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, *et al*., *Intervenor-Defendants-Appellants*	No. 22-5036, 22-5037 (Consolidated)

PLAINTIFFS-APPELLEES' OPPOSITION TO FEDERAL DEFENDANTS-APPELLEES' AND AMERICAN PETROLEUM INSTITUTE AND LOUISIANA'S MOTIONS TO DISMISS AS MOOT

Appellees Friends of the Earth, *et al.* (Friends) oppose the motions to dismiss filed by Defendant-Appellees Department of Interior (Interior) and Intervenor-Defendants-Appellants American Petroleum Institute and State of Louisiana (Intervenors). Contrary to the parties' arguments, the recently-enacted Inflation Reduction Act does not affect a court's ability to grant effective relief for Friends' claims in this litigation, and is silent on the central question in this appeal:

did Interior violate the National Environmental Policy Act (NEPA) when it decided to hold Lease Sale 257 based on a legally infirm analysis of the climate impacts of holding that sale? Rather, the provision's direction that Interior issue leases to high bidders in Lease Sale 257 is best read narrowly and in accordance with its plain language to remove Interior's discretion in a targeted but meaningful respect. Absent the provision, Interior has largely unfettered discretion to reject bids and decline to issue leases after holding a lease sale. By directing Interior now to accept bids and issue the leases pending the ongoing judicial review of the lawfulness of the lease sale by this Court, Congress ensured that the sale would be consummated if the Court agrees with Intervenors and determines that the lease sale did comply with NEPA. This removes the uncertainty created by the fact that Interior, exercising its usual discretion in the absence of this provision, could choose not to issue leases even if the Court were to determine the lease sale was lawful.

Rather than focus on the plain text of the provision, Interior and Intervenors invite the Court to speculate about what Congress might have "really" intended by Section 50264. Reading the provision to foreclose relief in this case, as Interior and Intervenors urge, would require the Court to either: (1) go beyond the provision's plain language and conclude that Congress repealed NEPA by implication, a heavily disfavored outcome; or, (2) read the provision in a manner that runs afoul

of Constitutional separation of powers principles that preclude Congress from infringing on the judicial branch by picking a winner in a lawsuit without changing the underlying law. Friends' reading of Section 50264, on the other hand, avoids the Scylla of repeal by implication and the Charybdis of constitutional infirmity to give effect to the plain text of Section 50264's limited requirement to issue leases to the high bidders from Lease Sale 257 pending adjudication of the sale's lawfulness, thereby ensuring they will have their leases if the Court decides the lease sale was lawful.

This case is not moot, and the Court should uphold the district court's order vacating Lease Sale 257.

BACKGROUND

This case challenges Interior's unlawful decision to hold an offshore oil and gas lease sale in the Gulf of Mexico in 2021 (Lease Sale 257) in reliance on a faulty environmental impact statement. *See* Doc. 1935890 at 3-5. The district court granted Friends' motion for summary judgment in part, vacated the record of decision and the actions taken based on it, and remanded to Interior for further proceedings. Order, Dkt. No. 77; Mem. Op. 67, Dkt. No. 78. It vacated the record of decision for Lease Sale 257 after Interior had opened the bids for Lease Sale 257 but before it had decided whether to accept them and issue leases to high bidders.

Intervenors appealed. Interior declined to appeal. In response to Friends' motion to dismiss Intervenors' appeals for lack of jurisdiction, Interior claimed that its time to remedy the NEPA violation identified by the court and hold the vacated Lease Sale 257 again had expired. Doc. 1937024. On that basis, it supported Intervenors' right to appeal, notwithstanding the remand rule. *Id*. Interior and the parties also agreed that, should this Court reverse the district court's order, Interior could resume its consideration of the bids received on November 17, 2021, for Lease Sale 257 and exercise its broad discretion to accept or reject those bids and issue the leases. *See id*. at 4-5, 10-11 (emphasizing that "if this Court reverses the vacatur, Interior would still retain its authority and discretion to decide whether to accept the bids and award the leases").

As the parties were briefing the appeals, Congress passed, and the President signed the Inflation Reduction Act. Pub. L. No. 117-169 (Aug. 16, 2022). Section 50264 of that legislation directs Interior to (1) accept the highest valid bid for tracts offered in Lease Sale 257 received on November 17, 2021, and (2) issue fully executed leases to the bidders. Inflation Reduction Act § 50264. Intervenors and Interior now argue that Section 50264 renders this case moot.

