09-54 JUL 13 2009

No.

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

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
MICHAEL T. GRAY
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under Section 303 of the Outer Continental Shelf Deep Water Royalty Relief Act (Royalty Relief Act), 43 U.S.C. 1337(a)(1)(H), the Secretary of the Interior is authorized to suspend royalty payments to the United States on certain oil and gas leases. Such suspensions are to be set on the basis of "a period, volume, or value of production determined by the Secretary," but they "may vary" (such that royalty payments are reinstated) if the price of oil or gas exceeds a certain threshold. Section 304 of the Royalty Relief Act (43 U.S.C. 1337 note entitled "Lease Sales") governs certain leases issued between 1996 and 2000, and it requires the use of Section 303's bidding system "except that" it specifies certain volumes at which "suspension of royalties shall be set." The question presented is:

Whether Section 304 of the Royalty Relief Act authorizes the Secretary of the Interior to vary the suspension of royalties, so as to collect royalties on oil or gas produced when the price of oil or gas exceeds thresholds specified in the lease, notwithstanding statutorily designated suspension volumes.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Ned Farquhar, Acting Assistant Secretary for Land and Minerals Management, United States Department of the Interior, is the successor in office to C. Stephen Allred, who was, in his official capacity, an appellant in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No.

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Interior and its Acting Assistant Secretary for Land and Minerals Management, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 554 F.3d 1082. The opinion of the district court (App., *infra*, 12a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. A petition for rehearing was denied on April 14, 2009 (App., *infra*, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 43a-63a.

STATEMENT

1. a. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, grants the Secretary of the Interior (Secretary) the authority to issue and administer leases on the outer Continental Shelf to companies seeking to produce oil and gas from the seabed. The Secretary is charged with administering OCSLA's leasing provisions and also with "prescib[ing] such rules and regulations as may be necessary to carry out" the statute. 43 U.S.C. 1334(a). Oil and gas leases on the outer Continental Shelf are generally issued on the basis of competitive bidding, with leases issued to the highest bidder. 43 U.S.C. 1337(a)(1). Under the terms of OCSLA and the leases, a lessee typically obtains the right to produce and sell oil and gas in exchange for agreeing to pay royalties to the United States at a specified percentage of the amount or value of production saved, removed, or sold from the lease. *Ibid.*; 43 U.S.C. 1337(b)(3). The statute requires leasing activities "to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." 43 U.S.C. 1344(a)(4).

b. On November 28, 1995, Congress amended OCSLA by enacting the Outer Continental Shelf Deep Water Royalty Relief Act (Royalty Relief Act or RRA), Pub. L. No. 104-58, 109 Stat. 563. The Royalty Relief Act allows the Secretary, under certain conditions, to suspend the payment of royalties to the United States by oil and gas lessees. As relevant here, the statute addresses royalty relief for three different circumstances: (1) for new production of oil and gas under pre-existing leases for deepwater tracts in certain specified parts of the Gulf of Mexico, RRA § 302, 109 Stat. 563-565 (43 U.S.C. 1337(a)(3)(C)); (2) for production of oil and gas under new leases for OCSLA lands generally, § 303, 109 Stat. 565 (43 U.S.C. 1337(a)(1)(H)); and (3) for production of oil and gas under new leases issued during the five-year period immediately following the enactment of the Royalty Relief Act for deepwater tracts in the same parts of the Gulf of Mexico noted above, § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales").

With regard to the first category of royalty relief—for newly produced oil and gas under pre-existing leases on deepwater tracts in specified parts of the Gulf of Mexico—Congress provided that, if the Secretary found that new production under a lease would not be economically viable without relief from royalties, the Secretary could then "determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production * * * , in no case will that volume be less than" one of three specified amounts (depending on the depth of the relevant tract). 43 U.S.C. 1337(a)(3)(C)(ii). Notwithstanding those minimum production volumes (beneath which royalties would generally not be due), Congress further provided that, even "[d]uring the production" of those minimum volumes, such oil and gas would remain "subject to royalties at the lease stipulated royalty rate" in any year during which the "arithmetic average of the closing prices on the New York Mercantile Exchange" for oil or gas exceeded certain specified price thresholds—$28.00

per barrel of oil and $3.50 per million British thermal units for natural gas, adjusted for inflation. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). Thus, Congress established a system for pre-existing deepwater leases that made royalty relief generally available when new production remained below certain volumes, but that still required royalties to be paid on production below those volumes in years when the price of oil or gas exceeded certain thresholds.[1]

