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

PLAINTIFF STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants' Cross-Motion (Doc. 209-1) raises a series of jurisdictional and remedial arguments; some of them are old and some are new, but all are wrong. They are predicated on a series of implausible arguments and legal errors, including Defendants' continued denial that a Pause exists, their feigned confusion at what the Pause could possibly describe, their misreading of final-agency-action and programmatic-challenge doctrines, their misreading of OCSLA and the MLA, and their misguided notion that ultra vires review is limited to constitutional claims. This Court should deny their cross-motion for summary judgment.

As to jurisdiction, Defendants again argue that this Court lacks jurisdiction over the Pause, the Executive Order, and individual lease sales. But this Court has jurisdiction over the Pause because it was the final step in the process to decide that oil and gas leases would not proceed. It is unlike the programmatic policies in the cases cited by Defendants, which explicitly cautioned that they should not be read to affect suits like this. This Court has jurisdiction over the Executive Order because ultra vires review extends to statutory claims and the savings clause does not apply since the Order directly contravenes the MLA and OCSLA. And this Court has jurisdiction over individual lease-sale cancellations because they constitute the final agency action determining that lease sales would not go forward as planned. If accepted, Defendants' jurisdictional arguments would allow the Executive to routinely defy Congress's commands and the APA without consequence.

As to remedies, Defendants invoke several supposed bars to relief, including some not raised previously. But each one fails. Nothing in 28 U.S.C. §2401's statute of limitations precludes relief here because Plaintiff States do not challenge the decades-old regulation that Defendants say they do—let alone facially. Plaintiff States instead challenge an Executive Order, Pause, and individual lease cancellations that had been in effect for far short of a year when Plaintiff States brought suit. Likewise, Rule 65 of the Federal Rules of Civil Procedure does not preclude relief here because this Court has

not issued a permanent injunction yet and Rule 65 does not impose the unforgiving limitations that Defendants suggest. Sovereign immunity does not preclude declaratory relief against agency action here because Congress waived it in the APA. And a nationwide injunction would not be unlawful because no binding legal precedent forbids it, nationwide injunctions are common—particularly when applying the APA's command that unlawful action be "set aside"—and the circumstances here warrant one.

BACKGROUND

I. BY STATUTE, THE FEDERAL GOVERNMENT MUST REGULARLY OPEN THE OUTER CONTINENTAL SHELF FOR ENERGY DEVELOPMENT.

A. The Outer Continental Shelf Lands Act Establishes a Mandatory, Four-Step Process for Scheduling Lease Sales in the Outer Continental Shelf.

Congress passed the Outer Continental Shelf Lands Act more than 70 years ago. OCSLA declares "the outer Continental Shelf" to be "a vital national resource reserve held by the Federal Government for the public." 43 U.S.C. §1332(3). To make the most of that resource, OCSLA directs the Secretary of the Interior to make the Shelf "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." *Id.*. Courts have described this as "OCSLA's overriding policy of expeditious development." *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 339 (E.D. La. 2011).

OCSLA facilitates the Shelf's expeditious development by directing the Secretary to administer a leasing program to routinely sell exploration interests in portions of the Shelf to the highest bidder. 43 U.S.C. §§1334(a), 1337(a)(1). To this end, OCSLA sets out a four-step process by which the Secretary must administer the program. The Secretary must: (1) create a Five-Year Leasing Program, (2) hold lease sales in accordance with that plan, (3) grant or deny exploration permits and plans, and (4) grant or deny final development and production plans. *See Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 632 (E.D. La. 2010) (citing *Sec'y of the Interior v. California*, 464 U.S. 312, 337

(1984)). Each step must follow stringent administrative requirements designed to maximize the chances for the public—including affected States and industry—to provide input on those lease sales.

B. President Obama's Heavily Vetted Five-Year Program Governs Lease Sales Occurring Now Through the End of 2022.

Current lease sales in the Shelf are governed by the 2017-2022 Five Year Oil and Gas Leasing Program ("the Current Five-Year Program" or "Five-Year Program"). The process of creating the Current Five-Year Program began in 2014 during the Obama Administration. President Obama's Bureau of Ocean Energy Management published a request for information in the Federal Register and sent a letter to all Governors, Tribes, and interested federal agencies seeking input on the Program. *See* 79 Fed. Reg. 34349 (June 16, 2014). BOEM received over 500,000 comments in response, allowing it to discharge its obligation under OCSLA to consider economic, social, and environmental values in making its leasing decisions. *See* 43 U.S.C. §1344(a).

