No. 22-816

In the
Supreme Court of the United States

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

v.

JOSEPH R. BIDEN, JR., 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 ADVANCING AMERICAN FREEDOM; ABLE AMERICANS; AMERICAN VALUES; CATHOLICVOTE.ORG EDUCATION FUND; CENTER FOR URBAN RENEWAL AND EDUCATION; CHRISTIAN LAW ASSOCIATION; CHRISTIANS ENGAGED; CITIZENS UNITED; CITIZENS UNITED FOUNDATION; COALITION FOR JEWISH VALUES; CORNWALL ALLIANCE FOR THE STEWARDSHIP OF CREATION; FAITH AND FREEDOM COALITION; FAMILY RESEARCH COUNCIL; GLOBAL LIBERTY ALLIANCE; VICKY HARTZLER; HIGHER PURPOSE FORUM; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; MY FAITH VOTES; NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE; NATIONAL RELIGIOUS BROADCASTERS; NEW JERSEY FAMILY POLICY CENTER; PROJECT 21 BLACK LEADERSHIP NETWORK; STUDENTS FOR LIFE OF AMERICA; THE JUSTICE FOUNDATION; YOUNG AMERICA'S FOUNDATION; AS AMICI CURIAE SUPPORTING PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom of speech and the free exercise of religious belief. AAF believes that a person's freedom of speech and the free exercise of a person's faith are among the most fundamental of individual rights and must be secured.[1]

Able Americans provides conservative solutions to problems faced by Americans with disabilities. It seeks to positively impact the lives of people with disabilities of all kinds — including special physical needs, mental health, behavioral and substance abuse problems—by removing government-created barriers and advancing free-market solutions that lead to better outcomes.

American Values, led by President Gary Bauer, is a public policy educational group committed to parents playing the central role in the education of America's children.

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program that serves the Nation by supporting educational activities that promote an authentic understanding of ordered

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[1] All parties received timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amici curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

liberty and the common good. In keeping with its mission, CVEF seeks to foster our nation's commitment to the pursuit of happiness properly understood, i.e., a life of virtue lived in keeping with the self- self-evident truths of the human person. One of the self-evident truths about the human person is biological sex, male and female, and the physical and emotional complementarity of man and woman. Consequently, CVEF steadfastly opposes the false doctrine of Gender Ideology, which treats gender as a social construct and promotes behavior that does not promote the true good of the human person. Further, CVEF believes that the use of governmental power to oppress individuals and institutions that dissent from the gender identity ideology is particularly pernicious because it threatens to destroy the very individuals and institutions that by preserving the truths about human sexuality offer hope and healing to individuals struggling with gender dysphoria thereby promoting the welfare of the person and the general welfare of society. For these reasons, CVEF is pleased to join Advancing American Freedom in its support for the Petitioner, College of the Ozarks.

The Center for Urban Renewal and Education (CURE) is a policy and research center dedicated to fighting poverty and restoring dignity through messages of faith, freedom and personal responsibility. CURE seeks free-market solutions to provide education, employment, healthcare and the opportunity for black families to grow and their communities to flourish.

For over 50 years, Christian Law Association has provided free legal assistance to Bible-believing churches and Christians who are experiencing difficulty in practicing their religious faith because of governmental regulation, intrusion, or prohibition in one form or another.

Christians Engaged is a national discipleship ministry that exists to awaken, motivate, educate, and empower ordinary believers in Jesus Christ to: PRAY for our nation and elected officials regularly, VOTE in every election to impact our culture, and ENGAGE our hearts in some form of civic education and involvement for the well-being of our nation.

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants and amici in important cases in which these fundamental principles are at stake. Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3).

Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so

through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals.

The Cornwall Alliance for the Stewardship of Creation, a network of Christian theologians, natural scientists, economists, and other scholars educating for Biblical earth stewardship, economic development for the poor, and the proclamation and defense of the good news of salvation by God's grace, received through faith in Jesus Christ's death and resurrection.

Faith and Freedom Coalition is concerned about how this case will affect the rights of parents and their children to live by their own principles and is committed to securing fundamental constitutional rights against government infringement.

