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

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., PLAINTIFFS, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; et al., DEFENDANTS.	CIV. NO. 2:21-CV-00778-TAD-KK

PLAINTIFF STATES' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO TRANSFER, OR ALTERNATIVELY TO SEVER AND TRANSFER, TO THE DISTRICT OF WYOMING UNDER THE FIRST-TO-FILE RULE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

INTRODUCTION

Plaintiff States have standing to challenge the Biden Ban. This Court has subject-matter jurisdiction over Plaintiff States' claims. And this forum is an appropriate venue for this litigation. The Federal Defendants thus face a conundrum: they have no viable defenses under Rule 12(b) of the Federal Rules of Civil Procedure. So they have turned to a novel argument instead—they now invoke the judicially created first-to-file rule to try to prevent a sovereign State from suing the Federal Government in a federal court within the State's boundaries. This Court should reject this novel posturing.

Multi-state challenges to major federal regulations simultaneously filed in separate federal forums have become a regular aspect of administrative law. Indeed, they are a key check on the administrative state's inexorable growth. This Court should refuse to create a new precedent that will let the Federal Government avoid vigorous judicial review of major agency actions and will preclude States from litigating within their borders.

Making matters worse, the Federal Defendants' first-to-file arguments fail on their own terms. There is no substantial overlap between this lawsuit and Wyoming's petition for review. Wyoming's petition is a narrow challenge to a single final agency action—the Mineral Leasing Act Leasing Moratorium—that primarily raises arguments under NEPA and the FLPMA. By contrast, Plaintiff States' lawsuit is a broad challenge to a litany of final agency actions pertaining to both onshore and offshore leasing and to Executive Order 14008 itself. These are two fundamentally different suits brought by separate sovereigns.

Finally, the court should reject Defendants' novel attempt to sever and transfer Plaintiff States' Mineral Leasing Act claims. Discovery elicited in connection with the MLA claims will be essential to Plaintiff States' argument that the reasons given for both the final agency actions related to the OCSLA

lease sales and those implicating the MLA are inconsistent and indicative of pretext. To preserve Plaintiff States' ability to obtain that discovery, all of their claims must be tried together in this forum.

BACKGROUND

I. President Biden Bans New Onshore and Offshore Drilling by Executive Order.

This case arises out of the Biden Administration's actions that placed a moratorium on oil and gas drilling on public lands and waters. The facts are fully recounted in Plaintiff States' Complaint and Memorandum in Support of Preliminary Injunction. To briefly recap: on January 27, 2021, President Biden issued Executive Order 14008 entitled "Tackling the Climate Crisis at Home and Abroad." 86 Fed. Reg. 7619. Section 208 of the Executive Order directs the Secretary of the Interior to "pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters." 86 Fed. Reg. at 7624-25.

In accordance with EO 14008, the Bureau of Ocean Energy Management (BOEM) stopped the leasing process for the Outer Continental Shelf. On February 18, 2021, a BOEM regional director issued a Notice to Rescind the Record of Decision authorizing Lease Sale 257. The half-page Federal Register Notice rescinds the Record of Decision—which was issued after an exhaustive process—with no analysis, no comment period, no discussion of statutory factors, and no consultation with the States, Tribes, or public. 86 Fed. Reg. 10132, 10132 (Feb. 18, 2021). The only stated rationale BOEM provided was "Executive Order 140008." *Id.* BOEM also issued a press release cancelling both the public comment period on the Draft EIS and public meetings about Lease Sale 258. BOEM Cancels Comment Period, Virtual Meetings for Proposed Lease Sale Offshore Alaska (Feb. 4, 2021),

https://bit.ly/3bF7Xqs. Like the Recission, the press release relies solely upon EO 14008 to cancel the comment period.

