No. 21-30505

In the United States Court of Appeals for the Fifth Circuit

STATE OF LOUISIANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF TEXAS; STATE OF UTAH; STATE OF WEST VIRGINIA,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; DEB HAALAND, in her official capacity as Secretary of the Interior; MICHAEL NEDD, in his official capacity as Deputy Director of the Bureau of Land Management; CHAD PADGETT, in his official capacity as Director of the Bureau of Land Management Alaska Office; RAYMOND SUAZO, in his official capacity as Director for the Bureau of Land Management Arizona Office; KAREN MOURITSEN, in her official capacity as Director for the Bureau of Land Management California Office; JAMIE CONNELL, in his official capacity as Director for the Bureau of Land Management Colorado Office; MITCHELL LEVERETTE, in his official capacity as Director for the Bureau of Land Management Eastern States Office; JOHN RUHS, in his official capacity as Director for the Bureau of Land Management Idaho Office; JOHN MEHLHOFF, in his official capacity as Director for the Bureau of Land Management Montana-Dakotas Office; JON RABY, in his official capacity as Director for the Bureau of Land Management Nevada Office; STEVE WELLS, in his official capacity as Director for the Bureau of Land Management New Mexico Office; BARRY BUSHUE, in his official capacity as Director for the Bureau of Land Management Oregon-Washington Office; GREG SHEEHAN, in his official capacity as Director for the Bureau of Land Management Utah Office; KIM LIEBHAUSER, in her official capacity

as Director for the Bureau of Land Management Wyoming Office; AMANDA LEFTON, in her official capacity as Director of the Bureau of Ocean Energy Management; MICHAEL CELATA, in his official capacity as Regional Director of the Bureau of Ocean Energy Management Gulf of Mexico Office; LARS HERBST, in his official capacity as Regional Director of the Bureau of Safety and Environmental Enforcement Gulf of Mexico OCS Office; MARK FESMIRE, in his official capacity as Regional Director of the Bureau of Safety and Environmental Enforcement Alaska and Pacific Office,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Louisiana, No. 2:21-CV-778 (Hon. Terry A. Doughty)

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiffs-Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification

Amicus Curiae:

The Chamber of Commerce of the United States of America. The Chamber of Commerce of the United States of America has no parent corporation. No publicly held company has any ownership interest in the Chamber of Commerce of the United States of America.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

The district court's preliminary injunction adheres to the primacy of congressional authority to oversee the disposition of the Nation's mineral resources, and the principle that an agency cannot escape judicial review under the Administrative Procedure Act by by characterizing final agency action as merely an interim pause. The Chamber and its members have a substantial interest in the uniform application of these principles.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amicus Curiae*, its members, or its counsel, made any contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for both parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

SUMMARY OF THE ARGUMENT

The plain text of both the Outer Continental Shelf Lands Act ("OCSLA") and the Mineral Leasing Act ("MLA") set out a congressional directive that mineral development on federal lands shall proceed expeditiously. *See* 43 U.S.C. § 1802(1); 30 U.S.C. § 226(b)(1)(A). That directive rests on a firm empirical foundation. Mineral development on federal lands is a key driver of economic growth—both on the national scale (fueling homes and businesses), and on the local scale (bringing jobs to communities throughout the country). U.S. Chamber of Commerce Global Energy Institute, *Federal Lands and Waters Energy Development* at 1 (hereinafter "Energy Report"), https://bit.ly/3HQRLQ6 (last accessed Jan. 2022).

Domestic production of oil and gas on federal lands also reduces the prices that consumers see at the pump and on their monthly utility bills. *See id*. Such reductions in energy prices help, in turn, to drive consumer spending on other goods and services. Likewise, each barrel of oil and cubic foot of natural gas produced from federal lands increases America's energy security and ensures that production occurs pursuant to this country's environmental regulations. *See* U.S. Dep't of Energy, *U.S. Oil and Natural Gas: Providing Energy Security and Supporting Our Quality of Life* 4-5 (Sept. 2020), (hereinafter "Energy Security") https://bit.ly/3K1b7UG.

OCSLA's and the MLA's directives are especially important during the ongoing global economic recovery, when demand for mineral resources is increasing. Federal land and water energy development accounts for a

substantial portion of total oil and natural gas production. *See* Energy Report at 1. And international production increases are "simply not enough" to meet domestic demand. The White House, *Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets* (Aug. 11, 2021), https://bit.ly/3zOUvL6. Yet at this "critical moment in the global recovery," *id.*, the Secretary of the Interior implemented a nationwide "pause" in leasing federal lands for oil-and-gas development. Both OCSLA and the MLA unequivocally direct the Secretary to do just the opposite: to "maintain" an offshore leasing program, 43 U.S.C § 1344(a), and to "h[o]ld" quarterly lease sales, 30 U.S.C. § 226(b)(1)(A).

