No. 22-816

IN THE

Supreme Court of the United States

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

PETITIONER,

V.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; MARCIA L. FUDGE, IN HER OFFICIAL CAPACITY AS SECRETARY OF U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; DEMETRIA MCCAIN, IN HER OFFICIAL CAPACITY AS PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR FAIR HOUSING & EQUAL OPPORTUNITY,

RESPONDENTS.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center frequently brings pre-enforcement challenges to newly enacted laws, rules, and policies to prevent harm to their clients from unconstitutional laws.

SUMMARY OF ARGUMENT & INTRODUCTION

The Eighth Circuit's ruling is not consistent with Supreme Court precedent stating that entities who will be affected by a law or rule need not wait until specific enforcement again before they can sue.

The Eighth Circuit should be reversed.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for all parties received timely notice of Amicus's intent to file this brief.

ARGUMENT

The College has standing to challenge the Directive because the Directive creates an imminent harm to the College.

The purpose of the injury-in-fact requirement is to ensure that the plaintiff has a "personal stake in the outcome of the controversy." *Warth v. Seldin,* 422 U.S. 490, 498 (1975) (quote and citation omitted). The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (quotes and citations omitted). If the threatened injury is "certainly impending," or there is a "substantial risk that harm will occur," then the requirement is satisfied. *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 414 n.5 (2013).

This Court has held that "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979)). So for example, a plaintiff has standing to challenge a statute criminalizing the use of "deceptive publicity" to encourage a boycott on the grounds that it "unconstitutionally penalize[d] inaccuracies." *Babbitt,* 442 U.S. at 301. The plaintiffs in *Babbitt* had "actively engaged in consumer publicity campaigns in the past" and "alleged in their complaint an intention to continue" those campaigns in the future. *Id.* They argued that "to avoid criminal

prosecution they must curtail their consumer appeals, and thus forgo full exercise of . . . their First Amendment rights." *Id.*

Lower courts have also found pre-enforcement suit proper in a wide variety of cases. *See ACLU v. Alvarez,* 679 F.3d 583 (7th Cir. 2012) (eavesdropping statute); *Picard v. Magliano,* 42 F.4th 89 (2d Cir. 2022) (prohibition against jury nullification); *United States v. Szabo,* 760 F.3d 997 (9th Cir. 2014) (regulation prohibiting disturbances at VA facilities).

This case is no different. The Directive requires the College to betray its core principles with respect to student housing, and deprives the College of its right to speak about its own policies. As in *Babbitt,* the Petitioner has engaged in the prohibited activity in the past and seeks to continue to do so. Petitioner should not need to "first expose [it]self to actual arrest or prosecution to be entitled to challenge" the Directive. *Steffel v. Thompson,* 415 U.S. 452, 459 (1974).

Nevertheless, the Eighth Circuit erroneously held that the Directive "does not impose any restrictions on, or create any penalties against, entities subject to the Fair Housing Act." Pet. App. 9a. The Eighth Circuit observed that the Directive does not "require that HUD reach the specific enforcement decision that the College's current housing policies violate federal law." *Id.* However, as the dissent observed, "if the government acts as the [Directive] facially requires, it is only a matter of time before the government concludes [that] the College's housing policy violates the FHA." Pet. App. 17a.

The plain text of the Directive supports the dissent's position. The Directive states that Executive Order 13988 "directs every federal agency . . . to fully enforce [federal] statutes to combat discrimination based on sexual orientation and gender identity." Pet. App. 36a-37a. The Directive itself states that "this Department's housing mission" is first and foremost "to ensure that all people peacefully enjoy a place they call home, where they are safe and can thrive, free from discrimination and fear." Pet. App. 37a. The Directive specifically singles out "lesbian, gay, bisexual, transgender, and queer-identifying persons" as having "been denied the constitutional promise of equal protection under the law," via "injustices [that] have perpetuated across our civic institutions," including "housing, where . . . we can enjoy the happiness and freedom to love whom we choose and to safely express who we are." *Id.* This is the language of a bureaucrat on a mission, not of an agency that intends to leave Petitioner alone. Or to put it another way, the Directive "implies a threat to prosecute, so pre-enforcement challenges are proper." *Bauer v. Shepard,* 620 F.3d 704, 708 (7th Cir. 2010); *see also Majors v. Abell,* 317 F.3d 719, 721 (7th Cir, 2003) ("the threat is latent in the existence of the statute").

The Directive also purports to apply to "state and local agencies that enter into agreements with the Department under the Fair Housing Assistance Program" and process discrimination complaints under local equivalents of the Fair Housing Act. *Id.* These laws must now, per the Directive, "explicitly prohibit discrimination because of gender identity" or "must include prohibitions on sex discrimination that are

interpreted and applied to include discrimination because of gender identity." Pet. App. 39a-40a.

The legal basis of the Directive, such as it is, is Executive Order 13988, which states that it is official presidential policy "to prevent and combat discrimination on the basis of gender identity . . . and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity." Pet. App. 43a. In short, to find that Petitioner will suffer a "certainly impending" injury, all this Court need to do is take the Respondents at their collective word.

It is also worth noting in this context that cancel culture is fueling an army of activists looking to manufacture complaints against those on the "wrong" side of culture war issues, and that this Administration is looking for "wins" to demonstrate its enthusiasm on this issue to its political base. All of this should give the Court "compelling evidence, or an overwhelming gut feeling, that the [Directive] has intolerable consequences." *ACLU,* 679 F.3d at 609 (Posner, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition should be granted, and the decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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