of a religion to decide whom it will regard

the Fair Housing Act, too, as long as membership in a religion is not "restricted on account of race, color, or national origin," Congress has permitted a religious organization to give preference to coreligionists in their housing decisions. 42 U.S.C. § 3607(a).

These exemptions are essential to the ability of religious colleges to carry out their missions. Without them, enforcement of these laws would inevitably interfere with religious colleges' right to provide an education consistent with the tenets of their respective faiths. Congress has long recognized the importance of such accommodations to the continued existence of religious colleges and the protection of religious liberty. It is vital that neither the courts nor administrative agencies narrow that broad protection.

II. Neither History nor Precedent Suggests the Agency Will Honor Religious Exemptions to Its New Interpretation.

Despite Congress's consistent protection for these religious rights, the lower court here relied heavily on Respondent's assertions that it "has never filed such a charge against a college for sex discrimination based on a housing policy that is specifically exempted from the prohibition on sex discrimination in education under Title IX of the Civil Rights Act." Pet 9a-10a. But in no instance did the agency state that it would continue that practice.[9] And past practice is no guarantee of future abstention.

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as its members, or who will best propagate its doctrine, *** an internal matter exempt from sovereign interference." *Id.*

[9] Br. for Appellees at 14, 27, 32-35, *School of the Ozarks, Inc.* v. *Biden*, 41 F.4th 992 (8th Cir. 2022) (No. 21-2270).

At the threshold, there is no past practice interpreting the new agency mandate at issue here. See Pet. 33. And that mandate makes clear that it is meant to change, not continue, the agency's prior practices regarding sexual orientation and gender identity. The mandate states that discrimination against LGBT individuals "is real and *urgently* requires enforcement action." Pet. 37a. The agency described its own historical practice as "limited," "insufficient," and "fail[ing] to fully enforce" the Fair Housing Act. Pet. 38a. Respondents have thus made clear that they are changing course when it comes to enforcing the Fair Housing Act.

The agency, moreover, has not indicated that it is any more satisfied with its prior enforcement in the context of dormitories than it is with its other enforcement efforts. Indeed, it repeatedly stated before the lower courts that Petitioner's housing policies—which are similar to those of many religious colleges, including many of *amicus*'s members—are discriminatory. Pet. 30. And it sidestepped the question whether Title IX, RFRA, or any other law protects religious colleges from enforcement of the agency's new interpretation of the Fair Housing Act.[10]

The only authority the agency ever cited before the lower court to suggest that its past practice was in some way officially recognized was its assertion that "HUD has promulgated regulations recognizing these exemptions in its own programs."[11] But HUD has only promulgated such regulations in its policies on funding for educational institutions under Title IX, not

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[10] *Id.* at 15, 23, 27.

[11] *Id.* at 7 (citing 24 C.F.R. 3.405(b)(1), 3.205.)

its ability to enforce the Fair Housing Act. Nowhere does the agency state that the Title IX exemption ever prohibited it from investigating, charging, and penalizing a religious college for limiting its housing based on biological sex—much less does it state that it does so now that the executive branch interprets Title IX, too, to generally prohibit discrimination based on sexual orientation and gender identity.[12]

The government has not pointed to any other authority that it believes offers religious colleges safe harbor from its new policy.

To be sure, religious colleges have often analogized from exemptions to other statutes in asserting their protection under Title IX.[13] And in one instance, a district court rejected a Fair Housing Act claim where students sought to challenge university-sanctioned housing's separation of students by gender, reasoning that "such a reading of the Fair Housing Act would render Title IX a nullity by forbidding conduct which Title IX expressly authorizes." *Wilson* v. *Glenwood Intermountain Props., Inc.*, 876 F. Supp. 1231, 1243-1244 (D. Utah 1995), *vacated on other grounds,* 98 F.3d 590 (10th Cir. 1996).

But even if that decision had not been vacated, or had been issued by a higher court, or even had decisions adopting the same reasoning been issued by many lower courts, the agency could attempt to evade such decisions through its reinterpretation of "sex."

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[12] Pet. 51a; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FR 41390-41579.

[13] Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. Kan. L. Rev. 327, 411-412 (2016).

Wilson relied on Title IX's provision that *all* colleges would be permitted to segregate their housing facilities based on sex, as that term was understood in 1995. *Id.* Under the executive's new interpretation of that term, biological sex-segregation must give way to self-professed gender identities.[14]

Simply put, the agency has identified no binding authority precluding it from pursuing religious colleges under the Fair Housing Act; it has stated no intention to abstain from filing charges against religious colleges based on Title IX; and the mandate itself makes clear that the agency believes its prior enforcement of the Fair Housing Act is inadequate. That ambiguity leaves religious colleges in a precarious, even untenable position.

