ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1023 (consolidated with No. 24-1024)

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

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents,

ALASKA COMMUNITY ACTION ON TOXICS, *et al.*,

Intervenors-Respondents.

On Petition for Review of Final Order
of the United States Department of the Interior
and Bureau of Ocean Energy Management

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THE AMERICAN PETROLEUM INSTITUTE

(Names and addresses of counsel appear inside cover.)

Date: July 19, 2024

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the Chamber of Commerce of the United States of America submits this certificate as to parties, rulings, and related cases.

A. Parties and *Amici Curiae*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the certificate filed by Petitioner the American Petroleum Institute.

The Chamber of Commerce of the United States of America is submitting this *amicus curiae* brief in support of Petitioner the American Petroleum Institute.

B. Rulings Under Review

References to the rulings at issue appear in the certificate filed by Petitioner the American Petroleum Institute.

C. Related Cases

Amicus curiae is not aware of any additional related cases within the meaning of Rule 28(a)(1)(C).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Chamber of Commerce of the United States of America ("Chamber"), through undersigned counsel, certifies as follows:

The Chamber is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

The parties have consented to the filing of this *amicus curiae* brief.

Pursuant to D.C. Circuit Rule 29(d), the Chamber of Commerce of the United States of America ("Chamber") is not aware of other entities or individuals intending to participate as *amici* to represent the perspectives and interests of the broader U.S. business community, including how the order under review will negatively impact the nation's economy, energy security, and global competitiveness. The Chamber has endeavored to avoid duplication in briefing.

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GLOSSARY

APA refers to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

BOEM refers to the Bureau of Ocean Energy Management.

Chamber refers to the Chamber of Commerce of the United States of America.

EIA refers to the U.S. Energy Information Administration.

Five-Year Program refers to the Record of Decision and Approval of the 2024-2029 National Continental Shelf Oil and Gas Leasing Program (Dec. 14, 2023).

GHG refers to greenhouse gas.

Interior or **Department** refers to the U.S. Department of the Interior.

OCS refers to the Outer Continental Shelf.

OCSLA refers to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*.

STATUTES AND REGULATIONS

Relevant statutes and regulations are appended to Petitioners' briefs.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber is well situated to aid the Court's review of the U.S. Department of the Interior's and Bureau of Ocean Energy Management's (collectively "Interior") Record of Decision and Approval of the 2024-2029 National Continental Shelf Oil and Gas Leasing Program ("Five-Year Program"), signed December 14, 2023. Many of the Chamber's members are directly impacted by the Five-Year Program, including those members who wish to lease Outer Continental Shelf ("OCS") areas and those members who would like to provide supporting services to such lessees. Many other members will be indirectly harmed by the Five-Year Program, due to a

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

reduction in economic opportunities associated with OCS development and diminished access to reliable and affordable energy.

The Chamber supports policies that reduce greenhouse-gas emissions as much and as quickly as reasonably possible, consistent with the pace of innovation and the feasibility of implementing large-scale technical change. *See* U.S. Chamber of Commerce, *The Chamber's Climate Position: 'Inaction Is Not an Option'* (Oct. 27, 2021), https://bit.ly/4dasiB3. The Chamber also has a strong interest in ensuring that agency action comply with the law and avoid disruptive consequences to the Nation's economy and energy security. The Chamber thus has a strong interest in ensuring that the Five-Year Program is correctly implemented and that the Court is provided important context on these subjects that will assist it in resolving this case.

SUMMARY OF ARGUMENT

Congress has declared it in the national interest to foster and encourage the development of oil and natural gas resources located in the OCS as a means to achieve economic and energy security goals, reduce dependence on foreign sources, and maintain the nation's position in the global balance of trade. *See* 43 U.S.C. § 1802(1). However, this Five-Year Program—which authorizes only *three* potential oil and natural gas lease sales on the OCS, in sharp departure from prior precedent—neither accomplishes those congressional purposes nor "best meet[s] national energy needs for the five-year period following its approval or reapproval." *See* 43 U.S.C.

§ 1344(a). Interior's decision is both counterproductive to maintaining national economic and energy security and contrary to the reasoned decision-making required by the Outer Continental Shelf Lands Act ("OCSLA") and the Administrative Procedure Act ("APA").

