

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 a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit*

**BRIEF OF *AMICI CURIAE* JUDICIAL WATCH,
INC. AND THE ALLIED EDUCATIONAL
FOUNDATION IN SUPPORT OF PETITIONER**

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INTERESTS OF THE *AMICI CURIAE*¹

Judicial Watch, Inc. (“Judicial Watch”) is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals.

The Allied Educational Foundation (“AEF”) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as an *amicus curiae* in this Court on many occasions.

Amici, as issue-oriented educational 501(c)(3) non-profit organizations, have a deep and vested interest in fair and equal access to the courts. *Amici* also have an interest in the proper balance of powers and the courts’ role in protecting federal statutory rights from federal agency encroachment. Judicial Watch has a particular interest in access to the courts because it litigates frequently as part of its public interest mission. The Eighth Circuit’s erroneous dismissal of Petitioners’ procedural injuries threaten to create a sphere of unchecked authority for federal

¹ The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

agencies, thereby upending the delicate balance of powers.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision to uphold the district court and reject Petitioners' lawsuit for lack of standing creates a dangerous precedent: a federal circuit court sanctioning a federal agency's bypass of statutory requirements. The Eighth Circuit's rogue application of extrajudicial requirements to fulfill this Court's loosened standing criterion for procedural injuries contradicts this Court's precedent, the Eighth Circuit's own precedent, the legal holdings of several other federal circuits, and the purpose of the Administrative Procedures Act ("APA"). The result of this rogue attack on Article III standing is a disordered separation of powers – the unchecked superpower of the fourth branch of government, the federal agencies.

The Eighth Circuit's decision to alter the standing criterion for procedural injuries has caused substantial adverse consequences for the Petitioners in this case and all citizens within the Eighth Circuit, putting them in the untenable position of losing their statutory right of notice and comment when a federal agency opts to bypass it. Citizens rely on the courts to protect their federal statutory rights and maintain a healthy balance of powers. The Eighth Circuit's decision has upended this balance for everyone who falls within its jurisdiction, and, if left in place, will effectively create separate Article III standing criterion for procedural injuries. The Petitioners and

residents of the Eighth Circuit are left with no avenue for legal relief of the adverse consequences they have suffered and will continue to suffer absent this Court's intervention.

The Eighth Circuit's decision contradicts the purpose of the APA, this Court's procedural rights jurisprudence, its own precedent, and the consistent legal holdings of other federal circuits.

This Court's intervention is needed.

ARGUMENT

A. **The Eighth Circuit's Decision Creates a Circuit Split.**

What qualifies as Article III standing is a federal question of law that demands one answer so that it may be applied uniformly and consistently, as federal laws must. The Eighth Circuit divorced itself from this uniformity by imposing a new, additional requirement to sustain standing based on a procedural injury: a concrete injury. *School of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 999-1000 (8th Cir. 2022).

Courts in the Fifth Circuit, Sixth Circuit, D.C. Circuit, and Federal Circuit have all recognized this Court's precedent in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n. 7 (1992), that "a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability

and immediacy.”² In so recognizing this loosened standing criterion, these circuit courts have held that a procedural injury qualifies as an Article III “injury in fact” so long as the procedural right being violated protects a concrete *interest*.³ In following *Lujan*, these courts did not require an additional “concrete injury” showing.⁴ Rather, like this Court held in *Massachusetts v. EPA*, 549 U.S. 497, (2007), the Article III injury was satisfied by a concrete interest and showing that “the petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.’” *Id.* at 517.

The Eighth Circuit’s determination that the Petitioners’ “alleged injury was too speculative to establish Article III standing” failed to credit the personal stake Petitioners have established in the outcome of this litigation. *Ozarks*, 41 F. 4th at 1000; *see also* Petition for a Writ of Certiorari, No. 22-816 at 5-10. The Petitioners demonstrated that their school policies fall directly within the activity regulated by the federal Directive, thereby placing them within the

² See *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019); *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666 (6th Cir. 2005); *Sierra Club v. EPA*, 699 F.3d 530 (D.C. Cir. 2012); *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Patrol*, 550 F.3d 1121 (Fed. Cir. 2008).

