No. 22-1251

In the Supreme Court of the United States

SIMON V. KINSELLA

Petitioner,

v.

U.S. BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.,

and

SOUTH FORK WIND, LLC.

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

OPINIONS BELOW

The Order of the U.S. District Court for the Eastern District of New York (E.D.N.Y.) in *Mahoney et al. v. U.S. Department of the Interior et al.* (E.D.N.Y., No. 22-cv-01305, ECF 93) dismissing the case (Supp App. 18a) is unreported.

JURISDICTION

The judgment of the court of appeals ordered Petitioner's emergency motion for a temporary restraining order and preliminary injunction be *denied,* and the petition for a writ of mandamus seeking review of the district court order to transfer be *denied,* entered May 17, 2023. (App 4a-5a) The judgment of the court of appeals ordered Petitioner's motion to stay the mandate (treated as a motion to stay the effectiveness) be *denied*, entered June 9, 2023. (App 3a). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provision, which is set out in the appendix to the supplemental brief (Supp App 2a), is 43 U.S.C. 1333(a)(1)(A).

STATEMENT

Pursuant to this Court's Rule 15.8, Petitioner calls the Court's attention to intervening actions of the transferee court, the District Court for the Eastern District of New York ("E.D.N.Y.") after petitioner's last filing in this Court on June 22, 2023.

The Petition for a Writ of Certiorari asks whether the Fifth Amendment requires that Federal Defendants, principally the Bureau of Ocean Energy Management ("BOEM"),[1] and Intervenor-Defendant South Fork Wind LLC ("SFW") answer the allegations against them in Petitioner's First Amended Complaint (filed November 2, 2022).[2]

Ten months have now passed since the filing of the amended complaint. Still, neither Federal Defendants nor SFW has answered the allegations despite District Judge Jia M. Cobb's order that they file responsive pleading by ***July 7, 2023*** (*see* Kinsella Affidavit ¶ 17) (Supp App 7a).[3]

Instead (on July 5), the transferee court granted Federal Defendants' and SFW's letter motions requesting a pre-motion conference regarding their

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[1] Federal Defendants are U.S. Department of the Interior, U.S. Environmental Protection Agency, and the federal Bureau of Ocean Energy Management ("BOEM"), including BOEM officials named in the amended complaint's particularized fraud claims. *See* First Amended Complaint, Claims for Relief Thirteen through Seventeen (D.D.C., 22-cv-02417, ECF 34-2, at 111-141).

[2] *See* D.D.C., 22-cv-02417, ECF 34-2

[3] *Also*, the original complaint filed against only Federal Defendants over a year ago (on July 20, 2022) went unanswered.

intent to file Rule 12(b) motions to dismiss (*id.*, ¶¶ 19-25) (Supp App 7a-15a);[4] thus, avoiding having to answer the allegations past July 7, or perhaps at all (*id.*, ¶¶ 16-17) (Supp App 6a-7a).

The July 5 Scheduling Order of District Judge Frederic Block provides no reason for granting Federal Defendants' and SFW's letter motions. Looking to the underlying letter motions, therefore, we find that Federal Defendants and SFW intend to file Rule 12(b) motions to dismiss all claims (except for the FOIA[5] claim) for, allegedly, Pl.-Petitioner's lack of standing, failure to state a claim, and because the district court lacks jurisdiction.

Federal Defendants and SFW made similar overtures regarding standing and failure to state a claim in the District Court for D.C. During the only hearing in that court, District Judge Jia M. Cobb responded as follows—

> I just want to make clear ... I have not ... suggested that you [Petitioner] don't have standing to bring this motion. So I just want that to be clear.[6]

Judge Cobb's comment was in reference to motion papers filed by Pl.-Petitioner the day before. *Please read excerpt* (Supp App 68a-69a).

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[4] On July 5, 2023, the District Court for E.D.N.Y. issued "SCHEDULING ORDER: Movant South Fork Wind's letter application 66 dated 6/16/23 and defendants' letter application 68 dated 6/20/23 are GRANTED" (id., ¶ 17) (Supp App 7a).

[5] Complaint's Twelfth Claim for Relief under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

[6] *See* November 9 Hearing Tr. 22:10-25 and 23:1-4 (D.C. Cir., No. 22-5317, 1994062-11, at 22-23, PDF 23-24)

Undermining the letter motions expressing a sudden desire to file motions to dismiss is the fact that neither Federal Defendant nor SFW filed a motion to dismiss in the transferor court, the District Court for D.C., soon after the filing of the complaint on July 20, 2022, or the amended complaint on November 2, 2022, or *at all*. In the District Court for D.C., Federal Defendants and SFW could have filed *actual* motions to dismiss rather than a laundry list of unsubstantiated grounds to dismiss in letter motions. We are left guessing why Federal Defendants and SFW waited ten months until the case was transferred to Judge Frederic Block in the transferee court before filing (conclusory) letter motions expressing an intent rather than an actual motion to dismiss in the transferor court, the District Court for D.C.