Also in accordance with Executive Order 14008, the Bureau of Land Management (BLM) cancelled all previously scheduled Second Quarter MLA lease sales. As justification, BLM has provided inconsistent reasons across a variety of documents, some public and some nonpublic. For example, on January 27, 2021, BLM posted a "fact sheet" on its website noting that the President ordered the Secretary to halt the leasing of public lands. Regional BLM offices also posted one-sentence notices on their NEPA registers, some indicating that the cancellation was "to confirm the adequacy of the underlying environmental analysis." *See, e.g.*, BLM Nat'l NEPA Register, 2021 March Oil and Gas Lease Sale, https://bit.ly/3ltYPIG (Wyoming). After Plaintiffs filed this suit, BLM posted a "Statement on Second Quarter Oil and Gas Lease Sales" in which it declared that it was, "as directed by Executive Order 14008 . . . exercising its discretion to not hold lease sales in the 2nd Quarter of Calendar Year 2021." BLM, "Statement on Second Quarter Oil and Gas Lease Sales" (Apr. 21, 2021), https://on.doi.gov/3xEImXG. Aside from citing EO 14008, BLM also stated that the cancellation was to determine "whether the current leasing process provides taxpayers with a fair return for extraction of the Nation's oil and gas resources; how to ensure [the leasing process] complies with applicable laws, such as the National Environmental Policy Act, and the United States' trust responsibilities; and how it will take into account climate change and environmental justice." *Id.* And in this litigation, the government has shifted its explanation yet again, stating that the lease-sale postponement was solely to "allow sufficient time to consider additional NEPA analysis." Doc. 71-1, at 5.

II. Louisiana and Other States File APA, OCSLA, and *Ultra Vires* Claims in This Court.

On March 24, 2021, a thirteen-state coalition led by Louisiana filed suit in the Western District of Louisiana challenging the halt of oil and gas leasing sales on public lands and the Outer Continental Shelf. Plaintiff States challenge both a broad array of administrative actions taken to implement Executive Order 14008 and the Executive Order itself. Plaintiff States allege that the OCSLA and MLA leasing moratoria and several other actions effecting a halt of leasing sales violated various statutes and were *ultra vires*. Plaintiff States rely upon three separate causes of action: the Administrative Procedure Act; OCSLA's citizen suit provision; and a nonstatutory, *ultra vires* claim. Plaintiff States challenge several final agency actions to implement EO 14008: the OCSLA Leasing Moratorium, the MLA Leasing Moratorium, the Recission of Lease Sale 257, the Delay of Lease Sale 258's comment period, and each individual delay of BLM Second Quarter public land sales. On March 31, 2021, Plaintiff States moved for a preliminary injunction. Doc. 3.

III. Wyoming files a petition for review of the MLA Leasing Moratorium in the District of Wyoming.

Also on March 24, 2021, Wyoming filed a narrow petition for review of the MLA Leasing Moratorium in the federal district court for the District of Wyoming. Wyoming's claims focus exclusively on the halt of lease sales on public lands and challenge a single final agency action: the Secretary's de facto moratorium on Second Quarter public land lease sales. Wyoming's petition challenges the moratorium under the FLPMA, NEPA, MLA, and APA, and asserts one cause of action, the APA.

ARGUMENT

I. Courts Routinely Consider Multiple Pending State Challenges to Major Regulatory Actions—Without Objection by the Federal Government.

Federal Defendants ask this court to extend the judicially created first-to-file rule to deny a sovereign State the use of a federal court within its own borders. *See* Doc. 71-1. This would be an

unprecedented and far-reaching holding with constitutional ramifications. To be sure, the Federal Government often fights State plaintiffs on jurisdiction, standing, venue, and other threshold matters. And it sometimes fights private and Tribal parties under the first-to-file rule. But to Plaintiff States' knowledge, this is the first time that the first-to-file rule has been invoked by the Federal Government to deny a *State* plaintiff the use of its home forum.

