ORAL ARGUMENT NOT YET SCHEDULED

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

FRIENDS OF THE EARTH, *et al.*, *Plaintiffs-Appellees*, v. DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, *et al*., *Defendants-Appellees,* and AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA, *Intervenor-Defendants-Appellants*	No. 22-5036, 22-5037 (Consolidated)

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS

As Conservation Groups explained in their motion to dismiss, this Court lacks jurisdiction over Intervenors' consolidated appeal because the district court's remand order is not an appealable final order. In its opposition, American Petroleum Institute ("API") does not dispute that private parties cannot generally appeal such orders. API nonetheless argues that it may appeal the district court order now because the district court remanded Interior's decision with vacatur rather than without. But that distinction does not create appellate jurisdiction. API

does not cite any case, nor are Conservation Groups aware of any, where a court has found a remand order immediately appealable because the district court vacated an agency decision. Quite the opposite. This Circuit and others have dismissed, for lack of jurisdiction, private party appeals of orders involving vacatur.

API also suggests that the collateral order doctrine supports its appeal, but it does not. This Court typically only allows the government to immediately appeal a remand order under that doctrine. Neither the vacatur of the lease sale decision nor the expiration of the current five-year plan prevent API from proceeding like any other private intervenor and appealing the decision below if it is aggrieved by the future outcome of the remand. Apart from its mistaken belief that an appeal is precluded, API has not identified any cost from awaiting the outcome of the remand. And in any event, "the Supreme Court has instructed that 'the strong bias of § 1291 against piecemeal appeals almost never operates without some cost.'" *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 658 (D.C. Cir. 2013) (citation omitted); *see also* Conservation Groups' Cross-Mot. 10, Doc. #1935890 ("Mot."). This Court should dismiss the present appeal.

Regardless of its disposition of this cross-motion, this Court should deny API's motion to expedite. Interior has now clarified that it "agrees with the parties" that it could proceed with consideration of the November 2021 bids "if this Court

were to reverse the vacatur." Fed. Defs.' Resp. 10, Doc. #1937024 ("Resp."). Interior's earlier failure to provide that assurance was the sole basis for API's motion to expedite. *See, e.g.*, API's Reply & Opp'n 3-5, Doc. #1936217 ("Opp'n").

1. The District Court's Remand Order Is Not a Final Decision.

As API acknowledges, Opp'n 7, a district court order remanding a case to an administrative agency "is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291." *N. Carolina Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 19 (D.C. Cir. 2008) (citations omitted); *see also* Mot. 3, 7-8 (citing cases). API nonetheless insists this Court has jurisdiction to hear this appeal because the district court vacated Interior's decision. The three example cases that API relies on do not directly support its expansive and novel theory that the final-judgment rule "generally applies" only when a district court remands without vacatur. Opp'n 7-8. And API does not cite any case in which a court exercised jurisdiction over a private party's appeal because the district court vacated the agency decision.

To the contrary, this Court and others have often determined that an order remanding with vacatur is not a final, appealable order. In *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 879-80 (D.C. Cir. 2000), the Court held that it lacked jurisdiction to consider a district court order that "vacated … and remanded the case … 'for agency action consistent with [the court's] Opinion.'" Likewise, in

Amarin Pharmaceuticals Ireland Limited v. FDA, this Court held that an "order remanding to the FDA is not an appealable final order, because it anticipates further agency action." No. 15-5214, 2015 WL 9997417 (D.C. Cir. Dec. 9, 2015). Like the district court order here, *Amarin* remanded with vacatur. *Amarin Pharmaceuticals Ireland Ltd. v. FDA*, 106 F. Supp. 3d 196, 219 (D.D.C. 2015) (clarifying that court "vacated" FDA's decision and remanded); *see also Cook Inlet Tribal Council v. Mandregan*, No. 14-cv-1835, 2019 WL 3816573, at *6 (D.D.C. Aug. 14, 2019) (holding order vacating an agency's decision and remanding could not be construed as "final" because the remand contemplated further agency proceedings).

