No. 22-816

In The Supreme Court of the United States

THE SCHOOL OF THE OZARKS, INC.
D/B/A COLLEGE OF THE OZARKS,

Petitioner,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF *AMICI CURIAE* HANNIBAL-LAGRANGE UNIVERSITY, MISSOURI BAPTIST UNIVERSITY, SOUTHWEST BAPTIST UNIVERSITY, AND THE CHRISTIAN LIFE COMMISSION OF THE MISSOURI BAPTIST CONVENTION SUPPORTING PETITIONER

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BRIEF OF *AMICI CURIAE* MISSOURI BAPTIST ENTITIES

Pursuant to Supreme Court Rule 37.2, Missouri Baptist Entities respectfully submit this *amicus curiae* brief in support of the grant of the Petition and reversal of the Eighth Circuit.[1]

INTEREST OF THE *AMICI CURIAE*

Your *amici* are religious universities and organizations associated with the Missouri Baptist Convention, located within the jurisdiction of the Eighth Circuit Court of Appeals.

Your *amici* include:

- **The Missouri Baptist Convention, by the Christian Life Commission of the Missouri Baptist Convention**, Jefferson City, Missouri;
- **Hannibal-LaGrange University**, in Hannibal, Missouri;

[1] All parties were given timely notice of intent to file this brief, pursuant to revised Rule 37.2. No party's counsel authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief.

- **Missouri Baptist University**, in St. Louis, Missouri; and
- **Southwest Baptist University**, in Bolivar, Missouri.

The **Missouri Baptist Convention** (MBC) is the state convention for Southern Baptist churches in Missouri. The Southern Baptist Convention (SBC) is the nation's largest Protestant association of churches, with about 50,000 churches and 15 million members. The MBC is comprised of about 1,800 independent local churches, with about a half million members. The **MBC's Christian Life Commission** addresses public policy issues such as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics. The University *amici* are entities affiliated with the Missouri Baptist Convention, and thereby related to Southern Baptist churches in Missouri. All are organized as private, nonprofit charities, dedicated in their charters to pursue excellence in distinctively Christian liberal arts education.

Each *amici* has adopted a statement of faith that includes the Southern Baptist Convention's statement of faith, the Baptist Faith and Message, 2000. Each of the University *amici*:

- share the Southern Baptists' convictions about religious liberty and freedom of conscience;[2]

[2] "God alone is Lord of the conscience . . . Church and state should be separate . . . A free church in a free state is the

- believe that religious freedom is a fundamental human right, granted by God, and should be recognized and protected by government, as in our First Amendment;
- believe that God created mankind in His image, male and female: "In the day that God created man, in the likeness of God made he him; male and female created he them; and blessed them. . . ." Genesis 5:1-2;
- believe, therefore, that all persons are created in God's image, and thus are equal in value, and that this Divine image extends to maleness and femaleness;
- assigns student dorms, bathrooms, locker rooms, and other intimate spaces based on male-female biology, consistent with these beliefs; and
- assigns married-student housing consistent with a belief that the divine institution of marriage is limited to a man and a woman. Genesis 2:24.

Further, each University *amicus* has notified the U.S. Department of Education of its religious convictions regarding marriage, sexual orientation, and gender identity, and has requested and obtained exemption from Title IX's requirements should they require the University to violate its religious tenets.

Christian ideal. . . ." Baptist Faith and Message, 2000, Article 17. *See* http://www.sbc.org/bfm/bfm2000.asp.

The Eighth Circuit decision below puts all your *amici* in jeopardy of an ambush enforcement action, with all the inevitable distraction, disruption, and diversion of resources that brings.

Your *amici* urge this Court to grant the Petition for Writ of *Certiorari* and reverse the Eighth Circuit.

SUMMARY OF ARGUMENT

Upon taking office, President Biden ordered the federal government to change the rules governing the Fair Housing Act (FHA) based on the theory that a ban on sex discrimination now encompasses gender identity and sexual orientation (Executive Order 13,988 or EO).[3] Just three weeks later, in February 2021, the U.S. Department of Housing and Urban Development (HUD) issued a directive imposing this rule change nationwide (HUD Directive) without notice and comment.[4] Private religious colleges are within the plain meaning of the HUD Directive.[5] And the text

[3] Executive Order No. 13,988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

[4] U.S. Department of Housing & Urban Development, Directive, Implementation of Executive Order 13,988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021) (the Directive). https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO 13,988.pdf. Last accessed March 30, 2023.

