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

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

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