No. 09-54

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

KERR-MCGEE OIL AND GAS CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondent's leases expressly require it to pay the United States royalties on federal oil and gas that it produces in years when the price of oil or gas exceeds certain thresholds specified in the leases. See Pet. 5-8. The court of appeals invalidated those price thresholds—and thus relieved respondent of its royalty obligations—on the basis of an erroneous construction of Section 304 of the Outer Continental Shelf Deep Water Royalty Relief Act (RRA), Pub. L. No. 104-58, Tit. III, 109 Stat. 565. If allowed to stand, that decision will cost American taxpayers hundreds of millions of dollars on respondent's leases alone, and probably at least $19 billion under all similar leases. See Pet. 21-23. Review by this Court therefore is warranted.

A. The Interior Department's Interpretation Of Section 304 Of The RRA Is Reasonable And Entitled To Deference

1. a. As the petition explains (at 5-6, 11-13 & n.8), the Interior Department has consistently read Section 304 of the RRA as establishing minimum volumes at which royalty suspensions "shall be set" in leases issued in the five years after November 28, 1995, but also allowing—by virtue of its cross-reference to Section 303 (43 U.S.C. 1337(a)(1)(H))—such suspensions to "vary" on the basis of changes in the market price of oil or gas. Respondent simply ignores the RRA's pattern of treating initial suspensions of royalties as distinct from the power to vary those suspensions based on prices at the time of production. See Pet. 16-17.

Respondent contends that Section 304 does not allow variances because the "plain language of Section 303" allows suspensions to "vary" only if those suspensions have been "determined by the Secretary" as a matter of discretion. Br. in Opp. 19. That is incorrect. Section 304 removes the discretion the Secretary would otherwise have under the first clause of Section 303 to determine the basis on which any suspension may be set (*i.e.*, a "period, volume, or value of production") and instead specifies that "the suspension of royalties shall be set" by the Secretary at amounts not less than specified volumes. But the Secretary continues to have discretion to set the suspensions at the minimum volumes or at some greater amounts; that the Secretary chose to set suspensions at the minimums does not mean the Secretary did not "determine[]" them. Moreover, the limited "excep-t[ion]" to Section 304's incorporation of Section 303 leaves unaffected the Secretary's distinct authority in the second clause of Section 303 to "vary" a suspension —irrespective of the manner in which it was initially set—"based on the price of production from the lease." See Pet. 13 & n.8.

b. Although respondent describes Congress's desire to encourage new development in deep-water areas of the Gulf of Mexico (Br. in Opp. 8-9), it never refutes the petition's explanation (Pet. 17-18) that the incentives created by a royalty suspension are unnecessary when the price of oil or gas reaches a high enough level to compensate for the costs of new production. Indeed, if price thresholds vitiated those incentives, then the Department's practice of including them in the vast majority of leases issued after the RRA would have squelched the explosion of "[d]eepwater leasing activity * * * immediately after the RRA was passed." Br. in Opp. 8.

2. Respondent suggests (Br. in Opp. 10-12, 25-27) that the Department has been inconsistent about its statutory authority to include price thresholds in leases covered by Section 304, principally because it did not include price thresholds in the text of regulations issued in 1998 to implement Section 304.

Respondent, however, points to no evidence that the Department ever concluded it lacked such authority. To the contrary, its interim rulemaking stated that the new Section 303 bidding system—which included any price thresholds "specified in the notice of sale published in the *Federal Register*"—would apply to "[a]ny lease sale held before November 28, 2000." 61 Fed. Reg. 3801, 3805 (1996). When it adopted later regulations, the Department decided to continue the practice of addressing price thresholds in notices of sale, to give the Department flexibility to respond to market conditions at the time of individual sales. See *Interior Department: A Culture of Management Irresponsibility and Lack of Accountability?: Hearing Before the House Comm. on*

Government Reform, 109th Cong., 2d Sess. Pt. 2, at 49, 67, 72 (2006) (*House Hearing*).

