

**No. 22-5807**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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STATE OF TENNESSEE, et al.,  
*Plaintiffs-Appellees,*

and

ASSOCIATION OF CHRISTIAN SCHOOLS, et al.,  
*Intervenors-Appellees,*

v.

DEPARTMENT OF EDUCATION, et al.,  
*Defendants-Appellants*

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On Appeal from the United States District Court for the  
Eastern District of Tennessee  
(No. 3:21-cv-00308)

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**PLAINTIFFS-APPELLEES' MOTION TO RECONSIDER  
CLERK OFFICE'S ORDER GRANTING DEFENDANTS-APPELLANTS'  
MOTION FOR EXTENSION OF TIME TO FILE OPENING BRIEF**

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Defendants-Appellants asked this Court to extend their deadline to file their Opening Brief by 30 days—until December 15, 2022—even though the Court’s rules expressly state that the Court “disfavors applications for extensions of time for the filing of briefs.” 6th Cir. R. 26(a)(1); *see also* 6th Cir. I.O.P. 26(a) (“The court does not favor motions to extend briefing deadlines.”). Good cause did not exist for delaying the filing of Defendants-Appellants’ Opening Brief. Contrary to Defendants’ representations to this Court, other federal agencies continue to rely on the enjoined guidance while this appeal is pending, and the U.S. Department of Agriculture has encouraged a different judge in the Eastern District of Tennessee to disregard the preliminary injunction ruling in this case. Thus, any delay in resolving this appeal prejudices Plaintiff States. Accordingly, Plaintiff States ask a panel of this Court to reconsider Defendants-Appellants’ motion, which the clerk’s office granted less than a day after Defendants-Appellants’ motion and before Plaintiff States responded, and enforce the Court’s rules as written. 6th Cir. R. 45(c).

*First*, good cause did not exist for this Court to ignore 6th Cir. R. 26(a)(1) and extend the normal briefing deadlines. Defendants-Appellants’ requested extension is merely their latest attempt to delay resolution of this case. The district court issued its preliminary injunction decision on July 15, 2022. Memorandum Op. & Order, R. 86, PageID#1942-88. Defendants-Appellants waited 60 days before appealing,

Notice of Appeal, R. 100, PageID#2407-08, the maximum time allowed under the federal rules, Fed. R. App. P. 4(a)(1)(B). In the meanwhile, citing many of the same reasons Defendants-Appellants again point to as justification for this motion, Defendants attempted to extend their deadline to answer indefinitely or, in the alternative, by 60 days. Defendants' Mot., R. 87, PageID#1989-92. Limiting the extension to the 14 days Plaintiff States had agreed to, the district court otherwise denied Defendants' request. Order, R. 91, PageID#2013-15. The district court was "sympathetic that counsel for Defendants have demanding schedules" but noted that "[c]ounsel for Defendants are employed by the Department of Justice, a federal executive department of the United States Government." R. 91 at 2, PageID#2014. Accordingly, the district court denied Defendants' requested extension and ruled that the U.S. "Department of Justice has adequate resources to devote to litigating this case." R. 91 at 2, PageID#2014. (In their communications yesterday, the first time Defendants had raised the extension, Plaintiff States pointed out that the district court had denied a similar extension request, but Defendants inexplicably failed to include that in their description of why Plaintiff States opposed the motion.)

So too here. The U.S. Department of Justice chose to assign new attorneys to this matter knowing full well about their work and vacation commitments, including one attorney's two-week-long vacation. This Court issued its briefing schedule on October 6, and Defendants-Appellants received 40 days to file their Opening Brief.

Briefing Letter, Dkt. No. 11. Defendants-Appellants do not need another 30 days on top of that—70 days after this Court’s Briefing Letter and five months after the district court’s preliminary injunction order—to prepare their Opening Brief.

This Court’s rules disfavor such extensions anyway. 6th Cir. R. 26(a)(1); 6th Cir. I.O.P. 26(a). Almost all practicing attorneys are responsible for more than one matter. But this Court still “disfavors applications for extensions of time for the filing of briefs.” 6th Cir. R. 26(a)(1). Indeed, this Court is more likely to expedite than delay “appeals from orders denying or granting preliminary injunctions.” 6th Cir. R. 31(c)(2). The only case Defendants-Appellants point to where this Court granted an opposed extension request, *cf.* Motion, Dkt. No. 14 at 4, was one where the parties opposing the motion did so only after themselves receiving an unopposed extension and where their opposition was contingent on the defendants altering their conduct to grant relief this Court had denied, *see Livingston Educational Service Agency v. Becerra*, No. 22-1257, Mot. for Extension, Dkt. No. 32 at 2-4 (6th Cir. July 6, 2022) (pointing out these distinctions). If 6th Cir. R. 26(a)(1) is to mean anything, it must apply in this case to counsel against the requested extension.

