ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-5036, 22-5037

IN THE

United States Court of Appeals for the District of Columbia Circuit

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FRIENDS OF THE EARTH, *et al.*,

Plaintiffs-Appellees,

– v. –

DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, *et al.*,

Defendants-Appellees,

AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-02317-RC, Hon. Rudolph Contreras

FINAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CIRCUIT RULE 28(a)(1) STATEMENT

As required by Circuit Rule 28(a)(1), counsel for the Institute for Policy Integrity at New York University School of Law certify as follows:

(1) All parties, amici, and intervenors appearing in this case to date are listed in Intervenors-Appellants' briefs.

(2) References to the final agency action under review and related and consolidated cases appear in Intervenors-Appellants' briefs.

RULE 26.1 DISCLOSURE STATEMENT

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Bureau of Ocean Energy Mgmt., *All Lease Offerings* (2022), https://perma.cc/N6MV-8DN7 .... 14, 15

Bureau of Ocean Energy Mgmt., *Outer Continental Shelf Oil and Gas Leasing Program: 2017–2022, Final Programmatic Environmental Impact Statement* (2016) 25

Bureau of Ocean Energy Mgmt., *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012–2017* (2012)............. 22, 23, 24

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Minerals Mgmt. Serv., *Proposed Final Program Outer Continental Shelf Oil and Gas Leasing Program 2007–2012* (2007) 23

U.S. Dep't of the Interior, *5-Year OCS Oil and Gas Leasing Program* (1980) 24

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

API	American Petroleum Institute
Interior	U.S. Department of the Interior, including its subagencies
NEPA	National Environmental Policy Act
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law (Policy Integrity) is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, focusing primarily on environmental issues.[1]

Policy Integrity has commented on offshore-planning and -leasing decisions, published reports on fossil fuel management, and participated in related litigation. One of its attorneys, Max Sarinsky, recently testified before Congress on offshore leasing's climate effects. *What More Gulf of Mexico Oil and Gas Leasing Means for Achieving U.S. Climate Targets: Hearing Before H. Nat. Res. Subcomm. On Energy & Mineral Res.*, 117th Cong. (2022) (statement of Max Sarinsky), https://perma.cc/5R25-XAXB. Its expertise in environmental and administrative law, especially regarding offshore leasing, provides a unique perspective on this case.

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[1] Per Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief wholly or partly, and no person contributed money intended to fund its preparation or submission.

Policy Integrity submits this *amicus curiae* brief to address Intervenor-Appellant American Petroleum Institute's (API) argument that the Department of the Interior (Interior)[2] may not consider non-local environmental effects of offshore leasing, including downstream emissions. API Br. 30–33.

All parties have consented to the filing of this brief. A single joint *amicus curiae* brief is not practicable due to the numerous and complicated legal issues involved.

SUMMARY OF ARGUMENT

According to API, the Outer Continental Shelf Lands Act (OCSLA) bars Interior from considering non-local environmental effects—including "downstream" emissions from fossil-fuel consumption—when administering the offshore-leasing program. API Br. 30–33. This contention is wrong for several reasons.

I. Start with OCSLA's text. API points to no provision governing Interior's authority over individual leasing decisions (like the lease sale here); it cites instead a provision governing the initial planning stage (43

[2] "Interior" refers to the Department of the Interior and its current and former entities (e.g., the Minerals Management Service and Bureau of Ocean Energy Management).

U.S.C. § 1344) that does not govern leasing. API Br. 31. Even assuming this planning-stage provision applies to individual leasing decisions, API's textual arguments still fail. OCSLA gives Interior broad discretion to craft an offshore-leasing program that it determines best meets "national energy needs" and that is also "consistent with" several statutorily enumerated "principles" requiring consideration of local environmental effects, among other factors. 43 U.S.C. § 1344(a). Contrary to API's argument, however, these principles are not an exhaustive list of factors Interior may consider when determining how best to meet "national energy needs." In fact, numerous OCSLA provisions indicate that Interior has discretion to consider a broad range of factors, including non-local environmental effects, when making that determination.

II. OCSLA's legislative history further confirms that Interior may consider non-local environmental effects. Congress enacted OCSLA in 1953 and overhauled it in 1978 in response to the energy crisis caused by the 1973–74 oil embargo. The House and Senate Reports for the 1978 amendments demonstrate that, while Congress wanted to ensure Interior retained broad discretion when making offshore-leasing

decisions, lawmakers were also concerned about environmental harm from OCS energy production and consumption. In fact, Congress believed increased OCS development would alleviate a near-term energy crisis while causing "substantially less harm to the environment," including through its downstream effects, "than most other sources" then available. S. Rep. No. 95-284, at 42 (1977). Over time, however, Congress expected that new and potentially cleaner energy sources would emerge. Lacking a crystal ball, Congress left it to Interior to determine how best to meet national energy needs through offshore leasing while also "considering all the economic, social, and environmental impacts of oil and gas activities." H. Rep. No. 95-590, at 149 (1977).

