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, 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 THE STATE OF MISSOURI AND EIGHTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Attorneys General of Missouri, Alaska, Alabama, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia, are the chief legal officers of their States and have the authority to file briefs on behalf of the States they represent.

"[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself" "to protect the States from overreaching by Congress." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). Today, Congress encourages federal agencies to exercise extraordinary legislative power without any meaningful oversight, and thus little prevents the federal bureaucracy from "invad[ing] the rights of the individual States, or the prerogatives of their governments." *Id.* (citing THE FEDERALIST NO. 46, p. 332 (B. Wright ed. 1961)). Federal actions that violate the substantive and procedural statutes that prescribe the exercise of legislative power intrude upon State sovereignty.

Through their Attorneys General, the *Amici* States are well positioned to explain that the Department of Housing and Urban Development has transgressed this boundary here. This case involves an expansion of federal power and the federal government's outright failure to address, let alone balance,

antidiscrimination policy and interests with religious beliefs. The *Amici* States enforce antidiscrimination statutes while at the same time "ensur[ing] 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." *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018). The federal action involves housing, an area of traditional State concern, and the States also have housing organizations, educational institutions, and localities that will be expected to comply with HUD's new Directive. *Amici* States urge the Court to apply traditional standing requirements and reverse the court of appeals, so that the merits may be heard.

SUMMARY OF ARGUMENT

The College of the Ozarks is a regulated entity under the Fair Housing Act. The Act makes it unlawful to refuse to sell or rent to or discriminate against any person "because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a), (b). The agency responsible for administering the act, HUD, announced that the Act's sex discrimination provisions now "prohibit discrimination because of sexual orientation and gender identity." App. 37a. HUD further insists that this kind of discrimination "is real and urgently requires enforcement action." *Id.* HUD also directs that it will now accept for filing and investigate, under its new broader view of the Act, "all complaints of sex discrimination, including discrimination because of gender identity or sexual orientation." App. 39a. As the court of appeals noted, HUD's directive omits any discussion of how the "Religious Freedom Restoration Act or the Free Exercise Clause may limit enforcement of the Fair Housing Act's prohibition on sex discrimination as applied to the College." App. 9a. Yet, the College's suit seeking that exact clarification—which HUD would have been required to address had the agency engaged in the notice and comment process—was dismissed.

The College's pre-enforcement suit raises serious challenges to expansive and careless executive action that tramples religious liberties. The courts have failed to recognize that HUD's Directive is a legislative rule. The President announced that "my Administration issued a rule change to ensure that the [FHA] finally guards against discrimination targeting LGBTQ+ Americans." App. 51a. The

President is correct in that the Directive changes the legal norm for regulated entities. The Directive reinterprets a long-standing interpretation of sex discrimination under the FHA and then removes any enforcement discretion by commanding that it and its many partners will fully enforce that new interpretation. Even if the Court were to disagree that this is a legislative rule, as Judge Grasz explained, notice-and-comment would still be required as this is certainly an interpretative rule that required the same treatment under the FHA and its then-existing regulations. App. 18a–20a. The point of notice-and-comment is to enable reasoned decision making and ensure that the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983). The HUD Directive fails that purpose.

Despite allegations that the College is subject to the Act and that HUD's Directive changes the College's legal liability, the court of appeals concluded that there was no injury-in-fact and that any injury was speculative because HUD had not yet knocked on the College's door. That is contrary to the usual showing for pre-enforcement challenges. And when States tell federal courts that a statute would not apply to specific (and often unforeseen) First Amendment conduct, courts do not dismiss without narrowing the law to its constitutional boundaries. That did not happen here. If a State or its agency announced that the days of "limited enforcement" are over and it would "fully enforce" a new and potentially

unconstitutional application of state law, *Amici* States doubt that they would receive the same treatment.