Federal Defendants and SFW did not merely seek an extension of a few weeks to file answers past the thirty-day statutory deadline (that expired nine months ago).[7] They filed (three-page) letter motions whereby they avoided having to answer substantive allegations of fraud against the public interest (*see* Kinsella Affidavit, ¶¶ 19-24) (Supp App 7a-11a), which the transferee court granted.

The letter motions are window-dressing. They do not address *any* of the sixteen claims they seek to dismiss. Instead, they only address alleged harm and

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[7] Plaintiff filed his First Amended Complaint particularizing allegations of fraud pursuant to Federal Rule of Civil Procedure 9(b) on November 2, 2022. The statutory deadline for serving an answer or otherwise plead to any complaint under 5 U.S.C. § 552(a)(4)(C) is thirty days, which expired on December 2, 2022.

rely on post hoc rationalizations unrelated to the claims. The complaint's claims *all* concern ***BOEM's review*** (of SFW's project), *not* SFW's project itself (or its harms). The complaint asks why, *inter alia*, ***BOEM failed to disclose and discuss*** known PFOA and PFOS groundwater contamination,[8] population-level effects on Atlantic Cod habitat (Cox Ledge), the socioeconomic impact of the project's cost ($2 billion), and procurement irregularities; and why ***BOEM fraudulently represented material facts*** in its environmental review. The amended complaint does ***not*** ask whether SFW's construction would cause such harm as that question should have been asked and answered in BOEM's environmental review (but was not). If the original or amended complaints sought redress for damages directly caused by SFW's construction, then SFW would have been a named defendant, but it was *not; it* was named as a potential intervenor.

The letter motions also rely on false information Federal Defendants and SFW provided regarding BOEM's lack of jurisdiction onshore and nearshore within New York State's outer boundary. Federal Defendants falsely claimed that "onshore construction activity was authorized by, and within the ***exclusive*** jurisdiction of, the [NYS]PSC[9] and other State and local authorities [emphasis added]. BOEM has no authority to regulate this activity because its jurisdiction is limited to the submerged lands starting

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[8] Groundwater, where SFW has installed underground concrete duct banks and large vaults that encroach into and are at the capillary fringe of a sole source aquifer, contains perfluoro-octanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) contamination exceeding regulatory limits.

[9] New York State Public Service Commission

three miles from state coastlines and extending seaward [citing 43 U.S.C. §§ 1331(a)]."[10]

Similarly, SFW falsely claimed that "Plaintiff's alleged injuries are not fairly traceable to Federal Defendants' Project approvals, as onshore construction work was authorized by the NYSPSC and the Town, not Federal Defendants ... [and] [e]ven if Federal Defendants' approvals for the Project were set aside, that relief would not affect the nearshore work or the [] onshore cable over which Federal Defendants lack jurisdiction ...."[11]

The recent (false) claims in Federal Defendants' and SFW's letter motions regarding the limits of BOEM's jurisdiction contradict BOEM's *own* record of decision,[12] Renewable Energy Lease OCS-A 0486/0517, and U.S. Supreme Court precedent.

BOEM's Record of Decision

Contradicting Federal Defendants' and SFW's (false) assertions about BOEM's lack of jurisdiction onshore and that it did *not* authorize SFW's onshore construction is the fact that BOEM *did* exercise jurisdictional authority in approving onshore construction and confirmed as much in its *own* record of decision.

BOEM "approve[d], with modifications, the COP [Construction and Operations Plan] for South Fork Wind adopting Habitat Alternative" Layout B.[13]

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[10] *Id.*, ECF #68 (at 2-3)

[11] *See* E.D.N.Y., 23-cv-02915, ECF #66 (at 3)

[12] *See* Record of Decision ("ROD"), issued November 24, 2021 at– www.boem.gov/renewable-energy/state-activities/record-decision-south-fork (last accessed September 9, 2023).

[13] *Id.*, (at 15, PDF 17, 1st ¶).