The Secretary's nationwide pause of mineral leases on federal land, as well as the individual cancellations at issue in this case, are final agency actions that contravene OCSLA and the MLA and that are subject to judicial review. The pause is final because it consummates the Secretary's decisionmaking regarding whether and how to implement Executive Order 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021). The consummation of that decision could hardly be more evident than in the Secretary's statement to Congress that a "pause" exists and is "still in place." Plaintiffs-Appellees Br. 17 (quoting ROA.2252). The district court thus correctly recognized the "fact that new oil and gas leases on federal lands and in federal waters are paused." ROA.2143. The district court also recognized the legal consequences of that pause: the cancellations, delays, and halts of the individual lease sales at

issue. ROA.2126. These are *final* agency actions, because they represent the Secretary's last word on whether each lease-sale will proceed as scheduled.

The Court should thus affirm the district court's preliminary injunction.

ARGUMENT

I. Congress Wisely Directed That the Secretary "Shall . . . Maintain" an Offshore Leasing Program and "Shall . . . H[o]ld" Quarterly Onshore Lease Sales.

Mineral development on federal lands buttresses the Nation's economy, supports local workforces, reduces the prices that consumers pay for energy, prevents development from being shifted abroad, and protects America's energy security. Both OCSLA and the MLA unequivocally advance these goals. OCSLA's and the MLA's plain text support the district court's holding that a nationwide pause "is not within the discretion of the [Secretary] by law." ROA.2127. Instead, under both OCSLA and the MLA, the Secretary "shall" take concrete steps to lease federal lands for mineral development. 30 U.S.C. § 226(b)(1)(A); 43 U.S.C § 1344(a). Enumerated among these steps are that the Secretary shall "maintain" an offshore leasing program and shall "h[o]ld" quarterly lease sales. *Id.*; *see In re Brown*, 960 F.3d 711, 716 (5th Cir. 2020) (describing "shall" as mandatory language). These congressional directives are imminently reasonable.

A. Mineral development on federal lands and in federal waters drives growth, creates jobs, reduces consumer costs, and funds state budgets.

The Chamber has long studied the impact that American oil and gas production has on the business community and on the public at large. Recently, the Chamber's Global Energy Institute produced a report on "the consequences of a leasing ban on federal lands and waters." Energy Report at 2. Synthesizing the results of multiple third-party studies, the Energy Report emphasizes that leasing and production on federal lands and in federal waters are key aspects of U.S. economic growth. *See id.* at 1.

During fiscal year 2019, for example, "oil and natural gas development on public lands contributed [n]early $76 billion to the U.S. economy." *Id.* at 2. The development activity also "[s]upported approximately 318,000 jobs" and generated "$3 billion in revenue" for state funding of "education, health and emergency services, and infrastructure." *Id.* Production on federal lands also has a real-world impact on the prices that consumers pay to commute and travel and to heat their homes. OnLocation, Inc., *The Consequences of a Leasing and Development Ban on Federal Lands and Waters* (Sept. 2020) (hereinafter "Development Ban"), https://bit.ly/3FhoI6D. "All Americans—not just those living in the 34 oil and natural gas-producing states or working at oil and natural gas jobs—directly benefit from increased domestic production." Energy Security at 5.

Pausing leasing activity significantly reduces these benefits in both the short and long terms. By 2025, for instance, such a pause would generate a

"loss of more than $22.7 billion to U.S. GDP." Energy Report at 2. And if a pause were to continue, production on federal lands would contribute nothing to the U.S. GDP by the year 2040. *Id.* A leasing pause through 2025 would also cause a "loss of more than 154,000" jobs and a loss of "nearly $4 billion in tax revenue." *Id.* Louisiana alone would lose almost 2% of jobs statewide. Development Ban at 19; *cf. id.* (arguing that nationwide job losses under a leasing pause would reach almost 1 million in 2022 alone).

Again, a leasing pause carries real-world consequences. New Mexico, for instance, depends on revenues from federal leasing for almost 20% of its entire yearly budget. *See* Energy Security at 45. And other states use these revenues to "fund higher education, primary and secondary schools, health care, conservation districts, and other programs sponsored by state and local governments." Timothy Considine, *The Fiscal and Economic Impacts of Federal Onshore Oil and Gas Lease Moratorium and Drilling Ban Policies* viii (Dec. 2020) (hereinafter "Lease Moratorium"), https://bit.ly/3K1L1kk.