In 2015, President Obama's BOEM published the Draft Proposed Program. That published draft incorporated responses to the RFI comments and set out a draft schedule of potential lease sales. And it started a 60-day comment period in which BOEM received over one million comments. After considering those comments, BOEM next published the Proposed Program, thereby starting a new 90-day comment period. Again, BOEM received over one million comments, held public meetings, and created environmental impact statements in compliance with the National Environmental Policy Act.

After all that, President Obama's BOEM published the Proposed Final Program in November 2016. In it, the Secretary determined which areas to include in the lease sales. In recognition that "[t]he Gulf of Mexico is known to contain significant oil and gas resources and already has world-class, well-developed infrastructure, including established spill response capability," the "PFP schedules 10 region-wide lease sales in the areas of the Gulf of Mexico that are not under Congressional moratorium or otherwise unavailable for leasing." Doc. 199-3 at S-2. The Proposed Final Program also observed

that "[i]n the Gulf of Mexico, infrastructure is mature, industry interest and support from affected states and communities is strong, and there are significant oil and gas resources available." *Id.* Thus, "[t]o take advantage of these incentives to OCS activity, the region-wide sale approach makes the entire leasable Gulf of Mexico OCS area available in each lease sale." *Id.*

On January 17, 2017—60 days after the Final Program was transmitted to President Obama and Congress—the Secretary approved the Final Program, "which schedules 11 potential oil and gas lease sales, one sale in the Cook Inlet (Alaska) Program Area and 10 sales in the GOM Program Areas," with "one sale in 2017, two each in 2018-2021, and one in 2022." BOEM00015. The Secretary's approval further specifically affirms the Final Program's specification that "[t]he GOM sales would be region-wide and include unleased acreage not subject to moratorium or otherwise unavailable ... to provide greater flexibility to industry, including more frequent opportunities to bid on rejected, relinquished, or expired OCS lease blocks." *Id.*

C. President Obama's Five-Year Program Approves Lease Sale 257 in the Gulf of Mexico and Lease Sale 258 in Cook Inlet, Alaska.

The Final Program approved and scheduled two lease sales relevant here. The first is GOM OCS Oil and Gas Lease Sale 257. Lease Sale 257 was set to comprise the Western and Central Planning Areas of the Gulf of Mexico and a portion of the Eastern Planning Area not subject to congressional moratorium. Ex. 1 at S-5. The second is Lease Sale 258 in Cook Inlet, Alaska, "where there is existing infrastructure currently supporting State leasing activities." *Id.* at S-2.

In accordance with the Five-Year Program, BOEM published a Proposed Notice of Sale for Lease 257 in the Gulf of Mexico in November 2020. *See* BOEM00021. As OCSLA requires, BOEM sent the Proposed Notice to Governors of the affected States. *Id.* It was also opened for public comment. *Id.*

The Secretary approved the Notice of Sale in a Record of Decision. *See* BOEM00206. In the ROD, the Secretary noted reliance on the "Gulf of Mexico Outer Continental Shelf Lease Sale: Final

Supplemental Impact Statement" in considering how to proceed with Lease Sale 257. Doc. 199-6 at 3. The Secretary analyzed five separate alternatives, including a no-action option, and determined that Alternative A—a regionwide lease sale with minor exclusions—would be "in the best interest of the Nation and meets the purposes of the OCS Lands Act." *Id.* at 5. The Secretary also determined that Lease Sale 257 "promotes domestic energy production, which can reduce the need for oil imports," and promotes other national interests including "continued employment, labor income, [and] tax revenues." *Id.* at 8. Additionally, the Secretary found that "[c]ontinued oil and gas leasing on the OCS may also reduce the risk of spills from the transportation of imported energy resources," and that "revenue sharing with applicable coastal states and political subdivisions ... can help mitigate the risks and costs assumed by the States and communities in the area of the lease sale." *Id.* at 5, 8.

In the ROD, the Secretary rejected the no-action alternative. The no-action alternative was inappropriate, the Secretary reasoned, because "the needed domestic energy sources and the subsequent positive economic impacts from exploration and production, including employment, would not be realized" and "revenue would not be collected by the Federal Government nor subsequently disbursed to the States." *Id.* at 10. Additionally, the Secretary found that other sources of energy "may have different but comparable levels of negative environmental impacts, such as the risk of spills from the transportation of alternative oil supplies over long distances." *Id.* at 10. That meant the no-action alternative "would not avoid the incremental contribution of the energy substitutes' impacts to those same cumulative effects." *Id.* Finally, the Secretary's approval noted that the Leased Sale 257 stipulations included "all practicable means to avoid or minimize environmental harm from the selected alternative." *Id.* at 11. Lease Sale 257 was formally scheduled for March 17, 2021. *Id.* at 1.

