

ORAL ARGUMENT NOT YET SCHEDULED
Nos. 24-1023 (and consolidated cases)

IN THE
United States Court of Appeals
for the District of Columbia Circuit

AMERICAN PETROLEUM INSTITUTE,

Petitioner,

– v. –

DEPARTMENT OF THE INTERIOR and BUREAU OF OCEAN ENERGY
MANAGEMENT,

Respondents.

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

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October 17, 2024

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

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity (Policy Integrity) is a nonpartisan, not-for-profit organization at New York University School of Law.* No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

* This brief does not purport to represent the views, if any, of New York University School of Law.

TABLE OF CONTENTS

	Page
CIRCUIT RULE 28(a)(1) STATEMENT	i
RULE 26.1 DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES.....	iv
GLOSSARY OF ACRONYMS AND ABBREVIATIONS	vii
INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	7
I. OCSLA’s Legislative History Shows That Congress Sought To Address A Short-Term Energy Crisis While Balancing Environmental Concerns.	7
II. Interior Has Long Considered Downstream Effects When Administering The OCS Leasing Program.	14
III. Interior’s Five-Year Plan Implements Congress’s Mandate That It Considers OCS Resources’ Economic, Social And Environmental Values By Accounting For Downstream Private And Public Values.	19
CONCLUSION	27
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Loper Bright Enterprises v. Raimondo</i> , 144 S. Ct. 2244 (2024)	14
Statutes	
43 U.S.C. § 1332(3)	9
43 U.S.C. § 1344	3, 8
43 U.S.C. § 1344(a)(1).....	6, 14, 20, 26
43 U.S.C. § 1801(14)	12
43 U.S.C. § 1802(2)(B)	14
Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953)	7
Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978)	8
Legislative Materials	
H. Rep. No. 94-1084 (1976)	8
H. Rep. No. 95-1474 (1978) (Conf. Rep.).....	9
H. Rep. No. 95-590 (1977)	4, 9, 11, 12, 13, 14
S. Rep. No. 93-1140 (1974)	10, 12
S. Rep. No. 94-284 (1975)	10, 11, 13
S. Rep. No. 95-284 (1977)	4, 7, 10
Agency Materials	
Bureau of Ocean Energy Mgmt., <i>2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program</i> (2016).....	15, 21, 22
Bureau of Ocean Energy Mgmt., <i>2024–2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program</i> (2023).....	21, 22, 24, 26

Bureau of Ocean Energy Mgmt., <i>All Lease Offerings (2022)</i>	7, 8
Bureau of Ocean Energy Mgmt., <i>Consumer Surplus and Energy Substitutes for OCS Oil and Gas Production: The 2015 Revised Market Simulation Model (MarketSim) Model Description (2015)</i>	26
Bureau of Ocean Energy Mgmt., <i>Consumer Surplus and Energy Substitutes for OCS Oil and Gas Production: The 2023 Revised Market Simulation Model (MarketSim) Model Description (2023)</i>	25
Bureau of Ocean Energy Mgmt., <i>OCS Oil and Natural Gas: Potential Lifecycle Greenhouse Gas Emissions and Social Cost of Carbon (2016)</i>	21
Bureau of Ocean Energy Mgmt., <i>Outer Continental Shelf Oil and Gas Leasing Program: 2017–2022, Final Programmatic Environmental Impact Statement (2016)</i>	18
Bureau of Ocean Energy Mgmt., <i>Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012–2017 (2012)</i>	15, 16, 17, 22
Council on Env’t Quality, <i>OCS Oil and Gas: An Environmental Assessment (1974)</i>	11
Minerals Mgmt. Serv., <i>5-Year Leasing Program Mid-1987 to Mid-1992 (1987)</i>	16, 21, 23
Minerals Mgmt. Serv., <i>Beaufort Sea Planning Area Oil and Gas Lease Sales 186, 195, and 202 Final Environmental Impact Statement (2003)</i>	19
Minerals Mgmt. Serv., <i>Chukchi Sea Oil & Gas Lease Sale 109 Final Environmental Impact Statement (1987)</i>	18
Minerals Mgmt. Serv., <i>Chukchi Sea Oil & Gas Lease Sale 126 Final Environmental Impact Statement (1991)</i>	19

