**ORAL ARGUMENT NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | |
|---|---|
| FRIENDS OF THE EARTH, *et al.*,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, *et al.*,<br><br>Defendants-Appellees,<br><br>AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA,<br><br>Intervenors-Defendants-Appellants. | Nos. 22-5036, 22-5037 (consolidated) |

**AMERICAN PETROLEUM INSTITUTE'S REPLY IN SUPPORT OF ITS MOTION TO EXPEDITE AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION TO DISMISS**

Interior's 2017-2022 Five Year Leasing Program is scheduled to end on June 30, 2022. Mot. 2. That naturally raises the question of whether Interior believes that the Leasing Program's scheduled expiration would prevent it from awarding leases to the Lease Sale 257 high bidders if this Court reverses the District Court's vacatur of that sale. API believes that nothing in the statute limits Interior's authority (Mot. 6-7), but with $198 million in bids and the sealed bidding system's integrity on the line, even some uncertainty is too much. API has repeatedly

attempted to elicit Interior's position, but Interior has refused that straightforward request. Interior's refusal is puzzling and just adds to the uncertainty.

For their part, Plaintiffs have properly conceded that, if this Court reverses the District Court, the Leasing Program's expiration does not prevent Interior from awarding leases to Lease Sale 257's high bidders. But Plaintiffs' concessions cannot obviate this motion because Interior, not Plaintiffs, administers the Outer Continental Shelf Lands Act. Interior's refusal to take a position has thus put the parties and this Court in an untenable position. The Court should expedite this appeal to ensure that the Lease Sale 257 bids are not nullified by the passage of time.

The Court should also deny Plaintiffs' cross-motion to dismiss or refer it to the merits panel. The District Court's vacate-and-remand order is final by all the usual measures: It disassociates the District Court from the case; it is intended to be the District Court's last decision on Lease Sale 257; and it resolves all claims against all parties. Plaintiffs nevertheless invoke the administrative-remand rule, under which private parties generally cannot appeal a district court's decision to remand to an agency for further proceedings. But the rule applies only when a district court remands in circumstances where delaying review avoids duplicate appeals, such as where the remand is *without* vacatur. In a remand-without-vacatur case, the agency must act in accordance with the district court's decision, after

which an aggrieved party can seek further judicial review. But in a remand-*with*-vacatur case like this one, the district court's order does not compel the agency to do anything and there is no guaranteed opportunity for later review. Indeed, Plaintiffs' position would extinguish API's ability to appeal the District Court's judgment, and it means more broadly that a private-party intervenor can *never* appeal a plaintiff's victory in an Administrative Procedure Act case. That result finds no support in the U.S. Code or case law.

## ARGUMENT

### I. THE CASE SHOULD BE EXPEDITED BECAUSE INTERIOR'S REFUSAL TO GIVE ASSURANCES REGARDING THE EFFECT OF THE JUNE 30, 2022 EXPIRATION OF THE FIVE-YEAR LEASE PROGRAM CREATES UNACCEPTABLE UNCERTAINTY AS TO $198 MILLION IN UNSEALED BIDS.

API and its members have a compelling interest in seeing this case disposed of promptly because it would eliminate any risk that the 2017-2022 Leasing Program's scheduled June 30 expiration will result in their unsealed bids being discarded, even if the Court reverses. Mot. 6-10. API did everything it could to eliminate this risk without the Court's involvement. API sought Plaintiffs' and Interior's views both before and after filing its motion. Mot. 1; Mot. Supp. 1-2. Plaintiffs, to their credit, promptly gave API the assurances it sought. Mot. Supp. 1-2. Interior refused, telling API only that it will "not be taking a position" on the motion to expedite. *Id.* at 2. API therefore cannot have confidence that, if this Court reverses and Interior cannot complete the lease-issuance process before June

30, Interior will not argue that the 2017-2022 Leasing Program's scheduled expiration prevents it from awarding leases to the Lease Sale 257 high bidders.

Plaintiffs contend that given Interior's statements to the District Court about the effect of remand without vacatur, API has no reason to believe that Interior would argue something different later. Opp. 7. To be sure, Interior and its lawyers at the Department of Justice are expected to "to turn square corners" in litigation. *United States v. Winstar Corp.*, 518 U.S. 839, 887 n.31 (1996) (quoting *Heckler v. Community Health Serv. of Crawford Cty., Inc.*, 467 U.S. 51, 61 n.13 (1984)). It would violate that obligation for Interior to refuse to answer API's direct questions about its views on the import of June 30, use its refusal to have expedition denied, and then argue *after* June 30 that it is barred from awarding leases to the high bidders based on that date. *See Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam) (emphasizing the need for "a culture of civility and mutual trust within the legal profession").

