

No. 22-10077 consolidated with No. 22-10534

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

U.S. NAVY SEALs 1-26; U.S. NAVY SPECIAL WARFARE
COMBATANT 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

**RESPONSE TO MOTION TO HOLD APPEAL IN
ABEYANCE**

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There is no reason to abate the appeal or remove the argument from the calendar, as the Court already implicitly recognized in its January 3 Order carrying the motion with the case. Regardless, the sole basis for the Defendant-Appellants' Motion to Hold Appeal in Abeyance has now been negated. Thus, Plaintiffs-Appellees respectfully request that the Court deny the Motion.

1. The sole basis for Defendants-Appellants' motion was that the Secretary of Defense had not yet implemented the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA). *See* Mot. to Hold Appeal in Abeyance at 3 (“The government accordingly requests that this appeal be held in abeyance, and the oral argument removed from the February 6 calendar, pending the Secretary’s action in response to Section 525.”).

2. The Secretary has now implemented that statute. On January 10, 2023, the Secretary issued a Memorandum rescinding the vaccine mandate in compliance with the FY23 NDAA.¹ The Memorandum states that no individuals serving in the Armed Forces may be separated solely because of their refusal to take the COVID-19 vaccine and orders that any adverse actions associated with any denials of religious accommodation requests be removed from such individuals’ records.² But the Memorandum goes on to state that vaccination status may still be considered “in

¹ Secretary of Defense, Memorandum, “Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces” (Jan. 10, 2023), <https://media.defense.gov/2023/Jan/10/2003143118/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-ON-RESCISSION-OF-CORONAVIRUS-DISEASE-2019-VACCINATION-REQUIREMENTS-FOR-MEMBERS-OF-THE-ARMED-FORCES.PDF>.

² *Id.*

making deployment, assignment, and other operational decisions.”³ The Navy also issued guidance on January 11.⁴

3. As suggested by Defendants-Appellants in their Motion, *see* Mot. at 2, on January 4, the Court ordered the parties to file supplemental letter briefs addressing the issue of mootness. Thus, Plaintiffs-Appellees will address the above Memorandum and guidance and the issue of mootness in their supplemental brief to be filed on January 27, 2023.

³ *Id.* at 2.

⁴ NAVADMIN 005/23, “REMOVAL OF COVID-19 VACCINATION MANDATE” (Jan. 11, 2023), <https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2023/NAV23005.txt?ver=a3G5K2LQwybusE7ETK7uLQ%3d%3d>.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that the Court deny the Motion to Hold Appeal in Abeyance.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On January 13, 2023, this motion 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; and (2) the electronic submission is an exact copy of any paper document in compliance with Fifth Circuit Rule 25.2.1.

/s/ Heather Gebelin Hacker
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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 349 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).

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