No. 18-30257

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ATCHAFALAYA BASINKEEPER; LOUISIANA CRAWFISH PRODUCERS ASSOCIATION-WEST; GULF RESTORATION NETWORK; WATERKEEPER ALLIANCE; and SIERRA CLUB and its Delta Chapter,

Plaintiffs – Appellees

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant – Appellant

BAYOU BRIDGE PIPELINE, LLC; STUPP BROS., INC. d/b/a/ STUPP CORPORATION,

Intervenor Defendants – Appellants

On Appeal from the United States District Court for the Middle District of Louisiana, Case No. 3:18-cv-23-SDD-EWD

BRIEF OF PLAINTIFF – APPELLEES ATCHAFALAYA BASINKEEPER ET AL.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiff/Appellees Atchafalaya Basinkeeper;

Plaintiff/Appellees Louisiana Crawfish Producers Association-West;

Plaintiff/Appellees Gulf Restoration Network;

Plaintiff/Appellees Waterkeeper Alliance;

Plaintiff/Appellees Sierra Club;

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STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument, which has been scheduled for April 30, 2018.

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INTRODUCTION

This appeal concerns the siting of a major piece of crude oil infrastructure, the Bayou Bridge pipeline, in a unique and sensitive environment, Louisiana's iconic Atchafalaya Basin. Plaintiff-appellees Atchafalaya Basinkeeper et al. ("Basinkeeper"), a coalition of commercial crawfishermen and conservation groups with a mission to protect the Basin, brought this suit after defendant U.S. Army Corps of Engineers ("Corps") authorized the pipeline without the full environmental review required by law. After extensive briefing and two days of evidentiary hearings and oral argument, the District Court issued a narrowly tailored injunction blocking construction of the pipeline in the Basin pending resolution of the case on the merits. The Court's 60-page opinion meticulously lays out the parties' arguments, the governing law, and the evidence. The injunction covers just 14% of the pipeline's 162-mile length, allowing construction elsewhere to proceed.

In asking this Court to hold that this narrow and careful decision constitutes an "abuse of discretion," Appellants promote a remarkably revisionist history of the proceedings below. Both harshly criticize the District Court for failing to address arguments that were never made. Both rely on evidence that they never presented to the District Court. Both rely on a legal theory, invoked by the concurring judge on a fractured motions panel, that has never been adopted in any

jurisdiction at this stage of a case. Neither addresses the fact that construction in the Basin has not resumed due to high water conditions that are likely to persist for months.

The District Court gave all parties ample opportunity to present their arguments and evidence, and weighed it for two weeks after the close of the hearing. It found that plaintiffs were likely to prevail on some of their claims under the Clean Water Act ("CWA") and National Environmental Policy Act ("NEPA"), but not on others. The evidence of irreparable environmental harm in a special and economically valuable place was overwhelming, and mostly uncontested. On the other hand, the evidence that a temporary delay would irreparably harm the proponent was thin, and did not outweigh the environmental damage the project would cause in any event. In short, the District Court's carefully reasoned injunction is the opposite of an abuse of discretion. This Court should sustain it.

STATEMENT OF THE CASE

A. Factual Background

The Atchafalaya Basin contains the largest contiguously forested wetlands in North America. ROA.1244. Characterized by unique cypress-tupelo swamps, the Basin supports more than 250 bird species and a diverse array of wildlife. ROA.226. About 100 species of fish, crawfish, shrimp and crabs support sport and

commercial fishing, and feed birds, reptiles and mammals. *Id.* It plays a critical flood protection role, and during major floods water is diverted into the Basin to protect communities downstream. *Id.; La. Crawfish Producers Ass'n-West v. Rowan*, 463 F.3d 352, 355 (5th Cir. 2006) (Atchafalaya Basin drains "approximately 41% of the continental United States"). It contributes significantly to the state's economy, generating hundreds of millions of dollars through tourism, hunting, and fishing. *Id*. As befits this priceless national treasure, state and federal agencies propose to expend extensive funds on wetland restoration and flood risk reduction in the Basin. *See, e.g.,* ROA.265.

The development of oil and gas pipelines has degraded extensive portions of the Basin. ROA.1345; ROA.1357; ROA.1372. Routing pipelines through the Basin destroys forests, creates devegetated canals, and results in "spoil banks," which are linear piles of dredged soil dumped adjacent to canal trenches. Pipeline canals transport and deposit sediments into sensitive forest swamps, effectively destroying these highly productive ecosystems while simultaneously robbing the coast of sediments needed to protect coastal wetlands. ROA.135-137; ROA.1347-1351; ROA.4181-4184. Spoil banks inhibit the natural pattern of water flow, drastically diminishing water quality and the suitability of wetlands to support crawfish and other wildlife. ROA.1345, 1357; ROA.1375-1379. Indeed, they are the single biggest cause of damage to wetlands in the Basin. ROA.1345. Large

portions of the Basin that once sustained crawfishing families for generations no longer do so, because of spoil banks. ROA.1375-1379. Last year, the state legislature questioned whether any "construction, maintenance, or any other work should be permitted" in the Basin until the problem of spoil banks is resolved. ROA.324.

Against this backdrop, on October 3, 2016, the Corps released a notice regarding a proposal for a major new project, the Bayou Bridge pipeline, that would cross the Basin. ROA.1700. The 24-inch pipeline would carry half a million barrels of oil a day through the unique aquatic habitats of the Basin, dwarfing the capacity of existing pipelines and exposing the Basin to significant risk. Plaintiffs (and many others, including prominent elected officials) submitted extensive comments to the Corps, focusing on the need for a comprehensive environmental review, known as an "environmental impact statement" ("EIS"), in light of these impacts and risks. ROA.137; ROA.605-610. The comments emphasized past noncompliance with other Corps pipeline permits, as well as the abysmal safety and compliance record of the proponent's parent company. *Id.*; ROA.138-139, 148, 153. In fact, the history of noncompliance with other pipeline permits—and the resulting spoil banks that have been catastrophic to the Basin's ecology and those who rely on it—was the most prominent issue in the public comment process. ROA.241-242; ROA.379; ROA.439-442; ROA.2711-2750.

On December 14, 2017, the Corps issued a § 404 permit authorizing the project, ROA.1875-1883, accompanied by a "memorandum" constituting its environmental review. ROA.1713-1804. Despite overwhelming public opposition to the project, and support for a full EIS, the Corps' analysis concluded that the project's impacts were too insignificant to trigger a comprehensive review. ROA.1803. The permit authorizes Bayou Bridge Pipeline, LLC ("BBP") to clear a 75-foot wide channel across the Basin, which would destroy hundreds of acres of unique cypress swamp, and maintain a permanent 30-foot right of way once construction is complete.[1] The Corps required the proponent to offset the impacts of this loss through the purchase of mitigation bank "credits." However, the majority of these credits were located in a completely different kind of wetland environment than the cypress swamps being destroyed, at a site 55 miles away. ROA.1351-1353; ROA.1254-1256. As to the issue of the historic pattern of noncompliance with other pipeline permits, the Corps ignored the issue altogether, instead imposing the identical conditions that had proven inadequate in the past.

[1] Although the Corps permit relies heavily on the distinction between the "temporary" and "permanent" loss of swamp, the District Court considered extensive unrebutted evidence that impacts deemed "temporary" by the Corps were in fact permanent, because it is all but impossible for cypress/tupelo swamp to regenerate once cut due to the altered hydrologic regime in the Basin and the presence of invasive species. ROA.373; ROA.397; ROA.1253; ROA.1346-1349.

Around the same time, the Corps issued a separate environmental review for a different permit related to the pipeline. ROA.1555-1698 ("§ 408 EA"); ROA.1839-1844. Under the Rivers and Harbors Act, a permit was required to cross federal "projects" (which include both engineered features like levees as well as natural features like major water bodies) and federal easements within the project right of way. 33 U.S.C. § 408. The scope of the § 408 EA was significantly more limited than the § 404 permit, comprising only 5% of the project's length through the Basin. Compare ROA.1687 (§ 408 EA) (project would "temporarily" impact 5 acres, and permanently impact 2.6 acres, of cypress-tupelo swamp); *with* ROA.1714 (§ 404 EA) (temporary impacts to 455 acres, and permanent conversion of cypress swamp of 142 acres).