As to Lease Sale 258—which would offer lands in the Cook Inlet, Alaska—BOEM in September 2020 began the process of preparing it in accordance with the Current Five-Year Program.

BOEM released a Call for Information and Nominations in the Federal Register to allow industry parties to indicate interest in parcels of the sale area. BOEM00016. BOEM also released a Notice of Intent to Prepare an EIS, which provided the public with an opportunity to comment on the scope of the lease sale. BOEM00019. In January 2021, after accounting for comments, BOEM published a Notice of Availability indicating the area proposed for sale in the Cook Inlet and a draft environmental impact statement. Docs. 199-8, 199-9.

II. THE MINERAL LEASING ACT REQUIRES THE FEDERAL GOVERNMENT TO HOLD LEASE SALES AT LEAST QUARTERLY FOR ENERGY DEVELOPMENT ON FEDERAL LANDS.

Besides its offshore interests, the Federal Government also holds energy-producing lands onshore. Congress has likewise made those lands available for development: Under the Mineral Leasing Act, the Secretary of the Interior is required to hold lease sales "for each State where eligible lands are available at least quarterly." 30 U.S.C. §226(b)(1)(A). The MLA provides that for oil and natural gas leases on federal lands, in States other than Alaska, 50 percent of bonuses, production royalties, and other revenues are granted to the State in which the lease is located, and 40 percent is granted to the Reclamation Fund, which maintains irrigation systems in several Western States. 30 U.S.C. §191(a). For leases in Alaska, 90 percent of revenues are granted to the State. *Id.*

BLM has the authority to lease public lands with oil and gas reserves to private industry for development under the MLA, the Federal Land Policy and Management Act, 43 U.S.C. §§1701-1787, and the BLM's own regulations and plans, *see* 43 C.F.R. Part 1600 (Planning, Programming, and Budgeting); 43 C.F.R. §§3120 (Competitive Leases) and 3160 (Onshore Oil and Gas Operations). BLM's regulations also provide for quarterly lease sales. 43 C.F.R. §3120.1-2(a) ("Each proper BLM S[t]ate office shall hold sales at least quarterly if lands are available for competitive leasing."). To comply with the MLA, several BLM regional offices planned to hold quarterly sales in March and April 2021 to lease available lands. Doc. 139 at 29-31.

III. PRESIDENT BIDEN ISSUES EXECUTIVE ORDER 14008, DECLARING A PAUSE ON OFFSHORE AND ONSHORE DOMESTIC ENERGY PRODUCTION.

On January 27, 2021, President Biden issued Executive Order 14008. BLM-Q2000046. Notwithstanding all the preceding notice, comment, and final decisionmaking, the Pause arbitrarily institutes a moratorium on energy production leases in offshore waters and on public lands: Section 208 of the Executive Order commands 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." BLM-Q2000053.

A. Relying Solely on the Pause, BOEM Cancels Lease Sales 257 and 258.

On February 18, 2021, Michael Celata, Regional Director of BOEM's Gulf of Mexico Office, issued a Notice to Rescind the Prior Lease 257 Record of Decision. BOEM00179. The Notice declared that the Record of Decision "is rescinded immediately." *Id.* The half-page-long Federal Register Notice purports to rescind the prior Record of Decision, but it provides no analysis, no comment period, no reference to the statutory factors, no reference to the Current Five-Year Program, and no consultation with the States or Tribes. *Id.* BOEM's *only* stated rationale is that it must rescind the Record of Decision "to comply with Executive order 14008." BOEM00179-80. The notice did not disclose firm plans to reschedule Lease Sale 257. Instead, the Recission Notice stated only that "BOEM may reevaluate GOM Lease Sale 257 and publish an appropriate ROD in the Federal Register." BOEM00180.

Lease Sale 258 fared no better. In early February 2021 BOEM published a press release on its website cancelling both the public comment period on the Draft EIS and public meetings about Lease Sale 258. *See* BOEM00070. The press release relied solely upon EO14008 to close the comment

period. BOEM later memorialized its press release in a Federal Register notice that relies solely on the Pause. BOEM00142.

