



U.S. Department of Justice
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March 28, 2022

VIA CM/ECF

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

RE: *Navy Seal 1, et al. v. Secretary of the United States Department of Defense, et al.*,
No. 22-10645 (11th Cir.)
Response to Rule 28(j) Notice of Supplemental Authority

Dear Mr. Smith:

The government writes in response to plaintiffs' March 28, 2022 letter submitting the Supreme Court's order in *Austin v. U.S. Navy SEALs 1-26*, No. 21A477 (Mar. 25, 2022).

The district court in *Navy SEALs 1-26* preliminarily enjoined the military from applying its COVID-19 vaccination policies to the service member plaintiffs in that case and "from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." *U.S. Navy SEALs 1-26 v. Biden*, No. 21-cv-1236, 2022 WL 34443, at *14 (N.D. Tex. Jan. 3, 2022). The Supreme Court granted the government's request to stay that injunction "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." Order 1. Justice Kavanaugh observed in concurrence that a stay was warranted because the district court had "in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments," and because "even accepting that [the Religious Freedom Restoration Act (RFRA)] applies in this particular military context, RFRA does not justify judicial intrusion into military affairs in this case." Order 2 (Kavanaugh, J., concurring); *see also id.* at 3 (cautioning against "employing the judicial power in a manner that military commanders believe would impair the military of the United States").

A stay is warranted here for the same reasons. The district court enjoined the military from making assignment decisions regarding plaintiffs and has directly countermanded military leaders' professional judgment that plaintiffs cannot safely and effectively hold command roles. *See, e.g.*, Stay Motion 9; *id.* at 17-21. Moreover, as the government explained in its stay reply, the district court's preliminary injunction here is far from narrow. *See* Stay Reply 1-2. It effectively requires the military to preclear any assignment decision made as to plaintiffs and to convince the district court that such decisions are not retaliatory with live testimony from senior military officials. *Id.*; *see* Dkt. 133 at 2-5, 7. In short, defendants are not free to make assignment decisions as to plaintiffs. That state of affairs warranted a stay in *Navy SEALs 1-26* and does so here too.

Sincerely,

/s/ Sarah J. Clark
Sarah J. Clark
Counsel for the United States

cc: Counsel of Record (via CM/ECF)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NAVY SEAL 1, ET AL.,
Plaintiffs-Appellees,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF DEFENSE, ET AL.,
Defendants-Appellants,

No. 22-10645

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendants-Appellants certify that the following persons have an interest in the outcome of this appeal.

Avallone, Zachary A.

Boynton, Brian M.

Carmichael, Andrew E.

Carroll, Sarah

Clark, Sarah J.

Coppolino, Anthony J.

Dover, Marleigh D.

Enlow, Courtney D.

Gannam, Roger K.

Haas, Alexander K.

Handberg, Roger B.

Harrington, Sarah E.

Macik, Thomas More

Mast, Jr., Richard L.

Merritt, R. Charles

Merryday, Hon. Steven D.

Mihet, Horatio G.

Porcelli, Hon. Anthony E.

Powell, Amy E.

Ross, Casen B.

Scarborough, Charles W.

Schmid, Daniel Joseph

Staver, Anita

Staver, Mathew D.

Sturgill Jr., Lowell V.

Wilson, Hon. Thomas G.

Counsel for Defendants-Appellants further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: March 28, 2022

/s/ Sarah J. Clark
SARAH J. CLARK