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.,
Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS AND WAGNER FAITH & FREEDOM CENTER IN SUPPORT OF 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.

This brief of *Amici Curiae* addresses the first issue.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, the American Association of Christian Schools (AACS) and the Wagner Faith & Freedom Center (WFFC) submit this brief.[1]

The AACS is an association of thirty-eight state and regional associations working together to promote high quality Christian education programs. The AACS provides institutional and personnel services to its constituents, including legislative and policy oversight. The AACS also coordinates the Coalition of Conservative Christian Colleges, an association of Christian institutions of higher education allied for the purpose of protecting their First Amendment religious and academic freedoms from government infringement.

Housed on the campus of Spring Arbor University, the Wagner Faith & Freedom Center serves as a national academic voice for faith and freedom. Working daily to secure the future for freedom of thought, conscience, and religion, the WFFC equips the next generation with strategies promoting good governance and the Rule of Law. Contending for the

[1] Pursuant to Rule 37(a), *Amici curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amici Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

faith, the WFFC strategically works to ensure the next generation may share the Gospel free of persecution and oppression. In public forums throughout the world the WFFC speaks on behalf of the persecuted and most vulnerable. The WFFC champions the cause of the defenseless and oppressed, standing for faith and freedom all around the world.

Amici Curiae have special knowledge helpful to this Court in this case, having a significant interest in the protection of the constitutional rights, privacy rights, and religious freedom of students, teachers, school faculty, and parents nationwide. *Amici Curiae* promote educational excellence and are committed to Biblical principles and the values of the Judeo-Christian heritage. *Amici Curiae* are committed to preserving good governance under the Rule of Law, including protection of the legal rights and freedoms of all Christians in education institutions, and are leading advocates in this area.

From its experience, *Amici Curiae* hold special knowledge helpful to this Court concerning the importance of an unelected body promulgating public policy in violation of statutory prescribed procedural requirements enacted by an elected Congress. *Amici Curiae,* therefore, file this brief seeking to preserve constitutional good governance, religious conscience, and the Rule of Law.

SUMMARY OF THE ARGUMENT

The government's deprivation of Petitioner's procedural right to notice and comment constitutes an injury in fact sufficient for Article III standing. Principles of good governance and the Rule of Law require a fundamentally fair, orderly, and just rulemaking process. A fair and just process requires, at a minimum, notice and the opportunity to be heard, where, as here, a religious institution is regulated by the federal rulemaking authority, and the religious institution has an immediate concrete interest threatened by the proposed regulation change.

ARGUMENT

I. DEPRIVATION OF PETITIONER'S RIGHT TO NOTICE AND COMMENT CONSTITUTES AN INJURY IN FACT SUFFICIENT FOR ARTICLE III STANDING, SUPPORTED BY PRINCIPLES OF GOOD GOVERNANCE AND THE RULE OF LAW

Good governance and the Rule of Law necessarily requires a fundamentally fair, orderly, and just rulemaking process.

A fair and just process requires, at a minimum, notice and the opportunity to be heard where, as here, a religious institution is regulated by the federal rulemaking authority, and the religious institution has an immediate concrete interest threatened by the proposed regulation. When governing authorities provide the citizenry with notice and the opportunity to be heard, it preserves values vital to functioning democratic institutions. Indeed, deeply rooted in the

legal history and traditions of this nation are the democratic values of transparency and public participation. Undergirding good governance and the Rule of Law, these important democratic principles preserve institutional legitimacy of governing authorities.

While a right to be heard is the fundamental charge of fair process, this right is of little value without notice. Which is likely why Congress, and the applicable federal regulations at the time, expressly required the federal regulating agency here to provide notice and an opportunity to respond.

When Congress enacted the Fair Housing Act (FHA) it included notice and comment requirements for "all rules" promulgated under its authority (including interpretative rules). *School of the Ozarks, Inc. dba College of the Ozarks v. Joseph R. Biden et al.* No. 21-2270, slip. op. (8th Cir. 2022) (Grasz, J. dissenting); 42 U.S.C. § 3614a; Pet. App. 18a

Additionally, during the relevant time here, HUD's own regulations under the APA required notice and comment for significant guidance documents. 24 C.F.R. § 11.1(b), 11.2, 11.8 (2020); Pet. App. 19a. Under this federal regulation, a guidance document included "a statement of general applicability, designed to shape or intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory … issue, or an interpretation of a statute." *Id*. at § 11.2(a) (2020); Pet. App. 19a. The applicable federal regulations at the time deemed the guidance document "significant" where one could reasonably anticipate it to "[r]aise novel legal or policy

issues arising out of legal mandates [or] the President's priorities." *Id*. § 11.2(d) (2020)[2] Finally, where a directive is a substantive rule (as here), the Administrative Procedure Act required notice and comment. 5 U.S.C. §§ 553(b)-(d); See *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. 1987) (per curiam)(holding agency creates a substantive rule requiring notice and comment where it ties itself to a legal standard with no enforcement discretion).