Importantly, too, the pause does nothing to reduce *demand* for oil and gas. Domestic supply constraints do not eliminate production altogether but may instead shift it beyond our borders to jurisdictions that lack America's environmental leadership. Mustafa H. Babiker, *Climate Change Policy, Market Structure, and Carbon Leakage*, 65 J. Int'l. Econ. 421, 441 (2005) (detailing how this well-studied chain of events "can lead to significant increases in offshore [*i.e.*, international] energy-intensive production associated with relocation").

B. Mineral development on federal lands and in federal waters also furthers America's energy security.

OCSLA governs the development of offshore oil-and-gas resources on the Outer Continental Shelf. Congress's 1978 revisions to OCSLA aimed to "expedite[] exploration and development of [offshore lands] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." 43 U.S.C § 1802(1); *see also id.* § 1332(3) ("[Offshore lands] should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs"). Indeed, Congress specified that it wished to "make [offshore] resources available to meet the Nation's energy needs as rapidly as possible." 43 U.S.C. § 1802(2). OCSLA's "objective," therefore, is "the expeditious development of [offshore] resources." *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981).

Likewise, the MLA governs the onshore development of oil-and-gas resournces on public land. It aims "to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981); *see also Arkla Expl. Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 358 (8th Cir. 1984) ("[The] broad purpose of the MLA was to provide incentives to explore new, unproven oil and gas areas . . . ."); *Wyoming v. U.S. Dep't of the Interior*, 493 F. Supp. 3d 1046, 1062 (D. Wyo. 2020) (similar).

Accomplishing these goals "makes the United States more secure." Energy Security at 51. Energy security reduces the likelihood that the country will repeat the shortages of the 1970s, a "history that includes long lines at gasoline pumps and curtailments of natural gas at schools and factories." *Id.* at 21. And energy security plays a critical role in economic development and recovery, which is particularly important at the present moment. Today, the American economy faces the economic pressure of the pandemic and unprecedented supply chain complications and labor shortages. *See, e.g.*, John Frittelli, Cong. Res. Serv., (IN11800), *Supply Chain Bottlenecks at U.S. Ports* (Nov. 2020), https://bit.ly/3r7ulzj. The energy development promised by OCSLA and the MLA helps address those challenges through energy security.

The leasing pause stands in stark contrast to these goals, and to the current Administration's exhortations that Americans should "have access to affordable and reliable energy" and that current foreign production levels are "simply not enough" to achieve that outcome. The White House, *Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets* (Aug. 11, 2021), https://bit.ly/3zOUvL6; *see also* The White House, *Press Briefing by Press Secretary Jen Psaki and Secretary of Energy Jennifer Granholm* (Nov. 23, 2021), https://bit.ly/3qjphbQ (statement by Secretary Granholm) ("We want [oil] supply to be increased both inside the United States and around the world so that we can reduce the pressures at the pump."). The pause further works against the goals that Congress set

forth in OCSLA and the MLA because it dampens competition and makes it more difficult for the United States to do that which it has asked of the international community.

C. The Secretary lacks authority to implement a pause.

The pause at issue in this case contravenes the purpose of both OCSLA and the MLA, as discussed above, and the statutes' text. In addition to the sound textual arguments that Plaintiffs-Appellees raise (Br. 32-39), the first stage of the competitive process for offshore development under OCSLA requires the Secretary to "prepare and periodically revise, *and maintain* an oil and gas leasing program." 43 U.S.C. § 1344(a) (emphasis added); *see id.* ("Such leasing program *shall be* . . . *maintained* in a manner consistent with the . . . principle[] [that] [l]easing activities *shall be conducted* to assure receipt of fair market value for the lands leased[.]" (emphases added)); *see also* ROA.2107-09 (describing the four stages); Plaintiffs-Appellees Br. 4-6 (same). The Government does not deny that it must maintain the lease-sale program. *See* Defendants-Appellants Br. 6-7. Yet the Government insists that it can cancel *every* individual lease sale during stage two. *See* Defendants-Appellants Br. 33-38.

Under the Government's view, then, the Secretary can "maintain" a first-stage lease plan even if the Secretary plans to never actually hold those sales during stage two. *See* 43 U.S.C. 1344(a). But this is incompatible with any common understanding of the term "maintain." *See* American Heritage Dictionary of the English Language 1059 (5th ed. 2011) (defining "maintain" as

"[t]o keep up or carry on"). Just like the word "'modify'. . . connotes moderate change" rather than "fundamental changes," *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994), so too the word "maintain" connotes that the *sales* portion of the lease-sale program will continue rather than fall to the wayside. *Cf. United States v. Perez*, 585 F.3d 880, 885 (5th Cir. 2009) (considering the plain meaning of the phrase "altered or obliterated").