B. Relying Solely on the Pause, BLM Cancels All Quarterly Lease Sales.

The Pause caused BLM offices to halt all pending quarterly lease sales in express contravention of the Mineral Leasing Act. Although BLM published no formal notice in the Federal Register halting the previously planned, heavily vetted, approved, and statutorily *required* quarterly land sales, it did publish a "fact sheet" in which it noted that the President ordered the Secretary of the Interior to halt the leasing of public lands. *See* BOEM00051-55. And then BLM offices began systematically posting postponement or cancellation notices for their March and April 2021 lease sales. Doc. 139 at 29-31.

III. THIS COURT GRANTS PLAINTIFF STATES INJUNCTIVE RELIEF.

On March 22, 2021, Louisiana submitted a notice of suit under OCSLA to the Secretary informing the Department that the States would be immediately injured by its violation of the law and were therefore preparing to file suit. On March 24, 2021, a coalition of thirteen States filed suit Pause and promptly moved for a preliminary injunction. The district court held a hearing on Plaintiff States' preliminary injunction motion on June 10, 2021. Five days later, the Court issued a nationwide preliminary injunction enjoining executive branch officials "from implementing the Pause of new oil and natural gas leases on public lands or in offshore waters as set forth in Section 208 of Executive Order 14008." Doc. 140.

On August 17, 2021, the Government appealed that preliminary injunction to the Fifth Circuit. The Government did not apply for a stay of the injunction, but it nonetheless did not immediately comply with that order. Instead, for almost two months, it took no public action to reschedule Lease Sale 257. Indeed, the Government continued to deny that a "pause" existed at all until the Secretary of the Interior finally admitted to Congress that "the Pause is still in place." *See* Doc. 148-1 at 1:00:23.

And all its intervening public statements indicated that the oil-and-gas leasing pause remained in place despite the injunction. Doc. 149-1.

After nearly two months of continued irreparable harm, and with no sign that Lease Sale 257 would be held, on August 9 the States filed a motion for an order to show cause and to compel compliance with the preliminary injunction. *Id.* The Government opposed this motion and revealed for the first time in their contempt briefing that Lease Sale 257's record of decision would be reissued on August 31, 2021. Doc. 155. After the Government issued the Lease Sale 257 Record of Decision and announced Lease Sale 257 would be held on November 17, 2021, the States withdrew their contempt motion without prejudice. The Lease Sale 257 auction was held on November 17, but leases have not yet been issued due to an order from a federal district court in Washington, D.C. The Administration has declined to appeal that order.

The Biden Administration has since said that, under compulsion of this Court's order, it was holding BLM lease sales (with drastically reduced parcel offerings compared to the original lease sale announcements). *See* Doc. 198. But after that, the Executive Branch made clear that those sales would not have happened (and future ones won't either) but for the Court's order: White House National Climate Advisor Gina McCarthy told a reporter that President Biden "remains absolutely committed to not moving forward with additional drilling on public lands." Hallie Jackson Reports (@HallieOnMSNBC), Twitter (Apr. 20, 2022 3:41 pm), bit.ly/3xVmud1.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

A. This Court has jurisdiction over the Pause.

Defendants argue that the Pause is not subject to this Court's review because it not a discrete and final agency action, but instead a "programmatic" policy. Cross-Mot. 15-18. But the Pause is a

discrete and final agency action, and it does not resemble the "programmatic" policies that Defendants compare it to.

An action must satisfy two requirements to be judicially reviewable final agency action under the APA. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). "[T]he Supreme Court has 'long taken' a 'pragmatic' approach . . . to finality,' viewing 'the APA's finality requirement as flexible.'" *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). The Pause satisfies both elements.

First, the Pause is the final word on whether scheduled lease sales will occur on schedule. As the Administration's lockstep cancellation of *all* oil and gas lease sales demonstrated, nothing about the Pause was tentative or interlocutory. *See* Doc. 139 (PI Op.) at 27. ("The Government Defendants conceded at oral argument that zero (0) new sales have been completed by the Government Defendants under MLA during both the first and second quarters of 2021."). The Pause was immediately effective, making it final agency action even if the Government might have resumed oil and gas leasing at some undisclosed future date. Second, the Pause is an action from which legal consequences will flow. Most obviously, agency officials have applied the Pause in lockstep, demonstrating that the Pause has "withdraw[n] an entity's previously-held discretion," "binds the entity," "alters the legal regime," and "thus qualifies as final agency action" under the APA. *Texas v. EEOC*, 933 F.3d at 442 (internal quotation marks omitted). Additionally, the Pause alters the legal rights of private parties seeking to bid on leases, and of the States (who are statutorily entitled to proceeds from the lease-sale bonus bids and subsequent ground rents and production royalties). It also alters the States' legal rights by withdrawing their statutorily vested OCSLA consultation rights

entitling them to a seat at the table when Interior makes significant alterations to the leasing program—such as the cancellation of a major sale.

