

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

STATE OF LOUISIANA, ET AL.)	
)	
Plaintiffs,)	Case No. 2:21-cv-00778
)	
v.)	
)	Honorable Judge Terry A. Doughty
JOSEPH R. BIDEN, Jr., in his official capacity)	
as President of the United States, ET AL.)	Magistrate Judge Kathleen Kay
)	
Defendants.)	
)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO TRANSFER

Defendants Joseph R. Biden, Jr., in his official capacity as the President of the United States, et al. respectfully submit this reply in support of their motion to transfer to Wyoming.

Plaintiffs’ lead argument opposing transfer erroneously claims that transfer would be “unprecedented” in depriving Louisiana of its chosen home forum. Pls.’ Mem. in Opp’n to Fed. Defs.’ Mot. to Transfer 4–5, ECF No. 95 (Opp’n). To the contrary, courts can and do transfer State challenges from the State’s home forum to a first-filed forum. It is Plaintiffs that seek an unprecedented ruling, carving out States from the generally applicable first-to-file rule. This Court should decline the invitation to create such a novel exception here, especially when twelve of the thirteen State Plaintiffs reside outside this forum.

The remainder of the opposition contains numerous factual and legal inaccuracies about both the nature of the underlying pleadings and the Fifth Circuit’s first-to-file jurisprudence. Because it is beyond serious dispute that issues across the two actions “might substantially overlap, the proper course of action [is] to transfer the case” to the District of Wyoming. *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999).

I. The First-To-File Rule Applies To States, Like All Litigants.

Plaintiffs contend that the first-to-file rule does not apply to States, or at least not when States sue the federal government within the borders of one plaintiff State. No precedent creates such an exception for State plaintiffs, and the Court should not create one.

The first-to-file rule applies to all litigants, including States; the United States has successfully transferred suits by home-forum States to a first-filed forum. For example, in *Huffman v. E.P.A.*, No. 2:10-cv-01189, 2011 WL 322661 (S.D.W. Va. Jan. 31, 2011), the court transferred a State challenge to coal mine permitting processes to the first-filed forum.¹ There, as here, the home-State plaintiff (West Virginia) sought judicial review of a “series” of allegedly unlawful agency actions and opposed transfer to the first-filed court. *Huffman*, 2011 WL 322661 at *4-5. West Virginia claimed that “transfer would prevent a sovereign state from litigating within its own borders” and hinder its efforts to seek “extra-record discovery.” *Id.* The court rejected those arguments. *Id.* at *6-7. It found the considerable weight afforded plaintiffs’ forum choice was strongly outweighed by, *inter alia*, the interest of judicial economy and avoiding inconsistent rulings from district courts and appellate courts. *Id.* Similarly, courts of appeal have transferred appellate petitions from a State’s home circuit to a first-filed circuit.²

¹ While courts in other circuits often address first-to-file principles in the context of transfer under 28 U.S.C. § 1404(a), “the Fifth Circuit made clear that it is the first-filed court, not [the second-filed] court, that should make the § 1404(a) determination.” *Twin City Ins. Co. v. Key Energy Servs., Inc.*, Civil Action No. H-09-0352, 2009 WL 1544255, at *6 (S.D. Tex. June 2, 2009) (citing *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 920 (5th Cir. 1997)).

² Ex. F, Mot. to Transfer, *South Carolina v. U.S. Dept. of Energy*, No. 10-1229 (4th Cir. Mar. 4, 2010), Doc. 13 (moving to transfer South Carolina’s petition for review of agency action from its home circuit to the D.C. Circuit where an earlier-filed petition challenging the same actions was pending); Ex. G, Order, *South Carolina*, No. 10-1229 (Mar. 25, 2010), Doc. 23 (granting motion).

