

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

NAVY SEALs 1-26, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as
President of the United States, et al.,

Defendants.

Case No. 4:21-cv-01236-O

DEFENDANTS' RESPONSE TO COURT ORDER OF DECEMBER 2, 2021

Defendants respectfully provide the following response to the Court's Order of December 2, 2021, ECF No. 28, concerning the entry of a protective order for the identities of all 35 individual SEALs and Special Warfare plaintiffs in this case. In particular, as set forth below, Defendants correct Plaintiffs' misrepresentation concerning the Government's position.

On November 30 and December 1, 2021, Government counsel emailed Plaintiffs' counsel to request the names of Plaintiffs, so that the Government can properly address issues related to the Plaintiffs in the opposition to Plaintiffs' Motion for a Preliminary Injunction, which is due on December 10, 2021. *See* Ex. 1 (Email Correspondence Between Andrew Carmichael and Heather Hacker (Nov. 30 & Dec. 1, 2021)). Government counsel attached a protective order entered in the related case *Doe v. Austin*, 3:21-cv-1211-AW (N.D. Fla. Oct. 19, 2021), and informed Plaintiffs' counsel that the Government would agree to have a similar protective order entered in this case. *Id.*; *see also* Ex. 2 (Order Granting Joint Motion for Protective Order in *Doe v. Austin*, ECF No. 29 and Protective Order, ECF No. 27-1). Government counsel also agreed to act as if the protective order was in place so the Government could receive the names of Plaintiffs immediately. *Id.* Government counsel explained that the names were needed immediately to allow the Government

to properly respond to Plaintiffs' Motion for a Preliminary Injunction by the deadline set by the Court. Ex. 1. Government counsel also stated that the Government still reserves the right to oppose a motion to proceed under a pseudonym as was done in *Doe v. Austin*. *Id.* However, the Government would agree to protect the names of Plaintiffs as if a protective order similar to the order entered in *Doe v. Austin* was in place until the Court ruled on any motion to proceed pseudonymously. *Id.*

Plaintiffs' counsel responded by asking for clarification of the Government's position, and Government counsel restated the Government's position in a subsequent email on December 1, 2021. *See* Ex. 1. Plaintiffs' counsel then filed a motion to proceed under a pseudonym and a motion for a protective order (which is different than the one proposed by the Government) without any further correspondence or consultation with Government counsel. *See* ECF No. 26. The certificate of service accompanying that motion states: "Plaintiffs' counsel conferred with counsel representing Defendants sued in their official capacities. Counsel for Defendants sued in their official capacities opposes this motion." However, the Plaintiffs never advised the Government of their motion or sent a copy of their proposed protective order to the Government, and Plaintiffs also failed to advise the Court that the Government itself proposed to receive the names of the individual SEAL and Special Warfare plaintiffs under a protective order, until resolution of any motion to proceed pseudonymously.

In lieu of the protective order proposed by the Plaintiffs, the Government requests the Court enter the attached protective order, which, except for the caption and the references to Local Rules, is identical to the one issued in *Doe v. Austin*, 3:21-cv-1211-AW, (N.D. Fla. Oct. 19, 2021), to allow for a standard protective order to be used across the related litigation. *See* Ex. 2. Moreover,

the Government's proposed protective order provides greater clarity concerning individuals who may access information covered under the protective order.

Further, the Government requests that the Court order Plaintiffs to provide Defendants with the names of all 35 Plaintiffs during business hours today (December 2, 2021), so that the Government can properly address issues related to the Plaintiffs in the opposition to Plaintiffs' Motion for a Preliminary Injunction.

Moreover, although Defendants do not believe that vaccination status alone is grounds for any Plaintiff to proceed anonymously, *see* Order Denying Plaintiffs Motion to Proceed Under a Pseudonym, *Doe v. Austin*, 3:21-cv-1211-AW (N.D. Fla. Dec. 2, 2021), ECF No. 49, Defendants cannot evaluate Plaintiffs' purported national security and operational security concerns without knowing their identities. Accordingly, Defendants also request two weeks (December 16, 2021) to either oppose Plaintiffs' motion to proceed anonymously or inform the Court that it will not oppose such a motion. (This proposed filing deadline is one week shorter than the default response time provided by Local Rule 7.1(e).)

Dated: December 2, 2021

Respectfully submitted,

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/s/Courtney D. Enlow
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2021, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/Courtney D. Enlow

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[PROPOSED] PROTECTIVE ORDER

Upon the request of Defendants in the above-captioned matter, and pursuant to Federal Rule of Civil Procedure 26(c), the Court hereby enters the following protective order to provide a mechanism for those plaintiffs who are currently proceeding in this action through pseudonyms (collectively “the Pseudonym Plaintiffs”) to provide their identities to Defendants.¹

1. Provision of the Pseudonym Plaintiffs’ Identities and Under Seal Filings to Defendants. Upon entry of this protective order, plaintiffs, through their counsel, will provide the identities and addresses of the Pseudonym Plaintiffs along with any documents that have been filed under seal in this matter to undersigned defense counsel of record.

2. Limited Dissemination of the Pseudonym Plaintiffs’ Identities. The following persons may receive notice of the Pseudonym Plaintiffs’ identities: (a) counsel for defendants, including supervisory officials at the Department of Justice and agency counsel for defendants; (b) persons regularly in the employ of counsel for defendants who have a need to know the Pseudonym Plaintiffs’ identities in the performance of their duties related to this action; (c) persons regularly in the employ of defendants who have a need to know the Pseudonym Plaintiffs’

¹ Entry of this protective order does not deprive Defendants of the opportunity to file an opposition to Plaintiffs’ motion to proceed under pseudonyms.

identities in the performance of their duties in conjunction with this action, provided that such persons agree to and sign the attached undertaking (Appendix A); and (d) potential witnesses for this action, provided that such persons agree to and sign the attached undertaking (Appendix A). Counsel for defendants shall maintain copies of all signed undertakings.

3. Permissible Uses of the Pseudonym Plaintiffs' Identities. Any person learning the Pseudonym Plaintiffs' identities pursuant to this Protective Order ("Recipient") shall use that information only for purposes of this litigation and shall not disclose the Pseudonym Plaintiffs' identities to anyone except persons identified in Paragraph 2, absent court order.

4. Scope of the Protective Order. This protective order does not alter the requirements of Northern District of Texas Local Rule 79.3. If any party wishes to use any document containing the Pseudonym Plaintiffs' identities, or other personally identifying information that would lead to the discovery of the Pseudonym Plaintiffs' identities, in a court filing or proceeding in this action, they shall either (i) redact the Pseudonym Plaintiffs' names and other personally identifying information or (ii) shall file a motion to seal pursuant to Northern District of Texas Local Rule 79.3.

5. Modifications. Each party reserves the right to seek to modify the terms of this protective order and Plaintiffs' pseudonym status at any time. If a party seeks to modify the protective order, the counsel for the party seeking to modify this protective order shall confer with counsel for all other parties to this action.

IT SO ORDERED, this _____ day of _____, 2021.

UNITED STATES DISTRICT JUDGE

APPENDIX A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of Texas on [date] in *Navy Seals 1-26 v. Biden*, No. 4:21-cv-01236-O. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of Texas for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
[printed name]

Signature: _____
[signature]