Family Research Council (FRC) seeks to advance faith, family, and freedom in public policy. FRC recognizes and respects the role that a robust concept of religious freedom plays in American society, and wishes to affirm this principle in law and public policy.

Vicky Hartzler is a former Member of Congress from Missouri's Fourth congressional district from 2011 to 2023. Congresswoman Hartzler is concerned about the constant threat to American First Amendment Religious Freedoms including threats under the current administration to freedom of religion and free expression in higher education.

Higher Purpose Forum considers viability & health of the natural/biological family to be the primary basis for advancing the spiritual wellbeing of individuals and communities. We oppose government/legal efforts to disrupt or confuse the patterns of the biologically natural family. The HUD directive to the College of the Ozarks imposes and unhealthy disruption and confusion of the students of that school.

The International Conference of Evangelical Chaplain Endorsers (ICECE) is a conference of evangelical organizations that endorse Christian clergy to be chaplains to provide for the free exercise of religion in the military and other limited-access organizations. ICECE's most important issue is protecting and advancing religious liberty for all chaplains and military personnel. That includes defending and emphasizing the right of chaplains and religious organizations to proclaim and exercise their faith in their daily lives and business transactions. ICECE supports challenges to government encroachments and/or restrictions on religious organizations' autonomy, operations, and internal governance of their affairs.

My Faith Votes is a non-partisan movement that motivates, equips and activates Christians in America to vote in every election, transforming our communities and influencing our nation with biblical truth.

The Global Liberty Alliance is a nonprofit organization based in Alexandria, Virginia, and an office in Melbourne, Florida, that defends and

advocates for fundamental rights, free enterprise, and the rule of law. The Global Liberty Alliance defends religious liberty, private property, and human rights in the legal and public policy space in the U.S. and with lawyers in other countries. It has and will continue to team with like-minded organizations in the U.S. and foreign countries through litigation, advocacy, and filing amicus curiae briefs to defend equality and freedom for individuals.

The National Apostolic Christian Leadership Conference (NACLC) is a nonprofit alliance that seeks to represent the interests of approximately four million Apostolic Pentecostal Christians in partnership with other people of faith. The NACLC engages with government on issues that are vital to protecting the right to practice religious beliefs without fear of government interference or discrimination.

National Religious Broadcasters (NRB) is a non-profit, membership association that represents the interests of Christian broadcasters throughout the nation. Most of its approximately 1100 member organizations are made up of radio stations, radio networks, television stations, television networks, and the executives, principals, and production and creative staff of those broadcast entities. NRB member broadcasters are both commercial and non-commercial entities. Since 1944, the mission of NRB has been to help protect and defend the rights of Christian media and to maintain access for Christian communicators. Additionally, NRB seeks to effectively minister to the spiritual welfare of the

United States of America through the speech it advances to the public.

New Jersey Family Policy Center, Inc. is a 501(c)(4) nonprofit organization, incorporated under the laws of the State of New Jersey. The vision of the New Jersey Family Policy Center sees a state where God is honored, Religious Freedom Flourishes, Families Thrive, and Life Is Cherished.

Project 21, a national leadership network for black conservatives, promotes the views of black citizens whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 has participated as amicus curiae in significant cases involving equal protection principles. *See*, e.g., *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); and *Bartlett v. Strickland*, 556 U.S. 1 (2009).

Students for Life of America ("SFLA") is the nation's largest pro-life youth organization that uniquely represents the generation most targeted for abortion. SFLA, a 501(c)(3) charity, exists to recruit, train, and mobilize the Pro-Life Generation to abolish abortion and provide policy, legal, and community support for women and their children, born and preborn. SFLA relies on its First Amendment freedoms to effectively pursue these goals. In carrying out these activities, Students for Life relies on sidewalk counseling, that is, person-to-person contacts that include passing out literature and engaging in oral education and counseling. Infringements on freedom of speech and freedom of

association pose a threat to Students for Life's constitutionally protected interest in persuading pregnant students to carry their babies to term instead of aborting them.

The Justice Foundation is a 501(c)(3) charitable foundation that provides free legal representation to protect individual and parental rights across the nation, while enforcing constitutional limits on state authority. It supports the fundamental and natural right of parents to direct the education and upbringing of their own children. The Justice Foundation is concerned about the effects of regulatory creep on this important issue of transgenderism in schools, including colleges, and the impact it has on parental rights.

