No. 09-54

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR et al.,

Petitioners,

v.

KERR-MCGEE OIL & GAS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 304 of the Outer Continental Shelf Deep Water Royalty Relief Act, which covers a small and diminishing number of oil and gas leases issued in five specific years for specific water depths in a limited geographic area of the Gulf of Mexico and provides that suspension of royalties "shall be set at a volume not less than" the specified amounts set by Congress, authorizes the Secretary of the Interior to reduce or eliminate the suspension of royalties below the minimum volumes mandated by Congress.

RULE 29.6 STATEMENT

Kerr-McGee Oil & Gas Corp. states that its parent corporations are Kerr-McGee Worldwide Corp., Kerr-McGee Corp., and Anadarko Petroleum Corp., and that no other publicly held corporation owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

This case meets none of this Court's exacting criteria for certiorari. As it relates to this case, the statute at issue, Section 304 of the Outer Continental Shelf Deep Water Royalty Relief Act ("RRA"), applies only to a small and rapidly diminishing number of oil and gas leases issued in three specific years for limited water depths in a limited geographic area of the Gulf of Mexico (the "Gulf"). Section 304's unique statutory language operated only temporarily: it has not applied to any lease granted in nearly a decade, and it will never apply to any future lease. In an opinion that petitioners (collectively, "Interior") admit conflicts with no other decision on any point, the Fifth Circuit applied well-settled tools of statutory construction to interpret Section 304's requirement that royalty suspensions "shall be set at a volume not less than" specified amounts of oil and gas production. As the Fifth Circuit correctly held, Congress's mandate unambiguously prohibits Interior from reducing royalty suspensions below the statutory minimums.

This routine, case-specific exercise in statutory construction raises no important legal issue warranting this Court's intervention. Not only does the statute unambiguously refute Interior's position, but the agency's weak claim to deference is belied by the fact that its own regulations for Section 304 leases—and more than a thousand of the leases originally issued under that provision of the RRA—do not include the price thresholds it now seeks to enforce. Contrary to the petition's *post hoc* claim of regulatory support, Interior expressly admitted in its royalty payment order to Kerr-McGee that its regulations for Section 304 leases do not provide for price thresholds. Pet. App. 33a.

Unable to identify any legal issue of overriding national importance, Interior resorts to flawed conjecture about the amount of royalties it might be unable to collect under the Fifth Circuit's straightforward application of Congress's guarantee of minimum royalty suspension volumes. But a case is not rendered appropriate for certiorari merely because of the amount of money a party unlawfully has demanded or speculates it may later demand. And Interior's current claims of national importance cannot be squared with its conduct over more than a decade of administering the RRA. Interior omitted price thresholds from leases granted at 40% of the relevant lease sales held from 1996-2000 through what it says was "inadvertence." And in 2005, Interior voluntarily acquiesced in a nearly identical Fifth Circuit decision involving the interpretation of the RRA notwithstanding what Interior said were similar monetary impacts.

Now, Interior says it will forego what it admits is one plausible route for seeking large amounts of Section 304 royalties in the Federal Circuit, and entirely ignores another route for asserting claims in other circuits. Interior's voluntary decision not to avail itself of other available options for review undermines its claims of national importance and is no reason for this Court to intervene.

Section 304 achieved Congress's goals, resulting in billions of dollars in risky private investments to explore and develop otherwise untouched deepwater Gulf of Mexico fields, creating thousands of jobs, and generating billions more to the government in upfront bonuses and increased royalties on future leases. The Fifth Circuit simply read this unique statute as it was unambiguously written. The petition should be denied.

COUNTERSTATEMENT

A. The Statute

Before Congress enacted the RRA in 1995, Gulf of Mexico oil and gas production was waning, companies were looking abroad for greater opportunities, and thousands of domestic jobs had been lost. *See* S. Rep. No. 103-248, at 4 (1994); 141 Cong. Rec. 11876 (Nov. 8, 1995) ("[W]e have lost * * * 400,000 jobs in America because of the fact that people are rushing to somebody else's waters, somebody else's lands to drill because we have made it uninviting to drill and produce in America.") (statement of Rep. Tauzin). By the early 1990's, the Gulf of Mexico had been called the "dead sea," and it appeared that "the area was nearly spent and had no long-term future in oil and gas development." Dep't of the Interior, *OCS Study MMS 2001-019, Lafourche Parish and Port Fourchon, Louisiana: Effects of the Outer Continental Shelf Petroleum Industry* 7 (2001). Although deepwater areas were largely unexplored and potentially promising, companies had not been willing to risk the multi-billion dollar investments necessary to explore those areas on a large scale. *See* 141 Cong. Rec. 11868 (Nov. 8, 1995) ("[I]t may cost lessees anywhere from $75 to $200 million just to determine if oil or gas is present and up to $1 billion to bring production on line.") (statement of Rep. Jackson-Lee).

In response, Congress amended the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA") by enacting the RRA. Using "royalty suspensions" as a statutory incentive, Congress sought to jump-start investment in one portion of the vast Outer Continental Shelf acreage covered by the OCSLA: deepwater areas in the Central and Western Gulf of Mexico. Section 304 was central to this effort to attract the massive investments that would be required to convert the deepwater Gulf to a producing region. In Section 304, Congress created a temporary statutory program of automatic, unconditional royalty relief limited to new leases in targeted deepwater areas of the Gulf granted during the five-year period after enactment. Section 304 required Interior to grant leases in these areas with royalty suspensions that "shall be set at a volume of not less than" three specific amounts depending on the water depth of a lease. RRA, Pub. L. No. 104-58, § 304, 109 Stat. 565-66 (1995). This case concerns Kerr-McGee's statutory entitlement under Section 304 to royalty suspensions "of not less than" the Congressional minimums.