Any interest Louisiana—just one of thirteen State Plaintiffs³—has in litigating in this District is similarly outweighed by the considerations the Southern District of West Virginia found dispositive in *Huffman*. The first-filed rule promotes judicial efficiency by placing substantially overlapping claims before a single forum and protects the integrity of the judicial process by preventing conflicting rulings. It would create substantial conflict if, for example, this Court ordered Interior to immediately hold first-quarter lease sales while the District of Wyoming issued an order specifically denying that same relief. *See Huffman*, 2011 WL 322661, at *7 (“It is difficult to comprehend the problems that might arise . . . if different rules are deemed to apply in different circuits.”). Such a conflict would be especially awkward since no land in Louisiana would be offered for lease, Ex. B, ECF No. 71-5, but the order could arguably implicate land located inside Wyoming where the District Court found no violation of law. Similar conflicts and problems could then arise in the circuit courts of appeals. Fidelity to the first-filed rule eliminates conflict by streamlining review through a single forum, thus promoting “certainty and finality,” which are issues “of greatest significance for all concerned.” *Huffman*, 2011 WL 322661, at *7.

Plaintiffs cite no authority establishing that States are exempt from the first-to-file rule; instead, their cited cases all deal with different issues. The first groups of cases stand for the unremarkable proposition that a State “resides” throughout its territorial boundaries and, therefore, a State with multiple judicial districts can initiate suit as a resident in any district

³ The other twelve Plaintiff states are, of course, not seeking to litigate within their boundaries. As such, any weight accorded to Louisiana residing in this forum would be diluted by the presence of twelve non-resident Plaintiffs.

within the State.⁴ And none of those cases establish that a State has a right to stay in its chosen venue that immunizes the State from transfer under the first-to-file rule. Plaintiffs' next group of cases address standing, not venue.⁵

Plaintiffs' citation to the Judicial Panel on Multidistrict Litigation's *In re Clean Water Rule* order is also off base. While the Panel found consolidation pursuant to 28 U.S.C. § 1407 would not further efficiency before the district courts, that ruling considered the procedural posture of the cases that made centralization "problematic." *In re Clean Water Rule: Definition of "Waters of the United States"*, 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015). The Panel recognized the cases were at different stages and that conflicting orders had already issued:

Several motions for preliminary injunctive relief already have been ruled upon, resulting in different jurisdictional rulings by the involved courts. Two courts have held that only the United States Courts of Appeals have jurisdiction over these regulatory challenges, whereas another reached the opposite conclusion, that jurisdiction over these actions properly resides in the United States District Courts. Centralization thus would require the transferee judge to navigate potentially uncharted waters with respect to law of the case.

Id. The Panel's procedural findings support Federal Defendants' argument that this case should be transferred under the first-to-file rule, because preventing conflicting rulings (like the ones that arose in the Clean Water Rule cases) is one of the goals of that rule. More broadly, the Panel has rejected efforts to create special transfer rules for States, disturbing their chosen

⁴ Opp'n 5 (citing *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018); *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1329 (N.D. Ala. 2005); *Atlanta & F.R. Co. v. W. Ry. Co. of Ala.*, 50 F. 790, 791 (5th Cir. 1892)).

⁵ Opp'n 5 (citing *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (ruling states had standing to challenge Deferred Action for Childhood Arrivals Program under the APA)); *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (holding state had standing to challenge "EPA's steadfast refusal to regulate greenhouse gas emissions"); *In re Gee*, 941 F.3d 153 (5th Cir. 2019) (finding abortion providers did not have standing to challenge Louisiana's Outpatient Abortion Facility Licensing Laws and denying mandamus); *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (holding states had standing to challenge Deferred Action for Parents of Americans and Lawful Permanent Residents program)).

forums “with some regularity.” *In re Generic Pharm. Pricing Antitrust Litig.*, MDL No. 2724, 2017 WL 4582710, at *1–*2 (J.P.M.L. Aug. 3, 2017) (transferring suit filed by forty states after rejecting their argument that “transfer is inappropriate [for] a sovereign enforcement action”).