Respondent relies (Br. in Opp. 10-11) on statements by some commenters in the rulemaking, who asserted that the Department lacked authority to include price thresholds under Section 304. But other commenters—including Shell and BP—agreed with the continued application of price thresholds to leases under Section 304. See Admin. R. Supp. 85 (A.R. Supp.) ("The approach should be consistent across all leases. This question is adequately dealt with by MMS in the Notice of Sale for Sale 157 [in 1996]."); *id.* at 35. The Department agreed that it had authority to impose price thresholds, as evidenced by its express inclusion of such thresholds in the Section 304 leases issued in 1996, 1997, and 2000.

Moreover, the Department's inadvertent failure to include price thresholds in leases issued in 1998 and 1999 was universally regarded—within the agency and by its congressional overseers—as an error that was inconsistent with the Department's policy decision to include price thresholds. See Office of the Inspector Gen., U.S. Dep't of the Interior, *Investigative Report on the Lack of Price Thresholds in Gulf of Mexico Oil and Gas Leases* 3, 5-6 (2007) <http://www.doioig.gov/upload/MMS%20ROI%20REDACTED.pdf>; *House Hearing* 5 (remarks of Rep. Waxman) ("I think we all recognize" that "the omission of price thresholds for royalty relief in oil and gas drilling leases signed in 1998 and 1999" was "a huge and unacceptable mistake.").

Respondent erroneously suggests (Br. in Opp. 26) that the payment order in this case said there is no basis in the regulations for price thresholds. The sentence respondent quotes was about how to calculate the date on which royalties must be paid when price thresholds are exceeded. Pet. App. 33a. The order elsewhere made clear that the power to impose price thresholds under Section 304 "derive[s] from specific authority granted in [Section 303]." *Id.* at 28a.[1]

3. Respondent attempts to support its reading of the RRA by quoting (Br. in Opp. 22-23) floor statements of Members of Congress who opposed the bill. In doing so, it proves the well-established principle that "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). There is no text of the amendment that Representative Miller purportedly "offered in the conference" in an attempt to render the royalty suspension "discretionary," 141 Cong. Rec. H11,875 (daily ed. Nov. 8, 1995), and there is no explanation for why that amendment was rejected. It is thus impossible to say, as respondent does, that Congress purposely rejected the Department's reading of the statute. Moreover, Representative Miller's statements contain many indications that he was concerned about making the initial *suspension* of royalties under Section 304 "mandatory" and "regardless of need." *Id.* at H11,875-H11,876; see *id.* at H11,857. He was refuting a statement that royalty relief "would only be granted on tracts where the Secretary

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[1] Respondent says (Br. in Opp. 12) the Office of the Solicitor of the Interior "expressed concern" about the Department's authority to include price thresholds. One of the quoted references merely expressed uncertainty about the authority to impose price thresholds retroactively with respect to a lease issued in 1998 without a price-threshold term. A.R. Supp. 103. The other reference (*id.* at 105) is from 2000 but is cryptic and does not purport to be a final opinion. Nevertheless, respondent's view indisputably did not carry the day, since price thresholds were included in later-issued leases.

determines it is necessary to encourage development." *Id.* at H11,875. Thus, he was contrasting Section 304 with the provisions governing pre-existing leases, under which suspensions could be triggered only upon the Secretary's determination that "new production would not be economic in the absence of [royalty] relief." 43 U.S.C. 1337(a)(3)(C)(ii). But in the case of pre-existing leases, the economic-need determination was separated from the statutory provisions imposing price thresholds. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). And Representative Miller gave no indication he was addressing price thresholds, as opposed to the lack of an economic-need determination, in Section 304.