Minerals Mgmt. Serv., <i>Outer Continental Shelf Natural Gas and Oil Resource Management Comprehensive Program 1992–1997</i> (1992)	16, 22, 23
Minerals Mgmt. Serv., <i>Outer Continental Shelf Oil & Gas Leasing Program: 2002-2007, Final Environmental Impact Statement</i> (2002)	18
Minerals Mgmt. Serv., <i>Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 1997 to 2002</i> (1996)	16, 17, 22
Minerals Mgmt. Serv., <i>Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2002–2007</i> (2002)	5, 16, 22
Minerals Mgmt. Serv., <i>Proposed Final Program Outer Continental Shelf Oil and Gas Leasing Program 2007–2012</i> (2007)	16, 22, 24
U.S. Dep’t of the Interior, <i>5-Year OCS Oil and Gas Leasing Program</i> (1980)	17, 21, 22
U.S. Dep’t of the Interior, <i>Tentative Proposed Final 5-Year OCS Leasing Program</i> (1982)...	21, 22
Other Authorities	
<i>Black’s Law Dictionary</i> (9th ed. 2009)	20, 21
Jeffrey M. Perloff, <i>Microeconomics</i> (7th ed. 2008)	20, 25
Richard Nixon, <i>Special Message to the Congress on Energy Policy</i> (Apr. 18, 1973)	8
Fed. Reserve Bank of S.F., <i>What Is the Difference Between Private and Social Costs, and How Do They Relate to Pollution and Production</i> , (Nov. 1, 2002)	20

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
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, 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, Senior Attorney, Inst. for Pol'y Integrity), <https://perma.cc/5R25-XAXB>. Interior invited one of its economists, Dr. Peter Howard, to present an in-depth review and critique

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.

of MarketSim.² Policy Integrity also submitted extensive comments, including legal and economic policy reports, on the five-year plan at issue here. Comments of the Inst. for Pol’y Integrity (Oct. 6, 2022) (BOEM-2022-0031-0001), <https://www.regulations.gov/comment/BOEM-2022-0031-6347>.

Policy Integrity submits this *amicus curiae* brief to address petitioner American Petroleum Institute’s (API) argument that the Department of the Interior (Interior)³ impermissibly considered the climate effects of the offshore leasing program, including downstream greenhouse gas emissions. API Br. 26–35.

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 the full costs of offshore leasing—

² See pp. 24–25, *infra* (explaining Interior’s use of MarketSim).

³ “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).

including “downstream” greenhouse gas emissions from fossil-fuel consumption (and thus combustion)—when administering the offshore-leasing program. API Br. 26–27. Interior explains why OCSLA’s text imposes no such bar. Respondents’ Br. at 31. This *amicus* brief further explains how OCSLA’s legislative history and Interior’s regulatory practice over the past several decades supports Interior’s reading of OCSLA and undermines API’s cramped interpretation. This brief also demonstrates how Interior’s regulatory practice has more specifically considered the downstream private benefits from combusting fossil fuels extracted from the Outer Continental Shelf (OCS); Interior’s mandate to consider “economic, social and environmental values,” 43 U.S.C. § 1344(a)(1), of OCS resources requires Interior to also consider the downstream public costs of that same combustion.

I. OCSLA’s legislative history confirms that Interior may consider a broad range of environmental and social values when preparing its five-year leasing plans. 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 Congress wanted to ensure Interior retained broad

discretion when making offshore-leasing decisions and was 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, and that Interior would be best positioned to assess these emerging developments. This legislative record demonstrates how and why Congress granted Interior discretion to determine how best to meet evolving national energy needs through offshore leasing while also “considering all the economic, social, and environmental impacts of oil and gas activities.” H.R. Rep. No. 95-590, at 149 (1977).

II. Interior has exercised its congressionally granted discretion when considering OCS leasing for national needs over the past four decades. Since at least the 1980s, Interior has considered downstream environmental effects, including greenhouse gas emissions, in its

planning and leasing determinations. In earlier analyses, when cleaner energy sources to meet national energy needs were scarce, these considerations resulted in Interior determining OCS natural gas to be a comparatively better way to meet those needs. For example, Interior highlighted downstream environmental advantages of OCS natural gas relative to dirtier alternative sources such as coal, noting 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* 71 (2002) [hereinafter 2002 Plan]. As technology has developed and coal generation declined, Interior has recognized the downstream benefits of alternative energy sources and attempted to quantify the impact of leasing on emissions from shipping, refining, end-product transportation, and consumption. Given this history, the Court should reject API’s argument that OCSLA somehow prohibits Interior from considering the full climate impacts of offshore leasing, including downstream emissions.