Section 304 concerned new leases in the deepwater Gulf, for which it was necessary to attract new investment. Section 302, by contrast, provided a different (and more limited) mechanism and measure of relief for existing leases in the same areas, for which companies had already invested millions of dollars in bonus payments, exploration and other activities. Section 302 authorized royalty relief only where Interior found that "new production" from an existing lease "would not be economic" without royalty relief. 43 U.S.C. § 1337(a)(3)(C)(ii). If such a finding was made, the "new production" would be subject to minimum royalty suspension volumes. *Id.* § 1337(a)(3)(C)(ii), (iv). Congress also expressly withdrew royalty relief under Section 302 for existing leases when annual commodity prices exceed certain thresholds, and provided that production in such a year "shall be counted toward the production volume" otherwise subject to relief. *Id.* § 1337(a)(3)(C)(v)-(vi).

Unlike Section 302, Section 304's royalty suspensions are not limited to "new production," and are not subject to any economic conditions, including price thresholds. This is because Congress recognized that different circumstances called for different incentives. Because owners of existing leases had already invested without the expectation of royalty relief, Congress saddled such owners with the burden of demonstrating that royalty relief was an economic necessity. And in keeping with this requirement of economic need, Congress precluded royalty relief for existing leases if commodity prices rose. By contrast, Congress mandated the certainty of royalty relief for new leases granted in a limited five-year period as an incentive for companies to take the great financial risk of investing in deepwater exploration.

In addition to hoping to generate massive new investments in the deepwater Gulf, and mindful that companies like Kerr-McGee would need to invest heavily in pre- and post-leasing expenditures, Congress anticipated that with the incentives provided by Section 304 the companies would be willing to pay nonrefundable up-front bonuses at premium prices in order to obtain new leases covered by that section. As one Congressman explained,

> the risk remains entirely with the lessee that hydrocarbon resources will be discovered in paying quantities. If a dry hole is drilled on a deepwater tract, no royalty relief is available, of course, yet a bonus bid will have been paid to the U.S. Treasury, *a bonus bid which will be incrementally larger than it would be without deepwater incentives*.

141 Cong. Rec. H7581 (July 25, 1995) (statement of Rep. Calvert) (emphasis added).

Finally, Congress used Section 303 of the RRA to fill a void in Section 8 of the OCSLA, 43 U.S.C. § 1337, by adding a new bidding system to the series of existing bidding systems that Interior can use to offer offshore leases for sale. Unlike Sections 302 and 304, and consistent with its status as a permanent amendment to the general framework of the offshore leasing program, Section 303 contains neither geographic nor temporal limitations. Rather, Section 303 applies everywhere the OCSLA applies, from shallow waters in the Gulf to the Pacific to offshore Alaska.

Under the bidding system added by Section 303, potential lessees must make an upfront cash bid on leases with a royalty rate of at least 12.5%. 43 U.S.C. § 1337(a)(1)(H). These cash bids are non-refundable, even if the leased property never produces anything. Section 303 also authorizes Interior to include a "suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease." 43 U.S.C. § 1337(a)(1)(H). The RRA authorized Interior to use the Section 303 bidding system for any lease sale held for any offshore lands after the RRA was enacted, subject to the express exception set forth in Section 304.

While Section 304 required Interior to use this new bidding system for the lease sales covered by that provision, as noted above, Congress expressly determined the minimum royalty suspension volumes for those leases. Thus, whereas Section 303 generally *authorized* the use of a cash bonus bid system and *authorized* Interior both to suspend royalties and to vary that suspension, Section 304, a targeted provision directed at leases granted in a specific area at a specific time, *required* the use of a cash bonus bid system and *required* the suspension of royalties up to certain levels of production. The discretion granted to Interior under Section 303 to "vary" suspensions "determined by *the Secretary*" did not apply to the minimum royalty suspension volumes that *Congress* mandated for Section 304 leases.

The RRA "far exceeded" expectations and "was one of the most successful bills ever passed for developing domestic energy resources." *National Energy Security Act: Hearing on S. 2557 Before the S. Comm. on Energy and Natural Res.*, 106th Cong. 36 (June 15, 2000) (statement of former Sen. Johnston). In short order, "the Gulf of Mexico went from being termed the 'dead sea' to being referred to as 'America's new frontier.'" *OCS Study MMS 2001-019, supra*, at 8.

Deepwater leasing activity "exploded" immediately after the RRA was passed, while shallow-water leasing remained constant. Dep't of the Interior, *OCS Report MMS 2004-021, Deepwater Gulf of Mexico 2004: America's Expanding Frontier* 13, 19 (2004). Between 1993 and 2003, the number of deepwater projects producing oil and gas in the Gulf had jumped from six to eighty-six. *Id.* at 5. In just one decade, deepwater oil production increased eight-fold and gas production sixteen-fold. *Id.* at 13, 19. According to Interior, the "growth in deep water crude oil production has offset production declines in shallow water, allowing total Gulf oil production to grow from 283 million barrels in 1990 to 540 million barrels in 2004." *Natural Gas Royalties—The Facts, The Remedies: Hearing Before Subcomm. on Energy and Res. of the H. Comm. on Gov't Reform*, 109th Cong. 26 (Mar. 1, 2006) (statement of Walter Cruickshank, Deputy Dir., Minerals Management Service ("MMS")) ("Cruickshank Statement"). At the time this litigation commenced, Kerr-McGee itself had already invested billions exploring for and producing oil and gas from deepwater areas of the Gulf. Pet. App. 13a.

As Congress intended, this increased production reduced dependence on foreign oil, Cruickshank Statement, *supra*, at 26, and created thousands of jobs, both on-shore and off-shore. As noted during debate on the RRA, "[d]eepwater incentives, which encourage oil and gas companies to risk their capital on new exploration and production, will create 20,000 new jobs for every $1 billion in private sector investment." 141 Cong. Rec. H11859 (Nov. 8, 1995) (statement of Rep. Brewster). "In turn, these workers pay taxes and create thousands of other indirect jobs." *Outer Continental Shelf Moratorium: Hearing Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Res.*, 104th Cong. (July 25, 1996) (statement of Cynthia L. Quarterman, Dir., MMS, Dep't of the Interior, at 1).

