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REPLY TO FLORIDA

March 3, 2022

By CM/ECF Only

The Honorable David J. Smith
Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303

**Re: No. 22-10645-DD, *Navy Seal 1 v. President of the United States*
District Court Docket No. 8:21-cv-02429-SDM-TGW**

Dear Mr. Smith:

I am counsel for Plaintiffs–Appellees in the above-captioned case. Defendants–Appellants today filed a time sensitive motion for stay pending appeal. I write to dispute the “time sensitive” characterization of the motion.

Defendants’ motion asks the Court to stay the preliminary injunction order of the district court pending appeal, and to “immediately issue an administrative stay while it considers this stay motion or issue a stay as soon as is practicable, given the grave and ongoing harm to military readiness posed by the preliminary injunction.” (Mot. 27.) Setting aside for now Plaintiffs’ disagreement with the alleged “grave and ongoing harm to military readiness posed by the preliminary injunction”—which Plaintiffs will address in their opposition to the motion—there are several reasons, including Defendants’ own conduct, which belie the “time sensitive” characterization of the motion:

First, the motion is premature under Fed. R. App. P. 8. Defendants first moved for a stay pending appeal in the district court just 3 days ago (Dist. Ct. Doc. 118), and the district court has not ruled on the motion. Rather, the district court promptly set an evidentiary hearing on the motion for March 10, 2022—one week from today (Dist. Ct. Doc. 122). In its order setting the hearing, the district court explained that, given Defendants’ insistence that their desire to remove Plaintiffs Navy Commander and Lieutenant Colonel 2 from their respective commands is “not from a retaliatory animus” despite the evidence adduced at the preliminary injunction hearing, “the defendants’ proffered basis to stay the injunction to permit the re-assignment of Navy Commander and Lieutenant Colonel 2 (despite the likely unlawful denial of their religious exemptions)

The Honorable David J. Smith

No. 22-10645-DD, *Navy Seal 1 v. President of the United States*

March 3, 2022

Page 2

warrants a prompt evidentiary hearing.” (Dist. Ct. Doc. 122 at 2–3.) Because of the factual issues involved in Defendants’ stay motion, allowing the district court to proceed with its evidentiary hearing is vital to both the district court’s and this Court’s consideration.

Second, just like the supposed obstacles to deploying unvaccinated service members, the “time sensitivity” is of Defendants’ own creation and not deserving of the Court’s heed. Defendants waited a full week to appeal from the preliminary injunction order they now seek to stay (Doc. 115), and another 3 days to file their “emergency” stay motion to the district court (Doc. 118). Defendants have identified no justification for emergency treatment. Defendants, not the district court, allegedly sidelined Plaintiff Navy Commander Surface Warfare Officer’s destroyer. (Mot. 1, 10–11.) Defendants, not the district court, have imposed status restrictions on Plaintiff Lieutenant Colonel 2’s ability to travel. (Mot. 11–12.) Defendants do not need expedited relief from the Court to remove these self-imposed impediments. Especially given Defendants’ unexplained and inexplicable delay in seeking relief from the district court, there is no urgency sufficient to justify disruption of the normal appellate process, let alone to afford Plaintiffs and the Court less time to respond to and consider Defendants’ motion than Defendants took to prepare and file it.

Accordingly, the Court should hold Defendants’ stay motion in abeyance pending the district court’s evidentiary hearing on Defendants’ stay motion first filed in that court. Alternatively, if the Court prefers to consider Defendants’ motion now, Plaintiffs should not be required to respond to the motion prior to March 14, which is the due date under the ordinary 10-day deadline for responding to motions under Fed. R. App. P. 27(a)(3)(A), and just 2 business days after the district court evidentiary hearing. Of course, if this Court requests an earlier response, Plaintiffs will provide one.

Respectfully submitted,



Roger K. Gannam
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