III. What is more, a key component of Interior’s valuation methodology for estimating the value of OCS resources is downstream

private benefits that accrue to consumers from using (and thus combusting) oil and gas extracted from the OCS.

Explaining this point requires a deeper dive into economic analysis and the methodologies Interior uses to estimate net benefits, which include benefits (or surplus) that end-use consumers receive from the use of oil and gas extracted from the OCS. This dive into Interior's methodologies reveals that it would be irrational for Interior's valuation to account for those *downstream private values* of combusting OCS-extracted fossil fuels while ignoring the *downstream public values* of their combustion, as API would prefer. Stated differently, Interior's valuation should and did consider both public and private downstream effects of OCS resource combustion to capture the total value to the United States of extracting these resources. An evenhanded assessment of the "economic, social, and environmental values" of OCS resources, 43 U.S.C. § 1344(a)(1), requires Interior to do so.

ARGUMENT

I. 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 (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) [hereinafter *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. *See* 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, supra*, at 4.

This 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 [1953] legislation.” H.R. 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 lent structure to the national leasing program by mandating the five-year planning process giving rise to this proceeding. 43 U.S.C. § 1344. Furthermore, as discussed above,

the 1978 amendments established principles for OCS development “subject to environmental safeguards” and “in a manner . . . consistent with . . . national needs.” *Id.* § 1332(3).

These amendments were grounded in three core, related ideas, as reflected in the Senate and House Reports preceding 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, including environmental factors, 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.R. Rep. No. 95-1474, at 76 (1978) (Conf. Rep.); *see also* H.R. 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 the 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 that 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 (similar).

This assessment of the desirability of OCS oil and gas was based in part on the downstream environmental effects of competing fuel sources. A Council on Environmental Quality report on the environmental effects of boosting OCS production, which 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://perma.cc/M7YQ-4Q4V>. 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.* Consistent with this Council on Environmental Quality report, a House report further explained that OCS leasing would be beneficial over the coming years because it was capable of providing energy “at a lower expense than most [then-available] alternatives in terms of development *and impact* costs.” H.R. 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

accordingly. 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.* Notably, the examples provided in the House report reflect not only alternative energy forms but many, such as solar, geothermal, and nuclear, that also have lower downstream environmental effects than fossil fuels. 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.R. 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).

API’s assertion that OCSLA bars Interior from considering downstream emissions is thus at odds with OCSLA’s 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 “considers economic, social, and environmental values” of OCS resources and “balance[s] orderly energy resource development with protection of the human, marine, and coastal

environments.” 43 U.S.C. § 1344(a)(1); 43 U.S.C. § 1802(2)(B); Respondents’ Br. at 30–31.

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

Interior’s prior five-year plans—all nine prior five-year plans since the 1978 amendments—do not stop at localized impacts when assessing “national energy needs.” Rather, as Congress intended, Interior has for decades exercised its discretion to consider downstream environmental effects in some form in administering the OCS leasing program—including prior five-year plans and when assessing individual lease sales. Such “longstanding practice of the government . . . can inform [a court’s] determination of what the law is.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024).

Interior’s longstanding practice makes sense because, as explained above, OCSLA’s history demonstrates that Congress specifically understood that available energy resources and their relative risk profiles would continue to change over time. *See, e.g.*, H.R. Rep. No. 95-590, at 53 (discussing alternative energy sources with lower downstream emissions profiles, like geothermal, solar, and nuclear). Interior’s prior plans recognize 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) [hereinafter 2017 Plan].

Like the current plan, prior plans analyze 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* 100–114 (2012) [hereinafter 2012 Plan]. This analysis often leads to direct comparisons between fuel sources, including downstream environmental effects—comparisons that would be irrelevant (and possibly unlawful) if OCSLA precluded Interior from considering downstream environmental effects. The inclusion of downstream emissions when making these comparisons is unsurprising, because absent a robust examination of downstream environmental impacts, Interior would be hard-pressed to fulfill its OCSLA mandate.