ARGUMENT

A case becomes moot "only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox v. Serv. Emp. Int'l Union,*

Local 1000, 567 U.S. 298, 307 (2012) (citation omitted). Effectual relief is "expansively defined" and "encompasses acts that may not necessarily undo a *fait accompli*, but that may serve to mitigate it," including partial relief. *Ctr. for Food Safety v. Salazar*, 900 F.Supp.2d 1, 5-6 (D.D.C. 2012) (collecting cases); *Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("Even the availability of a partial remedy is sufficient to prevent a case from being moot.") (cleaned up).

Interior and Intervenors have failed to carry their "heavy" burden to demonstrate mootness. *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). Their motions are premised on the belief that Section 50264 absolves Interior from complying with NEPA for Lease Sale 257, rendering an adjudication of the adequacy of Interior's NEPA analysis for Lease Sale 257 irrelevant, and thereby depriving the Court of any ability to grant effective relief. However, as explained below, this contention finds no support in the plain language of Section 50264, which directs two specific agency actions not challenged in this case and makes no mention of the separate lease sale decision or supporting NEPA compliance that *are* the subject of this case. Interior and Intervenors' various arguments that the provision nonetheless deprives this Court of its power to provide effective relief would require the Court to read Section 50264 in a manner that effects a repeal by implication or violates the separation of powers doctrine and is unsupported by the

cases Interior and Intervenors cite. The provision's plain text and context compel a much narrower reading that avoids these problems.

I. Section 50264 Instructs Interior to Take Specific Actions That Do Not Eliminate a Court's Ability to Provide Effective Relief for Interior's NEPA Violation.

Section 50264(b) directs Interior to take two specific actions: accept the highest valid bid received for each tract offered in Lease Sale 257 within 30 days and issue a lease to each high bidder in accordance with existing law. With respect to these specific actions, Congress has removed Interior's normal regulatory discretion, *see* Interior Mot. 3-4, Doc. 1964417 (describing Interior's regular process for evaluating bids and issuing leases). Specifically, Interior no longer can exercise its normally broad discretion to reject a bid for acreage offered in a valid lease sale, regardless of the bid amount. 30 C.F.R. § 556.516(b); 43 U.S.C. § 1337(a)(1) (Interior is "authorized to grant to the highest responsible qualified bidder … any oil and gas lease"); *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1121 (D.C. Cir. 1969) (concluding that "[t]he use of the word 'authorized' indicates that the Secretary has discretion in granting leases and is not required to do so. He might for example have rejected all bids on the ground that none was in the public interest ….").

Congress is presumed to have been acting in full awareness of this lawsuit. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006)

(presuming Congress is aware of judicial branch actions when it legislates). Here, because Interior had not appealed the district court order and was actively defending President Biden's Executive Order 14008, 86 Fed. Reg. 7619, 7624–25 (Jan. 27, 2021) (directing actions to address the climate crisis, including pausing issuance of new offshore leases), against challenges by industry and several states, *see e.g.*, *Louisiana v. Biden*, 45 F.4th 841, 846 (5th Cir. 2022), there was considerable uncertainty about whether Interior would exercise its discretion to issue the leases if Intervenors were to prevail in this appeal. Section 50264 represents Congress' decision to eliminate this uncertainty. The provision does so by ensuring that the sale would be consummated if this Court determines the lease sale does comply with NEPA. By directing issuance of leases now, Congress removed the chance that Interior, exercising its usual discretion in the absence of this provision, would choose not to issue leases even if Intervenors should prevail in this appeal. This is a meaningful, though targeted, directive.[1] Section 50264 puts

[1] The provision's title, "Reinstatement of Lease Sale 257," is consistent with Friends' reading of the statute. It describes the situation: Congress is directing the issuance of leases to high bidders in a lease sale that is currently vacated (pending judicial review). In any case, it cannot alter the provision's actual, limited directive. "It has long been established that the title of an Act cannot enlarge or confer powers." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 n.14 (1981) (cleaned up); *see also Demore v. Kim*, 538 U.S. 510, 535 (2003) (O'Connor, J., concurring) (citing *INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001)) (statutory title "has no power to give what the text of the statute takes away").

Interior and Lease Sale 257 bidders in the position they could have been had the district court not vacated Lease Sale 257.

