UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

ROBERT F. KENNEDY, JR. ET AL.	**CIVIL ACTION NO. 3:23-cv-00381**
VERSUS	**JUDGE: TERRY A. DOUGHTY**
JOSEPH R. BIDEN, ET AL.	**MAG. JUDGE: KAYLA D. MCCLUSKY**

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PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF CONSOLIDATION

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Before this Court is Plaintiffs' motion to consolidate the above-captioned case with *Missouri v. Biden*, 3:22-cv-01213 (W.D. La.). The two cases are brought against common defendants based on the same facts, and both allege that the Federal Government's massive campaign to induce social media censorship violates the First Amendment. This Court gave all non-moving parties a deadline of July 19 to respond to Plaintiffs' consolidation motion. All those parties have now responded.

Defendants in both actions, apart from issues pertaining to standing, do not oppose consolidation. [*Kennedy v. Biden*, Doc. 25.] Similarly, the state plaintiffs in *Missouri v. Biden* do not oppose consolidation. [*Missouri* action, Doc. No. 310.] However, the *individual* plaintiffs in *Missouri* (hereafter "*Mo*. Ind. Pls.") do oppose the motion. [*Missouri* action, Doc. No. 311.] This memorandum is respectfully submitted in reply to their opposition.

Plaintiffs deeply regret the position taken by the *Mo*. Ind. Pls., for whom Plaintiffs have the utmost respect. Under well-established law, however, consolidation is plainly appropriate here;

indeed, it is virtually mandated, given the manifest waste and inefficiency duplicate discovery, motions practice, and trial would cause. The *Mo*. Ind. Pls. barely contest that basic truth. Instead, their principal argument is essentially ad hominem.

One of the named Plaintiffs in the instant case is Robert F. Kennedy, Jr., who is now running for President, and the *Mo.* Ind. Pls. say that Mr. Kennedy's involvement will cause their claims to be "tainted" by "politicization" and by "tabloid" newspaper coverage. [*Missouri* action, Doc. No. 311, at 2.] Plaintiffs are deeply saddened by this reaction—especially given that Mr. Kennedy has been as much a victim of the Government's censorship campaign as any of the *Mo*. Ind. Pls., and has stood with them at every turn and passionately defended their claims—but for the reasons given below, their objection is improper and invalid.

The *Mo.* Ind. Pls. also contend, albeit a little half-heartedly, that consolidation will cause "delay" and "complications." *Id.* at 9-10. But if that were true, the *state* plaintiffs—Louisiana and Missouri—as well the honorable Attorneys General representing those states would surely be opposing consolidation on such grounds. They are not opposing, however, and their non-opposition powerfully confirms that the objections raised by the *Mo*. Ind. Pls. are insubstantial.

FACTUAL STATEMENT

The instant case and *Missouri v. Biden* are almost factually identical. There is, however, one major difference between them with legal significance. In *Missouri*, the plaintiffs are individuals and two states, resting their claims primarily on the First Amendment rights of censored speakers. By contrast, in this case, one of the Plaintiffs—Children's Health Defense—is a nonprofit organization representing over 70,000 consumers of health information nationwide, resting its claims on the First Amendment right to receive information and ideas.

This difference between the two cases could make all the difference to the ultimate result. Standing will of course be an issue on appeal in *Missouri v. Biden*, and as shown in Plaintiffs' preliminary injunction briefs, under controlling law CHD has the strongest possible standing to seek a nationwide preliminary injunction of the Government's censorship campaign. Whereas the *Mo.* Ind. Pls. may be required to show a threat of future suppression of their own *plaintiff-specific* speech in order to establish standing, CHD labors under no such requirement, because CHD seeks to vindicate the rights of social media viewers and listeners, and those rights are violated by the Government's censorship campaign *no matter which particular individuals' speech the Government is silencing*. Similarly, as this Court has recognized, the state plaintiffs in *Missouri v. Biden* cannot claim parens patriae standing beyond their own citizenry. Again, CHD is not hampered by any such restriction. It represents 70,000 consumers of health information *all over the country* and is thus ideally positioned to ask for a nationwide injunction.

Thus it is Plaintiffs' hope and intention that CHD's presence in consolidated proceedings will cement standing and thereby cement this Court's jurisdiction, potentially saving this Court's preliminary injunction from a serious attack on appeal based on the *Missouri* state and individual plaintiffs' alleged lack of standing. For this reason too, as well as those set forth below, consolidation is warranted.

ARGUMENT

The standards governing a consolidation motion are well known. "While consolidation is up to the trial court's discretion, the Fifth Circuit has directed district judges 'to make good use of Rule 42(a) in order to . . . eliminate unnecessary repetition and confusion.'" *Doyle v. Reata Pharms., Inc.*, No. 4:21-CV-00987, 2022 U.S. Dist. LEXIS 74088, at *12 (E.D. Tex. Apr. 22, 2022) (quoting *In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir. 1977)). Critically,

consolidation may "be ordered despite opposition of the parties." *Flessner v. Progressive Southeastern Ins. Co.*, No. 20-CV-874, 2021 U.S. Dist. LEXIS 195288, at *4 (W.D. La. Oct. 7, 2021). No cases of which Plaintiffs are aware state that the private preferences of any parties or their counsel furnish a valid objection to consolidation.

Consolidation does not "merge the two cases" into one, *Miller v. United States Postal Service*, 729 F.2d 1033, 1036 (5th Cir. 1984), but a district court has the "undisputed ability" to consolidate cases for any or "all purposes," including "hearings," "motions," "discovery," and/or "trial." *Hall v. Hall*, 138 S. Ct. 1118, 1129 (2018). Even when full consolidation is granted, consolidated cases retain their separate identity for appellate purposes. *Id*.