Under that alternative, BOEM reduced the number and adjusted the siting of offshore turbines (WTGs), but "[a]ll other Project components and construction and installation" would remain "identical to the Proposed Action[,]"[14] which BOEM described to include the "South Fork Export Cable (SFEC)" consisting of a "cable and an [onshore] interconnection facility" connected "to the existing [onshore] mainland electric grid in East Hampton, New York, for the delivery of power to the South Fork of Suffolk County, Long Island." [15]

Renewable Energy Lease OCS-A 0486/0517

The lease assignment (OCS-A 0517) agreed between the United States (acting through BOEM) and SFW is subject to the terms of the original lease (OCS-A 0486).[16] The lease assignment reads—

> This assignment, as approved, has the effect of segregating the assigned portion into a new lease, which now carries the new lease number OCS-A 0517 ... The segregated lease is subject to all terms and conditions of

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[14] *See* Final Environmental Impact Statement ("FEIS"), issued August 16, 2021 (at 2-12, PDF 38, 4th & 5th ¶¶) at boem.gov (www.boem.gov/renewable-energy/state-activities/sfwf-feis)

[15] *See* ROD (at 7, PDF 9, 2nd bullet point)

[16] BOEM initially awarded lease OCS-A 0486 to Deepwater Wind New England LLC as lessee (dated September 2013 with an effective date of October 1, 2013). A portion of that lease was assigned to South Fork Wind LLC (SFW) (formerly Deepwater Wind South Fork LLC) and given lease number OCS-A 0517. BOEM approved the Assignment of Record Title Interest on March 23, 2020. *See* Lease OCS-A 0486 and 0517 at boem.gov (https://www.boem.gov/renewable-energy/lease-and-grant-information).

> the original lease [OCS-A 0486] ... *(see* n.16 on page 7).

Section 1 of the original lease (OCS-A 0486) reads—

> This lease is issued pursuant to subsection 8(p) of the Outer Continental Shelf Lands Act [OCSLA] ("the Act"), 43 U.S.C. *§§* 1331 *et seq.* This lease is subject to the Act and regulations promulgated pursuant to the Act ... This lease is also subject to ... amendments to the Act ... and regulations promulgated thereafter ... It is expressly understood that amendments to existing statutes, including but not limited to the Act, and regulations may be made, and/or new statutes may be enacted or new regulations promulgated ... and that the Lessee bears the risk that such amendments, regulations, and statutes may increase or decrease the Lessee's obligations under the lease. (*See* n.16 on page 7).

SFW's lease clearly stipulates that the lease is subject to subsequent amendments to existing statutes, including the OCSLA, and new statutes or new regulations, and that SFW, as lessee, bears the risks associated with such amendments, regulations, or statutes. Section is a standard clause that appears in BOEM's renewable energy leases.

On January 1, 2021, Congress amended the OCSLA, Section 4(a)(1),[17] which now reads—

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[17] *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, tit. XCV, Sec. 9503 (2021).

> The Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State, to- (i) the subsoil and seabed of the outer Continental Shelf ... (iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources; or (iv) any such installation or other device ... for the purpose of ... transmitting such resources. 43 U.S.C. § 1333(a)(1)(A)

At the time BOEM issued its Record of Decision approving the Final Environmental Impact Statement for SFW (on November 24, 2021) and approved SFW's Construction and Operations Plan (on January 18, 2022), the lease (OCS-A 0486) and lease assignment (OCS-A 0486) recognized subsequent amendments to the OCSLA; and the OCSLA as amended January 1, 2021, expressly provided that the laws of the United States apply to installations and devices attached to the seabed of the Outer Continental Shelf for the purpose of exploring for, developing, producing and transmitting non-mineral energy resources, such as energy from offshore wind farms. Still, although BOEM and SFW were parties to the lease assignment and bound by the terms and conditions of the original lease, they asserted that BOEM did *not* have jurisdiction onshore or nearshore, contradicting those documents.

U.S. Supreme Court Precedent

This Court recently observed in *Siemens Gamesa Renewable Energy v. Gen. Elec. Co.*—

> It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *United States v. Apfelbaum*, 445 U.S. 115, 121, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980). The language of the statute indicates that the "laws ... of the United States" apply to items affixed to the Outer Continental Shelf for energy generation. *43 U.S.C. § 1333(a)(1)(A)*. [*Id.*, at 216]
>
> Through the OCSLA, Congress sought to extend federal power over the area to promote "leasing," "discovery[,] and development." [H.R. Rep. No. 83-413, at 2, 3 (1953)] [*Id.*]
>
> [I]t is undisputed that the Haliade-X wind turbines for energy generation will be affixed to the seabed within 200 miles from the United States coastline, and a wind turbine affixed within 200 nautical miles of the coast is 'within the United States' [*Id.*, 218].
>
> In short, "[t]here can be no question that the primary purpose for this legislation was to assert United States jurisdiction over the shelf, and to set up ***a system for the full development*** of its natural resources [emphasis added]." *Olsen v. Shell Oil Co.*,