Finally, as established above, Plaintiffs incorrectly assert the federal government has never moved to transfer a plaintiff State’s lawsuit from a home forum to another forum where a similar case was first filed. That is exactly what happened in *Huffman* and *South Carolina*. And the federal government’s decision not to request transfer in other litigation neither limits its ability to do so here nor creates a special right for States to avoid transfer.⁶

II. Transfer Under The First-To-File Rule Is Warranted.

Plaintiffs’ Opposition errs in four significant ways in opposing transfer. *First*, although Plaintiffs claim that there is no substantial overlap between the Wyoming action and this case, Plaintiffs mischaracterize both their Complaint and Wyoming’s suit to conjure exaggerated differences. For example, Plaintiffs incorrectly claim (without citation) that their Complaint challenges “each individual [Bureau of Land Management (BLM)] Regional Office’s cancellation of Second Quarter lease sales.” Opp’n 9. But a Complaint filed in March 2021 cannot challenge second-quarter actions that had not yet occurred. Similarly, Plaintiffs recast their lawsuit as challenging BLM’s “individual” lease-sale decisions, Opp’n 11–12 & ¶¶ 14–17, when neither their requested relief nor their enumerated counts mention such a challenge, *see* Compl. ¶¶ 155, 163, 167, ECF No. 1 (seeking vacatur of the “[Mineral Leasing Act (MLA)]

⁶ Plaintiffs point to a number of challenges to Trump-administration actions where the federal government did not seek to transfer under the first-to-file rule. Opp’n 7–8. But the litigation practices of one administration neither reflect nor establish jurisprudential limitations that bind subsequent administrations. And while Plaintiffs also identify one lawsuit litigated during the Obama administration, *id.* at 6–7, the second-filed challenge in that instance was promptly stayed and dismissed on other grounds, *see Nebraska v. United States*, No. 4:16-cv-3117, ECF Nos. 24, 27 (D. Neb.), thus establishing nothing about the propriety of applying the first-to-file rule.

Leasing Moratorium,” while saying nothing about individual lease-sale decisions); *id.* at 50 ¶ d (seeking judgment “setting [the Leasing Moratoriums] aside,” without asking the Court to set aside individual lease-sale decisions).⁷

Although the Complaint references individual BLM decisions as evidence of the alleged MLA Leasing Moratorium, Compl. ¶¶ 100–10, so does Wyoming’s Petition, Ex. A ¶ 5, ECF No. 71-3. And while Louisiana’s Complaint seeks to compel delayed lease sales, Compl. ¶ 159, Wyoming’s action requests the same relief, Ex. A ¶¶ 15, D. Despite this overlap, Plaintiffs wrongly contend that a “finding or holding that there is no Secretarial-level final agency action would be the end of Wyoming’s case.” Opp’n 10. In fact, such a finding would not dispose of Wyoming’s lawsuit as Wyoming has already sought a preliminary injunction compelling Interior to hold first-quarter and second-quarter lease sales. Ex. H, Wyo.’s Mot. for Prelim. Inj. 1, No. 21-cv-56-J, ECF No. 44 (D. Wyo. May 3, 2021).

Next Plaintiffs try to highlight distinctions between the suits—such as Wyoming citing the Federal Land Policy and Management Act (FLPMA) as the basis for notice and comment requirements, while Plaintiffs cite the Administrative Procedure Act (APA). But those distinctions are minor; both suits allege an *absence* of notice and comment procedures, rather than a specific deficiency under one of those statutes.

In sum, Plaintiffs’ MLA claims are virtually identical to claims that were already pending in Wyoming’s first-filed action on both legal and factual grounds. As a legal matter, both suits claim that the alleged onshore leasing moratorium is contrary to the MLA’s quarterly lease sale

⁷ Notably, whereas Plaintiffs’ OCSLA counts specifically seek vacatur of the alleged OCSLA Leasing Moratorium, the Rescission of Lease Sale 257’s Record of Decision, and the Errata cancelling Lease Sale 258’s comment period, Compl. ¶¶ 136–141, their MLA counts are limited to the alleged MLA Leasing Moratorium, *see id.* ¶¶ 155, 163, 167.

provision, arbitrary and capricious, and adopted without notice and comment procedures required by law. Both suits also seek to compel the agency to hold postponed lease sales and seek preliminary injunctive relief. As a factual matter, both complaints present the unusual allegation that Interior had—by March 24, 2021—adopted an unpublished moratorium on onshore leasing, thereby threatening to send two courts “down the rabbit hole of reviewing the lawfulness of an agency policy that the agency insists does not even exist.”⁸