Increased deepwater investment also brought increased revenue to the Treasury, both in the short and long terms. In the Gulf lease sales held under Section 304, Interior estimated that the United States received $2 billion more in bonus payments than it would have received without royalty relief. Cruickshank Statement, *supra*, at 26; Complaint ¶ 27 (R. 1); Amended Answer ¶ 27 (R. 26). The long-term benefits to the Treasury are also substantial. For the remainder of their terms, Section 304 leases will be fully royalty-bearing after production exceeds the suspension volumes. Moreover, the tracts originally covered by Section 304 leases can be leased again without royalty relief when the original leases expire or are relinquished. These tracts have now become more attractive due to the deepwater infrastructure generated by Section 304 leases. Indeed, Interior has already collected billions of dollars in bonuses for new leases of tracts formerly subject to now-expired Section 304 leases. Interior expects new offshore leases, which will use increased royalty rates, to yield $170 billion in royalties over 40 years, in addition to billions in upfront bonuses.[1]

B. Interior Intentionally Omits Price Thresholds From Its Regulations For Section 304 Leases.

As Interior expressly stated in the royalty payment order under review in this case, "[t]here are no MMS regulations that address the price thresholds for section 304 leases." Pet. App. 33a. Indeed, among all of the regulations that Interior promulgated to implement the RRA, *only* the Section 304 regulations omit price thresholds. As the regulatory history demonstrates, this was a deliberate choice by Interior.

Carrying out Congress's direction to implement the RRA through regulations, *see* RRA § 305, Interior adopted interim regulations specifically governing Section 304 leases. Those interim regulations did *not* include price thresholds for Section 304 leases and nowhere stated that Interior had the discretion to include them. *See* 61 Fed. Reg. 12022, 12027 (Mar. 25, 1996).

Shortly thereafter, Interior sought public comment on whether, in its final regulations for Section 304 leases, "price ceilings [should] affect suspension volumes in the same ways as for existing leases." 61 Fed. Reg. 6958, 6960 (Feb. 23, 1996). Numerous

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[1] *Royalties at Risk*: *Hearing Before the H. Comm. on Natural Res.*, 110th Cong. 16 (Mar. 28, 2007) (statement of C. Stephen Allred, Assistant Sec'y, Dep't of Interior); Dep't of the Interior, *OCS Report MMS 2008-013, Deepwater Gulf of Mexico 2008: America's Offshore Energy Future* 20-21 (2008) (two 2007 sales yielded $3.2 billion in bonuses and one 2008 sale yielded $3.7 billion).

commenters responded that the statute forbade Interior from imposing price thresholds on the statutorily-guaranteed royalty relief provided for Section 304 leases. *See* Administrative Record Supplement ("AR Supp.") 8, 22, 46, 62, 94 (R. 33). Interior then promulgated final Section 304 regulations that once again did not include price thresholds or authority to adopt them. *See* 63 Fed. Reg. 2626, 2628-30 (Jan. 16, 1998). To the contrary, the regulations informed lessees that "you do not owe royalty on the production from your lease up to the applicable royalty-suspension volume." 30 C.F.R. § 260.110(d)(6) (1998).[2]

This exclusion was deliberate. As one of its officials has admitted, Interior "*made a policy decision* not to address price thresholds [for Section 304 leases] in the regulations * * *." *Interior Department—A Culture of Management Irresponsibility and Lack of Accountability?: Hearing Before H. Comm. on Gov't Reform*, 109th Cong. 49 (Sept. 14, 2006) (statement of Lynn Scarlett, Deputy Sec'y, Dep't of Interior) ("Scarlett Statement") (emphasis added). While Interior has subsequently contended that it still wanted to be able to include thresholds in individual lease sale documents, *id.*, the actual Section 304 regulations include no such discretion.

In striking contrast, Interior included price thresholds in every other set of royalty suspension regulations adopted pursuant to the RRA. These include (i) the interim and final regulations

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2 In 2008, Interior removed this provision (then at 30 C.F.R. § 260.117(b)) to conform its regulations to *Santa Fe Snyder Corp.* v. *Norton,* 385 F.3d 884 (5th Cir. 2004), which had invalidated the regulations on other grounds. *See* 73 Fed. Reg. 58467 (Oct. 7, 2008).

applicable to existing deepwater leases governed by Section 302 (*see* 30 C.F.R. §§ 203.60-91; 61 Fed. Reg. 27263, 27277-78 (May 31, 1996); 63 Fed. Reg. 2605 (Jan. 16, 1998)); (ii) final regulations for "deep gas" wells drilled in shallow water areas of the Gulf (*see* 30 C.F.R. §§ 203.40-48); (iii) regulations for post-2000 leases (*see* 30 C.F.R. §§ 203.78, 260.122); and (iv) regulations implementing Section 303 (*see* 30 C.F.R. § 260.110(g)). Only Interior's regulations governing Section 304 leases fail to include price thresholds or the authority to impose them.

C. Interior Inconsistently Includes Price Thresholds In Section 304 Leases.

The first Section 304 leases, issued in 1996 and 1997, included price thresholds. But shortly after Interior finalized its Section 304 regulations, it began omitting thresholds from Section 304 leases sold at the four lease sales in 1998 and 1999, citing the new regulations that included no price-threshold authority. Pet. 6-7 n.4. Interior has said that this omission was due to "inadvertent" action by "field personnel." *Id.* Regardless of whether the omissions were inadvertent, Interior reinserted price thresholds commencing in 2000 for the final two lease sales governed by Section 304. But its own Solicitor expressed concern that Interior lacked authority to do so. *See* AR Supp. 105 ("Solicitor's Office is concerned with doing so"); *see also id.* at 103 ("The Solicitor does not feel MMS has the clear authority to apply price thresholds").

D. The Decisions Below

Because Interior did not include the unlawful price thresholds in its final Section 304 regulations, Kerr-McGee and other lessees could not have them judicially invalidated until faced with a final, reviewable order to pay royalties. *See OXY USA Inc.* v. *Babbitt*, 122 F.3d 251, 259 (5th Cir. 1997) (lessee may not challenge MMS royalty payment orders until they are "final" under the Administrative Procedure Act ("APA")). Kerr-McGee eventually received such an order for eight Section 304 leases in which it held an interest. Pet. App. 23a. Kerr-McGee then filed suit under the APA, alleging that the order and the lease terms it sought to enforce were "not in accordance with law," 5 U.S.C. § 706(2)(A), because they require payment of royalties before Kerr-McGee has produced the minimum royalty suspension volumes required by Section 304.