Likewise, the MLA directs that "lease sales *shall be held* for each State where eligible lands are available at least quarterly." 30 U.S.C. § 226(b)(1)(A) (emphasis added). This Court has understood the term "shall" as "a mandatory word indicating a command." *In re Brown*, 960 F.3d 711, 716 (5th Cir. 2020) (citing *Foster v. Heitkamp*, 670 F.2d 478, 487 (5th Cir. 1982)). Put simply, the MLA commands that, at least quarterly, the lease sales must be held.

In response, the Government argues that § 226(a) grants it the authority to impose the pause, by providing that certain lands "may" be leased. Plaintiffs-Appellees Br. 28-29. In context, however, this section defines the class of lands that are available for leasing: "All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary." 30 U.S.C. § 226(a) (emphasis added). The MLA thereafter directs that the Secretary *shall* hold quarterly sales under § 226(b)(1)(A). Those sales must occur and must consist of the lands that the Secretary *may* lease under § 226(a). The MLA, like OCSLA, establishes a mandatory mineral leasing program.

II. The District Court Correctly Concluded That the Secretary Has Taken Final Agency Action.

Judicial review under the APA is available for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. An action is final if it (1) "mark[s] the consummation of the agency's decisionmaking process" and (2) either determines "rights or obligations" or produces "legal consequences." *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 441 (5th Cir. 2019) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). This Court treats finality as "a jurisdictional prerequisite of judicial review." *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016). There are two categories of actions at issue here: first, the pause itself; and second, the cancellations and halting of individual lease sales. Both the pause and the cancellations and halts are final and are judicially reviewable now.

The district court correctly "determined that the Pause in new oil and gas leases on federal lands and in federal waters" is a "final agency action[] that [is] reviewable under the APA." ROA.2126.

First, the pause consummates and implements the Secretary's decisionmaking process regarding whether and how to implement Executive Order 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021). *See* ROA.1075-1089. The decision in which that process culminated could hardly be clearer, as the district court recognized: it is a "fact that new oil and gas leases on federal lands and in federal waters are paused." ROA.2143. It is no response that the Secretary might reverse the leasing pause at some undefined point in the future. An

agency need not "permanently swear[] off the entirety of its statutory discretion" in order to make action final. *Texas v. Biden*, 20 F.4th 928, ___, 2021 WL 5882670, at *7 (5th Cir. Dec. 21, 2021). This is because "[r]evocability . . . is not the touchstone for whether agency . . . action is reviewable." *Texas v. United States*, 809 F.3d 134, 167 (5th Cir. 2015). If it were otherwise, then "agency action [would be] nonreviewable so long as the agency retained its power to undo that action or otherwise alter it in the future"—an outcome "[t]hat accords with neither common sense nor the law." *Texas v. Biden*, 20 F.4th at ___, 2021 WL 5882670, at *7.

Second, as to the individual lease sales, "[c]ourts consistently hold that" agency action "binding it and its staff to a legal position produce[s] legal consequences or determine[s] rights and obligations." *Equal Emp. Opportunity Comm'n,* 933 F.3d at 441. In analyzing whether an action binds the agency, this Court "does not focus on labels, and it does not rely on a sharp (and false) dichotomy between statements announcing policies and final statements." *Texas v. Biden*, 20 F.4th at ___, 2021 WL 5882670, at *8. The legal consequence here is plain: individual lease sales have in fact been cancelled or halted because of the pause. *See* ROA.2143. The occurrence of those cancellations and halts is more than sufficient to show that the pause has controlling effect over the agency and that it is subject to this Court's review.

The district court correctly held that "the cancellation of Lease Sale 257, the stoppage of Lease Sale 258, and the cancellation or postponements of 'eligible lands' under the MLA, are final agency actions that are reviewable

under the APA." ROA.2126. The cancellations and halts are the consummation of the Secretary's decisionmaking process on whether to hold the sales as scheduled, and "[t]here is no real question that . . . cancellations are actions from which legal consequences will flow." ROA.2124. These actions are therefore final and subject to judicial review.

CONCLUSION

The Court should affirm the district court's preliminary injunction.

Dated: January 13, 2022

Respectfully submitted,

/s/ Michael B. Schon

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CERTIFICATE OF SERVICE

On January 13, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Michael B. Schon
Michael B. Schon

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,075 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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