Young America's Foundation is a 501(c)(3) public charity whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. The Foundation accomplishes its mission by providing essential conferences, seminars, and educational materials to young people across the country, and through its school chapter program, Young Americans for Freedom. Chapters often face administrative obstacles on campus, and the Foundation supports students and parents to overcome such obstacles.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment explicitly protects "the freedom of speech" and "the free exercise of [religion]," U.S. Const. amend. I, and has been found implicitly to protect a fundamental right of association which is the "individual's ability to join with others to further shared goals." *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021). Further, "because First Amendment freedoms need breathing space to survive," "the risk of a chilling effect on association is enough," to trigger First Amendment protections. *Id*. (internal quotation marks omitted) (quoting *Nat'l Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963)). In this case, the School of the Ozarks ("College") seeks standing to challenge a directive issued by the Department of Housing and Urban Development (HUD) which, if enforced on its own terms, would infringe the College's First Amendment-protected rights, and which merely by its existence, causes harm by restricting the College's speech and through an ever-present threat of enforcement. This Court's well established standing requirements, which help the Court decide when it may constitutionally hear a case, are necessary as a part of the constitutional scheme of separation of powers. Those requirements are met in this case, and the Court should grant certiorari to consider the standing of the petitioner.

As part of its effort to avoid review of the HUD directive, the Government has pointed to its lack of

previous enforcement of the policy and made an "in-court oral suggestion that it would not enforce its interpretation of FHA against religious institutions based on historic practice following Title IX's religious exemption." *Sch. of the Ozarks v. Biden*, 41 F.4th 992, 1002 (8th Cir. 2022) (Grasz, J. dissenting). If the College is found not to have standing to challenge the directive now and HUD were later to bring an enforcement action against the College, the school would be unable to rely on that suggestion as a defense. As such, if the Government is able to avoid review now on the basis of that "oral suggestion," it would be at no cost to itself, while at the same time opening up the College to significant constitutional harm. Because the suggestion of future nonenforcement will be of no future value to the College, it should be of no present value to the Government in its effort to avoid judicial review of its illegal directive.

ARGUMENT

I. The College has Already Suffered Harm as a Result of the Directive and, if its Standing is Denied, That Harm Will Continue, with the Ever-Looming Possibility of Even Greater Harm if the Government Chooses to Pursue an Investigation or Case Against It.

"An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation." *M'Culloch v. State*, 17 U.S. 316, 327 (1819). So too, is the power regulate. The Government in this case asks the Court to reject the

claim of College of the Ozarks for lack of standing and thus leave in place the looming threat of government regulation and retribution. As the dissent below recognized, "This case highlights the corrosive effect on the rule of law when important changes in government policy are implemented outside the normal administrative process," namely, the opportunity for interested parties to participate in the rulemaking through comments on a proposed rule before its adoption. *Sch. of the Ozarks*, 41 F.4th 1001 (Grasz, J., dissenting). Americans and American institutions should be free to exercise their constitutionally recognized rights without the looming threat of government targeting and investigation. That basic expectation of operating in a free society was denied the College in this case by the Eighth Circuit, which found that the threat was insufficiently imminent to constitute a harm to the College and thus failed to meet the requirements of standing. *Id*. at 1001.

The College has already suffered two types of harm as a result of the directive. First, as the dissent in the Eighth Circuit notes, "the College has *already suffered* [a] deprivation of its rights to notice and comment." *Id*. at 1002 (Grasz, J. dissenting) (emphasis in original). Had the Government followed the normal regulatory process, the College could have obviated that harm. Second, they have suffered the harm of an ever-present threat of adverse legal action from the government. Finally, if the College is not allowed to challenge the directive now, and the Government chooses to enforce the plain language of that directive against the College, it will face the

significant costs of investigation and defense in court even if it ultimately prevails on the claims it seeks to bring now.