Defendants cite no case where the first-to-file rule upset a State's choice of venue. And with good reason. This reflects the States' "unique position in the federal system." *Texas v. United States*, 328 F. Supp. 3d 662, 691 (S.D. Tex. 2018). When acting as plaintiffs, States are entitled under 28 U.S.C. §1391(e) to choose a federal venue within their borders. *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018) ("A state is ubiquitous throughout its sovereign borders. The text of the statute therefore dictates that a state with multiple judicial districts 'resides' in every district within its borders."); *Alabama v. U.S. Army Corps of Engineers*, 382 F. Supp. 2d 1301, 1329 (N.D. Ala. 2005) ("[C]ommon sense dictates that a state resides throughout its sovereign borders .... a state may bring suit under 28 U.S.C. § 1391(e)(3) in any district within the state."); *cf Atlanta & F. R. Co. v. W. Ry. Co. of Alabama*, 50 F. 790, 791 (5th Cir. 1892) ("[T]he state government, [] resides at every point within the boundaries of the state."). And the Supreme Court has long recognized that "States are not normal litigants." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). Rather, States have "special rights to seek relief in federal court." *In re Gee*, 941 F.3d 153, 167 (5th Cir. 2019); *see also Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) ("'It is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual'").

Defendants' novel use of the judicially created first-to-file rule to deny Plaintiff States' choice of forum would undermine those longstanding principles. And extending the first-to-file rule to

Plaintiff States would raise serious federalism issues by undermining the States' ability to select forums in which to exercise their right to challenge federal actions.

Reflecting the States' unique position and ability to bring suit against the federal government, States routinely bring suits challenging the same federal Executive action in multiple district courts throughout the Nation. For example, four separate State coalitions brought suit within days of each other against the Obama Administration EPA's Waters of the United States Rule in four separate courts. *See Georgia v. Wheeler*, No. 2:15-cv-79 (S.D. Ga. filed June 30, 2015); *Texas v. United States*, 3:15-cv-162 (S.D. Tex. filed June 29, 2015); *North Dakota v. EPA*, 3:15-cv-59 (D.N.D. filed June 29, 2015); and *Ohio v. U.S. Army Corps of Engineers*, 2:15-cv-2467 (S.D. Ohio filed June 29, 2015). The Federal Defendants there did not file a motion to transfer under the first-to-file rule in any of those cases. Instead, the Federal Defendants petitioned the Judicial Panel on Multidistrict Litigation (JPMDL) for consolidation, arguing that the questions presented by the cases were "substantially similar" and one court should resolve the "identical or overlapping legal and record-based challenges to the Clean Water Rule." *See* Doc. No. 1-1, at 11, 12 (July 27, 2015), *In re Clean Water Rule*, MDL No. 2663. The JPMDL, however, rejected the government's motion: "[T]hese actions will turn on questions of law with respect to whether the EPA and the Corps exceeded their statutory and constitutional authority when they promulgated the Clean Water Rule. Accordingly, centralization under Section 1407 is inappropriate." *In re Clean Water Rule*, 140 F. Supp. 3d 1340, 1341 (U.S. Jud. Pan. Mult. Lit. 2015).

Indeed, multiple simultaneous State challenges to regulatory actions are now a regular feature of the federal administrative process, as illustrated by the following list:

- The Obama Administration's Title IX "dear colleague" letter was challenged by two separate State coalitions within months of each other with no party raising first-to-file

concerns. *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb. filed July 8, 2016); *Texas v. United States*, No. 7:16-cv-54 (N.D. Tex. filed May 25, 2016);

- The Trump Administration's management of the Postal Service was challenged by three separate State coalitions within the same week with no party raising first-to-file concerns. *New York v. Trump*, No. 1:20-cv-2340 (D.D.C. filed Aug. 25, 2020); *Pennsylvania v. DeJoy*, No. 2:20-cv-4096 (E.D. Pa. filed Aug. 21, 2020); *Washington v. Trump*, No. 1:20-cv-3127 (E.D. Wash. filed Aug. 18, 2020);
- The Trump Administration's Public Charge Rule was challenged by three separate State coalitions within the same week with no party raising first-to-file concerns. *New York v. DHS*, No. 1:19-cv-7777 (S.D.N.Y. filed Aug. 20, 2019); *California v. DHS*, 4:19-cv-4975 (N.D. Cal. filed Aug. 16, 2019); *Washington v. DHS*, No. 4:19-cv-5210 (E.D. Wash. filed Aug. 14, 2019);
- The Trump Administration's Interim Final Rules regarding the contraceptive mandate were challenged by two separate State coalitions within weeks of each other with no party raising first-to-file concerns. *See Pennsylvania v. Trump*, No. 2:17-cv-4540 (E.D. Pa. filed Oct. 11, 2017); *California v. Azar*, No. 4:17-cv-5783 (N.D. Cal. filed Oct. 6, 2017);
- The Trump Administration's rule rescinding the Deferred Action for Childhood Arrivals was challenged by two separate State coalitions within the same week with no party raising first-to-file concerns. *California v. DHS*, No. 3:17-cv-5235 (N.D. Cal. filed Sept. 11, 2017); *New York v. Trump*, No. 1:17-cv-5228 (E.D.N.Y. filed Sept. 6, 2017); and
- The Trump Administration's international travel restrictions were challenged by two separate States within the same week with no party raising first-to-file concerns. *Hawaii*

