No. 16-368

IN THE
Supreme Court of the United States

NOBLE ENERGY, INC.,

Petitioner,

v.

K. JACK HAUGRUD, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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The petition raises three critical questions, regarding (1) the application of *United States v. Texas*, 507 U.S. 529 (1993), to agency regulations; (2) the proper application of countervailing presumptions of congressional intent; and (3) the continuing validity of deference to agency regulatory interpretations under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The Government's opposition scarcely addresses these questions, instead insisting that (1) the challenged Bureau of Safety and Environmental Enforcement ("BSEE") Order contains an indisputably correct interpretation of the agency's decommissioning regulations for Outer Continental Shelf ("OCS") oil and gas wells; and (2) this case is a poor vehicle to reconsider *Auer* and *Seminole Rock*.

Those arguments cannot square with the presumption recognized by this Court in *Texas* regarding the incorporation of common law principles into positive law; the closely intertwined relationship between Government offshore oil and gas leases, the OCS Lands Act, and BSEE's regulations; or the centrality of *Auer* to the reasoning of the D.C. Circuit in holding Noble to regulatory obligations to which it agreed as part of the bargain reached in Lease 320, a bargain broken by the Government's material breach of the lease. The legal issues presented are ripe for the Court's review and have far-reaching impacts on thousands of the Government's contractual counterparties and other regulated entities, lower courts weighing presumptions of congressional intent, and the administrative state. The Court should grant this petition.

ARGUMENT

I. This Case Directly Presents the Correct Application of *Texas*.

The Government's claim that Noble's first two Questions, Pet. i, are not "presented here" because the "court of appeals' decision is correct," Opp. 10, 11, is untenable as a matter of law and fact.

The Government devotes much of its argument to the claim that the *Texas* presumption does not apply the common law discharge rule to BSEE's decommissioning regulations because discharge "is particular to the law of contracts," not these "independent" regulatory obligations. Opp. 11–12. Not so.

1.a. To begin with, the Government's notion that OCS regulations are separable from the underlying lease contracts is belied by the OCS Lands Act provision authorizing BSEE's regulations in the first instance:

> The Secretary shall administer ***the provisions of this subchapter relating to the leasing of the outer Continental Shelf***, and shall prescribe such rules and regulations as may be necessary to carry out ***such provisions***.

43 U.S.C. § 1334(a) (emphases added). While the Secretary may prescribe "rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of natural resources," the OCS Lands Act expressly

confers that authority only to "operations ***conducted under a lease***." *Id*. (emphasis added). In short, "the statute gives the Secretary the authority to issue rules and regulations . . . [o]nly in connection with the administration of OCS mineral leases;" Section 1334 "does not give the Secretary the authority to promulgate . . . measures regulating other activities . . . ." *United States v. Alexander*, 602 F.2d 1228, 1231 (5th Cir 1979).[1]

Thus, the OCS regulations constitute precisely the kind of positive law into which common law contract principles such as discharge are read, absent clear indication of contrary legislative or regulatory intent. *See* Pet. 17 n.3. *Cf. Ins. Co. of the West v. United States*, 243 F.3d 1367, 1374 (Fed. Cir. 2001) (absent "explicit language" to the contrary, reading the common law of contracts relating to assignees into the Tucker Act grant of authority over contractual and other claims against the Government).

1.b. This is especially so given that Lease 320 and BSEE's regulations are inextricably intermeshed; among other things, both addressing the decommissioning obligations at issue here. Lease 320 expressly incorporates the OCS Lands Act as well as, *inter alia*, "***all regulations*** issued pursuant to . . . [the OCS Lands Act] in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental

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[1] While *Alexander* addressed the OCS Lands Act prior to the 1978 amendments to the statute, the salient passages of Section 1334(a) were not amended.

Shelf." C.A. JA 057, § 1 (emphasis added); *see also* C.A. JA 058, § 10. Compliance with BSEE's regulations is therefore part of the bargained-for exchange in the marketplace. *See* Pet. 4–6, 22.