At the same time, if Interior's position were as certain as Plaintiffs contend, Interior presumably would have put the matter to rest by giving the Court and API the same assurances Plaintiffs did. And Interior's position is not as clear as Plaintiffs make it out to be. *See* Opp. 6. Interior stated in its District Court supplemental brief that, without vacatur, "the date of the sale for five-year program purposes would still be November 2021, well within the established 2017-2022

Five-Year Outer Continental Shelf Leasing Program." D. Ct. Dkt. No. 74 at 4. But at the time of that filing, any remand without vacatur would have taken place before June 30. Interior's supplemental brief is less clear as to what Interior's position is if the vacatur were reversed after the Leasing Program's scheduled expiration on June 30. And Interior refuses to clarify.

With $198 million in unsealed bids at stake, API—and the Court—cannot simply let June 30 pass and hope for the best. Expedition should be granted.

## II. THE DISTRICT COURT'S ORDER VACATING LEASE SALE 257 IS FINAL.

1. Plaintiffs have injected into the middle of emergent briefing about expedition a question of this Court's jurisdiction. The Court has jurisdiction for at least all the reasons we explain below. *Infra* pp. 6-14. But if the Court does not deny the motion to dismiss now, it should follow its usual practice of referring the motion to the merits panel. First, the administrative-remand rule does not apply to federal-government appeals, *see Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989), and Interior's time to appeal has not run. *See* Fed. R. App. P. 4(a)(1)(B). Referring the motion to the merits panel allows the motion to be mooted if Interior later appeals. Second, the abbreviated timeline for the motion to expedite means that the Court is unlikely to receive Interior's views on jurisdiction before the Court will have to act on the expedite motion. And finally,

the Court will benefit from full development of the jurisdictional issue in the merits briefs rather than as an adjunct to the briefing on expedition.

2. In any event, the District Court's order vacating and remanding is final. 28 U.S.C. § 1291 grants the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." In turn, "[a] 'final decision' is one 'by which a district court disassociates itself from a case.'" *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408-409 (2015) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)). This Court takes a practical approach and considers "whether the district court intended the judgment to represent the final decision in the case," *North Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1253 (D.C. Cir. 2020) (quoting *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 385 n.6 (1978) (per curiam)), and whether the district court's judgment "dispose[s] of all claims against all parties." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 221 (D.C. Cir. 2011). If an order "terminates an action," rather than leaving the "core dispute unresolved" for "further proceedings," the order is final. *Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 385 (D.C. Cir. 2017).

The District Court's order satisfies all of these criteria. The District Court's order vacated Interior's Record of Decision and all actions taken in furtherance of

Lease Sale 257, stripped Interior's action of legal force,[1] and ended the case. *See Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("vacate" means to "annul, . . . to make of no authority or validity, to set aside"). The District Court thus washed its hands of the case; it set the Record of Decision and Lease Sale 257 aside and let Interior decide what new or additional actions, if any, to take in response. *See* D. Ct. Op. 67. And the District Court's order resolves all claims against all parties by granting Plaintiffs the relief they sought—vacatur of Interior's Record of Decision and Lease Sale 257—and leaving nothing else for the District Court to decide, now or in the future. *See* D. Ct. Dkt. 1 at 51-52 (Plaintiffs' prayer for relief).

3. Plaintiffs nonetheless invoke (at 7-10) this Court's administrative-remand rule, which states that a private party usually "may not appeal a district court's order remanding to an agency because it is not final." *Northern Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 857 (D.C. Cir. 2012) (quoting *North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 19-20 (D.C. Cir. 2008)). But Plaintiffs take the rule out of context; it generally applies when a district court

[1] That the district court ruled on Interior's duties under NEPA and nullified Lease Sale 257 should be enough to establish finality. *Cf. Sackett v. EPA*, 566 U.S. 120, 126 (2012) (holding that an action constitutes "final agency action" under 5 U.S.C. § 704 where (1) it "determined rights or obligations," and (2) "legal consequences flow from" it); *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 598 (2016).

