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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 Mark Brnovich *et al.*,
20 Plaintiffs,

21 vs.

22 Joseph R. Biden, *et al.*,
23 Defendants.
24

No. 2:21-cv-01568-MTL

**FEDERAL DEFENDANTS' RESPONSE
TO 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 (ECF NO. 73)**

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RESPONSE

The Federal Government Defendants¹ (“Defendants”) hereby consent to Plaintiffs’ request that the Court adjudicate the merits of Counts I through VIII of the Second Amended Complaint, ECF No. 70, separately from the merits of Counts IX through XIII. *See* Pls.’ Mot. Under Rules 42(b) and 65(a)(2), ECF No. 73 at 1 (“Mot.”). As Plaintiffs observe, the former eight counts concern Executive Orders regarding COVID-19 vaccination and have been the subject of extensive preliminary-injunction briefing, while the latter five counts concern parole policies for arriving aliens and have not yet been briefed. Because there will be little, if any, overlap between the evidence and argumentation for Counts I through VIII and the evidence and argumentation for Counts IX through XIII, it would be sensible to separately adjudicate the merits of these two sets of claims.

Defendants generally agree with Plaintiffs’ assertion that it would be efficient to consolidate adjudication of the pending motion for preliminary injunction with adjudication of the merits of Counts I through VIII. *See* Mot. at 1–2. However, Defendants cannot presently consent to this request with respect to Counts III and IV, which are brought by an unidentified federal employee seeking to proceed under the alias “John Doe,” because knowing this Plaintiff’s identity may be crucial to assessing whether he has Article III standing and how the Civil Service Reform Act applies to his claims. *See* Defs.’ Opp’n to Pl.’s Mot. for Leave to Proceed Pseudonymously 4, ECF No. 53. Defendants have opposed Plaintiff Doe’s request to proceed pseudonymously and asked that, at a minimum, the Court require this individual to reveal his identity to Defendants under a protective order so that Defendants can fairly respond to his claims. *See generally id.* Plaintiff Doe resists this request on the puzzling ground that the federal government might grant him the relief he has requested—an exception to the vaccination requirement—if it knew his identity. *See* Pl. John Doe’s Reply ISO Pls.’ Mot. to Proceed Pseudonymously 2, ECF No. 67.

¹ Plaintiffs’ Second Amended Complaint also names the City of Phoenix as a Defendant. This response is submitted on behalf of all Defendants other than the City.

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Once the pending motion to proceed pseudonymously has been resolved and Defendants have received an opportunity to supplement their defense to Counts III and IV, if necessary, Defendants would not object to consolidation under Federal Rule of Civil Procedure 65(a)(2). Defendants agree with Plaintiffs’ assertion that Counts I through VIII present almost exclusively legal issues, such that discovery and trial procedures are unnecessary. *See* Mot. at 1–2. Defendants further agree that consolidation would conserve the Court’s and the parties’ resources. Ultimately, Defendants defer to the Court on the extent to which consolidation under Rule 65(a)(2) is desirable here. Of course, Defendants would be happy to provide further briefing or oral argument to the extent it would be helpful to the Court.

Respectfully submitted this 3rd day of December, 2021.

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