The decision is even more concerning because the unlawful agency action burdens religious freedoms. HUD's decision to issue its new Directive without notice-and-comment violated the APA and the FHA's procedures. The Directive clearly binds HUD's agencies and its state and local partners to enforce the interpretation of Title VII's sex discrimination prohibition announced in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), to the FHA's provisions. App. 39–40a. But in issuing this new legislative rule, HUD failed to consider important First Amendment issues that directly affect any such enforcement. The absence of any discussion of religious practices or RFRA, when the very legal authority HUD relies on describes RFRA as a "super statute, displacing the normal operation of other federal laws," App. 9a, shows that HUD is not relying on *Bostock* or that decision's analysis for its new Directive. The APA requires more than mere lip service, and the court of appeals should be reversed.

I. The HUD Directive is a legislative rule seeking to evade judicial review.

The court of appeals assumed that the challenged agency action was not a "rule" that required compliance with the APA's or the FHA's notice-and-comment procedures. The College specifically alleged that the HUD Directive[1] is a substantive rule and offered factual allegations supporting that conclusion, but neither the court of appeals nor the district court addressed these allegations at all. More fundamentally, the court of appeals ignored the well-pleaded allegations due to its own conclusion that the Directive did not "require that HUD reach the specific enforcement decision that the College's current housing policies violate federal law." App. 9a. But the court of appeals failed to grasp that the Directive removed any discretion HUD might otherwise have, thus under the College's allegations it is more than plausible the new legal regime would require an enforcement action.

A rule "includes 'nearly every statement an agency may make.'" *Milk Indus. Found.* v. *Glickman*, 949 F. Supp. 882, 893 (D.D.C. 1997). The APA defines "rule," in part, as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). There are primarily two types of rules,

[1]U.S. Department of Housing and Urban Development, *Memorandum Re: Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021); App. 36a.

legislative and interpretative. The primary difference between the two "is the legal base upon which the rule rests." *United Techs. Corp.* v. *EPA*, 821 F.2d 714, 719–20 (D.C. Cir. 1987). And only legislative rules must be promulgated through notice and comment. *Id.* § 553(b); *see also* 42 U.S.C. § 3614a (procedure for implementing FHA rules on discrimination).

"Expanding the footprint of a regulation by imposing new requirements . . . is the hallmark of legislative rules." *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 873 (8th Cir. 2013). "The critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). But when "the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *General Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Even though a document might interpret a statute, as most federal guidance documents do, if the agency "bases enforcement actions on the policies or interpretations formulated in the document ... then the agency's document is for all practical purposes binding." *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). "When an agency creates a new 'legal norm based on the agency's own authority' to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule." *Iowa League of Cities*, 711 F.3d at 873. This occurs when the agency action "alters the legal regime to which the action agency is subject." *Bennett* v. *Spear*, 520 U.S. 154, 168–69 (1997).

The HUD Directive clearly creates a new legal norm and bases its enforcement decisions on it. The agency claims to reinterpret what discrimination on the basis of sex means in the context of the FHA, but the agency relies solely on the Executive Order 13988's directive to do so.[2] Although EO 13988 purports to be relying on Supreme Court precedent to reinterpret the FHA, the decision in *Bostock* interprets a provision of Title VII—not the FHA. The Executive Order does not analyze the text, history, or statutory scheme of the Fair Housing Act. It merely announces that "laws that prohibit sex discrimination —including … the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), … along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." 86 Fed. Reg. 7023. The President does not identify what contrary indications are sufficient and neither does HUD.

The HUD Directive explicitly requires its own agencies, state and local agencies, and private organizations to enforce a new, atextual prohibition on gender identity and sexual orientation discrimination. App. 39a–40a. HUD also orders its enforcement arm, the FHEO, to "conduct all other activities involving the application, interpretation, and enforcement of the Fair Housing Act's prohibition on sex discrimination." *Id.* It also decertifies what state and local laws are "substantially equivalent" to

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[2]Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation*, 86 F. Reg. 7023 (Jan. 20, 2021); App. 42a.

the FHA for complaint processing purposes unless those existing laws are "administered consistent with *Bostock*." *Id.* HUD requires all Fair Housing Initiative Program (FHIP) grant recipients to interpret sex discrimination the same way. This is exactly the kind of agency action that may be challenged pre-enforcement because it "play[s] a central role in the action agency's decisionmaking process." *Bennett*, 520 U.S. at 169.