1. The OCS is a cornerstone of domestic energy production and provides significant benefits to direct participants, downstream customers, local communities, and the nation. Here, Interior has disregarded or inexplicably misconstrued Congress's clear direction as set forth in OCSLA. This Five-Year Program fails to promote and expedite the development of natural resources in the OCS in a manner that "achieve[s] national economic and energy policy goals, assure[s] national security, reduce[s] dependence on foreign sources, and maintain[s] a favorable balance of payments in world trade." *See* 43 U.S.C. § 1802(1).

2. OCSLA does not assign unbounded discretion to Interior. Instead, OCSLA clearly and specifically lists particular factors for Interior to consider when developing an OCS leasing program, which require Interior to balance robust oil and natural gas development with localized environmental considerations.

Here, Interior ventured well beyond the bounds of OCSLA, giving significant weight to statutorily impermissible factors to pursue an aggressive agenda that cannot be squared with the statutory mandate. Interior's reasoning is based on "net-zero" hypotheticals, which lack basis in existing law or support in its own record,

and global impacts, which are divorced from the types of localized and regional harms that OCSLA instructs Interior to consider. Likewise, Interior's analysis ignores OCSLA's explicit short-term emphasis on the nation's energy needs in the next *five* years. And this Five-Year Program is otherwise arbitrary and capricious because Interior failed to acknowledge, let alone justify, its sharp departures from its prior proposed leasing programs.

For these reasons—as well as those raised by Petitioner the American Petroleum Institute—this Five-Year Program violates OCSLA, is arbitrary and capricious, and should be remanded to Interior for consideration of additional sales.

ARGUMENT

I. OCSLA's stated objectives are not met by the Five-Year Program.

The OCS is a critical economic engine that serves an important role in preserving domestic energy independence and security. And Congress has clearly defined the purpose of OCSLA to promote these interests. Notably, Congress described the OCS not only as a resource for producing affordable energy, but as a means of ensuring that our short-term need for reliable domestic energy is met, *independent* from foreign reliance. But here, Interior impermissibly relied on energy demand predictions that suppose a future where America's energy needs are met by relying only upon foreign producers.

A. The Five-Year Program does not satisfy the stated purpose of OCSLA to promote OCS development.

Congress passed OCSLA to "meet the urgent need for further exploration and development of the oil and gas deposits" on the OCS. Outer Continental Shelf Lands Act, Pub. L. No. 83-212, § 8, 67 Stat. 462, 468 (1953). Likewise, when Congress amended OCSLA in 1978, it specified that the Act was "intended to result in *expedited* exploration and development of the [OCS]." 43 U.S.C. § 1802(1) (emphasis added). Congress's mandate was animated by specific policy objectives: to "achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." *Id*. The 1978 amendment also sought to balance "rapid[]" development with other OCS interests, including environmental safeguards. *See California v. Watt*, 668 F.2d 1290, 1296 (D.C. Cir. 1981). Congress recently reaffirmed this commitment in the Inflation Reduction Act by prohibiting Interior from offering offshore wind development leases unless it met two conditions: (1) it held an offshore oil and gas lease sale, and (2) it offered for lease at least 60,000,000 acres (sum total) during the 1-year period. Pub. L. No. 117-169, § 50265(b)(2)(A)-(B), 136 Stat. 1818, 2061 (2022). *See* 43 U.S.C. § 3006(b).

This Five-Year Program fails to follow Congress's directive by limiting lease sales far below historic levels and below levels proposed by Interior before finalizing the Five-Year Program. From 1992-2022, each five-year leasing program has

provided between 11 and 21 lease sales, with an average of 16.8 lease sales. Here, Interior proposes three sales, at most. BOEM, *Lease Sales*, https://bit.ly/3Lx6UtG. Those same five-year lease programs each represent, on average, more than 350 million acres of available leases. BOEM, *All Lease Sale Offerings* (updated Feb 2024), https://bit.ly/3LtDJHZ. Interior's abrupt departure from past practice does not promote OCS development in the manner required by OCSLA.

B. This Five-Year Program undermines our energy security and does not best meet our energy needs.

Congress tasked Interior with establishing leasing programs "which [the Secretary] determines will *best meet* national energy needs for the five-year period . . . ." 43 U.S.C. § 1344(a) (emphasis added). At a minimum, this means ensuring reliable and affordable energy, which this Five-Year Program fails to do by imposing a limit of no more than three lease sales.