> 561 F.2d 1178, 1188 (5th Cir. 1977). Its key purpose "was to expedite the exploration and development of the [O]uter [C]ontinental [S]helf while retaining adequate assurances that the marine ***and coastal environments*** would be protected [emphasis added]." *Watt, 565 F. Supp. at 1131.* [*Id.*] 605 F. Supp. 3d 198 (D. Mass. 2022)

The plain language of the OCSLA, as amended in 2021, mandates that the "laws ... of the United States are extended, to the same extent as if the outer Continental Shelf were an area of ***exclusive Federal jurisdiction located within a State***, to ... any such installation or other device ... for the purpose of ... transmitting such resources [emphasis added]."[18] If a Haliade-X wind turbine for energy generation falls under United States jurisdiction, then it follows that a high-voltage export cable to be used for transmitting its energy resource also falls under federal jurisdiction and control. The transmission cable is a necessary integral part of "***a system for the full development*** of [the shelf's] natural resources" over which, pursuant to the OCSLA, the United States asserts jurisdiction as if it were an area of exclusive Federal jurisdiction located within a State.

Under subparagraph (iv), a transmission cable does *not* have to be attached to the OCS seabed[19] but must

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[18] 43 U.S.C. § 1333(a)(1)(A)(iv)

[19] Although it could be argued that a transmission cable *is* attached (buried to four to six feet) to the seabed, it is not necessary for it to satisfy subparagraph (iv). Rather, the cable needs only to be for the purpose of transmitting such resources

be for the purpose of transmitting resources from an installation as defined under subparagraph (iii), such as an offshore wind turbine to fall within United States jurisdiction. The statutory definition of "any such installation or other device" under subparagraph (iv), such as a transmission cable, therefore, is not limited to a geographic boundary but instead defined by its purpose— "for the purpose of ... transmitting such resources" (43 U.S.C. § 1333(a)(1)(A)), irrespective of the interconnection point where the cable delivers its electrical energy. In the case of SFW, the transmission cable connects the offshore wind farm on the OCS to the interconnection facility on eastern Long Island in the Town of East Hampton, NY. Therefore, the laws of the United States are extended to the offshore *and* onshore transmission cable "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State" (43 U.S.C. § 1333(a)(1)). The question is *not* whether federal law applies, but ***whether state law applies to a federal enclave.***

BOEM and SFW made similar false statements about BOEM's jurisdiction in another case, *Mahoney et al. v. U.S. Department of the Interior et al.* (E.D.N.Y., No. 22-cv-01305) concerning, *inter alia,* BOEM's federal review of SFW that was also before District Judge Frederic Block. On July 17, 2023, Judge Block dismissed that case with prejudice for lack of standing, holding that BOEM "had no jurisdiction over onshore

as defined under subparagraph (iii), such as wind-generated electrical energy from an offshore wind turbine attached to the OCS seabed.

trenching. BOEM's jurisdiction extends only over the portion of the Project situated on the outer continental shelf, which extends seaward from New York state waters" (*see Mahoney, supra,* ECF 93, at 11) and that the "NYPSC [] had exclusive jurisdiction over onshore trenching" (*id.*, at 9). The ruling of Judge Block (Supp App 18a) contradicts this Court's precedent.

This Supplemental Brief is not the first time that Pl.-Petitioner has raised the issue of SFW's false statements concerning BOEM's jurisdiction. *See* Pl.-Petitioner's complaint to the DC Bar Association on February 21, 2023 (Supp App 31a).

SFW (falsely) claims that Pl.-Petitioner "failed to comply with OCSLA's 60-day notice requirement" (*see* E.D.N.Y., 23-cv-02915, ECF #66, at 3, n.4). On the contrary, Pl.-Petitioner *did* file a 60-day notice of intent on December 18, 2021 (*see* D.D.C., 22-cv-02147, ECF 3-2) *and* a second notice "Re: URGENT: South Fork Wind Imminent Risk to Public Health" on March 11, 2022 (*id.*, ECF 3-3).

CONCLUSION

The practical effect of transferring the instant matter to District Judge Block in the E.D.N.Y., given Judge Block's erroneous order in *Mahoney* (dismissing that case on flawed jurisdictional grounds), will result in prolonging the litigation, wasting time, energy, and money, that is contrary to this Court's ruling in *Van Dusen v. Barrack*— that the purpose of section 1404(a)

"is to prevent the waste of time, energy and money' and to protect litigants, witnesses and the public against unnecessary inconvenience and expense" 376 U.S. 612, 616 (1964).

Respectfully submitted this 12th day of September 2023,

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