IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO – Cincinnati Division

HUNTER DOSTER, et. al.	:	Case No.: 1:22-cv-00084
Plaintiff	:	
v.	:	
Hon. FRANK KENDALL, et. al.	:	
Defendants	:	

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITY

Plaintiffs provide this brief response to Defendants' Notice of Supplemental Authority, in which they cite *Austin v. U.S. Navy SEALs 1-26*, No. 21A477 (U.S. Mar. 25, 2022). In that case, the Supreme Court granted a limited stay, but did not disturb lower court injunctions prohibitions on disciplining or separating military members, all in violation of RFRA, but instead only "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions."

The Court could have gone further, as Justice Kavanaugh did. It could have stayed the entirety of the injunction as to the lower court injunctions prohibitions on disciplining or separating military members, but it did not.

Seizing upon a concurrence that was joined by a single justice (out of nine), Justice Kavanaugh, the Government now argues it wins under the rationale put forward by Justice Kavanaugh. That is an especially strange proposition, since generally five Justices are necessary to make a binding opinion, not one. This is not the first time a governmental actor has sought to seize upon a single-justice concurrence. "Defendants believe [this concurrence] decides this matter." *Ramsek v. Beshear*, 468 F. Supp. 3d 904, 911 (KYED 2020). "For several reasons, that

demands too much of the preliminary views of one Justice." *Id.* "At the very least, if the concurring opinion is to be accorded weight, then the fact that no other Justices joined the opinion must be acknowledged and considered." *Id.* at 912.

In *Marks v. United States*, the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of the five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). In expanding on this principle, the Marks court addressed cases decided on the merits and the principle articulated has since been applied in those circumstances. *See id.* at 193-94 (discussing concurring opinions in First Amendment decisions).

"Logically, where a concurring opinion accompanies a decision in which the court did not fully address the merits, like here, the opinion cannot be said to carry more weight than an opinion accompanying a decision on the merits." *Ramsek*, 468 F. Supp. 3d 904, 912.

As a plurality of the Supreme Court recently explained, "a single Justice writing only for himself" does not have "the authority to bind this Court to propositions it has already rejected." *Ramos v. Louisiana*, --- U.S. ---, 140 S. Ct. 1390, 1402, 206 L. Ed. 2d 583 (2020). And, the Supreme Court did *just* decide a RFRA case, that largely rejects the propositions the Government advances here: a uniform and unbridled degree of deference. *Ramirez v. Collier*, 2022 U.S. LEXIS 1670, 540 U.S. --- (2022). There, as here, "no basis for deference exists given the [Government]'s history of allowing [medical and administrative exemptions." *Id.* In light of Ramirez, it would be a mistake to read more into Austin, other than its limited application that Courts should not issue orders that impede upon "deployment, assignment, and other operational decisions."

Here, the broad reading ascribed by the Government to the decision in *Austin*, No. 21A477, which itself stayed only that aspect of the District Court's decision that applied to "deployment, assignment, and other operational decisions," but left in place that portion of the lower court's decision that stopped punitive actions against the Plaintiffs, based a single-Justice concurrence by Justice Kavanaugh that can be read to go further, strains incredulity.

In this matter, Plaintiffs seek only the relief that extended to the portion of the lower court judgment that the Supreme Court left in place: a prohibition against disciplinary or separation measures to these Plaintiffs under RFRA. If anything, the fact the Supreme Court left those aspects of the lower court's injunctions in place can be read as approving of them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing by CM/ECF, this 28 day of March, 2022.

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