[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 18-5343 and 18-5345

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOLENEX LLC, a Louisiana Limited Liability Company,
Plaintiff-Appellee,

v.

DAVID BERNHARDT, Secretary,
U.S. Department of the Interior, *et al.*
Defendants-Appellants,

and

BLACKFEET HEADWATERS ALLIANCE, *et al.*,
Intervenor Defendants-Appellants

On Appeal from the U.S. District Court for the District of Columbia

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE SOLENEX LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus curiae the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Concurrently with this *amicus curiae* brief the Chamber is filing a motion for leave to file under Federal Rule of Appellate Procedure 29(a), Intervenor Defendants-Appellants not having taken a position on the Chamber's participation.

Under Federal Rule of Appellate Procedure 29(d), the Chamber states that it is unaware of any other *amicus* brief representing the interests of businesses from every economic sector and region of the country, and from a perspective that extends beyond the direct scope of this appeal. Among other issues addressed, the Chamber believes that its brief is particularly useful in bringing to this Court a discussion of the effects of this appeal on the diverse business interactions the Chamber's members have with the federal government.

The Chamber is aware that the Western Energy Alliance also intends to file an *amicus curiae* brief. Written Representation of Consent to File *Amicus Curiae* Brief, *Solenex LLC v. Bernhardt, et al.*, No. 18-5343 (consolidated), Doc. 1789089 (D.C. Cir. filed May 22, 2019). However, given the significant differences between the memberships of the Chamber and the Western Energy Alliance, and given the distinct

interests the members of the Chamber and the Western Energy Alliance have in this case, it is impracticable to collaborate in a single brief. The Court will benefit from the presentation of *both* perspectives. Being respectful of this Court's and the parties' resources, the Chamber has sought to present its arguments in as succinct a fashion as possible. Accordingly, this brief is only 2,841 words, well below the 6,500 words allowed by the Federal Rules of Appellate Procedure for an *amicus curiae* brief.

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic 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 that raise issues of concern to the nation's business community.[1]

The implications of this case—involving the federal government's arbitrary and capricious cancellation of a decades-old oil and gas lease without due process or consideration of the reliance interests of the private businesses that entered into that lease—reach far beyond federal oil and gas leasing; they extend to numerous aspects of government interaction with private businesses, including many Chamber members. Judicial approval of the government's behavior here

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

would deprive private parties seeking to do business with the government of an essential assumption fostering such transactions: the confidence that such business is likely to be a fair and beneficial endeavor. Just as many private businesses need the federal government as a customer or contracting partner, the government needs private business to implement important federal programs and policies that serve the Nation's citizens and drive economic growth.

SUMMARY OF ARGUMENT

Appellee's response brief explains persuasively and in detail why this Court should uphold in all respects the decision below invalidating the lease cancellation. The Chamber raises three additional points supporting the lower court's ruling:

First, affirmance of the district court's decision will send an important message to the federal government and to private business—that when private business reasonably relies on the good faith and prior representations of the government in entering into business transactions with the government, the courts will not abide arbitrary action terminating those transactions based on pretext and politics.

Second, affirmance of the district court's decision invalidating the

lease cancellation will demonstrate that private property rights on federal land mean something, and that when Congress intends to protect those valid existing rights the Executive Branch cannot thwart that intent through arbitrary and capricious or otherwise unlawful action.

Third, affirmance of the district court's decision is fully consistent with the federal policy of responsible development of natural resources on public lands. The limited development that remains possible in the area will be subject to all existing environmental laws and regulations, and will create valuable jobs and revenue for the region.

In sum, this Court should affirm the district court's ruling that Interior's cancellation of the Solenex lease was arbitrary and capricious, as well as that court's order directing reinstatement of the lease.

ARGUMENT

I. The District Court correctly ruled that the Department of the Interior's cancellation of the Solenex lease was arbitrary and capricious due to its disregard of the lessee's reliance interests.

