MINUTE ENTRY
KAYLA D. MCCLUSKY
U.S. MAGISTRATE JUDGE
MARCH 28, 2022

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

STATE OF LOUISIANA, ET AL.	**CIV. ACTION NO. 3:21-4370**
VERSUS	**JUDGE TERRY A. DOUGHTY**
XAVIER BECERRA, ET AL.	**MAG. JUDGE KAYLA D. MCCLUSKY**

In *Brick v. Biden*, Civil Action No. 2:21-cv-04386, Plaintiffs have filed a Motion to Consolidate that case with the above-referenced case. A copy of the motion is appended to this Minute Entry.

No opposition was filed in the *Brick* case, and the time to do so has now passed. However, notice was not given to the parties in this case. Accordingly, if any party in this action wishes to oppose the motion to consolidate, a written opposition must be filed no later than fourteen (14) days from the date of this Minute Entry.

KDM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

SANDY BRICK, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, *in his official capacity as President of the United States*, *et al.*, Defendants.	No. 2:21-cv-04386-TAD-KK **Motion to Consolidate**

Plaintiffs respectfully move to consolidate this case with *Louisiana v. Becerra,* No. 3:21-cv-4370 (W.D. La.) under Federal Rule of Civil Procedure 42(a). In support, Plaintiffs state as follows:

On December 28, 2021, Judge Cain reassigned this matter to Judge Doughty because "a related challenge is pending in this court" before Judge Doughty and "the interests of judicial economy and an efficient resolution to both cases" would be served by such reassignment. Dkt. 7. This Court also suspended briefing on Plaintiffs' Motion for Preliminary Injunction in this case because it intended to decide a similar motion by January 2, 2022. Dkt. 8.

Rule 42(a) permits a court to consolidate two or more actions that "involve a common question of law or fact." The stated purpose of doing so is "to avoid unnecessary costs or delay." "[T]he decision to invoke the rule is entirely within the discretion of the district court." *Gentry v. Smith,* 487 F.2d 571, 581 (5th Cir. 1973). Fifth Circuit district judges are "urged to make good use of Rule 42(a) . . . where there

is involved a common question of fact and law as to the liability of the defendant in order to expedite the trial and eliminate unnecessary repetition and confusion." *Dupont v. Southern Pacific Co.,* 366 F.2d 193, 195 (5th Cir. 1966). Among the factors courts consider when weighing consolidation are whether 1) the actions are pending before the same court; 2) the actions involve a common party; 3) there is any risk of prejudice or confusion from consolidation; 4) inconsistent adjudications of common factual or legal questions will result if the matters are tried separately; 5) consolidation will reduce the time and costs of trying both matters separately; and 6) the cases are at the same pre-trial stage. *Shively v. Ethicon, Inc.,* Nos. 17-0716 & 17-0721, 2018 U.S. Dist. LEXIS 94075 at *3 (W.D. La., June 1, 2018).

First, as stated above, both cases are now pending before the same court. Second, all five defendants in *Louisiana* – The U.S. Department of Health and Human Services ("HHS"), HHS Secretary Becerra, the Administration for Children and Families ("ACF"), ACF Principal Deputy Assistant Secretary Jooyeun Chang, and Office of Head Start director Bernadine Futrell – are defendants in this case. *Brick* Cmplt. ¶¶ 10-14; Dkt. 1 in 3:21-cv-4370-TAD-KDM (Dec. 21, 2021) ("*La.* Cmplt.") ¶¶ 28-32. This case has two further defendants – President Biden and the Office of Head Start – one of whom is a government official tasked with duly executing the law, sued in his official capacity; and the other is a federal subunit of ACF, and is represented in *Louisiana* via Ms. Futrell. *Brick* Cmplt. ¶¶ 8-9.

Third, there is no risk of confusion from consolidation. *Louisiana,* like this case, involves a facial challenge to the Head Start Mandate. *Brick* Cmplt., Dkt. 1 ¶ 1-3; *La.* Cmplt. ¶ 1.

Fourth, if the cases are tried separately, and the Head Start Mandate is found constitutional in one and not the other, an inconsistent adjudication could result.