1. This Five-Year Program fails to prioritize and ensure our energy security.

Energy security is "the uninterrupted availability of energy sources at an affordable price." *See* Int'l Energy Agency ("IEA"), *Energy Security; Reliable, Affordable Access to All Fuels and Energy Sources*, https://bit.ly/3ClXP3i. Our national economic success is dependent on energy security, which in turn is greatly strengthened by a robust OCS leasing program. Both long-term energy security (timely investments to supply energy in line with economic developments and

environmental needs) and short-term energy security (the ability of the energy system to react promptly to sudden shifts in the supply-demand balance) are crucial to our economy's ability to function. *See* Global Energy Institute Comments on BOEM's Notice of Availability of the 2023-2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program and Draft Programmatic Environmental Impact Statement, Docket No. BOEM-2022-0031 (Comment ID BOEM-2022-0031-6360) (Oct. 5, 2022).

Oil and natural gas production in the OCS plays a vital role in the United States economy and helps to ensure energy security. It provides a stable and predictable supply of energy resources to meet the nation's energy demand, both as a direct primary fuel and as a reliable baseload energy source as compared to intermittent renewable energy sources. *See* Nat'l Energy Tech. Lab'y, U.S. Dep't of Energy, *Additional Pipeline Capacity and Baseload Power Generation Needed to Secure Electric Grid* (Feb. 20, 2020), https://bit.ly/3Iq1soo. Interior has previously estimated that the OCS provides 4% of natural gas production and 18% of domestic oil production. *See Evaluating Federal Offshore Oil and Gas Development on the Outer Continental Shelf: Hearing Before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources* (2017) (statement of Katherine S. MacGregor, Acting Assistant Secretary), https://bit.ly/4fb4773. The value of OCS production cannot be overstated: it generates billions of dollars in revenues, lowers

domestic energy costs, directly supports an estimated 372,000 jobs, indirectly supports millions of jobs, reduces trade deficits, and enhances national security. JA__-__, __ [BOEM, *2024-2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program* 1-9 to 1-12, 5-26 (Sept. 2023)] [hereinafter "PFP"]; *see* Energy & Industrial Advisory Partners, *The Economic Impacts of a 5-Year Leasing Program Delay for the Gulf of Mexico Oil and Natural Gas Industry* 5 (2022), https://bit.ly/3BS3MDq.

By design, a proper OCS leasing program enhances our energy security and independence by reducing the nation's reliance on foreign sources of oil and natural gas, and insulating the United States economy from global energy supply disruptions and price shocks. *See* JA__ [PFP at 1-10]. The stability of OCS production has helped to ensure affordable domestic energy prices even when the global energy markets have become volatile. *See* U.S. Dep't of Energy ("DOE"), *Valuation of Energy Security for the United States: Report to Congress* 12 (Jan. 2017), https://bit.ly/3JtSEiI. This is accomplished, in part, because OCS production increases the available supply of oil and gas and diversifies our domestic sources of energy. Supply diversity "reduces the likelihood that disruptions to supply or threats to production areas, trade, or distribution routes—whether caused by weather, terrorism, or geopolitics—significantly disrupt United States access to physical energy supplies." *Id.* at 44. The Department of Energy has found that increased

domestic production of oil and natural gas has "improved domestic, and thus global, energy security in a variety of ways" and has repeatedly prevented spikes in energy prices that could have threatened both the United States and global economy. *Id.* at 12. As a result, even if we could meet our energy needs in the next five years without OCS oil and natural gas production, a program that *best* meets America's energy needs is one that ensures a diversity of redundant forms of energy are readily available—including OCS oil and gas.