When a private party takes title to a leasehold on federal property, that party as lessee is entitled to some measure of certainty that the government will not abuse its position as lessor. Here, the

lessees proceeded in good faith for decades, expending resources to submit the required applications and participate in the seemingly endless administrative processes the government demanded before receiving approval to develop the leased lands. Eventually, though, the delay exhausted Solenex's patience and any measure of reason; Solenex sought to protect its rights by filing suit to compel a decision by the Department of the Interior ("Interior") as to whether the suspension of its lease by Interior should be lifted. The district court agreed that, "[b]y any measure" the government's delay in determining whether to lift the longstanding suspension was unreasonable. *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 84–85 (D.D.C. 2015).

But that was not the end. *After* the district court ruled that Interior's delay was unreasonable, Interior summarily canceled the lease—without making any finding of fault by the lessee or even providing lessee a hearing. In doing so, Interior abandoned its prior positions, both in dealings with the lessee and before the lower court, by asserting for the first time that the lease should never have been awarded in the first place. The district court appropriately ruled that Interior's abrupt reversal violated the law.

Affirmance of the lower court's decision invalidating the lease cancellation is necessary not only to vindicate the rights of a lessee who made substantial expenditures in reliance on the premise that the government would act in good faith, but also to demonstrate to the business community at large that the government will be held to the same standards of good faith and fair dealing that apply to any private party doing business with the federal government.

The Solenex lease was issued 37 years ago, in 1982. Through the successive administrations of five presidents and until the unilateral lease cancellation at issue here, Interior continued to act as though the Solenex lease was validly entered. To that end, the government expended untold sums of taxpayer dollars in studying potential impacts of oil and gas drilling on the leasehold so that, presumably, such drilling could go forward in a responsible manner. Interior continued in this vein for decades after the Ninth Circuit issued the decision that, Interior now claims, renders the lease improperly issued. U.S. Br. 12. In fact, in approving the record of decision for the 1993 application for a permit to drill on the leasehold, Interior *expressly* considered whether the lease was subject to that decision and determined that it was not.

See Solenex Am. Br. 19 (Doc. 1791947) (referencing 1993 record of decision). It was thus eminently reasonable for the lessee to rely on the government's official position that the lease was valid, to continue to participate in actions designed to develop the resources on that leasehold, and to fully expect eventual fulfillment by the government of its statutory duties.

It is hardly surprising, then, that the district court ruled that Interior's wholly new and inconsistent "eleventh-hour interpretation" of the law was due "no great degree of deference." *Solenex LLC v. Jewell*, 334 F. Supp. 3d 174, 182 (D.D.C. 2018) (quoting *Tex. Oil & Gas Corp. v. Watt,* 683 F.2d 427, 431 (D.C. Cir. 1982)).

Moreover, when Interior canceled the Solenex lease, it did not accompany that cancellation with any sort of declaration of nationwide policy applicable to all leases issued during the same time period containing the same alleged legal infirmity. Rather, Interior arbitrarily and capriciously singled out for cancellation just the Solenex lease and other leases in this one particular area of the country (the "Badger-Two Medicine Area"), having determined that these leases were not pleasing

to an administration's preferred constituencies.[2] Not only, then, were the leases cancelled after a positional about-face, but they were also treated in a manner different from other leases that may have been similarly-situated, disadvantaging these particular lessees against all others. *See Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) ("Government is at its most arbitrary when it treats similarly situated people differently."). Strikingly, then-Secretary Jewell expressed the following regarding the cancellations: "This sets the right tone for how business should be done in the future."[3] In sum, Interior's belated, self-contradictory cancellation of the Solenex lease is the *sine qua non* of arbitrary, capricious action. *See Tex. Oil & Gas Corp.*, 683 F.2d at 435 (rejecting lease cancellation where the "Secretary . . .

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[2] *See, e.g.*, U.S. Dep't of the Interior, Press Release, "Interior Department Cancels Remaining Oil and Gas Leases in Montana's Badger-Two Medicine Area" (Jan. 10, 2017), https://www.doi.gov/pressreleases/interior-department-cancels-remaining-oil-and-gas-leases-montanas-badger-two-medicine (explaining that cancellation of the Badger-Two Medicine leases "respects . . . concerns expressed by the Blackfeet Tribe and interested members of the public").