III. Interior has done that over the past four decades. Since at least the 1980s, Interior has considered downstream environmental effects, including greenhouse gas emissions, at both the planning and leasing stages. In earlier analyses, when cleaner sources were less widely available, Interior highlighted downstream environmental advantages of OCS natural gas relative to dirtier alternative sources such as coal, noting, for example, that natural gas is an "environmentally preferred source of energy for electricity generation." Minerals Mgmt. Serv.,

Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2002–2007 at 71 (2002) ("2002 Plan"). As technology has developed and coal generation declined, Interior has recognized the downstream benefits of alternative renewable sources and attempted to quantify the impact of leasing on total emissions.

IV. Finally, although API believes caselaw is on its side, API Br. 33, no binding holding of this Court bars Interior from considering non-local environmental effects. The case API cites holds only that OCSLA does not require Interior to consider such effects. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior* ("*CBD*"), 563 F.3d 466, 484 (D.C. Cir. 2009). The case's dicta admittedly goes further, but the dicta is based on a flawed analysis that disregards key OCSLA text and history. Consistent with that text and history, this Court later rejected an argument similar to the one API makes here, holding that OCSLA does not bar Interior from considering environmental effects beyond the OCS. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 606–07 (D.C. Cir. 2015). Moreover, decisions from other courts cut against API's argument.

For all these reasons, this Court should reject API's argument that OCSLA prohibits Interior from considering non-local environmental effects.

ARGUMENT

I. OCSLA's Text Does Not Bar Interior From Considering Downstream Effects When Making Leasing Decisions.

According to API, the only environmental effects that Interior may consider under OCSLA are local ones. API Br. 31–32. To the contrary, OCSLA grants Interior discretion to consider a wide range of environmental effects in identifying an offshore-leasing program that best meets national needs.

API's crabbed understanding of Interior's authority is based on a few isolated provisions taken out of context, so it helps to take a step back and walk through OCSLA's basic framework. To begin with, OCSLA is "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt* ("*Watt I*"), 668 F.2d 1290, 1297 (D.C. Cir. 1981). Ignoring this structure, API relies on the OCSLA section governing first-stage planning of the lease program (§ 1344), not the sections governing later lease sales (§§ 1334 and 1337). API Br. 31–32

(citing only § 1344). The lease-sale sections "authorize" Interior to sell leases but do not require such sales or constrain Interior's discretion to forgo them. 43 U.S.C. § 1337(a)(1). In fact, OCSLA's lease-sale sections do not reference its planning requirements in § 1344 or provide that Interior is restricted from forgoing leasing based on them.

As this Court recognized, Interior "may list areas [in its five-year plan] that [it] does not intend to lease." *CBD*, 563 F.3d at 483. And Interior often does so. *See* Cong. Rsch. Serv., Five Year Program for Offshore Oil and Gas Leasing: History and Program for 2017–2022, at 10 tbl.1 (Aug. 23, 2019), https://perma.cc/R2XQ-8GK3 (showing Interior held many fewer lease sales than proposed in prior five-year plans). Despite the distinctions between planning and leasing, API offers no basis for reading § 1344's planning-stage standards into §§ 1334 and 1337, which govern the lease sale here.

Even assuming § 1344 were applicable, API's argument still fails. The first sentence of § 1344 directs Interior to "prepare . . . and maintain an oil and gas leasing program to implement the policies of this subchapter." 43 U.S.C. § 1344(a). The "policies of this subchapter" are found in § 1332, which declares, among other things, that the OCS "is a

vital national resource reserve" that should be developed "in a manner which is consistent with the maintenance of competition and other national needs." *Id.* § 1332(3).[3] The second sentence of § 1344(a) then directs Interior to craft a "leasing program . . . indicating . . . the size, timing, and location of leasing activity which [Interior] determines will best meet national energy needs[.]" *Id.* § 1344(a). OCSLA thus gives Interior broad discretion to craft a leasing program that it determines best meets "national needs" and "national energy needs."

Courts must give such "general words . . . their full and fair scope." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012). And they have done so when interpreting similar general words. Take the Ninth Circuit's explanation that "such terms as 'that (which) will best meet the needs of the American people' . . . 'breathe[] discretion at every pore.'" *Perkins v. Bergland*, 608 F.2d 803,

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[3] Multiple other sections echo this emphasis on development consistent with national interests. *See* 43 U.S.C. § 1801(7) (finding the OCS "must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest"); *Id.* § 1802(1) ("establish[ing] policies and procedures . . . to achieve national economic and energy policy goals"); *Id.* § 1345(c) (requiring Interior to "balance . . . the national interest and the well-being of the citizens of the affected State").