With regard to the second category of royalty relief—for oil and gas produced under new OCSLA leases generally—Section 303 of the Royalty Relief Act established that the Secretary could opt to use a new form of bidding system for such leases, as an alternative to one of the seven others already available under OCSLA.[2] Under that new system, bidding would be based on a

> cash bonus bid with royalty at no less than 12 and ½ 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.

43 U.S.C. 1337(a)(1)(H). Thus, under that system, even though royalties may be suspended under a new lease

---

[1] Section 302 also authorized (but did not require) the Secretary to reduce or eliminate the royalty or net profit share specified in leases in roughly the same specified parts of the Gulf of Mexico in order to promote development of increased production or to encourage production of marginal resources. See 43 U.S.C. 1337(a)(3)(B). That separate authorization is not at issue here.

[2] See 43 U.S.C. 1337(a)(1)(A)-(G) (enumerating the other available bidding systems).

"for a period, volume, or value of production," the Secretary may further provide that the suspension, once prescribed, would then "vary based on" price thresholds determined by the Secretary. The Department of the Interior (Department) has codified in regulations its authority to "vary" royalty suspensions for such leases "based on the price of production." 30 C.F.R. 260.110(g).

This case involves the third category of royalty relief—for new oil and gas leases on deepwater tracts in the same specified parts of the Gulf of Mexico that were issued in the five years after November 28, 1995. In Section 304 of the Royalty Relief Act, Congress required those leases to be sold on the basis of the new bidding system it had created in Section 303. RRA § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales"). More specifically, Section 304 provides as follows:

> For all tracts located in water depths of 200 meters or greater in [specified parts of the Gulf of Mexico], any lease sale within five years of the date of enactment of this title [November 28, 1995], shall use the bidding system authorized in section 8(a)(1)(H) of the Outer Continental Shelf Lands Act, as amended by this title [43 U.S.C. 1337(a)(1)(H)], except that 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 400 to 800 meters of water; and
>
> (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.

RRA § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales").[3] Although Section 304 addresses the minimum volume at which royalty suspensions are to be "set," it is silent with respect to Section 303's further authorization for the Secretary to "vary" a suspension if the price of oil or gas exceeds certain price thresholds.

In light of Section 304's incorporation of Section 303, the Department determined that the royalty suspensions in new leases issued under Section 304 in the five years after November 28, 1995 could "vary" as provided in Section 303 and therefore would be subject to price thresholds. New leases issued in 1996, 1997, and 2000 included such price thresholds. App., *infra*, 25a.[4]

---

[3] The minimum volumes specified in Section 304—which were the same as the ones established by Section 302 for new production under pre-existing leases, 43 U.S.C. 1337(a)(3)(C)(ii)—originated with the Department and "were developed out of technical analyses conducted by [the Minerals Management Service (MMS)] of the royalty suspension volumes needed for capital cost recovery in developing unproduced oil and gas fields at various water depths in the Gulf of Mexico." Minerals Management Service, Department of the Interior, *Deepwater Royalty Relief for New Leases*, 61 Fed. Reg. 12,023 (1996); see 141 Cong. Rec. 13,002 (1995).