In sum, the Directive relies on its own authority, establishes a new legal norm, and bases mandatory enforcement actions on that legal norm. This legislative rule binds not only HUD but also its state, local, and private partners. This Court should rely on President Biden's Proclamation on National Fair Housing Month that recognizes "[j]ust 2 months ago my Administration issued a rule change to ensure that the [FHA] finally guards against discrimination targeting LGBTQ+ Americans." App. 51a. HUD failed to follow statutory procedures when issuing a substantive rule, and the court of appeals erred in affirming dismissal of the case.

II. Imposing new liability for gender identity and sexual orientation discrimination without evaluating the burden on religious freedoms is inconsistent with *Bostock* and the APA.

The College alleges that HUD issued this Directive without considering how it would affect religious organizations. Assuming, as the Court must, that this is true, it is a fatal omission that renders the rule substantively arbitrary and capricious. This Court has noted the difficulty in applying antidiscrimination

law to devout business owners and organizations because "religious and philosophical objections to gay marriage are protected views." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727. In *Bostock*, the Court was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution." 140 S. Ct. at 1754. HUD's failure to consider the impact on First Amendment freedoms in the context of imposing a new anti-discrimination policy is manifestly arbitrary and capricious.

The First Amendment's sweeping promise that no law shall "prohibit[] the free exercise" of religion is fundamental to our society. Our constitutional system embraces "a spirit of freedom for religious organizations, [and] an independence from secular control or manipulation," so that they may decide "free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). The Court has explained that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). In addition, Congress has layered on further protections, including by allowing religious organizations to limit the "sale, rental or occupancy of

dwellings … to persons of the same religion." 42 U.S.C. § 3607(a).[3]

At the same time, protecting classes of individuals from unlawful discrimination is a legitimate state interest, and this interest can conflict with devout business owners expressing and exercising their religious beliefs. *See Masterpiece Cakeshop,* 138 S. Ct. at 1728. The federal government, no less than the States, may not ask such business owners to compromise their beliefs if they "want[] to do business in the state." *Id.* at 1729. Governmental bodies that fail to show due respect for and are dismissive of a person's free exercise rights often run afoul of the First Amendment. *Id.* The Constitution "commits government itself to religious tolerance," even when enforcing antidiscrimination laws. *Id.* at 1731.

HUD applies a greatly overbroad interpretation of *Bostock* that is not faithful to the opinion itself. The Court's holding was limited to "[f]iring employees because of a statutorily protected trait." 140 S. Ct. at 1753. It explicitly declined to consider "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII." *Id.* Due to the manifest concerns about religious freedom, the Court expressly noted Title VII has a statutory exemption for religious organizations and that the "First Amendment can bar the application of employment discrimination laws" to some claims. *Id.* at 1754 (citing *Hosanna-Tabor*, 565 U.S. at 188). The Court further explained that the

[3]This provision may not apply in the College's circumstances because it limits housing based on its own religious beliefs, and not what beliefs the renter holds.

Religious Freedom Restoration Act of 1993 acts as a "super statute, displacing the normal operation of other federal laws, [and] might supersede Title VII's commands in appropriate cases." *Id.* at 1755.

HUD's repeated insistence that it relied on *Bostock* rings hollow. One would think that such reliance would require interpreting the FHA's statutory scheme and history and explaining how RFRA, as a "super statute," informs HUD's enforcement priorities. One could also see where HUD's Directive might have noted that the First Amendment and this Court's precedents in *Hosanna-Tabor* and *Masterpiece Cakeshop* may limit HUD's authority (and its partners' authority) to "fully enforce" the sex discrimination prohibition. The Directive's only passing reference to the Constitution is its description of the FHA's purpose, and it never mentions religion, faith, or beliefs. This complete failure to consider a pervasive issue that directly affects HUD's enforcement of gender identity and sexual orientation discrimination is telling.

The Directive recognizes that its new take on the FHA departs from its previous interpretation of discrimination on the basis of sex. HUD's failure to consider well-known and obvious First Amendment protections shows that its decision not the product of reasoned agency decision making after due consideration of the relevant factors.

III. The College has standing to challenge HUD's new Directive authorizing new categories of liability before facing an enforcement action.