[3] Brown, Matthew, "U.S. Cancels Energy Leases in Sacred Badger-Two Medicine Area," ASSOCIATED PRESS (Nov. 16, 2016), https://billingsgazette.com/news/state-and-regional/montana/u-s-cancels-energy-leases-in-sacred-badger-two-medicine/article_e1cca295-5045-566c-ace5-795adbea77aa.html.

engaged in a hasty attempt, based on politically suspect motives at worst and on a legally erroneous theory at best, to undo what had been done"); *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) ("[T]he power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.").

A decision by this Court reversing the district court's conclusions and condoning Interior's unfair and arbitrary behavior could chill American businesses' desire to conduct any manner of business with the federal government. The sword of Damocles the government now asserts it holds over private business—the ability to reverse course without warning or finding of fault with the private party—could profoundly undermine any confidence private business has in the validity of permits, licenses, leases, or product registrations received from the government, much less contracts entered into with the government.

The prospect that the government could cherry-pick one license, registration, or lease at random and select it for rescission because the government gets cold feet increases risk, and thus cost, for U.S.

businesses, and naturally will make them think twice about partnering with the government in the future. *See, e.g.*, *Tex. Oil & Gas Corp.*, 683 F.2d at 433–34; *see also, e.g.*, *W. Org. of Res. Councils v. BLM* ("*WORC*"), 591 F. Supp. 2d 1206, 1228 n.4 (D. Wyo. 2008) (explaining that "each lessee has an investment-backed expectation that its [application for permits to drill] will be considered in a timely manner" (citing *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 620 (2000)).

Billions of dollars of private capital are invested in developing products that require government approval, researching the natural resource potential of federal lands, and proposing contractual relationships with the government. This essential area of U.S. economic activity relies on the reasonable possibility of return on that investment and the basic courtesy of good faith and fair dealing by the government.

II. Beyond damaging private businesses' legitimate reliance interests, Interior's lease cancellation displays a troubling disregard for private property rights.

A federal oil and gas lease is a constitutionally protected interest in real property. *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975); *see also Mobil Oil Expl.*, 530 U.S. at 620 (describing leases as

being "more than rights to obtain approvals"). Congress, as proprietor of the federal lands, *see* U.S. Const. art. IV, § 3, has actively sought private partners to aid in developing the resources those lands contain. Indeed, it was—and remains—the intent of Congress "to foster and encourage private enterprise in . . . the orderly and economic development of domestic mineral resources," and to allow "all valuable mineral deposits in lands belonging to the United States," subject to certain exceptions, to be "free and open to exploration and purchase" by U.S. citizens. 30 U.S.C. §§ 21a, 22. It is hard to square that policy, and Congress's actions respecting valid existing rights in the Badger-Two Medicine Area with the government's actions here.

The United States purchased the Badger-Two Medicine Area in June 1896. Act of June 10, 1896, Ch. 398, 29 Stat. 321, 353–58. The express purpose of this purchase was mineral development: In ratifying the agreement between the Blackfeet Tribe and the U.S. delegation sent to negotiate it, Congress declared that "the lands so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral-land laws *only*." *Id.* at 357 (emphasis added).

Over time, part of this area was designated for inclusion in Glacier National Park. An Act to Establish "Glacier National Park," Pub. L. No. 61-171, 36 Stat. 354 (1910). But the remaining land remained available for its intended purpose of mineral development. In fact, Congress specified that the designation did not "affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land." *Id.* § 1. Thus, although Congress determined to put some of the land to a different use, it respected the valid existing property rights of private individuals and entities fulfilling the original purpose of the purchase.

By 2006, Congress determined it no longer wished to encourage further development of natural resources in the Badger-Two Medicine Area, and it accordingly withdrew the area from availability for future leasing. Pub. L. No. 109-432, § 403, 120 Stat. 3050. At the same time, Congress explicitly protected valid existing leasehold rights like those of Solenex. *Id.* § 403(b)(1) (withdrawing land "subject to valid existing rights"). Understanding that these leases hold significant value for the lessees, Congress created a tax incentive to encourage relinquishment

of existing leases. *Id.* § 403(c). Thus, even while determining in 2006 not to enter into further leases in the Badger-Two Medicine Area, Congress continued to respect the valid existing property rights of private individuals and entities seeking to fulfill the original purpose of the purchase.

