

No. 22-35474

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DAVID G. DONOVAN, *et al.*

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, *et al.*

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington
No. 4:21-cv-05148-TOR
Hon. Thomas O. Rice

APPELLANTS' MOTION TO CONSOLIDATE

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Pursuant to Rules 3(b)(2), 27, and 33 of the Federal Rules of Appellate Procedure (“FRAP”), Plaintiff-Appellants respectfully request the consolidation of the above-captioned appeal with Appeal No. 22-15518, *Mark Brnovich, et al. v. Joseph Biden, et al. Brnovich* was recently filed with this Court and involves challenges to one of the two Presidential Executive Orders (“EO”), EO 14042 and EO 14043 challenged by Appellees in the lower Court; namely, EO 14042. Consolidation should be granted as it is in the interest of justice, respects judicial economy, and would result in little to no delay.

I. INTRODUCTION

This appeal arises out of an order issued in the District Court in and for the Eastern District of Washington’s (“District Court”) May 12, 2022, Granting Defendants’ (here, Appellees) Motion to Dismiss Plaintiffs’ request to enjoin EOs 14042 and 14043 in Case No.: 4:21-cv-05148-TOR. EFF No. 86. Plaintiffs filed a Notice of Appeal of that order on June 9, 2022. ECF No. 88. This appeal assigns error to the District Court’s order dismissing Appellee’s claims related to EOs 14042 and 14043, maintaining EOs 14042 and 14043.

Appeal No. 22-15518 is taken by President Biden, among others, challenging a decision issued by the District Court in and for Arizona permanently enjoining EO 14042 within that district (i.e., within the State of Arizona). See

Mark Brnovich, et al v. Joseph Biden, et al., No. CV-21-01568-PHX-MTL, ECF No. 165.

Appellees notified Appellants' counsel via email on June 21, 2022, of the intent to file this motion to consolidate the appeals. Appellants responded on June 22, 2022, indicating that they did not consent to this request at the time. Appellants further indicated that they may request this Court to hold this matter in abeyance until the *Brnovich* matter is decided. Appellees will affect electronic service of this Motion through the CM/ECF system.

II. DISCUSSION

A. Consolidation Serves the Interest of Justice and will not Delay Justice.

Consolidating these appeals will streamline the appeals and will save the parties and the court time and resources. Consolidation is justified as the appeals involve similar factual and the same legal issues. Specifically, Appellants challenge the District Court's order denying an injunction of EO 14042 and EO 14043, while Appellants in Appeal No. 22-15518 challenge the District Court's issuance of a permanent injunction of EO 14042.

FRAP 3(b)(2), which was adopted "to encourage consolidation of appeals whenever feasible." *See* 1967 Advisory Committee Notes to FRAP 3. Consolidation will assist this Court in avoiding conflicting decisions, as the same

legal principles are at issue (i.e., a challenge to the President’s authority to issue the challenged Executive Orders) for which contradictory orders will cause confusion. Moreover, each case was lodged at the District Court level with a request for the same relief: injunctive relief.

Without consolidation, these appeals will require two separate panels of this Court to review and analyze the same issues which were raised with extensive records that include information and pleadings regarding the President’s Executive Orders. Each earlier case was supported by evidence, including declarations from similarly situated Plaintiffs (i.e., individuals who were harmed by the vaccine mandate by requiring the individuals to choose between individual liberties and retaining employment). Consolidation would eliminate the redundancy of such an effort by this Court and would allow the court to resolve this issue in an expedited manner. Consolidation would also prevent separate appellate panels from drawing different, and possibly conflicting, conclusions about the substantial record in the case below. A single challenge to the President’s authority will save judicial resources by having the case heard once.

The above circumstances demonstrate that consolidation is appropriate as the court has jurisdiction over each appeal and consolidation is “in the interests of justice.” See *United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978). Moreover, consolidation is warranted as the same issues are on appeal in each

matter. See *California v. Mesa*, 813 F.2d 960, 961 n. 1 (9th Cir. 1987), where this Court ordered consolidation for two cases “[b]ecasue they raise the same legal issues.” *Id.*

Finally, consolidation will not delay justice in either case. Appellee seeks an order consolidating this appeal with Appeal No. 22-15518 as such an action would be consistent with the FRAP, existing case law, and would be in the interest of justice.

B. Appellees Request a Case Management Conference if Consolidation is not Granted.

If the Court determines that consolidation is not appropriate, Appellants respectfully request a case management conference to discuss the most efficient way to proceed with this appeal. For the convenience of the parties, Appellants respectfully request that the case management conference be conducted by telephone.

III. CONCLUSION

WHEREFORE, Appellants respectfully move this court to consolidate these cases or, in the alternative, to schedule a case management conference, and for such other relief as the court deems just and appropriate.

DATED this 11th day of July 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 804 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

DATED this 11th day of July 2022.

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STATEMENT OF RELATED CASES

I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Appeal No. 22-15518, *Mark Brnovich, et al. v. Joseph Biden, et al.* contains the same issue related to Executive Order 14042.

DATED this 11th day of July 2022.

ARNOLD & JACOBOWITZ PLLC

/s/ Nathan J. Arnold

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2022, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 11th day of July 2022.

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