The College's pre-enforcement challenge to HUD's new interpretation of the FHA's sex discrimination prohibition is entirely proper. The Eighth Circuit's decision, though recognizing the action as a pre-enforcement challenge, essentially requires the College to wait until the regulators are at the gates. Regulated entities, like the College, have concrete interests in the agency's interpretation of the law that regulates them. And an agency promising full enforcement to rectify past injustices satisfies the imminence requirement.

A. The College has plausibly alleged an injury-in-fact and substantial risk of a prospective injury

The College has an imminent injury: the threat of enforcement actions and investigations by HUD and private parties that have been invited to sue the College on this new category of liability. It cannot be that the College must risk defending whether its housing practices are consistent with its religious tenets, *see* 20 U.S.C. § 1681(a)(3), in multiple venues (administrative hearings, suits by different parties with differing claims on the same theory) from actions spurred on by HUD's invalid rule erroneously interpreting the FHA. By inviting complaints on this liability theory and mandating enforcement, HUD has created a substantial risk of litigation for the College. *See Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (*SBA List*) (stating that an "allegation of a

future injury" is imminent when "there is a substantial risk that the harm will occur").

A party has standing to sue when faced with a prospective injury "where the threatened injury is real, immediate, and direct." *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). A threatened injury "is both immediate and real" when compliance with a law "is coerced by the threat of enforcement." *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 508 (1972); *see also SBA List*, 573 U.S. at 158 (2014). "Therefore, '[p]laintiffs have standing to challenge the facial validity of a regulation notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them.'" *Keller* v. *City of Fremont*, 719 F.3d 931, 947 (8th Cir. 2013) (alteration in original) (quoting *Gray* v. *City of Valley Park*, 567 F.3d 976, 984 (8th Cir. 2009)).

The Court in *SBA List* explained that a future injury is imminent where "the threatened injury is certainly impending, *or* there is a substantial risk that the harm will occur." 573 U.S. at 158 (emphasis added) (internal quotation marks omitted). "[A]dministrative action, like arrest or prosecution, may give rise to sufficient harm to justify pre-enforcement review." *Id.* at 159. Because plaintiffs who demonstrate a "realistic danger" of harm from a statute meet this requirement, *see Pennell* v. *City of San Jose*, 485 U.S. 1, 8 (1988), the Court recognized that plaintiffs who "allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" can demonstrate a substantial risk of harm if they can

show an "actual and well-founded fear that the law will be enforced against [them]," *SBA List*, 573 U.S. at 159.

Here, the College has adequately alleged that there is a substantial risk of future harm, and therefore it faces a "real, immediate, and direct" negative impact. Specifically, the College wishes to maintain its dorm policies, which are "affected with a constitutional interest" since they are informed by the College's religious beliefs. Compl. at 27. But doing so also means that the College opens itself up to penalties. *E.g.*, *id.* (noting penalty amount per violation). Or the College risks abandoning its deeply held beliefs and incurring out-of-pocket costs to adapt housing and other facilities to comply with HUD's new interpretation of the FHA. This is certainly a realistic danger to the College.

The Eighth Circuit's claim that any potential injury lacked imminence operates under two mistaken assumptions. First, it relied on the federal government's past history of not filing charges against religious institution's dormitories, based in part on how an official in a *previous* Administration interpreted its authority. App. 9a–10a. Historical practice offers no shelter because this Administration expressly breaks from that enforcement tradition, decrying it as "limited" and "insufficient." *See* App. 20a. And the Administration did so without pausing to consider the effect on religious institutions or reassure religious institutions that its past practice under the FHA would continue. This failure is particularly striking because the precedent the Administration claims to follow expressly recognizes that religious protection statutes operate as a "super-

statute, displacing the normal operation of other federal laws." *Bostock*, 140 S. Ct. at 1754.

Second, the Eighth Circuit assumed that an investigation into the College's practices, as required by the Directive, is not "enforcement" because the Directive does not explicitly require a specific enforcement action. App. 10a–11a. It is difficult to understand how a civil investigation (where the agency undoubtedly would require compliance with its interpretation of the FHA) is not enforcement. In the context of the FHA, that assumption borders on bizarre, as the Act heavily relies on state, local, and private partners in its enforcement actions. *See supra* I, at 8. The Directive not only mandates that HUD "fully enforce" its new interpretation but mandates that all of its partners do as well. And importantly, the Directive requires that those investigations go forward without any consideration of whether HUD could fine or sue the institution under the Act.