[5] President Biden later commented that the Directive was a "rule change" that "finally" "improved upon" the FHA. JA38-39, 198, *citing* Fed. Register.

permits the government to force the Universities to let a male occupy female dorms and even qualify for roommate selection if a male claims a female gender identity. Because the FHA bans statements and notices that are considered discriminatory, the new directive also censors colleges from even telling students or their parents about the college's religious policies, including that students can only apply for dorms that fit their biological sex.

The College of the Ozarks brought a pre-enforcement challenge to the Directive, alleging that HUD's failure to engage in the notice-and-comment process violated both the FHA and the Administrative Procedure Act (APA). The government admits that the Directive does not discuss or consider student housing at religious colleges, or how the Directive would interact with other statutes like Title IX or RFRA. 8th Cir. Appellees' Br. at 20, 23, 27-29. The government refuses to expressly guarantee that religious conscience rights of the schools will be given protection over claims of sexual liberty. Thus, a college is compelled to adjust its program and budget to mitigate the risk of prosecution, significant penalties, and legal costs of practicing preventive law.

Still, the lower courts dismissed the pre-enforcement filing, holding that the College suffered no Article III injury. The Eighth Circuit affirmed that a school lacks standing to commence a pre-enforcement challenge without a specific complaint. The Fifth, Sixth, Ninth, D.C., and Federal Circuits have said being deprived of notice and comment is itself a concrete injury

sufficient for Article III standing, without showing additional concrete injury. In those jurisdictions, regulated entities within the plain scope of the rule have the right to challenge the rule rather than wait to be blindsided by an enforcement action. This Court should resolve this 5-1 circuit split by reversing the Eighth Circuit here.

Private universities suffer concrete injury by the existential threat created by these unaccountable, overbroad rules. The EO and the HUD Directive censor and compel religious schools to communicate policies that are contrary to their faith, and forbid teaching doctrine that is contrary to government policy, regarding fundamental moral questions. Christians and many religious faiths hold fundamental convictions about marriage, sexuality, and gender, according to the dictates of revealed truth. These convictions are non-negotiable for believers and for institutions who adhere to them, so that a government demand of acquiescence or compromise to government policy is, in effect, a demand to go out of business. The Supreme Court has promised religious Americans, who hold to venerable and honorable religious convictions about men and women, that their free exercise of their faith would be protected in conflicts with anti-discrimination laws.

ARGUMENT

I. Private universities face an existential threat under the enforcement requirements of Presidential Executive Order 13,988 and the HUD Directive.

Beyond the violation of notice-and-comment rules, the EO and directive threaten imminent concrete injury to religious colleges. More than just a "credible threat," these actions pose an existential threat to the very survival of the Christian liberal arts college, as historically conceived.

The government order and directive here create an inevitable collision between sexual liberty and religious liberty. A Presidential edict redefining the Fair Housing Act (FHA) to prohibit sexual orientation and gender identity discrimination and mandating "full enforcement" nationwide does not create a merely "speculative" risk. This is a deliberate declaration by the President of the United States to implement a government ideology of sexual liberty that will inevitably collide with the religious liberty of faith-based colleges, like Petitioner and *amici* who teach a biblical sexual ethic. Far from being speculative or hypothetical, *amici* believe this inevitable collision poses an existential threat to the continued survival of Christian liberal arts universities, as historically conceived, unless the fundamental rights of Free Exercise and Free Speech are protected by the Courts before the Executive arrow strikes its target.

II. The Directive censors and compels protected speech.

As religious universities, your *amici* have a conscientious duty to communicate clearly with constituents, including Missouri Baptist churches and prospective and current students and their families. College catalogs and other policy statements must clearly explain the application of fundamental religious beliefs to campus policies pertaining to dormitories, showers, bathrooms, and other private or intimate areas. The school's duty to communicate truthfully about doctrine and policy squarely conflicts with legal duties under the plain meaning and scope of the HUD Directive. The HUD rule, as applied to *amici* universities, would compel them to say things that would violate their religious conscience, or else prohibit them from saying things that religious conscience would compel, such as the fact that private or intimate areas will be assigned according to biological sex, consistent with the school's religious doctrine, and that gender is a gift of God, who has created us, male or female, for our good and for His glory.

