No. 16-368

In the Supreme Court of the United States

NOBLE ENERGY, INC., PETITIONER

v.

K. JACK HAUGRUD,
ACTING SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal government's breach of a federal oil and gas lease on the Outer Continental Shelf discharged petitioner from its independent regulatory obligation to permanently plug an undersea well. See 30 C.F.R. 250.1702, 250.1710, 250.1711, 250.1723(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted at 650 Fed. Appx. 9. The opinion of the district court (Pet. App. 6a-26a) is reported at 110 F. Supp. 3d 5. A prior opinion of the court of appeals (Pet. App. 41a-58a) is reported at 671 F.3d 1241. A prior opinion of the district court is reported at 770 F. Supp. 2d 322.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2016. A petition for rehearing was denied on June 24, 2016 (Pet. App. 61a-62a). The petition for a writ of certiorari was filed on September 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Outer Continental Shelf Lands Act (OCSLA or Act), 43 U.S.C. 1331 *et seq.*, acknowledges the United States' "jurisdiction and control over the outer continental shelf [OCS], a zone which extends from the edge of state coastal waters to the border of international waters—generally from 3 to 200 miles offshore." *Aera Energy LLC* v. *Salazar*, 642 F.3d 212, 213 (D.C. Cir.), cert. denied, 132 S. Ct. 252 (2011). The OCSLA declares that it is the policy of the United States that the OCS "is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. 1332(3); see 43 U.S.C. 1332(6) (providing that operations "should be conducted in a safe manner" using "technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts" or "other occurrences which may cause damage to the environment or to property, or endanger life or health").

The OCSLA authorizes the Secretary of the Interior to promulgate regulations "as may be necessary to carry out" the provisions of the statute "relating to the leasing" of the OCS. 43 U.S.C. 1334(a). The OCSLA also authorizes the Secretary to promulgate such regulations "as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources" of the OCS. *Ibid.* Such environmental regulations "shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under" the OCSLA. *Ibid.* The Act further authorizes the Secretary to "en-

force safety and environmental regulations," 43 U.S.C. 1348(a), requiring the holder of any lease or permit under the Act to comply with any "regulations intended to protect persons, property, and the environment on the outer Continental Shelf." 43 U.S.C. 1348(b)(2).

The Department of the Interior has promulgated comprehensive regulations implementing the Act, and in particular governing the decommissioning of an undersea well. 30 C.F.R. Pt. 250, Subpt. Q. The Secretary has delegated regulatory oversight of decommissioning (and certain other activities of offshore oil and gas lessees) to the Bureau of Safety and Environmental Enforcement (BSEE). 30 C.F.R. 250.101. BSEE inherited those functions from the now-disbanded Minerals Management Service (MMS). See Pet. App. 10a n.4.

BSEE regulations provide, *inter alia*, that any lessee or owner of operating rights is jointly and severally liable for obligations to decommission a well, and that those obligations apply "as the obligations accrue and until each obligation is met." 30 C.F.R. 250.1701(a). A lessee or owner accrues obligations to decommission an undersea well when he "[d]rill[s] a well" or becomes a lessee of a lease on which there is a well that has not been permanently plugged. 30 C.F.R. 250.1702. Among those obligations, a lessee must "permanently plug all wells on a lease within 1 year after the lease terminates." 30 C.F.R. 250.1710. Additionally, if "BSEE determines that continued maintenance of a well in a temporary abandoned status is not necessary for the proper development or production of a lease," a lessee or owner "must * * * [p]romptly and permanently plug the well." 30 C.F.R. 250.1723(a). And if BSEE determines that a well "[p]oses a hazard to safety or the environment," or is not commercially useful, it

will order the well permanently plugged. 30 C.F.R. 250.1711(a) and (b). The regulations also detail how to plug a well permanently. *E.g.*, 30 C.F.R. 250.1715.