v. Trump, No. 1:17-cv-50 (D. Hawaii filed Feb. 3, 2017); *Washington v. Trump*, No. 2:17-cv-141 (W.D. Wash. filed Jan. 30, 2017).[1]

The one time the Federal Defendants have made an argument remotely analogous to their first to file motion here, they were cut down. *See In re Clean Water Rule*, 140 F. Supp. 3d at 1341. This Court should decline the Federal Defendants' invitation to treat this State challenge differently from all other State challenges to major regulatory actions.[2]

II. Plaintiff States' Lawsuit and Wyoming's Petition Do Not Substantially Overlap.

The Federal Defendants' use of the first-to-file rule is even more surprising because—unlike the challenges cited above—Plaintiff States' challenge does not even substantially overlap with Wyoming's petition. "Under the first-to-file rule, when related cases are pending before two federal courts, the Court in which the case was last filed may refuse to hear it if the issue is raised by the cases substantially overlap." *Harrison v. Phillips 66*, 2020 WL 6302367, at *2 (W.D. La. Oct. 27, 2020). To determine if substantial overlap exits, courts look "at factors such as whether 'the core issue ... was the same' or if 'much of the proof adduced ... would likely be identical.'" *Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 678 (5th Cir. 2011). And when—as Defendants concede is the case here—"'the overlap between two suits is less than complete, the judgment is made case by case, based on such factors as the extent of overlap, the likelihood of conflict, the comparative advantage and the interest of each forum in resolving the dispute.'" *Id.*

[1] For a helpful tool, see State Litigation and AG Activity Database, "Multistate Litigation Database," https://bit.ly/3vwP7Ji.

[2] The Federal Government's argument also fails to appreciate the Fifth Circuit's special respect for State and Tribal sovereignty when determining threshold matters such as standing and venue. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015); *see also Texas v. United States*, 328 F. Supp. 3d 662, 691 (S.D. Tex. 2018).

A. There is no substantial overlap between this suit and Wyoming's petition.

The Federal Defendants ground their motion on the fundamentally erroneous assertion that the "crux" of "both cases is the unusual allegation that the Secretary of the Interior has taken unpublished, final agency action to implement a nationwide moratorium on oil and gas leasing." Doc-71-1, at 14. But the existence of a federal moratorium on federal oil and gas leasing is a factual issue that is not in serious dispute. And to the extent there is a dispute over whether a Secretarial-level final agency action exists that halts oil and gas leasing sales, this only highlights the differences between the cases. Wyoming challenges only one final agency action—a Secretarial-level moratorium on MLA leasing sales. Plaintiff States, on the other hand, challenge a litany of final agency actions—the Secretarial-level moratorium on MLA leasing sales, the Secretarial-level moratorium on OCSLA leasing sales, the Federal Register Notice rescinding Lease Sale 257's Record of Decision, the press release and later Federal Register Notice cancelling Lease Sale 258's comment period, and each individual BLM Regional Office's cancellation of Second Quarter lease sales. Plaintiff States specifically allege that each of these actions is a final agency action and final legislative rule individually subject to review under the APA. What's more, Plaintiff States—unlike Wyoming—directly challenge the legal authority for Executive Order 14008 itself.[3]

[3] Defendants contend in passing that Plaintiff States' *ultra vires* claim is not "colorable" because the Executive Order states that the moratorium is limited "[t]o the extent consistent with applicable law." Br. 15. First, all executive orders contain this boilerplate language, and that does not immunize them from judicial review. *See, e.g.*, *Hias, Inc. v. Trump,* No. 20-1160, 2021 WL 69994 (4th Cir. Jan. 8, 2021) ("[W]e reject the government's attempt to immunize the Order from review through a savings clause which, if operational, would nullify the 'clear and specific' substantive provisions of the Order."); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018) ("Because the Executive Order unambiguously commands action, here there is more than a 'mere possibility that some agency might make a legally suspect decision.' The Executive Order's savings clause does not and cannot override its meaning."). Second, this very argument suggests that the Executive Order is unenforceable.