Prior programs have encouraged robust development of the OCS, helping the nation achieve a net exporter status of oil and natural gas in 2020 for the first time since 1952. *See* Energy Info. Admin. ("EIA"), *U.S. Total Energy Exports Exceed Imports in 2019 for the First Time in 67 Years* (Apr. 20, 2020), https://bit.ly/3Yg31AS. In 2005, the net petroleum imports totaled some 12.55 million barrels per day, but by 2022 the nation had net exports of 1.27 million barrels per day. EIA, *Oil and Petroleum Products Explained* (updated Jan. 19, 2024), https://bit.ly/4d3pIws. That swing of nearly 14 million barrels per day represents reduced dependence on foreign energy sources, an improved trade balance, consumers saving billions of dollars in energy costs, and a strengthened geopolitical position with increased influence around the world. DOE, *The Economic Benefits of Oil & Gas*, https://bit.ly/3Y6gQlp.

Based on Interior's own analysis, most of the energy substitution for reduced OCS leasing and development would come from oil *imports*. Interior also estimates that only about 10% of the energy substitution due to reduced OCS development would be addressed through reduced consumption of oil and gas. JA__ [PFP at 5-17 Table 5-3]. Interior's analysis thus indicates that a lack of OCS oil and natural gas leasing would make the United States increasingly vulnerable to energy price spikes and the resulting geopolitical instability. As a result, this Five-Year Program does not best meet America's energy needs, as required by OCSLA.

2. *The Five-Year Program relies on unsupported assumptions about the energy transition and increases reliance on foreign partners to justify the three lease limit.*

After noting that a key priority of the Administration is to achieve carbon-free electricity and net-zero emissions, Interior explains that it considered "energy needs under both the current national energy landscape and the possibility of an energy market that is significantly transformed by transitioning to a clean energy economy." JA__-__, __ [PFP at 1-3 to 1-8, 6-17]. But Interior has not provided any discussion or analysis about the ability to meet national energy demands with renewable energy products. Indeed, the forecasts Interior cites indicate that oil and natural gas will continue to make up the majority of domestic energy consumption. JA__ [PFP at 1-7 fig. 1-5]. Other reports indicate that natural gas production will need to rise to meet increasing demand. *See* EIA, *U.S. Natural Gas Production and LNG Exports Will*

Likely Grow Through 2050 in AEO2023 (Apr. 27, 2023), https://bit.ly/4dap2VZ. As Interior acknowledged, "[t]he decision of whether to include a specific area in a National OCS Program does not result in one-for-one change to the United States energy demand. Instead, the decision to have leasing in an area affects *prices*." JA__ [PFP at 5-16] (emphasis added).

OCSLA provides no basis for Interior to rely on untested assumptions about our ability to transition to new energy sources in managing the Five-Year Program. The leasing plan that meets our realistic energy needs, and thus fulfills Interior's obligations under OCSLA, is one that does not make fundamentally flawed assumptions such as presuming a rapid and smooth energy transition or amicable relations with foreign nations (which the United States will likely require to affordably obtain the energy that it needs). And given that a key policy objective of OCSLA is to *reduce* dependence on foreign sources, such a presumption cannot serve as a basis for limiting OCS production.

Specifically, Interior does not address how reliance on renewable energy products in place of domestic oil and gas furthers the objectives of OCSLA to promote energy security and favorable trade balances. The current ability to make a timely and smooth energy transition to renewables—and to maintain and expand that infrastructure to meet future demand—depends on geopolitics in a way that runs counter to OCSLA's goals. For example, certain rare earth metals and critical

minerals are necessary components for batteries, electric vehicles, solar panels, and wind turbines. IEA, *The Role of Critical Minerals in Clean Energy Transitions: World Energy Outlook Special Report* (Mar. 2022), https://bit.ly/3LVwKqE. The vast majority of such rare earths are mined and processed by China. Daniel J. Cordier, U.S. Geological Survey, *Mineral Commodity Summaries: Rare Earths* 2 (Jan. 2022), https://on.doi.gov/3V5RWib. From 2015 to 2018, the United States imported 80% of rare earth elements from China, and imports from other countries were often derived from Chinese inputs. Congressional Research Service, *An Overview of Rare Earth Elements and Related Issues for Congress* 1 (Nov. 24, 2020), https://bit.ly/4680o6h. And, in 2019, 100% of the rare earth metals and compounds used in the United States were imported. *Id.* at 1. Despite the critical need for these raw materials and the negative consequences of foreign reliance, Interior has taken an active role in preventing domestic mining. *See, e.g.*, Notice of Availability of the Ambler Road Final Supplemental Environmental Impact Statement, 89 Fed. Reg. 32,458 (Apr. 26, 2024) (DOI blocks the construction of a mining road and terminates existing right of way grant).