Similar factual and discovery-related overlap is created by Plaintiffs’ Outer Continental Shelf Lands Act (OCSLA) claims, albeit to a lesser extent than the MLA claims. As Plaintiffs contend, their OCSLA and MLA claims “arise from a common thread of administrative law violations stemming from Executive Order 14008” over which Plaintiffs intend to “vigorously pursu[e] discovery.”⁹ Opp’n 15. It is wasteful for two district courts to expend resources resolving duplicative or largely overlapping discovery disputes. And the Fifth Circuit has “long advocated that district courts exercise their discretion to avoid duplication of proceedings where related claims are being litigated in different districts.” *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985). And transfer to the first-filed court avoids such duplication, as the *Huffman* court explained:

From an economy standpoint, there is obvious value in having a single district judge superintend the multiple civil actions spawned by defendants' policies. Absent transfer, three judges and their staffs will devote dozens if not hundreds of hours to properly frame the issues, review substantial briefing and arguments at different points, and carefully craft opinions addressing complex subject matter. It bears noting that these multiplicitous proceedings account for work performed only in the district court. Three additional appellate layers are likely to materialize at some point, presenting another undesirable effect discussed further in. Transfer is an easy solution to these unwelcome results.

⁸ *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep’t of Agric.*, 7 F. Supp. 3d 1, 13 (D.D.C. 2013), *aff’d on other grounds*, 797 F.3d 1087 (D.C. Cir. 2015).

⁹ Defendants disagree that any discovery is appropriate, but it appears likely at this point that there will at least be disputes about the propriety of discovery.

Huffman, 2011 WL 322661, at *6.

Second, none of the cases Plaintiffs cite support their quantitative comparison of issues as an appropriate means for determining overlap. Exhaustively and repetitively listing every possible issue that may be implicated by their Complaint, Opp’n 10–12, is not an approach sanctioned by the relevant caselaw. Instead, courts look “at factors such as whether ‘the core issue . . . was the same’ or if ‘much of the proof adduced . . . would likely be identical’” in determining substantial overlap, rather than the sheer quantity of subsidiary issues. *Int’l Fid. Ins. Co. v. Sweet Little Mex. Corp.*, 665 F.3d 671, 678 (5th Cir. 2011) (citations omitted).¹⁰ Here, the crux of Plaintiffs’ case are the allegations that Interior adopted unpublished nationwide leasing moratoria that are arbitrary and capricious, contrary to law, and procedurally deficient. Because these are the same core issues as in Wyoming’s case, this matter should be transferred.

Third, Plaintiffs incorrectly contend that the “presence of . . . independently sufficient legal claims prevents a finding of . . . likelihood of conflict.” Opp’n 13. But the presence of *some* non-overlapping claims does not prevent conflict as to overlapping claims. Were this Court and the District of Wyoming to issue conflicting rulings about whether challenges to a *de facto* MLA leasing moratorium was an improper programmatic challenge, for example, the only way to resolve that conflict would be through appeal and, if necessary, petitioning the Supreme Court for certiorari. That is the precise sort of conflict that the first-to-file rule is designed to prevent. *W. Gulf Mar. Ass’n v. ILA Deep Sea Loc. 24*, 751 F.2d 721, 729 (5th Cir. 1985) (“The

¹⁰ Plaintiffs’ closest case, *Diversified Foods & Seasonings, Inc. v. Basic Food Flavors, Inc.*, No. 10-cv-4339, 2011 WL 13213833 (E.D. La. June 6, 2011), is inapposite. In that case, there were no overlapping claims because “the same relief [was] not being requested in both cases given that the relief requested in the Louisiana litigation concerns liability damages, and the relief requested in the Nevada litigation concerns a finding of no insurance coverage.” *Id.* at *1. Moreover, the movant sought only to stay, not transfer, raising delay concerns not present here.

concern manifestly is . . . to avoid piecemeal resolution of issues that call for a uniform result.”).