Defendants thus misrepresent the fundamental nature of each case. Plaintiff States' lawsuit is a broad APA challenge against multiple final agency actions relating to oil and gas leasing sales. Wyoming's petition is a narrow challenge against one final agency action. Although a finding or holding that there is no Secretarial-level final agency action would be the end of Wyoming's case, Plaintiff States' lawsuit can easily survive such a holding because it challenges several other discrete final agency actions such as the Recission of Lease Sale 257's Record of Decision. Thus, "the core issues" in the two forums are not the same. *Int'l Fid. Ins. Co.*, 665 F.3d at 678.

Beyond those fundamental differences in factual and legal allegations, there are at least twenty-seven distinct and significant legal issues between the two cases. *Only four overlap*.

The four common issues:

1. Whether the MLA Leasing Moratorium is final agency action.

2. Whether the MLA Leasing Moratorium violates the MLA.

3. Whether the MLA Leasing Moratorium is arbitrary and capricious under the APA.

4. Whether the MLA Leasing Moratorium is an unlawful delay.

Meanwhile, Wyoming's petition for review raises four distinct issues not involved in this lawsuit:

1. Whether the MLA Leasing Moratorium violates the Federal Land Policy and Management Act's notice and comment requirements. Doc. 71-3, at 6-7, ¶¶6-7.

2. Whether the MLA Leasing Moratorium violates the FLPMA's formal Resource Management Plan amendment process. Doc. 7-1, at 7, ¶8.

3. Whether the MLA Leasing Moratorium violates NEPA's hard look requirement. Doc. 71-3 at 8-9, ¶11.

4. Whether the MLA Leasing Moratorium violates NEPA's EIS requirement. Doc. 71-3, at 8-8, ¶11.

And Plaintiff States' Complaint raises 19 distinct legal issues that are nowhere in Wyoming's petition:

1. Whether the OCSLA Leasing Moratorium is final agency action.

2. Whether the OCSLA Leasing Moratorium is a legislative rule subject to the APA's notice and comment requirements.

3. Whether the OCSLA Leasing Moratorium is arbitrary and capricious under the APA.

4. Whether the OCSLA Leasing Moratorium violates OCSLA.

5. Whether the Recission of Lease Sale 257's Record of Decision is final agency action.

6. Whether the Recission of Lease Sale 257's Record of Decision is a legislative rule subject to the APA's notice and comment requirements.

7. Whether the Recission of Lease Sale 257's Record of Decision is arbitrary and capricious under the APA.

8. Whether the Recission of Lease Sale 257's Record of Decision violates OCSLA.

9. Whether the cancellation of Lease Sale 258's comment period is final agency action.

10. Whether the cancellation of Lease Sale 258's comment period is a legislative rule subject to the APA's notice and comment requirements.

11. Whether the cancellation of Lease Sale 258's comment period is arbitrary and capricious under the APA.

12. Whether the cancellation of Lease Sale 258's comment period violates OCSLA.

13. Whether the MLA Leasing Moratorium is a legislative rule subject to the APA's notice and comment requirements.

14. Whether the individual BLM lease sale cancellation notices are final agency action.

15. Whether the individual BLM lease sale cancellation notices are final legislative rules subject to the APA's notice and comment requirements.

16. Whether the individual BLM lease sale cancellation notices are arbitrary and capricious.

17. Whether the individual BLM lease sale cancellation notices conflict with the MLA.

18. Whether OCSLA's citizen suit provision is available to State plaintiffs.

19. Whether EO 14008 is ultra vires.

See Doc. 1, at 43-50, ¶¶127-77.