2. In 1979, petitioner's predecessor in interest acquired a lease to "drill for, develop, and produce natural gas on submerged lands off the coast of California." Pet. App. 2a. In 1985, petitioner's predecessor drilled the well at issue in this case, Well OCS-P320 No. 2, on one of the leased tracts. *Id.* at 2a-3a. It discovered oil and gas, then temporarily plugged the well. *Id.* at 3a. The well has been temporarily plugged and idle ever since. *Ibid.*

For many years the lease was subject to "suspensions" of operations, some requested by petitioner's predecessors in interest and others directed by the government. Pet. App. 3a. In 2001, however, a federal district court held that Interior could not grant a "suspension" without undertaking a new "consistency review" to ensure that the suspension was consistent with the State of California's coastal management programs. *California* v. *Norton*, 150 F. Supp. 2d 1046, 1047-1048 (N.D. Cal. 2001). The court required Interior to conduct this consistency review and, in the meantime, to order a cessation of activity on all affected leases (including petitioner's). *Id.* at 1057-1058. The Ninth Circuit affirmed. *California* v. *Norton*, 311 F.3d 1162, 1178 (2002).

Some of the affected lessees (including petitioner) sued the United States for breach of contract in the Court of Federal Claims (CFC).[1] The CFC ruled in the lessees' favor. The court held that, by complying

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[1] Petitioner acquired its interest in the lease after the district court issued its decision in *Norton* but before the CFC lawsuit was filed. See 11-5114 Gov't C.A. Br. 13.

with the district court's order in *California* v. *Norton*, "the government had effectively 'repudiated the lease agreements by putting into practice the new [court-mandated] rules applicable to the availability of requested suspensions.'" Pet. App. 44a (quoting *Amber Res. Co.* v. *United States*, 538 F.3d 1358, 1370 (Fed. Cir. 2008) (brackets in original)). The CFC awarded $1.1 billion in restitution to the plaintiffs, including petitioner. *Amber Res.*, 538 F.3d at 1367. Petitioner's "share of the recovery was roughly $1.2 million." Pet. App. 45a.

The Federal Circuit affirmed. *Amber Res.*, 538 F.3d at 1367. In addition to holding that the government had materially breached the leases and that it owed restitution, the court held that the common-law rule of discharge excused the lessees' further performance under the leases. *Id.* at 1370.

3. Petitioner took no steps to permanently plug the well. In 2009, BSEE issued an order to petitioner. Pet. App. 45a-46a. That order provides that, "as required by 30 CFR 250.1723, you must: promptly and permanently plug the well according to 250.1715"; "clear the well site according to 250.1740 through 250.1742; and perform any additional activity necessary to fully satisfy your decommissioning obligations." Pet. App. 45a-46a. Petitioner has estimated that the total cost of compliance is $20 million. *Id.* at 46a.

a. Petitioner refused to comply with BSEE's order and filed suit in district court. 770 F. Supp. 2d 322. Relying on the principle that Congress legislates against a backdrop of common-law rules, see *United States* v. *Texas*, 507 U.S. 529 (1993), petitioner argued that its regulatory obligations to decommission the wells had been "discharged" because the regulations did not ex-

pressly address the consequences of a breach of an associated contract and thus implicitly incorporated the common-law contractual "discharge" doctrine. The district court granted summary judgment to the government. 770 F. Supp. 2d at 332. The court held that the government's breach had discharged petitioner's *contractual* obligations to decommission the well, but that "the OCSLA regulations—which are not being challenged by [petitioner]—establish an independent obligation to permanently plug and abandon all exploratory wells." *Id.* at 331. The court explained that petitioner had "cite[d] no authority in support of its position that the common law principle of discharge relieves the non-breaching party of *regulatory* obligations," and the court "decline[d] to expand the scope of the common law principle of discharge in that direction." *Ibid.*

The D.C. Circuit vacated and remanded. Pet. App. 41a-58a. The court held that "[r]esolution of this dispute depends on what the plugging regulations mean." *Id.* at 48a. The court explained that, "[i]f the regulations impose an obligation to plug [the well] regardless of the government's breach of the lease contract, [petitioner's] argument fails. If the regulations release the duty to plug once the government materially breaches the lease agreement, then [petitioner] prevails." *Id.* at 48a-49a.