The district court held that Interior had violated Section 304. It relied in part on the reasoning of *Santa Fe Snyder Corp.* v. *Norton*, 385 F.3d 884, 885 (5th Cir. 2004), in which the Fifth Circuit had rejected a similar attempt by Interior to circumvent the minimum royalty suspension volumes established in Section 304. The court held that Section 304 was unambiguous and unequivocal: Interior had no authority to alter the statute's mandatory volume-based royalty relief. Pet. App. 21a.

The court also rejected Interior's argument, asserted in a series of affirmative defenses, that Kerr-McGee was precluded from challenging the price thresholds because it had signed form leases containing the threshold provisions. As the court held, "'if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound by estoppel, acquiescence, or failure to protest.'" Pet. App. 21a (citation omitted). Thus, Interior was unable to evade review by excluding clearly unlawful terms from its regulations and instead including them in take-it-or-leave-it standard form leases that could not be negotiated or effectively challenged in advance.

A panel of the Fifth Circuit unanimously affirmed, agreeing that Section 304 unambiguously creates mandatory royalty relief that Interior has no authority to alter. Pet. App. 10a. The Fifth Circuit also expressly noted that Interior had failed to appeal the rejection of its affirmative defenses and "therefore, it has abandoned this argument." Pet. App. 9a n.3. Thus, Interior's argument that Kerr-McGee will receive "unjustified windfalls" because it bid for and signed Section 304 leases, Pet. 23, has been waived.

REASONS FOR DENYING THE PETITION

I. APPLYING SETTLED TOOLS OF STATUTORY CONSTRUCTION, THE FIFTH CIRCUIT CORRECTLY INTERPRETED A NARROW STATUTE OF LIMITED AND DIMINISHING APPLICATION.

A. The Question Presented Applies Only To A Very Small And Dwindling Number Of Leases.

The question presented has an exceedingly narrow reach. This case solely concerns Section 304 of the RRA, which governs only offshore oil and gas leases (1) issued between 1996 and 2000; (2) for a specific region of the Gulf of Mexico; and (3) in water depths of more than 200 meters. *See* RRA § 304. The question is further narrowed to those Section 304 leases entered into in 1996, 1997 and 2000, because Interior omitted the challenged price thresholds from Section 304 leases granted pursuant to lease sales held in 1998 and 1999. The issue thus will not recur with respect to any offshore tracts leased in the future, nor does it exist for the thousands of offshore federal tracts located in shallow water areas of the Gulf of Mexico, or in shallow and deep water areas of the Eastern Gulf, the Pacific, and offshore Alaska.

The number of leases still covered by Section 304 diminishes every year as leases expire or are surrendered. When leases originally covered by Section 304 expire or are surrendered and are subsequently offered for leasing by Interior, the lands are no longer subject to Section 304, and Interior can grant new leases without royalty suspensions. Unless maintained by timely lease operations, *see* 43 U.S.C. § 1337(b)(2), the 1996 leases expired by 2006, the 1997 leases expired by 2007, and the 2000 leases will expire by next year. AR 73, 127, 158. Despite prudent exploration and development efforts, most Section 304 leases are not producing. Accordingly, out of the 2,369 covered leases issued in 1996, 1997 and 2000, Interior asserts that only eighty-three (or 3.5% of the total) will ever be affected by the interpretation it espoused below. *See* Pet. 22; GAO Report GAO-07-590R at 5 (Apr. 12, 2007) (www.gao.gov/new.items/d07590r.pdf).

B. The Fifth Circuit Correctly Construed Section 304's Unique Language.

It is *undisputed* that Interior's invalidated price thresholds would have the effect of reducing Kerr-McGee's suspension volumes below the minimum volumes that Congress established in Section 304. This is because Interior has demanded royalties in any year when prices exceed the thresholds, with production during such years counting toward the suspension volume on which Congress directed that royalties not be owed. Pet. App. 2a-3a.[3] The issue is not *whether* the price thresholds would reduce Kerr-McGee's royalty suspension volumes, but whether that reduction is *lawful.*

The unanimous Fifth Circuit panel, like the district court before it, had no difficulty applying settled tools of statutory interpretation to hold that the unique language of Section 304 unambiguously bars Interior's action. As the court held, "[t]he statement that 'the suspension of royalties shall be set at a volume not less than' the specific production levels means just that: royalty payments shall be suspended up to the production volumes established by Congress." Pet. App. 10a. The only other case ever to have considered Section 304, *Santa Fe Snyder*, *supra*, employed very similar reasoning and unanimously affirmed a decision invalidating another attempt by Interior to circumvent the statute's commands. Accordingly, eight federal judges have considered Section 304 and all have agreed that it unambiguously prevents Interior from altering Congress's mandate so as to reduce or eliminate the minimum suspension volumes. Nothing about that routine exercise in statutory construction warrants this Court's review.

1. Section 304 provides that, for the narrow category of leases it covers, Interior "shall use the bidding system authorized in [Section 303], except

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[3] Thus, for example, if a Section 304 lease that is entitled to a minimum statutory royalty suspension equal to 52.5 million barrels of production, *see* RRA § 304(2), produces 2.5 million barrels during a year in which commodity prices exceed the threshold, under the price thresholds royalties would be owed on those 2.5 million barrels and the total maximum royalty suspension volume would be reduced to 50 million barrels.

that the suspension of royalties shall be set at a volume of not less than" statutorily-specified amounts, depending on water depth. RRA § 304. Interior cannot credibly explain how a royalty suspension that Congress specified "shall be set at a volume of *not* less than" a certain amount can be unilaterally reduced by the Secretary below the statutory minimum. Instead, Interior seeks to rewrite the statute, adding terms that Congress did not use and reordering the words that Congress actually employed. Thus, Interior asserts that Section 304 merely specifies volumes "at which royalty suspensions were to be set *in the first instance*," or "at which a royalty suspension is *initially* set." Pet. 13, 16 (emphases added). But Interior's editorial additions are absent from the statute. Section 304's directive uses no such qualifiers: it categorically says that suspensions "shall be set" at certain minimum volumes. Period.