To recap, at best, only *four* issues overlap between these cases. This is nowhere close to the overlap needed to invoke the first-to-file rule. *See Brocq v. Lane*, 2017 WL 1281129, at *2 (N.D. Tex. Apr. 6, 2017) (cases "must be 'more than merely related'"); *see also Stannard v. Nat'l Indoor RV Centers*, LLC, 2018 WL 3608560, at *2 (E.D. Tex. July 27, 2018) ("The Indiana suit asserts causes of action against Newmar, the manufacturer, while the Texas suit asserts causes of action again NIRVC, the seller. Furthermore, the claims are uniquely asserted against them based on their role with respect to the Motorhome transaction.").

Because Plaintiff States' suit involves claims that rise or fall independent of the Wyoming claims, the cases are not likely to substantially overlap. *See Int'l Fid. Ins. Co.*, 665 F.3d at 678 (no substantial overlap because claims "not dependent" on each other); *Hart v. Donostia LLC*, 290 F. Supp. 3d 627, 631 (W.D. Tex. 2018) ("[T]he cases differ because the outcome of one is not necessarily dispositive of the other."). At most, Federal Defendants have shown that the cases are related. But this is not nearly enough to show the likelihood of substantial overlap required for transfer. *Hart* , 290 F. Supp. 3d at 632 ("While the cases are certainly related, there are significant differences between them as to the issues and parties involved."); *Buckalew v. Celanese, Ltd.*, 2005 WL 2266619, at *2 (S.D. Tex. Sept. 16, 2005) ("Although the first-to-file rule also does not require the issues to completely overlap, 'the cases should be more than merely related to support a motion to transfer when venue is otherwise appropriate.'"); *BNSF Ry. Co. v. OOCL (USA), Inc.*, 667 F. Supp. 2d 703, 708-09 (N.D. Tex.

2009) ("[T]he first-to-file rule does not apply when there is merely some relation between the first and subsequently filed actions."). That alone makes transfer unwarranted under the first-to-file rule.

B. The likelihood of conflict is minimal and this Court has a comparative advantage in determining OCSLA claims.

The other first-to-file rule factors also counsel strongly against transfer. The likelihood of conflict between the proceedings is minimal given the federal judiciary's demonstrated ability to simultaneously try challenges to rules with far more overlap than that present here. *See supra* Section I. Even if all four common issues go against Plaintiff States, their suit still contains other colorable claims about both the offshore and onshore leasing bans. The presence of such independently sufficient legal claims prevents a finding of substantial overlap or likelihood of conflict. *See Int'l Fid. Ins. Co.*, 665 F.3d at 678; *Hart*, 290 F. Supp. 3d at 631. Beyond that, the sheer quantity of legally distinct claims in Plaintiff States' complaint counsels strongly against a finding of substantial overlap. *Diversified Foods & Seasonings, Inc. v. Basic Food Flavors, Inc.*, 2011 WL 13213833, at *1 (E.D. La. June 6, 2011) ("The Court finds that the first-to-file rule is inapplicable to the instant case because the issues raised by the Nevada litigation and the Louisiana litigation do not overlap substantially. The instant litigation is much broader than the Nevada litigation and involves multiple issues that will not be addressed by the Nevada litigation."). And concerns about overlapping discovery standing alone are insufficient to warrant transfer. *N. Cypress Med. Ctr. v. Cigna Healthcare*, 2010 WL 11468609, at *3 (S.D. Tex. July 8, 2010) ("[T]he fact that the discovery requests in the two cases may substantially overlap, a consideration on which CIGNA dwells at great length, does not constitute an overlap of issues for purposes of the 'first-to-file' rule.").

The interest and expertise of this Court also weighs heavily against transfer. As Federal Defendants acknowledge, this Court has unparalleled expertise with offshore oil matters, and suits against the Federal Government asserting OCSLA violations in particular. *E.g.*, *Island Operating Co. v.*

Jewell, 2016 WL 7436665, at *8 (W.D. La. Dec. 23, 2016); *State of La., ex rel. Guste v. United States*, 656 F. Supp. 1310 (W.D. La. 1986). To be sure, Louisiana derives royalties from BLM land sales, but Wyoming derives no revenue from Outer Continental Shelf sales. In short, while this district has an interest in both MLA and OCSLA sales, Wyoming has no such interest or expertise with Outer Continental Shelf matters.