Had Interior proceeded in that event to issue leases, this would have led to a state of affairs identical to any other appeal in which leases have been issued pursuant to a lease sale that is under judicial review by this Court. This Court and others routinely have evaluated and ruled on NEPA challenges to lease sales even after the leases have issued. Most recently, this Court determined that Interior violated NEPA for sales held four years ago and remanded to Interior for reconsideration without vacating the lease sale or leases. *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 805 (D.C. Cir. 2022)[2]; *see also Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 494 (9th Cir. 2014) (finding NEPA violation for lease sale six years after leases issued); *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F.Supp.3d 147, 153 (D.D.C. 2014) (reviewing EIS for sales held two years earlier). Section 50264 puts this case in an indistinguishable procedural posture.

[2] Interior recently issued a draft supplemental Environmental Impact Statement (EIS) analyzing potential impacts from a representative lease sale in the Gulf of Mexico, including the discussion of the report that formed the basis of this Court's remand in *Gulf Restoration Network*. 87 Fed. Reg. 61014 (Oct. 7, 2022). Interior requested comments on that draft and intends to issue a final EIS in early 2023. While Interior has not completed that review or announced how it will affect the lease sales already held, it has not argued or even hinted that the issuance of the leases in any way precludes it from completing its NEPA analysis or taking additional actions based on that analysis. The same is true in this case: the issued leases have no bearing on what Interior can and must do to comply with NEPA after the fact.

And, as in those cases, nothing about the issuance of the leases affects the Court's ability to adjudicate the appeal and provide whatever relief it deems appropriate.[3]

Thus, notwithstanding Interior's issuance of leases in accordance with Section 50264, if the Court concludes that Interior violated NEPA when it decided to hold the lease sale in the first place, it can still grant effective relief to avoid or ameliorate harm to the environment and to Friends' interests. This includes injunctive relief to prevent activity on the issued leases unless and until the agency complies with NEPA. *See WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 84-85 (D.D.C. 2019) (declining to vacate, but enjoining issuance of permits on the leases until NEPA violations were remedied). The Court may also vacate the challenged EIS to prevent Interior from relying on it going forward or vacate the issued leases because they were the product of a lease sale that occurred based on Interior's violation of the law. *See*, *e.g.*, *Mont. Wildlife Fed'n v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 WL 2615631, *11-12 (D. Mont. May 22, 2020) (vacating onshore oil and gas leases), *appeal docketed*, No. 20-35609 (9th Cir. July 9, 2020). The Court also retains the ability to remand the leases to Interior to consider whether or how to exercise its suspension or cancellation authority. *See* 30 C.F.R. § 585.417;

[3] Intervenor and Interior's reliance on *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) is beside the point. Congress' targeted removal of Interior's discretion to forgo issuance of the leases need not (and as described *infra* Section II, cannot) be read to remove Interior's NEPA obligations for the lease sale.

Mem. Op. 64-65, Dkt. No. 78 (finding that vacatur before issuance of leases was most straightforward relief, but noting that Interior maintained ability to suspend or cancel leases even once issued).

Indeed, in the proceedings below, Interior agreed that the court retains full discretion to order relief notwithstanding issuance of the leases. *See* Dkt. No. 14 at 6 (Interior asserting that even after leases are issued "nothing in Section 1334 [of Outer Continental Shelf Lands Act] would constrain this Court's equitable authority to issue whatever relief it finds appropriate, either on a preliminary basis or assuming it ultimately rules for Plaintiffs on the merits. Thus, Plaintiffs could seek to vacate the leases after they are issued.").[4] In short, nothing in Section 50264's requirement to issue the leases deprives courts of their equitable authority to provide effective relief if Interior violated NEPA when it held Lease Sale 257.

[4] Interior and Intervenors below similarly emphasized that issuing leases is not the determinative step they now portray it to be. *See, e.g.*, Dkt. No. 74 at 3-4 (noting Interior's discretion "to suspend any leases associated with that sale" or "exercise [] discretion ranging from affirming the leases to voiding Lease Sale 257 and the associated leases in their entirety pursuant to a new Record of Decision"); Dkt. No. 73 at 4-5 (API arguing that vacatur was unnecessary because Interior's "regulations explicitly authorize the agency" to suspend leases once issued under certain circumstances, including compliance with NEPA (citing 30 C.F.R. § 250.172)).

II. Interior and Intervenors' Contrary Reading Is Unsupported by Section 50264's Text and Rests on a Theory that Congress Effected a Repeal by Implication or Acted in Violation of Separation of Powers Principles.

