

STATE OF TENNESSEE

Office of the Attorney General



JONATHAN SKRMETTI
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202
TELEPHONE (615)741-3491
FACSIMILE (615)741-2009

July 10, 2023

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: *State of Tennessee, et al. v. Department of Education, et al.*, No. 22-5807

Dear Ms. Hunt:

Plaintiffs-Appellees, other than Arizona, respectfully submit this Rule 28(j) letter further updating the Court about recent decisions of the Supreme Court and this Court, all of which support the district court’s preliminary injunction.

First, the Supreme Court’s standing analysis in *Biden v. Nebraska*, No. 22-506, 2023 WL 4277210 (U.S. June 30), conflicts with Defendants’ insistence that the district court was wrong to rely on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). *See* Reply at 28-29. Citing *Rumsfeld* for the principle that “[i]f at least one plaintiff has standing, the suit may proceed,” the Supreme Court concluded that Missouri’s standing meant it “need not consider the other theories of standing raised by the States.” 2023 WL 4277210, at *6. The Supreme Court then left the Eighth Circuit’s nationwide preliminary injunction in place. *Id.* *15. That was the correct result where—as here and in *Nebraska*, and unlike potentially different cases seeking to enjoin enforcement of statutes—States bring an Administrative Procedure Act suit seeking vacatur of an unlawful federal regulation. *Cf. Kentucky v. Yellen*, 54 F.4th 325, 358 n.1 (6th Cir. 2022) (Nalbandian, J., concurring in part).

Second, the Supreme Court agreed in *303 Creative LLC v. Elenis* with the Tenth Circuit’s ruling that a website designer had established “a credible threat” of Colorado’s enforcement of an antidiscrimination law, even though she had not yet “follow[ed] through on her plans to offer wedding website services.” No. 21-476, 2023 WL 4277208, at *5-6, *13 (U.S. June 30). The States have *already* enacted laws and policies that arguably conflict with the challenged documents and contemplate enacting still more.

Third, in a published order, this Court ruled that *Bostock*’s “reasoning applies only to Title VII, as *Bostock* itself and our subsequent cases make clear.” *L.W. v. Skrmetti*, No. 23-5600, 2023 WL 4410576, at *7 (6th Cir. July 8).

This Court should affirm the preliminary injunction order as to the Department’s Interpretation, Dear Educator Letter, and Fact Sheet to stop Defendants’ unlawful attempts to “remove these trying policy choices from fifty state legislatures.” *Id.*

Respectfully submitted,

/s/ Clark Lassiter Hildabrand

Clark Lassiter Hildabrand

Senior Counsel

P.O. Box 20207

Nashville, TN 37202

(615) 253-5642

Clark.Hildabrand@ag.tn.gov

*Counsel for all Plaintiffs-Appellees
other than the State of Arizona*

CERTIFICATE OF SERVICE

I, Clark Hildabrand, counsel for Plaintiffs-Appellees other than the State of Arizona and a member of the Bar of this Court, certify that, on July 10, 2023, a copy of the foregoing Rule 28(j) letter was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Clark Lassiter Hildabrand

Clark Lassiter Hildabrand
Senior Counsel