III. Special Circumstances Militate Against Transfer.

"Even if substantial overlap exists, courts may exercise their discretion and decline application of the first-to-file rule in light of 'compelling circumstances.'" *Gonzalez v. Unitedhealth Grp., Inc.*, No. 2020 WL 2992174, at *4 (W.D. Tex. June 3, 2020). Multiple district courts within the Fifth Circuit have recognized that "[e]xceptions to the first-filed rule apply when the Section 1404(a) factors weigh in favor of giving priority to the second action." *United States Risk Mgmt., L.L.C. v. U.S. Risk Ins. Grp., Inc.*, 2012 WL 13001312, at *2 (E.D. La. Jan. 25, 2012); *see Hart v. Donostia LLC*, 290 F. Supp. 3d 627, 633 (W.D. Tex. 2018) ("[T]he Court considers the § 1404(a) convenience factors when deciding whether to apply the first-to-file rule."). Under Section 1404(a), "the rule for determining the propriety of transfer to another district [is] the convenience of the parties. Convenience is determined by private and public interest factors, none of which are given dispositive weight." *Id.*

These factors weigh decisively against a transfer. This Court has a special interest in adjudicating a case involving potentially billions of dollars of economic harm to the region. *See In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004) (considering "local interest in having localized interests decided at home"). This Court also has particular familiarity with OCSLA. *See id.* at 203 (considering "the familiarity of the forum with the law that will govern the case"). And it is far more practical, convenient, and inexpensive for Louisiana to litigate this case within Louisiana. *See id.* at 203 (considering "all other practical problems that make trial of a case easy, expeditious and inexpensive").

In light of the Federal Defendants' novel arguments, this Court may also hold that Plaintiff States' "special rights to seek relief in federal court," *In re Gee*, 941 F.3d at 167, their entitlement to litigate in their home forum, and their "unique position in the federal system," *Texas v. United States*, 328 F. Supp. 3d at 691, constitute compelling circumstances to decline application of the first-to-file rule. *See Hart*, 290 F. Supp. 3d at 633 ("Courts may exercise their discretion and decline application of the rule in light of 'compelling circumstances.'"). Thus, even if there is substantial overlap, this Court should not transfer Plaintiff States' lawsuit to another forum.

IV. This Court Should Not Sever and Transfer the MLA Claims.

Finally, this Court should reject Defendants' novel attempt to sever and transfer part of Plaintiff States' complaint. Severance is governed by a five-factor test:

> (1) whether the claims arise out of the same transaction or occurrence; (2) whether the posture of discovery as to the respective claims suggests that they should not be tried jointly; (3) whether the claims present common questions of fact or law; (4) whether the claims will require testimony of different witnesses and documentary proof; and (5) the prejudice to either party in the event separate trials are ordered.

Beechgrove Redevelopment, L.L.C. v. Carter & Sons Plumbing, Heating & Air Conditioning, Inc., 2009 WL 382713, at *5 (E.D. La. Feb. 11, 2009).

Federal Defendants are correct that Plaintiff States' "OCSLA and MLA claims largely involve different published transactions," Doc. 71-1, at 20. But the claims in this case arise from a common thread of administrative law violations stemming from Executive Order 14008. And Plaintiff States intend on vigorously pursuing discovery about the inconsistencies in the explanations for the challenged actions. To compare those explanations to ensure that they are not pretextual, it is vital that all of Plaintiff States' claims are tried together.

For example, even before the commencement of discovery, Federal Defendants have provided conflicting justifications for the challenged actions. A comparison of further OCSLA and

MLA justifications revealed through discovery will affect all of Plaintiff States' claims. Contrary to Defendants' claim that this element is irrelevant because discovery is inapplicable to APA claims, the Supreme Court has recently and explicitly held that extra-record discovery may be appropriate in certain circumstances evincing pretext. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019) (evidence revealed through discovery "does not match the explanation the Secretary gave for his decision" in the administrative record). Given the already conflicting rationales offered by the Biden Administration, Plaintiff States must be allowed to conduct discovery jointly regarding their OCSLA and MLA claims. *See id.* at 2575 ("Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.").

