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

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

**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

## INTRODUCTION

Based on potential actions that Plaintiffs fear the Department of the Interior *might* take on federal oil and gas leasing, Plaintiffs hastily challenged an Executive Order, Interior's general management of the onshore and offshore oil and gas leasing programs, and interim actions. In so doing, Plaintiffs ignored the President's authority as head of the Executive Branch to direct executive officers and ignored the statutory requirement that Plaintiffs must give Interior 60 days' notice before filing suit. In their Opposition to Defendants' Motion to Dismiss, Plaintiffs ask the Court to ignore these things, too. Instead, Plaintiffs' Complaint should be dismissed.

In particular Counts IX (Outer Continental Shelf Lands Act citizen suit) and X (*ultra vires*) should be dismissed at this stage. In so doing, the Court need not upset its order granting Plaintiffs' Motion for a Preliminary Injunction, which Motion was based only on APA counts.

## ARGUMENT

### I. The Court's Ruling Entering a Preliminary Injunction Is Not the Law of the Case and Does Not Have Precedential Value

Plaintiffs repeatedly assert that the Court has already decided various issues in the preliminary injunction phase of this case. *See, e.g.*, Opposition (Opp'n), 15, 17, 18, Doc. 142.

Preliminary injunction rulings, however, are not binding law in a case, and only preserve the relative positions of the parties. *See, e.g.*, *Jonibach Mgmt. Tr. v. Wartburg Enterprises, Inc.*, 750 F.3d 486, 491 (5th Cir. 2014) ("Thus, 'the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.' As such, the district court's finding during the preliminary injunction phase of the proceeding . . . may be challenged at a later stage of the proceedings.") (citation omitted); *Meineke Disc. Muffler v. Jaynes*, 999 F.2d 120, 122 n.3 (5th Cir. 1993) ("This argument presupposes that the court's findings and conclusions after an abbreviated hearing on a preliminary injunction are binding as the law of the case. Such an argument is incorrect.") (citation omitted); *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990) ("At the preliminary injunction phase the court found that [plaintiff] had failed to prove he was likely to succeed. This is not a finding that he could not succeed. [Plaintiff's] failure to convince the judge that he was likely to succeed did not *per se* preclude a jury from finding in his favor on the same or similar evidence."). Plaintiffs thus cannot avoid addressing the merits of Defendants' arguments by citing the preliminary injunction ruling.

Plaintiffs' attempt to rest on this Court's findings and conclusions to date is especially inappropriate because issues pertaining to Plaintiffs' *ultra vires* count and Plaintiffs' failure to provide notice 60 days before filing an OCSLA citizen suit claim were not fully presented and briefed at the preliminary injunction stage. Rather, Plaintiffs' Motion for a Preliminary Injunction relied on and briefed only APA claims. *See* Mot. for Prelim. Inj., 12-24, Doc. No. 3-1. Defendants respectfully maintain their positions and arguments that Plaintiffs' APA claims fail, including for purposes of potentially appealing the preliminary injunction order, but focus this reply on Counts IX and X. As stated, this is the first time Counts IX and X have been fully briefed, and those counts can be dismissed without disturbing the preliminary injunction order.

## II. Plaintiffs' Own Authority Establishes that Count X Is Not a "Quintessential" *Ultra Vires* Claim, and Plaintiffs' Argument that Executive Order 14,008 Is Invalid Ignores Its Language and Misrepresents Its Directive

Plaintiffs do not dispute that the President has authority to direct Executive Branch officers, but nonetheless oppose dismissal of their *ultra vires* claim. They primarily rely on a court's authority to review direct actions of a President as *ultra vires*. But that authority is irrelevant here because Executive Order 14,008 is not self-executing and requires implementation by the Secretary. Plaintiffs also ignore the plain language of the Executive Order that directs the Secretary to implement a pause only where she can lawfully do so. Plaintiffs invent their own interpretation of the Executive Order and argue the implementation of *that* interpretation would be illegal, but the order is clearly valid when all of its language is considered. Accordingly, the Court should dismiss Plaintiffs' *ultra vires* claim, and dismiss the President as a party.