Interior also argues that the "'except' clause of Section 304 limits the Secretary's discretion under the *first* clause of Section 303," but "does not apply to the Secretary's discretion under the *second* clause of Section 303 to 'vary' a suspension based on the price of production." Pet. 12-13 (emphases in original). But that is not how Congress wrote the statute. Within Section 304, Congress placed the "except that" clause so that it follows, and thus directly qualifies, the entirety of the cross-reference to the Section 303 bidding system. Interior's rewriting of the text, reproduced at footnote 8 of the petition, shows why its interpretation is wrong. When it attempts to meld Section 304's "except" clause with Section 303, Interior shoehorns that clause into the middle of Section 303 so that it modifies only part of that section. *See* Pet. 13-14 n.8. But as Congress wrote the statute, Section 304 modified the *entirety* of the discretion that Section 303 otherwise vested in Interior, not simply the discretion created by the first clause of Section 303.[4]

Interior's argument is further belied by the plain language of Section 303. Interior bases its entire argument on Section 304's cross-reference to Section 303, which states that Interior may award leases "*with suspension of royalties* for a period, volume, or value of production *determined by the Secretary, which suspensions* may vary based on the price of production from the lease." 43 U.S.C. § 1337(a)(1)(H) (emphasis added). Interior argues that its discretion under Section 303 to "vary" suspensions "based on the price of production" was not removed by the "except that" clause of Section 304.

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[4] If the two sections are combined accurately, the result is as follows:

> For all tracts located in water depths of 200 meters or greater [in the specified area of the Gulf], any lease sale within five years of the date of enactment of this title shall use the bidding system authorized in [Section 303]:
>
>> cash bonus bid with royalty at no less than 12 and 1/2 per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease,
>
> except that the suspension of royalties shall be set at a volume of not less than the following: (1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters; (2) 52.5 million barrels of oil equivalent for leases in water depths of 400 to 800 meters; (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.

But under the plain language of Section 303, the only suspensions that "may vary" are suspensions that have been "determined by *the Secretary*." For Section 304 leases, however, the suspensions were determined not by *the Secretary* in his discretion, but rather by *Congress* as a statutory mandate. *See* Pet. App. 10a ("§ 304 'immediately excepts and replaces Interior's discretion'") (quoting *Santa Fe Snyder*, 385 F.3d at 892). As Interior itself has conceded, Section 304 "removes Interior's discretionary authority provided by section 303 to 'determine' the 'period, volume, or value of production' at which royalties will be suspended by expressly specifying the 'volume' at which the suspension of royalties 'shall be set.'" Interior 5th Cir. Br. 16-17 (filed June 27, 2008). Because the "which suspensions" language in Section 303 unambiguously refers solely to suspensions "determined by the Secretary," that language confirms that Interior has no authority to "vary" the Section 304 suspensions, which were determined by Congress.

The Fifth Circuit was therefore correct in holding that "Interior's reading would render § 304's mandatory language meaningless[,]" because "if price thresholds trigger royalty payments before § 304's production volumes are exceeded, then the royalty payment suspension *is* being set at a volume less than § 304's specified production levels." Pet. App. 9a (emphasis in original). Indeed, if Interior's interpretation were correct, it could have relied on the "which suspensions may vary" language of Section 303 to set price thresholds so low that they would always be exceeded, thus entirely negating Congress's mandated suspensions. If Interior has the discretion it claims, there would have been no need for Congress to have enacted Section 304 at all.

Interior identifies no precedent of this Court that the Fifth Circuit allegedly failed to follow. It cites *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989), for the proposition that "statutory exceptions are to be construed narrowly," Pet. 13, but the Fifth Circuit merely gave Section 304 its natural, narrow reading. Even narrowly construed, the term "the suspension of royalties shall be set at a volume of *not less than* * * * 52.5 million barrels of oil equivalent," RRA § 304(2) (emphasis added), does not allow Interior to reduce royalty suspensions to volumes *less than* 52.5 million barrels of oil equivalent.

2. Lacking textual support in Section 304, the statute that actually governs this case, Interior devotes much of its argument to construing Section 302, a provision that does not apply to the leases at issue in this case and that serves different purposes. As the Fifth Circuit correctly observed, far from supporting Interior's statutory interpretation, the comparison between Sections 302 and 304 only shows why that interpretation is wrong.

In keeping with Section 302's requirement that existing deepwater leases would only receive royalty suspensions based on a demonstration of economic need, Congress expressly conditioned royalty suspensions for such leases on price thresholds. *See* 43 U.S.C. § 1337(a)(3)(C)(v)-(vi). These economic strings on royalty suspensions, however, are conspicuously missing from Section 304. Thus, as the Fifth Circuit correctly explained, "[h]ad Congress intended to impose price thresholds on the royalty relief for [Section 304] leases, it certainly knew how to do so." Pet. App. 10a. Far from raising an important legal issue worthy of this Court's review, this determination was dictated by well-settled precedent. *See, e.g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123, 2129-30 (2008) ("'[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (alteration in original)).

The difference in language chosen by Congress reflects the fact that Sections 302 and 304 served different purposes. Because the owners of *existing* deepwater leases had already determined that it was worth investing to some extent, Congress ensured that incentives for further investing in these leases would be less than for new leases and that the royalty suspensions for existing leases would be more limited. Thus, for *existing leases*, the statutory right to royalty suspensions is highly conditional: conditioned on the profitability of the lessee's operations, conditioned on there being "new production," and conditioned on commodity prices remaining below the statutory price thresholds.

By contrast, for leases not yet granted and governed by Section 304, Congress mandated royalty suspension incentives *without* any showing of economic hardship, in order better to attract the many billions of dollars in new investment that were essential to generating new, large-scale deepwater exploration. These differences were apparent to Interior's own economists, who noted only two years into the five-year Section 304 time period that, "[c]learly, the *mandated royalty suspensions* available to new fields, *regardless of economic need*, played an important role" in causing "bidding on deep water tracts [to] explode." Complaint ¶ 24 (R. 1) (emphasis added); Amended Answer ¶ 24 (R. 26).