806 (9th Cir. 1979) (cleaned up). Or consider this Court's observation that there is "no conflict" between assessing environmental effects and a statutory command to consider "the need of the Nation to conserve energy" in developing vehicle fuel-efficiency standards. *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 263 n.27 (D.C. Cir. 1988); *accord Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (reaching same conclusion under provision addressing "need for national energy . . . conservation").

According to API, Interior's discretion is constrained to local environmental considerations by § 1344(a)'s subsections, API Br. 31 (citing § 1344(a)(1), (a)(2)(A), (G)–(H)), which provide that the leasing program that Interior "determines will best meet national energy needs" must also be "prepared and maintained in a manner consistent with the . . . principles" contained in § 1344(a)(1)–(4). This constraint does not have the meaning that API attributes to it. Although some of the "principles" in § 1344(a)(1)–(4) do have a local focus, *see, e.g.*, § 1344(a)(2)(A), API erroneously concludes that these provisions take non-local considerations "off the table entirely," API Br. 32. Had Congress wanted to constrain Interior's authority in this way, it easily

could have done so explicitly. Congress instead said that the leasing program that Interior "determines best meets national energy needs" must be "consistent with" the principles in § 1344(a)(1)–(4), meaning "compatible," Merriam-Webster's New Collegiate Dictionary 266 (11th ed. 2014).

A leasing program that considers non-local effects—such as one that analyzes how varying amounts of OCS development would alter the relative volumes of different energy sources and the knock-on environmental and economic effects of those various amounts, *see Jewell*, 779 F.3d at 603—can easily be "consistent with" one that also considers the principles in § 1344(a)(1)–(4), including those with a local focus. *Cf. O.A. v. Trump*, 404 F. Supp. 3d 109, 150 (D.D.C. 2019) (interpreting different statute's use of "consistent with" to mean "compatible" and as permitting consideration of additional factors if "compatible" with the statute).

Contrary to API's reading, the principles act as a floor for what Interior must consider—which makes sense given that Congress's decision to amend OCSLA was a reaction to unbridled OCS leasing that catered to the petroleum industry. *See infra* Part II. But the principles

do not bar Interior from considering other relevant factors when determining "national energy needs." 43 U.S.C. § 1344(a). In other words, OCSLA "provides [Interior] with broad standards to govern promulgation of the leasing program—it must best meet national energy needs and be consistent with enumerated principles—but leaves it to the Secretary to devise a program satisfying those broad standards." *Watt I*, 668 F.2d at 1301.

Moreover, the principles in § 1344(a)(1)–(4) are not exclusively focused on local effects, as API believes. For example, subsection (a)(1) instructs Interior to "consider[] economic, social, and environmental values of the renewable and nonrenewable resources contained in the [OCS]." 43 U.S.C. § 1334(a)(1). API reads "contained in the [OCS]" as limiting the location of effects that may be considered, API Br. 31, but the phrase limits only the "resources" at issue (to those in the OCS). It does not constrain how Interior may assess the "economic, social, and environmental values" of OCS resources, which may have values that accrue nationally or even internationally.[4]

[4] Avoiding redundancy also requires that the first clause of § 1344(a)(1) be understood to encompass something different from the second, which

Of course, some of the principles in § 1344(a)(1)–(4) direct Interior to consider local environmental harms, namely those in § 1344(a)(2) that API cites. API Br. 31. But § 1344(a)(2) provides only that the "timing and location"—not the size—of OCS production "shall be based on a consideration of" the local effects that API identifies. In contrast, § 1344(a)'s preamble makes clear that the "*size*, timing, and location of leasing activity [is that] which [Interior] determines will best meet national energy needs." (emphasis added). The notable omission from § 1344(a)(2) indicates Congress did not intend to limit Interior's discretion regarding the "size" of the leasing program to the local considerations in § 1344(a)(2). Furthermore, as noted above, Congress provided that the leasing program must be "consistent with" the principles in § 1344(a)(1)–(4), and a leasing schedule whose timing and location accounts for local considerations is "consistent with" one whose size accounts for additional environmental considerations. *Cf. Jewell*, 779 F.3d at 603 (approving comparative consideration of on-shore substitution effects not expressly listed in § 1344(a)(1)–(4)).

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directs Interior to consider "the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments."