Count X is different in kind from "a quintessential *ultra vires* claim," as demonstrated by the cases Plaintiffs provide. Opp'n 14. Plaintiffs cite *Ancient Coin Collectors Guild v. United States Customs & Border Protection, Department of Homeland Security*, 801 F. Supp. 2d 383, 402 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012), to define when *ultra vires* review is available. Opp'n 13-14. But there, the agency was exercising a delegation of Presidential authority, not authority granted to the agency by Congress. *Ancient Coin*, 801 F. Supp. 2d at 402. Thus, the court held it was essentially reviewing the direct actions of the President, which it could not do under the APA; *ultra vires* review was the court's only option. *Id.* at 404.[1] Here,

[1] Indeed, most of the cases Plaintiffs cite are irrelevant because they involve challenges to self-executing Presidential actions. *See Rosebud Sioux Tribe v. Trump*, 428 F. Supp. 3d 282, 288 (D. Mont. 2019) (reviewing Presidential permit directly issued "pursuant to the 'authority vested in . . . [the] President'"); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (reviewing President's direct designation of a national monument pursuant to "his

because the order is not self-executing, in addition to being explicitly limited to directing the Secretary to exercise authority to the extent available under relevant statutes, any implementation will require agency action, and any final agency action will be subject to the APA framework for review.

Plaintiffs' reliance on *Associated Builders & Contractors of Southeast Texas v. Rung*, 2016 WL 8188655, at *5 (E.D. Tex. Oct 24, 2016), is also misplaced, as that case does not even address an *ultra vires* claim or include the President as a party. *See* Opp'n 13-14. It instead reviewed the implementation of an Executive Order as a challenge to *agency* action. *Associated Builders*, 2016 WL 8188655, at *5.[2]

Plaintiffs' effort to dismiss relevant precedent falls flat because the operative language here mirrors the order in *Building & Construction Trades Department v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), and courts cannot ignore the language of an Executive Order, *see Common Cause v. Trump*, 506 F. Supp. 3d 39, 47 (D.D.C. 2020). Plaintiffs assert, "unlike the executive order at issue [in *Albaugh*], Section 208 'unambiguously commands action.'" Opp'n 14 n.7. But Plaintiffs do not and cannot show any significant difference between the orders. Both start by directing the agency to take action only "to the extent consistent with" or "permitted by" applicable law, then use "shall" to direct what the agency must do if legally allowed. *Compare*

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delegated powers under the Antiquities Act"); *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 991 (D. Alaska 2018) (reviewing President's reversal of previous Presidential withdrawal); *see also City of Dallas, Tex. v. Hall*, No. 3:07-cv-0060, 2007 WL 3257188, at *15 (N.D. Tex. Oct. 29, 2007) (granting leave to add *ultra vires* claim against agency officers, not against the President, for actions allegedly in violation of statutory authority).

[2] Another case that Plaintiffs cite to support the assertion that their claim is "a quintessential *ultra vires* claim of the type reviewed by courts across the nation," also did not include an *ultra vires* claim. Opp'n 14 (citing *W. Watersheds Project v. Bureau of Land Mgmt*, 629 F. Supp. 2d 951, 959 (D. Ariz. 2009). In *Western Watersheds Project v. Bureau of Land Management*, the plaintiff explicitly said it was "not challenging 'action by the President . . .'" and was only challenging agency action under the APA. 629 F. Supp. 2d at 959.