Besides the necessary raw materials, solar and wind energy components are also largely imported from abroad. China dominates solar panel production, while China and Europe both have footholds in the manufacturing of components necessary for wind generation. Garrett Hering & Anna Duquiatan, *'Extreme*

Dependence': US Solar Panel Imports Boom to Record 54 GW in 2023, S&P GLOBAL (Feb 23, 2024), https://bit.ly/46iM9vt; DOE, *Wind Energy: Supply Chain Deep Dive Assessment* 25-26 (Feb. 24, 2022), https://bit.ly/3zOwMig.

Further, there is no clear national policy nor other evidence that our reliance on foreign materials and foreign products will change in the near future, and prior attempts by the executive and legislative branches have been "insufficient to stem the overall decline of the [domestic] industry." Lachlan Carey, *The U.S. Solar Industry Strategy*, Center for Strategic & International Studies (Dec. 1, 2021), https://bit.ly/46iE0r2.

Interior accepts, and in fact emphasizes throughout the Five-Year Program, that the nation is becoming more reliant on foreign sources of energy generation, without explaining how *reducing* the number of OCS lease sales will counteract this trade imbalance. Interior must explain how the purposes of OCSLA are fulfilled by a program that exchanges domestic production for reliance on foreign materials. Interior does not (and cannot). Simply put, this Five-Year Program would trade current energy security (supported by domestic oil and gas production) with energy *insecurity*. OCSLA does not allow for such a result.

C. The Five-Year Program harms the United States economy.

The OCS leasing program supports significant economic activity and provides critical benefits for the associated coastal states and for the nation. In 2022, the

American Petroleum Institute projected that the oil and gas industry in the Gulf of Mexico alone would support an estimated 372,000 jobs in the United States. Energy & Industrial Advisory Partners, *The Economic Impacts of a 5-Year Leasing Program Delay for the Gulf of Mexico Oil and Natural Gas Industry* 5 (2022), https://bit.ly/3BS3MDq. The study also determined that the offshore industry in the Gulf of Mexico would contribute an average of $31.4 billion to the GDP per year from 2022 to 2040, the forecast period. *Id.* And it estimated that OCS leasing would generate an average of $7.4 billion in government revenues per year over the same period. *Id.* This governmental revenue is critical for state and local governments that collectively receive hundreds of millions of dollars from revenue sharing under the Gulf of Mexico Energy Security Act. *Id.* The revenues also provide funding for the Land and Water Conservation Fund, the National Park Service, and the Historic Preservation Fund, each of which rely on their allocations of OCS revenue to support critical projects. Royalties from OCS leasing also finance coastal restoration and protection projects that mitigate the impacts of climate change. *See* JA__-__ [PFP at 1-11 to 1-12].

OCS production is critical for ensuring American consumers have access to affordable energy. OCS production helps ensure that Americans can affordably power the vehicles that deliver their products and ferry them to work. *See* JA__-__ [PFP at 1-4 to 1-5]. Likewise, too, for the provision of reliable and affordable

electricity. Electricity prices are closely linked to the cost of natural gas, which is critical to ensuring that businesses and consumers can heat and cool their businesses and homes. *See* EIA, *Electricity Explained: Electricity in the United States* (July 15, 2022), https://bit.ly/3J2rVZB. Because "[c]onsumers can't easily cut [energy] consumption on short notice, as they can with discretionary purchases, . . . higher prices act as a tax, draining the money they have available to spend on other goods and services." Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, WALL ST. J. (Oct. 10, 2021), https://on.wsj.com/3N57qPq. And unreliable or unaffordable energy sources have a disproportionately high impact on poor communities.

OCS production is also critical to ensuring that many consumer products remain affordable, as oil and natural gas serve as the feedstocks for creating plastics, rubbers, resins, synthetic fibers, agricultural chemicals, and many other products. *See* EIA, *Bulk Chemical Feedstock Use a Key Part of Increasing Industrial Energy Demand* (May 29, 2015), https://bit.ly/3WvWy3S. Interior agrees. *See* JA__ [PFP at 5-26] (New OCS production "increases the supply of oil and natural gas, which lowers the price consumers pay and producers receive" and "benefits consumers"). Put simply, OCS leasing is vital to the entire United States economy.