Finally, OCSLA envisions a robust review under the National Environmental Policy Act (NEPA) for all lease sales, 43 U.S.C. § 1346(a), and further states that "[e]xcept as otherwise expressly provided," the statute should not "be construed to amend, modify, or repeal any provision" of NEPA, *id.* § 1866(a). At the time of the 1978 OCSLA amendments, Council on Environmental Quality (CEQ) guidance advised agencies to include "[s]econdary or indirect . . . consequences" in their NEPA analysis. Council on Env't Quality, Preparation of Environmental Impact Statements Guidelines, 147 Fed. Reg. 20,550, 20,553 (Aug. 1, 1973). In November 1978, CEQ adopted that requirement in regulations that remain effective today. 40 C.F.R. § 1508.1(g)(2). Under that requirement, agencies "typically include" downstream environmental effects in NEPA reviews of "resource extraction and development projects." Council on Env't Quality, Final Guidance for Fed. Depts. and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in Nat'l Env't Policy Act Reviews 14 (2016) (withdrawn Apr. 5, 2017; under review Feb. 19, 2021, for revision and update); *see also id.* at 16 n.42 (counseling agencies to consider "impacts associated with the end-use of the fossil fuel being extracted").

*   *   *

Considered as a whole, OCSLA's text authorizes Interior to determine the OCS leasing program that will best serve national needs, and nothing bars Interior from considering environmental effects outside the OCS when making that determination. But if there were any doubt, OCSLA's legislative history further clarifies that Interior may consider downstream environmental effects, as detailed next.

II. OCSLA's Legislative History Shows That Congress Sought To Address A Short-Term Energy Crisis While Balancing Environmental Concerns.

Congress enacted OCSLA in 1953 to assert exclusive federal jurisdiction and control over the seabed and subsoil of the OCS. Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462, 462 (1953). As originally enacted, OCSLA granted Interior a "carte blanche delegation of authority" over the nation's OCS leasing program. *See* S. Rep. No. 95-284, at 43; 67 Stat. 462, § 5.

Initially, OCS leasing was limited. Interior held only 24 relatively small lease sales in the first 15 years after OCLSA's enactment, and, after the Santa Barbara oil spill in 1969, halted all leasing outside the Gulf of Mexico for five years. *See* Bureau of Ocean Energy Mgmt., *All*

Lease Offerings (2022) ("*All Lease Offerings*"), https://perma.cc/N6MV-8DN7. In the mid-1970s, however, increased dependence on imported oil and the 1973–1974 oil embargo created an acute energy crisis that prompted a drastic increase in leasing activity. President Nixon directed Interior to extend leasing to all OCS areas and to triple the acreage offered. Richard Nixon, Special Message to the Congress on Energy Policy (Apr. 18, 1973), https://perma.cc/MU4X-NL62. Over the next five years, Interior offered for lease nearly 20 million offshore acres—more than it had in the entire 19-year period since the leasing program began. *See All Lease Offerings*.

The rapid pace of OCS leasing "crystalized growing concern on the part of many in Congress and elsewhere about the open-ended authority granted in the 23-year-old legislation." H. Rep. No. 94-1084, at 73–74 (1976). Among other things, representatives worried that "the present law's grant of total discretion to [Interior] led to a situation where the petroleum industry had a too dominant voice" and "provide[d] too many advantages for industry at the possible expense of the taxpayer." *Id.* at 76, 78. And many in Congress were concerned that this "closed process" for leasing failed to reflect the public's growing "environmental protection

concerns." *Id.* at 48, 74 (internal quotation marks omitted). Congress acted in 1978 by significantly amending OCSLA. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978).

These amendments gave structure to the national leasing program by mandating a five-year planning schedule and, as discussed above, setting out principles for OCS development "subject to environmental safeguards" and "in a manner . . . consistent with . . . national needs." 43 U.S.C. § 1332(3). While adding principles and planning requirements, the 1978 amendments substantively preserved OCSLA's preexisting leasing provisions and did not restrict Interior's authority to not lease a parcel. *See supra* p. 5–6.

These amendments were grounded in three core and related ideas, as reflected in the Senate and House Reports leading up to enactment: (1) that increased production of oil and gas in the OCS in the short-term would help overcome the 1970s energy crisis; (2) that OCS oil and gas production was favored in part because it was environmentally desirable when compared to then-available alternatives; and (3) that, in the future, Interior would need to balance a wide range of considerations as fuel sources and national needs changed.

First, Congress was focused on the 1970s energy crisis and saw "expeditious yet safe" OCS development as a way to address immediate energy demand. H. Rep. No. 95-1474, at 76 (1978) (Conf. Rep.); *see* H. Rep. No. 95-590, at 53. But Congress did not necessarily expect OCS leasing to remain at elevated levels indefinitely. All the Senate reports leading up to the amendments' enactment focus on OCS production "during the next decade" and highlight the need to structure development activity taking place in the "next few years." *E.g.*, S. Rep. No. 95-284, at 42; S. Rep. No. 94-284, at 1–2 (1975) (same). Rather than mandate indefinite and unbridled drilling—already possible under the original OCSLA—the amendments embodied an effort to "improve the short- and medium-term supply of domestic primary fuels" from the OCS, S. Rep. No. 93-1140, at 1–2 (1974), while implementing "standards and criteria" to guide the leasing program moving forward, S. Rep. No. 95-284, at 43.