Executive Order 14,008 § 208, *with* Executive Order 13,202 §§ 1, 3. Nor do Plaintiffs explain how their allegation that the Secretary has implemented a "blanket 'pause' on oil and gas lease sales," Opp'n 16, gives Plaintiffs license to "ignore" "unambiguous qualifiers imposing lawfulness." *Common Cause*, 506 F. Supp. 3d at 47. Subsequent agency actions cannot render *ultra vires* an Executive Order that was valid when issued, and again: any final agency action implementing the Executive Order is itself subject to the APA's review framework.

Plaintiffs' cases rejecting savings clauses are distinguishable because in those cases the courts found that the clauses, if credited, would render the challenged Executive Orders to be "without any real meaning." *City and Cnty. of S.F. v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018). Not so here. The purpose and meaning of Section 208 are to direct a comprehensive review and reconsideration of the federal oil and gas leasing program, and to keep land unencumbered wherever the law allows so that the report can be put to maximum use when complete.[3] This could be achieved through pauses other than "an across the board moratorium on all oil and gas lease sales." Opp'n 15. In the OCSLA context, for example, even if Interior believed it was legally required to proceed with Lease Sale 257 (which Defendants respectfully maintain it was not), and even if Interior believed it is also required to hold all lease sales as proposed in the Five Year Program (which it is not), Interior could "pause" by holding lease

[3] The first sentence of Section 208 provides, "To the extent consistent with applicable law, the Secretary of the Interior shall 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." Executive Order 14,008 § 208. Plaintiffs assert the offshore sale deferrals here are different from past deferrals because those occurred in response to "specific crises or court holdings." Opp'n 16 n.8. Here, the identified crisis is climate change. *See generally*, Executive Order 14,008 ("Tackling the Climate Crisis at Home and Abroad").

sales at the latest time proposed in the Program, such as scheduling Gulf of Mexico Lease Sale 259 for December 2021. Since the Five Year Program proposes only the years in which lease sales can occur—not days or even months—scheduling sales late in the year could not be a deviation from the Five Year Program,[4] and would further Executive Order 14,008's goal of keeping land unencumbered pending completion of the comprehensive review.[5] Thus, the pause directed by Executive Order 14,008 can be given effect "consistent with applicable law" even if, "[i]n th[e] Court's opinion, pausing, stopping and/or cancelling lease sales scheduled in OCSLA Five-Year Plan would be significant revisions of the plan." Opp'n 16 (quoting Doc. 139 at 39).

The Court need not go further, and should dismiss Count X on these bases alone. But it is also true that stopping, or even cancelling lease sales scheduled in a five year program would not necessarily amount to a significant revision to the program within the meaning of 43 U.S.C. § 1344. As an initial matter, Interior has long interpreted OCSLA as providing the Secretary "considerable discretion to determine whether the deletion, delay or advancement of sales or milestones within an approved 5-year program" requires BOEM to follow the five year program approval process found in 43 U.S.C. § 1344. 88 Interior Dec. 20, 23 (Jan. 5, 1981). Consistent with this understanding, Interior has regularly delayed or cancelled sales without following the process in § 1344. *See* Defs.' Mem. 15.[6] And every court to address the issue has recognized

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[4] Indeed, because the Five Year Program provides only the years in which offshore lease sales are proposed to occur, Interior had not deviated from the Five Year Program at the time Plaintiffs filed the Complaint, and still has not deviated from the Program.

[5] In addition to the Secretary's authority to defer or cancel sales in offshore waters, Defendants' Motion to Dismiss also laid out circumstances where the Secretary could do so on federal public lands. Mem. in Support of Defs.' Mot. to Dismiss (Defs.' Mem.) 16, Doc. 128-1. Plaintiffs do not make any specific arguments in opposition.