To varying degrees, Interior and Intervenors argue that Section 50264's direction to accept bids and issue leases absolved the agency from any NEPA violation at the separate and distinct lease sale stage. These arguments push far beyond the plain text of this provision and infer congressional intent to dictate the merits of this appeal. The interpretations not only lack support in the text but require the Court to pick one of two strongly disfavored paths: either infer that Congress repealed NEPA's applicability to Lease Sale 257 by implication or infer that Congress legislated the outcome in this case without changing the law to exempt compliance with NEPA, in violation of separation of powers principles. Neither interpretation is supported or necessary to give effect to Section 50264.

A. The Inflation Reduction Act Does Not Repeal NEPA by Implication.

At most, the Inflation Reduction Act affected Interior's otherwise unfettered discretion to accept or reject bids. *See supra* Section I. Interior and Intervenors would have this provision's carefully targeted language, aimed at specific post-lease-sale activities, exercise a sweeping retroactive NEPA exemption for the underlying, unaddressed, Lease Sale 257 decision. However, "repeals by implication are not favored" and "will not be found unless an intent to repeal … is *clear and manifest.*" *Hunter v. FERC*, 711 F.3d 155, 159 (D.C. Cir. 2013)

(citation omitted); *id*. (noting that the party raising this argument "carries a heavy burden"). Section 50264 does not mention Interior's NEPA compliance for the lease sale (or anything else), let alone show a "clear and manifest," intent to exempt Interior from its requirements for the sale; nor is there any reason to infer that "such a construction is absolutely necessary." *id.* at 159-160 (citation omitted). The statute's plain language directs a far more limited step—to take away Interior's discretion to reject bids and deny leases in the event this Court reverses the district court's decision.

When Congress intends to do so, it knows exactly how to amend or repeal otherwise applicable requirements. *See, e.g.*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 127 (2016) (finding that if "Congress intended to alter this fundamental detail … we would expect the text of the amended [provision] to say so. Congress does not, one might say, hide elephants in mouseholes.") (cleaned up). In contrast to its silence in Section 50264, Congress expressly repealed other requirements in multiple other parts of the Inflation Reduction Act. For example, in Section 10001, entitled "Amendment of 1986 Code," Congress made plain that "whenever in this subtitle an amendment or repeal is expressed in terms of an

amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986." It then explicitly amended that law throughout. *See e.g.*, §§ 10101(k)(1)(B)(i) and (ii)(II) (directing eligibility calculations to be "determined without regard to section 56A(d))" of the 1986 Code); *id.* at (D)(i) ("determined without regard to paragraphs (2)(D)(i) and (11) of section 56A(c)" of the 1986 Code). In other sections, Congress explicitly exempted compliance with other provisions of law. *See, e.g.*, § 22002(a) (appropriating funds "notwithstanding section 9007(c)(3)(A) of" the Farm Security and Rural Investment Act of 2002 (7 U.S.C. § 8107)). In the absence of any similar language in Section 50264 indicating that leases should issue "without regard to" or "notwithstanding" NEPA, the Court should not infer congressional intent to override NEPA. On the contrary, "when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning." *Maine Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1323 (2020) (cleaned up).

Moreover, courts are particularly reluctant to find that another statute overrides NEPA, emphasizing instead "a congressional desire that we make as liberal an interpretation as we can to accommodate the application of NEPA." *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986) (noting that Congress used "strong words" to express an "important congressional mandate to have NEPA

apply 'to the fullest extent possible.' 42 U.S.C. § 4332"). "[C]ourts have found clear congressional intent to impliedly repeal NEPA only where there was 'a clear and unavoidable conflict' between an agency's organic statute and NEPA …." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 662-63 (D.C. Cir. 2011) (citations omitted). Section 50264 lacks any clear conflict on its face and there is no legislative history for the provision at all, let alone the kind of "very strong evidence in the legislative history demonstrating a congressional desire to repeal NEPA" that courts require. *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981).