Second, Congress considered offshore oil and gas production more environmentally favorable than other available fuel sources within this near-future timeframe. For instance, the final Senate report recognized that despite "justified concern of many people over the potential damage to the environment" resulting from OCS development, OCS oil and gas

was expected to "supply [energy] with substantially less harm to the environment than most other sources" then available. S. Rep. No. 95-284, at 42. In particular, this report noted "an increasing feeling that responsible OCS development may well be more acceptable environmentally than other potential domestic energy resources such as massive strip mining for coal and oil shale." *Id.*; S. Rep. No. 93-1140, at 3 (same).

This assessment of the desirability of OCS oil and gas was based in part on the downstream environmental effects of competing fuel sources. A CEQ report on the environmental effects of boosting OCS production that was a "major focus" of congressional hearings, S. Rep. No. 94-284, at 23, explained that, "[i]n its extraction *and end uses*, coal presents a number of environmental problems," making "coal-fired powerplant systems [] the least desirable from an environmental standpoint." Council on Env't Quality, *OCS Oil and Gas: An Environmental Assessment* 41 (1974) (emphasis added), https://babel.hathitrust.org/cgi/pt?id=uva.35007000492391&view=1up&seq=7. The report further noted that "air and water, solid wastes, and land use impacts are higher with coal-fired systems than with oil, gas, or

nuclear systems." *Id.* Representatives thus considered downstream effects and determined that OCS leasing was beneficial because it was capable of providing energy "at a lower expense than most [then-available] alternatives in terms of development *and impact* costs." H. Rep. No. 95-590, at 53 (emphasis added).

Third, Congress understood that national energy needs could evolve over time and that the nation's reliance on fossil fuels could change. For example, the final House report anticipated that "[d]evelopment of our OCS resources will afford us needed time—as much as a generation—within which to develop alternative sources of energy . . . [and] provide time to bring on-line, and improve energy technologies dealing with, solar, geothermal, oil shale, coal gasification and liquefaction, nuclear, and other energy forms." *Id*. Congress thus drafted OCSLA to guide Interior's management of these resources "in a manner which takes into consideration the Nation's long-range energy needs." 43 U.S.C. § 1801(14).

To that end, Congress empowered Interior to consider the availability and relative environmental effects of competing energy sources. For example, the final law omitted language that would have

required all productive lands to "[be made] available for leasing as soon as practicable," S. Rep. No. 93-1140, at 6, due to concerns that such development "may involve undesirable environmental or other effects," S. Rep. No. 94-284, at 48. Congress instead directed Interior to administer the leasing program to "best meet national energy needs," 43 U.S.C. § 1344(a), which the final House report explained would require Interior to "weigh environmental and other risks against energy potential and other benefits" in a manner that "consider[s] all the economic, social, and environmental impacts of oil and gas activities," H. Rep. No. 95-590, at 149. As part of such an analysis, a Senate report explained that Interior would consider "alternatives to large scale expansion of [OCS] leasing" and how the leasing program "relate[s] to national energy goals and plans." S. Rep. No. 94-284, at 17–18 (highlighting General Accounting Office policy report). As this Court has recognized, these provisions granted Interior broad discretion to weigh elements that "may well shift with changes in technology, in environment, and in the nation's energy needs." *Watt I*, 668 F.2d at 1317.

API's assertion that OCSLA bars Interior from considering downstream emissions is thus at odds with not only OCSLA's text but

also its legislative history. Congress did not intend for Interior to blind itself to the downstream effects of oil and gas in relation to available alternatives when administering a leasing program that "balance[s] orderly energy resource development with protection of the human, marine, and coastal environments." 43 U.S.C. § 1802(2)(B).

III. Interior Has Long Considered Downstream Effects When Administering The OCS Leasing Program.

As Congress intended, Interior has for decades considered downstream environmental effects in some form in administering the OCS leasing program—both when developing five-year plans and assessing individual lease sales. This provides further proof that OCSLA does not bar Interior from considering non-local environmental effects. *See Smiley v. Citibank*, 517 U.S. 735, 740 (1996) ("[A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist.").