B. Legal and Regulatory Overview.

NEPA is our "basic national charter for protection of the environment." 42 U.S.C. §§ 4321–4370f; 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1). NEPA requires that federal agencies "take a 'hard look' at the environmental consequences before taking action." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council,* 462 U.S. 87, 97 (1983). One of NEPA's purposes is to ensure that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental

impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

If an agency action has adverse effects that are "significant," they need to be analyzed in a full EIS. 40 C.F.R. § 1501.4; *State of Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985) (agency action that "*may* cause a significant degradation of some human environmental factor" requires an EIS); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) ("If *any* significant environmental impacts *might* result from the proposed agency action, then an EIS must be prepared…]") (emphasis added). NEPA regulations define "significance" to "require considerations of both context and intensity." 40 C.F.R. § 1508.27. With respect to context, the regulations acknowledge that significance "must be analyzed in several contexts such as the society as a whole… the affected region, the affected interests and the locality." *Id*. With respect to "intensity," the regulations articulate multiple factors that must be considered, for example, "unique characteristics of the geographic area such as…wetlands…or ecologically critical areas"; the degree to which the effects on the environment "are likely to be highly controversial," are "highly uncertain" or "involve unique or unknown risks"; and "whether the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id*.

If the agency determines that the impacts of a decision are not significant, it must document this conclusion in an environmental assessment ("EA") and a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.9(a) (EA must "provide sufficient evidence and analysis for determining whether to prepare an" EIS). The justification for such conclusion must be clearly demonstrated: "simple, conclusory statements of 'no impact' are not enough." *Foundations on Economic Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).[2] While the impact of projects can be "mitigated"—i.e., either avoided or offset through compensation—to the point where they are insignificant enough that an EIS is not required, courts scrutinize such mitigation justifications closely. *Robertson*, 490 U.S. at 333 ("[M]itigation [should] be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated[.]"); *O'Reilly v. U.S. Army Corps of Engineers,* 477 F.3d 225, 234 (5th Cir. 2007).

Whereas NEPA is primarily aimed at *procedures* to improve consideration of environmental values, the CWA puts strict *substantive* limits on actions that degrade water quality and aquatic uses. The law prohibits the discharge of soil or other materials into wetlands unless authorized by a permit issued by the Corps.

[2] EAs are supported to be brief, and according to federal guidance, "[a] lengthy EA indicates that an EIS is needed." 46 Fed. Reg. 18026, 18037 (March 23, 1981); *Sierra Club v. Marsh,* 769 F.2d 868, 874 (1st Cir. 1985).

33 U.S.C. § 1344(a); 33 C.F.R. § 322.3; Parts 323, 325. Standards for issuance of § 404 permits are strict and binding. For example, permits must be denied if there is any "practicable alternative" with less impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). The Corps is prohibited from granting a permit "unless it can be demonstrated that such a discharge [from the project] will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern," *id*. § 230.1(c), or if the discharge will result in significant adverse effects to water quality. *Id*. § 230.10(c)(3); *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982) (CWA regulations create a "very strong" presumption "that the unnecessary alteration or destruction of (wetlands) should be discouraged as contrary to the public interest."). These strict standards are intended to achieve the law's sweeping goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also* 33 U.S.C. § 2317(a) (establishing goals of no net loss of wetlands and long-term goal "to increase the quality and quantity of the Nation's wetlands").[3]

[3] The regulations call out floodplains for special protection, noting that even a minor change could have cumulative impact that significantly degrades floodplain values and functions. 33 C.F.R. § 320.4(l)(2).

Finally, the Corps is required to conduct a "public interest" review, and permits that are not in the public interest must be denied. 33 C.F.R. § 320.4(a); 40 C.F.R. § 230.1. The Corps must consider the probable impacts of the proposed action, its putative benefits, and weigh all "relevant" considerations. *Id*. The Corps must balance the benefits "which reasonably may be expected to accrue" from the action against the "reasonably foreseeable detriments." *Id*. Part of this process involves formulating permit conditions that mitigate project impacts, first by avoiding or minimizing impacts where possible, and second by providing compensatory mitigation for unavoidable impacts. *Id*. § 320.4(r); § 325.4(a),(c), § 332.3(a). Such conditions are mandatory when necessary to satisfy the public interest and to protect the aquatic resource. *Id*. § 325.4(a).

C. Overview of District Court Proceedings and Appeal

Plaintiffs filed this action on January 11, 2018, and, once it became evident that construction was about to begin, filed a motion seeking a temporary restraining order and preliminary injunction halting construction within the Basin.[4] The Court denied the TRO motion, but ordered additional briefing and convened

[4] Intervenors inappropriately accuse plaintiffs of delay. Plaintiffs could not have sought preliminary injunctive relief until harm was "imminent," and there were multiple indications that construction would not start until much later in the year. ROA.2865. Plaintiffs brought their motion immediately after it became clear that construction was imminent. The District Court considered and rejected the argument that plaintiffs unduly delayed filing their motion. ROA.4013.

an evidentiary hearing. On February 8, the Court heard expert and fact witness testimony that took a full day. Dr. William Conner, an expert on wetland forests, explained how cutting a 75-wide channel through the Basin would have harmful and permanent ecological effects, and how the Corps' proposed mitigation "does not actually mitigate for any of the harms imposed" by the pipeline's construction. ROA.1256; ROA.4156-4169. Dr. Ivor van Heerden, a nationally recognized expert in Louisiana wetlands, explained how the pipeline channel would alter the Basin's hydrology and cause the deposition of sediments in Basin swamps, explaining that construction would "cause irreparable ecological damage." ROA.1157; *see also* ROA.4185 ("We're dealing with a Basin that's under severe stress . . . we just keep cutting up this cypress swamp and changing the hydrology . . . [we] are getting close to the tipping point where we lose a large portion of this Basin."). Scott Eustis, a wetlands scientist with extensive expertise in reviewing mitigation proposals, explained how the proposed mitigation "fails to replace lost ecosystem functions" in the Basin. ROA.1352. The Court also heard from fact witnesses who explained how pipeline construction in the Atchafalaya Basin has had devastating effects on its unique aquatic ecology, ROA.1322-1340, and on the commercial crawfishing business. ROA.1373-1380; ROA.1378-1379 ("Today it takes me 2-3 times longer and double the effort to harvest enough crawfish to make a living."); ROA.4275 ("There's not enough oxygen to sustain your crawfish

in the trap."). The Court also admitted evidence of the environmental damage being caused by the pipeline's construction already underway. ROA.4601-4620; ROA.4625-4630.

The Corps did not contest any of this evidence, put on any witnesses of its own, or cross-examine any of plaintiffs' witnesses—effectively conceding the irreparable injury, balance of harms, and public interest prongs of the injunction test to plaintiffs. Intervenors submitted written declarations addressing irreparable harm, and asserting vast but unsubstantiated financial damages if the injunction was issued. ROA.6779-6796. However, it chose not to supplement the declarations with live testimony. ROA.4323.

The District Court also oversaw an extensive oral argument that covered a wide range of issues regarding the merits of plaintiffs' claims, the irreparable harm to the environment and plaintiffs' interests, and impacts to the company. ROA.4325-4405. Concluding the hearing, the Court acknowledged that time was of the essence, but nonetheless provided the parties with yet another chance to advocate their positions with post-hearing briefs. ROA.4406; ROA.3904-3928; ROA.3929-3945; ROA.3946-3967; ROA.3894-3902. Two weeks later, the Court issued an initial ruling granting the motion for a preliminary injunction, following up a few days later with a 60-page opinion that described in detail the evidence and the parties' arguments, and provided the basis for the Court's rulings as to each of

the injunction factors. ROA.3998-4057. As Basinkeeper had requested, the injunction was limited to the 23-mile segment of the pipeline that crossed the Basin, which constitute 14% of the project's length.

Bayou Bridge appealed the decision and asked this Court for an "emergency" stay pending appeal. After a highly accelerated briefing schedule and argument, a divided motions panel granted the stay. All three judges appeared to agree that plaintiffs were likely to prevail on the merits of their legal claims. However, the lead opinion, authored by Judge Clement, concluded that "the district court should have allowed the case to proceed on the merits and sought additional briefing from the Corps on the limited deficiencies noted in its opinion." Judge Owen concurred in the result but for different reasons, finding that the District Court in issuing the injunction "implicitly concluded" that vacatur of the challenged permit would be the appropriate remedy if plaintiffs ultimately prevailed on the merits. Instead, Judge Owen noted, the district court "could" have sought "an additional or supplemental ruling" from the Corps without vacating the permit. Neither addressed the District Court's factual findings with respect to irreparable environmental harm, the balance of harms, or public interest.