[4] The Department did not include price thresholds in leases that were issued in 1998 and 1999, even though they too were governed by Section 304. When that omission came to light, it triggered congressional concerns and an investigation by the Department's Inspector General. 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* 5 (2007) <http://www.doioig.gov/upload/MMS%20ROI%20REDACTED.pdf>. The Inspector General's final report concluded that the omission had been inadvertent and inconsistent with the "policy decision" that the Department made "shortly after the inception of the Outer Continental Shelf Deep Water Royalty Relief Act in 1995 * * * to include price thresholds in the leases issued between 1995 and 2000." *Id.* at 2; see *ibid.* ("MMS field personnel initially attached ad-

2. This case involves eight leases issued in 1996, 1997, or 2000 pursuant to Section 304 of the Royalty Relief Act, under which respondent is a lessee or operator. App., *infra*, 24a, 36a-37a. The notices for each of the three sales at which the leases were purchased—which were published in the *Federal Register*—provided that the leases would include royalty suspensions up to the statutorily designated volumes, but that the suspensions would also be subject to price thresholds and would thus vary based on the price of production from the lease. See 65 Fed. Reg. 45,103 (2000); Admin. R. 189, 233-234; 62 Fed. Reg. 39,865-39,866 (1997); 61 Fed. Reg. 42,715 (1996). Consistent with those notices, each of the eight leases that respondent bid for, signed, and accepted contains a royalty-suspension provision subject to price thresholds. App., *infra*, 2a-3a, 13a, 26a-27a. The price thresholds are set at the amounts specified in 43 U.S.C. 1337(a)(3)(C)(v)-(vii) (governing new production in specified parts of the Gulf of Mexico under existing leases), with terms allowing adjustment for inflation. App., *infra*, 25a-28a. The leases require respondent to make royalty payments for any year in which the average price of oil or gas rises above the specified threshold. *Ibid.*

At various dates between 2002 and 2004, respondent began to produce oil and gas under each of the eight leases. App., *infra*, 30a. The price of gas exceeded the thresholds specified in the leases in both 2003 and 2004, and the price of oil exceeded the specified threshold in 2004. *Id.* at 4a, 31a-32a. Therefore, in a January 6,

denda to the leases containing price threshold language but stopped for 2 years and instead cited a regulation that they thought contained threshold language, when, in fact, it did not. MMS's review process * * * simply failed to identify this discrepancy.").

2006 decision, the Department ordered respondent to pay royalties on the value of the oil and gas produced under the leases in those years. *Id.* at 4a, 23a-40a.

3. Respondent refused to pay the royalties as ordered and instead brought this action, claiming that the price-threshold provisions it accepted in its leases were contrary to Sections 304 of the Royalty Relief Act. App., *infra*, 2a, 18a-19a. On cross-motions for summary judgment, the district court granted judgment for respondent. *Id.* at 2a, 12a.

The district court relied primarily on the Fifth Circuit's earlier decision in *Santa Fe Snyder Corp.* v. *Norton*, 385 F.3d 884 (2004), which had invalidated part of the Department's regulations implementing Section 304.[5] The district court concluded that Congress did not provide the Secretary with the authority to impose price thresholds on leases issued for deepwater tracts in the Gulf of Mexico during the five years following enactment of the Royalty Relief Act. App., *infra*, 19a-21a. The district court concluded that Congress had specified a volume up to which royalties were to be suspended in Section 304 of the Royalty Relief Act, and that its doing

[5] The Department had issued regulations that interpreted the suspension of royalties under Section 304 as applying only to leases issued in fields that had not produced oil or gas before the enactment of the Royalty Relief Act. See *Santa Fe Snyder*, 385 F.3d at 889. The Department's regulations also provided that the royalty-suspension volumes would be measured against the combined production from all leases in a field (rather than the production under each individual lease). *Ibid.* In *Santa Fe Snyder*, the Fifth Circuit held that those two aspects of the Department's regulations were contrary to the statute. According to the court, Sections 303 and 304, unlike Section 302, did not contain any "New Production Requirement," and Section 304 made the royalty-suspension volumes applicable on a lease-by-lease, rather than field-by-field, basis. *Id.* at 892-893.

so had removed the Secretary's authority under Section 303 to "vary" those suspensions on the basis of a price threshold. *Ibid.*

4. The court of appeals affirmed. App., *infra*, 1a-11a. Like the district court, the court of appeals relied heavily on its earlier decision in *Santa Fe Snyder*, in which it had considered the interplay between Sections 303 and 304 of the Royalty Relief Act. *Id.* at 8a-11a. The court of appeals began its analysis by noting that this case "is the logical and inevitable extension of *Santa Fe Snyder*" because, in the court's view, the Department sought to use a limitation on royalty relief present in Section 302 (which mandates price thresholds for new production under existing leases) to curtail the royalty relief provided in Section 304 for new leases, just as it had attempted to apply Section 302's "New Production Requirement" to Section 304 in *Santa Fe Snyder*. *Id.* at 9a. The court held that Section 304 "immediately excepts and replaces [the Secretary's] discretion [under Section 303 to vary the suspension on the basis of price thresholds] with a fixed royalty suspension." *Id.* at 10a (quoting *Santa Fe Snyder*, 385 F.3d at 892). The court thus concluded that Section 304's "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"—without any further conditions or exceptions. *Ibid.* Because it found that "Section 304 is unambiguous in this regard," the court did not address whether the Department's contrary con-

struction of the statute is reasonable under "*Chevron*'s second step." *Ibid.*[6]

REASONS FOR GRANTING THE PETITION

The court of appeals' decision will likely cost the United States at least $19 billion in forgone or refunded royalties under several dozen leases that were issued under Section 304 of the Royalty Relief Act, and there is no meaningful likelihood that another court of appeals will have a chance to interpret the same federal statutory provisions. Notwithstanding the obvious importance of the case to the government, the court of appeals based its decision on a cursory examination of the statute, without even addressing the government's arguments about the statutory text and context. As Sections 302 and 303 of the Royalty Relief Act establish, the suspension of royalty payments for oil and gas at production below certain designated volumes can easily co-exist with a requirement that the lessee pay royalties on any oil or gas produced at times when prices exceed certain thresholds. The court of appeals erroneously read out of the statute Section 304's requirement to use the Section 303 bidding system—which includes the express authority to "vary" the suspension of royalties on the basis of such price thresholds (43 U.S.C. 1337(a)(1)(H)). The court's decision is contrary to the statutory language, and, at the very least, fails to give appropriate deference to the Department's reasonable interpretation. This Court should grant the petition for a writ of certiorari to consider an important question about the proper interpretation of a federal statute on which so many billions of dollars of federal revenue turn.

---

[6] The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 41a-42a.

A. The Court Of Appeals Incorrectly Interpreted The Royalty Relief Act And Failed To Give Appropriate Deference To The Department's Reasonable Interpretation

The court of appeals concluded (App., *infra*, 10a) that Congress's establishment of minimum production volumes for royalty suspensions in Section 304 of the Royalty Relief Act is unambiguously inconsistent with any residual discretion on the part of the Secretary to vary those royalty suspensions on the basis of price thresholds. But that understanding of the statute is flatly wrong. The Department's contrary interpretation is the best reading of the statute or, at the very least, a reasonable reading entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. Because this case raises questions "implicating an agency's construction of the statute which it administers," principles of *Chevron* deference control.[7] *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (internal quotation marks omitted). If Congress has "directly spoken to the precise question at issue," "that is the end of the matter," but if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842-843.

In interpreting the Royalty Relief Act, the Department understood that the proper construction of Section 304 necessarily depends on the other provision to which it refers, Section 303 (43 U.S.C. 1337(a)(1)(H)). In regulations adopted approximately two months after the

---

[7] Congress directed the Department to promulgate rules and regulations necessary to implement both OCSLA in general and the Royalty Relief Act in particular. See 43 U.S.C. 1334(a); RRA § 305, 109 Stat. 566.

RRA was enacted, the Department implemented Section 303 by acknowledging its discretionary authority to include price thresholds in any notices of lease sales. See 30 C.F.R. 260.110(a)(7) (1996); 61 Fed. Reg. 3804 (1996). It explained that the new bidding system would also apply to deepwater leases issued from 1996 to 2000 pursuant to Section 304. See *id.* at 3801. When administering the leasing program under Sections 303 and 304, the Department exercised its authority to specify price thresholds in notices of lease sales (including all of the notices concerning respondent's leases). See p. 7, *supra*. That construction was fully consistent with the best reading of Sections 303 and 304, and is certainly entitled to deference.

2. As outlined above (see pp. 4-5, *supra*), Section 303, which added a new bidding system to OCSLA, contains two relevant clauses. The first authorizes the Secretary to suspend the payment of royalties "for a period, volume, or value of production determined by the Secretary"; and the second states that those "suspensions may vary based on the price of production from the lease." 43 U.S.C. 1337(a)(1)(H). Section 304 then provides that, with regard to the leases issued from November 28, 1995 to November 28, 2000, the Secretary "shall use the bidding system authorized [by Section 303], except that the suspension of royalties shall be set at a volume of not less than" specified amounts. RRA § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales").

Section 304's "except" clause limits the Secretary's discretion under the *first* clause of Section 303—by requiring the initial suspension to be set on the basis of a volume specified in Section 304 itself, rather than on the basis of a "period, volume, or value of production determined by the Secretary," as in Section 303, 43 U.S.C. 1337(a)(1)(H). But the "except" clause 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. That discretion carries over into Section 304 by virtue of the direction in that section that the Secretary "shall use the bidding system" authorized by Section 303. Thus, when Sections 303 and 304 are read together, as they must be, they allow the price thresholds included in respondent's leases. In other words, although Congress in Section 304 "set" minimum royalty suspension volumes, it otherwise incorporated Section 303, including its grant of authority to "vary" during lease administration the suspension volumes set by Congress. That conclusion is reinforced by the established principle that statutory exceptions are to be construed narrowly. *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989). Here, Congress "excepted" from the system described in Section 303 only the specification of volumes at which royalty suspensions were to be set in the first instance. Congress incorporated unchanged all the rest of that bidding system, including its authorization of variances based on the price of production.[8]

---

[8] The relationship between Section 304 and the different portions of Section 303 is evident when Section 304's cross-reference is replaced by the language of Section 303 and Section 304's "except" clause then substituted for Section 303's parallel "suspension of royalties" provision. When thus integrated, as Congress directed, the provisions read as follows (with the language from Section 304 in brackets):

> [For all tracts located in water depths of 200 meters or greater in the Western and Central Planning Area of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, any lease sale within five years of the

3. The court of appeals rejected that straightforward interpretation of Section 304 on the ground that allowing royalty suspensions to "vary" based on the prices of oil and gas would "render [Section] 304's mandatory language meaningless" by effectively reducing the production volumes for which royalties are to be suspended. App., *infra*, 9a. But the court's objection is misplaced, and its resulting construction of Section 304 is refuted not only by the text, but also by the context and purpose of the Royalty Relief Act. See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (explaining that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute").

a. In Sections 302 and 303—the provisions of the Royalty Relief Act dealing with new production under pre-existing deepwater leases in specified parts of the Gulf of Mexico (43 U.S.C. 1337(a)(3)(C)) and with new OCSLA leases generally (including the specified parts of the Gulf of Mexico for leases issued after November

---

> date of enactment of this title, shall use the] cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties [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 400 to 800 meters of water; and
>
> (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters],
>
> which suspensions may vary based on the price of production from the lease.

That combined form gives effect to both the cross-reference to Section 303 and the "except" clause in Section 304.

28, 2000) (43 U.S.C. 1337(a)(1)(H))—Congress mandated or permitted the application of price thresholds even when the minimum production volumes associated with royalty relief have not been reached. See pp. 3-4, *supra*.

Indeed, in Section 302, Congress included mandatory suspension volumes that first appear to be unqualified, but that actually operate to set an initial suspension volume subject to variance depending on the price of oil and gas at the time of production. Section 302 provides that "*in no case* will [the suspension volumes] be less than [the same minimum volumes specified in Section 304]." 43 U.S.C. 1337(a)(3)(C)(ii) (emphasis added). But that seemingly absolute language cannot be read in isolation. Section 302 goes on to provide that—even "[d]uring the production" of the volumes up to which royalties would otherwise be suspended—the amounts of oil and gas that are produced are nevertheless "subject to royalties at the lease stipulated royalty rate" during years in which the average price of oil or gas rises above specified levels. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). In addition, Section 302 expressly provides that "[a]ny production subject to" the price thresholds "shall be counted toward the production volume" for the royalty suspension, even though royalties must be paid on those production amounts. *Ibid.* Thus, the apparently mandatory royalty relief under Section 302 is compromised twice over. First, the relief does not apply to any amounts produced during periods when price thresholds are exceeded. Second, by counting against the production volume associated with the initial royalty suspension, the amounts produced at those times also reduce the amount of production that is subject to relief from royalties in future years. In other words, the royalty suspension *varies* as a result of the application of price thresholds.

By including in an overall scheme to determine royalty relief both mandatory suspension volumes and specified price thresholds, which can be applied in tandem to a single lease, Section 302 demonstrates that the two concepts are not mutually exclusive. To the contrary, as Section 303 also confirms, price thresholds—provisions that allow a suspension of royalties to "vary" according to the price of production—are fully compatible with the statute's specification of a volume at which a royalty suspension is initially set. They are also consistent with the very function of "variances," which provide for an exception from a general rule in circumstances in which the purposes of the rule do not apply. See, *e.g.*, *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 76-77 (1980); see also pp. 17-18, *infra* (discussing the purposes of the RRA).

Section 304 is no different from Sections 302 and 303 in this regard. In Section 304, Congress required suspension of royalties at certain volumes and also required the Secretary to use the Section 303 bidding system—which includes the authorization to vary the congressionally set suspensions based on the price of oil and gas. That dual requirement is consistent with Congress's decision throughout the Royalty Relief Act to combine a system for *suspending* royalties with a system for *varying* those suspensions based on the price of oil and gas at the time of production. Such price thresholds serve to ameliorate the distortions that would occur at a time of high energy prices if royalty suspensions were based on volume of production alone.

Thus, given Sections 302 and 303, which expressly contemplate the applicability of *both* minimum volumes for royalty suspensions *and* price thresholds, the court of appeals erred in concluding (App., *infra*, 9a) that the application of price thresholds under Section 304 would render suspension volumes "meaningless." As a result, the court misunderstood the import of Section 304's language mandating minimum volumes for royalty suspensions, interpreting it to carry a negative implication that other, linked sections of the statute expressly refute. In sum, the court failed to appreciate that the Royalty Relief Act as a whole, including Section 304, permits the Secretary to include price thresholds in leases that also include minimum suspension volumes.

b. The Department's interpretation is also consistent with the purposes of the Royalty Relief Act. No one disputes that for leases issued before November 28, 1995 and after November 28, 2000, Congress acted both to spur production and to protect the public fisc by offering suspended royalties but conditioning the suspensions on price thresholds. Thus, the Secretary is required to impose price thresholds for new production on existing leases that qualified for royalty relief. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). And the Secretary is permitted to impose such price thresholds for new leases issued in the same geographic areas after Section 304's five-year period. 43 U.S.C. 1337(a)(1)(H).

It would, to say the least, be anomalous for Congress to have mandated price thresholds for existing leases, and to have authorized price thresholds for new leases in the future, and yet to have prohibited price thresholds, in the selfsame piece of legislation, during the five-year interim period addressed by Section 304. The purpose of the Royalty Relief Act was to create economic incentives for new production. Price thresholds are fully consistent with that goal, because the economic incentive of a royalty suspension is no longer necessary when the price of oil or gas rises sufficiently high. Indeed, respondent bid on and entered into the very leases at issue here knowing that they contained such price thresholds. And at the point at which special economic incentives are no longer necessary, the purpose of protecting the public fisc through the collection of the standard royalties in the lease becomes paramount. See 43 U.S.C. 1344(a)(4) (OCSLA requires leasing activities "to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government").

There is nothing in the text, structure, or purpose of the Royalty Relief Act to suggest that Congress intended for price thresholds to apply in every circumstance except for leases issued during the five-year period following enactment of the statute—and thereby to forgo billions of dollars in revenue otherwise due to the American public, and to bestow billions of dollars of windfalls on lessees when oil and gas prices are high.