Interior's focus on the 30-day window for accepting bids cannot manufacture that clear and unavoidable conflict. Interior Mot. 11-13. By its plain terms, the law only directs Interior to issue leases to the high bidders from the sale within that time frame. The imposition of an immediate timeline for this action does not suggest, let alone state, that Congress intended to retroactively excuse Interior from complying with NEPA for the separate decision to hold Lease Sale 257 and thereby divest the Court of jurisdiction to adjudicate the matter. Indeed, the very premise of Interior's argument—that a 30-day deadline suggests a NEPA waiver—does not hold in the OCSLA context. *See* 43 U.S.C. § 1340(c)(1) (providing that Interior must approve or disapprove an offshore exploration plan within thirty days); *id.* § 1866(a) (providing "nothing in this chapter shall be

construed to amend, modify, or repeal any provision of … [NEPA]"). The more straightforward reading of the 30-day requirement is that Congress intended Interior to issue leases right away, before the end of the pending judicial review of the lease sale's compliance with NEPA. Congress, presumably, intended that the leases be in place when this Court adjudicated the appeal and determined appropriate relief such that they may factor into the Court's consideration of the appropriate remedy. Congress' silence about the initial lease-sale NEPA compliance in this provision does not bless Interior's decision to hold the sale with a wink and a nod. Rather, that silence manifests congressional intent not to address this issue, leaving that question for the Court to decide in the litigation Congress knew was pending.

Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776, 787 (1976) and its progeny are inapposite. Interior Mot. 12-13. Those cases interpret provisions imposing deadlines to approve actions with no previous NEPA compliance and which may otherwise have been subject to NEPA. *See, e.g.*, *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 962 (9th Cir. 2016) (finding that even if the "approval … was a 'major Federal action[ ]' within the meaning of NEPA," agency "was not required to prepare an EIS because there is an irreconcilable statutory conflict between NEPA" and timeframe in governing law). Here, Interior was not preparing a separate NEPA analysis for its review of bids and issuance of

leases—it had already completed its analysis in the EISs at issue in this appeal. Congress was legislating in the context of litigation that would determine whether that existing NEPA analysis (for the lease sale and actions that flow from it) was adequate. Interior itself does not treat as subject to NEPA the separate decision whether to issue a lease to a lease sale bidder. Thus, the 30-day requirement is not tied to a decision that generates separate NEPA analysis. Interior's argument about its significance and the analogy to *Flint Ridge* falls on this difference.[5]

B. Interior and Intervenors' Reading of Section 50264 Violates Separation of Powers Principles.

Absent a repeal of NEPA by implication, reading the statute in the way Interior and Intervenors urge would violate the separation of powers doctrine. Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *United States v. Klein*, 80 U.S. 128, 146 (1871)).

This does not preclude Congress from legislating in a way that might affect ongoing litigation, but it may permissibly do so only where it explicitly changes

[5] Contrary to Interior's portrayal, the court in *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157 (9th Cir. 2007) relied primarily on the provision's directive to take action "notwithstanding any other provision of law" to conclude that Congress meant to change the law and override NEPA, not on the language directing action "without delay." *Id*. at 1168-69 (interpreting "without delay" as reinforcing its reading of the "notwithstanding" language to exempt the action from laws that "would delay commencement of" a project).

the underlying law that the courts would apply to a case. "Congress may not direct the result of pending litigation unless it does so by 'supply[ing] new law.'" *Patchak v. Jewell*, 828 F.3d 995, 1001-02 (D.C. Cir. 2016), *aff'd sub nom. Patchak v. Zinke,* 138 S. Ct. 897 (2018) (citation omitted) ("Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases" but only "when it directs courts to apply a new legal standard to undisputed facts.").

Absent a change in NEPA obligations that cannot reasonably be inferred, reading the provision in the manner Interior and Intervenors urge would require finding that Congress meant for the Court to apply existing NEPA law to the facts of this case to choose a winner and a loser. And that, the courts are clear, is unconstitutional. *Contra Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 437 (1992) (upholding as constitutional legislation that "replaced the legal standards underlying the two original challenges … without directing particular applications under either the old or the new standards"). Here there is no indication that Congress meant to waive NEPA or otherwise change the law with respect to Interior's lease sale decision.

When Congress means to explicitly supply new law, it knows exactly how to do so. As multiple courts have held, Congress makes clear an intent to excuse compliance with an existing provision by directing the agency to act "notwithstanding any provision of law" or "without regard to" other law or

regulation. In *Friends of Animals v. Jewell*, for example, the Court considered a separation of powers challenge to a provision that required the agency to issue a rule exempting certain captive-bred herds of antelope from certain Endangered Species Act protections. The Court concluded:

> [W]e have no trouble in concluding that Section 127 amended the applicable law and thus does not run afoul of *Klein*. Section 127 directed the Secretary of the Interior to reissue the Captive-Bred Exemption "without regard to any other provision of statute or regulation that applies to issuance of such rule." … By issuing this legislative directive, Congress made it clear that, with respect to U.S. captive-bred herds of the three antelope species, individual permits are *no longer required* to engage in activities otherwise prohibited by Section 9 of the Act.