A. Interior frequently considers downstream environmental effects in its five-year plans.

Interior has published nine five-year plans since the 1978 amendments. As noted above, these plans propose a leasing schedule that

Interior determines will "best meet national energy needs." 43 U.S.C. § 1344(a). Interior has recognized that "[e]nergy needs . . . is a broad term that includes" many "aspects of national welfare affected by the availability of appropriate quantities and qualities of oil and gas." Bureau of Ocean Energy Mgmt., *2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program* 1-3 (2016) ("2017 Plan"). To assess national energy needs, Interior analyzes the current energy mix in the market, projected demand for energy, the most likely alternative energy mix that would emerge without OCS leasing, and the relative environmental effects of those alternative energy mixes. *See, e.g.*, Bureau of Ocean Energy Mgmt., *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012–2017* at 100–114 (2012) ("2012 Plan"). This analysis often leads to direct comparisons between fuel sources, including downstream environmental effects—comparisons that would be irrelevant if OCSLA required Interior to disregard non-local environmental effects.

Interior first considered the environmental advantages of natural gas relative to other fossil fuels in 1987. That and the next several five-

year plans described natural gas as "clean burning" (1987, 2007, 2012),[5] the "cleanest form of fossil fuel" (1997),[6] and a "clean burning, environmentally preferred source of energy for electricity generation" (2002).[7] Reflecting its advantages over the alternative energy sources then available, Interior specifically noted that "[t]he use of natural gas results in significantly lower emissions of CO_2 than the use of either coal or oil." Minerals Mgmt. Serv., *Comprehensive Program 1992–1997 Final Environmental Impact Statement* V-62 (1992).

These assessments of downstream environmental effects influenced the structure of Interior's leasing programs. For instance, Interior's 1992 five-year plan included a guiding principle to "[e]mphasize gas-prone areas to promote the expeditious development of natural gas as an environmentally preferable energy source." Minerals Mgmt. Serv., *Outer Continental Shelf Natural Gas and Oil Resource Management*

[5] *See* Minerals Mgmt. Serv., *5-Year Leasing Program Mid-1987 to Mid-1992* at 76 (1987); Minerals Mgmt. Serv., *Proposed Final Program Outer Continental Shelf Oil and Gas Leasing Program 2007–2012* at 74 (2007); 2012 Plan at 113.

[6] Minerals Mgmt. Serv., *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 1997 to 2002* at 69 (1996) ("1997 Plan").

[7] 2002 Plan at 71.

Comprehensive Program 1992–1997, at 13 (1992). This emphasis carried over to the 1997 plan, which asserted that "[e]xpanded use of natural gas, including that produced on the OCS, has substantial environmental benefits over other fossil fuels" and offers "the cleanest form of fossil fuel." 1997 Plan at 4. In that plan's assessment of "energy policy goals" under § 1802(1), Interior determined that the "environmentally sound development of the Nation's OCS resources will help further the . . . goal" of the Department of Energy's 1995 National Energy Policy Plan "to reduce the adverse environmental impacts associated with energy production, delivery, *and use*." *Id.* at 3–4, 66 (emphasis added).

At the same time, and consistent with expectations reflected in the legislative history, Interior has recognized that it may no longer consider natural gas "a favored fuel" once "renewable energy sources can supply a much larger share of the Nation's energy." 2012 Plan at 113. Interior has also recognized the downstream environmental advantages of renewables, *id.* at 114, as well as the connection between leasing policy and renewable development, *see* U.S. Dep't of the Interior, *5-Year OCS Oil and Gas Leasing Program* 78 (1980) ("A potential benefit of [the No-

Action Alternative] is that it might serve as a catalyst in bringing new energy alternatives on line (i.e., solar)").

In addition, starting as early as 2002, Interior has at times calculated the greenhouse-gas emissions that would result from consumption of oil and gas produced from OCS leasing programs. *See* Minerals Mgmt. Serv., *Outer Continental Shelf Oil & Gas Leasing Program: 2002-2007, Final Environmental Impact Statement* 5-50 (2002) ("2002 EIS"); Bureau of Ocean Energy Mgmt., *Outer Continental Shelf Oil and Gas Leasing Program: 2017–2022, Final Programmatic Environmental Impact Statement* 4-6 to -10 (2016) ("2017 EIS"). That assessment has evolved over time: Although Interior found the calculation to be of "limited value" in 2002 given the complexities involved, 2002 EIS at 5-50, in 2017 it used these figures to inform its consideration of the No-Action Alternative, 2017 EIS at 4-8.

B. Interior frequently considers downstream environmental effects in its lease sales.

Since at least the 1980s, Interior has considered the downstream environmental effects of alternative fuel sources in individual lease sales numerous times. For example, Interior's analysis for a 1987 lease sale unfavorably characterized the "problems of air pollution" resulting from

coal consumption that a no-leasing option may facilitate, "including the local and global effects of sulfur oxides and carbon-dioxide emissions." Minerals Mgmt. Serv., *Chukchi Sea Oil & Gas Lease Sale 109 Final Environmental Impact Statement* at App. H, H-2 (1987) ("1987 EIS"). Likewise, a 1990 analysis considered various "[a]dverse environmental effects from heavier reliance on coal" that may occur absent the lease sale, noting that "[c]ombustion of coal results in various emissions, notably SO_2 and particulates." Minerals Mgmt. Serv., *Chukchi Sea Oil & Gas Lease Sale 126 Final Environmental Impact Statement* App. I, I-1 to I-2 (1991).