The Pause is final agency action of the type that courts routinely review. *See, e.g.*, *Texas v. United States*, 524 F. Supp. 3d 598, 642 (S.D. Tex. 2021) (100-day pause of deportations was final agency action); *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 334-36 (E.D. La. 2011) (blanket moratorium on deepwater drilling in the Gulf of Mexico was a final agency action); *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 2018 WL 5919096, at *5 (C.D. Cal. Nov. 9) (document that effectively lifted a moratorium constituted final agency action); *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 2007 WL 1032346, at *5 (S.D. Tex. Mar. 31, 2007) (plan that effectively closed an area to drilling operations was final agency action); *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (portions of the Five-Year Plan under OCSLA could be reviewed so a decision to "Pause" the 5-year plan should also be able to be reviewed); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015) (DACA memo making more persons eligible for the DAPA program and extending employment authorization was a final agency action); *Wilbur v. U.S. ex rel. Barton*, 46 F.2d 217 (D.C. Cir. 1930), *aff'd sub nom. U.S. ex rel. McLennan v. Wilbur*, 283 U.S. 414, 51 S. Ct. 502, 75 L. Ed. 1148 (1931) (temporary withdrawal of public lands by the Secretary of the DOI was found to be a final agency action); *Al Otro Lado, Inc. v. McAleenan*, 349 F. Supp 3d 1168 (S.D. Cal. 2019) (unwritten policy of limiting asylum seekers at ports of entry from accessing the asylum process by based on false claims of capacity restraints was final agency action); *Amadei v. Nielsen*, 348 F. Supp. 3d 145 (E.D.N.Y. 2018) (unwritten policy of searching travelers for identification documents after disembarking from domestic flights was a final agency action). Finality is a pragmatic test precisely so the Executive Branch cannot circumvent APA review by conducting its operations through unwritten policies. *BNSF Ry. Co. v. EEOC*, 385 F. Supp. 3d 512, 523 (N.D. Tex. 2018) ("An agency cannot skirt its obligations by acting illegally and then claiming it has not acted at all.").

That an agency has not committed the Pause to writing does not insulate it from judicial review. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 479 (2001) ("Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final."); *see Gomez v. Trump*, 485 F. Supp. 3d 145, 193 (D.D.C. 2021) ("cluster of guidance documents, cables, and directives, have ordered consular offices and embassies to cease processing and issuing visas for otherwise qualified applicants" constitutes final agency action). The final-agency-action inquiry is pragmatic and elevates substance over form. *See BNSF Ry. Co. v. EEOC*, 385 F. Supp. 3d 512, 522 (N.D. Tex. 2018) ("Buoying this pragmatic framework is an increasing hesitance by the Supreme Court and lower courts alike to shelter agencies from judicial enforcement of congressional mandates.").

Courts have thus consistently found that unwritten but clear and discrete policies constitute final agency action regardless of whether they are committed to a formal writing or published in the Federal Register. *Bhd. of Locomotive Eng'rs & Trainmen v. FRRA*, 972 F.3d 83, 100 (D.C. Cir. 2020) (collecting cases holding that "[a]gency action generally need not be committed to writing to be final and judicially reviewable"); *accord Rosa v. McAleenan*, 2019 WL 5191095, at *19 (S.D. Tex. Oct. 15, 2019) (same); *Velesaca v. Decker*, 458 F. Supp. 3d 224, 237 n.7 (S.D.N.Y. 2020) ("[A] number of cases have involved courts inferring from a course of agency conduct that the agency has adopted a general policy, even in the face of agency denials of such policies existing.").

Denying judicial review here would allow the Executive Branch to make a major national decision in the most opaque manner possible. Finality is a pragmatic test precisely because if it were not, the Executive Branch could circumvent APA review by avoiding formal rulemaking procedures. *BNSF Ry. Co.*, 385 F. Supp. 3d at 523 ("An agency cannot skirt its obligations by acting illegally and then claiming it has not acted at all."); *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1206-07 (S.D. Cal. 2019) ("[A] contrary rule 'would allow an agency to shield its decisions from judicial review

simply by refusing to put those decisions in writing.'"). Holding that the Pause is not reviewable final agency action would provide the Executive Branch with a template to evade judicial review and public participation.