*Second*, Plaintiff States are prejudiced by the delayed resolution of the appeal. In their motion, Defendants-Appellants inaccurately insisted that Plaintiff States cannot be harmed because the “preliminary injunction prohibits the [federal] government from implementing against plaintiffs certain agency guidance

documents” about the meaning of Title VII and Title IX. Motion, Dkt. No. 14 at 1-2. Defendants failed to provide a full picture of the situation to this Court.

To start, the district court ruled that “*Bostock* does not require Defendants’ interpretations of Title VII and IX,” so Plaintiff States are likely to prevail on their claim that the challenged guidance documents are, in fact, legislative rules issued in violation of the APA’s notice-and-comment requirements. Memorandum Op. & Order, R. 86 at 31, 40, PageID#1972, 1981. Although Defendants acknowledge that the preliminary injunction bars them from citing or referencing the enjoined guidance, Notice of Compliance, R. 97 at 2, PageID#2058, the U.S. Department of Education has *not* paused its rulemaking process for a previously issued proposed rule that relied on the now-enjoined Interpretation, *see* Response to Defendants’ Notice of Compliance, R. 99 at 2-3, PageID#2399-2400. Plaintiff States have had to expend resources responding to that pending rule. *See, e.g.*, Comment of Tennessee and 19 Co-Signing States, Docket No. ED-2021-OCR-0166 (“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”) (Sept. 12, 2022), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-34-letter.pdf>.

Even more significantly, other federal agencies that are not parties to this litigation continue to rely upon the challenged U.S. Department of Education

Interpretation. The U.S. Department of Agriculture “concur[red] with and adopt[ed]” the now-enjoined Interpretation in an attempt to force its rewriting of Title IX and the Food Nutrition Act on entities that receive Supplemental Nutrition Assistance Program (“SNAP”) funds. USDA, CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022), <https://www.fns.usda.gov/sites/default/files/resource-files/crd-01-2022.pdf>. Tennessee and many of the Plaintiff States in this case have sought a preliminary injunction against that unlawful action in the Eastern District of Tennessee. *Tennessee v. USDA*, No. 3:22-cv-00257, Mot. for Preliminary Injunction, R. 2, PageID#139-47 (E.D. Tenn. July 26, 2022). But a different district court judge is handling that case, so the federal government has encouraged that judge to ignore the reasoning of the preliminary injunction order in this case. *See Tennessee v. USDA*, No. 3:22-cv-00257, Opposition to Preliminary Injunction Mot., R. 54 at 26, 31-33, 36, PageID#346, 351-53, 356 (E.D. Tenn. Sept. 9, 2022).

And the U.S. Department of Health and Human Services issued a notice of proposed rulemaking that relied on the Interpretation *after* the district court enjoined the Defendants in this case from relying on it. U.S. Dep’t of Health & Human Servs., Notice of Proposed Rulemaking, Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47828 & n.46 (Aug. 4, 2022). Tennessee and other Plaintiff States have had to expend even more resources responding to that unlawful

proposed rule. *See* Comment of Tennessee and 19 Co-Signing States, No. HHS-OS-2022-0012 (“Nondiscrimination in Health Programs and Activities”) (Oct. 3, 2022), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-39-comment.pdf>. Only the speedy resolution of this preliminary injunction appeal and the subsequent vacatur of the challenged guidance documents will stop other federal agencies from continuing to rely on the documents against Plaintiff States.

*Third*, and least importantly, Defendants-Appellants’ motion also failed to include the required certificate of compliance. *See* Fed. R. App. P. 32(g)(1).

Accordingly, Plaintiff States ask that this Court follow 6th Cir. R. 26(a)(1)’s instruction and reconsider the order granting the motion for an extension.

Respectfully submitted,

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October 25, 2022

## CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 1,265 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This motion also complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in proportionally spaced typeface using Times New Roman 14-point font.

/s/ Clark L. Hildabrand  
CLARK L. HILDABRAND  
Assistant Solicitor General

October 25, 2022

**CERTIFICATE OF SERVICE**

I, Clark L. Hildabrand, counsel for Plaintiffs-Appellees and a member of the Bar of this Court, certify that, on October 25, 2022, a copy of Plaintiffs-Appellees' Motion to Reconsider Clerk Office's Order Granting Defendants-Appellants' Motion for Extension of Time to File Opening Brief was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Clark L. Hildabrand  
CLARK L. HILDABRAND  
Assistant Solicitor General