

No. 22-10077

**In the United States Court of Appeals
for the Fifth Circuit**

U.S. NAVY SEALs 1-26; U.S. NAVY SPECIAL WARFARE COMBAT-
ANT CRAFT CREWMEN 1-5; U.S. NAVY EXPLOSIVE ORDNANCE
DISPOSAL TECHNICIAN 1; U.S. NAVY DIVERS 1-3,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America; LLOYD AUSTIN, Secretary, U.S. Department of Defense, individually and in his official capacity as United States Secretary of Defense; UNITED STATES DEPARTMENT OF DEFENSE; CARLOS DEL TORO, individually and in his official capacity as United States Secretary of the Navy,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-01236

MOTION TO CONSOLIDATE APPEALS

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Pursuant to Federal Rule of Appellate Procedure 3(b)(2), Plaintiffs-Appellees hereby move this Court to consolidate separate appeals from the same underlying action in the United States District Court for the Northern District of Texas. In support of this motion, Plaintiffs-Appellees state as follows:

1. On January 3, 2022, the District Court entered an Order granting Plaintiffs-Appellees' Motion for a Preliminary Injunction in *U.S. Navy SEALs 1-26 v. Austin*, No. 4:21-cv-01236-O (ECF 66).

2. On January 21, 2022, Defendants-Appellants filed a notice of appeal of the January 3 Order granting a preliminary injunction, which this Court has docketed as case number 22-10077.

3. On March 28, 2022, in the same underlying action, the District Court entered an Order granting Plaintiffs-Appellees' Motion to Certify Class and Motion for a Class-Wide Preliminary Injunction in *U.S. Navy SEALs 1-26 v. Austin*, No. 4:21-cv-01236-O (ECF 140).

4. On May 27, 2022, Defendants-Appellants filed a notice of appeal of the March 28 Order granting class certification and a class-wide preliminary injunction, which this Court has docketed as case number 22-10534.¹ The Court has already noted this new appeal is related to the first appeal in 22-10077.

¹ Defendants-Appellants did not petition for permission to appeal the certification of the class on an interlocutory basis, so there is no jurisdiction to review that issue at this time. Fed. R. Civ. P. 23(f).

5. Therefore, this Court now has pending before it two separate appeals, both of which ask this Court to review orders that granted preliminary injunctions on the same claims in the same underlying action.

6. The two above-referenced appeals present substantially similar questions of law and fact. Specifically, each appeal involves the question whether Plaintiffs-Appellees are likely to succeed in their claims that the Navy unlawfully discriminated against—and unlawfully refused to accommodate—Plaintiffs-Appellees’ religious beliefs in compelling Plaintiffs-Appellees to take the COVID-19 vaccine and in granting COVID-19 vaccine exemptions for secular but not religious reasons. Further, the appeals at issue arise from the same case and the same underlying facts. In fact, the injunctions at issue are identical except that one applies to the entire class and the other applies only to Plaintiffs-Appellees.

7. Consolidation will conserve judicial resources. Substantial progress in the briefing for case number 22-10077 already has occurred. Defendants-Appellants filed their initial brief on March 28, 2022, and the response brief for Plaintiffs-Appellees is due on June 10, 2022. To conserve judicial resources, Plaintiffs-Appellees ask that the appeals be consolidated and propose the following consolidated briefing schedule:

- a. Defendants-Appellants file a supplemental initial brief for both appeals, due 40 days after the date that the record for the later-docketed appeal is filed.
- b. Plaintiffs-Appellees file an response brief for both appeals, due 30 days after the date that the supplemental initial brief is filed.

- c. Defendants-Appellants file a reply brief for both appeals, due 30 days after the date that the answer brief is filed.
8. Counsel for Plaintiffs-Appellees has conferred with counsel for Defendants-Appellants regarding this Motion and the relief that it requests. Defendants-Appellants oppose the relief sought by this Motion.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and consolidate the above-referenced appeals.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On May 23, 2022, Heather Hacker, counsel for Plaintiffs-Appellees, conferred by e-mail with Sarah Clark, counsel for Defendants-Appellants, regarding this Motion and the relief that it requests. Defendants-Appellants oppose the relief sought by this Motion.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER

CERTIFICATE OF SERVICE

On June 1, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 526 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER