NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 22-5036; 22-5037

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

FRIENDS OF THE EARTH, ET AL.,

Plaintiffs-Appellees,

v.

DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, ET AL.,

Defendant-Appellees,

STATE OF LOUISIANA AND AMERICAN PETROLEUM INSTITUTE,

Intervenors-Defendants-Appellants.

On Appeal from the United States District Court,
District of Columbia, Case No. 1:21-cv-2317-RC

BRIEF FOR AMICI CURIAE BAYOU CITY WATERKEEPER, SAN ANTONIO BAY ESTUARINE WATERKEEPER, SOCIETY OF NATIVE NATIONS, SURFRIDER FOUNDATION, AND TURTLE ISLAND RESTORATION NETWORK IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel hereby certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici that appeared before the district court are listed in the Brief for Intervenor-Appellant American Petroleum Institute. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Intervenor-Appellant American Petroleum Institute, except for amici BP Exploration & Production, Inc.; Shell Offshore, Inc.; the Chamber of Commerce; EnerGeo Alliance and the National Ocean Industries Association; the States of Montana, Alabama, Alaska, Arizona, Arkansas, Georgia, Kentucky, Mississippi, Missouri, Oklahoma, Texas, Utah, and West Virginia; Chevron USA, Inc.; Amici Curiae submitting this brief; and additional amici identified in separate briefs of amicus curiae.

B. Ruling Under Review

References to the rulings at issue appear in the Brief for Intervenor-Appellant American Petroleum Institute.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Stephanie Safdi
Stephanie L. Safdi

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Amici state:

Bayou City Waterkeeper ("BCWK") is a Houston-based non-profit, tax-exempt organization founded in 2001 and incorporated in the State of Texas. As relevant to this litigation, BCWK's general nature and purpose is to address environmental injustices caused by water pollution and infrastructure and promote equity and climate resilience in decisions affecting the greater Houston region's water and people. BCWK and its members have a vested interest in decisions, such as Lease Sale 257, that will increase water pollution and climate risks in this region and participate in litigation when necessary, including as amicus, to assert this interest.

San Antonio Bay Estuarine Waterkeeper ("SABEW") is a project of the Calhoun County Research Watch, a non-profit, tax-exempt organization founded in 1989 and incorporated in the State of Texas. The organization monitors and protects Lavaca, Matagorda, and San Antonio Bays along the Texas Gulf Coast. As relevant to this litigation, SABEW's general purpose is to root out sources of water pollution, report pollution to authorities and prompt action, and take enforcement action when necessary to protect these coastal areas.

Society of Native Nations is a non-profit, tax-exempt organization incorporated in the State of Texas. As relevant to this litigation, Society of Native

Nations' general nature and purpose is to help protect and preserve the way of life, culture, spirituality, teachings, and medicines of the Native Indigenous people along the Gulf Coast and throughout North and South America.

Surfrider Foundation ("Surfrider")is a non-profit, tax-exempt organization incorporated in the State of California with more than 350,000 members and supporters, 79 local chapters (including five in Texas and four along the Gulf Coast), and over 190 school clubs in the United States. Surfrider's members study and enjoy marine species in the Gulf and derive recreational, aesthetic, and economic benefits from the Gulf and the diverse marine life that reside there. As relevant to this litigation, Surfrider's general nature and purpose is to protect Surfrider's members' use and enjoyment of Gulf waters, which depends on healthy and sustainable populations of marine mammals and other marine life and on clean and healthy waters and unpolluted beaches. When necessary to protect its members' interests, Surfrider participates in litigation, including as amicus.

Turtle Island Restoration Network ("TIRN") is a non-profit, tax-exempt organization incorporated in the State of California with over 150,000 members and supporters, including in Texas, and with an office in Galveston, Texas home to TIRN's Gulf of Mexico program. For over thirty years, TIRN has been a leading advocate for oceans and marine wildlife, including in the Gulf of Mexico. As relevant to this litigation, TIRN's general nature and purpose is to protect and

restore populations of endangered sea turtles and other vulnerable marine species such as whales and dolphins, and to protect marine biodiversity throughout the Gulf and southeastern United States. TIRN promotes policy change and undertakes strategic litigation to ensure laws are properly enforced and participates as amicus to advance its members' interests.

As to each, Amici have no parent corporation, and no publicly held company has 10% or greater ownership in any Amici.

CERTIFICATE OF CONSENT AND NECESSITY OF SEPARATE AMICUS BRIEF

Pursuant to Circuit Rule 29, Amici certify that all parties have consented to the filing of this brief.

This separate brief is necessary because Amici, as environmental and advocacy organizations charged with stewarding natural and cultural resources in the Gulf of Mexico, bring a unique perspective and expertise to this appeal that will not be represented by the other parties and amici. Located in the area most directly impacted by the leases at issue in this appeal, Amici are uniquely positioned to attest to the consequences of the Court's decision for Gulf Coast ecosystems and communities. This brief will assist the Court in understanding the value of informed scrutiny and disclosure of environmental impacts of major federal actions like offshore fossil fuel lease sale, as well as the costs of overturning the district court's remedy in this case.

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IDENTITY AND INTERESTS OF AMICI

Amici are not-for-profit environmental advocacy organizations whose missions include protecting species, ecosystems, communities, and cultural resources along the Gulf Coast.[1]

Amici include: BCWK and SABEW, which monitor and prevent pollution and other threats to their respective regions of the Texas coastline and promote coastal preservation and climate resiliency; the Society of Native Nations, which promotes protection and preservation of the way of life, culture, spirituality, and teachings of Indigenous people in and beyond the Gulf; the Surfrider Foundation, a 40-year old grassroots environmental organization with five chapters in Texas and four along the Gulf Coast, dedicated to protection and enjoyment of the world's ocean, waves, and beaches; and TIRN, a leading advocate for protection of marine biodiversity in the Gulf for over thirty years.

Amici and their members have directly observed the devastation that offshore oil-and-gas development has caused in the Gulf of Mexico and have a vested interest in ensuring that future energy development is compatible with a living Gulf. Amici endeavor to protect coastal resources and communities sitting

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici state that no counsel for any party drafted this brief in whole or part, and no entity or person aside from Amici and their counsel contributed money to fund preparing or submitting the brief.

at the frontlines of climate disaster driven by fossil fuels. Amici share a strong interest in ensuring that this Court's ruling furthers informed decision-making about major federal actions like Lease Sale 257 affecting the Gulf's future.

SUMMARY OF ARGUMENT

This case asks whether approval of the country's largest-ever offshore oil-and-gas lease sale can proceed where it rests on a record that failed to inform the government and public of the stakes for the global climate. Just as international bodies are warning that new fossil fuel investments may push the climate past a catastrophic tipping point, Lease Sale 257 offered more than 80 million acres in the Gulf to oil and gas extraction. The activities that flow from this lease sale would create cascading effects for Gulf Coast communities and ecosystems that already have been hardest hit by fossil fuel development over the last century and are at the frontlines of climate change.

The National Environmental Policy Act ("NEPA") and this Court's precedents make clear that federal agencies must consider the full scope of environmental impacts from this type of action before they make an irretrievable commitment of resources. Under the structure of the Outer Continental Shelf Lands Act ("OCSLA") that governs these leases, "[i]t is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, including... the effects of the sale on climate change." *Native Vill. of*

Point Hope v. Jewell, 740 F.3d 489, 504 (9th Cir. 2014) (*Point Hope*). Comprehensive environmental analysis at this stage informs not only the agency's exercise of discretion as to leasing, but also subsequent decisions, including on exploration and development. Even if leases are awarded, analysis of climate change and other impacts from the lease sales continues to shape agency decisions and inform options to avoid and mitigate harms. The district court correctly held that the Bureau of Ocean Energy Management ("BOEM") could not move forward with Lease Sale 257 without first properly considering these impacts. It also correctly concluded that BOEM's determination that these unprecedented fossil fuel leases would somehow lead to lower greenhouse gas ("GHG") emissions than leaving oil and gas in the ground lacked logic or record support.

In attacking the district court's decision, Intervenor-Defendants and their amici paint a distorted picture of the interests at stake, portraying the Gulf as a sacrifice zone of fossil fuels available for extraction by industry. A more accurate picture of the Gulf must inform this Court's review.

The Gulf of Mexico is a place of extraordinary natural beauty, complex and interdependent ecosystems, and high levels of ecological diversity. Vast arrays of aquatic animals depend on its intact ecosystems. So too do over 15 million people who call the Gulf Coast home and millions more who visit each year and draw irreplaceable cultural and spiritual value and welfare from its rich environment.

Meanwhile, impacts of oil-and-gas extraction – including spills, seismic events, air and water pollution, and vast GHG emissions – pile on top of disproportionate pollution burdens already borne by Gulf communities and ecosystems. This Court should take account of these stakes in affirming the carefully considered judgment of the district court.

ARGUMENT

I. NEPA Requires Evaluation of Foreseeable Environmental Impacts at the Lease Sale Stage

Intervenor-Defendants and their amici would have this Court limit environmental review at the leasing stage to a narrow range of ancillary activities immediately authorized on lease issuance, like creating water wells and conducting geographical surveys. In their view, broader impacts that foreseeably flow from the decision to open millions of acres to oil-and-gas extraction – like cumulative GHG emissions – must await environmental review until further OCSLA stages, if ever.[2] This extraordinary theory of NEPA review has no support in the law and would have dangerous and far-reaching consequences for informed governmental decision-making.

[2] As a practical matter, Interior's invocation of NEPA categorical exemptions for exploration and development plans in the central and western Gulf means that the leasing stage is also likely the last one for disclosure of environmental impacts from Lease Sale 257. *See* Plaintiffs-Appellees Br. at 35.

While NEPA allows BOEM to tier its environmental analyses as it navigates OCSLA's four-stage pyramidic program (*see* 40 C.F.R. § 1501.11), it does not sanction the myopic analyses or deferred scrutiny of environmental impacts that Intervenor-Defendants invite. Just the opposite: NEPA requires the agency to issue a "*broader* EIS" at the earlier "need and site selection" OCSLA stages, and then "issue subsequent, more detailed [EISs] at the program's later, more site-specific stage" as it moves through the pyramid. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 474 (D.C. Cir. 2009) (*CBD*) (emphasis added); *see* 43 C.F.R. § 46.140(c); *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 54 (D.D.C 2019) (environmental review for site-specific actions "may incorporate program-wide EISs, but must supplement those EISs with more specific environmental analyses of the action at issue"). As soon as it is "reasonably possible to analyze the environmental consequences," BOEM must do so, whether the agency is at a programmatic phase of the pyramid or refining its analysis under a site-specific plan. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002); *Point Hope*, 740 F.3d at 497. This rule prevents the agency from "postpon[ing] its analysis of an environmental consequence to the last possible moment." *Kern*, 284 F.3d at 1072.

At the lease sale stage, NEPA therefore requires BOEM to "take into account the full environmental effects of its actions when deciding whether and in

what manner to pursue the lease sale." *Point Hope*, 740 F.3d at 504. As BOEM moves down the pyramid, it will inevitably refine the analysis by considering more site-specific impacts. This underscores the import of broader cumulative review at the leasing stage. As the Ninth Circuit explained:

> It is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, including the overall risk of oil spills and the effect of the sale on climate change. It is also only at the lease sale stage that the agency can take into account the effects of oil production in deciding which parcels to offer for lease.

Id. Site-specific analyses in later-tier EISs would be a wholly "inadequate substitute for an estimate of total production from the lease sale as a whole." *Id.*

This Circuit's precedents are in accord. As this Court explained in *CBD*, the OCSLA leasing stage is the "critical stage of a decision" for NEPA. 563 F.3d at 480; *see* 43 U.S.C. § 1346(a)(1). It is here that the agency reaches "the point of irreversible and irretrievable commitment of resources" and assumes "the concomitant obligation to fully comply with NEPA." *CBD*, 563 F.3d at 480. While it may not be possible for BOEM, "at the leasing stage, [to] reasonably foresee the environmental impacts of specific drilling projects, it could reasonably foresee and forecast the impacts of oil and gas drilling across the leased parcels as whole." *WildEarth Guardians*, 368 F.Supp.3d at 67. At this precipice, BOEM has maximal discretion to avoid environmental consequences, and broad review of

impacts is thus most vital. *See id.* at 66 ("leasing stage is the point of no return with respect to emissions").

Intervenor-Defendants and their amici offer two misguided arguments to evade this result. First, they misread the Court's decision in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980) in arguing that it limits environmental review to "imminent" environmental harms arising from the lease sale. *See* States Amicus Br. at 32. In *North Slope*, this Court found the "worst case scenario" analysis of potential future oil spills in an OCSLA leasing stage EIS to be consistent with NEPA. 642 F.2d at 605. While the Court noted that certain questions about spill hazards could not be answered until specifics of drilling and production plans were elaborated in subsequent OCSLA stages, nothing in its decision alleviates the agency of its obligation to forecast downstream harms at the leasing stage. To the contrary, the agency *did* engage in such forecasting in *North Slope*, and this Court simply concluded that a "worst case scenario" analysis was a reasonable means of doing so for "remote hazards." *Id.*

Second, this Court's decision in *Sierra Club v. Federal Energy Regulatory Commission*, 8567 F.3d 1357 (D.C. Cir. 2017) forecloses Intervenor-Defendants' argument that downstream emissions from consumption of fossil fuels produced under the leases are too uncertain to analyze at the leasing stage. *Sierra Club* considered whether the Federal Energy Regulatory Commission violated NEPA by

failing to analyze downstream GHG emissions from combustion of gas carried by a pipeline project. This Court explained that burning natural gas at the pipeline terminus "is not just 'reasonably foreseeable,' it is the project's entire purpose" and thus requires fulsome analysis. *Id*. at 1372. So too here, "[p]roducing oil and gas for consumption 'is the [leasing] project's entire purpose," and "[d]ownstream use of oil and gas, and the resulting GHG emissions, are thus reasonably foreseeable effects of oil and gas leasing" necessitating review in the lease sale EIS. *WildEarth Guardians*, 368 F.Supp.3d at 73; *see also San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (same); *Birckhead v. Fed. Energy Regul. Comm'n*, 925 F.3d 510, 520 (D.C. Cir. 2019) (rejecting argument that downstream GHG emissions are reasonably foreseeable effects of pipeline project only if specific end destination is identified).

To be sure, BOEM will need to manage uncertainty about how much oil and gas will be produced and how it will interact with the market. But NEPA analysis "necessarily involves some 'reasonable forecasting'" and "educated assumptions about an uncertain future." *Sierra Club*, 867 F.3d at 1374; *WildEarth Guardians*, 368 F.Supp.3d at 69 (agency "could have reasonably forecasted, by multiple methods, the GHG emissions to be produced by wells on the leased parcels"). The mere existence of uncertainty does not entitle BOEM to "simply throw up its hands

and ascribe any effort at quantification to 'a crystal ball inquiry.'" *WildEarth Guardians*, 368 F.Supp.3d at 70 (citation omitted).

Were the court to accept Intervenor-Defendants' invitation to circumscribe NEPA review at the leasing stage, it would have sweeping implications for all manner of tiered environmental reviews.[3] A broad range of local and global impacts are reasonably foreseeable results of early-tier commitments to extractive programs like lease sales. These include air and water pollution from wastewater and fracking fluid discharge, leaking equipment, and oil spills; habitat destruction; noise and vibration pollution from geographic surveys and vessel traffic; and vast GHG emissions unleashed by infrastructure buildout, extractive activities, and downstream fossil fuel consumption. *See infra* Section III.B. These harms directly impact aquatic species and communities already overburdened by the fossil fuel industry's monopolization of Gulf waters.

None of these foreseeable impacts depend on where precisely oil and gas will be extracted or in what specific quantities. And it would be nothing short of disastrous for the environment, communities, and the global climate – not to

[3] BOEM did not even address the effects of ancillary activities under Lease Sale 257 itself, instead relying on its programmatic and model lease sale EISs and a supplemental EIS for a separate lease. For simplicity only, this Brief refers to those three precursor EISs collectively as the "EIS" for the Lease Sale 257 project.

mention contrary to this Court's precedents – if BOEM could ignore these impacts altogether when making its major programmatic commitments.

II. The District Court Correctly Concluded that Lease Sale 257's Record of Decision Was Arbitrary and Capricious

A. BOEM's Conclusion that the Country's Largest Offshore Fossil Fuel Lease Sale Would Reduce GHG Emissions Flouts Logic and the Record

"Pursuant to NEPA's 'hard look' requirement, BOEM must ensure that 'the adverse environmental effects of the proposed action are adequately identified and evaluated." *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 255 F.Supp.3d 101, 123 (D.D.C. 2017) (*Standing Rock I*) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). To meet this standard, BOEM's decision must be "fully informed and well-considered." *Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regul. Comm'n*, 783 F.3d 1301, 1324-25 (D.C. Cir. 2015). "An agency fails to meet its 'hard look' obligation when it 'rel[ies] on incorrect assumptions or data' in drafting an EIS or presents information that is 'so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of alternatives." *Native Ecosys. Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018) (citation omitted); *see* 40 C.F.R. § 1502.1. Courts will set aside an EIS where its "deficiencies are significant enough to undermine informed public comment and informed decisionmaking." *Sierra Club*, 867 F.3d at 1368.

As the district court held, BOEM's evaluation of GHG impacts falls woefully short. First, BOEM's illogical conclusion that an offshore oil-and-gas lease sale of unprecedented scale would result in *lower* GHG emissions than if no sale took place represents the sort of "clear error of judgment" that requires a record be set aside. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Not only did the EIS fail to properly inform the agency and public of the magnitude of the problem, but the very direction of climate impacts flies in the face of all available evidence.

The preeminent scientific body on climate change – the Intergovernmental Panel on Climate Change ("IPCC") – has concluded that rapid and deep decarbonization, including immediate transition away from fossil fuels, is required to avoid overshooting the consensus 1.5°C limit on global warming beyond which the world will suffer catastrophic damage.[4] The International Energy Agency has likewise warned that "hav[ing] a fighting chance of" attaining this target "requires nothing short of a total transformation of the energy systems that underpin our economies."[5] To avoid the worst effects of climate change, there can be "no new

[4] IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Summary for Policymakers at 19 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf (*IPCC Summary*).

[5] Intl. Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy System* (2021), https://www.iea.org/reports/net-zero-by-2050.

oil and gas fields approved for development."[6] The agency's executive director put it more bluntly: "If governments are serious about the climate crisis, there can be no new investments in oil, gas and coal, from now — from this year[, 2021]."[7] BOEM's contrary conclusion – that the country's largest offshore oil-and-gas lease sale would be better for the climate than leaving fossil fuels in the ground – is implausible on its face. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 739 (9th Cir. 2020) (*Liberty*) ("BOEM's conclusion that *not* drilling will result in more carbon emissions than drilling is counterintuitive" and "so implausible that it could not be ascribed to a different in view or the product of agency expertise." (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43)).

Second, the EIS's conclusion conflicts with evidence in the record. The MarketSim model on which BOEM relied for its GHG analysis "show[ed] a reduction in foreign oil consumption of approximately 1, 4, and 6 billion barrels of oil for the low-, mid-, and high-price scenarios, respectively" over the duration of the five-year leasing program under a no-action alternative. AR0014220. In other words, BOEM itself concluded, consistent with basic principles of supply and

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[6] *Id.* at 11.

[7] Harvey, Fiona, *No New Oil, Gas or Coal Development if World is to Reach Net Zero by 2050, Says World Energy Body*, Guardian (May 18, 2021), https://www.theguardian.com/environment/2021/may/18/no-new-investment-in-fossil-fuels-demands-top-energy-economist

demand and record evidence, that leaving oil in the ground would reduce foreign oil consumption. *See* Op. at 32.

BOEM's error came in failing to take the next step: Rather than translate this reduction in net fossil fuel consumption into a reduction in GHG emissions, it ignored the issue entirely. AR0014220 ("GHG impacts for this reduction in oil consumption . . . are not captured in this analysis."). The agency's failure to "consider [this] important aspect of the problem" cannot withstand scrutiny. *Motor Vehicle Mfrs.*, 463 U.S. at 43. "Even if the extent of the emissions resulting from increased foreign consumption is not foreseeable, the nature of the effect is." *Liberty*, 982 F.3d at 738. BOEM's truncated analysis led it to a conclusion that "runs counter to the evidence before [it]" – the quintessence of arbitrary decision-making. *Motor Vehicle Mfrs.*, 463 U.S. at 43; *see Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 342 F.Supp.3d 1145, 1156 (D. Colo. 2018) ("It is arbitrary and capricious for a government agency to use estimates of energy output for one portion of an EIS, but then state that it is too speculative to forecast effects based on those very same outputs.")

Compounding these deficiencies, the EIS premised its no-action alternative on flawed and unsupported assumptions that international sources would substitute for domestic production and that foreign oil would be more carbon-intensive than oil produced in the Gulf. AR0014190. While some assumptions are "inevitable in

the NEPA process," they must be "educated" and explained. *Sierra Club*, 867 F.3d at 1374. BOEM's were not. Further, courts have uniformly disapproved of the "perfect substitution assumption" that BOEM relies on here. In *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017), the Tenth Circuit concluded that such an assumption rendered comparison of leasing to the no-action alternative arbitrary and capricious because it lacked record support and was simply "irrational (i.e. contrary to basis supply and demand principles)." *Id.* at 1236; *see High Country Conservation Advoc. v. U.S. Forest Serv.*, 52 F.Supp.3d 1174, 1197-98 (D. Colo. 2014) (perfect substitution assumption "illogical at best"). This Court should reach the same conclusion.

B. The EIS's Failure to Rationally Analyze Downstream GHG Impacts is Profound

Intervenor-Defendants and their amici fall back on attempting to trivialize BOEM's flawed emissions analysis, asserting that the district court "flyspeck[ed]" the record and set aside approvals because of a "minor" quibble about methodology. API Br. at 33, *see* EnerGeo Amicus Br. at 5. Nothing could be further from the truth.

As the Biden Administration has recognized, the "United States and the world face a profound climate crisis." Tackling the Climate Crisis at Home Abroad, 86 Fed. Reg. 7619, 7619 (Jan. 27, 2021) (Exec. Order 14008). Human-induced climate change has already caused "[w]idespread, pervasive impacts to

ecosystems, people, settlements, and infrastructure" and will pose even more devastating effects if emissions are not swiftly curtailed on an economy-wide basis.[8] For low-lying coastal areas like the Gulf, "[s]ea level rise poses an existential threat;" coupled with increasing extreme weather and "increasingly irreversible losses" to coastal and marine ecosystems, these areas are on a trajectory to becoming unlivable.[9] With an unacceptable amount of global warming already baked in through historic emissions, "[t]he magnitude and rate of climate change and associated risks depend strongly on near-term mitigation and adaptation strategies."[10] To meet this challenge, the Administration has directed "a government-wide approach to the climate crisis," with federal agencies "driv[ing] assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy." 86 Fed. Reg. at 7622; *see Protecting Public Health and the Environment and Restoring Science, To Tackle the Climate Crisis,* 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021) (Exec. Order 13990).

NEPA is key to realizing the Administration's whole-of-government approach to tackling the climate crisis. By requiring that every federal agency take a "hard look" at impacts of major actions, NEPA mandates a careful assessment of

[8] *IPCC Summary* at 9.

[9] *Id.* at 9, 15.

[10] *Id.* at 14.

emissions across the full range of federal activities, enabling the government to account for climate risks and opportunities in all aspects of decision-making. Without meaningful analysis of GHG impacts of federal projects, the government and public are left in the dark on the most important vector of natural and human welfare of our time.

In addition to two courts, the federal government itself has deemed the GHG analysis at issue here too flawed to sustain a NEPA-compliant EIS. In one of his first executive orders, President Biden ordered Interior to "pause new oil and natural gas leases on public lands or in offshore waters" – including Lease Sale 257 – "pending completion of a comprehensive review and reconsideration . . . , including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters." 86 Fed. Reg. at 7624-25. Interior has since doubled down on its position that the EIS was fatally flawed, admitting in an August 15, 2021 statement that the leasing programs "failed to adequately incorporate consideration of climate impacts into leasing decisions or reflect the social costs of [GHG] emissions."[11] The Administration's decision to stand on this admittedly flawed record is pure caprice.

[11] Dept. of Interior, *Statement on Oil and Gas Leasing Program*, Aug. 16, 2021, https://www.doi.gov/pressreleases/interior-department-issues-statement-oil-and-gas-leasing-program.

Finally, BOEM's errors have profound ripple effects. On August 16, 2022, President Biden signed into law the Inflation Reduction Act ("IRA"), coupling incentives for decarbonization with concessions to the fossil fuel industry, including a directive on Lease Sale 257. Official support for the bill was premised on the belief that it would "deliver[] the most significant action in U.S. history to tackle the climate crisis."[12] Yet the bill analyses were performed without the benefit of sound analysis by Interior of Lease Sale 257's actual consequences for climate change. The EIS's errors, if uncorrected, would also continue to infect BOEM's decision-making in later-tier exploration and production phases, undercutting NEPA's purpose "to provide for informed decision making and foster excellent action." 40 C.F.R. § 1500.1(a). The district court was correct to vacate this record.[13]

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[12] White House, *State Facts Sheets: How the Inflation Reduction Act Lowers Energy Costs, Creates Jobs, and Tackles Climate Change Across America,* https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/17/state-fact-sheets-how-the-inflation-reduction-act-lowers-energy-costs-create-jobs-and-tackles-climate-change-across-america/, Aug. 17, 2022.

[13] Contrary to Defendants' motions to dismiss filed last week, the IRA does not render this case moot. The meaningful analysis of climate and other environmental impacts that NEPA mandates at the leasing stage informs not only BOEM's leasing decisions, but also manifold discretionary decisions in subsequent OCSLA stages. These include: selection of leasing stipulations to mitigate environmental risks; imposition of post-approval monitoring conditions (*see* 40 C.F.R. § 1505.3); decisions on proposed exploration, development, and production plans under the leases; and determinations whether to cancel leases when, among other grounds, "[c]ontinued activity on the lease would probably cause harm or damage to life (including fish and other aquatic life), property . . . , or the marine, coastal, or

III. Vacatur is Necessary and Appropriate Given the Stakes for Gulf Ecosystems, Communities, and the Global Climate

Intervenor-Defendants and their amici spend a great deal of space arguing that the district court *should have* allowed Lease Sale 257 to remain in place while BOEM corrected the record on remand. This fails to address the question on review: whether the district court abused its equitable discretion in remanding with vacatur. *Standing Rock Sioux Tribe v. U.S. Army Corps. of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (*Standing Rock II*).

It did not. Vacatur is the statutory default under the APA, including, as this Court recently affirmed, for violations of NEPA. 5 U.S.C. § 706(2); *Standing Rock II*, 985 F.3d at 1051-52. Vacatur furthers NEPA's purpose to promote informed decision-making by ensuring remand does not become a mere paper exercise in rationalizing agency action already taken. *Cf. Food Mktg. Ins. v. Interstate Com. Comm'n.*, 587 F.2d 1285, 1290 (D.C. Cir. 1978) (recognizing the "danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues"). Indeed, the district court could only depart from this norm if it had found that vacating flawed agency action pending remand would create more problems

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human environment" (43 U.S.C. § 1334(a)(2)(A); 30 C.F.R. § 550.181). Without a meaningful GHG analysis in the EIS, BOEM will be uninformed about the climate impacts of these decisions and hamstrung in avoiding or mitigating them.

than it resolves. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (considering "seriousness of the order's deficiencies" and "disruptive consequences" of vacatur). As the district court carefully concluded, this is not the case here.

Intervenor-Defendants and their amici distort the two *Allied-Signal* factors in asking this Court to overstep the scope of its review. First, as to severity, they ask and answer the wrong question in arguing that BOEM could choose to proceed with lease sales even with a corrected GHG analysis. But the question is not whether the "ultimate action could be justified," but whether the errors cast doubt on whether "'the agency chose correctly' regarding the *substantive action*." *Standing Rock II*, 985 F.3d at 1052. Were it otherwise, the vacatur analysis "would subvert NEPA's purpose by giving substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later." *Id.* Given that the Administration has directed agencies to center evaluation of GHG impacts in all decision-making, BOEM's failure to intelligently disclose GHG impacts for this historic-scale lease sale is egregious, and "refusing to vacate the corresponding agency action would 'vitiate' [NEPA]." *Id.*

Second, Intervenor-Defendants and their amici distort the analysis of disruptive consequences by focusing only on purported economic costs of vacatur to regulated fossil fuel industries. *See, e.g.*, API Br. at 44-45. While courts do

sometimes consider such costs, "it is not clear that economic concerns are as relevant in an environmental case like this one." *Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F.Supp.3d 1, 3 (D.D.C. 2016). In any event, costs to regulated industry are neither determinative nor the heart of the vacatur analysis. Rather, the evaluation should properly center impacts to public health and the environment and select the remedy that would best fulfill NEPA's objectives. *See Wisconsin v. U.S. Envtl. Prot. Agency*, 938 F.3d 303, 336 (D.C. Cir. 2019); *Am. Bankers Assn. v. Natl. Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019) (considering whether vacatur would "'set back' the Act's objectives"); *Envtl. Defense Fund v. U.S. Evntl. Prot. Agency*, 898 F.2d 183, 190 (D.C. Cir. 1990) (considering vacatur's effect on "enhanced protection of the environmental values" required by Clean Air Act); *Standing Rock I*, 282 F.Supp.3d at 105 (criticizing "economic myopia"). The scales here tip strongly in favor of vacatur.

A. Offshore Fossil Fuel Leasing Is Damaging to the Gulf Coast Economy

While Louisiana and the Chamber of Commerce complain that vacatur would costs jobs and public revenues (Louisiana Br. at 22-23; Chamber Amicus Br. at 12-13), they neglect to mention that these numbers are dwarfed by economic benefits of sustainable Gulf industries that would be harmed by fossil fuel leasing. The Gulf Coast's tourism industry alone supplies 2.6 million jobs – more than 8

times the jobs that, according to Chamber of Commerce, are supplied by all oil and gas development on U.S. public lands.[14] Chamber Amicus Br. at 12. Gulf wildlife tourism brings in over $19 billion in annual spending and generates over $5 billion in tax revenue.[15] On top of this, Gulf commercial fishing and seafood industries generate over 81,000 jobs and $800 million in landing revenue alone.[16] These industries depend on healthy ecosystems, abundant wildlife, and unpolluted waters. Entrenching Lease Sale 257 compromises these major economic drivers.

Climate change driven by fossil fuel extraction creates even greater economic vulnerabilities for the Gulf. The federally-mandated Fourth National Climate Assessment concluded that Texas and the Southeast are alone responsible for 34%, or $700 billion, of U.S. manufacturing output and warned that "future climate changes would pose challenges for economic competitiveness."[17] The assessment also projects 570 million labor hours lost per year in the Southeast by

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[14] Stokes et al., *Wildlife Tourism and the Gulf Coast Economy* at 5 (2013), http://www.daturesearch.com/wp-content/uploads/WildlifeTourismReport_FINAL.pdf (*Wildlife Tourism*).

[15] *Id.*

[16] Natl. Oceanic & Atmospheric Admin. ("NOAA"), *Fisheries Economics of the United States 2019* at 163 (Mar. 2022), https://media.fisheries.noaa.gov/2022-07/FEUS-2019-final-v3_0.pdf.

[17] U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Vol. II* at chp. 19 (2018), https://nca2018.globalchange.gov/.