Fifth, consolidation will reduce the cost of both actions. There is no reason to engage in two distinct sets of discovery over the same matter, for example.

Sixth, the cases are both in their infancy. They were filed within a single day of one another, each less than two weeks ago. Though this Court has heard and decided the motion for a preliminary injunction in *Louisiana*, Dkt. 15, it has taken no action on the merits.

Finally, this case should be consolidated with *Louisiana* rather than stayed pending the outcome in *Louisiana*. Plaintiffs are individual employees of Head Start programs subject to the vaccination mandate, and as such their individual interests are different from those of the State Plaintiffs, whether in their sovereign capacities or as Head Start operators (their proprietary capacity). Plaintiffs are the targets of the mandate; the program operators (employers) are merely the middle man between HHS and "the unvaccinated."[1]

Plaintiffs have individual constitutional interests in their medical freedom and privacy. *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 U.S. Dist. LEXIS 229949, at

[1] *See* Remarks of the President, September 9, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

*42 (W.D. La. Nov. 30, 2021) ("citizens will suffer irreparable injury by having a substantial burden placed on their liberty interests because they will have to choose between losing their jobs or taking the vaccine."). Such a mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). *Accord Sambrano v. United Airlines, Inc.*, No. 21-11159, 2021 U.S. App. LEXIS 36679, at *6 (5th Cir. Dec. 13, 2021) (Ho, J., dissenting) ("irreparable injury results when employees are forced to choose between their beliefs and their benefits.").

The plaintiffs in *BST Holdings*, for instance, include six CaptiveAire employees whose personal circumstances illustrate the lack of narrow tailoring due to the nature of their work (they are HVAC maintenance men who work primarily outside but still occasionally interact with customers). *See* 17 F.4th at 607 (discussing over and underinclusive nature of mandate based on different job types). In a similar way, the Plaintiffs here can add a personal dimension based on their individual experiences unavailable to the States as employers or sovereigns.

Finally, a 2-1 panel of the Eleventh Circuit has held that a state's sovereign or proprietary interests are not sufficient for standing in a similar case. *Florida v. HHS*, No. 21-14098, 2021 U.S. App. LEXIS 35998 (11th Cir. Dec. 6, 2021). Though Plaintiffs disagree with this decision on multiple fronts, it is another reason why their consolidation makes this case a stronger vehicle for final resolution because it establishes an independent basis for standing.

These are important considerations which individual employees have standing to make and are best positioned to argue, such that merely staying their case while excluding their voices and arguments from the *Louisiana* case would be a substantial loss to the overall decision.

Plaintiffs have consulted counsel for Plaintiff States and for the Defendants, and the Plaintiff States have consented to consolidation. Counsel for the Defendants asked that Plaintiffs represent their position as follows: "Defendants do not believe consolidation is appropriate at this time given that the government's time to appeal the preliminary injunction in the Louisiana case has not run. If the government appeals, Defendants believe that both *Brick* and *Louisiana* should be held in abeyance pending the appeal."

In an effort to promote judicial efficiency rather than to complicate the existing case, Plaintiffs pledge to regularly consult with counsel for Plaintiff States in order to avoid duplicative briefing, discovery, or motion practice.

Consolidation under "Rule 42(a) is the proper solution to the problems created by the existence of two or more cases involving the same parties and issues, simultaneously pending in the same court." *Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 592 (5th Cir. 2018) (cleaned up). That is exactly the situation here. For that reason, this case should be promptly consolidated with *Louisiana v. Becerra,* No. 3:21-cv-4370 (W.D. La.).

Dated: January 6, 2022

Respectfully Submitted,

/s/ Sarah Harbison

Sarah Harbison
Pelican Institute for Public Policy
400 Poydras St., Suite 900
New Orleans, LA 70130
Telephone: 504-952-8016
sarah@pelicaninstitute.org

Daniel R. Suhr
Jeffrey M. Schwab*
Liberty Justice Center
141 West Jackson Blvd., Suite 1065
Chicago, Illinois 60604
Telephone: 312-637-2280
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

*Pro Hac Vice forthcoming
Attorneys for Plaintiffs