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

plans described natural gas as “cleaner-burning” (1987),⁴ the “cleanest form of fossil fuel” (1997),⁵ and a “clean burning, environmentally preferred source of energy for electricity generation” (2002).⁶

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 Comprehensive Program 1992–1997* 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, *supra* note 5, at 4. In that plan’s assessment of “energy policy

⁴ See Minerals Mgmt. Serv., *5-Year Leasing Program Mid-1987 to Mid-1992* 76 (1987) [hereinafter 1987 Plan]; Minerals Mgmt. Serv., *Proposed Final Program Outer Continental Shelf Oil and Gas Leasing Program 2007–2012* 74 (2007) [hereinafter 2007 Plan] (“clean burning”); 2012 Plan, *supra*, at 113 (“clean-burning”).

⁵ Minerals Mgmt. Serv., *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 1997 to 2002* 69 (1996) [hereinafter 1997 Plan].

⁶ 2002 Plan, *supra*, at 71.

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 OCSLA’s 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, *supra*, at 113. Interior has also recognized the downstream environmental advantages of renewables. *Id.* at 114. And from its first five-year plan, it recognized the connection between leasing policy and renewable development. U.S. Dep’t of the Interior, *5-Year OCS Oil and Gas Leasing Program 78* (1980) [hereinafter 1980 Plan] (“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) [hereinafter 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) [hereinafter 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, *supra*, at 5-50, for the 2017 Plan it used these figures to inform its consideration of the no-action alternative, 2017 EIS, *supra*, at 4-8.

Furthermore, since at least the 1980s, Interior has considered the downstream environmental effects of alternative fuel sources in individual offshore 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* App. H, H-2 (1987) [hereinafter 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 SO₂ and particulates.” Minerals Mgmt. Serv., *Chukchi Sea Oil & Gas Lease Sale 126 Final Environmental Impact Statement* App. I, I-1 to I-2 (1991). 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). Consuming OCS resources means combusting them, producing pollution. Decades of agency OSCLA implementation thus undermines API’s contention that Interior cannot consider downstream social and environmental effects.

III. Interior’s Five-Year Plan Implements Congress’s Mandate That It Considers OCS Resources’ Economic, Social And Environmental Values By Accounting For Downstream Private And Public Values.

Another key feature of Interior’s regulatory history further supports Interior’s consideration of the downstream social and environmental effects of its five-year plans: It routinely estimates the downstream private benefit that end-users receive from consuming (and

thus combusting) the fossil fuels extracted from the OCS.⁷ A full assessment of the “economic, social, and environmental values” of OCS resources, 43 U.S.C. § 1344(a)(1), would thus require that Interior also account for the downstream public costs⁸—i.e., the downstream social and environmental values—of consuming those same fossil fuels, as it did here.⁹ Explaining this point requires a review of Interior’s methodology.

⁷ A private good is rival and exclusive. “A rival good is used up as it is consumed,” and “[e]xclusion means that others can be prevented from consuming a good.” Jeffrey M. Perloff, *Microeconomics* 610 (7th ed. 2008). In the context of offshore leasing, fossil fuels are private goods and, hence, consumers obtain “private benefits” from using them.

⁸ In contrast with private goods, *see supra* note 7, “[a] public good is nonrival and nonexclusive. Clean air is a public good.” Perloff, *supra* note 7, at 613. The concept of public good is analogous to that of positive externality; “[a] public good is a special type of externality. If a firm reduces the amount of pollution it produces, thereby cleaning the air, it provides a nonpriced benefit to its neighbors: a positive externality. . . . Unfortunately, markets undersupply public goods.” Perloff, *supra* note 7, at 613. This brief refers to the undersupply of public goods as “public costs” that society bears. Accordingly, such public costs are analogous to negative externalities.