824 F.3d 1033, 1045 (D.C. Cir. 2016); *see also Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1095, 1097 (D.C. Cir. 2001) (finding language directing action "[n]otwithstanding any other provision of law," did not violate *Klein* because it "amend[ed] the applicable substantive law"); *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2013) (finding that "Congress [] amended the law" in statute that directed agency to remove protections from wolves "without regard to any other provision of statute or regulation that applies to issuance of such rule" and specifying that a new rule "shall not be subject to judicial review").

Congress can also change the law through an overall approach that makes clear that new legal standards are meant to replace those that gave rise to a claim. In *Robertson*, the Supreme Court evaluated a provision that effectively nullified

lower court injunctions prohibiting old-growth logging. The language at issue provided that "Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section … is adequate consideration for the purpose of meeting the statutory requirements that are the basis" for the legal violations underpinning the injunctions. 503 U.S. at 435 n.2. The Court reasoned that the provision "replaced the legal standards underlying the two original challenges with those set forth in subsections (b)(3) and (b)(5), without directing particular applications under either the old or the new standards." *Id.* at 437. The Court was persuaded that the provision still left it to the judiciary to apply the facts to those criteria and decide whether the sales would comply with the new standard.[6] *Id.* at 438 ("We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law"); *see also Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1147-1149 (9th Cir. 2005) (finding no separation of powers violation where subsequently enacted statute provided that challenged timber sales "shall not be deemed arbitrary and capricious under … NEPA or other applicable law as long as" agency met certain specific standards).

[6] *Id.* at 438 ("Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions. Its operation, we think, modified the old provisions.")

Section 50264 bears none of these hallmarks. Rather, the provision merely requires Interior to accept the high bids within 30 days and issue the leases pursuant to existing law without saying anything about NEPA compliance or in any way extinguishing Interior's NEPA violation. Unlike many other provisions that courts have upheld because they changed existing law, there is no language directing Interior's action "without regard to" NEPA or "notwithstanding any other provision of law," precluding judicial review, or pronouncing Interior's existing NEPA compliance in any way sufficient. Unlike the language in *Robertson*, it does not replace NEPA compliance with a new legal standard, or give any other indication of congressional intent to change the applicability of NEPA to the lease sale decision.

In short, absent a repeal of NEPA missing from Section 50264, *supra* II.A., Interior and Intervenors' reading of this limited provision would require the Court to apply the existing law to existing facts in a specific manner and to reach a specific outcome—that Interior's NEPA compliance was adequate. Congress cannot pick a winner in this lawsuit.

The Court need not and should not read the law to create a constitutional problem. *See Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) ("as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will

save the act.") (citation omitted). Here, that principle is easily satisfied by reading Section 50264 to do only what the plain text of the statute requires (to issue the leases to the high bidders) and rejecting the unnecessarily expansive NEPA waiver that Interior and Intervenors infer.

III. Interior's Alternative Argument Fails.

Interior's alternative argument, Interior Mot. 16-17, that Intervenors now lack standing to pursue their appeal because Congress has remedied their injury by issuing leases free and clear of any NEPA violation fails for the same reasons as their primary mootness argument. As detailed above, Section 50264 does not divest this Court of its jurisdiction to review Lease Sale 257's compliance with NEPA and fully remediate any violation (though as Friends explain in their Opening Brief, Doc. 1964661 at 17-24, this Court lacks jurisdiction over the appeal under the remand rule).[7]

[7] If the Court nonetheless agrees with Interior and Intervenors that Section 50264 moots this case, it should remand to the district court to determine whether Interior and Intervenors have "demonstrate[d]" an "equitable entitlement" to vacatur. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). *See, e.g., Alfa Int'l Seafood, Inc. v. Ross*, No. 17-5138, 2018 WL 4763179, at *1 (D.C. Cir. Feb. 1, 2018) (remanding to district court "with instructions to consider the appellants' request for vacatur" as a motion under Fed. R. Civ. P. 60(b)).

CONCLUSION

For the foregoing reasons, this Court should deny the motions to dismiss and uphold the district court's order on the merits.

Respectfully submitted this 23rd day of November, 2022.

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CERTIFICATE OF COMPLIANCE

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Respectfully submitted this 23rd day of November, 2022.

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