Interior's attempt to conflate Sections 302 and 304 is thus directly contrary to Congress's intentional omission of conditions in Section 304 that it mandated in Section 302.

3. Although the Fifth Circuit found it unnecessary to consult legislative history, that history further shows why Interior's position is wrong.

Congress *rejected* a proposal to amend Section 304 to provide Interior with exactly the authority it has now arrogated to itself. As an opponent of the RRA noted in urging its defeat,

> [u]nder the language of the conference report, all leases in more than 200 meters *must* be granted on a royalty-free basis for the next 5 years *with no finding of need* * * *. *Don't let anyone tell you the royalty holiday is discretionary for new leases. My amendment, offered in the conference, to make it clear the holiday is discretionary was voted down. So there should be no doubt: this holiday is mandatory, regardless of need, regardless of facts, regardless of cost.*

141 Cong. Rec. H11875-76 (Nov. 8, 1995) (emphases added) (statement of Rep. Miller). *See also id.* at H11857 (Nov. 8, 1995) ("The problem with this is, it is mandatory."); *id.* at H11868 (Nov. 8, 1995) ("This is an entitlement for the next five years because this is mandatory. This is not discretionary."); *id.* at H7580 (July 25, 1995) (legislation "mandates that * * * on future leases—for 5 years—there be no

finding of hardship; royalties must be forgiven at the prescribed level * * *.") (statements of Rep. Miller).

Thus, as another opponent noted, royalty suspensions under Section 304 are automatic and non-discretionary *even if commodity prices rise*:

> [t]here is no opportunity for flexibility or judgment, this Senate language mandates the application of this new policy [of royalty relief]. *What happens if the price of oil changes?* That happens just about every day. If the price goes up, obviously these leases and the recovery of this oil becomes even more economically feasible than today. *If this legislation were put in law, it is a policy. The money flows out no matter what.*

Id. at H7584 (July 25, 1995) (statement of Rep. Vento) (emphases added).

As a principal sponsor agreed, Section 304 is "straightforward. For the next 5 years, deep water leases will be offered for sale under the following terms: First, payment of an upfront bonus bid, and second, waiver of the royalty on a fixed volume of oil and gas based on the water depth of the lease." 141 Cong. Rec. S17023 (Nov. 14, 1995) (statement of Sen. Johnston). Price thresholds, expressly included in Section 302, are not among those terms, while the royalty suspension volume was "fixed." *Id.*

The Fifth Circuit's interpretation therefore hews exactly to Congress's intent and evokes no need for this Court's extraordinary intervention.[5] That dec-

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[5] *See, e.g.*, *Sec'y of the Interior* v. *California*, 464 U.S. 312, 327 (1984) ("Since House § 313 would have provided respondents with precisely the protection they now seek here, it is significant that the Conference Committee, and ultimately the Congress as a whole, flatly rejected the provision."); *Thompson* v. *Thompson*, 484 U.S. 174, 183-85 (1988) (exchange

ision did not result in any unwarranted "windfalls," Pet. 18, 23, but rather carried out Congress's precise intent: non-discretionary royalty relief for certain leases over a limited five-year period, which Congress accurately predicted would result in billions of dollars in additional upfront bonuses, new investment, new jobs, and higher royalties on future leasing. The term "windfall" suggests a hand-out or benefit that is received unexpectedly. Given that Congress intended to jump-start the ailing offshore oil and gas industry with the RRA, the Fifth Circuit's decision results in no windfall.

C. Interior's Misinterpretation Warrants No Deference.

The petition also asserts that Interior's interpretation is owed *Chevron* deference. *See* Pet. 11-12. The Fifth Circuit correctly found it unnecessary to reach this issue because the statute is unambiguous, but Interior's invocation of *Chevron* is in any event wrong. Although the petition implies otherwise, Interior's current interpretation of Section 304 appears in no notice-and-comment regulations or any other formal determination worthy of deference. Quite to the contrary, Interior made the considered decision *not* to incorporate price-threshold authority into its Section 304 regulations.

Chevron deference "is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of

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in committee hearing showing "Congress considered and rejected an approach to the problem" provided an "unusually clear indication that Congress did not intend" that approach); *Smith* v. *United States*, 507 U.S. 197, 202 n.4 (1993) (rejecting interpretation that "would effectively resurrect the scheme rejected by Congress").

law, *and that the agency interpretation claiming deference was promulgated in the exercise of that authority.*'" *Gonzales* v. *Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001)) (emphasis added). Such deference is unwarranted for informally-reached determinations such as those contained in "opinion letters * * *, policy statements, agency manuals, and enforcement guidelines." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000).

Congress directed Interior to implement both the OCSLA and the RRA through formal notice-and-comment regulations. *See* 43 U.S.C. 1334(a); RRA § 305; Pet. 11 n.7. But the only regulations for which the petition asserts deference are those governing *Section 303* of the RRA. *See* Pet. 12 (noting that "the Department implemented *Section 303*" by acknowledging price-threshold authority) (citing 30 C.F.R. § 260.110(a)(7) (1998)) (emphasis added). It is undisputed that Interior can vary suspensions by price in leases that are governed only by Section 303 and not subject to the specific mandate of Section 304. Thus, the inclusion of price-threshold authority in the general Section 303 regulations says absolutely nothing about whether such authority is appropriate in light of the specific language of Section 304. Indeed, Interior included express price thresholds in its specific regulations governing other leases subject to the general Section 303 bidding system, *see* 30 C.F.R. § 203.48 (royalty relief for "deep gas" wells drilled in shallow water); *id.* § 260.122 (post-2000 leases), but deliberately excluded that authority from its Section 304 regulations.

If any decision is worthy of *Chevron* deference in this case, it is Interior's considered policy decision *not* to include price-threshold authority in its Section 304 regulations. As Interior admitted in the order under review, but now neglects to inform this Court, "[t]here are no MMS regulations that address the price thresholds for section 304 leases." Pet. App. 33a. In formulating its regulations, Interior had specifically solicited comment as to whether, for Section 304 leases, "price ceilings [should] affect suspension volumes in the same ways as for existing leases," 61 Fed. Reg. at 6960, and was informed by several commenters that Section 304 prohibited such thresholds, AR Supp. 8, 22, 46, 62, 94. It then issued final Section 304 regulations *without* price-threshold authority, and affirmatively informed lessees that "you do not owe royalty on the production from your lease up to the applicable royalty-suspension volume." 30 C.F.R. § 260.110(d)(6) (1998). As admitted by one of its officials, Interior "made a policy decision not to address price thresholds [for Section 304 leases] in the regulations * * *." Scarlett Statement, *supra*, at 49. This purposeful policy decision *not* to include price-threshold authority in the Section 304 regulations is the only decision that could conceivably warrant *Chevron* deference in this case.