Judge Davis dissented, finding that the district court correctly concluded that the § 404 permit did not comply with the law. He noted that the majority also recognized this legal deficiency, but that it nonetheless concluded that a "ready

explanation" could still be provided. However, "[t]his ready explanation was not provided to the district court or us. That should be the end of the inquiry for this motions panel." Although the injunction has been stayed, it appears that construction has not resumed in the Atchafalaya Basin.

SUMMARY OF ARGUMENT

After providing extensive opportunities for all parties to be heard and conducting a full evidentiary hearing, the District Court issued a narrowly-tailored injunction to prevent irreparable harm in the Atchafalaya Basin, a national ecological treasure that has been extensively degraded by pipelines and other oil and gas infrastructure. The Court found that plaintiffs were likely to prevail on the merits of their claims under the Clean Water Act ("CWA") and National Environmental Policy Act ("NEPA") in two important respects. First, the District Court found that the U.S. Army Corps of Engineers, which authorized the project to cross the basin, violated its own regulations by authorizing the destruction of hundreds of acres of unique and valuable cypress swamp based on an invalid mitigation plan. Second, the Court found that the Corps arbitrarily and capriciously ignored extensive evidence that its permit conditions for other pipelines in the Basin had been violated without consequence. The Court carefully weighed the evidence as to the environmental harm from construction and the impact to the proponent from an injunction. Its carefully considered and

narrowly tailored injunction is the opposite of an abuse of discretion, and should be affirmed.

STANDARD OF REVIEW

While "the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931–32 (1975). An "abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court." *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 803 (5th Cir. 2003). The district court's findings of fact are subject to a clearly erroneous standard of review, while conclusions of law are reviewed *de novo*. *Janvey v. Alguire*, 647 F.3d 585, 591–92 (5th Cir. 2011) (citations omitted).

Important to this appeal, a party "may not advance on appeal new theories or raise new issues not properly before the district court to obtain reversal[.]" *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576 (5th Cir. 2010). Arguments not raised before the district court are waived. *Lyles v. Medtronic Sofamor Danek, USA, Inc.*, 871 F.3d 305, 310 (5th Cir. 2017) ("this court ... will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion") (quotation omitted); *Alexander v. Verizon Wireless Servs.*,

L.L.C., 875 F.3d 243, 251 n.13 (5th Cir. 2017). Exceptions can be made only in "extraordinary circumstances," where "the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 916 (5th Cir. 1996).

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT INJUNCTION STANDARD.

Intervenors (not joined by Corps) open their appeal by attacking the District Court's discussion of a "sliding scale" to weigh the injunction factors. The argument fails, for two reasons. First, the District Court explicitly found that the plaintiffs had shown a "substantial likelihood" of success on the merits. ROA.4014. While the Court discussed the question of whether a more relaxed standard would suffice, that discussion is immaterial to its holding. In multiple places throughout the opinion, the District Court confirmed that plaintiffs had "demonstrated a likelihood of success" on the merits. ROA.4042, 4048. Intervenors' argument fails at the gate.

Second, the District Court got the law exactly right. In the Fifth Circuit, a strong showing of irreparable harm will offset something less than a "substantial" likelihood of success on the merits. "Where the other factors are strong, *a showing of some likelihood of success on the merits* will justify temporary injunctive relief[.]" *Productos Carnic, S.A. v. Cent. Amer. Beef & Seafood Trading Co.*, 621

F.2d 683, 686 (5th Cir. 1980) ("it is not even necessary that a substantial likelihood of success be shown"). Under this approach, a "sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *Fla. Med. Ass'n, Inc. v. U. S. Dept. of Health, Ed. and Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979). District Courts in this Circuit cite these foundational cases, and apply a balancing approach to injunctions, all the time. ROA.2842.

These foundational cases have never been overruled and remain good law. Just last year, this Court confirmed that while "there is no particular degree of likelihood of success that is required in every case, the party seeking a preliminary injunction *must establish at least some likelihood of success* on the merits before the court may proceed to assess the remaining requirements." *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) (emphasis added); *Monumental Task Comm. v. Chao*, 678 Fed. Appx. 250, 251 n.1 (5th Cir. 2017) ("even if the varying strengths and weaknesses of each of the four preliminary injunction factors may cross-compensate, this relationship has limits; the *movant still must always 'present a prima facie case'*").[5]

[5] Intervenors' failure to address *Jefferson Community Health* is troubling, as it was a focus of briefing in the District Court, and was discussed both in the briefs and in the oral argument before the motions panel in this Court.

Intervenors argue that the U.S. Supreme Court eliminated the discretion to balance the injunction factors in *NRDC v. Winter*, 555 U.S. 7 (2008), but that is not correct. *Winter* altered the "sliding scale" for preliminary injunctions in only one respect, holding that a plaintiff always needs to demonstrate a "likelihood" of irreparable harm. *Id*. at 20-23. As to applying a sliding scale to the other injunction factors, *Winter* is silent. *See id*. at 51 (Ginsberg, J., dissenting) ("This Court has never rejected that formulation, and I do not believe it does so today.") While the 5th Circuit has not considered the issue, most circuits that have addressed it agree that *Winter* and its progeny have not impacted a court's ability to apply a sliding scale as long as there is a likelihood of irreparable harm. *See Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 37 (2d Cir. 2010) ("If the Supreme Court had meant for *Munaf, Winter,* or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself."); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) ("[W]e join the Seventh and the Second Circuits in concluding that the 'serious questions' version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*."); *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co*., 582 F.3d 721, 725 (7th Cir. 2009) (same).

The District Court correctly observed that the injunction test involves a dynamic balancing of all injunction factors, rather than the rigid formulation advanced by Intervenors. It further found that plaintiffs were likely to succeed on the merits of its claims under either formulation. Intervenors' effort to manufacture a legal error must be rejected.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE PLAINTIFFS WERE LIKELY TO PREVAIL ON THE MERITS.

Challenges to decisions under NEPA and CWA are reviewed under the Administrative Procedure Act ("APA"), to determine whether the decision was "arbitrary, capricious," or "not in accordance with law." 5 U.S.C. § 706; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."). A reviewing court must "studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Sabine River Auth. v U.S. Dept. of Interior*, 951 F.2d 669, 678 (5th Cir. 1992). As this Circuit declared in *O'Reilly*,

> [T]his restriction does not turn judicial review into a rubber stamp. In conducting our NEPA inquiry, we must make a searching and careful inquiry into the facts and review whether the decision ... was based on consideration of the relevant factors and whether there has been a clear error of judgment.

477 F.3d at 230 (quotation omitted). The District Court correctly employed this standard to find that the plaintiffs were likely to prevail on the merits of two of their claims: the adequacy of the Corps' out-of-kind compensatory mitigation offsets, and its failure to address the cumulative effects of past pipeline permitting.

A. The District Court Correctly Found that Plaintiffs Were Likely to Prevail on the Merits of their Mitigation Claims.

The Corps authorized the destruction of hundreds of acres of forested wetlands based on a requirement to purchase "mitigation bank" credits 55 miles away from the project site, that bore virtually no ecological or hydrologic relationship to the damaged area. ROA.4036. The District Court agreed with plaintiffs that this "out-of-kind" approach to mitigation violated CWA and NEPA. Appellants are unable to identify any error in this decision.

1. The Mitigation Proposal Violates the CWA.

The CWA requires that destruction of wetlands be avoided to the greatest extent practicable. Where impacts are "unavoidable," the regulations allow for "compensatory" mitigation, as long as it adheres to an extensive and detailed set of standards. 33 C.F.R. § 332.3; 40 C.F.R. § 230.93. The "fundamental objective" of these requirements is to offset "environmental losses" in light of what is "environmentally preferable." 33 C.F.R. § 332.3(a)(1). They seek to "replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources…" and

many other factors. *Id*. § 332.3(b)(1). The regulations express a preference for mitigation bank credits, but only where "the bank has the appropriate number and resource type of credits available." *Id*. § 332.3(b)(2). Where they are not available, other approaches must be considered. *Id*. § 332.3(b).

Whichever approach is chosen, the regulations impose strict limits on using mitigation that is "out-of-kind," i.e., of a different type or resource than the affected area.