A college's "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Moreover, "the First Amendment interests are especially strong here" because these housing policies, including compelled pronouns, relate to the College's core religious and moral

beliefs. *Meriwether v. Hartop*, No. 20-3289, 2021 WL 1149377, at *11 (6th Cir. 2021).

The directive restricts the College's protected speech based on its content. Compl. ¶¶ 228-46, 374-83. The FHA and its regulations do not govern the College's speech on all topics, but only its speech concerning particular content: speech "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c).

HUD's regulations restrict the College's ability to "[m]ake, print, or publish," or "[r]epresent to any person" speech deemed discriminatory. 24 C.F.R. § 100.50(b)(4)–(5). By definition, this is a limitation on speech based on its content.

The directive also restricts speech based on its viewpoint. Compl. ¶¶ 228-46, 374-83. The directive's use of the FHA and HUD regulations means that the College can tell students they will be placed in dorms using their gender identity, but the College cannot tell students they will be placed in dorms based on their biological sex. And, given that the school's religiously-based policies should be constitutionally protected, its speech implementing and supporting its policies must also be treated as protected activities.

Here, the College's "religious and philosophical" positions "are protected views" entitled to "neutral and respectful consideration." *Masterpiece Cakeshop, Ltd.*

v. Colorado C.R. Comm'n, 138 S.Ct. 1719, 1727-9 (2018). The College's "First Amendment interests are especially strong" because its housing policies and speech, including the use of pronouns, derive from the College's core religious beliefs. *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021).

This Court should clarify that a broad edict that compels, constrains, or chills speech of regulated entities, contrary to religious conscience, is sufficient to constitute an "injury in fact" for purposes of standing. Petitioner has the right to find out in advance of an enforcement action whether or not the government will enforce its speech code against religious colleges. This is especially true when the government has hurled the rule forward without notice and comment. Petitioner should not have its speech compelled or constrained while waiting for the government to file and prosecute a specific complaint, only then telling the college whether and to what extent it was covered by the Directive.

III. Biblical Convictions about Sexuality and Marriage are Fundamental and Non-Negotiable for Christian Colleges like *Amici*.

The Southern Baptist Convention's doctrinal statement, Baptist Faith and Message, 2000 (BFM)[6] teaches laymen and clergy to "make the will of Christ

[6] The full text of the Baptist Faith and Message, 2000, is available at https://bfm.sbc.net/; last accessed March 30, 2023.

supreme in our own lives and in human society" to "oppose racism . . . all forms of sexual immorality, including adultery, homosexuality, and pornography . . . " and to "bring industry, government, and society" under the sway of biblical truth. (Article 15)

BFM, Article 5, on Man, says, in part:

> Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God's creation. . . . The sacredness of human personality is evident in that God created man in His own image, and in that Christ died for man; therefore, every person of every race possesses full dignity and is worthy of respect and Christian love.

BFM, Article 12, on Education, says:

> Christianity is the faith of enlightenment and intelligence. In Jesus Christ abide all the treasures of wisdom and knowledge. All sound learning is, therefore, a part of our Christian heritage. The new birth opens all human faculties and creates a thirst for knowledge. Moreover, the cause of education in the Kingdom of Christ is co-ordinate with the causes of missions and general benevolence, and should receive along with these the liberal support of the churches. An adequate system of Christian education is necessary to a complete spiritual program for Christ's people.

> In Christian education there should be a proper balance between academic freedom and academic responsibility. Freedom in any orderly relationship of human life is always limited and never absolute. The freedom of a teacher in a Christian school, college, or seminary is limited by the pre-eminence of Jesus Christ, by the authoritative nature of the Scriptures, and by the distinct purpose for which the school exists.

BFM, Article 17, on Religious Liberty, says, in part:

> God alone is Lord of the conscience. . . . The state has no right to impose penalties for religious opinions of any kind.

BFM, Article 18, on the Family, says, in part:

> God has ordained the family as the foundational institution of human society. It is composed of persons related to one another by marriage, blood, or adoption. . . . Marriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is God's unique gift to reveal the union between Christ and His church and to provide for the man and the woman in marriage the framework for intimate companionship, the channel of sexual expression according to biblical standards, and the means for procreation of the human race.
>
> The husband and wife are of equal worth before God, since both are created in God's image. The marriage relationship models the way God relates to His people.