Among its specific requirements, Lease 320 provided: "Within a period of one year after termination of this lease in whole or in part, the Lessee shall remove all devices, works, and structures from the premises . . . in accordance with all applicable regulations and orders . . . ." C.A. JA 060, § 22. Overall, Lease 320's "text is short, only four pages, shorter than many leases used in the private sector," and "[t]he regulations plainly function as a supplement to the lease . . . ." Pet. App. 53a–54a (Williams, J., concurring) (internal citation omitted).

1.c. Indeed, BSEE "promulgated regulations that exactly match the set of parties governed by its lease: itself and those lessees." Pet. App. 53a (Williams, J., concurring). More specifically, BSEE's regulations impose decommissioning obligations on "[l]essees and owners of operating rights . . . ." 30 C.F.R. § 250.1701(a).[2] The obligation to permanently plug and abandon a well itself is nearly identical to Section 22 of Lease 320, providing: "You must permanently plug all wells on a lease within one year after the lease terminates." *Id*. § 250.1710. The subsequent regulations simply detail the technical

[2] An "owner of operating rights" is a sub-category of lessees, and hold only a portion of the interest—for example, rights at different depths—granted in an offshore lease. Such holders are therefore generally included within the definition of "lessee." *See* 30 C.F.R. § 250.105.

specifications for permanently plugging a well. *See id.* §§ 250.1710–1716, 1725–1728; Pet. App. 54a ("[T]he specific [decommissioning regulations] here directly complement a lease provision" and "essentially repeat the terms of § 22 in more detail." (Williams, J., concurring) (internal citation omitted)).

2. In light of these overlaps, Noble is not "*extending* common-law principles to novel and unfamiliar contexts." Opp. 13. More broadly, because *Texas* only applies to read common-law background rules into positive law, the Government's position would deprive *Texas* of any meaning. Cases applying *Texas* to incorporate common-law principles into positive law are by definition applying principles that in the first instance did not arise from statutes or regulations.[3]

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[3] Contrary to the Government's suggestion, Opp. 13, courts have applied *Texas* regardless of whether the common-law rule is "on point" with the federal law at issue. *See*, *e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1323–25 (Fed. Cir. 2015) (common law laches defense presumptively included in Patent Act), *cert. granted*, 136 S. Ct. 1824 (2016); *Exact Software N. Am., Inc. v. DeMoisey*, 718 F.3d 535, 543 (6th Cir. 2013) (statutory limitations on federal courts' supplemental jurisdiction did not abrogate jurisdiction to resolve fee disputes where statute "does not speak to fee disputes and nothing in the statute suggests that Congress meant otherwise"); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 128 (2d Cir. 2001) (RICO presumptively incorporates common law "revenue rule" regarding the enforcement of foreign taxes); *Kasza v. Browner*, 133 F.3d 1159, 1167–68 (9th Cir. 1998) (Resource Conservation and Recovery Act does not displace the common law privilege for state secrets).

It is thus irrelevant whether the common-law principle was originally designed to apply directly to "regulatory obligations," because *Texas* holds that the regulations "despite their literal language, should be read in light of the common law principles that governed parallel transactions in the private sector." Pet. App. 57a–58a (Williams, J., concurring).

To the extent the concept of an "exchange" is pertinent, Opp. 11–12, Noble agreed to abide by the regulations in exchange for the opportunity to develop the oil and gas resources underlying the lease. The Government's material breach of the lease deprived Noble of the latter, and the doctrine of discharge appropriately holds that, as a consequence, the Government cannot now insist upon the former.

3. The Government's related contention that Noble "does not seek review of BSEE's interpretation of its own regulations," Opp. 11, 13, is similarly without merit. Noble has directly challenged BSEE Orders purporting to read the agency's regulations to require Noble permanently to plug and abandon the 320 #2 well notwithstanding the Government's material breach. Pet. App. 27a, 59a. The *Texas* presumption concerns the ***content*** of positive law that invades areas—like mineral leasing—previously covered by the common-law (and, here, contracts), and the incorporation of common law principles into the content of such positive law as an "interpretive gloss on the[ir] . . . literal language." Pet. App. 58a (Williams, J., concurring). Only a statutory or regulatory provision that "speak[s] directly" to the issue addressed by the common law, *Texas*, 507 U.S. at

534–35 (quotation omitted), alters this result; the Government has never identified one.