Yet, in summarily canceling the Solenex lease, Interior demonstrated its disdain not only for Solenex's private property rights, but also for Congress's express intent to continue to respect such rights. The ability of private parties to hold and enjoy property rights of all kinds is a fundamental precept upon which this Nation was founded. Alexander Hamilton described "the security of Property" as "one of the 'great obj[ects] of Gov[ernment]." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting) (quoting 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1934)). The right to own property goes hand-in-glove with the right to pursue commercial enterprise. Interior's wholesale disregard for the former in this case leads inexorably to the conclusion that it has little respect for the latter.

III. Responsible development of natural resources on federal land is an essential driver of the American economy.

Federal public lands—including the Badger-Two Medicine Area of the Lewis & Clark National Forest—are intended for multiple uses. *See, e.g.*, 16 U.S.C. §§ 520, 528–29. In enacting the Mineral Leasing Act and other statutes, Congress clearly declared natural resource development to be one of those intended uses. *See supra* 9–10 (quoting the statute); *see also, e.g.*, *WORC*, 591 F. Supp. 2d at 1228 n.4 (noting the Mineral Leasing Act and regulations "require maximum ultimate economic recovery of oil and gas from leased lands"). And the United States has developed a robust suite of environmental laws to ensure that such lands are developed responsibly and then reclaimed in the same manner. *See, e.g.*, 36 C.F.R. § 228.8 (requiring that mineral development on National Forest land comply with all federal and state standards for air quality, water quality, and solid waste disposal; and specifying requirements for protection of scenic values, fisheries and wildlife habitat, and reclamation).

Without doubt, the ability to make use of our natural resources has been critical to the Nation's economic growth and domestic security. Domestic production of oil and gas means not just domestic energy, but

also raw materials used across the spectrum of American industry from fuels, to clothing, to modern medicine.[4] Oil and gas production on public lands has increased in recent years, creating thousands of jobs and returning over $1 billion in revenues in 2018 alone—which support both federal and state programs.[5] At the same time, the amount of public land disturbed to do so has *decreased*.[6] Interior is clearly confident in its ability to responsibly permit energy development on public land in general, and there is no reason to believe that it cannot do so on the lands leased by Solenex, in particular.[7] Reversal of the district court's

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[4] *See, e.g.*, U.S. Chamber of Commerce Global Energy Inst., "Infrastructure Lost: Why America Cannot Afford to 'Keep It In the Ground'" 5 (2018), https://www.globalenergyinstitute.org/sites/default/themes/bricktheme/pdfs/GEI_KIITG_report_WEB.pdf.

[5] U.S. Dep't of the Interior, Press Release, "Using the Least Amount of Acreage in History, Interior Hits Record Oil and Gas Revenues in 2018 at $1.1 Billion" (May 1, 2019), https://www.doi.gov/pressreleases/using-least-amount-acreage-history-interior-hits-record-oil-and-gas-revenues-2018-11.

[6] *Id.*

[7] Furthermore, only two lease parcels have any potential of being developed in the entire Badger-Two Medicine Area, representing a small fraction of its 129,500 acres. U.S. Br. 4. The Solenex parcel, with its ready proximity to road and rail, is particularly well-suited for responsible development. Solenex Am. Br. 10.

decision and ratification of Interior's decades-belated lease cancellation will give developers of minerals, and private businesses in general, good cause to question whether they will find a willing and faithful business partner in the government.

CONCLUSION

This Court should affirm the district court's decision invalidating the lease cancellation, to protect not only the rights of Solenex as lessee, but also the ability of private businesses generally to have confidence in their business dealings with the federal government.

June 12, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. Rule 29(a)(5) because it contains 2,841 words. This motion 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 the motion has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

June 12, 2019

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019 the foregoing was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

/s/ Thomas A. Lorenzen
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