In the case at bar, the President issued an Executive Order deeming that FHA's prohibition on sex discrimination included gender identity and sexual orientation. Exec. Order 13988; Pet. App. 3a. Without providing any notice or opportunity to comment, the Department of Housing and Urban Development (HUD) promulgated a directive implementing the Executive Order. *Id.* Addressed to HUD's Office of Fair Housing and Equal Opportunity (OFHEO) and agencies administering or receiving funding via HUD programs, the directive interpreted and deemed the FHA's sex discrimination provision to "prohibit discrimination because of sexual orientation and gender identity." Pet. App. 3a-4a. The directive directed the OFHEO to "fully enforce" the FHA as modified by the added sexual orientation and gender identity classifications. Pet. App. 4a. President Biden described the promulgation as a "rule change."

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[2] Although since revoked, the relevant regulations remained "in force" during the pertinent period here. During this time, the government was required to follow and obey the relevant regulations. See, *Ozark supra.*, citing *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992); Pet. App. 19a-20a

Proclamation No. 10,177, 86 Fed. Reg. 19,775 (Apr. 11, 2021). The OFHEO was specifically directed to "accept for filing and investigate all complaints" involving "discrimination because of sexual orientation and gender identity" (because, according to the promulgating agency, such discrimination "is real and urgently requires enforcement action.") *Id.*

Whether HUD's directive here is an interpretive rule (governed by FHA's notice and comment requirement) or a significant guidance document (governed by the CFR's notice and comment requirement), HUD's deficient promulgation process lacked transparency and necessarily precluded citizen participation. Diminishing good governance under the rule of law, HUD's denial of notice and opportunity to comment detrimentally harmed regulated entities directly impacted by the unfair and unjust process.

Like many Christian colleges and universities, the College of the Ozarks grounds its housing policy and code of conduct on sincerely held religious conscience, based in Christian doctrine. *Ozarks*; Pet. App. 4a-5a. To wit, the college provides housing to students, based on biological sex. These policies are grounded in Biblical precepts that God created men and women in His image, as incarnate beings of either the male or female sex. As such, these precepts provide the basis for why Petitioner and other Christian institutions hold their students to have inherent value and why they, through their housing policies, seek to protect the dignity of their students (e.g., by not empowering a biological male student to share a dorm room or other intimate spaces with a biological female student).

The underlying Biblical precepts, and college housing policies produced therefrom, are part of Petitioner's very identity as a Christian college. *Id*. at Pet. App. 5a. Petitioner holds a concrete interest in preserving this religious identity. The government directive here compels College of the Ozarks to change its dorm policies and violate its sincerely held religious conscience. In doing so, it directly threatens, indeed destroys, Petitioner's ability to preserve its identity as a Christian college. By its very design, the right to notice and comment protects against this threatened interest of the college. The government's depriving Petitioner of its procedural right to notice and comment, therefore, constitutes an injury in fact sufficient for standing. See, *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 573 n.8 (1992); U.S. Const. Art III.

Petitioner unquestionably has a concrete interest that the procedural right to notice and comment is designed to protect. Unelected government authorities at HUD changed the law and its enforcement policy here without providing any notice to threatened entities like the Petitioner falling under its regulatory authority. The government then compounded its lack of transparency by denying participation in the promulgation process to threatened parties, like Petitioner, directly impacted by the change. The failure to provide an opportunity to comment during the promulgation process deprived the Petitioner its procedural right to notice and the right be heard. The relevant notice and comment requirements here ensure fair and just agency conduct. Depriving Petitioner of its procedural right to notice and comment, by itself, establishes a concrete

injury sufficient for constitutional standing. Compare, *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019)(standing sufficient where party establishes it suffers a procedural injury (i.e., deprivation of right to notice and comment) threatening its concrete interests; *Dismas Charities, Inc. v. U.S. Dep't of Just.*, 401 F.3d 666 (6th Cir. 2005)(standing sufficient where party held procedural right of notice and comment to protect a concrete interest); *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018)(standing sufficient for procedural injury due to lack of notice and comment); *Sierra Club v. EPA,* 699 F.3d 530 (D.C. Cir. 2012)(standing sufficient where Sierra Club members affected by the EPA regulation promulgated without required notice and comment); *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Patrol*, 550 F.3d 1121 (Fed. Cir. 2008)(standing sufficient where claim sought to enforce consultation procedural right under Endangered Species Act).

Here the federal rulemaking authority regulated Petitioner, and the Petitioner held an immediate concrete interest threatened by the proposed directive promulgated by the government authority. Nonetheless, the government, in defiance of the Rule of Law, deliberately deprived Petitioner of its right to notice and the right to be heard on the promulgation of this rule. That deprivation is a constitutionally sufficient Article III injury here. Had HUD complied with the notice and comment requirements in the law, the requirement would have, as designed, protected Petitioner's concrete interest in preserving its Christian identity. Given the direct threat to this concrete interest from the government's change in the

law, bypassing the notice and comment process certainly was an expedient way of silencing those who might present strong public policy arguments against its promulgation. Perhaps that is why the government dispensed with the fairness and transparency normally associated with properly functioning democratic institutions. In doing so, though, the government not only constitutionally injured the Petitioner, it diminished good governance and the Rule of Law.

CONCLUSION

For the reasons provided in this brief, *Amici Curiae* urge this Court to grant certiorari, and reverse the decision of the Eighth Circuit.

Respectfully submitted,

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