The court of appeals found nothing in the agency order or in the regulations themselves that clearly answered the question. Pet. App. 49a. The court also declined to give deference, under *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997), to the agency's appellate brief. Pet. App. 51a. The court stated that the brief was "written by the Department of Justice," and that the

brief "defend[ed] the actions of a disbanded Interior Department office, without—as far as we can tell—any consideration of the regulations by MMS's successor." *Ibid.* The court concluded that "[t]his is not the stuff of *Auer* deference." *Ibid.* The court therefore remanded to BSEE "to interpret its regulations in the first instance and to determine whether they apply in situations" like petitioner's and, if so, to "explain why." *Id.* at 51a-52a.

Senior Judge Williams concurred. Pet. App. 53a-58a. He "express[ed] doubt" that BSEE could sustain its decision on remand. *Id.* at 53a. He stated that, "when the government behaves as a market actor" and issues regulations that "govern[] the relationship between it and private-sector market actors in a manner parallel to what in the private sector would be controlled by contract or the common law," those regulations "are presumptively subject to the sort of implied caveats and qualifications that apply to comparable contract language or common law understandings." *Ibid.*

b. On remand, BSEE again ordered petitioner to plug the well promptly and permanently. Pet. App. 27a-40a. The order stated that "BSEE has thoroughly reexamined this issue in the course of preparing this order and has determined that the regulations impose decommissioning obligations independent of the contractual obligations in the lease." *Id.* at 36a. "Because the obligations are independent of the lease," the order explained, "they continue post-breach and require [petitioner] to permanently plug the well," even though petitioner's "contractual obligations were discharged due to the government's breach." *Ibid.*

BSEE based its conclusion "both on the terms of the decommissioning regulations and their purpose."

Pet. App. 36a. First, BSEE stated that "the regulations explicitly apply to more than just a current lessee, and the obligations extend beyond the life of the lease." *Ibid.* "[T]he entire regulatory scheme is premised on the decommissioning obligations being independent of the lease." *Id.* at 38a. "[T]he obligations may accrue on the leasehold before one becomes a lessee (as in this situation); the obligations apply to operators and former lessees, not just current lease owners; and the obligations remain owed until fulfilled, not until the lease is assigned, relinquished, or otherwise terminated." *Ibid.*; see *id.* at 37a-38a (detailing the operation of the relevant regulations). The fact that the lease itself also imposes decommissioning obligations, BSEE stated, "does not mean or imply that the obligations are merely contractual." *Id.* at 38a. "[R]ather, their inclusion reflects a 'belts and suspenders' approach to ensuring that the critical tasks of decommissioning, such as permanently plugging wells, are completed." *Ibid.* BSEE thus concluded that its order relied "on its public health and safety regulatory requirements," not on any contractual obligations. *Ibid.*

Second, BSEE explained that "[t]he independence of the decommissioning obligations from the lease" is "fundamental to fulfilling the purposes of the regulations." Pet. App. 38a. BSEE stated that, consistent with Congress's direction in 43 U.S.C. 1332, those regulations "serve to protect the environment and ensure wise stewardship" of public resources. Pet. App. 38a-39a. "Wells that have not been properly and permanently plugged and abandoned," BSEE explained, "pose a risk to the marine and coastal environment from potential oil discharges or gas explosions." *Id.* at 39a. BSEE concluded that the "implementing public

health and safety regulations do not exempt from their plugging and abandonment mandates any party who had an interest in the lease after a well was drilled on the basis of a change in the status of the contractual relationship." *Ibid.*

c. Petitioner again refused to comply and again sought relief in district court. The court granted summary judgment to the government. Pet. App. 6a-26a. The court deferred to BSEE's interpretation of its regulations because it was not "plainly erroneous or inconsistent with the regulation." *Id.* at 15a (quoting *United States Postal Serv.* v. *Postal Regulatory Comm'n*, 785 F.3d 740, 750 (D.C. Cir. 2015), and *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512, 514 (1994)). The court concluded that BSEE had "adequately explained, based on the purpose and the text of the regulations, its conclusion that the regulatory decommissioning obligations are wholly independent from the contractual decommissioning obligations" and therefore continue to apply even after a party is "freed from the contractual obligations." *Id.* at 19a-20a. The court rejected petitioner's argument that a "common-law of discharge" exception must be "read into the regulation." *Id.* at 20a. The court explained that "there is no authority to support importing the principle of discharge into a non-contractual obligation." *Id.* at 21a.