[6] Plaintiffs dismiss the significance of consistent past practice, calling it an "assertion that the Executive Branch has acted lawlessly in the past." Opp'n 16 n.8. But the Fifth Circuit has considered consistent past practice as support that an agency's interpretation of a statute is

Interior need not follow the five year program approval process in order to defer or cancel a lease sale. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 483 (D.C. Cir. 2009) (recognizing "the completion of the first stage of a leasing program [adopting a Five Year Program] . . . does not require any action," thus Endangered Species Act claim was not ripe at program approval stage because a program that does not require any action cannot cause any harm); *Blanco v. Burton*, No. 06-cv-3813, 2006 WL 2366046, at *5 (E.D. La. Aug. 14, 2006) (ruling Louisiana pled a *prima facia* case that Interior violated OCSLA by not accepting Louisiana's request to postpone Gulf of Mexico Lease Sale 200). Indeed, Plaintiffs' position here contradicts Louisiana's position in a past suit against Interior.

Louisiana has previously taken the position in federal court proceedings that the Secretary has authority to postpone lease sales proposed in a five year program without following the full process to amend a program, including the authority to postpone a sale until after the program expires. *See Blanco*, 2006 WL 2366046, at *5. Following hurricanes Katrina and Rita, Louisiana commented on Interior's notice proposing to hold the last potential lease sale in the then-effective 2002-2007 five year program, Lease Sale 200. *Id*. "[T]he Governor recommended that Lease Sale 200 be postponed and included in the 2007-2012 program [then] being prepared by [Interior] . . . [which] would allow [Interior] the opportunity to meaningfully assess the impact of [Outer Continental Shelf] activities in light of the devastation wreaked on the Gulf Coast as a result of the 2005 hurricanes." *Id*. Louisiana asserted Interior had "failed, perhaps in the simple rush to stay on the schedule identified in the [five year program], to take

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entitled to deference. *See Mesa Operating Ltd. P'ship v. U.S. Dep't of Interior*, 931 F.2d 318, 322 (5th Cir. 1991) (recognizing "because the determination at issue here involved the interpretation of a statute, the question for this Court is 'whether the agency's interpretation is based on a permissible construction of the statute'" and considering consistent past practice).

the necessary steps with which it is charged under [federal law] to ensure for the protection of Louisiana's coastal zone and the infrastructure." *Id.* at *4. The Eastern District of Louisiana ruled that Louisiana pled a *prima facia* case that Interior violated OCSLA in denying Louisiana's request to postpone Lease Sale 200.[7] Louisiana's reversal of its position not only ignores the law as long recognized by Louisiana, Interior, the Eastern District of Louisiana, and other courts, it is also short sighted. Louisiana may think the climate crisis is not a good reason to defer lease sales while undertaking a comprehensive review, but Louisiana could again find itself in a position where it believes further review is appropriate and may want to again call on Interior to defer sales proposed in a five year program.

For all these reasons, Defendants respectfully request the Court dismiss Count X of Plaintiffs' Complaint and dismiss the President as a party.

## III. Plaintiffs' Claimed Harms are Not Sufficiently "Immediate" to Excuse OCSLA's Statutory 60-day-notice Requirement, or Are Purely Procedural

Plaintiffs assert three alleged "immediate" harms to excuse them from the statutory requirement that they provide notice sixty days before filing suit: (1) delay in receiving ground rents, bonuses, and royalties, (2) their claimed "statutorily vested right to be consulted . . . regarding Lease Sale 257 and to comment about Lease Sale 258," and (3) an alleged "threat to 'public health and safety' [caused] by depriving environmental restoration funds of their major sources of funding." Opp'n 17. None of these withstand scrutiny.

[7] Like the process leading up to the scheduling of Lease Sale 200, in which Louisiana submitted a comment letter urging Interior to delay that lease sale, Louisiana also had notice and opportunity to submit a comment letter regarding the timing of Lease Sale 257. Unlike the process leading up to the scheduling of Lease Sale 200, Louisiana did not submit any comment letter regarding the timing of Lease Sale 257. Accordingly, Louisiana cannot plausibly claim a violation of the same OCSLA provision in this case.

