

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

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Rules matter. The “printed and accessible words” of the Sixth Circuit’s rules allow litigants to know what to expect when their case is before the Court. *Summa Holdings, Inc. v. Comm’r of IRS*, 848 F.3d 779, 781 (6th Cir. 2017) (protecting a taxpayer who complied with the express terms of the federal tax code). If the Court simply ignores 6th Cir. R. 26(a)(1) and 6th Cir. I.O.P. 26(a)’s instruction that extensions of time for the filing of briefs is disfavored, “it’s fair to ask what the point of making these” rules “accessible” to the public is. *Id.* at 782.

Defendants knew that the district court had *already* rejected their contention that the work and vacation schedules of attorneys at the U.S. Department of Justice are enough to justify extensions in this case but failed to disclose that fact to this Court. Order, R. 91, PageID#2013-15. While Defendants insist that they provided this Court “with the reason [Plaintiff States] provided for th[eir] opposition,” Opp. at 2, here is the email that Plaintiffs-Appellees sent to Defendants-Appellants on Monday a little over an hour after Defendants’ request:

Hope your week is also off to a good start. Plaintiff States do not consent and would oppose the motion. The Sixth Circuit itself “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.”). While I understand the concern about deadlines in other cases, the U.S. “Department of Justice has adequate resources to devote to litigating this case.” *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-cv-00308-CEA-DCP, Order, ECF 92 at 2, PageID#2017 (E.D. Tenn. July 28, 2022).

That quoted district court order is the same one that rejected Defendants-Appellants' contention that attorneys at the U.S. Department of Justice are too busy to handle this case in a timely manner. Yet Defendants *still* fail even to acknowledge that order.

Given that order and the importance of this case, Defendants-Appellants should not have waited to raise their extension request with Plaintiffs-Appellees until they were 18 days into the 40 days this Court had set for the Opening Brief. And the only avenue that this Court's rules allow for Plaintiffs-Appellees to challenge the clerk office's order—issued hardly one hour of business time after Defendants-Appellants requested the extension after this Court's hours of operation on Monday—is 6th Cir. R. 45(c), which allows Plaintiffs-Appellees to file a motion to reconsider instead of a response.

Plaintiffs-Appellees respect that the clerk's office has a difficult job managing the many cases before this Court and understand that there are circumstances when briefing extensions are justified. After all, 6th Cir. R. 26(a)(1) “disfavors applications for extensions of time for the filing of briefs” but does not forbid them. Here, however, the federal government does not really need 70 days to draft an Opening Brief challenging a preliminary injunction that the district court granted five months before Defendants-Appellants' preferred deadline.

While Plaintiff States are glad that the preliminary injunction provides them some measure of protection from the Defendants in this lawsuit, it simply is not accurate to say that Plaintiff States have received all the relief they seek in this case. The unlawful guidance documents still have not been vacated by this district court, and the district court cannot take action that would disturb this Court's jurisdiction while the preliminary injunction is on appeal. Simply put, if Defendant Department of Education and other agencies of the federal government want to take advantage of the fact that the guidance documents have not been vacated in this litigation, it is inequitable for Defendants-Appellants to attempt to slow-walk the appeal.

Indeed, over six weeks after appealing but just one day after the clerk's office granted Defendants-Appellants' motion to extend their briefing deadline, Defendants indicated for the first time to Plaintiff States that Defendants intend to seek a stay of proceedings in the district court until this Court decides their appeal of the preliminary injunction. (Shockingly, Defendants-Appellants failed to mention this new fact in their Opposition.) The focus of this litigation is on the appeal in this Court. And there is no good reason to delay it.

Accordingly, Plaintiff States respectfully ask that this Court follow 6th Cir. R. 26(a)(1)'s instruction, reconsider the clerk office's order granting the motion for an extension, and restore the original briefing deadlines for this appeal.

Respectfully submitted,

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October 27, 2022

## CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 734 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This reply 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 27, 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 27, 2022, a copy of Plaintiffs-Appellees' Reply in Support of 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