d. In an unpublished per curiam opinion, the court of appeals affirmed. Pet. App. 1a-5a. The court explained that "BSEE ha[d] determined that the regulations operate independently from any lease agreement and impose an independent obligation on [petitioner] to permanently plug" the well. *Id.* at 4a. The court concluded that this interpretation was not "plainly erroneous or inconsistent with the regulation," and there-

fore was "controlling." *Ibid.* (quoting *Auer*, 519 U.S. at 461). The court further held that, because petitioner "has a regulatory obligation independent of its contractual obligation to permanently plug" the well, "there is no conflict between the regulations and the common law of discharge, and *United States* v. *Texas*, 507 U.S. 529 (1993), does not apply." Pet. App. 4a.

ARGUMENT

The court of appeals correctly affirmed the district court's grant of summary judgment to the government, which upheld BSEE's order requiring petitioner to permanently plug the well that its predecessor drilled into the ocean floor on land leased from the United States. The court's unpublished per curiam decision does not conflict with any decision of this Court or any other court of appeals, is limited to the unusual facts of this case, and does not warrant further review.

Petitioner asks this Court to grant certiorari to decide (Pet. i) whether the court of appeals should have "appl[ied] the presumption that Congress intends positive law to retain common law principles absent clear evidence to the contrary, *United States v. Texas*, 507 U.S. 529 (1993)," rather than "deferring under *Auer v. Robbins*, 519 U.S. 452 (1997), to an agency's conclusion that its general regulations implicitly displace the common law." Petitioner also seeks review (Pet. i) of whether "the 'general' *Auer* presumption that Congress intended deference to the agency applies when this Court has recognized a specific countervailing presumption of congressional intent."

Neither question is presented here. BSEE did not conclude that its regulations displace the "discharge" rule from the common law of contracts. Rather, BSEE concluded that its regulations impose regulatory re-

quirements, independent from the lease contract, to permanently plug a well in order to protect health, safety, and the environment. Petitioner does not seek review of BSEE's interpretation of its own regulations. And as the court of appeals recognized, there is no common-law rule that a regulated entity becomes "discharged" from independent regulatory obligations when the government breaches a contract.

Petitioner also asks (Pet. i) this Court to grant certiorari to decide whether to overrule *Auer* and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). On several recent occasions, this Court has declined to consider whether to overrule *Auer* and other decisions affording deference to an agency's interpretation of its own regulation. See p. 15, *infra* (collecting cases). It should do the same here. This case would also be a poor vehicle for addressing those questions. Because BSEE adopted the best interpretation of its own regulations, the decision below would be affirmed even without deference. Indeed, the district court here initially reached the same interpretation on its own, without applying any kind of deference.

1. a. The court of appeals' decision is correct. Although petitioner asserts that BSEE's order fails to account for "the common law discharge rule" (Pet. 9), the "rule" to which petitioner refers is particular to the law of contracts. It is described by Section 237 of the Restatement (Second) of Contracts (1981), entitled "Effect on Other Party's Duties of a Failure to Render Performance," and provides in relevant part: "[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at

an earlier time." *Ibid.* This doctrine applies to situations where a party has "remaining duties to render performances * * * under an exchange of promises." *Ibid.* Pursuant to this doctrine, petitioner has been discharged of its *contractual* obligations, under its prior lease, to decommission the well here.

As the court of appeals concluded in the first appeal in this case, however, the background rule on which petitioner relies (the discharge rule) applies to contractual obligations, not to "independent statutory and regulatory obligations." Pet. App. 48a (citation omitted). Accordingly, so long as the regulatory decommissioning obligations here are independent, *Texas* is inapposite because there is no background common-law rule to displace. *Ibid.* BSEE determined that its "regulations impose decommissioning obligations independent of the contractual obligations in the lease," and that the regulatory obligations "continue post-breach and require [petitioner] to permanently plug the well." *Id.* at 4a. The courts below accepted BSEE's conclusion that its regulations impose independent obligations, see *id.* at 4a, 16a-20a, and there is no common-law rule that a material breach of a contract discharges a counter-party's independent *regulatory* obligation. The court of appeals therefore correctly held that "there is no conflict between the regulations and the common law of discharge," and that the *Texas* rule "does not apply." *Id.* at 4a.