expects the agency to correct its errors on remand with respect to the *same* agency action, such as when a district court remands without vacatur. *See Sierra Club v. U.S. Dep't of Agriculture*, 716 F.3d 653, 656 (D.C. Cir. 2013) (district court "concluded that there was no need to vacate"); *North Carolina Fisheries*, 550 F.3d at 18 ("The district court, relying on our precedent, declined to vacate Amendment 13C . . . ."); *American Hawaii Cruises v. Skinner*, 893 F.2d 1400, 1402 (D.C. Cir. 1990) (per curiam) (district court declined to revoke ship's Coast Guard-issued license).[2]

To be sure, the District Court's order used the word "remand." D. Ct. Dkt. No. 77 at 1. But that reflects nothing more than the principle that "when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further

[2] The only case that we are aware of applying the administrative-remand rule where the district court had vacated the agency action is *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 879-881 (D.C. Cir. 2000). But the Court mentioned the vacatur only in passing in the background section, and the appellant does not appear to have argued for finality on the basis of the vacatur. *See id.*; *see also New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 699 n.17 (10th Cir. 2009) (distinguishing a case applying the administrative-remand rule because the appellant "did not argue that the order below was final, but only that an exception to the finality rule applied"). *Pueblo of Sandia* also predated the Supreme Court's decision in *Sackett*, which showed that, where a definitive legal ruling has immediate legal consequences, the possibility of additional agency proceedings—or none at all—does not foreclose judicial review. *See* 566 U.S. at 126.

action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). As Judge Randolph has explained, administrative-law remedies generally fall into two categories: "Vacate and remand" or "simply remand." *Natural Resources Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring). When a court vacates and remands, it nullifies the agency's action. By contrast, when a court simply remands, it does not pass final judgment and instead directs the agency to remedy any issues by, for example, providing additional explanation or responding to objections. It is "[i]f a district court *merely* remands a case to an agency" that this Court "hold[s] that there is no final judgment to appeal." *Id.* (emphasis added). When a district court vacates and remands, as it did here, there is.

Plaintiffs, however, propose a magic-words approach. Consider two District Court judgments: one that "vacates" the agency's action and another that "vacates" the agency's action and then "remands." There is no practical difference between them. Both judgments are final because the agency action has been invalidated, the judicial process is over, and nothing the agency does on remand can revive its earlier action. But in Plaintiffs' view, the first judgment is final and the second is not. The absurdity of that outcome is why finality is "given a practical rather than a technical construction." *Liminia*, 857 F.3d at 385 (citation omitted).

Treating remands without vacatur and similar dispositions as typically non-final makes good sense. When a district court remands without vacatur, the agency *must* act in accordance with the district court's mandate to remedy the identified deficiencies; if it does not, parties can petition for mandamus to force compliance. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). And once the agency has responded on remand, a disappointed litigant can challenge the agency's remand decision. *See Sierra Club*, 716 F.3d at 657 ("[A] private party dissatisfied with the action on remand may still challenge the remanded proceedings—as well as the remand order requiring them—after the proceedings are complete."). The remand trip to the agency is a waystation in the district court's ongoing proceedings, not a final destination. *See Am. Hawaii Cruises*, 893 F.2d at 1403 (a non-final remand order "simply turns [the agency action] back for further proceedings by the agency, after which it may well return to court again") (citation, brackets, and internal quotation marks omitted).

Remand *with* vacatur is nothing like that; the agency's action is a nullity and the agency is returned to the position it was in before it took action. *See Action on Smoking*, 713 F.2d at 797. The district court's order does not compel the agency to fix the errors the court identified; the agency is expected to take new action or may take no action at all. Without an immediate appeal, there may never be an appeal if the agency elects to not act following the district court vacatur.

3. The Tenth Circuit has held that a district court's order was final and subject to appeal in analogous circumstances. In *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 697 (10th Cir. 2009), the district court held that the Bureau of Land Management—a bureau of Interior like the Bureau of Ocean Energy Management here—did not conduct an adequate site-specific NEPA analysis before auctioning oil and gas leases and enjoined Interior from issuing the leases until a NEPA analysis was complete. *Id.* A private-party intervenor appealed, and the Tenth Circuit rejected Interior's attempt to dismiss. *Id.* at 698-699. The court explained that "[i]n effect, [Interior] argues that whenever a court order requires further action by an agency, the order constitutes a 'remand,' and we cannot review the matter until the agency acts and the parties return to court." *Id.* at 697.