The petition also notes that certain Section 304 leases, contrary to the regulations, include price thresholds. Pet. 12. But that action warrants no *Chevron* deference because the leases were not an exercise of the rulemaking authority directed by Congress. *Gonzales*, 546 U.S. at 255. In any event, the leases contain no discussion of Interior's purported statutory authority, and the agency inconsistently omitted price thresholds from more than a thousand Section 304 leases, expressly citing the governing regulations that contained no such authority. *See* Pet. 7 n.4. In *Coeur Alaska, Inc.* v. *Southeastern Alaska Conservation Council*, 129 S. Ct. 2458, 2473 (2009), this Court recently declined to accord *Chevron* deference to an agency determination that addressed an issue in detail and was consistent with decades of agency practice, because it was "not subject to sufficiently formal procedures to merit *Chevron* deference." Interior's non-regulatory leasewriting process is even less worthy of deference, since there is no discussion of the purported statutory authority and the leases were inconsistently drafted by lower level employees. Indeed, the mere fact that Interior omitted thresholds from numerous leases through what it now says was "inadverten[ce]" on the part of "field personnel," Pet. 6-7 n.4, shows how casual and *ad hoc* that process really was.[6]

In sum, this case implicates no issue of *Chevron* deference, much less an important one worthy of this Court's review.

II. THIS CASE INVOLVES NO IMPORTANT QUESTION OF LAW.

Interior expressly admits that "there is no conflict in the circuits about the correct interpretation of Section 304 of the Royalty Relief Act," Pet. 18, and it does not argue that the Fifth Circuit disregarded any precedent of this Court. Nor is there any "important question of federal law" that warrants this Court's review. Sup. Ct. R. 10(c). This case involves the

[6] The petition does not assert *Chevron* deference for the order that directed Kerr-McGee to pay royalties. And for good reason. That determination, which contains no substantive discussion of the interpretive issues, was not the product of any impartial or adversarial adjudication and is simply a demand by Interior for payment.

routine interpretation of a statute that affects at most, by Interior's estimation, eighty-three leases held by a handful of lessees, out of tens of thousands of offshore leases governed by the OCSLA. At bottom, the petition asks the Court to correct "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. No such error occurred. But regardless, nothing in the Fifth Circuit's cogent and well-reasoned decision calls for an exercise of the Court's sparingly used powers of error correction.

Interior nevertheless asserts that the issue is important based solely on its own speculative assertions about the amount of royalties it might have collected under its unlawful price thresholds. But the amount of money a party unlawfully has demanded or says it will demand does not make a case suitable for this Court's review. Indeed, until now that has been the consistent view of Solicitors General, who have advocated denial of petitions where private parties have unsuccessfully sought large amounts from the Government but no credible circuit split was alleged. As the Solicitor General noted in one case, "the mere monetary size" of a petitioner's liability "does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention." Pet. Opp. 16 n.14, *Exxon Corp.* v. *United States*, No. 85-429 (filed Dec. 28, 1985).[7] That the

[7] *See also* Pet. Opp., *McDonnell Douglas Corp.* v. *United States*, No. 99-1258 (successfully advocating denial of certiorari after reversal of $1.2 billion judgment against United States) (Jan. 27, 2000); Pet. Opp. 27, *Cal. Fed. Bank, FSB* v. *United States*, No. 04-1557 (successfully advocating denial and noting that even though the cases involved billions of dollars in claims and over a billion dollars in judgments, the Court should not

shoe is now on the other foot is no reason for a different outcome.

The magnitude of Interior's purported "loss" is entirely due to its own setting of price thresholds that were held invalid. If Interior had elected to set lower thresholds, then the purported loss would likely have been even higher, but the case would have been no more suitable for this Court's review. By analogy, a patentee could not secure this Court's review of a case-specific Federal Circuit decision invalidating a patent merely by saying that it could have assessed many billions in royalties under the patent over many years and complaining that no circuit split could develop. That this case involves leases makes it no more worthy of certiorari.

Interior cites no precedent where this Court granted certiorari based merely on the amount alleged to be at stake, in the absence of a circuit split or other issue of importance. Instead, it cites only a case where certiorari was *denied* and language from a treatise. Pet. 21. The "'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." *Teague* v. *Lane*, 489 U.S. 288, 296 (1989) (citation omitted; alteration in original).[8] And the precedential value is even lower for a treatise written largely by practitioners.

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step in where an issue "affects a progressively smaller and steadily dwindling number of cases") (May 19, 2005).

[8] The petition in the cited case, moreover, did not merely rely on the monetary impact but also argued that the lower court decision conflicted with a precedent of this Court and the issue had been decided differently in another circuit. *See* Pet. for Cert., *Fidelity Fed. Bank & Trust* v. *Kehoe*, No. 05-919 (Jan. 17, 2006).