To put it another way, *Texas* directs courts to favor "the retention of long-established and familiar" common-law principles as background rules that control unless superseded by statute or regulation. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). But this

Court has never directed courts to manufacture a new background rule—and to make it controlling—by *extending* common-law principles to novel and unfamiliar contexts, much less to do so when the expert agency tasked with administering the statute has found that such an extension would be contrary to the text and purpose of the overall scheme. And while petitioner asserts (Pet. 17 n.3) that the court of appeals' interpretation of *Texas* conflicts with decisions of other circuits, it identifies no other court of appeals that has addressed the application of *Texas* in a case where no background common-law rule is on point.

b. Relying on Senior Judge Williams's concurrence in the initial appeal in this case, petitioner briefly contends (Pet. 18-19) that the government "entered into the market for offshore oil and gas development 'as a rather standard market actor,'" and that its regulations "invade the common law" by not incorporating the discharge rule. *Ibid.* (quoting Pet. App. 53a). But petitioner does not seek this Court's review of any question specific to OCSLA or BSEE's implementing regulations. Instead, petitioner seeks review of more general questions about the *Texas* presumption. See Pet. i. As explained above, those broader questions are not presented here.

In any event, any argument concerning the proper interpretation of the OCSLA decommissioning regulations would not warrant this Court's review. No conflict of authority exists on this point; the issue has little current or prospective importance; and the decision below is correct. As BSEE explained, it did not promulgate the decommissioning regulations here solely in its capacity as an ordinary market actor. Rather, the government adopted them in its sovereign capacity

"for the protection of the environment and to ensure public health and safety on the [OCS]." Pet. App. 34a; see 43 U.S.C. 1332, 1348. "The decommissioning obligations take on particular importance because idle infrastructure poses a potential threat to the [OCS] environment, and the presence of idle platforms may harm navigation safety." Pet. App. 34a. Under the regulations, those obligations continue until decommissioning is complete, including after the responsible party has relinquished or assigned its lease interests, or the lease terminates. 30 C.F.R. 250.1701(a), 556.710, 556.1101(b). No provision allows for the discharge of those obligations due to material breach or any other circumstance.

2. Petitioner also seeks review (Pet. i) of whether "the 'general' *Auer* presumption that Congress intended deference to the agency applies when this Court has recognized a specific countervailing presumption of congressional intent." For the reasons set forth above, that question is not presented here. This Court has not "recognized a specific countervailing presumption of congressional intent," *ibid.*, that applies when interpreting statutes and regulations in this context. Rather, the court of appeals held that the *Texas* presumption "does not apply" here at all, because there is no common-law background rule that a regulated entity is discharged from independent regulatory requirements when the government breaches a contract. Pet. App. 4a.

3. Finally, petitioner asks (Pet. i) this Court to overrule both *Auer* and *Seminole Rock*. On a number of recent occasions, this Court has declined to consider whether to overrule *Auer* and other decisions affording deference to an agency's interpretation of its own

regulation. See, *e.g.*, Pet. i, *Gloucester Cnty. Sch. Bd.* v. *G.G.*, No. 16-273 (Aug. 29, 2016) (asking in question 1 whether "th[e] Court [should] retain the *Auer* doctrine"); *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 369 (2016) (granting review of questions 2 and 3 but not of question 1); see also *Flytenow, Inc.* v. *FAA*, No. 16-14, 2017 WL 69183 (Jan. 9, 2017); *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861); *Swecker* v. *Midland Power Coop.*, 136 S. Ct. 990 (2016) (No. 15-748); *Brown* v. *Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015) (No. 14-913); *Stewart & Orchards* v. *Jewell*, 135 S. Ct. 948 (2015) (No. 14-377); *Michigan Dep't of Cmty. Health* v. *Sebelius*, 133 S. Ct. 1581 (2013) (No. 12-589).[2] Petitioner identifies no reason why the Court should follow a different course here.

