

July 29, 2022

VIA CM/ECF

Michael E. Gans, Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, MO 63102

**Re: *Religious Sisters of Mercy v. Becerra*, No. 21-1890
Response to Rule 28(j) Notice of Supplemental Authority:**

School of the Ozarks, Inc. v. Biden, No. 21-2270 (8th Cir. July 27, 2022)

Dear Mr. Gans:

The Government's July 28 letter cites *School of the Ozarks, Inc. v. Biden*, where this Court held a religious college lacked standing to challenge an internal agency memorandum. But *Ozarks* is easily distinguishable.

First, the Court emphasized that the *Ozarks* memorandum was “an internal directive to HUD agencies, not a regulation of private parties”; it did not “direct the [plaintiff] to do anything,” nor did it “expose the [plaintiff] to any legal penalties.” Op.9. The Court contrasted this with a challenge to “a final administrative rule” or statute that “regulate[s] the [plaintiff’s] conduct” and carries potential “sanctions.” *Id.* Here, Plaintiffs challenge a statute and final rules that regulate their conduct (something the Government hasn’t disputed, Resp.Br.30-31) and carry severe sanctions—including loss of millions in funding, debarment from federal contracting, false-claims liability, and criminal penalties. A757; Resp.Br.13.

Second, the Court noted that the government “formally advised” the *Ozarks* plaintiff that it enjoyed a religious exemption under Title IX protecting its “housing” practices; the agency had a years-long policy of respecting that exemption; and there was no record of any other enforcement against religious entities. Op.8.



Here, by contrast, the Government expressly refused to grant a religious exemption (Resp.Br.48-49); it has already solicited, received, and investigated complaints against religious entities (Resp.Br.38-39); and multiple courts have already applied Section 1557 to religious entities engaged in the same conduct as Plaintiffs (Resp.Br.39).

Finally, the agency in *Ozarks* indicated in court “that it would not enforce its interpretation of the [statute]” against the plaintiff. Op.14-15 (Grasz, J., dissenting). Here, the Government expressly refused to disavow enforcement against Plaintiffs. Resp.Br.4, 40 (“[Q.] Are you able to tell us that ... you’re not going to enforce? [A.] No your honor.”)

Indeed, after the district court entered its injunction in this case, the Government moved to modify it, stating that it risked being held in contempt of court because it anticipates enforcing Section 1557 against Plaintiffs in this very case. Resp.Br.41. This is a straightforward admission of a credible threat of enforcement. Nothing like that was remotely present in *Ozarks*.

The Court should affirm.

Word Count: 347

Sincerely,

/s/ Luke W. Goodrich

LUKE W. GOODRICH

MARK L. RIENZI

JOSEPH DAVIS

DANIEL L. CHEN

The Becket Fund for Religious Liberty

1919 Pennsylvania Ave. NW, Ste. 400

Washington, DC 20036

(202) 955-0095

lgoodrich@becketlaw.org

Counsel for Plaintiffs-Appellees