Similarly, in *In re Long-Distance Telephone Service Federal Excise Tax Refund Litigation*, on which API elsewhere relies, this Court considered the final-judgment rule in the context of a remand order with vacatur. 751 F.3d 629, 633 (D.C. Cir. 2014). Although the Court found that it had jurisdiction, it based that ruling on other grounds and never considered or even mentioned vacatur in its reasoning. API tries to distinguish only *Pueblo of Sandia* by asserting that the finality argument based on vacatur was never made in that case. Opp'n 8 n.2. But API cannot explain why, if vacatur is *the* determinative factor, neither the parties nor the courts addressed the issue in any of these cases. Indeed, this Court has even determined that remand is not final when a district court entirely dismisses a case

from its docket, as long as the district court leaves core issues unresolved and remands for further proceedings. *Am. Hawaii Cruises v. Skinner*, 893 F.2d 1400, 1403 (D.C. Cir. 1990) (holding that finality does not turn on whether the district court retained jurisdiction); *N.A.A.C.P., Jefferson Cnty. Branch v. U.S. Sugar Corp.*, 84 F.3d 1432, 1436 (D.C. Cir. 1996) (same). The same is true here. Like in *American Hawaii Cruises*, the district court directed Interior to remedy its NEPA error and remanded "for further proceedings." Mem. Op. 67, D. Ct. Dkt. No. 78.

The law in other circuits is the same. For example, the Ninth Circuit has often held that orders vacating and remanding an agency's decision are not final, appealable orders under Section 1291. *E.g.*, *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1074, 1077 (9th Cir. 2010) (holding that order vacating lease extensions and decision to approve a power plant was not a final, appealable order); *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1185-86 (9th Cir. 2004) (considering private party appeal of order vacating agency action and holding "we lack jurisdiction over the entire Remand Order, including its provision setting aside the" agency's decision).

API's argument makes little sense, considering that vacatur is the default remedy in Administrative Procedure Act cases, while remand without vacatur is the exception to the rule. Mem. Op. 57-58. Creating a blanket doctrine that grants finality to all remand decisions with vacatur would effectively erase the long-

standing rule that administrative remand decisions are not final. And API's suggestion that a remand *with* vacatur gives an agency little incentive to act, and thus generate another agency action that could be challenged, gets things backwards.[1] Opp'n 10. This Court has said that vacatur is what prompts agency action on remand, whereas a remand alone invites inaction. *See e.g.*, *Am. Great Lakes Ports Ass'n v. Schulz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (noting that agencies often "decline to take action" when a court remands without vacatur); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (J. Griffith, concurring) (noting that open-ended remand without vacatur invites agency indifference). As such, it is more likely that API's worries about an unbounded remand would come to pass had the district court remanded without vacatur.

API's contention that vacatur means it will somehow never be able to appeal the district court decision also rings hollow. Opp'n 12-13. As Conservation Groups explained in their motion, API is not entirely foreclosed from appealing. If API is unsatisfied with the ultimate outcome of the remand, it is free to challenge it later.

[1] API's attempt to distinguish between an order that only vacates an agency action and one that vacates and remands is inapt. Opp'n 9. It is the nature of the district court order and not the court's use of the term "remand" that governs finality. *E.g.*, *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 857 (D.C. Cir. 2012) (noting that in determining finality, "if a district court should have remanded … for jurisdictional purposes, [this Court] treat[s] a private party's appeal as if the district court did remand). The relevant question is whether there is something more for the agency to do in response to the order.

Mot. 9-10. Here, the district court's extensive discussion of remedy demonstrates that the court expected Interior to act on remand in some way, even if it ultimately decided not to hold the sale. Mem. Op. 56-63. The court's vacatur discussion was not focused on whether Interior had work to do on remand, but instead whether the government could fix the existing decision or needed to make a new decision. *Id.* at 57-58. Whether the outcome of the remand is a revised or new decision, the final-judgment rule applies just the same. As numerous cases demonstrate, the purpose of the final-judgment rule is instead to "promote[] judicial economy and efficiency by avoiding the inconvenience and cost of two appeals." *Sierra Club*, 716 F.3d at 656 (citation omitted). Moreover, deferring consideration of appellate jurisdiction to the merits panel, Opp'n 5-6, would give rise to the very same piecemeal appeals that the final-judgment rule was designed to avoid.[2] Judicial economy is best served by a determination before the parties engage in full merits briefing.

API relies heavily on one case from another circuit that is readily distinguishable. Opp'n 11-13 (citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009)). In that case, the district court did not

[2] Interior's conclusive statement that it "has decided not to appeal," Resp. 2, further undermines API's suggestion to refer this motion pending Interior's appeal decision. Opp'n 5.

remand for further proceedings—instead it enjoined the Bureau from committing further NEPA violations. *Richardson*, 565 F.3d at 698 (explaining that the district court's order differed from a typical remand because it "did not require [the Bureau] to recommence a proceeding, or indeed to take any action at all—it simply enjoined [the Bureau] from further NEPA violations").