II. The Five-Year Program violates OCSLA, is arbitrary and capricious, and is not consistent with the requirements of Section 18.

To reach its desired policy outcome of limited sales, Interior impermissibly ignored three mandatory statutory directives: (1) that the analysis be based on specific enumerated considerations; (2) that any environmental considerations be limited to localized concerns; and (3) that the focus be limited to the short term—specifically, the next five years.

A. Interior impermissibly relied on considerations beyond those enumerated in OCSLA to limit sales in the Five-Year Program.

Congress instructed that Interior "shall" prepare and revise an oil and natural gas program for the OCS "in a manner consistent with" certain specifically listed "principles." 43 U.S.C. § 1344(a). These principles include the development of a leasing program that "will best meet national energy needs for the five-year period following [the program's] approval or reapproval." *Id.* Section 18(a) specifies eight factors on which the development of the leasing program "shall be based":

> (A) existing information concerning the geographical, geological, and ecological characteristics of such regions;
>
> (B) an equitable sharing of developmental benefits and environmental risks among the various regions;
>
> (C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;
>
> (D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed

> sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
>
> (E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;
>
> (F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
>
> (G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and
>
> (H) relevant environmental and predictive information for different areas of the outer Continental Shelf.

Id. § 1344(a)(2)(A)–(H). Congress expressly required Interior to consider *only* these factors. *See Watt*, 668 F.2d at 1305 ("Secretary must base the leasing program upon the result of his consideration of these factors"); *cf. Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 465 (2001) (holding that agency was prohibited from considering extra-statutory factors where Congress directed agency to set standards requisite to protect public health, without regard to cost).

Interior went through some of the required motions, for instance by identifying and providing mostly qualitative descriptions of the above factors, *see* JA__-__ [PFP at 2-3 to 2-7], and by describing (in skewed fashion) the economic, social, and environmental values of OCS resources, *see* JA__-__ [PFP at 2-8 to 2-10], and national energy needs, *see* JA__-__, __ [PFP at 1-2 to 1-13, 2-3]. *But see*

supra Part I. The problem, however, is that the organizing principles carefully prescribed by Congress did not in fact drive Interior's decision-making.

Notably, none of these eight factors present climate-related considerations. Indeed, Congress directed Interior to consider and balance only localized or regional environmental concerns for the OCS regions and did not authorize it to consider global emissions impacts. For instance, Interior "shall" "consider[] economic, social, and environmental values of the renewable and nonrenewable resources *contained in the outer Continental Shelf*," and the "potential impact of oil and gas exploration on other resource values *of the outer Continental Shelf and the marine, coastal, and human environments*." 43 U.S.C. § 1344(a)(1) (emphases added). And Interior "shall" develop the leasing program "so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact *on the coastal zone*." *Id.* § 1344(a)(3) (emphasis added). Congress's repeat use of "shall" evinces an intent to convey mandatory requirements. *See Murphy v. Smith*, 583 U.S. 220, 223 (2018) (In a statute, "the word 'shall' usually creates a mandate, not a liberty."). Moreover, the decision by Congress to define the universe of "principles" that Interior "shall" observe conveys an expectation that Interior consider each of those principles, and only those principles, when developing the leasing program. *Cf. Huls Am. Inc. v. Browner*, 83 F.3d 445, 450 (D.C. Cir. 1996) (A statute's use of language like "'shall take into

account' to introduce the list of factors" is generally interpreted "to imply that the [agency]'s discretion to consider only those factors it deems relevant is limited.").

Thus, Interior must account for each of OCSLA's enumerated principles, but it is precluded from venturing beyond those enumerated considerations. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Agency action "would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."); *see also MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990) (finding order arbitrary and capricious where "[m]uch of the FCC's explanation . . . appears to rest securely upon . . . forbidden considerations" and the court could not determine "from the FCC's order whether it considered" the rest of its explanation "to be independent of the impermissible factors and a sufficient basis for its conclusion in their absence").