⁹ Our terminology is based on the standard economic definition of social net benefits, which equals the sum of private and public net benefits. Fed. Reserve Bank of S.F., *What Is the Difference Between Private and Social Costs, and How Do They Relate to Pollution and Production*, (Nov. 1, 2002), <https://perma.cc/23VU-RFUQ>; Perloff, *supra* note 7, 600–02. But it aligns with the statute as well, which uses “value,” meaning “[t]he significance, desirability, or utility of something,” *Black’s Law Dictionary* 1690 (9th ed. 2009), and more specifically directs Interior to consider

It also requires understanding that OCS leasing decisions can produce upstream *private* and *public* values (costs and benefits) as well as downstream *private* and *public* values (costs and benefits). Interior has for decades assessed downstream *private* benefits, but only recently undertook a more holistic assessment by also assessing downstream *public* costs using the form of the Social Cost of Carbon and Greenhouse Gases.¹⁰

Since 1980, Interior has implemented its OCSLA mandate to consider the economic, social, and environmental values of OCS resources in its five-year plans, § 1344(a)(1), by using quantitative methodologies to evaluate the costs and benefits of different OCS oil and gas leasing schedules. It has done so in each of its ten five-year plans.¹¹ Interior’s

“social value,” meaning “[t]he significance, desirability, or utility of something *to the general public*,” *id.* (emphasis added), in addition to “economic value.”

¹⁰ Bureau of Ocean Energy Mgmt., *2024–2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program* 5-21, 5-32 (2023) [hereinafter 2024 Plan]; 2017 Plan, *supra*, at 5-24; see also Bureau of Ocean Energy Mgmt., *OCS Oil and Natural Gas: Potential Lifecycle Greenhouse Gas Emissions and Social Cost of Carbon* v (2016).

¹¹ 1980 Plan, *supra*, at 16; U.S. Dep’t of the Interior, *Tentative Proposed Final 5-Year OCS Leasing Program* 1 (1982) [hereinafter 1982 Plan]; 1987 Plan, *supra* note 4, at 50; Minerals Mgmt. Serv., *Outer Continental*

methodologies have improved over time, incorporating evolving best practices in economic modeling. A brief review of Interior’s historical methodologies is set out below. It traces how, since releasing its fifth five-year plan in 1997, Interior has consistently used a methodology that quantifies the end-use benefits of OCS resources—a downstream *private* benefit that comes from combusting OCS fossil fuels.

In its first two five-year plans, Interior assessed potential leasing programs solely based on upstream private benefits, which it labeled as “net economic” value. 1982 Plan, *supra* note 10, at 1. Interior determined this value by first calculating expected gross revenue from extracted oil and gas sales and then subtracting total production costs. *See* 1980 Plan, *supra*, at 17 tbl.1 (summary of the net economic value of all the lease options under consideration); 1982 Plan, *supra* note 10, at 1 (defining net economic value as “the difference between product price and all the costs leading to production and transportation to market”). In its next two five-year plans, and consistent with evolving information, Interior

Shelf Natural Gas and Oil Resource Management Comprehensive Program 1992–1997 4 (1992) [hereinafter 1992 Plan]; 1997 Plan, *supra* note 5, at 16; 2002 Plan, *supra*, at 12; 2007 Plan, *supra* note 4, at 84, tbl.6; 2012 Plan, *supra*, at 117, fig.2; 2017 Plan, *supra*, at 5-13; 2024 Plan, *supra* note 10, at 5-18 (2023).

complemented its net economic value estimation by quantifying certain upstream environmental and social costs of OCS extraction—in other words, Interior began to match the upstream private benefits with their corresponding upstream *public* costs.¹² See 1987 Plan, *supra* note 4, at 50; 1992 Plan, *supra* note 10, at 6. Specifically, Interior subtracted environmental and social costs from its net *economic* value to produce what it called a net *social* value for each program.¹³ At this point Interior was not considering end-use (or downstream) values, either private or public.

¹² The 1987–1992 final program was the first that incorporated an environmental and social cost estimate. This program acknowledges the difficulty of assessing these costs and proposes a methodology to tame this concern: “Because of the uncertainty and difficulties associated with estimating several categories of cost, a sensitivity analysis was carried out to determine the social cost that would be estimated if specific unit costs are presumed to be even higher than the overstated costs used to develop the estimates of social costs presented” 1987 Plan, *supra* note 4, at 53.