2090 if climate risks are not properly addressed and flooding of nearly $30 billion in coastal property from sea-level rise by 2030.[18] Further, without swift action to slash GHG emissions, storms like Hurricane Harvey – which caused more than $125 billion in damage to the Gulf – are projected to become more frequent and devastating.[19]

On the other side of the ledger, the economic consequences of vacatur for regulated industries are marginal at best. Chevron, the highest bidder for 34 tracts, complains that it lost access to $9.4 million it paid in bonus bids. Chevron Amicus Br. at 24 n.3; Op. at 9 n.2. But even if Chevron lost its entire bid amount, that would have no discernible effect on its bottom line. Chevron's $9.4 million bids amount to **.004%** of its $239.5 *billion* in total assets.[20] Indeed, $9.4 million is only .08% of Chevron's $11.4 billion in adjusted *earnings* from the second quarter of 2022 alone.[21]

Size aside, economic impacts to regulated industry merit little consideration in this vacatur analysis. The federal government and bidders elected to proceed

[18] *Id.* at Figure 19.21; chp. 23.

[19] *Id.* at chp. 2.

[20] Chevron Corp., *2021 Annual Report* at 23, https://www.chevron.com/-/media/chevron/annual-report/2021/documents/2021-Annual-Report.pdf.

[21] Chevron Corp., *Second Quarter 2022 Results*, July 29, 2022, https://www.chevron.com/newsroom/2022/q3/chevron-announces-2q-2022-results

with the challenged lease sales in November 2021 with briefing pending and only two months before the district court deemed the EIS deficient. Op. at 9. They offer no reason why bidding could not have been delayed until this case was decided to avoid any costs. Their attempt to wield such costs against vacatur shows precisely why courts are correct to "fear[]" that, absent an expectation of vacatur, "agencies and third parties may choose to devote as many resources as possible to a challenged project – and then claim disruption in light of such investments." *Standing Rock I*, 282 F.Supp.3d at 106.

B. Offshore Fossil Fuel Leasing Devastates Public Health and Welfare and the Gulf Coast Environment

Tellingly, Intervenor-Defendants and their amici disclose no risks to public health or the environment from vacatur. Rather it is remanding *without* vacatur that would pose serious risks. *See Standing Rock I*, 282 F.Supp.3d at 105 (faulting defendants and amici for addressing "potentially disruptive effects of vacatur as if they occur in a vacuum,' thus giving short shrift to the 'potentially disruptive effects that could flow from remand without vacatur'") (citation omitted). To put the decision on remedy in proper context, Amici offer a snapshot of the risks that lease sales pose.

1. Climate Impacts

As discussed above, expert bodies at the highest levels are sounding the alarm that *any* new investments in fossil fuel extraction risk pushing the global

climate into irreversibly damaging overshoot. As the country's largest ever offshore oil-and-gas lease sale, Lease Sale 257 poses a cognizable threat to the stability of the global climate. In addition to vast direct and downstream emissions, infrastructural buildout associated with oil-and-gas extraction is expected to generate more than half a billion tons of GHG emissions by 2030, the majority coming from Texas and Louisiana.[22] Even earlier, fossil fuel leasing interferes with development of renewable wind energy infrastructure, directly reducing leasable areas and hindering the urgently needed transition to renewable energy sources.[23]

The consequences for GHG emissions are not abstract for Gulf communities on the frontlines of climate disaster. The Gulf Coast is especially vulnerable to sea-level rise because of its fragile, low-lying shorelines and adjacent coastal environments: sea levels are projected to increase by 14-18 inches over the next 30 years, the highest rise among U.S. coastal regions.[24] On top of land losses, climate change is driving more damaging weather in the Gulf, including floods and hurricanes.

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[22] Waxman et al., *Emissions in the Stream: Estimating the Greenhouse Gas Impacts of an Oil and Gas Boom*, Envtl. Res. Letters 15 (2020), https://iopscience.iop.org/article/10.1088/1748-9326/ab5e6f/pdf.

[23] Plaintiffs' Opening Br. at 42, Dkt. # 34 (citing AR 14358).

[24] NOAA, *2022 Sea Level Rise Technical Report*, https://oceanservice.noaa.gov/hazards/sealevelrise/sealevelrise-tech-report.html#step1.

These climate-driven changes impact the livability of the Gulf. According to the Union of Concerned Scientists, 5,505 homes in Texas are at risk of chronic inundation by 2030 and over 82,000 homes by 2100.[25] More serious efforts to prevent GHG emissions dramatically reduce these projections.[26]

2. Impacts to Gulf Communities

Allowing Lease Sale 257 to move forward will layer new public health and safety risks onto a region disproportionately burdened by polluting industry. The Gulf already hosts 1,751 active offshore drilling platforms in federal waters, and 35 refineries and numerous support facilities and pipelines pock the coastline.[27] These polluting industries persistently expose communities to air and water pollution, particularly low-income communities of color.[28] People living near an oil or gas well are at heightened risk of reproductive, neurological, respiratory, and

[25] Union of Concerned Scientists, *Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate,* June 18, 2018, https://www.ucsusa.org/resources/underwater.
[26] *Id.*
[27] Ctr. for Biological Diversity, *Toxic Waters: How Offshore Fracking Pollutes the Gulf of Mexico* at 6 (July 2021), https://biologicaldiversity.org/w/news/press-releases/offshore-fracking-report-finds-toxic-pollution-in-gulf-of-mexico-2021-07-07/ (*Toxic Waters*).
[28] *Id.*

other harms.[29] Maternal exposure to fracking and drilling can also increase incidence of high-risk pregnancies, premature births, and birth defects.[30]

Gulf oil-and-gas operations also present acute safety hazards, including disaster-level spills, chemical releases, fires, and explosions.[31] And they severely inhibit recreational access and enjoyment of coastal environments for millions of residents and visitors who come to the Gulf to surf, fish, swim, boat, observe wildlife, and draw solace from the unique coastline.[32] Further compounding these impacts are severe risks to health, safety, habitability, and enjoyment created by sea-level rise, extreme weather, and other climate changes driven by fossil fuel extraction.