Here, Interior went outside the statute, focusing to a significant degree on other impermissible factors. Those factors appear to have heavily influenced the decision to propose only very limited leasing opportunities. For example, Interior expanded OCSLA's requirement for a leasing program that "best meet[s] national energy needs," *see* 43 U.S.C. § 1344(a), to also account for a policy "to confront the climate crisis through reducing greenhouse gas emissions." JA__ [PFP at 2]; *see also* JA__ [PFP at 6-6] (asserting as relevant to Section 18(a) the consideration of "how the National OCS Program fits in with *future* climate policies as the U.S. transitions

to a clean energy future" (emphasis added)). But OCSLA makes no mention of the leasing program as a policy lever for reducing emissions, much less a factor on par with the directive for a leasing program that "best meet[s] national energy needs." *Cf. Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009) (affirming Interior's previous conclusion that it "is a matter for Congress" to consider policy objectives such as "the role of oil and gas generally, including domestic production and imports, in the Nation's overall energy policy").

Relatedly, Interior placed outsized emphasis on "global" climate-related impacts stemming from both the post-production refining, storage, and distribution and the consumption of oil and natural gas extracted from OCS regions—i.e., the "midstream" and "downstream" climate-related effects, respectively. *See* JA__-__ [PFP at 5-31 to 5-33]; *see also* JA__, __, __ [PFP at 6, 1-8, 2-3] (noting consideration of downstream, consumption-related climate policies); JA__ [PFP at 5-26 n.38] (noting that the social cost of GHG emissions calculations "go beyond domestic impacts" and "include[ ] global impacts"). Indeed, the majority of the social cost of GHG's impacts are global as opposed to domestic.

Section 18(a), however, focuses squarely on localized or regional environmental concerns—predominantly in and around the OCS regions. *See* 43 U.S.C. § 1344(a)(2), (3); *see also Ctr. for Biological Diversity*, 563 F.3d at 485 (OCSLA permits Interior to make leasing decision based only on "the local

environmental impact of leasing activities in the OCS."). In fact, with respect to midstream and downstream climate-related effects, this Court observed that Interior is "not authorize[d] . . . to consider" the environmental impact of oil and natural gas consumption on "the world at large, or the derivative impact of global fossil fuel consumption on OCS areas." *Id.* ("Interior simply lacks the discretion to consider any global effects that oil and gas consumption may bring about."). Just so here.

Finally, Interior impermissibly extended its consideration of "national energy needs" beyond the "five-year period" of a leasing program. *See* 43 U.S.C. § 1344(a); *see also* JA__ [PFP at 2] ("Meeting national energy needs for the 5-year period following approval of a new National OCS Program is a stated purpose of [OCSLA]."). Interior instead placed heavy emphasis on aggressive net-zero hypotheticals according to a time horizon of "decades," *see* JA__, __ [PFP at 6, 1-12], and seemed to reason that goals set forth in this Administration's executive orders precede (and can trump or otherwise warrant ignoring or modifying) binding statutory direction. Not so. *Marks v. Cent. Intelligence Agency*, 590 F.2d 997, 1003 (D.C. Cir. 1978) ("Of course, an executive order cannot supersede a statute."); *see also United States v. E. Tex. Motor Freight Sys., Inc.*, 564 F.2d 179, 185 (5th Cir. 1977) (same). There is no legal basis for Interior to decide to effectively amend OCSLA's five-year horizon to encompass decades-long and speculative projections

of energy and climate policies. Expanding the statutory timeline to span decades to justify limited lease sales violates OCSLA's explicit direction.

* * *

In sum, nothing in OCSLA allows Interior to give weight—let alone dispositive weight—to unenumerated factors to justify few sales. Section 18(a) of OCSLA provides a litany of factors that Interior must consider in its discretion to arrive at a proposed leasing program. That discretion did not authorize Interior to go off-script and rely upon impermissible considerations, as it did here. The eight-part test under Section 18(a)(2) is designed as a methodology for developing an actual, relevant schedule of offshore oil and natural gas lease sales to satisfy short-term United States energy needs; it is not a process that would allow the elimination (or even the diminution) of such sales on the basis of extra-statutory considerations.