³ *Texas*, 933 F.3d at 447; *Dismas Charities*, 401 F.3d at 677-78; *Sierra Club*, 699 F.3d at 533; *Salmon Spawning*, 550 F.3d at 1132.

⁴ *Ibid.*

zone of interests for procedural standing.⁵ *See e.g.*, *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (*quoting Association of Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). This showing qualifies as a procedural injury-in-fact in the Fifth, Sixth, D.C., and Federal circuits.⁶ By requiring an additional “concrete harm” showing, the Eighth Circuit created a new standing criterion for procedural injuries – creating a circuit split.

Curiously, the Eighth Circuit’s denial of Petitioner’s standing flies in the face of its own precedent. Nearly ten years prior to this case, the Eighth Circuit strongly affirmed the use of procedural injuries as a qualified basis to bring an APA claim. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the Eighth Circuit held that the petitioner municipal association had standing to bring an APA claim. The petitioner’s injury was the EPA’s failure to adhere to the APA’s comment and notice requirement. *Id.* at 870-71. Additionally, the Eighth Circuit found that the petitioner had established an Article III standing injury by showing it had a “concrete interest in ... meeting their regulatory responsibilities [and also] in avoiding regulatory

⁵ “The Directive” refers to the February 2021 memorandum issued by the Department of Housing and Urban Development (“HUD”), implementing President Biden’s Executive Order No. 13,988. Amici adopts Petitioners’ use of “Directive” to identify the agency rule at issue. *See* Petition for a Writ of Certiorari, No. 22-816.

⁶ *Ibid.*

obligations above and beyond those that can be statutorily imposed on them.” *Id.* at 871.

The Petitioners in this case could be easily substituted for the *Iowa League* petitioners and their injury easily identified. Instead, the Eighth Circuit ignored its own precedent. In fact, *Iowa League* is not even mentioned by the Eighth Circuit majority – an alarming circumstance.⁷

The Eighth Circuit’s *Ozarks* holding causes a disparity in the application of federal law and denies protection of federal statutory rights to the residents within its jurisdiction, while the residents of other jurisdictions enjoy the protection of those same rights. This inconsistency presents a quintessential case for intervention by this Court.

B. The Petition Presents an Important Issue with Substantial Adverse Consequences.⁸

The Eighth Circuit’s decision to deny Petitioners’ standing has resulted in substantial adverse consequences for Petitioners. The primary adverse consequence suffered by Petitioners and all

⁷ Only the dissent mentions *Iowa League* in the underlying opinion. Circuit Judge Grasz referred to the *Iowa League*’s holding that, as part of the “normal method of rulemaking,” notice and comment “secure[s] the values of government transparency and public participation.” *School of the Ozarks*, 41 F.4th at 1001-02 (Grasz, J., dissenting) (quoting *Iowa League*, 711 F.3d at 873.).

⁸ Petitioners present two issues in the petition, but *Amici* focus on Article III standing being predicated on a notice and comment injury issue.

residents within the Eighth Circuit's jurisdiction is an unequal application of federal law. While Petitioners cannot challenge Respondents' failure to engage in the APA's notice and comment requirement, a similarly situated school in the Fifth Circuit or Sixth Circuit can challenge the procedural failure and seek the courts' intervention. *See e.g., Texas v. EEOC*, 933 F.3d 433, 447-48 (5th Cir. 2019); *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 677-78 (6th Cir. 2005). A school or resident of the State of Missouri cannot seek judicial intervention under the APA for procedural injuries, but a resident of Washington D.C. or Texas can. *See e.g., Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012); *Texas*, 933 F.3d at 447-47. Federal statutory rights ought never be dependent on where you live.

Additionally, by adding an extrajudicial requirement to procedural standing, the Eighth Circuit frustrates the very purpose of the APA and gives federal agencies carte blanche control over when, or even if, they will abide by the APA's statutory demands. This scheme is an affront to the balance of powers. Federal agencies should not be free to create federal policies which have the force of law without abiding by the statutory demands of the APA, including the notice and comment period.