B. There Will Be No Meaningful Opportunity For Further Interpretation Of The Royalty Relief Act In The Courts Of Appeals

Although there is no conflict in the circuits about the correct interpretation of Section 304 of the Royalty Relief Act, the unusual circumstances of the statute and its application all but guarantee that the Department's arguments will not be considered by other courts of appeals. By its terms, Section 304 applies only to leases issued for deepwater tracts on the outer Continental Shelf in certain portions of the Gulf of Mexico "lying west of 87 degrees, 30 minutes West longitude." 109 Stat. 565. Those areas are generally adjacent to Texas, Louisiana, and Mississippi, and the Department did not issue any leases under Section 304 for tracts that are within the territorial jurisdiction of any court of appeals other than the Fifth Circuit. Additional litigation with other lessees about the payment of future royalties would be brought in the same way this case was: A lessee could challenge an order to pay royalties as contrary to law under the Administrative Procedure Act, 5 U.S.C. 706(2). As respondent did, other lessees could be expected to bring any future suits in the Fifth Circuit, given its holding that price thresholds are unambiguously beyond the agency's authority under Section 304 when minimum suspension volumes have not been reached.[9]

Although there is one plausible route to another court of appeals, it would be very unlikely to result in a circuit split reviewable by this Court and thus does not justify the denial of further review at this time. The Fifth Circuit's decision in *Santa Fe Snyder* noted that a lessee seeking a refund of royalties that had already been paid to the government should file suit in the Court of Federal Claims (for a claim involving more than $10,000), see 385 F.3d at 893, and such a suit could be appealed to the Federal Circuit, see 28 U.S.C. 1295(a)(3). As an initial matter, that scenario would require the Department to refuse to accept the Fifth Circuit's decision regarding payments already made under a lease within that court's jurisdiction, even as the Department would be effectively prevented from demanding any *additional* payments from the same lessee under the same lease term. Cf. *National Cable & Tele-*

[9] In this case, respondent alleged venue (Compl. ¶ 10) under 28 U.S.C. 1392(e)(1) (which refers to the residence of the defendant) and 43 U.S.C. 1349(b)(1) (which allows a proceeding with regard to a case arising out of the production of minerals on the outer Continental Shelf to be "instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose").

comms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 984-985 (2005) (explaining that an appellate opinion that finds a statute "unambiguous" overrides an agency's contrary interpretation of the statute). And, in fact, if the Fifth Circuit's decision is allowed to stand, the Department does not intend under the circumstances to oppose refunds of royalties that were, under that court's reasoning, beyond its statutory authority to collect.[10] Moreover, even if such a suit were brought and appealed to the Federal Circuit, and if the government then prevailed, the Federal Circuit's decision would apply only to royalties that had already been collected, and the lessee could decide not to seek this Court's review, because the loss of royalties already paid could be more palatable than the possibility of having to pay royalties on all future production. If, on the other hand, the government were to lose in the Federal Circuit, there would still be no circuit split.

This Court should not rely on the speculative possibility of another appellate ruling under such circumstances. If the Court were to deny certiorari here, the Fifth Circuit's decision would likely be the final word interpreting Section 304 of the Royalty Relief Act. This case is therefore akin to those arising within the exclusive jurisdiction of the Federal Circuit, in which there is no realistic opportunity for another court of appeals to

[10] In March 2008, after the district court's decision in this case, the Department advised parties making royalty payments not to adjust their prior or ongoing royalty payments until there is a final, non-appealable judgment. It also suggested that requests for refunds of royalties be made in the interim only when they might otherwise be barred by a statute of limitations. The Department would be particularly reluctant to refuse to refund royalties it collected on the basis of that letter.

address the questions raised. In such circumstances, the lack of a circuit split does not suffice to insulate the court of appeals' decision from this Court's certiorari jurisdiction. See Eugene Gressman et al., *Supreme Court Practice* 286-288 (9th ed. 2007).