Under Fed. R. Civ. P. 42, the primary factor in deciding on consolidation is the existence of "common question[s] of law or fact," F.R.C.P. 42(a), but a court may also consider whether: "the actions are pending before the same court; the actions involve a common party; any risk of prejudice or confusion will result from consolidation; any risk of inconsistent adjudications of common factual or legal questions will result if the matters are tried separately; consolidation will reduce the time and cost of trying the cases separately; and the cases are at the same stage of preparation for trial." *Flessner*, U.S. Dist. LEXIS 195288, at *4 (citations omitted); *Shively v. Ethicon, Inc*., No. 17- 0716, 2018 U.S. Dist. LEXIS 94075, at **3-4 (W.D. La. June 1, 2018) (same). Ultimately, as the Fifth Circuit has stated, the "purpose of consolidation" is to promote "convenience and economy" while avoiding "waste and inefficiency." *In re Air Crash Disaster*, 549 F.2d at 1014 (citation omitted).

Under these standards, there can be no doubt that consolidation is warranted here. The two cases involve common questions of law and fact; are pending before the same court;[1] involve

[1] The interlocutory appeal pending in *Missouri* does not divest this Court of jurisdiction.

common parties; pose a high risk of inconsistent adjudications if tried separately; are at a similar same stage of "preparation for trial"; and, most fundamentally, will produce duplicative, wasteful proceedings if unconsolidated. Indeed, it is hard to imagine a greater "waste and inefficiency," *In re Air Crash Disaster*, 549 F.2d at 1014, than requiring duplicate discovery and trials in these cases.[2]

Moreover, there is no basis for the *Mo*. Ind. Pls.' claim that consolidation will cause delay. The preliminary injunction in *Missouri v. Biden* is currently before the Fifth Circuit. Either this Court will postpone proceedings in *Missouri* until the appellate matter is resolved, or the Court will permit proceedings to continue notwithstanding the appeal. Either way, consolidation will cause no delay. As stated above, if there were any serious prospect that consolidation would cause delay or prejudice, the state plaintiffs in *Missouri* would surely be opposing it.

The *Mo.* Ind. Pls. suggest that consolidation may lead to disagreements among counsel, but the only basis they offer for this suggestion is that that Plaintiffs in the instant case are pressing certain arguments—for example, the rights of viewers and listeners, as opposed to the rights of speakers—that plaintiffs in *Missouri* do not make or have not emphasized. That is not disagreement. Those additional jurisprudential arguments can only help the *Mo.* Ind. Pls., who thus cannot claim prejudice therefrom.

Ultimately, then, the *Mo.* Ind. Pls.' opposition boils down to their claim that consolidation will inject "unnecessary politicization" into the case because Mr. Kennedy is one of the Plaintiffs. This claim should be rejected for two reasons.

First, the case law on which the *Mo.* Ind. Pls. rely states clearly that consolidation is

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[2] Nor should Plaintiffs' revocable request for a jury trial weigh as a factor. For avoidance of doubt, Plaintiffs here would upon consolidation waive their right to a jury trial.

improper when there is "prejudice to the *rights* of the parties," but the *Mo.* Ind. Pls.' politicization claim identifies no such prejudiced rights. To quote from the *Mo.* Ind. Pls.' own memorandum:

> "[C]onsolidation is improper if it would prejudice the *rights* of the parties." *St. Bernard Gen. Hosp.*, 712 F.2d at 989; *see also Dupont v. S. Pac. Co*., 366 F.2d 193, 196 (5th Cir. 1966) ("[T]he trial judge should be most cautious not to abuse his judicial discretion and to make sure that the *rights* of the parties are not prejudiced by the order of consolidation . . . . Where prejudice to *rights* of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error.").

[*Missouri* Action, Doc. 311, at 6 (emphases added).] When the *Mo.* Ind. Pls. say that Mr. Kennedy's involvement will "politicize" the case, "taint" it in some way, or create a politicized "atmosphere" they wish to avoid, these are not claims of *rights* being violated. Rather, these are claims about public relations. No doubt PR can be very important to modern litigants, but it is not a matter of right. Similarly, the *Mo*. Ind. Pls. write, "Nobody signed up to be the sideshow of a Presidential campaign," *id*. at 10, but this expression of personal preference is very different from identifying a procedural or substantive right of any kind and showing that this right would be prejudiced.

Second, even more fundamentally, *Missouri v. Biden* is *already* a highly "politicized" case—indeed, one of the most highly "politicized" district court cases in recent memory. The case has *already* provoked extraordinary national media attention, bringing with it the partisan furor and politicization that has become all too familiar a part of the nation's reaction to important judicial decisions. The *Mo.* Ind. Pls. have (to their credit) courageously put themselves on the front lines of a hotly contested, highly visible challenge to the current Administration—a challenge that could eventually alter the First Amendment landscape of this country and have a profound effect on future elections. With all due respect, the notion that *Missouri v. Biden* is currently a non-political case, and that Mr. Kennedy's name on the caption of a consolidated case would be the thing that politicizes it, is hard to take seriously.

CONCLUSION

For the reasons stated above, Plaintiffs ask the Court to consolidate the instant case with *Missouri v. Biden*. Further, because and for the same reasons that a preliminary injunction has already been granted in *Missouri v. Biden*, Plaintiffs additionally and respectfully request that the Court rule on Plaintiffs' pending preliminary injunction motion, thereby putting the two cases on the same procedural footing.

Respectfully submitted,

Dated: July 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on July 22, 2023, I caused a true and correct copy of the foregoing to be filed by the Court's electronic filing system, to be served by operation of the Court's electronic filing system on counsel for all parties who have entered in the case.

/S/ G. Shelly Maturin, II

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