HUD's failure to expressly consider how its new FHA interpretation affects religious interests, as *Bostock* highlights, firmly establish the College's completed procedural injury. Judge Grasz explains that HUD had a responsibility to engage in notice-and-comment before issuing the Directive and that "[t]he College has a concrete interest in complying with the FHA as interpreted by HUD." App. 21a. That interest is heightened when the agency expressly declares "full enforcement" of the Act to rectify past injustices from "limited," "insufficient," and "inconsistent" enforcement. App. 20a. And in notice-and-comment, the federal government would have been required to expressly weigh and respond to comments about the inevitable impact the Directive

would have on religious institutions. The College, and many other religious institutions, deserve such consideration when HUD makes such wholesale changes to its interpretation of the FHA's discrimination provisions.

Nor is it accurate to claim that this procedural injury is not concrete when the regulated entity asserts the procedural injury. The court of appeals erroneously concluded that the asserted right was a "procedural right *in vacuo*," App. 12a, based on this Court's precedents in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), and *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009). Those plaintiffs were not regulated by the agency rule, they asserted that the agency action would harm ecologically important sites they had visited in the past. *Lujan*, 504 U.S. at 563 (past visitor to Egypt); *Earth Island Inst.*, 555 U.S. at 494 (past visitor to California's Burnt Ridge site). Unlike the attenuated interests of non-regulated parties, the College seeks to "avoid[] regulatory obligations above and beyond those that can be statutorily imposed upon them." *Iowa League of Cities*, 711 F.3d at 871. This easily satisfies the injury-in-fact requirement, and this procedural injury is sufficient to warrant reversal on standing.

B. Because the Executive Order and HUD's new Directive causes the College's harm, enjoining Defendants from enforcing the new rule provides effective relief.

The court of appeals mistakenly held that enjoining officials from implementing the Directive would not redress *any* injury. App. 15a–16a. Yet, the Executive Order and HUD's Directive declared it was open season on any institution alleged to violate this

new category of FHA discrimination liability. True, although private plaintiffs could still sue the College, Petitioner could receive effective relief against the most likely and well-funded aggressor: HUD and its partners. This partial relief satisfies the redressability requirement.

Closely linked to the cause of a plaintiff's injury is whether a court's decision will grant appropriate relief. When the plaintiff is a regulated party "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62. It is axiomatic that "no federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 801 (2021). Yet, even "the ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Id.* (noting that though "a single dollar cannot provide full redress," partial remedies still satisfy redressability) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

The court of appeals was unpersuaded that the College, indisputably subject to the Act, was not the object of the Directive. App. 10a. It concluded that it was an "internal directive" and not a regulation of private parties. *Id.* That conclusion falls flat. In addition to HUD, the Directive requires state and local agencies that receive HUD funds to enforce the FHA as HUD requires. App. 40a. Moreover, in requiring "full enforcement," the Directive is not enforcing this new requirement against "internal" agencies, the Directive requires HUD and its agencies

to enforce its new and unreasoned view of the FHA against third parties, like the College.

It is undeniable that the College would receive partial relief by enjoining implementation of the Directive. The College's suit does not seek to foreclose all liability, only "to [e]njoin the Memorandum and any enforcement of it by Defendants." App. 5a (alteration in original). That is within the Court's power, even though private "individuals remain free to bring claims for FHA violations." *Id.* This "partial remedy" satisfies the redressability requirement. *Church of Scientology*, 506 U.S. at 13. Indeed, a favorable ruling from this Court would, if not fully effectuate the remedy that the College seeks, provide some remedy by preventing the suits by the HUD Directive's recipients.

CONCLUSION

Amici States urge the Court to grant the petition for writ of certiorari to address the important questions it raises and require federal agencies to engage in Congress's prescribed procedures before exercising legislative power.

Respectfully submitted,

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