Defendants argue that the Pause is more like a "programmatic" challenge, and therefore this Court cannot review it. They cite *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), for the proposition that plaintiffs cannot make "sweeping argument[s]" about an agency's "management" of some program but must instead bring several individual actions. Cross. Mot. 16. And they cite *Lujan v. National Wildlife Fed'n,* 497 U.S. 871 (1990), for the proposition that plaintiffs cannot sue for "wholesale improvement" to a "program." Cross Mot. 15. But unlike the vague programs described in *Peterson* and *Lujan*, the Pause is a discrete agency action and it falls within the heart of APA review.

Defendants focus most heavily on *Peterson*, Cross.-Mot 11-16, but *Peterson* undermines their case. In *Peterson*, an environmentalist group had earlier challenged the Forest Service's Program that called for the use of a certain method of timber harvesting. 228 F.3d at 562. They were successful—the Forest Service revised that program to take no position on methods of timber harvesting. *Id.* But because no law prohibited that method, some individual Forest Service projects continued to employ it. *Id.* at 562-63. The plaintiffs then brought a lawsuit challenging the residual practice, which the Fifth Circuit described as encompassing the "management of the Texas forests over the last twenty years." *Id.* at 567. But with the original Forest Service Program no longer in effect, there was no final agency action to review. The court rejected the notion that merely "allowing timber harvesting in the Texas forests" constituted a final agency action because it did not constitute any "identifiable action or event" or "mark the 'consummation' of the agency's decisionmaking process." *Id.* at 567.

Defendants read *Peterson* very differently. They say that it is a general bar against claims with "sweeping" effects on follow-on agency actions and that it shows that courts never have jurisdiction over "programs consisting of numerous individual agency actions." Cross-Mot. 15-16. But *Peterson*

cautioned against exactly that sort of takeaway. It explained that plaintiffs "*can* challenge a specific final agency action … even when such a challenge has the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency." 228 F.3d at 567 (internal quotation marks removed). They simply cannot challenge widespread practices not dictated by any formal rules.

In so cautioning against such a takeaway, *Peterson* quoted Defendants' next favorite "programmatic" case, *Lujan*. *Id.*; *see* Cross-Mot. 15-18. *Lujan* specifically explained that an action "applying some particular measure across the board," like the Pause, could constitute final agency action. 497 U.S. at 890 n.2. And *Lujan* warned that plaintiffs need not restrict themselves to challenging isolated agency actions, but may also challenge widespread agency policies that themselves purport to govern "a series of regulations," or "even a whole 'program.'" *Id.* at 894. It held only that plaintiffs could not enlist a court in an ongoing supervision of BLM's land-withdrawal review program to obtain more satisfactory management. 497 U.S. at 891. No wonder that courts in similar situations have held, for instance, that "requesting BLM conduct quarterly leases of eligible and available parcels is not a programmatic challenge, but a request that this Court enforce a discrete, non-discretionary duty contained in a single statutory provision, unlike the situation in *Lujan*." *W. Energy All. v. Jewell*, 2017 WL 3600740, at *13 (D.N.M. Jan. 13, 2017); *see also Dunn-McCampbell Royalty Int., Inc. v. NPS*, 2007 WL 1032346, at *5 (S.D. Tex. Mar. 31, 2007) (challenge to closure of "acreage to drilling operations" is "not a broad- based 'programmatic challenge.'").

B. This Court has jurisdiction over the Executive Order.

Defendants again argue that this Court lacks jurisdiction to review the Executive Order because ultra vires claims cannot be based on statutory arguments and because the Executive Order includes a savings clause. Cross-Mot. 20. Both arguments are wrong. As to the supposed ban on statutory ultra vires claims, ultra vires review has long been understood to include review of a president's statutory compliance. Ultra vires review asks whether the Executive "exceed[ed] the

authority given to it *by Congress*." *Jean v. Gonzales*, 452 F.3d 392, 397 (5th Cir. 2006) (emphasis added). Courts around the country employ ultra vires review to determine "whether the President has violated … the statute under which the challenged action was taken, or other statutes," or whether he "did not have statutory authority to take a particular action." *Ancient Coin Collectors Guild v. U.S. Customs & Border Protection*, 801 F. Supp. 2d 383, 406 (D. Md. 2011) (citing *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002)). Ultra vires means "[u]nauthorized," *Black's Law Dictionary* (10th ed. 2014), not unconstitutional. And ultra vires review is available when a president takes an act unauthorized—or prohibited—by statute. Even the leading ultra-vires case that Defendants relied on in their Opposition, Opp. 24-25, explicitly acknowledged that "claims that the President has violated a statutory mandate" could be "judicially reviewable outside the framework of the APA," and made clear to limit its holding to the proposition that review was not available only "when the statute in question commits the decision to the discretion of the President." *Dalton v. Specter*, 511 U.S. 462, 474 (1994). Because no statute commits the decision to impose a pause on oil and gas leasing to the President's discretion, *Dalton*'s statutory exception has no relevance here.