See also "*The Nashville Statement*," a contemporary "Christian Manifesto on human sexuality," released on August 29, 2017, and endorsed by many Southern Baptists and some of your *amici*.[7] The statement is framed in terms of what signers affirm and what they deny, showing that religious exercise is sometimes expressed by a refusal. The Preamble declares that the liberty to proclaim the truth about human sexuality is not mainly in service of the speaker's conscience, but focuses on the desire for human flourishing for the hearer. Article 1 affirms that God designed marriage to be the union of man and woman, to signify covenant love between Christ and the Church. Article 10 denies that same-sex marriage can be approved morally, according to the Bible.

IV. The Supreme Court has promised protection of fundamental religious freedom, even in the face of laws advancing a public policy of non-discrimination.

The U.S. Supreme Court has ruled twice—clearly and repeatedly—that the government must respect and tolerate Americans who hold the belief that God has ordained marriage as between one man and one woman. While generally extending equal treatment to same-sex marriages, the Court has also promised to protect the dignity and worth of religious citizens who continue to advocate man-woman marriage.

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[7] https://cbmw.org/nashville-statement (last accessed March 30, 2023).

Obergefell v. Hodges, 576 U.S. 644 (2015), promised religious believers and organizations that they would remain secure in their constitutional right to believe, teach, and live out their sincere religious convictions that marriage is between a man and woman, and that same-sex marriage should not be condoned. The promise was unmistakable and unambiguous:

> Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

Id., 657.

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.

Id., 672.

> It must be emphasized that religions, 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. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to

> continue the family structure they have long revered.

Id., 680.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018), Justice Kennedy, writing again for the majority, applied *Obergefell*'s promise to protect Jack Phillips's Christian conscience from naked anti-religious *animus*:

> At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.

Id., 1727.

The Court anticipated future cases involving the inevitable collision between religious liberty and sexual liberty, but the courts must resolve them with mutual tolerance and respect.

In *Bostock v. Clayton County*, *Georgia*, 140 S.Ct. 1731 (2020), the U.S. Supreme Court held that Title VII's prohibition against employment discrimination "because of sex" was violated when an employee was fired just because of being homosexual or being transgender. But Associate Justice Gorsuch, in the majority opinion in *Bostock*, disclaimed that its holding applied outside the Title VII employment context, or to intimate spaces like showers or locker rooms in college housing.

> What are these consequences anyway? The employers worry that our decision will sweep

> beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." . . . Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id., at 1753-54.

Justice Gorsuch also disclaimed that *Bostock* had retreated from protecting deeply held religious convictions under either the Free Exercise clause, or under statutes like the Religious Freedom Restoration Act, or statutory exceptions in Title VII and other non-discrimination laws:

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. **We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.** (emphasis added) But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq*. That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title

> VII's commands in appropriate cases. *See* § 2000bb–3.
>
> But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.

Id., at 1753-54.

Justice Gorsuch also says, "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."

In *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021), a unanimous court held that the refusal of Philadelphia to contract with Catholic Social Services for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise clause of the First Amendment.

The decision used narrow grounds to reach the result, but your *amici* urge this Court to give robust protection to First Amendment rights of religious organizations.

The interest of government to advance a social ideology with non-discrimination laws must yield to sincerely held religious convictions of ministry organizations like Petitioner and like *amici*.

CONCLUSION

Founding father James Madison wrote:

> Because it is proper to take alarm **at the first experiment on our liberties**. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America **did not wait till usurped power had strengthened itself by exercise**, and entangled the question in precedents. They saw all the consequences in the principle, and **they avoided the consequences by denying the principle**.[8]

College of the Ozarks presents this Court with a chance to provide "further elaboration" on how government must respect the dignity interests of all citizens, including the dignity of sincere religious believers, individuals, and organizations, like College of the Ozarks. And this case offers a chance to say that Presidential Executive Orders and HUD directives on these issues must yield to fundamental free exercise and conscience rights of faith-based colleges and universities like COO and your *amici.* At the very least, the notice-and-comment rules must be followed.

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[8] James Madison, *Memorial and Remonstrance*, 1785 (emphasis added). *See* https://founders.archives.gov/documents/Madison/01-08-02-0163; last accessed March 30, 2023.

For these reasons, your *amici* join the Petitioner in urging this Court to grant the Petition for Writ of *Certiorari* and reverse the Eighth Circuit.

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