While the presence of non-overlapping claims may be relevant to questions of severance, they have little relevance to whether conflict is likely to occur so as to require transfer.

Fourth, Plaintiffs seek to import the consideration of convenience factors, Opp’n 14, even though courts in this Circuit have held those factors are reserved for the first-filed court, Mem. in Supp. of Fed. Defs.’ Mot. to Transfer 11, ECF No. 71-1 (collecting cases). But Wyoming is also a convenient forum for Plaintiffs, which include multiple western States adjacent to Wyoming. And Plaintiffs’ lead witness for their preliminary injunction motion, Dr. Timothy Considine, is a Professor at the University of Wyoming. ECF No. 3-2 ¶ 1. Accordingly, Plaintiffs have failed to establish any compelling circumstance not to transfer based on convenience factors.

III. Alternatively, The MLA Claims Should Be Severed And Transferred.

Plaintiffs principally make one inapposite argument in opposition to Defendants’ alternative request to sever and transfer the MLA Claims to Wyoming even if the OCSLA claims remain in Louisiana.¹¹ Despite conceding that the two primary factors weigh in favor of severance, Plaintiffs contend that severance is inappropriate given “the inconsistencies in the explanations for the challenged [agency] actions,” Opp’n 15, and their desire to jointly conduct discovery into OCSLA and MLA claims in order to establish that the agency relied on pretextual rationales.

¹¹ Although Plaintiffs also claim that severance should not occur because there will be “overlapping expert witnesses,” they identify no such expert witnesses that will offer overlapping testimony. (And their preliminary injunction principally relies on Dr. Considine for MLA issues, ECF No. 3-2, and two different witnesses for OCSLA issues, ECF Nos. 3-4, 3-6.) Further, Plaintiffs claim that Wyoming would be less convenient for Gulf Coast States, must be weighed against Wyoming’s greater convenience for western State Plaintiffs, such as Utah, Montana and Alaska.

Plaintiffs' accusations of pretext are premature. An agency rationale is pretextual when there is a "significant mismatch between the decision the Secretary made and the rationale he provided" for that decision. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). Plaintiffs have provided no evidence that there is a mismatch between the agency's rationale and the decision made; to the contrary, Plaintiffs repeatedly contend that the challenged actions are arbitrary and capricious for providing no rationale, Compl. ¶¶ 149, 162. Rather than identify any evidence of pretext, Plaintiffs have simply pointed to different rationales associated with *different* agency actions. *See* Opp'n 3 (reflecting different rationales for announcement of impending executive order, first-quarter BLM deferrals, and second-quarter BLM deferrals). But distinct rationales for distinct actions are not pretextual. Plaintiffs cannot seriously claim that discovery is necessary to explore incongruent rationales before they have even received the administrative record reflecting the agency's rationale for its decision.

Even were discovery somehow appropriate here, however, discovery concerns would not weigh against severance. Insofar as Plaintiffs believe discovery concerning Interior's MLA program is necessary to support their OCSLA claim, they can seek leave to serve such discovery, regardless whether their MLA claims are heard in another district, and the presiding judge will be fully capable of assessing that discovery's reasonableness and resolving any corresponding motion practice. Alternatively, Plaintiffs could seek to take any relevant material they may obtain in the Wyoming litigation and request to enter it in the Louisiana litigation.

For all of these reasons, the Court should transfer this action to the Wyoming court, which can then address severance, before ruling on Plaintiffs' preliminary injunction motion. Alternatively, the Court should sever and transfer the onshore claims to Wyoming, before ruling on the onshore half of Plaintiffs' preliminary injunction motion.

Respectfully submitted this 6th day of May, 2021.

JEAN E. WILLIAMS
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Michael S. Sawyer
THOMAS PORTS, JR.
MICHAEL S. SAWYER
Trial Attorneys, Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-5492 (Ports)
(202) 514-5273 (Sawyer)
Fax: (202) 305-0506
Email: Thomas.Ports.Jr@usdoj.gov
Michael.Sawyer@usdoj.gov

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 2021, I filed the foregoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Michael S. Sawyer
MICHAEL S. SAWYER