As to the Executive Order's savings clause, Defendants' argument that it is possible to lawfully implement the Executive Order, Cross-Mot. 20, is just a new version of their merits arguments. The MLA requires that "lease sales *shall* be held for each State where eligible lands are available at least quarterly." 30 U.S.C. §226(b)(1)(A); *see Maine Comm. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) ("The first sign that the statute imposed an obligation is its mandatory language: 'shall.' Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.") (internal quotation marks omitted). The President may not veto the MLA by Executive Order. And although OCSLA allows for non-"significant" revisions without additional statutory process, 43 U.S.C. §1344(e), an indefinite leasing moratorium—including the cancellation of the largest Gulf lease sale in American history—is "significant" by any measure.

C. This Court has jurisdiction over individual lease sales.

Defendants also argue that this Court lacks jurisdiction over individual lease sales. But each BLM lease cancellation is the consummation of the decisionmaking process—each cancels a lease sale that was scheduled. Simply put, the cancellation of Q1 and Q2 lease sales means there will never be Q1 and Q2 lease sales. Defendants say that those cancellations are not reviewable because they are "interlocutory" actions. Cross-Mot. 19. But an agency's labelling an action "interlocutory" does not make it so. *See, e.g.*, *State of La. v. DOE*, 507 F. Supp. 1365, 1371 (W.D. La. 1981) ("The label an agency attaches to its action is not dispositive."). Otherwise, agencies could preclude judicial review of all their rules and regulations by labeling them interlocutory. And in any event, BLM did not merely "defer[]" or "postpone[]" the decisional process for Q1 and Q2 oil and gas lease sales. Cross-Mot. 18. It cancelled them. That the agency could later make lands available again, or might be ordered to do so by a court, does not vitiate this finality. *NRDC v. Wheeler*, 955 F.3d 68, 79-80 (D.C. Cir. 2020) ("[A]s long as an agency has completed its decisionmaking on a challenged rule—even one interim in nature—the rule satisfies the first prong of the finality test.").

The Recission of Lease Sale 257's Record of Decision similarly marks the consummation of the agency's decisionmaking process. The ROD determined that Lease Sale 257 should proceed in accordance with the Five-Year Plan. The Recission vacated the ROD, ensuring that Lease Sale 257 would not go forward. Such RODs, and even their summaries, are routinely held to be final agency actions. *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 2011 WL 7701433, at *36 (D.N.M. Aug. 3, 2011) ("[I]n the leasing context, the ROD and the Forest Service's leasing decision constitute final agency action authorizing specific activities."); *Dunn-McCampbell Royalty Int., Inc. v. NPS*, 2007 WL 1032346, at *7 (S.D. Tex. Mar. 31, 2007) (same); *see also Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1091 (9th Cir. 2003) ("[B]ecause the ROD pre-determines the future through the selection of a long-term plan (to

the exclusion of others which will not be among the available options at the implementation phase), it is ripe for review.").

Nor are Defendants right that this Court lacks jurisdiction to compel lease sales. Cross-Mot. 19. This argument is predicated on their earlier premise that the agency didn't "take a *discrete* agency action" and was not "required to take" that action. *Id.* But both premises are false. The relevant agency actions were discrete and final, and the MLA and OCSLA required them.

II. NO STATUTE, RULE, OR VALID LEGAL DOCTRINE PRECLUDES RELIEF.

A. No statute of limitations applies here.

As to Plaintiff States' relief, Defendants now argue that 28 U.S.C. §2401(a), which requires a lawsuit to be filed within six years after an action accrues, prohibits relief. Cross-Mot. 21. Their argument seems to be that Plaintiff States are actually seeking facial invalidation of a regulation enacted decades ago, 43 C.F.R. §3120.1-3, and therefore are very late. Cross-Mot. 21. But Plaintiff States are not seeking a facial invalidation of that regulation. *See generally* Docs. 1, 3-1, 199-1. It is unclear where Defendants got that idea from. Plaintiff States have rarely said anything substantive about the regulation. Plaintiff States are challenging the Pause, Executive Order, and cancellations that began shortly before they filed suit. *See generally* Docs. 1, 3-1, 199-1. Those all plainly occurred within six years of Plaintiff States' filing suit.