Because the plain language of the directive appears to apply a new legal standard to the College, and because HUD and its representatives have consistently said that the statutory language applies to the College, it faces the choice of either desisting from its constitutionally protected activities of free expression, free exercise, and free association, or of continuing to exercise those rights in its housing policy and how it advertises that policy, but in so doing, open itself up to investigation and civil liability by the government. Thus, even if there is no future enforcement, the College has already suffered constitutional harm as a result of the HUD directive.

Further, the appellate court found that the impending harm claimed by the college "lacks imminence" because, "As explained in the government's brief, the agency 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." *Id.* at 998. The court goes on to say, "The College's enjoyment of an exemption under Title IX, and its failure to show that HUD has previously filed discrimination charges against it or similarly situated colleges, substantially undermines its argument that enforcement is imminent now." *Id.* (citing *Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398, 411 (2013)). Of course HUD has never enforced this policy against the College or schools like it because it is a new policy. It is absurd

to predict future nonenforcement on the basis of past nonenforcement when the whole reason the College brought its complaint was that it believes there has been an illegitimate and adverse change in enforcement policy.

The College has already suffered genuine harm to its constitutional interests, and HUD's new enforcement policy makes it likely that it will face costly investigation and enforcement in the future if it is not granted standing to have the legality of the directive reviewed. That future harm would similarly strike at the heart of the College's First Amendment rights. The Government argues that it should avoid review, in part because of its lack of past enforcement and a suggestion that it will continue to apply a Title IX exemption to the College and schools like it. *See Id.* at 998. That suggested intent of future nonenforcement should be given no greater weight than the lack of past enforcement: it would provide no protection for the College in any future enforcement action.

II. The Government's Suggestion that it Will Continue its Practice of Nonenforcement Should be Given no Weight in the Standing Analysis in This Case Because it Will Likely Have No Weight as a Defense in a Future Enforcement Action Against the College.

The 1780 Massachusetts state constitution, drafted by John Adams, prohibited each of its government's three branches from exercising the powers of the other two so that, "it may be a government of laws and not of men." Mass. Const. pt.

1, art. XXX. The Constitution creates a structure of separation of powers to accomplish the same goal. Consistent with the separation of powers, executive claims and promises of future nonenforcement are generally not reliable as a defense against future investigation or prosecution, lest the executive have the power to obviate existing law without the consent of Congress. Zachary S. Price, *Reliance on Nonenforcement*, 58 Wm. & Mary L. Rev. 937, 944 (2017). For that reason, the Biden administration's equivocal claims of future nonenforcement will be of no value to the College if investigated, sued, or prosecuted in the future, and thus should not allow the agency to avoid review in this case.

a. The Government likely would not be estopped from enforcing its policy against the College in the future on the basis of its suggestion in litigation that it does not plan to enforce it against the College.

At least in cases involving the enforcement of public rights and interests, "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (citations omitted); *McQuagge v. United States*, 197 F. Supp. 460, 469 (W.D. La. 1961) (When, "seeking to enforce a public right or protect a public interest . . . the government is not bound by ordinary rules of private contract law or by decisions of estoppel or waiver."). In this case, the College has received much less than

a binding agreement of future nonenforcement. The agency seeks to avoid pre-enforcement review on the basis of its suggestion that it will continue its policy of nonenforcement despite the policy change that led the College to bring this case. Because that enforcement is not fulfillment of a contract between the government and the College, the government likely would not be estopped from bringing that enforcement action.

Further, "the general requirements for estoppel of a private party are neither conclusive nor exhaustive when one seeks to bind the government." *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985) (citing *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 104 (1984)). In *Morgan*, a retiring teacher was given an estimate of the social security benefits she would receive upon retirement by a field representative of the Social Security Administration which she later claimed were incorrect and upon which she claimed to have relied to her detriment. *Morgan*, 779 F.2d at 545. For the government to be estopped in cases like this, "beyond the four traditional elements of estoppel, estoppel against the government must rest upon affirmative misconduct going beyond mere negligence. *Id.* (citing *Simon v. Califano*, 593 F.2d 121, 123 (9th Cir. 1979)). "Furthermore, estoppel will apply only where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Id.* (citing *Simon*, 593 F.2d at 123; *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973)).