The first and third assertions, that Plaintiffs are immediately harmed by delayed receipt of funds, are belied by Plaintiffs' concessions at the preliminary injunction hearing that they do not immediately receive funds from new federal leases. Plaintiffs now claim the delayed-funds harm "is immediate—every month that passes is a month without ground rents; a month without bonuses; and a month longer to obtain royalties." *Id.* But in the preliminary injunction hearing, Plaintiffs acknowledged this is not so. Rather, the federal government does not disburse funds, and the states do not receive funds, until the next calendar year. This next-year timing is significant since Plaintiffs allege they sent their notice of intent to sue on March 21, Compl. ¶ 173. Had Plaintiffs waited to sue until May 21, as required by OCSLA, they would still be more than half a year away from potentially receiving funds from new leases. This is not "immediate."

The second assertion, that Plaintiffs suffer immediate harm because they were not consulted about the rescission of Lease Sale 257 and could not comment on Lease Sale 258, is also incompatible with the notice requirement in the statute. For example, in *Fisheries Survival Fund v. Jewell*, No. 16-CV-2409 (TSC), 2018 WL 4705795, (D.D.C. Sept. 30, 2018),[8] the plaintiffs claimed BOEM failed to properly consider certain interests at the site selection and lease sale stages and that those interests would be harmed by a scheduled lease sale, including by fixing the boundaries of the challenged development area. *Id.* Plaintiffs argued the harm they sought to redress was "immediate" because the lease sale was scheduled to occur in 45 days (less than the 60 days required by OCSLA's notice provision). *Id.* Although the court found plaintiffs had standing—and thus a right to advance the asserted interests—plaintiffs' injuries did not excuse them from OCSLA's notice requirement. *Id.* at *11. The alleged procedural injury here,

[8] *aff'd sub nom. Fisheries Survival Fund v. Haaland*, No. 20-5094, 2021 WL 2206426 (D.C. Cir. May 20, 2021).

although framed as Plaintiffs' right to comment and consult, is no different. Plaintiffs' Opposition ignores *Fisheries Survival Fund* entirely.

Plaintiffs also assert this Court's finding of irreparable harm at the preliminary injunction stage demonstrates Plaintiffs have "met their burden to allege a violation that 'would immediately affect a legal interest of the plaintiff." Opp'n 17. But these are distinct legal standards and the Court must consider different time periods. Whereas OCSLA only excuses a plaintiff from waiting 60 days to file suit when a violation would immediately affect a legal interest of the plaintiff, a court considering a preliminary injunction must consider whether "irreparable injury will occur *during the pendency of the litigation*." *Sabre Indus. Inc. v. McLaurin*, No. 5:19-cv-00934, 2019 WL 3933798, at *6 (W.D. La. Aug. 19, 2019) (emphasis added) (internal quotations omitted). Although this litigation could stretch into next year before final resolution, OCSLA's 60-day notice provision required that Plaintiff wait only until May of this year to sue. Indeed, after filing suit Plaintiffs waited the better part of that 60-day period to file and serve their preliminary injunction motion. Specifically, Plaintiffs waited ten days to move for a preliminary injunction, until March 31, *see* Doc. No. 3. Then, after the Court ordered that deadlines would follow Plaintiffs' proof of service on all Defendants, Doc. No. 7, Plaintiffs still had not filed proof by the time Defendants appeared in the case on April 28, *see* Doc. No. 85. In sum, none of Plaintiffs' arguments satisfy their burden of showing that the "alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff." *See* 43 U.S.C. 1349(a)(3).

Because Plaintiffs did not follow OCSLA's statutory requirement that they provide notice 60 days before filing suit, Count IX of Plaintiffs' Complaint should be dismissed.

## CONCLUSION

Wherefore, Defendants respectfully request the Court dismiss Plaintiffs' Complaint, and note the Court can dismiss Counts IX and X without disturbing the preliminary injunction.

Respectfully submitted this 22nd day of July, 2021.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 22, 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/ Thomas W. Ports, Jr.*
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