> In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site. For example, tidal wetland compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal wetlands, while perennial stream compensatory mitigation projects are most likely to compensate for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of this section, the required compensatory mitigation *shall* be of a similar type to the affected aquatic resource.

Id. § 332.3(e)(1) (emphasis added). Out-of-kind compensatory mitigation may be adopted *only* where the Corps determines, using a detailed "watershed approach," "that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed." *Id*. § 332.2(e)(2).[6] This high bar for out-of-kind compensatory mitigation is raised even higher for "difficult-to-replace" resources. *Id*. §

[6] The focus of the detailed analyses of the "watershed approach" is on replacing the "suite of functions typically provided by the affected aquatic resource," *id*. § 332.3(c)(2)(i), not on establishing a geographic boundary for random trading of mitigation credits.

332.2(e)(3). The "basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action." 33 C.F.R. § 332.3(e)(2).

After closely scrutinizing these regulations and the administrative record documents supplied by the Corps, the District Court found that the Corps' approach to mitigation—offsetting destruction of cypress swamps with distant out-of-kind mitigation bank credits—could not withstand scrutiny. ROA.4034-4042. Indeed, neither the Corps nor Intervenors made any effort to justify the chosen mitigation under the governing regulations. Instead, they misconstrued the regulations and claimed that they established a "strict priority" order under which mitigation banks were always chosen first, regardless of the circumstances. ROA.4034; ROA.1539-1541; ROA.3918-3919; ROA.2041-2042. The District Court properly rejected that interpretation of the regulations, and found that "there is not an iota of discussion, analysis, or explanation how [bottomland hardwood] credits mitigate the loss of function and value of the cypress/tupelo swamp impact," which is what the regulations explicitly require. ROA.4035.

The Court was correct, as any asserted basis for allowing this distant, out-of-kind mitigation was not "documented in the administrative record." *Id.* § 332.3(e)(2). The Corps provided no "watershed analysis" documenting why planting bottomland hardwood tree seedlings in a former cotton field 55 miles

away would "replace lost aquatic resource" functions, or "serve the aquatic resource needs of the watershed." *Id.*; *id.* § 332.3(b)(1) And while the absence of documentation in the record for its decision would be sufficient to doom it, there was also abundant extra-record evidence that the proposed mitigation bore virtually no hydrologic or aquatic relationship to the "aquatic resource" functions and needs of the Basin. ROA.1346-1353 (functions of Basin like navigation, wildlife habitat, recreation, and commercial opportunities are not replaced by mitigation credits); ROA.1255-1256 (mitigation site "does not have the same kind of hydrology and wetland connection to the rest of the" Basin and "does not in any respect 'mitigate' the ecological impacts" of lost cypress/tupelo wetlands); ROA.4561 ("The proposed mitigation does nothing to help the Atchafalaya Swamp within the confines of the floodway.")[7]

[7] While this testimony was submitted for the purpose of demonstrating irreparable harm, it can also be considered on the merits. Courts "may review evidence in addition to the administrative record to determine whether an agency adequately considered the environmental impact under NEPA of a particular project." *Sierra Club v. Peterson*, 185 F.3d 349, 370 (5th Cir. 1999); *Sabine River*, 951 F.2d at 678 (court may consider extra-record evidence "to determine whether the agenc[y] adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary"). Consideration of extra-record evidence is especially appropriate since Basinkeeper never had an opportunity to comment on the out-of-kind mitigation bank credits chosen here. ROA.4028.

Contrary to Appellants' claims, Basinkeeper has not challenged mitigation banks in general, or the Bayou Fisher mitigation bank specifically.[8] Basinkeeper took no position below whether the Bayou Fisher mitigation bank could lawfully provide *in-kind* credits. In fact, Bayou Fisher had a modest number of cypress swamp credits available, and Basinkeeper did not challenge their use. The issue here is the Corps' unsupported and unexplained decision to allow destruction of cypress swamp in exchange for out-of-kind bottomland hardwood forest credits that don't provide the same aquatic values as the destroyed areas.[9]

The District Court correctly found the Corps decision to be arbitrary and capricious and in violation of the governing regulations. Appellants offer no reason to disturb that finding.

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[8] The Corps' insistence that Basinkeeper's recommended mitigation strategy, removal of existing spoil banks in the right of way to restore hydrology, is also "out of kind" is puzzling. Improving the functioning and condition of the wetlands directly impacted by a permit is an in-kind form of mitigation. 33 C.F.R. § 332.3(a)(2) ("restoration should generally be the first option" in any mitigation scenario); *id*. § 332.3(b)(1) ("[R]equired compensatory mitigation … should be located where it is most likely to successfully replace lost functions and services").

[9] Intervenor is incorrect that in approving the mitigation bank, the Corps necessarily approved its use anywhere within its service area for any aquatic resource. The prospectus for the mitigation banks (yet another document on which Intervenors rely even though it was never provided to the District Court) makes no claim that any of the hardwood forest or swamp credits could be used on any wetland resource anywhere in the Basin.

2. The Mitigation Proposal Also Violates NEPA

The District Court also found that the mitigation plan violates NEPA. ROA.4036-4042. This too was correct.[10] It is well established that an EA and FONSI that justify a finding of insignificance based on mitigation must support that finding with adequate details. In *O'Reilly*, this Circuit rejected an EA that relied on a mitigation plan that did little more than announce that the permittee would have to purchase credits. 477 F.3d at 233-34 ("The record before us…is simply not sufficient to determine whether the mitigated FONSI relies on mitigation measures which compensate for any adverse environmental impacts stemming from the original proposal…."); *I-Care v. Dole*, 770 F.2d 423, 434 (5th Cir. 1985) ("mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS."). Thus, while it is true that NEPA contains no explicit substantive requirement to mitigate significant adverse effects, the failure to do

[10] Indeed, the notion that the Corps could permit a massive crude oil pipeline to cross one of the nation's most iconic and sensitive landscapes *without* an EIS can only be described as astonishing. Courts have set aside agency decisions to sidestep an EIS on projects with far less impact. *See, e.g., O'Reilly*, 477 F.3d at 229 (residential development allowing dredging and filling in 39.54 acres of wetlands); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339 (D.C. Cir. 2002) (airport expansion); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014) (gas pipeline upgrade); *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7 (D.D.C. 2010) (decision to allow jet-skis in park); *Friends of the Earth v. U.S. Army Corps*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000) (permit for riverboat casinos).

means that the permit cannot be granted without a full EIS. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998).

Other Circuits join this one in enforcing this approach to EAs and mitigation. *See, e.g., Nat'l Parks and Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) ("mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact.") (quotations omitted); *Hill v. Boy*, 144 F.3d 1446, 1450–51 (11th Cir. 1998) (Corps' refusal to prepare EIS arbitrary and capricious where no evidence supported mitigation assumption and no analysis conducted); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2nd Cir. 1997) (agency unlawfully bypassed EIS where record failed to establish efficacy of mitigation proposal); *Kentucky Riverkeeper v. Rowlette*, 714 F.3d 402, 413 (6th Cir. 2013) (invalidating § 404 permit for failure to provide evidence showing that compensatory mitigation alleviated significant impacts).

Intervenors criticize the District Court for relying on *O'Reilly*, claiming that it is "inapplicable" because it predated the revised CWA mitigation regulations adopted in 2008. Intervenors Br. at 38. The argument is misplaced. *O'Reilly* concerns an inadequate NEPA analysis, not a violation of any CWA standard. 477 F.3d at 229-30. The *O'Reilly* Court never cited the CWA regulations, focusing instead on the NEPA requirement that calls for sufficient support in the record for

an EA that relies on mitigation. *Id*. at 230-32. The fact that the decision predated the mitigation regulations is irrelevant.

For its part, the Corps makes the novel argument that the Court erred by holding the EA for the pipeline to an allegedly higher standard for a "mitigated FONSI." Corp Br. at 9. As a threshold matter, there is no such thing as a "higher standard" for mitigated FONSIs—all NEPA decisions are subject to conventional arbitrary and capricious review. More importantly, the notion that the Corps could have authorized this pipeline—and the permanent destruction of hundreds of acres in the Atchafalaya Basin, one of the nation's ecological crown jewels and a principal floodway for the Mississippi River—with no mitigation, and still deem it "insignificant" for purposes of NEPA, is revisionism of the worst kind.

