



July 29, 2022

VIA CM/ECF

Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

**Re: *Franciscan Alliance, Inc. v. Becerra* (No. 21-11174)
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. Cayce:

The Government's July 29 letter cites *School of the Ozarks, Inc. v. Biden*, where the Eighth Circuit held a religious college lacked standing to challenge an internal agency memorandum. But *Ozarks* is easily distinguishable.

First, the *Ozarks* court emphasized that the 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 (Resp.Br.29) and carry severe sanctions—including loss of millions in funding, debarment from federal contracting, false-claims liability, and criminal penalties (Resp.Br.11).

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 has expressly refused to grant a religious exemption to anyone (Resp.Br.27), much less to Plaintiffs specifically; it has already solicited, received, and investigated complaints against religious entities (Resp.Br.25); and multiple courts have already applied Section 1557 to religious entities engaged in the same conduct as Plaintiffs (Resp.Br.24 n.1).

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.25 (“[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.26. 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: 350

Sincerely,

/s/ Joseph C. Davis

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cc: All counsel of record (by ECF notification)