Murky floor statements from legislative opponents are less informative than the oversight hearing respondent also cites. Br. in Opp. 11, 26. Of the many Representatives who spoke at that hearing, none suggested the agency lacked authority to include price thresholds between 1996 and 2000. See *House Hearing* 1-2, 5-6, 16-17, 29, 30, 31, 31-32, 35-36, 39-40 (remarks of Reps. Davis, Waxman, Maloney, Kucinich, Duncan, Watson, Issa, Cummings, Markey). If it had lacked such authority, there would have been little point in holding a fifth hearing (*id.* at 5) to investigate and chastise the Department for failing to include thresholds in 1998 and 1999.

4. That widespread understanding that the Department had authority to impose price thresholds shows that its reading of the RRA was, at the very least, a reasonable one. But respondent claims that the Department's interpretation is not entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because price-threshold authority was not incorporated "into its Section 304 regulations." Br. in Opp. 24. In fact, this Court has long recognized that official agency

interpretations adopted through a "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to interpretation of regulations contained in an "Advisory Memorandum" because it "reflect[ed the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to statements in explanatory preamble to final regulations). In this case, the official position that the agency has repeatedly expressed—in the preamble to the Section 303 regulations, in multiple notices of lease sales, in the terms of the leases themselves, in the order to pay, and in this litigation—is entitled to deference. Moreover, there is every reason to believe that Congress expected the Department to speak with the "force of law" (*Mead*, 533 U.S. at 229) when it drafted the terms of the lease and issued its order to pay, since Congress authorized administrative penalties of $10,000 a day for failure to comply with either. See 30 U.S.C. 1719(c)(1).

B. There Remains No Meaningful Opportunity For Further Percolation In The Courts Of Appeals

The petition explains (at 18-21) that there will be no meaningful opportunity for further interpretation of Section 304 of the RRA by the courts of appeals because future suits (like this one) under the Administrative Procedure Act, 5 U.S.C. 706(2), would be filed in the Fifth Circuit, and because a conflict with the Federal Circuit would be very unlikely to occur. Respondent does not dispute the first proposition. And respondent actually gives an additional reason why refund suits that could be appealed to the Federal Circuit are unlikely: lessees with other producing leases could simply offset their putative refunds against other royalties they owe, rather than sue in the Court of Federal Claims. Br. in Opp. 32 n.10; see 30 U.S.C. 1721a(a).

Respondent separately contends that a civil enforcement action under 30 U.S.C. 1722(a) could provide another avenue for the government to "seek review of the statutory issue outside the Fifth Circuit." Br. in Opp. 32-33. But, as respondent acknowledges (*id.* at 33), the government has not previously attempted to short-circuit the administrative process for determining royalty obligations by filing suit under that provision. Indeed, although respondent cites a reference to Section 1722(a) in *BP America Production Co.* v. *Burton*, 549 U.S. 84, 88 (2006), the Court's opinion there assumed that such a suit would come after the Department had followed its usual process of notifying the lessee about a deficiency in royalty payments, then "reviewing the lessee's response," and, if it still "concludes that the lessee owes additional royalties," only then "[issuing] an order requiring payment of the amount due," which could be enforced under Section 1722(a). *Ibid.* As the government informed the Court in that case (Br. at 37-38), the Department "is not aware of any instance in which recourse to the courts was necessary to require compliance with an order to pay. Instead, MMS administratively imposes civil penalties to enforce its orders." Such orders are, of course, susceptible to administrative challenges by lessees—who would naturally seek out the Fifth Circuit.[2] This Court's exercise of certiorari juris-

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[2] As the petition notes (at 22), there are already 21 other pending administrative appeals of orders to pay royalties under Section 304

diction should not turn on whether a federal agency is willing to upend its well-established administrative practices in favor of a novel enforcement mechanism solely to shop for a forum other than the one where the leased properties are located.

