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July 17, 2023

VIA CM/ECF

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

RE: *State of Tennessee, et al. v. Department of Education, et al.*, No. 22-5807
(argued April 26, 2023)

Dear Ms. Hunt:

We write in response to the States' letter regarding recent decisions of this Court and the Supreme Court. The States' reliance on those decisions is misplaced.

First, the Supreme Court's invocation in *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023), of the one-party standing rule from *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006), does not support the overbroad injunction here. Although the one-party rule may "give courts license to *avoid* complex questions of standing in cases where the standing of others makes a case justiciable," it "does not ... permit a court that *knows* that a party is without standing to ... allow that party to participate in the case." *Kentucky v. Yellen*, 54 F.4th 325, 341 n.12 (6th Cir. 2022) (citation omitted). Thus, those plaintiff States that identified no laws in conflict with the challenged information documents cannot benefit from an injunction. *See* Reply Br. 27-28.

Second, the Court's decision in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), does not support the States' standing here. The Court there granted certiorari with respect only to petitioner's First Amendment claim. In any event, while a law's chilling effect on "expressive activity protected by the First Amendment," *id.* at 2319, may be sufficient to confer standing, this case involves no expressive activity or First

Amendment claims. Moreover, the parties in *303 Creative* did not dispute that there existed a history of past enforcement against “nearly identical [expressive] conduct,” *id.* at 2310, whereas the States have not shown any past history of enforcement or clear conflict between their laws and the challenged information documents.

Finally, this Court’s emergency stay ruling in *L. W. by & through Williams v. Skrametti*, 2023 WL 4410576 (6th Cir. July 8, 2023), which the panel itself cautioned was “initial” and “may be wrong,” *id.* at *8, does not help the States. That interlocutory decision did not address any of the threshold Article III and reviewability questions that are the subject of this appeal.

Sincerely,

s/ David L. Peters

David L. Peters
U.S. Department of Justice
Appellate Staff, Civil Division

cc (via CM/ECF): Counsel of Record