B. The Five-Year Program did not acknowledge, much less justify, Interior's departure from its prior decisions.

Where an agency decides to change an existing policy, the APA requires it to "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). This requires the agency, at a minimum, to "'display awareness that it is changing position' and 'show that there are good reasons for the new policy,'" as well as to "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"

Id. at 221-22 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

This Five-Year Program runs afoul of this requirement. Previously, Interior has carefully avoided affording dispositive significance to global policy considerations. For instance, Interior's five-year leasing program for 2017 to 2022—which proposed a schedule of 11 lease sales—explained that the analysis of net benefits would not include the costs associated with GHG emissions related to the production, transport, processing, and consumption of oil and natural gas extracted from OCS regions. These costs were excluded because the costs and benefits of the leasing program "are appropriately assessed at the domestic or national level" under OCSLA, whereas "GHGs and their associated impacts occur on a global scale such that the resulting effects cannot appropriately be isolated for inclusion in the net benefits analysis." BOEM, *2017-2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program* 5-23 (Nov. 2016), https://bit.ly/3WcBE8x.

Additionally, the accompanying final programmatic environmental impact statement explained that Interior's consideration of the implications of climate policies on the demand for oil and natural gas was limited to "current law and regulation," and that Interior would "not speculate about how different climate policy measures could affect the nature of activities or activity levels" under its leasing program. BOEM, *Outer Continental Shelf Oil and Gas Leasing Program:*

2017-2022: Final Programmatic Environmental Impact Statement 1-11 (Nov. 2016), https://bit.ly/46aNC6W. Interior further explained that, even under aggressive climate policy scenarios, there would continue to be "a long-term need for oil and natural gas" as well as "large-scale investment in oil and natural gas" as part of a "lower-cost energy bridge to a low-carbon future through the next several decades." *Id.*

Likewise, for the final programmatic environmental impact statement for the five-year leasing program for 2012 to 2017—which proposed 15 potential lease sales—Interior expressly declined recommendations to consider the "full cycle" effects of Outer Continental Shelf oil and natural gas development, such as purported upstream and downstream consumption effects. *See* BOEM, *Outer Continental Shelf Oil and Gas Leasing Program: 2012-2017: Final Programmatic Environmental Impact Statement* 1-19 (July 2012), https://bit.ly/3SbVG1w. Interior explained that its review was limited "to assessing the relative impacts of production and extraction of OCS oil and gas on the localized areas where such activities occur." *Id.* Interior went on to explain elsewhere that climate change is a "global phenomenon . . . requir[ing] consideration of large scale or even worldwide GHG emissions, not just emissions at a local level," but that climate change modeling "lacks the ability to estimate the impact of GHGs from a particular source or sources such as oil and gas activities associated with the Program." *Id.* at 4-200.

For this Five-Year Program, however, Interior ignores these precedents. *See supra* Section II.A. Previously, Interior concluded that potential midstream and downstream climate-related impacts stemming from OCS development fall outside the statutory scope and cannot be isolated for purposes of a net benefits analysis. But here, Interior opted to consider such impacts, which necessarily take on a "global nature" by incorporating social cost of upstream GHG emission estimates. *See* JA__, __, __-__, __-__ [PFP at 5-14, 5-26 n.38, 5-31 to 5-33]. Previously, Interior declined to speculate about hypothetical climate policy measures. But here Interior placed undue emphasis on hypothetical net-zero scenarios that span decades into the future. *See* JA__, __, __ [PFP at 1-3, 1-8, 5-31]. And previously Interior properly acknowledged that a long-term need for offshore oil and natural gas production (and corresponding investment) will persist even under aggressive climate policy hypotheticals. But here Interior relies on insufficiently supported assumptions regarding reduced demand and energy substitution as "replacements" for forgone OCS production. *See* JA__, __ [PFP at 5-17, 5-31]. Interior failed to explain its about-face on these issues, proceeding as if its choices are self-explanatory. This was arbitrary and capricious under the APA. *See* 5 U.S.C. § 706(2)(A).

Regulatory certainty and predictability are critical for the business community, including for the OCS leasing program. Interior's actions to limit lease sales here, if left uncorrected, upend such notions by allowing Interior to materially

tip the scales against offshore oil and natural gas leasing on the basis of extra-statutory policy considerations. Such an outcome jeopardizes the opportunity for a successful national energy policy and the billions of dollars of multi-year investments needed to realize additional offshore production.

CONCLUSION

This Court should grant the petition for review.

Date: July 19, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5876 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on July 19, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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