III. Agency Mandates That Do Not Explicitly Provide Religious Exemptions Pose an Acute Threat to Religious Colleges.

Without explicit recognition of a religious exemption to sweeping mandates like the one at issue here, religious colleges must assume they may be subject to enforcement action if they run afoul of the government's definition of sex discrimination. A lack of charges prior to that definition change will mean very little to the first college that faces an investigation, litigation, fines, and damages because of

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[14] The Department of Education's proposed rules reinterpreting Title IX "would make clear that preventing any person from participating in an education program or activity consistent with their gender identity would subject them to more than de minimis harm on the basis of sex and therefore be prohibited, unless otherwise permitted by Title IX or the regulations." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FR 41390, 41535.

its decision to stand by its religious convictions. Religious colleges thus face the impossible choice between following their religious precepts—knowing that by doing so they might be dragged before an administrative agency or court—or abandoning those precepts. See Pet. 31.

That risk is especially acute here, where the agency's mandate requires its personnel to investigate complaints brought by others. As Petitioner notes, "there is no shortage of third parties eager" to bring such challenges. Pet. 28 (citing *Hunter* v. *U.S. Dep't of Educ.*, No. 6:21-cv-00474-AA (D. Or. 2021)). Mandates like the one at issue here declare open season on religious colleges, and complaints about their housing, hiring, and other educational decisions are sure to follow.

Religious colleges who dare to stand by their principles in the face of such mandates must run the risk of devastatingly expensive investigations and lawsuits. Penalties for violating the Fair Housing Act are steep and can even include incarceration in some cases. Pet. 7, 31. Religious colleges could also find themselves on the hook for both actual and punitive damages and attorney's fees. 42 U.S.C. § 3613(c). Even settlements of HUD charges can easily climb to six figures or more.[15]

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[15] *E.g.*, DOJ, *Justice Department and University of Nebraska at Kearney Settle Lawsuit Over Rights of Students with Psychological Disabilities to Have Assistance Animals in Student Housing* (Sept. 3, 2015), https://www.justice.gov/opa/pr/justice-department-and-university-nebraska-kearney-settle-lawsuit-over-rights-students.

Nor are the threats of investigation limited to meritorious challenges: Even a baseless complaint could lead to an investigation that includes "written questions, demands for documents, and interviews with faculty, staff, and students[.]" Pet. 33. Complying with those demands requires significant diversions of personnel time—and a college looking to prevail in such an investigation will probably want to hire an attorney as well, with all the accompanying fees.

Many religious schools are small and struggling to survive even without such threats.[16] Few have a sizable endowment—if they have one at all.[17] Respondents' assertion in the lower court that religious colleges like Petitioner do not face "any hardship" from their mandate because they "could present [their] arguments in an investigation, *** in federal district court or before an ALJ"[18] is cold comfort for schools that lack the resources to present those defenses. Such schools are in no position to run the risks of invasive and expensive charges, investigation, and litigation.

In short, as Justice Brennan wisely counseled, the very "prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S.

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[16] *See* Bobby Ross, Jr., *Closing Doors: Small Religious Schools Struggle for Survival*, Religion N. Serv. (Nov. 20, 2017), https://religionnews.com/2017/11/20/closing-doors-small-religious-colleges-struggle-for-survival/.

[17] *Ibid.*

[18] Br. for Appellees at 15, *School of the Ozarks, Inc.* v. *Biden*, 41 F.4th 992 (8th Cir. 2022) (No. 21-2270).

327, 343 (1987) (Brennan, J., concurring in judgment). Contrary to the lower court's characterization, Pet. 9a-10a, agency mandates that fail to explicitly recognize religious exemptions pose a grave threat to religious colleges, and they should be subject to immediate challenge in federal court.

CONCLUSION

Religious exemptions are indispensable to the ability of faith-based colleges to fulfill their religious missions. Yet Respondents refused to include any such exemption in its sweeping mandate. By doing so, it exerted coercive pressure against religious colleges to abandon their convictions so as to avoid crippling investigations and penalties. *Amicus* urges the Court to grant the petition because of the imminent threat Respondents' actions pose to religious colleges throughout the Nation.

Respectfully submitted,

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