To support its claim that "impacts were not significant even without mitigation," the Corps misleadingly cites to the § 408 EA and FONSI. Corps Br. at 10. But these documents were not challenged by the plaintiffs nor were they the subject of the Court's decision. Corps Br. at 10. The § 408 EA governs only a small portion of the Basin. *See supra* at 6. The § 404 EA, in contrast, repeatedly concedes the significance of the impacts of the project in the face of its broader scope:

> The proposed project will change and/or reduce wetland functional quality along the proposed ROW by conversion of forested habitat types and temporary clearing during construction. Since the project is larger in function and size when compared to the extent of other

> wetlands directly and/or secondarily affected by previous development activities, *it would contribute cumulatively to wetland alteration and loss within the watersheds that it crosses.*

ROA.1762 (emphasis added); ROA.1775 ("[t]he proposed project is very large compared to other pipeline activities…. A key issue[] of concern in this watershed is loss of wetland function and value").

To address these impacts, the Corps proposed both compensatory measures (i.e., mitigation bank credits) as well as permit conditions that reduced impacts (i.e., requirements to restore preconstruction contours). ROA.1714; ROA.1742. The Corps explicitly relied on these measures to make its finding of no significant impact. For example, in a table detailing environmental impacts, the Corps found that adverse impacts to wetlands and other parameters will be "Neutral as a result of mitigative action." ROA.1764. The EA further states:

- "Significant secondary and cumulative impacts are not anticipated *provided the applicant adheres to the special conditions* in the Department of the Army permit." ROA.1770 (emphasis added).

- With regard to "secondary effects on the aquatic ecosystem[,]" "[r]estoration of pre-existing contours and elevations along the pipeline ROW will minimize it's potential to incur long-term changes in drainage and flow patterns, flooding and sediment distribution and accretion in environmentally sensitive areas such as the Atchafalaya Basin." ROA.1763.

- "It is anticipated that through the efforts taken to avoid and minimize the effects on the project site wetlands *and the mandatory implementation of a mitigation plan* that functionally compensates unavoidable remaining impacts, permit issuance will not result in substantial direct, secondary or cumulative adverse impact on the aquatic environment." ROA 1762 (emphasis added).

Indeed, the Corps' own brief to this Court claims that effects are insignificant because they are mitigated. Corps Br. at 28 ("the Corps rationally concluded that those discharges will not have cumulative effects *because their impacts will be mitigated*") (emphasis added); *see also id*. at 27 (effects on wetlands will be "negligible" "[d]ue to the mitigation requirement."). The Corps reached a finding of insignificance only by relying on permit conditions and mitigation. The District Court correctly scrutinized the record support for this finding and found it wanting. There was no error.

3. The Corps' "LRAM" Policy Does Not Resolve the Flaws in the Corps Mitigation Decision.

Both the Corps and Intervenors focus the bulk of their argument on the "Louisiana rapid assessment method" ("LRAM"), a tool used to calculate mitigation credits within the Corps' Louisiana district. According to Appellants, LRAM is the key to understanding the mitigation here, and both harshly criticize the District Court's failure to address it. However, the Corps never said a single word about LRAM to the District Court—not in its opposition to the preliminary injunction motion, not in two days of evidentiary hearings and legal arguments, and not in its post-hearing brief. Indeed, the document on which Appellants rest this appeal was never even submitted below. Instead, the Corps submits LRAM as an attachment to its appellate brief, and asks that this Court take judicial notice of

it.[11] If LRAM constitutes a "complete answer" to the question before the District Court, as claimed, it should have been submitted and argued. Intervenor Br. at 36. It was plainly not an abuse of discretion for the District Court to fail to respond to evidence never put before it, and the entire LRAM argument should be deemed waived. *Supra*, at 15.

Even if this Court chooses to consider appellants' arguments regarding LRAM, it will quickly find that it is far from a "complete answer" to the issues raised in this case. LRAM is neither a regulation nor even a final policy. Ex. 1 to Corps Brief ("Interim Version 1.0"). It is a tool used to calculate the number of mitigation credits, nothing more. It does not and cannot override the plain language of the Corps' mitigation regulations, like the obligation to carefully document and justify the use of out-of-kind mitigation through a watershed

[11] Judicial notice is not a back door for a party to circumvent the rules of both fairness and evidence to put material in front of an appeals court that it never submitted below. *See Brown v. Builders Transp. Inc.,* 138 F.3d 952, at *3 (5th Cir. 1998); *Kemlon Products & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir. 1981) ("A court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court...."); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n. 5 (D.C. Cir.1980) ("Judicial notice was never intended to permit such a widespread introduction of substantive evidence at the appellate level..."). The Court should deny the request for judicial notice of LRAM as well as the various other documents cited by Intervenors that are not part of the District Court record (for example, the Bayou Fisher mitigation bank prospectus and EPA policy documents). Intervenors' Br. at 34-35.

analysis. 33 C.F.R. § 332.3(e); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (agency cannot alter regulations through guidance).

Moreover, LRAM does not justify this mitigation decision in any event. To the contrary, citing § 332.3(e), LRAM explicitly states that its intent is to provide for *in-kind* compensatory mitigation. Ex. 1 at 9. "The focus on in-kind habitat replacement is to assure similar functions and services that are lost at an impact site are gained at a mitigation site." *Id*. Following that direction, the document explicitly declares cypress-tupelo swamps to be of a different "kind" than bottomland hardwoods (and four other categories of wetlands present in Louisiana). *Id*. LRAM does not provide for out-of-kind mitigation in any respect, for example, by including it as a factor to be considered in the calculation of credits. *Id*. at 45-46. In short, it appears that the Corps misapplied LRAM by allowing credits generated for in-kind mitigation to be used out-of-kind, in violation of both 33 C.F.R. § 332.3(e) as well as LRAM itself.[12] Indeed, the claim that the analysis that the District Court found wanting is "baked in" to LRAM, or that LRAM "scores" out-of-kind wetlands, is flatly false. *See* Corps Br. at 18; 24.

[12] As Intervenors' concede, the Corps used the same "ratio" of acres to LRAM credits without regard to whether those credits would be used for in-kind or out-of-kind mitigation. Intervenors' Br. at 35. Intervenors argument that this reflects "the similarity of mitigation types" is fabricated from whole cloth – there is no support in LRAM or anywhere else for the claim.

The Corps denigrates plaintiffs' concerns about the mitigation by making it about a preference over "aesthetics." Corps Br. at 22. The argument collides with its own regulations, and even its own LRAM policy—all of which place great weight on ensuring that compensatory mitigation matches the same "aquatic resource type" as that impacted. While the Corps' legal brief offers unsupported factual arguments that there is no ecological difference between the cypress swamps it authorized the company to destroy, and the seedlings planted in a former cotton field it allowed in compensation, the record before the District Court told an overwhelmingly different story. *See supra* at 11.

It may be true that no more in-kind mitigation bank credits were available in the Atchafalaya. But that did not give the Corps license to simply ignore its regulations and backfill the required mitigation with distant, out-of-kind credits. To the contrary, the unavailability of appropriate mitigation credits raised the bar. The Corps could only justify out-of-kind compensatory mitigation if it followed the stringent requirements of its own rules, such as a full watershed analysis and documentation of how the proposal would meet the "resource needs" of the Atchafalaya Basin. 33 C.F.R. § 332.3(e)(2). Alternatively, it could have identified other mitigation approaches, besides out-of-kind mitigation credits, that would offset the aquatic harm being authorized. *Id*. § 332.3(b). As Basinkeeper and many others have emphasized, alternative mitigation approaches were available.

And if there was no mitigation available that could offset the adverse impacts to the Basin, then the only lawful approach would have been to either reconfigure the project to avoid these impacts, or to deny the permit altogether. 40 C.F.R. § 230.1(c). The District Court got this issue exactly right.

B. The District Court Correctly Found that the Corps Ignored the Issue of Historic Noncompliance and Cumulative Effects.

There was abundant evidence developed during the permitting process that spoil banks resulting from pipeline construction have had a devastating effect on the Basin. ROA.1373-1374; ROA.1347-1351; ROA.2749. There was also abundant evidence that these spoil banks violated the terms of Corps permits, with little or consequence. ROA.1323-1327. As Basinkeeper explained, "virtually every commenter who participated in the permit process raised this issue of noncompliance as a reason either to deny the permit or to conduct a full EIS." ROA.4042. However, in issuing the § 404 permit, the Corps ignored this extensive evidence and outpouring of public concern, and simply imposed the same permit conditions prohibiting spoil banks that had repeatedly failed in the past. *Compare* ROA.1324-1328 *with* ROA.1878. The District Court correctly found that the Corps' failure to meaningfully grapple with the issue of historic noncompliance was arbitrary and capricious. Appellants identify no error.