Numerous times over the past 35 years, Interior has specifically highlighted the potential for greenhouse gas emissions from the downstream use of fossil fuels as part of its lease-sale analysis. *E.g.*, 1987 EIS at App. H, H-2; Minerals Mgmt. Serv., *Beaufort Sea and Planning Area Oil and Gas Lease Sale 144 Final Environmental Impact Statement* App. C, C-3 to C-4 (1996). And dating back to at least 2003, Interior has presented estimates of greenhouse gas emissions of "shipping, refining, end-product transportation, and *consumption*" resulting from a lease sale. Minerals Mgmt. Serv., *Beaufort Sea Planning Area Oil and Gas*

Lease Sales 186, 195, and 202 Final Environmental Impact Statement V-82 (2003) (emphasis added).

* * *

API's claim that Interior cannot consider downstream environmental effects is thus further undermined by over three decades of agency practice.

IV. No Binding Precedent Holds That OCSLA Bars Interior From Considering Downstream Effects.

Although API relies on *CBD*, API Br. 32 (citing 563 F.3d at 485), that case holds only that OCSLA does not *require* Interior to consider downstream environmental effects. API's broader reading of *CBD* as barring Interior from considering non-local effects also conflicts with cases from this Court and others.

A. *CBD* narrowly holds only that OCSLA does not require consideration of downstream effects.

This Court reached a narrow holding in *CBD*: "[W]e *hold* that OCSLA does not *require* Interior to consider the global environmental impact of oil and gas consumption before approving a Leasing Program." 563 F.3d at 484 (emphasis added). Some *CBD* passages admittedly go further, stating that OCSLA does not authorize Interior to consider

downstream environmental effects at the planning stage. *See id.* at 485. But those statements were "unnecessary for [the] disposition of the case" and are therefore dicta. *Telecommunications Rsch. & Action Ctr. v. F.C.C.*, 917 F.2d 585, 588 (D.C. Cir. 1990) (Silberman, J., concurring).

Indeed, this Court later characterized *CBD*'s holding as narrow, stating that *CBD* "conclude[s] that OCSLA was sufficiently ambiguous to *permit* Interior to forgo consideration of climate-related effects of burning OCS-derived fossil fuels, and to *allow* Interior to limit its consideration of the environmental impact of OCS leasing." *Jewell*, 779 F.3d at 608 n.11 (emphasis added). Because courts are "not bound by dicta," *Kerry v. Din*, 576 U.S. 86, 94 (2015), this Court need not follow *CBD*'s stray comments on the scope of Interior's discretion—particularly in light of the dicta's conflict with the Court's subsequent analysis in *Jewell,* as discussed further below.

CBD's dicta is also unpersuasive. For one thing, the decision rests on just a few isolated passages from the "principles" in § 1344(a)'s subsections, *CBD*, 563 F.3d at 484–85, and fails to analyze the statute's nearby language, legislative history, or past practice discussed above—

all of which demonstrate Interior has discretion to consider non-local environmental effects. *See supra* Parts I, II, III.

For another, *CBD* mischaracterizes other OCSLA caselaw. Citing *Watt I*, *CBD* asserts that Interior "need only consider the 'potential for environmental damage' on a localized area basis." *CBD*, 563 F.3d at 484. In *Watt I*, however, this Court analyzed only Interior's duty to balance the costs and benefits of leasing in various OCS regions, approving Interior's view that "planning activities in an area" should be based on whether "the costs in that area outweigh the benefits." *Watt I*, 668 F.2d at 1317–18. *Watt I* never discusses whether Interior can look beyond local environmental effects when determining the size and scope of OCS leasing—this Court did not address that question until *Jewell* (discussed below).

CBD's analysis also rests partly on the erroneous premise that "Interior's decisions . . . do not affect the impact that *consuming* oil and gas may have on climate change," because any leasing program "would presumably lead to the same overall consumption effects." *CBD*, 563 F.3d at 485. There are many problems with this assumption, but the most obvious is that Interior has "broad . . . discretion," *Watt I*, 668 F.2d at

1317, to select the "size" of OCS leasing, § 1344(a), and different sizes of OCS leasing can lead to different downstream consumption effects. Interior found as much here, concluding that forgoing Lease Sale 257 would alter the market and reduce oil consumption. *See Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 141–42 (D.D.C. 2022).

Finally, *CBD* concerns only the planning stage. As noted above, and as *CBD* itself recognizes, Interior enjoys broad discretion not to hold individual lease sales contemplated in five-year plans. *See supra* p. 6–7 (citing 563 F.3d at 483).