B. Rule 65 does not preclude relief.

Defendants also now argue that Rule 65 of the Federal Rules of Civil Procedure precludes Plaintiff States' requested relief. Cross-Mot. 21-22. But Rule 65 refers to injunctive *orders*, not to requests for injunctive relief, so Defendants' arguments are premature. If the Court concludes that Rule 65 requires it to define the "Pause" within its permanent injunction, for instance, then Plaintiff States will of course have no objection. And if after that, "for some reason [Defendants] had doubts

about the meaning of any part of the injunction, [they] could s[eek] district court clarification." *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 517 (5th Cir. 1969). Now is not the time.

In any event, Defendants are wrong about Rule 65. As to their argument that Rule 65's requirement of specificity forbids relief because Plaintiff States have not defined "the Pause," Cross-Mot. at 22, Plaintiff States use the term "Pause" because the Court has, Doc. 139 at 1; Doc. 140, as has the Secretary, Doc. 148 at 1. In 2021, Secretary of the Interior Deb Haaland testified to the Senate Committee on Energy and Natural Resources that "the Pause is still in place." *See id.*; Doc. 148-1. The term refers to the Biden Administration's moratorium on new oil and natural gas leases. And although Rule 65 requires that an injunction describe the acts required in detail and without reference to other documents, injunctive orders routinely are informed by the contents of accompanying opinions. Finally, although Defendants criticize Plaintiff States' request that the injunction clarify that it applies to "any similar pause or delay of oil and gas leasing framework," that request reflects only Plaintiff States' concern that Defendants would not otherwise change their behavior given their repeated denial that any "Pause" exists and repeated assertion that the word "Pause" is incomprehensible to them. *See, e.g.*, Opp. 15-17.

C. No other legal doctrines preclude relief.

Defendants argue that this Court may not issue a declaration that the Executive Order is unlawful for the same reasons that it argued that this Court lacks jurisdiction over the Executive Order in the first place—because, they say, ultra vires claims must be "constitutional" in nature. Cross-Mot. 24. But ultra vires review is available for statutory claims. *See,* Part I.B, *supra*; *see also*, e.g., *Gonzalez*, 452 F.3d at 397 (ultra vires review available to determine whether the Executive "exceed[ed] the authority given to it by Congress"); *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 406 (ultra vires review available to determine "whether the President has violated … the statute under which the challenged

action was taken, or other statutes," or whether he "did not have statutory authority to take a particular action").

Defendants argue that federal agencies enjoy sovereign immunity against declaratory relief. Cross-Mot. 25. In support of this position, Defendants cite a single district court in Oregon that held that 28 U.S.C. §2201 alone did not waive sovereign immunity. *Id* (citing *Burns Ranches, Inc. v. DOI*, 851 F. Supp. 2d 1267 (D. Or. 2011). But that is not Plaintiff States' argument here. Congress provided in 5 U.S.C. §702 that a lawsuit "stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority" that "seek[s] relief other than money damages," such as declaratory relief, "shall not be dismissed nor relief therein be denied on the ground that it is against the United States[.]" And 5 U.S.C. §703 clarifies that this waiver "include[es] actions for declaratory judgments."

Finally, Defendants argue that any injunction that this Court issues should not apply on a nationwide basis. Cross-Mot. 23. But despite Defendants' efforts to stop nationwide injunctions, binding precedent continues to allow them. The Fifth Circuit's stay decision in *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021), may of course be considered as persuasive authority to the extent that it is persuasive. But it is not binding. *See*, *e.g.*, *Northshore Development, Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988) (even when published, "a motions panel decision is not binding precedent"); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurral) ("a decision by this motions panel granting a stay … has no precedential force"). The Supreme Court, for its part, has said that "the scope of injunctive relief is dictated by the extent of the violation established, *not* by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added). And nationwide injunctions remain ubiquitous. *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) ("where a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate"); *Karnoski v. Trump*, 2017 WL 6311305, at

*10 (W.D. Wash. Dec. 11, 2017). And when it comes to claims under the APA, it may not even be accurate to call an order vacating the agency action and preventing its implementation, as Plaintiff States seek here, a "nationwide injunction." *Cook Cnty., Ill. v. Wolf*, 498 F. Supp. 3d 999, 1011 (N.D. Ill. 2020). It is simply the APA's standard remedy. Finally, the circumstances here especially warrant a nationwide injunction given the widespread nature of the harm and the comprehensive nature of the leasing scheme set out by Congress.

CONCLUSION

This Court should deny Defendants' cross-motion for summary judgment.

Respectfully submitted,

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/s/ Elizabeth B. Murrill

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