Moreover, the claims in this case—particularly those involving harm to the States' revenues—will require testimony and documentary proof from overlapping expert witnesses. And Plaintiff States—particularly those along the Gulf Coast—obviously will be harmed by having to litigate any part of this suit in Wyoming. This Court should therefore reject the Federal Defendants' attempt to sever Plaintiff States' claims.

CONCLUSION

This Court should deny Federal Defendants' motion to transfer the case in the entirety. It also should deny their alternative request to sever the case and transfer certain claims.

Respectfully submitted,

Dated: May 4, 2021

/s/ Elizabeth Murrill

JEFF LANDRY
Attorney General
ELIZABETH B. MURRILL (LSBN 20685)
Solicitor General
JOSEPH S. ST. JOHN (LSBN 36682)
Deputy Solicitor General
BENJAMIN WALLACE* (LSBN 39516)
Assistant Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6766
emurrill@ag.louisiana.gov
stjohnj@ag.louisiana.gov
wallaceb@ag.louisiana.gov

Counsel for Plaintiff States

**Motion to enroll pending*

TYLER R. GREEN
DANIEL SHAPIRO
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423

OTHER COUNSEL:

STEVE MARSHALL
Attorney General of Alabama
Edmund G. LaCour Jr.*
Solicitor General
Office of the Alabama Attorney General
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2196
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAg.gov
Counsel for the State of Alabama

TREG TAYLOR
ATTORNEY GENERAL
Ronald W. Opsahl* (Colo. Bar No. 35662)
Assistant Attorney General
Alaska Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
Telephone: (907) 269-5100
Fax: (907) 276-3697
Email: ron.opsahl@alaska.gov
Counsel for the State of Alaska

LESLIE RUTLEDGE
Attorney General of Arkansas
Nicholas J. Bronni*
Solicitor General
Dylan L. Jacobs*
Assistant Solicitor General

Office of Arkansas Attorney General Leslie Rutledge
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
Nicholas.bronni@arkansasag.gov
Counsel for the State of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia
Andrew A. Pinson*
Solicitor General
Office of the Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3409
apinson@law.ga.gov
Counsel for the State of Georgia

LYNN FITCH
Attorney General of Mississippi
Justin L. Matheny**
Assistant Solicitor General
State of Mississippi
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205
Tel: (601) 359-3680
Counsel for the State of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri
D. John Sauer*
Solicitor General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-0304
Fax: (573) 751-0774
John.Sauer@ago.mo.gov
Counsel for the State of Missouri

AUSTIN KNUDSEN
Attorney General of Montana
David M.S. Dewhirst*
Solicitor General
Montana Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
406.444.4145
david.dewhirst@mt.gov
Counsel for the State of Montana

DOUGLAS J. PETERSON
Attorney General of Nebraska
James A. Campbell*
Solicitor General
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
jim.campbell@nebraska.gov
Counsel for the State of Nebraska

MIKE HUNTER
Attorney General of Oklahoma
Mithun Mansinghani*
Solicitor General
Oklahoma Office of Attorney General
313 N.E. 21ST Street
Oklahoma City, OK 73105
Phone: (405) 522-4392
mithun.mansinghani@oag.ok.gov
Counsel for the State of Oklahoma

KEN PAXTON
Attorney General of Texas
Judd E. Stone II*
Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 009)
Austin, Texas 78711-2548
Tel.: (512) 463-4139
Fax: (512) 474-2697
Judd.Stone@oag.texas.gov
Counsel for the State of Texas

SEAN D. REYES
Attorney General of Utah
Melissa A. Holyoak*
Solicitor General
Utah Attorney General's Office
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
385.271.2484
melissaholyoak@agutah.gov
Counsel for the State of Utah

PATRICK MORRISEY
West Virginia Attorney General
Lindsay S. See*
Solicitor General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
(304) 558-2021
Lindsay.s.see@wvago.gov
Counsel for the State of West Virginia

**Admitted pro hac vice*
*** Motion for pro hac vice admission forthcoming*