C. If Allowed To Stand, The Court Of Appeals' Decision Will Cost The United States Treasury Billions Of Dollars In Lost Revenue

The court of appeals' decision presents an important question of federal statutory interpretation in part because, if allowed to stand, it will require the government to forgo many billions of dollars of revenue.

As Justice Scalia recently explained in a case in which a private party faced "a possible $1.4 billion judgment" and also had potentially $40 billion at stake in other pending class actions, "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether 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); accord Gressman 269 ("The fact that especially large amounts of money are involved in litigation over the issue of statutory construction may also be a persuasive factor, though not always sufficient by itself unless the amount is enormous.").

In this case, the Department's 2006 order required respondent to pay approximately $36.2 million in royalties for production of oil and gas from eight leases in 2003 and 2004. Moreover, the Department estimates that another $159 million in royalties came due on production in 2005-2007 under the terms of those eight leases alone. But this is the least of the matter. Respondent and its corporate affiliates have interests in ten other leases on which the Department estimates an additional $169.3 million in royalties came due on production through 2007. The court of appeals' decision will also govern the disposition of billions of additional dollars of potential federal revenue involving other lessees. There are 21 other pending administrative appeals of similar orders to pay royalties under Section 304 leases—appeals that have generally been held in abeyance pending resolution of this case. And some similarly situated lessees have continued to pay royalties during this litigation; as of June 30, 2009, the Department had collected an estimated $1.5 billion in royalties from leases issued in 1996, 1997, and 2000, the validity of which is called into doubt by the court of appeals' decision.

In addition to the royalties already due or paid, vastly more is at stake. The court of appeals' decision, if allowed to stand, will prevent the government from collecting royalties on oil and gas production in any future year in which the price thresholds are exceeded. As the Department recently informed Congress, its most recent predictions are that 83 leases from 1996, 1997, and 2000 will produce 2.46 to 2.7 billion barrels of oil equivalent before reaching the royalty-suspension volumes required by the court of appeals' decision. Letter from Richard T. Cardinale, Chief of Staff, Land & Minerals Mgmt., U.S. Dep't of the Interior, to Hon. Dianne Feinstein, Chairman, Subcomm. on Interior, Env't & Related Agencies, Senate Appropriations Comm., encl. 5b (Mar. 9, 2009). That would result in forgone future royalties estimated at $17.97 to $18.98 billion. *Ibid.* (The amount could, of course, be higher if either the amounts produced or the prices of oil and gas turn out to be higher than the estimates that the Department used in making its forecast.[11])

Whatever the precise amount of forgone future royalties ultimately proves to be, the total cost will be huge, and it will have a direct, adverse affect on the Treasury of the United States. See 43 U.S.C. 1337(m) and 1338 (requiring royalties to be "deposited in the Treasury of the United States and credited to miscellaneous receipts"). And, correspondingly, those same sums will constitute huge and unjustified windfalls for respondent and other lessees that bid for, signed, and extracted federal oil and gas under leases that expressly provide for the very price thresholds they now seek to avoid. The "enormous" sum of federal revenue that turns on the "question of federal statutory interpretation" presented by this case is thus "a strong factor" counseling in favor of certiorari. *Fidelity Fed. Bank & Trust*, 547 U.S. at 1051 (Scalia, J., concurring in the denial of certiorari).[12]

---

[11] In 2008, the Government Accountability Office conducted its own study of the 1996, 1997, and 2000 leases, and estimated that a loss in this case by the government would cost between $15.1 and $38.3 billion in forgone royalties from oil and gas production under 84 leases over the next 25 years. U.S. Gov't Accountability Office, *GAO-08-792R, Oil and Gas Royalties: Litigation Over Royalty Relief Could Cost the Federal Government Billions of Dollars* 8 (June 5, 2008) <http://www.gao.gov/new.items/d08792r.pdf>.

[12] This case is not in an interlocutory posture and thus does not present the circumstance that caused Justices Scalia and Alito to concur in the denial of certiorari in *Fidelity Federal Bank & Trust*. See 547 U.S. at 1051.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

MICHAEL T. GRAY
Attorney

JULY 2009