In any event, the Court should not grant review based solely on one party's unsupported speculation of a purported financial impact. Such assertions demand record evidence, which is wholly absent here. Interior's extra-record reports reveal little about the key assumptions on which its speculation necessarily depends: projections of oil and gas production volumes and commodity prices decades into the future, and assumptions about future conduct by Interior and lessees not parties to this action. Despite all these significant uncertainties, Interior boldly projects a narrow range for future foregone royalties in which the high and low ends are remarkably only 5% apart. *See* Pet. 22. Interior's purported losses are as conjectural as its certainty is implausible [9]

Even more important, Interior entirely ignores the many offsetting benefits that were Congress's express basis for enacting the RRA. These include billions in higher upfront bonuses on all leases, including bonuses paid to drill hundred-million-dollar dry holes that will never produce. The benefits also include incalculable billions in new investment, job creation, and other economic development spurred by new exploration in the previously moribund deepwater Gulf of Mexico. And the federal Treasury will directly benefit from

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9 Just as oil and gas prices have fluctuated wildly in the past, going under the thresholds for significant periods, so too may they in the future. For example, for the first seven months of 2009, the price of natural gas was *below* the threshold. Dep't of the Interior, MMS, *Prices Above Which Full Royalties Are Due Notwithstanding Any Remaining Royalty Suspension Volumes* (www.mms.gov/econ/PDFs/CurrentPT.pdf) (last visited August 27, 2009). If that trend continues over the entire year, no royalties will be due on gas produced from Section 304 leases even under Interior's rejected position.

billions more in higher royalties on future leases in the Gulf, which build upon the new infrastructure spurred by the RRA. Congress knew, of course, that royalty relief would mean relief from royalties. *Cf.* 141 Cong. Rec. H7583 (July 25, 1995) (opponents' estimate of $15 billion impact). But it also expected an offsetting trade-off in terms of higher upfront bonuses and long-term benefits, all of which have been realized.

Finally, Interior's conduct over the years belies its current assertion of importance: its intentional decision to exclude price threshold authority from the Section 304 regulations; its "inadvertent" omission of price thresholds from leases granted at four of the ten lease sales governed by Section 304; and its acquiescence in the *Santa Fe Snyder* decision interpreting Section 304, notwithstanding what Interior estimated were similar multi-billion-dollar impacts. *See* AR Supp. 109 (notice of acquiescence); 72 Fed. Reg. 72652, 72654 (Dec. 21, 2007) (estimating undiscounted foregone revenues of up to $10 billion). Given Interior's own casual and inconsistent approach, there is no basis for this Court to defer to the agency's new-found urgency in order to exercise extraordinary error-correction powers on a routine issue of statutory interpretation.

III. FURTHER REVIEW OF THE ISSUE IS AVAILABLE IN THE LOWER COURTS.

Interior asserts that the Court should ignore the lack of a circuit split because it is "unlikely" one would occur. Pet. 19. Interior admits that there is at least one "plausible route to another court of appeals," Pet. 19, but says it will not pursue that route and instead will voluntarily acquiesce in the Fifth Circuit's decision by refunding royalties already collected if certiorari is denied. Pet. 20. But Interior neglects to mention another direct avenue for review outside the Fifth Circuit, which would allow it to assert a claim to *all* other royalties allegedly owed. And in any event, a party cannot manufacture grounds for certiorari by unilaterally cutting off other available avenues for review.

Interior notes one avenue for extra-circuit review. Interior has already collected what it says are $1.5 billion in royalties as a result of price thresholds in Section 304 leases. *See* Pet. 22. Lessees seeking to recover those amounts would have to seek refunds in the Court of Federal Claims, with review available in the Federal Circuit. *See Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 368 (5th Cir. 1987) (jurisdiction over royalty refund suits lies exclusively in Court of Federal Claims for claims over $10,000).[10] It would then be open to the Federal Circuit to decide whether to follow the Fifth Circuit's decision.[11]

Moreover, there is another, far more direct, avenue by which the government can seek review of the statutory issue outside the Fifth Circuit. Under 30 U.S.C. § 1722(a), the government, "[i]n addition to any other remedy," may "bring a civil action in a district court * * * to compel the taking of any action

[10] Some lessees might seek to offset those overpaid royalties against other amounts, but only if they have other producing leases for which royalties are owed and are able to comply with time limits and other legal requirements.

[11] If the government obtains a favorable decision in the Federal Circuit, it could acquiesce in this Court's review. Or, in the very unlikely event all affected lessees elect to forego the entire $1.5 billion by not appealing an adverse decision, Interior could then swiftly take another case to this Court through the Fifth Circuit after issuing an order to pay.

required by or under * * * any mineral leasing law of the United States." Such suits may be brought anywhere "the defendant is found or transacts business." 30 U.S.C. § 1722(b). This provision allows the government to file an affirmative suit to recover royalties alleged to be owed, even before it issues a formal order to pay.[12] Such suits can be brought anywhere a lessee transacts business, which would include most (if not all) circuits for the large energy companies that entered into Section 304 leases. The government has traditionally elected not to employ this remedy, preferring instead to issue administrative orders to pay that are subject to APA review proceedings initiated by the federal lessee. Nevertheless, Section 1722(a) suits remain a potential avenue for the government to continue to assert claims to Section 304 royalties, whether past or future, notwithstanding the Fifth Circuit's decision.[13]

Without even mentioning the possibility of such actions, Interior says that review in the Court of Federal Claims will never occur because "if the Fifth Circuit's decision is allowed to stand, the Department does not intend under the circumstances to oppose refunds of royalties" that do not comport

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[12] *See Samedan Oil Corp.* v. *Deer*, No. 94-2123, 1995 U.S. Dist. LEXIS 10158, at *26-27 (D.D.C. June 14, 1995) ("Although a lessee may have to exhaust administrative remedies prior to suing, nothing in the statute or regulations or lease contract foreclose[s] a lawsuit by the United States as soon as the royalties [are] overdue. Nothing prevented the government from bringing a civil action, either under * * * 30 U.S.C. 1722(a) or under common law for breach of the lease contract."); *see also BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 88 (2006) (government may enforce order to pay under Section 1722(a)).

[13] Relitigation of the issue against Kerr-McGee or its privies, however, would be precluded by estoppel and other principles.

with that decision. Pet. 20. If Interior wants voluntarily to refund what it says is $1.5 billion and counting—or refuse to institute actions to collect what it speculates may be many billions more—rather than test its theory in another circuit, that is its choice to make. But this Court's certiorari decisions should not be governed by whether the government unilaterally seeks to avoid another potentially adverse circuit court decision.

The only reason a circuit split may be unlikely is because other circuits will agree with the Fifth Circuit, or Interior will decide not even to give them the opportunity. Either way, that is not a reason for this Court to grant certiorari on a narrow issue over which there is admittedly no conflict and that is subject to further review in other circuits.

CONCLUSION

For these reasons, the petition should be denied.

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