The APA is a legal mechanism that provides legal review and relief to anyone harmed by the action of a federal agency. Passed by Congress in 1946 against the backdrop of an explosion of federal agencies, the intent of the APA was to hold all federal agencies uniformly accountable and ensure all

agencies did not abuse the extensive authority accorded to them. See Crystal Cummings, *Note: A Call to Replace the APA's Notice-and-Comment Exemption for Guidance Documents*, 86 Brooklyn L. Rev. 1197 (2021) (internal citations omitted).

The APA has been described as the “bill of rights,” the ‘quasi-constitution,’ and the ‘bible’ for the modern regulatory state.” *Id.* at 1197. One essential aspect of the APA’s accountability is the notice and comment requirement. 5 U.S.C. § 553(b)-(c). This Court has recognized the importance of the notice and comment requirement and stated that it “guards against excesses in rulemaking.” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 109 (2015).

The purpose of the notice and comment requirement encapsulates the broader purpose of the APA: the accountability of federal agencies. Any member of the public may engage in notice and comment. It permits all citizens the opportunity to voice concerns and provide relevant information or research to better develop the issue at hand.⁹ Notice and comment is the vehicle for interested parties to influence the outcome of the agency decision and participate in the final outcome.¹⁰ Ultimately, the notice and comment requirement assures fairness

⁹ See *Dismas Charities*, 401 F.3d at 678; see also *Intl. Union, UMW v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

¹⁰ See *United States Steel Corp. v. U.S. EPA*, 595 F.2d 207, 214 (5th Cir. 1979).

because it requires the agencies to consider and respond to public opinions.¹¹

By permitting the Respondents to bypass the notice and comment requirement, the Eighth Circuit has completely frustrated the purpose of the APA. Respondents face no accountability for the Directive. If left to stand, not only will Petitioners continue to suffer the consequences, but it is also a green light for federal agencies to disregard the APA's procedural rights in the Eighth Circuit.

C. The Eighth Circuit's Decision Was Erroneous and It Ignored This Court's Principles of Article III Standing for Procedural Rights.

To begin the Article III standing inquiry, the Eighth Circuit should have engaged in three simple questions. First, was a procedural right involved? Second, was that right violated? And third, did that right protect a concrete interest?

The answer to the first question is affirmative. The Petitioners have the procedural right to engage in notice and comment pursuant to the APA. The Directive substantively changed how HUD executes housing policies. This change was the purpose of the Directive and was not previously a part of any federal rule or legislation. The Directive was not merely agency guidance. It was, as described by the President himself, a rule change. *School of the*

¹¹ See *Dismas Charities*, 401 F.3d at 678; see also *Sierra Club*, 699 F.3d at 533.

Ozarks, 41 F.4th at 1003 (Grasz, J., dissenting). As a rule change, the Directive falls squarely within the statutory requirements of the APA.

The answer to the second question is also affirmative. The Respondents did not engage in an APA's notice and comment period. This is uncontested. And the last and final question is also affirmative. The Petitioners' right to engage in notice and comment protects its concrete interest in preserving the religious and moral purposes of its housing rules.

Nowhere in any of this Court's procedural injury standing jurisprudence has it ever been required of the injured party to make an additional showing of "concrete harm." In fact, this Court was very clear that the normal standing standards were not in play with procedural injuries. "A person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572, n. 7.

This is most especially the case with APA review:

We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of the statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes.

Bennett, 520 U.S. at 163 (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400, n. 16 (1987)).

The Eighth Circuit itself has recognized that the importance of the APA's notice and comment right required narrowly construed exemptions to provide liberal judicial review when it held that "an agency potentially can avoid judicial review through the tyranny of small decisions. Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that 'the APA's notice and comment exemptions must be narrowly construed.'" *Iowa League*, 711 F.3d at 873.

The lessening of the "normal" standard and the generous review accorded to APA actions comport with the purpose of the APA: agency accountability. The Eighth Circuit ignored all of this. The Eighth Circuit ignored the loosened standing criterion for procedural injuries and the generous review standard under the APA.

The Court's intervention is needed to restore agency accountability to the Eighth Circuit.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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