First, the failure to address historic noncompliance violated NEPA. The Corps must consider "reasonably foreseeable" consequences of a project based on

past outcomes. *O'Reilly,* 477 F.3d at 234-235. The Corps may forgo an EIS only if compliance with permit conditions is assured. *Found. for N. Amer. Wild Sheep v. U.S. Dep't of Agric*., 681 F.2d 1172, 1180-82 (9th Cir. 1982); *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) (agency cannot rely on measures that "are speculative without any basis for concluding they will occur."); *see also Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 868, 885 (S.D.W. Va. 2009) (Corps failed to provide evidence that the conditions "would be successful or adequately enforced," and failed to consider effects of past actions); *Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs,* 351 F. Supp. 2d 1232, 1251-52 (D. Wyo. 2005) (holding mitigation measures speculative when Corps failed to "point to shred of scientific evidence . . . demonstrat[ing] that wetland replacement is a successful mitigation measure"). Similarly, NEPA mitigation guidelines require that past experience inform conditions for new permits, and specifically directs agencies to consider past mitigation failure before issuing a FONSI. Final Guidance on Use of Mitigated Findings of No Significant Impact, 76 Fed Reg. 3843 (Jan. 21, 2011).

Agencies also need to assess "cumulative effects" when evaluating whether or not an EIS is required. 40 C.F.R. § 1508.27(b)(7); *id*. § 1508.7; *Vieux Carre Prop. Owners v. Pierce*, 719 F.2d 1272, 1277 (5th Cir. 1983) (cumulative effects analysis must look at "closely related and proposed or reasonable foreseeable

actions that are related by timing or geography"). As this Circuit has found, an EA that "merely recites the potential cumulative effects of the project… but is supported by no real analysis or data" is invalid. *O'Reilly*, 477 F.3d at 235 (quotation omitted).

The Corps failure to assess this historic record of noncompliance also violated the CWA. The law requires the Corps to weigh "all those factors which become relevant in each particular case" before issuing a permit. 33 C.F.R. § 320.4(a). The agency must base its permit decision on "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." *Id*. The disruption of flow patterns—the primary effect of spoil banks—is specifically called out as the kind of issue to which the Corps must pay close attention. 40 C.F.R. § 230.41(b).

The District Court made factual findings based on this record, applied the governing law, and properly concluded that the Corps' failure to grapple with the problem of historic noncompliance was unlawful. ROA.4042-4048; *Motor Vehicles*, 463 U.S. at 43 (action is arbitrary and capricious where it "fails to consider an important aspect of the problem"). Appellants' efforts to attack that finding fall short.

The Corps appears to completely misunderstand the issue, muddying the waters by arguing that there cannot be any cumulative effects because individual

effects have been mitigated. Corps Br. at 28-29. Like the Corps' permit, its legal brief simply sidesteps the issue of historic noncompliance altogether. It never addresses the central question of whether it was arbitrary and capricious to ignore the single most prominent issue raised in the permitting process.

For their part, Intervenors first repeat the discredited canard that historic noncompliance was not an issue because it only involves "pre-CWA" permits. This is false. The record documents ongoing violations of the Sorrento pipeline CWA permit, issued in 2001, which shares its right of way with the Bayou pipeline. ROA.4583-4588; ROA.4198-4201; ROA.4679-4688. Basinkeeper also documented violations of another CWA pipeline permit issued in 2017. ROA.4590-4591; ROA.2824-2829. Other permit violations do, in fact, pre-date the CWA, but are regulated by the Corps with the same kinds of conditions under the Rivers and Harbors Act, 33 U.S.C. § 403. ROA.4691; ROA.4590, 4598.

Next, Intervenors abandon their position below—that noncompliance with pipeline permits elsewhere in the Basin was "irrelevant"—to insist that the Corps *did* adequately consider the issue. Intervenors Br. at 41-42.[13] This argument is equally unavailing. For example, Intervenors misleadingly cites the § 408 EA,

[13] Intervenor argued to the District Court that the only thing the Corps could consider in issuing the § 404 permit was the impact of *this* specific pipeline. ROA.1532; ROA.4045. This unsupportable position is expressly foreclosed by both NEPA and CWA regulations, and has been abandoned in this appeal.

which is irrelevant to the issue of historic noncompliance. They then cite to parts of the § 404 EA that merely summarize public comments, or make general statements about historic conditions that don't actually address the specific issue. Intervenor Br. at 42. In fact, not a word in the Corps §404 decision indicates that the Corps grappled with this critical problem and arrived at a reasonable solution. Instead, the Corps ignored the compelling evidence that it could not rely on the same conditions to avoid an EIS, and simply imposed them anew. The District Court did not abuse its discretion in finding that the Appellees would likely succeed in their claim that this approach was arbitrary and capricious.

C. The District Court Did Not Abuse its Discretion by Denying the Injunction in Favor of "Additional Explanation" from the Corps.

The Corps strives to radically reframe the District Court's decision. It claims that its only flaw was that it did not adequately "explain" its § 404 decision, and hence the only appropriate remedy is an opportunity to better explain itself. This reasoning influenced the motions panel, as the two judges who favored the stay acknowledged deficiencies in the Corps' decision but reasoned that they could be addressed without an injunction, either through additional briefing or a remand to the agency for additional explanation. This novel approach, never argued below

or even to the motions panel, would violate long-settled jurisprudence and sidestep the role of preliminary injunctions in cases like this one.[14] It should be rejected.

1. Plaintiffs Do Not Need to Address the Ultimate Remedy in an APA Case In Order to Prevail on a Preliminary Injunction Motion

Citing to Judge Owen's concurring opinion, both the Corps and Intervenors argue that the District Court erred in issuing the preliminary injunction because in assessing the likelihood of success on the merits, the Court implicitly held that "vacatur of the order granting the permit would be the proper remedy."[15] Panel Ruling, at 3, *citing Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). The argument has no basis. No party cites to any decision, from any jurisdiction, in which a court considered the *Allied-Signal* test for remanding without vacatur at the preliminary injunction stage, nor can one be found. Appellants offer no reason for this Court to be the first.

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[14] This panel owes no deference to the splintered motions panel decision, particularly as it was acting under the extremely rushed context of an emergency stay. *U.S. v. Bear Marine Services,* 696 F.2d 1117, 1119-20 (5th Cir. 1983).

[15] Neither Appellant tries to defend the panel's majority rationale that the Corps should have had the opportunity to provide "additional briefing" on its permit deficiencies. The Corps was provided ample opportunity to present its views below. It filed a lengthy brief in opposition to plaintiffs' motion, participated in an evidentiary hearing and argument, and filed a post-hearing brief. The Corps will have further opportunity to provide "additional briefing" during the merits phase of the case.

Under the APA, a court must "hold unlawful and set aside agency action" that is found to be unlawful. 5 U.S.C. § 706(2)(C). Adhering to this clear statutory command, vacatur is the default remedy in administrative law cases, including cases under NEPA and the CWA. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); *Fed. Commc'n Comm'n v. Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act *requires* federal courts to set aside federal agency action that is not in accordance with law.") (emphasis added). In *Allied-Signal*, the D.C. Circuit carved out a narrow exception to this rule, in a case that addressed a Nuclear Regulatory Commission rulemaking. 988 F.3d at 150. The Court found that the modest flaws in the agency's rulemaking could likely be resolved on remand with additional explanation, rather than any substantive changes, and that vacating the rule during the remand would be highly disruptive, as the agency would have to refund fees it had already collected, and be barred from collecting them anew under a revised rule. *Id.*

Since that time, the *Allied-Signal* exception to the APA's statutorily prescribed vacatur remedy has been applied sparingly, primarily in the context of rulemaking. Its most common use is where a rule is found inadequate for being insufficiently stringent to comply with an underlying statute. In these situations, vacatur of the too-weak rule would afford even less regulatory protection during

the remand, defeating the goals of the statute. *See, e.g., Davis County Solid Waste Mgmt v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (air pollution regulations). It has also been applied in cases where extensive agency implementation of a rule has already occurred, that could not be undone as a practical matter. *See, e.g., Sugar Cane Growers Co-Op of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) ("The egg has been scrambled and there is no apparent way to restore the status quo ante.")