Far from an issue of "little current or prospective importance," Opp. 13, the proper application of well-known common-law principles is important to all federally regulated entities, and the discharge rule itself relevant to the Government's myriad contractual counterparties. Indeed, lessees alone have entered roughly 8,000 active OCS leases[4] and provided more than $5 billion of revenues to the Government in fiscal year 2015 alone.[5] That BSEE's regulations may serve an environmental purpose, Opp. 13–14, is irrelevant—the fact that a given well should be permanently plugged and abandoned says nothing about ***who*** is responsible.[6] Indeed, Noble has no capacity itself permanently to plug and aban-

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[4] Bureau of Ocean Energy Management, *Oil and Gas Leasing in the Outer Continental Shelf* 1, *available at* https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf (last visited Feb. 23, 2017).

[5] Dep't of Interior, Office of Natural Resources Revenue, Statistical Information, *available at* http://statistics.onrr.gov/ReportTool.aspx (Reported Revenues (Single Year Only), FY2015, Federal Offshore, All Offshore Regions) (last visited Feb. 23, 2017).

[6] The decommissioning regulations' application to assignors, Opp. 14, only confirms the connection between the common-law and regulations that supports application of *Texas*. Such assignor liability has long been a feature of the common-law. *See Chieftain Int'l (U.S.), Inc. v. Southeast Offshore, Inc.*, 553 F.3d 817, 819 (5th Cir. 2008) (holding assignor liable for costs associated with lease abandonment because assignment, "by itself, did not release [assignor] from its obligations" to co-lessees); Restatement (Second) of Contracts § 318(3) (1981).

don wells, and would—like the Government—need to engage one or more third party contractors.

II. This Case Directly Presents the Appropriate Application of Competing Presumptions.

The petition also presents an important question, as to which the Courts of Appeals are in significant disarray, regarding competing presumptions of Congressional intent, and the inapplicability of general presumptions (like *Auer*) in light of a specific (here, *Texas*) presumption. Pet. i, 23–32. The Government does not dispute the gravity of this issue or the growing necessity of this Court's guidance, instead doing little more than repeating its untenable claim that *Texas* does not apply to begin with. Opp. 14. The little additional argument is a misstatement of the D.C. Circuit's opinion and BSEE's Order.

The D.C. Circuit did not find *Texas* inapplicable "because there is no common-law background rule that a regulated entity is discharged from independent regulatory requirements . . . ." Opp. 14. Rather, the D.C. Circuit held that *Texas* does not apply because there is no "conflict" between BSEE's regulations and the common law discharge doctrine. Pet. App. 4a. That is simply the wrong standard, a point expounded at length in the petition, Pet. 15–23, and ignored in the Opposition.

Moreover, the D.C. Circuit reached this conclusion only by deferring under *Auer* to BSEE's Order interpreting the decommissioning regulations, Pet. App. 4a, an Order that in turn simply states

that the regulations are "independent," Pet. App. 36a. The decision thus squarely presents for this Court's clarification the manner in which the *Texas* presumption's specific teaching on the content of positive law impacts the general presumption of *Auer* deference, as well as broader issues of general versus specific presumptions. Pet. 23–32.

III. This Case Is an Excellent Vehicle to Reconsider *Auer*.

The Government does not substantively dispute that *Auer*'s continuing viability is fit for this Court's review. Nor could it; reconsideration of *Auer* has broad implications for the administrative state and the separation of powers, and has accordingly been the subject of numerous calls for reconsideration from within the Court. Pet. 35.

While this Court has declined to consider whether to overrule *Auer* in several instances, Opp. 14–15, each of those cases appear to have suffered from vehicle problems not present here. In brief, the cited petitions for certiorari: (1) included the threshold question whether *Auer* deference applied to the form of agency statement in which the regulatory interpretation was made;[7] (2) involved a Court of Appeals decision finding the regulatory language unambiguous;[8] (3) did not involve a direct applica-

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[7] *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16-273, (Aug. 29, 2016) (whether *Auer* applies to agency letter).