C. The Issue In This Case Involves Tens Of Billions Of Dollars Of Federal Revenue

Explaining that the court of appeals' decision can be expected to cost the Treasury at least $19 billion (Pet. 21-23), the petition notes Justice Scalia's recent observation that "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari). In an odd attempt to refute that view, respondent invokes (Br. in Opp. 29) the Court's refusal in *Teague* v. *Lane*, 489 U.S. 288 (1989), to treat "opinions accompanying the denial of certiorari" as if they have "the same effect as decisions *on the merits*." *Id.* at 296 (emphasis added). But the petition suggested no such treatment; it simply posited the view, expressed also in the leading treatise, that enormous monetary stakes count as a significant reason to grant certiorari.[3]

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leases. Respondent provides no reason to conclude that those suits will not proceed to the Fifth Circuit and result in the same sort of preclusion it asserts for itself. See Br. in Opp. 33 n.13; see also *Marathon Oil Co.* v. *Babbitt*, 938 F. Supp. 575, 581 n.12 (D. Alaska 1996) (concluding that a suit under Section 1722(a) to collect unpaid royalties would need to be stayed while the lessee pursued administrative challenges).

[3] Respondent also relies (Br. in Opp. 28-29 & n.7) on the government's previous opposition to certiorari in cases involving large amounts of money. The cases it cites, however, had other vehicle prob-

Respondent attempts, by raising a series of non sequiturs, to minimize the very large amounts of money that the United States would be unable to collect if the decision below were allowed to stand. First, respondent objects that the government's predictions are not supported by "record evidence" (Br. in Opp. 30), but the record in this case is inevitably about the administrative decision under review—not the broader effect the appellate ruling will have.

Second, after ignoring the nearly $2 billion in royalties that are already due or collected (see Pet. 21-22), respondent claims there are "significant uncertainties" associated with forecasting *future* "production volumes and commodity prices." Br. in Opp. 30. Respondent does not, however, offer any lower forecast, much less suggest that such a forecast would be more accurate than the ones made by the Department ($17.97 to $18.98 billion) and by the Government Accountability Office ($15.1 to $38.3 billion). See Pet. 22, 23 n.11.

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lems and did not involve amounts as enormous as the ones at issue here. See Br. in Opp. at 8, 11-12, *California Fed. Bank, FSB* v. *United States*, 546 U.S. 817 (2005) (No. 04-1557) (petitioner sought vacatur to allow Federal Circuit to resolve alleged intra-circuit split about whether flotation costs of $955 million should be added to damages award); Br. in Opp. at 8, 9, *McDonnell Douglas Corp.* v. *United States*, 529 U.S. 1097 (2000) (No. 99-1258) ($1.2 billion judgment; government opposed certiorari on ground that judgment was interlocutory); Pet. App. at 4a and Br. in Opp. at 16 n.14, *Exxon Corp.* v. *United States*, 474 U.S. 1105 (1986) (No. 85-429) ($1.64 billion judgment; government also noted that petitioner's constitutional arguments had not been advanced until its rehearing petition in the court of appeals). Moreover, this Court has in fact granted certiorari when the government could be held liable for large sums. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 211 & n.7 (1983) ($100 million).

Third, respondent claims (Br. in Opp. 30-31) that the government has already received "many offsetting benefits" from the RRA. But those benefits resulted from competitive bids for leases that contained price thresholds. Items like upfront bonuses to the government were presumably smaller than they would have been if the thresholds respondent now seeks to invalidate had not existed.

Finally, respondent claims (Br. in Opp. 31) that the amount of money at stake is smaller than it would have been had the Department sought this Court's reversal of an earlier loss "of up to $10 billion" or had it not inadvertently failed to include price thresholds in leases issued in 1998 and 1999. The figure respondent cites, however, was a "high case" estimate of loss that would occur only if the government also lost this case. 72 Fed. Reg. 72,654 (2007). The prior case alone was associated with a "low case" estimate of $3 billion. *Ibid.* In any event, there is no reason why the government's decision to be "out for a penny" in an earlier case compels it to remain "out for a pound" in this one.

Thus, respondent's quibbles do not alter the reality that this case does indeed involve an enormous sum of federal revenue.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2009

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