The *Allied-Signal* exception has been applied in NEPA cases in only a tiny handful of situations, as the "standard remedy" for a violation of NEPA is vacatur. *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007). The same is true of the CWA. *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79-80 (D.D.C. Aug. 20, 2010) (vacating unlawful CWA permit to prevent ongoing development). That makes sense, as decisions on remedy should always be made in light of the purposes of the underlying statute, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1982), and the purpose of NEPA is to ensure that all potential impacts are assessed before "resources have been committed or the die otherwise cast." *Robertson,* 490 U.S. at 349; *Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.")

(quotation omitted). Where an agency's environmental review is deficient, vacatur of the underlying permit prevents the action from proceeding until a valid review is complete, as NEPA intends.

Basinkeeper is unaware of any case, from any jurisdiction, where the *Allied-Signal* analysis was applied at the preliminary injunction stage. Indeed, doing so would violate long-established principles of federal equity jurisprudence. Preliminary injunctions have long been evaluated under the traditional four-factor balancing test. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Layering the *Allied-Signal* inquiry on top of this test would add two additional factors that have never before been required, and dramatically raise the bar for entry of a preliminary injunction, in violation of decades of precedent. It would require a movant to effectively prove their entire case from success on the merits through to remedy, in addition to the equitable factors, in a single expedited motion at the outset of a case. Such an approach collides with the entire purpose of preliminary injunctions, which is "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("A party thus is not required to prove his case in full at a preliminary injunction hearing."). This Court should reject the invitation to upend decades of settled law and require a District Court to rest on up-front guesses, based on incomplete evidence, about the ultimate remedy at the conclusion of the case.

2. It is Likely that the § 404 Permits Would Need to be Vacated.

Should the Court nonetheless accept Appellants' invitation to delve into these uncharted waters, it would quickly find that this case is a poor candidate for the *Allied-Signal* exception. The *Allied-Signal* test would involve two questions: first, whether it is "likely" that the Corps could cure the deficiencies in its § 404 permits with additional "explanation" rather than substantive changes, and second, whether vacating the permit would be "highly disruptive," in the sense that is has been used in *Allied-Signal* and its progeny. Neither test supports allowing the pipeline to be built and completed through the Atchafalaya during a remand, since the entire purpose of NEPA is to ensure that all environmental effects are considered, and alternatives evaluated, before such work takes place.

The Corps' violations of NEPA are major shortcomings that go to the heart of the Corps' determination regarding whether the pipeline permit needed a full EIS and, indeed, whether a permit could be granted at all. Where a court identifies "major shortcomings that go to the heart of the" agency's decision, vacatur is appropriate. *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614–15 (D.C. Cir. 2017); *O'Reilly*, 477 F.3d at 238 (enjoining Corps from issuing permit pending compliance with NEPA). As plaintiffs have emphasized, NEPA prohibits authorization of any action with "significant" environmental effects without a full EIS. A 162-mile long pipeline, carrying half a million barrels of oil a day through

one of the nation's most iconic and unique aquatic landscapes, is an obvious candidate for an EIS. An EIS on this pipeline would provide robust scrutiny of its risks and impacts, a full assessment of proposed mitigation, a fair comparison of alternatives, and a transparent and accountable public process so that decision makers could hear the public's legitimate concerns and expose the company's claims to scrutiny. Valid NEPA compliance can and should influence the ultimate permit decision.

The Corps avoided an EIS process by relying on compensatory mitigation that violated its own rules, and permit conditions that had been shown to have failed repeatedly in the past. *See supra*. It also reached the unfathomable conclusion that cumulative effects were insignificant despite abundant record evidence to the contrary. These are not minor oversights that can be papered over with additional "explanation." They call into question the fundamental decision whether an EIS should have been prepared, which in turn could result in meaningful changes to the project's configuration and mitigation, or even permit denial. *Humane Soc'y v. Zinke*, 865 F.3d at 614–15. Appellants ask that this Court turn NEPA on its head by allowing the pipeline to be completed first, and a valid NEPA analysis finished later. No case supports that outcome.[16]

[16] Intervenors cite *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2017 WL 6001726 (D.D.C. 2017), which remanded an invalid NEPA analysis for an oil pipeline but did not vacate the underlying permit. Intervenor Br. at 46. But that

Similarly, the CWA *prohibits* issuance of a permit that has an unacceptable adverse impact on fishery areas, wildlife, or recreational areas. *See Supra* at 8-10. The Corps' misapplication of its own regulations raises questions about whether the permit could have been granted at all, or whether significant changes would have to be made in order to lawfully permit the project. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("we have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion"). By the Corps' own admission, no additional in-kind mitigation credits are available in the Basin. A remand could result in changes to the project, or even project denial. Accordingly, vacatur is required. *See Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d 69, 137 (D.D.C. 2014), (ordering vacatur when agency rule was "predicated on an interpretation of the [law] that is contrary to the statute's purpose.") *aff'd* 865 F.3d 585 (D.C. Cir. 2017).

Moreover, while vacatur will likely involve some costs and inconvenience to the project proponent, it would not be "disruptive" in the sense that *Allied-Signal* and its progeny have used it. As discussed above, remand without vacatur is considered in situations where vacatur would cause regulatory havoc if the

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case involved a completed and already-operating pipeline, and the harm from its construction was already complete. Here, of course, construction through the Basin has not yet occurred, and a NEPA analysis requires can still meaningfully inform permit issuance and the elimination or reduction of environmental harm.

challenged regulation or permit is later reinstated or weaken regulatory protections. In contrast, vacatur of permits and injunctions to protect the environment in NEPA and CWA cases during the time it takes to comply with the law are commonplace, even where costly to private interests. *See, e.g., O'Reilly*, 477 F.3d at 240; *Sierra Club v. Sigler*, 695 F.2d 957, 983 (5th Cir. 1983) (Corps permit rejected for crude oil terminal even though "further delay could kill the project"); *Fritjofson v. Alexander*, 772 F.2d 1225, 1249 (5th Cir. 1985) (enjoining private housing development); *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 998 (8th Cir. 2011) (enjoining power plant construction). Moreover, discussed below, the District Court weighed the impacts of a delay on the proponent, and found them unpersuasive.

The standard for issuance of a preliminary injunction is the traditional four-factor test. Nobody ever argued otherwise. The District Court did not abuse its discretion by applying this standard.

III. THE DISTRICT COURT CORRECTLY FOUND AN INJUNCTION WAS NEEDED TO PREVENT IRREPARABLE HARM.

A district court's factual findings with respect to irreparable environmental harm are not to be disturbed lightly. *Sabine River,* 951 F.2d at 678–79 ("If the district court has conducted an evidentiary hearing, and has drawn factual inferences and made credibility determinations, we must give great deference to the district court's conclusions."). Here, the District Court heard from multiple

witnesses and reviewed dozens of documentary exhibits and photographs. It had the opportunity to weigh the credibility of plaintiffs' experts and fact witnesses, who were subject to cross examination, against Intervenors' written declarations. Neither the Corps nor Intervenors offer any reason to question the District Court's evidence-based conclusion that construction would cause irreparable harm.

The Corps complains that the District Court's findings with respect to irreparable harm were in error, but fails to explain why it thinks this is so. Leaving aside its failure to offer any rationale, the Corps waived any potential appeal on the issue of harm. It put on no evidence, declined the opportunity to cross-examine plaintiffs' witnesses, and never argued the issue in its post-hearing brief. ROA.4173, 4191. It has waived any arguments related to harm. *Supra* at 14-15.[17]

Intervenors raise various objections to the District Court's factual findings, but none show any error. First, they seize upon the District Court's use of the word "potentially" in describing the hydrologic harm that would occur if a new channel is cut across the Basin. Intervenor Br., at 47. But the District Court plainly understood that plaintiffs must show a *likelihood* of irreparable harm.

[17] Its effort to argue that the injunction is "overbroad" because it "might" also be read to prevent the Corps from taking "administrative" actions related to the permit is misplaced. Corps Br. at 30. The Corps can seek the agreement of plaintiffs, or address a motion to the District Court, should this unlikely hypothetical come to pass. It is not a basis to dissolve the injunction.