"That argument," the Tenth Circuit held, "fundamentally misunderstands the nature of a 'remand' in an administrative case." *Id.* Enjoining the lease auction and remanding "simply does not square with the traditional notion of a 'remand,' wherein the reviewing court returns an action to a lower court for further proceedings." *Id.* at 698. That was because "[t]he court's order did not require [Interior] to recommence a proceeding, or indeed to take any action at all—it simply enjoined [Interior] from further NEPA violations." *Id.* If Interior "wish[ed] to allow oil and gas leasing in the plan area it must undertake additional

analysis based on the district court's memorandum opinion, but it retains the option of ceasing such proceedings entirely." *Id.* And as a result, "the nature of the court's injunction is wholly unlike a traditional remand." *Id.*

Plaintiffs concede the features of the District Court's vacatur order that make it similar to the district court's injunction in *Richardson*. The Plaintiffs told the District Court that vacatur would "provide[] Interior a blank slate needed to comply with NEPA and fully exercise its discretion to decide whether and how to proceed" and "provide[ ] Interior discretion to decide not to hold the lease sale at all." D. Ct. Dkt. No. 76 at 1. The District Court adopted that view in its order. D. Ct. Op. 67. API does not agree that Interior can validly refuse to hold Lease Sale 257 again, but the District Court's view of its order renders it final and appealable, just as the order was in *Richardson*.

If anything, the District Court's order here is even *more* final than *Richardson*. In *Richardson*, Interior could presumably reinstate the enjoined auction once it completed its NEPA analysis; the District Court's vacatur here, if not reversed, means that Interior will need to hold an entirely new lease sale after it completes its NEPA review.

Plaintiffs' position is also inconsistent with settled intervention law. "An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court." *Stringfellow v. Concerned Neighbors in*

*Action*, 480 U.S. 370, 375-376 (1987). If orders remanding without vacatur and orders remanding with vacatur are both not appealable, then private intervenor-defendants can *never* appeal an adverse District Court decision. In other words, "every victory by a plaintiff in a case brought pursuant to the APA would necessarily be a non-final 'remand' order." *Richardson*, 565 F.3d at 698 (cleaned up). But "[h]ad Congress wished to allow appeal under the APA only when an agency prevails on all claims in the district court, it could have done so explicitly." *Id.* "It is unsurprising, then, that [courts] have often treated district court orders requiring further agency action under NEPA as final and reviewable in the past." *Id.* (collecting cases). The District Court's order here should be no different.

4. Even if the Court concludes that the District Court's order is not final, it should still hold that API may appeal. A non-final remand order may nonetheless be appealed where the appellant "would not have an opportunity to appeal the district court's legal ruling after the proceedings on remand." *Occidental Petroleum*, 873 F.2d at 331.

That exception is "not normally available to a private party," *North Carolina Fisheries Ass'n*, 550 F.3d at 20, but "normally" is not "never." *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014) (administrative-remand rule is "not absolute"). Interior has already told the District Court in its supplemental brief that vacatur would prevent it from

conducting Lease Sale 257 again, even with new bids, because Interior is not "legally permitted to hold any lease sales under the 2017-2022 five-year program" after June 30, 2022. D. Ct. Dkt. No. 74 at 4-5. If API cannot appeal now, it can never appeal the District Court's decision vacating Lease Sale 257. "In these unusual circumstances, treating the district court's remand order as unappealable would 'effectively preclude' [API] from ever challenging the district court's decision[ ]." *Long-Distance Tel. Serv.*, 751 F.3d at 633 (brackets and citation omitted); *see also Ringsby Truck Lines, Inc. v. United States*, 490 F.2d 620, 624 (10th Cir. 1973) ("To deny jurisdiction here would effectively signal the end of appellants' cause of action without any judicial review."). The Court should hold that API's inability to appeal the vacatur of Lease Sale 257 later means that it can appeal now. *See Occidental Petroleum*, 873 F.2d at 331-332.

## CONCLUSION

For the foregoing reasons and those in the motion to expedite, the motion to expedite should be granted and the cross-motion to dismiss should be denied.

Respectfully submitted,

/s/ Catherine E. Stetson
CATHERINE E. STETSON
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

JONATHAN A. HUNTER
SARAH Y. DICHARRY
JONES WALKER LLP
201 St. Charles Avenue, Suite 5100
New Orleans, Louisiana 70170-5100
(504) 582-8000
jhunter@joneswalker.com

*Counsel for American Petroleum Institute*

February 22, 2022

## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,345 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Catherine E. Stetson

**CERTIFICATE OF SERVICE**

I certify that on February 22, 2022, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Catherine E. Stetson