[8] *See Michigan Department of Community Health v. Sebelius*, No. 12-589 (Nov. 7, 2012) (*Mich. Dep't of Cmty. Health v. Sebelius*, 496 F. App'x 526, 532–33 (6th Cir. 2012)); *Brown v.* (...continued)

tion of *Auer*;[9] or (4) lacked an on-point regulation for the agency to interpret.[10] The pending petition in *Hyosung D&P Co. v. United States*, No. 16-141 (July 29, 2016), suffers similar shortcomings.[11]

Justice Thomas strongly dissented from a recent denial because, among other things, *Auer* deference encourages agencies to enact vague laws and then legislate through later interpretation, which "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government," *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)),

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Columbia Gas Transmission, LLC, No. 14-913 (Jan. 21, 2015) (*Columbia Gas Transmission, LLC v. Brown*, 768 F.3d 300, 309 (3d Cir. 2014)); *United Student Aid Funds, Inc. v. Bible*, No. 15-861 (Jan. 4, 2016) (*Bible v. United Student Aid Fund, Inc.*, 799 F.3d 633 (7th Cir. 2015) (decision split three ways, and a majority of the judges did not consider regulation ambiguous)). *See also Bible* Opp. 1–2.

[9] *See Flytenow, Inc. v. Federal Aviation Administration*, No. 16-14 (June 24, 2016) (considering deference to agency interpretation "predominantly" of the common law); *Stewart & Jasper Orchards v. Jewell*, No. 14-377 (Sept. 30, 2014) (lower court decision applied deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[10] *See Swecker v. Midland Power Coop.*, No. 15-748, Opp. 1–2 (Dec. 10, 2015).

[11] The Petitioner in *Hyosung* has recently asserted that the case should be held pending the Court's decision in *Gloucester County*, which, like *Hyosung*, involves the threshold question whether *Auer* deference is warranted for a particular form of agency pronouncement. *See* Petition i; Reply 1–3.

by letting "'[h]e who writes a law' also 'adjudge its violation,'" *id*. at 1609 (quoting *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1343 (2013) (Scalia, J., dissenting)). That is precisely the danger threatened by the D.C. Circuit's resort to *Auer* here. *See* Pet. 32–35.

The Government's remaining objections that this case is a poor vehicle to reconsider *Auer*, Opp. 17, are equally without merit.

First, the Government argues that *Auer* deference was irrelevant to the D.C. Circuit's decision because "BSEE adopted the best interpretation of its own regulations . . . ." Opp. 11, 15. But *Auer* deference to BSEE's interpretation was the sole stated basis of the D.C. Circuit's decision. Pet. 4a. Moreover, Noble thoroughly demonstrated the many failings in BSEE's interpretation—both the failure to apply the *Texas* presumption and, even setting aside *Texas*, the inextricable connection between the OCS Lands Act, OCS leases, and BSEE's regulations. *See* Pet. 11–23 & n.4; *supra*. That connection—and the BSEE regulations' adoption of common-law principles elsewhere, *see supra* n.6—equally indicates the applicability of the common-law discharge rule.

Second, the Government's suggestion that *Auer* is not implicated because this case "does not involve deference to statements in the government's brief," Opp. 16, ignores the scope of *Auer,* which involves both general deference to formal agency interpretations, and deference to agency interpretations in legal briefs. *See Auer*, 519 U.S. at 461 (explaining that the agency's interpretation of its

"own regulations . . . is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation'" (quoting, *inter alia*, *Seminole Rock*, 325 U.S. at 414); *id.* at 462–63 (rejecting argument that well-established deference is not owed to interpretation in legal brief (distinguishing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

Nor does the technical nature of the regulations mean that Noble lacked a legitimate expectation in discharge of all remaining obligations stemming from the lease following the Government's material breach. Opp. 16–17. That some regulations contain "technical" details on how to plug a well does not fill the regulations' silence as to the consequences of the Government's material breach of the lease from which all the regulatory obligations flow.

Third, the Government's restitution of the $1.2 million lease bonus paid to the Government to acquire Lease 320, Opp. 17, is beside the point. Both restitution and discharge are appropriate remedies for material breach—one retrospectively returning the wronged party to its pre-contract position, and the other prospectively preventing the breaching party from imposing future obligations on the wronged party arising out of the breached contract relationship. Noble's investment failed not for lack of oil and gas resources, but because the Government's actions deprived Noble of the benefits of the contract. Noble should not now be held to obligations it shouldered in return for the opportunity to develop Lease 320.

The validity of *Auer* is an important question that should not wait any longer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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