ROA.4008-4013. In its bench ruling, the Court noted that there had been "significant" testimony that hydrologic damage "will occur" if construction is completed. ROA.4307; ROA.4179-4184. The undisputed evidence before the District Court was that harm to the Basin through changes to hydrology and sedimentation was a certainty, not just a possibility. ROA.1246-1248; ROA.1156-1240; ROA.1341-1364; ROA.4178-4186.

Second, Intervenors argue that the harm here cannot be irreparable because the law allows impacts to be "mitigated" through compensation in some circumstances. But appellants muddle the issue on the legal merits (whether the Corps lawfully imposed compensatory mitigation) with the separate factual question of whether plaintiffs have demonstrated imminent irreparable harm for purposes of an injunction. The District Court considered and explicitly rejected Intervenors' argument. ROA.4306-4307 ("Mitigation doesn't somehow repair a harm."). Construction of the pipeline will damage or destroy hundreds of acres of sensitive and important cypress swamp. ROA.4036. That harm cannot be repaired: trees cannot be brought back, altered hydrology cannot be restored. ROA.4165-4168 (conditions allowing for cypress regeneration "don't exist anymore."); ROA.4176 ("We cannot replicate those conditions"); 4182 ("Once the sediment is deposited . . . You can't take it away."). The fact that the law allows such harm to occur if certain conditions are met is immaterial to the question of

whether it is "irreparable" for purposes of an injunction—nor has any Court, anywhere, so found.[18]

Third, Intervenors repeat the argument, considered and forcefully rejected below, that the harm is *de minimis* because the destruction of hundreds of acres of cypress swamp appears small when compared to the Basin as a whole. ROA.4036; *compare O'Reilly*, 477 F.3d at 229 (invaliding permit impacting 39 acres of wetlands). The argument is wrong both legally and factually. Courts have rejected the argument that environmental harm can be ignored by simply comparing it to some larger area. *See Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 575 (comparison of affected area to others is "irrelevant"); *see also* 40 C.F.R. § 1508.27(a) ("context" means that "significance would usually depend upon the effects in the locale rather than the world as a whole"). Clearing a 23-mile long, deforested channel from one side of the Basin to the other would have cascading impacts to the ecology of both the Basin and the coast, and is hardly *de minimis*. Basinkeeper's experts expressly discussed this issue in their testimony. ROA.4158 ("It's a small factor now but it can become a huge factor when you put them

[18] While the plaintiff organizations urged the Corps to consider other forms of mitigation, including restoration of the site right of way, they in no way "conceded" that environmental harm was not irreparable. Intervenors Br. at 48. Plaintiffs understood that the Corps was likely to grant the permits over their objections and that, at a minimum, it should follow the law and impose meaningful mitigation.

altogether."); ROA.4183 (creation of channel fills swamps, robbing coast of sediment). A bullet wound may only impact a small percentage of the body's surface area, but its effects are grave. The Court was right to reject Intervenors' "*de minimis*" argument.

Lastly, Intervenors make the unusual argument (never raised below) that the destruction of ancient trees is not cognizable as irreparable harm. Intervenor Br. at 49. This argument refers to evidence that construction would result in the destruction of ancient "heritage" trees that have survived throughout the Basin since antiquity.[19] The oldest cypress trees are three and a half thousand years old. ROA.4163. Some are affixed with plaques that highlight their antiquity, to educate and inspire the public. ROA.4236-4237. These ancient trees provide a range of critical environmental values, like habitat for endangered bears and attenuation of flood flows, that cannot be mitigated if the trees are destroyed. ROA.4162-4163; ROA.4179-80; ROA.4211 (ancient trees are the "Noah's Ark" of the cypress swamp). The claim that statutes like NEPA and CWA do not protect the giant sentinels of the Atchafalaya Basin, which have stood since the dawn of human civilization, from being ground into sawdust must be vigorously rejected. *See*

[19] Intervenors misstate the evidence about the number of trees that would be affected. Plaintiffs found 17 heritage trees in the 10% of the right of way that it surveyed. ROA.4212-4213. The real number of heritage trees that would be destroyed is surely much higher. *Id.*

League of Wilderness Defenders v. Connaughton, 752 F.3d 755, 764 (9th Cir. 2014) ("logging of mature trees" is irreparable because "[n]either the planting of new seedlings nor the paying of money damages can normally remedy such damage.").

IV. THE DISTRICT COURT PROPERLY CONSIDERED THE BALANCE OF HARMS AND THE PUBLIC INTEREST.

As it did below, the Corps mostly ignores the balance of harms and the public interest. Intervenors barely bother to argue the issue. Their reticence is unsurprising, as the District Court's fact-finding and balancing must be treated with "great deference" by this Court. *Sabine River,* 951 F.2d at 678–79. The District Court gave Intervenors and the Corps ample opportunity to put on evidence, and it considered that evidence closely. The fact that the District Court found Intervenors' evidence unpersuasive is a testament to Intervenors' failure to put on persuasive evidence, not an indication of judicial error.

Intervenors submitted declarations from its executives claiming extraordinary financial harms if an injunction issued. ROA.6779-6781; ROA.6795. Plaintiffs showed that the declarations merited little weight, as they were carefully hedged, used contingent language, and lacked supporting evidence. ROA.2867-2868. They further explained that since the injunction covered only 14% of the pipeline's length, the company could likely mitigate the financial impacts through modest changes to the construction schedule. Finally,

Basinkeeper explained how the company bore some responsibility for the financial impacts of an injunction, because it chose to proceed with construction in the face of significant controversy and despite the litigation. *Sierra Club*, 645 F.3d at 997 (finding claims of economic harm to have been "largely self-inflicted" by starting construction).

Weighing the evidence and arguments, the District Court agreed with plaintiffs. It concluded that the "vast" claims of economic damage were "not supported by underlying data" or "specific details or analysis." ROA.4053. It further concluded, based on the evidence presented to it, that cessation of work in the Basin could be "ameliorated" by shifting construction to other parts of the project. Finally, the District Court cited well-established law that financial damage does not outweigh irreparable environmental harm. *Amoco Prod Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The District Court's decision, after a full evidentiary hearing and weighing of the harms on both sides, should be left undisturbed.

Intervenors' arguments fail for another reason. BBP cannot complete construction of the project at this time anyway, as the § 408 permit dictates that work must cease and excavations must be backfilled during a "high river event," defined as a Carrolton gage reading of 11.0 feet or higher. ROA.1850. Outside those areas constrained by the § 408 permit, Bayou Bridge itself acknowledged

that high waters would delay construction. Decl. of Michael Aubele, ¶ 7 (Doc. 00514374546). The Carrolton gage reading surpassed 11.0 feet the day before the injunction was issued, and water levels will remain high through the end of August if not later. Van Heerden Decl. (Doc 00514373738 at 255), ¶ 10, 14 & Ex. 4. Construction has not resumed in the Basin even though the motion panel stayed the injunction. Whatever economic impact is occurring at this time, it is not being caused by any action of the District Court.

As to the public interest, "it is always served by requiring compliance with Congressional statutes." *ADT v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 700 (N.D. Tex. 2015); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1342 (S.D. Ala. 2002) ("[T]he public interest, as identified by Congress in passing NEPA and the ESA, favors informed agency decision-making."). The public interest is further protected by pausing a project with significant flood implications. Projects like this one not only reduce the capacity of the Basin to retain floodwaters, but they rob the coast of sediment needed to sustain coastal wetlands that protect against storms. *See supra*, at 3; *Sargent v. United States*, 2008 WL 3154761, at *9 (E.D. La. Aug. 5, 2008) ("In the wake of hurricane Katrina and the devastation it wrought on the City of New Orleans, there can be no greater public interest for this City than flood protection."); *Blanco v. Burton*, 2006 WL 2366046, at *20 n.43 (E.D. La. Aug. 14, 2006) ("The real 'climate of uncertainty,' however, hovers over

south Louisiana as its resources are harvested by way of miles of pipelines and navigation channels, its infrastructure is taxed to the near breaking point, its natural buffer against hurricanes is carved and shredded as a result of ongoing and future [oil and gas] activities[.]"). The District Court correctly found that the public interest supports a limited injunction preventing construction in the Atchafalaya Basin while this case proceeds to the merits

CONCLUSION

For the foregoing reasons, the District Court's preliminary injunction should be affirmed.

Respectfully submitted this 12th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2018, I filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

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I hereby certify that on this 12th day of April, 2018, the foregoing brief was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system.

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