Richardson, in any event, is not the law in this Circuit. The D.C. Circuit has not "treated district court orders requiring further agency action under NEPA as final and reviewable." *See id*. at 699; Opp'n 13. In *Sierra Club*, for example, the district court enjoined the Rural Utility Service from issuing any further approvals for a coal plant expansion project without first completing an environmental impact statement. 716 F.3d at 656. This Court determined that practical considerations did not render the district court's order final, emphasizing that practical exceptions "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Id*. at 657 (citation omitted).

2. The Collateral Order Doctrine Does Not Provide Jurisdiction.

API also suggests that the collateral order doctrine confers jurisdiction because API will allegedly never be able to appeal the district court's decision. *See* Opp'n 13-14 (citing *Occidental Petroleum*, 873 F.2d at 331); *see also Long-Distance Tel. Serv.*, 751 F.3d at 633 (holding that the exception applies to a private

party if that party has "no opportunity to appeal"). But API provides no factual or legal support for its suggestion, apart from a single statement by Interior. Opp'n 13-14. As described below, Interior's statement, repeated in its Response, is based on an impermissibly narrow view of the remand that fails to account for all possible outcomes, including the possibility that Interior may decide not to hold a lease sale at all.

As the district court carefully emphasized, vacatur and remand would "allow the agency an opportunity to remedy its NEPA violation as it so chooses in the first instance" and rather than prejudge the outcome of the remand, the court expressly declined to "specify … what ultimate conclusion it must reach." Mem. Op. 67; *see also id*. at 63 (outlining different decision options available to Interior on remand). Significantly, Interior does not say that it has abandoned the required NEPA review; nor does it contend that it cannot correct its NEPA deficiencies before June 30. At most, Interior indicates that it does not have time to ***both*** correct its NEPA deficiencies and hold a new lease sale, should it so choose, before June 30, 2022. Resp. 8-9. Despite this, there are at least two paths that the remand could still take—and both provide an opportunity for Intervenors to appeal later.

In the first scenario, Interior may decide ***not*** to hold a new lease sale at all. Interior has ample time to complete the NEPA analysis before June 30— and it

could act any time after it analyzes public comments on the draft SEIS (Step 3).[3] Resp. 8; *see* Mem. Op. 62 (noting that Interior could correct its NEPA deficiencies before June, given the substantial progress it already made). Interior's one-sided timeline fails to address this possibility. Should Intervenors be dissatisfied with such a decision, they would then have the opportunity to challenge it, including an appeal of the underlying remand order that precipitated it. In this scenario, moving forward with an appeal during the remand risks duplicative appeals—the precise problem that the final-judgment rule operates to prevent.

In the second scenario, Interior may later decide to offer a lease sale of some scope. Interior states the "expiration of the current five-year program precludes Interior's ability to hold a new Lease Sale 257 on remand." Resp. 10. But as Interior highlights near the end of its discussion, it has the authority to provide a lease sale after June 30 as part of its new five-year program if it so chooses. Resp. 10; *see also* D. Ct. Dkt. No. 74 at 5 (Interior's similar statement below); Mem. Op. 62 (district court noting same). And Interior states that it is obligated to draft a new five-year program and is in the process of doing so. Resp. 3.

Interior's attempts to discount this authority are unavailing. First, Interior contends that the contents of its next five-year program are "speculative," but that

[3] The point is not that Interior must or should choose this option, but simply that nothing precludes this.

fails to distinguish this situation from any other remand. *Id*. at 10. The outcome of any remand or review is always necessarily "pre-decisional" at the outset. Second, Interior casts its decision as whether to offer a "new Lease Sale 257" after the current plan expires, improperly focusing on labels rather than substance. *Id*. A new decision to hold a lease sale based on its new NEPA analysis would be just that—a new decision—it would not exactly mirror Lease Sale 257 nor would it carry the same moniker. The question (now or later) is if Interior has authority to hold ***any*** lease sales after June 30. And, as Interior admits, that authority exists under its recurring five-year planning process. If Interior decides not to hold a sale in the new five-year program, Intervenors can then appeal. Proceeding with an appeal during the remand now would waste the Court's and the parties' resources before Interior has decided the ultimate path forward.

API's reliance on *Long-Distance* is misplaced. In that case, the agency did not act on remand for over two years and expressly conceded that it was "not planning" to engage in future rulemaking in response to the remand order. *Long-Distance Tel. Serv.*, 751 F.3d at 633. And, even then, the court ultimately turned to the merits only because appellants' merits arguments were "plainly insubstantial" and therefore easily and efficiently rejected. *Id*. In contrast to *Long-Distance*, Interior has never indicated that it will forego further consideration.

CONCLUSION

For these reasons, this Court should dismiss Intervenors' consolidated appeal.

Respectfully submitted this 1st day of March, 2022.

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Respectfully submitted this 1st day of March, 2022.

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