¹³ The 1987–1992 and 1992–1997 five-year plans assess the alternative schedules using this net social value. See 1987 Plan, *supra* note 4, at 17, 49–54; 1992 Plan, *supra* note 10, at 13–15. According to the 1987–1992 five-year plan, social costs included “large oil spills . . . , small spills . . . , spill control and cleanup costs, commercial fishing losses, recreation losses, potential ecological damages, real property losses, legal expenses, subsistence losses, the value of oil spilled, research expenses, and other costs.” 1987 Plan, *supra* note 4, at 50.

Starting with its 1997–2002 five-year plan, Interior broadened the scope of its net social value metric by incorporating a component that estimates consumer surplus, which is a downstream *private* benefit. Consumer surplus refers to the benefits consumers get when they purchase a product. This benefit is measured in dollar terms as “the difference between the price charged for a service or product and the highest price consumers are willing to pay for a service or product.” *See* 2024 Plan, *supra* note 10, at 5-26. Lower prices thus increase consumer surplus, i.e., benefit consumers. In the context of Interior’s five-year plans, “The availability of OCS oil and gas increases supply of those commodities on the market and thus lowers the price consumers must pay.” 2007 Plan, *supra* note 4, at 86. This price drop increases consumer surplus relative to the no-action alternative. Interior adds this consumer surplus value to the aforementioned net social value estimate to get the net benefits of each leasing program. Since its 1997–2002 five-year plan, Interior has included consumer surplus as a main component of its net-benefits analysis of alternative leasing programs.¹⁴

¹⁴ Interior already accounts for “producer surplus,” and labels it as “net economic value.” 2007 Plan, *supra* note 4, at 85. Interior’s explicit

Interior released a detailed description of the model—MarketSim—it used to estimate consumer surplus in 2015, and first deployed this model in its 2017 Plan.¹⁵ MarketSim is a highly stylized model designed to predict how different OCS resource extraction schedules would change the U.S. energy sector in the long run. It models OCS fuel extraction as an oil and gas supply increase that lowers the price of oil and gas, ultimately improving the consumer surplus of the end-users.¹⁶ Interior’s methodology assumes fuel combustion when estimating consumer surplus, as part of its statutory consideration of the economic, social, and environmental values of the OCS resources. Bureau of Ocean Energy Mgmt., *Consumer Surplus and Energy Substitutes for OCS Oil and Gas*

definition of “producer surplus” equates with how economics literature defines this term. See Perloff, *supra* note 7, at 273. In this analysis, producer surplus is also synonymous with private upstream benefits.

¹⁵ In September 2023 Interior published a minor update of the model, labeled MarketSim 2023, which it used for the plan at issue in this case and which still relies on fuel combustion to generate consumer surplus. Bureau of Ocean Energy Mgmt., *Consumer Surplus and Energy Substitutes for OCS Oil and Gas Production: The 2023 Revised Market Simulation Model (MarketSim) Model Description* (2023).

¹⁶ “Under the model structure . . . , price and quantity may change due to shifts in supply functions driven by the [Exploration and Development] scenario itself.” *Id.* at 22.

Production: The 2015 Revised Market Simulation Model (MarketSim) Model Description 1 (2015).

This consumer surplus value necessarily relies on OCS-resource combustion, which in turn results in greenhouse gas emissions. Because Interior is considering downstream *private* benefits of this combustion in the form of consumer surplus, it naturally follows that Interior must also consider the *public* social costs associated with the same combustion to provide a complete estimate of the economic, social, and environmental value of OCS resources. Whether Interior separately considers “downstream” greenhouse gas emissions in its valuation, *see* 2024 Plan, *supra* note 10, at 5-21 (showing Interior’s consideration of public social costs in its valuation of OCS resources), or directly includes these costs as a social or environmental value in rational OCS resource valuation estimations, Interior’s valuation of OCS resources must encompass the public costs at the same time as considering its private benefits. Failing to do so would miss an essential part of valuing OCS resources. And it would fly in the face of Congress’s broad mandate for Interior to manage the OCS in a way that “considers [their] economic, social and environmental value.” 43 U.S.C. § 1344(a)(1).

CONCLUSION

For the foregoing reasons, this Court should reject API's argument that OCSLA bars Interior from considering downstream social and environmental costs.

October 17, 2024

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 5,219 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

Counsel further certifies that this *amicus curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

DATED: October 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October 2024, 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: October 17, 2024

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