

**MARK BRNOVICH**  
**ATTORNEY GENERAL**  
(Firm State Bar No. 14000)

Joseph A. Kanefield (No. 15838)  
Brunn (Beau) W. Roysden III (No. 28698)  
Drew C. Ensign (No. 25463)  
James K. Rogers (No. 27287)  
2005 N. Central Ave  
Phoenix, AZ 85004-1592  
Phone: (602) 542-8540  
[Joseph.Kanefield@azag.gov](mailto:Joseph.Kanefield@azag.gov)  
[Beau.Roysden@azag.gov](mailto:Beau.Roysden@azag.gov)  
[Drew.Ensign@azag.gov](mailto:Drew.Ensign@azag.gov)  
[James.Rogers@azag.gov](mailto:James.Rogers@azag.gov)

*Attorneys for Plaintiffs Mark Brnovich  
and the State of Arizona*

**WILENCHIK & BARTNESS PC**

Jack Wilenchik  
The Wilenchik & Bartness Building  
2810 North Third Street  
Phoenix, AZ 85004  
Phone (602) 606-2816  
JackW@wb-law.com

*Attorney for Plaintiff John Doe*

Michael Napier (No. 002603)  
Eric R. Wilson (No. 030053)  
Cassidy L. Bacon (No. 031361)  
2525 E. Arizona Biltmore Cir, Ste C-135  
Phoenix, Arizona 85016  
Phone: 602.248.9107  
[mike@napierlawfirm.com](mailto:mike@napierlawfirm.com)

*Attorneys for Plaintiffs PLEA and United  
Phoenix Firefighters Association Local 493*

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as  
Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as  
President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

**PLAINTIFFS' MOTION UNDER  
RULES 42(B) AND 65(A)(2) TO  
CONSOLIDATE TRIAL ON THE  
MERITS OF COUNTS I-VIII, WITH  
THE PRELIMINARY  
INJUNCTION HEARING**

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**MOTION**

Plaintiffs respectfully move for consolidation of trial on the merits of Counts I-VIII (the “Vaccine Mandate Counts”) of the Second Amended Complaint (Doc. 70) with the hearing or other adjudication of their Third Motion for Preliminary Injunction (Doc. 72).

This Motion is made pursuant to Rules of Civil Procedure 42(b) and 65(a)(2). Rule 42(b) permits the Court to order separate trials of one or more separate claims “[f]or convenience, to avoid prejudice, or to expedite and economize.” *See Athbridge v. Aetna Cas. & Sur. Co.*, 604 F3d 625, 635 (DC Cir. 2010) (finding bifurcation appropriate “where the evidence offered on two different issues will be wholly distinct” (quoting *Vichare v. AMBAC Inc.*, 106 F.3d 457, 466 (2d Cir. 1996)). The evidence for the Vaccine Mandate Counts will be wholly distinct from the evidence offered on Counts IX-XIII, which relate to certain Defendants’ Parole Policies for arriving aliens. Separate trial on the Vaccine Mandate Counts is thus appropriate.

Plaintiffs further request under Rule 65(a)(2) that trial on the merits for the Vaccine Mandate Counts be advance and consolidated with the hearing on the pending Third Motion for Preliminary Injunction (Doc. 72). Good cause supports this request for four reasons.

*First*, consolidation will serve the interests of judicial economy. The issues presented regarding the Vaccine Mandate Counts are almost exclusively legal and no facts appear to be genuinely contested. Moreover, the issues for preliminary and permanent injunctive relief are nearly identical: “The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546, n.12 (1987).

Conversely, another round of briefing and hearings would needlessly waste the resources of the parties and this Court. If this Court wishes to have supplemental briefing on particular issues following the hearing or other adjudication of the Third Motion for Preliminary Injunction, the State would be happy to submit such briefing. But simple

1 repetition of existing arguments for permanent injunctive relief is completely avoidable, and  
2 should be avoided here.

3 *Second*, no actual trial should be required for the Vaccine Mandate Claims, so granting  
4 this motion would merely consolidate consideration of all legal issues into a single hearing.  
5 None of the material factual issues appear to be disputed. Indeed, Federal Defendants did  
6 not submit or seek to submit any live evidence in connection with their opposition to the  
7 earlier preliminary injunction motion.

8 *Third*, consolidation under Rule 65(a)(2) would obviate any need to resolve issues of  
9 the relative effectiveness of preliminary injunctive relief relative to permanent relief. In other  
10 words, this eliminates the need for the Court to engage further in the issue of when precisely  
11 Defendants are going to require contractors to amend their contracts. The Plaintiffs that are  
12 challenging the contractor mandate have clearly established standing for declaratory relief  
13 about the lawfulness of such requirements in the first place. Consolidation would thus simplify  
14 the issues presented, obviate the need for repetitive briefing, and prejudice no one.

15 **CONCLUSION**

16 For the foregoing reasons, Plaintiffs Motion under Rules 42(b) and 65(a)(2) trial on the  
17 merits of Counts I-VIII (the “Vaccine Mandate Counts”) of the Second Amended Complaint  
18 with the hearing or other adjudication of their Third Motion for Preliminary Injunction should  
19 be granted.

20 RESPECTFULLY SUBMITTED this 19th day of November, 2021.

21  
22 **MARK BRNOVICH**  
**ATTORNEY GENERAL**

23  
24 By: /s/ James K. Rogers  
Joseph A. Kanefield (No. 15838)  
Brunn W. Roysden III (No. 28698)  
Drew C. Ensign (No. 25463)  
James K. Rogers (No. 27287)

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27 *Attorneys for Plaintiffs Mark Brnovich and the State of*  
28 *Arizona*

**WILENCHIK & BARTNESS PC**

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By: /s/ Jack Wilenchik (with permission)  
Jack Wilenchik (No. 029353)

*Attorney for Plaintiff John Doe*

**NAPIER, BAILLIE, WILSON, BACON & TALLONE, P.C.**

By: /s/ Michael Napier (with permission)  
Michael Napier (No. 002603)  
Eric R. Wilson (No. 030053)  
Cassidy L. Bacon (No. 031361)

*Attorneys for Plaintiffs PLEA and United Phoenix Firefighters Association Local 493*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of November, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants, who have appeared, are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing. Other counsel will be served with this Motion when they are served pursuant to Rule 4 or otherwise accept service.

/s/ James K. Rogers  
*Attorney for Plaintiffs Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as  
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**[PROPOSED] ORDER**

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Having considered the Plaintiffs' Motion Under Rules 42(B) and 65(a)(2) to Consolidate Trial on the Merits of Counts I-VIII, With the Preliminary Injunction Hearing, **IT IS HEREBY ORDERED** granting the motion.