This case would be a poor vehicle for reconsidering *Auer* and *Seminole Rock*. First, although the court of appeals deferred to BSEE's interpretation of its regulations, the court of appeals' judgment would be affirmed even without deference because BSEE's interpretation is "the fairest reading of the [regulations] in question." *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring).

In its initial decision in this case, the district court rejected petitioner's argument without applying *Auer* or *Seminole Rock* deference, and without the benefit of any agency interpretation to which it could defer. Addressing the issue de novo, the court held that the regulations "establish an independent obligation to permanently plug and abandon all exploratory wells" that "was not discharged as to [petitioner] by the gov-

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[2] At least one other petition for a writ of certiorari pressing similar arguments is currently pending before the Court. See *Hyosung D&P Co.* v. *United States*, No. 16-141 (filed July 29, 2016).

ernment's breach of contract." 770 F. Supp. 2d at 331-332. The court found that the regulations "explicitly and comprehensively address the question of who bears decommissioning responsibilities and when those responsibilities accrue." *Id.* at 332. Specifically, "the obligation to permanently plug and abandon a well accrues upon the drilling of a well or, as in [petitioner's] case, upon becoming a lessee of a lease on which there is a well that has not been permanently plugged." *Ibid.* (citing 30 C.F.R. 250.1702). "Lessees and owners of operating rights are jointly and severally liable for meeting their decommissioning obligations for the facilities on the lease as the obligations accrue 'and until each obligation is met.'" *Ibid.* (quoting 30 C.F.R. 250.1701(a)). "Once a lessee has accrued a decommissioning obligation, it retains that obligation, notwithstanding transfer, assignment, or relinquishment of the lease." *Ibid.* (citing 30 C.F.R. 256.62(d), 256.64(a)(5), 256.76). "Indeed, the OCSLA regulations specify that this duty survives even the termination of the lease." *Ibid.* (citing 30 C.F.R. 250.1710).

Second, unlike *Auer*, this case does not involve deference to statements in the government's brief.[3] In the first appeal in this case, the court of appeals declined to defer to the government's litigation position, and instead remanded to BSEE to address this issue in the first instance through a formal agency order. Pet. App. 51a-52a. This case also does not implicate any potential concerns about an agency "writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later." *Perez* v. *Mortgage*

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[3] This case does not present the question whether *Auer* deference may extend to an unpublished agency letter, which is currently pending before the Court in *Gloucester County*.

Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring); see *id.* at 1210-1211 (Alito, J., concurring). The regulations here are technical, detailed, and specific, and BSEE has simply read them to mean what they say.

There is also no merit to petitioner's claim (Pet. 34) that the application of *Auer* here disrupted its purported "long-settled expectations" that, if the government materially breached the lease agreement, petitioner would be discharged from its decommissioning obligations under *both* its contract *and* BSEE's regulations. As explained above, there is no common-law rule that a material breach of a contract also discharges independent statutory or regulatory requirements. And no court or agency decision has found that a material breach of contract by the government has the effect of discharging the particular regulatory decommissioning obligations at issue here. The regulations state that a party must "permanently plug all wells on a lease within 1 year after the lease terminates," 30 C.F.R. 250.1710, and it contains no exception for cases where lease termination results from the government's breach.

Finally, petitioner is not without a remedy for the breach of contract that was found here. Petitioner has already shared in a $1.1 billion restitution award for that breach. Pet. App. 45a; see *Amber Res. Co.* v. *United States*, 538 F.3d 1358, 1367 (Fed. Cir. 2008). That judgment is final, and thus conclusively establishes the adequacy of that award as the remedy for the breach itself. Every lessee must bear the costs of plugging and abandonment once a well is drilled in the OCS, regardless of the returns they obtain from their investment in the lease. Petitioner would have been required to incur that cost if the well yielded no oil or

gas whatsoever and petitioner received no recovery. The fact that petitioner's recovery from the lease may be insufficient to cover its decommissioning expenses makes the enforcement of its regulatory obligations no less fair.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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