B. *Jewell* holds that Interior may consider non-local effects.

What is more, this Court later rejected the argument "that environmental effects that do not occur in any OCS area should be treated as irrelevant to Interior's environmental calculus under OCSLA." *Jewell*, 779 F.3d at 605. There is little difference between that argument and API's claim here that Interior must "make leasing decisions based only on 'the *local* environmental impact of leasing activities in the' OCS." API Br. 31 (quoting *CBD*, 563 F.3d at 485).

In rejecting this argument, this Court concluded that Interior's "replacement-cost methodology" analyzing the relative effects of

substitute energy sources was a reasonable method to craft an OCS leasing policy that "will best meet national energy needs." *See Jewell*, 779 F.3d at 603–06. More specifically, this Court found that Interior had authority "to quantify environmental. . . and social costs . . . , in addition to costs from activities associated with exploration, development, production and transportation that might occur with new OCS production and its most likely replacement." *Id.* at 603 (cleaned up). The Court observed that "[m]eeting national energy demands from [non-OCS] sources carries its own environmental risks and harms, distinct from the familiar risks associated with extraction from the OCS, which Interior determined should be taken into account." *Id.* And, the Court held, nothing in OCSLA "expressly proscribed" this "approach." *Id.* at 605.

True, the replacement-cost methodology in *Jewell* compared only local "upstream" OCS effects with substitute national upstream effects. *Id.* at 603–06. But nothing in the Court's holding or analysis suggests Interior is barred from also considering downstream effects from global consumption. Rather, the Court's analysis confirms that, in crafting a policy to "[m]eet[] national energy demands," Interior has discretion to determine if "environmental risks and harms[] distinct from the familiar

risks associated with extraction from the OCS . . . should be taken into account," *id.* at 603, so long as those considerations are "neither expressly proscribed by the statute nor unreasonable," *id.* at 605; *cf. Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 295–96 (D.C. Cir. 1988) (holding Interior must consider potential energy-conservation alternatives that would "provid[e] significant environmental benefits" beyond the OCS area). As explained above, downstream effects are neither proscribed nor unreasonable.

Finally, *Jewell*, like *CBD*, concerns only the planning stage and does not constrain Interior's broad discretion to forgo individual lease sales. *See supra* p. 6–7 (citing *CBD*, 563 F.3d at 483).

C. Other decisions hold that Interior (and other agencies) may consider downstream effects.

A recent Ninth Circuit decision further undermines API's position, holding that Interior may consider downstream greenhouse gas emissions in administering the OCS leasing program. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020). The Ninth Circuit explained that Interior "has the statutory authority to act on the emissions resulting from [downstream] oil consumption" and that, "[i]f it . . . concludes that such emissions will be significant, it may well approve

another alternative included in the [environmental impact statement] or deny the lease altogether." *Id.* Although the Ninth Circuit's analysis focused on NEPA, the court was well aware that NEPA analysis of a particular effect is unnecessary if the agency "lacks the power to act on whatever information might be contained" about that effect in the analysis, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004), as it cited *Public Citizen* just after explaining that Interior has authority to consider downstream emissions. *Bernhardt*, 982 F.3d at 740. Thus, the Court effectively recognized that Interior may consider non-local environmental impacts under OCSLA, like it had previously when it recognized the importance of "adequately consider[ing] cumulative effects of [an OCS] lease sale . . . on climate change." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 504 (9th Cir. 2014).

Interpreting similar statutes, this and other courts have also ruled that "combustion emissions are an indirect effect of an agency's decision to extract those natural resources" that the agency may consider. *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242–43 (D.N.M. 2018) (collecting cases). One court relied in part on Interior's authority in the onshore context to "weigh long-term benefits

to the public against short-term benefits," 43 U.S.C. § 1712(c)(7), to conclude that the agency "could decline to sell [onshore] oil and gas leases . . . if the environmental impact of those leases—*including use of the oil and gas produced*—would not be in the public's long-term interest." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73 (D.D.C. 2019) (emphasis added). And this Court similarly held that the Federal Energy Regulatory Commission's charge to consider "the public convenience and necessity" in pipeline certification allows it to consider "power-plant carbon emissions that the pipelines will make possible." *Sierra Club v. FERC*, 867 F.3d 1357, 1371–73 (D.C. Cir. 2017) (citing 15 U.S.C. § 717f(e)).

CONCLUSION

For the foregoing reasons, this Court should reject API's argument that OCSLA bars Interior from considering non-local environmental effects.

December 14, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Plaintiffs-Appellees contains 6,492 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

DATED: December 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2022, a true and correct copy of the foregoing Final Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support Plaintiffs-Appellees was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: December 14, 2022

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