

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID G. DONOVAN, et al,

Plaintiffs-Appellants,

vs.

JOSEPH R. BIDEN, et al,

Defendants-Appellees.

No. 22-35474

D.C. No.: 4:21-cv-05148-
TOR

**Appellees' Opposition to Motion to Consolidate and
Motion to Hold this Appeal in Abeyance**

Defendants-appellees oppose appellants' motion to consolidate this case with another appeal pending in this Court, *Brnovich v. Biden*, No. 22-15518. (Dkt. No. 11), and instead ask that this case be held in abeyance pending the Court's resolution of *Brnovich*.

1. This case and *Brnovich* both presented challenges to Executive Order 14,042, 86 Fed. Reg. 50,985 (Sept. 14, 2021), which directs federal agencies to include in certain contracts a clause requiring covered contractor employees to follow COVID-19 safety protocols, including becoming vaccinated against the COVID-19 virus.

The district court in *Brnovich* issued a final decision on the

merits of the plaintiffs' claims and permanently enjoined enforcement of the Executive Order. *See Brnovich v. Biden*, 562 F. Supp. 3d 123 (D. Ariz. 2022). In particular, the court concluded that the Executive Order constituted a public health measure not clearly authorized by Congress and raised nondelegation and federalism concerns that, in its view, counseled against upholding the Executive Order. The government has filed its opening brief in *Brnovich*, and briefing is scheduled to be completed by early September.

Plaintiffs here also challenged the President's authority to issue the Executive Order and asserted a variety of other contentions as well. The district court held as a threshold matter that plaintiffs' allegations did not demonstrate the existence of a live controversy. *Donovan, et al. v. Vance, et al.*, Case No. 4:21-CV-05148-TOR (E.D. Wash.), Dkt. No. 86 at 13-14. After reviewing plaintiffs' second amended complaint, the court concluded that "Plaintiffs' continued failures to address the shortcomings in their various pleadings demonstrates a third opportunity to amend would be futile." The court then "address[ed] the current legal and factual deficiencies for clarity."

Plaintiffs have appealed, and their opening brief is due on September 22, 2022.

2. Under the circumstances, there is no sound reason to delay consideration of the government's appeal in *Brnovich* in order to hear it together with plaintiffs' appeal here, which presents issues that are not part of the *Brnovich* appeal.

Instead, judicial economy will be best served by holding this appeal in abeyance pending a decision *Brnovich*, which will resolve the question of the President's authority to issue Executive Order 14,042, which is also the primary challenge raised by plaintiffs here. Because the government is currently enjoined from enforcing the Executive Order pursuant to a separate nationwide injunction, *see Georgia v. Biden*, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021), *appeal pending* No. 21-14269 (11th Cir.), plaintiffs can assert no plausible harm resulting from this course, even apart from the fact that their claims, as the district court held, are not ripe.

CONCLUSION

The Court should deny the motion for consolidation and instead

hold this case in abeyance pending disposition of *Brnovich v. Biden*,
No. 22-15518.

DATED this 21st day of July, 2022.

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/s/John T. Drake

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CERTIFICATE OF SERVICE

I hereby certify that on this day that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System.

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I certify that on this day I mailed a copy via U.S. Mail to the following: N/A

s/ Molly M.S. Smith

Assistant U.S. Attorney