3. Impacts to Gulf Ecosystems

Intervenor-Defendants' portrait of the Gulf as a sacrifice zone for fossil fuel extraction erases the extraordinary beauty, diversity, and complexity of Gulf ecosystems. As just a snapshot of its natural wealth, the Gulf contains 15.4 million acres of coastal wetlands, 3.35 million acres of intertidal wetlands, and over a

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[29] *Id.*

[30] *Id*.

[31] *Id.*

[32] Deepwater Horizon Natural Resources Damage Assessment Trustee Council, Final Programmatic EIS at 4-648 (Feb. 2016) ("*Deepwater Horizon PEIS") available at https://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan* (documenting 17 million lost days of boating, fishing, and beach going).

million acres of seagrass, providing a breeding ground for 75% of migratory waterfowl crossing the United States.[33] Just 100 miles south of the Louisiana-Texas border lies the Flower Garden Banks National Marine Sanctuary, a "secret garden" known for its "fantastic coral reefs" and abundant marine life.[34] In addition to serving as an important carbon sink, these habitats provide food, shelter, and spawning grounds to a vast array of aquatic species, many of which are already at risk of extirpation. Among Gulf species listed as threatened or endangered are twenty-two marine mammal species (including critically imperiled Rice's whale), five sea turtle species, seven bird species, and five coral species.[35]

[33] *See* Multisale EIS at 4-71 to 4-72, 4-75.

[34] NOAA, *Flower Garden Banks National Marine Sanctuary*, https://oceanservice.noaa.gov/ocean/sanctuaries/flower-garden.html.

[35] Multisale EIS at 4-259 to 4-260.

A turtle swims through Flower Garden Banks National Marine Sanctuary.

These habitats and wildlife that depend on them are highly vulnerable to impacts of offshore oil-and-gas activities. The Deepwater Horizon Oil Spill caused by Amicus BP offers a telling case study of what can go wrong. The spill directly killed up to 102,000 birds, 159,000 endangered sea turtles, and up to 5 trillion larval fish, and caused up to 35% excess mortality in marine mammals.[36] It also caused massive losses to sargassum, a floating seaweed that provides essential habitat for young fish and sea turtles.[37] Years later, the long-term effects of the spill continue to ripple throughout the Gulf food web.

[36] Deep Water Horizon PEIS 4-149, 4-462, 4-561, 4-621.

[37] *Id.* at 4-149.

Oil mars the Gulf coastline.

Even routine contamination from oil-and-gas operations poses a serious threat. Aquatic animals are routinely exposed to chemicals from leaking infrastructure, frequent oil spills,[38] and widespread dispersal of fracking fluids and wastewater. Between 2010 and 2020 alone, oil companies dumped at least 66.3 million gallons of toxic fracking fluids into the Gulf.[39] The Gulf's endangered sea

[38] Between 1973 and 2011, the Coast Guard documented 42,041 oil spills in the Gulf. *Toxic Waters* at 8.

[39] *Id.* at 1.

turtles are particularly susceptible to this pollution because of their long lifespans and lack of effective detoxification methods. Marine mammals too are vulnerable to exposures, in addition to disturbances from vessel traffic and noise that attend lease activities.

A sea turtle suffers from spilled oil.

Many other threats from early-stage lease activities are only beginning to be understood. For instance, it is now clear that both marine mammals and sea turtles are highly vulnerable to seismic surveys widely used in marine geophysical oil-and-gas exploration.[40] Low frequency noise pollution from surveys also causes

[40] Nelms et al., *Seismic Surveys and Marine Turtles: An Underestimated Global Threat*, 193 Biological Conserv. 49 (2016).

stress for crustaceans, mussels, and even aquatic worms, with potentially far-reaching consequences for marine ecosystems.[41]

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These and other impacts on overburdened ecosystems and communities are foreseeable results of leasing. While some may accrue immediately upon lease issuance, others become more likely if this Court were to allow lease sales to stand pending remand, entrenching path-dependence on a flawed decision. Vacatur appropriately reflects the gravity of potential harms and ensures that BOEM actually takes the "hard look" that NEPA requires before making this irretrievable commitment to a fossil fuel future.

CONCLUSION

The district court correctly held that the environmental analyses BOEM relied on in deciding to proceed with Lease Sale 257 were fatally flawed. And it properly exercised its discretion to set aside the sales to ensure that BOEM's decision-making will be fully informed, as NEPA requires. This Court should affirm.

[41] Wang et al., *Low Frequency Noise Pollution Impairs Burrowing Activities of Marine Benthic Invertebrates*, 310 Envtl. Pollution (2022).

Respectfully submitted,

September 23, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point proportionally spaced font and contains 6,488 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

/s/ Stephanie Safdi
Stephanie L. Safdi

CERTIFICATE OF SERVICE

I hereby certify that, on September 23, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Stephanie Safdi
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