In this case it is unlikely that the Government's suggestions in the course of litigation would rise to the level of affirmative misconduct. In *I.N.S. v. Miranda*, the Court held that the Government had not engaged in affirmative misconduct when it took 18 months to process plaintiff's immigration status absent evidence "that the delay was unwarranted." 459 U.S. 14, 17-18 (1982). The Court went on to say, "neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country." *Id*. at 18. In this case, the Government is not even taking clear affirmative action. It is only suggesting that it will not take certain action in the future. As such, even with the significant harm the College would face from future enforcement action by the Government, such action will likely not be estopped. As such, because the Government's nonenforcement suggestions would not estop enforcement of the directive's policy, those suggestions deserve no weight in the standing analysis in this case, lest review be avoided at no cost to the Government and at great cost to the College.

b. Precedent in criminal cases also suggests that the Government would not be estopped from enforcing the policy against the College.

Three of this Court's decisions in the criminal context suggest that in narrow circumstances, a party's due process rights are violated if they are prosecuted after being assured by government officials that certain conduct would be legal. However, in this case, the College could very well

face expensive investigations, be subject to exorbitant civil penalties, and confront costly damages, all without criminal prosecution. Further, even if the College were prosecuted, the cases discussed below would almost certainly not make available to the College as a defense the Government's suggestion of future nonenforcement.

In *Raley v. Ohio*, the defendants were held in contempt after they refused to answer certain questions posed by the Ohio "Un-American Activities Commission" to avoid self-incrimination, when the commission mistakenly informed them that they had a right under Ohio law not to give answers that would be potentially self-incriminating. 360 U.S. 423, 425 (1959). The Court reversed the judgement as to three of the four defendants because the commission, speaking as "the voice of the State" had actively misled the witnesses. *Id.* at 438-49 (citation omitted). In *Cox v. Louisiana*, this Court reversed a conviction of the defendants under a statute that prohibited protesting near a courthouse because "the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did." 379 U.S. 559, 571 (1965).

Finally, in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 675 (1973), the Court found that the district court had erred in refusing to allow the prosecuted corporation to present evidence of their reliance on the Army Corps of Engineer's interpretation of the applicable statute, and the reasonableness of that reliance. In this case, most relevant of the three, the Court said, "we think

there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." *Id*. at 674 (citation omitted). In the case of the College, it could argue, as did the Pennsylvania Industrial Chemical Corporation (PICCO), that it was relying on longstanding administrative policy. However, the Court in that case did not make a final decision on that issue (instead remanding for the district court to hear the corporation's evidence) and that case was a criminal case. The challenged directive is a change in policy, and so it is unlikely that past nonenforcement would be a sufficient basis for the College to claim a due process violation.

Further, even if the principles from these cases were extended to include civil suits and enforcement actions, the College still might not be able to rely on the government's claims here. In the three cases discussed above, the government statement or policy upon which the plaintiffs relied were clear. In this case, the government has never given the College an assurance that it will not pursue the school for violations of the FHA. Rather, the agency has pointed to its past nonenforcement based on Title IX and RFRA and made an "in-court oral suggestion that it would not enforce its interpretation of FHA against religious institutions based on historic practice following Title IX's religious exemption." *Sch. of the Ozarks*, 41 F.4th at 1002 (Grasz, J. dissenting). Thus, because the agency's claim that it does not intend to enforce the rule against schools like the College would be unreliable in a future proceeding, those claims should equally be of no value here in

undermining the College's standing to challenge the agency's new rule as created by the directive.

The Government's suggestion that it does not plan to enforce the HUD directive against the College is unlikely to estop the Government from that enforcement in any future investigation or enforcement action against the College. Further, that suggestion would certainly be of no value to other schools similar to the College if any were to face enforcement under this directive. To mitigate and remedy existing harm and to prevent significant future harm, this Court should not allow the Government to avoid pre-enforcement review in this case. This Court grant certiorari and find that the College has standing in spite of the Government's suggestion that it will not enforce the challenged policy against the College. Because the Eighth Circuit wrongly denied the school's standing, the Court should grant its petition for certiorari to consider the important question of whether agencies can avoid review of illegal policy changes or whether the harms caused by such changes are judicially cognizable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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