

Nos. 24-966 & 24-971

IN THE
Supreme Court of the United States

RESPONSIBLE OFFSHORE DEVELOPMENT
ALLIANCE, A D.C. NONPROFIT CORPORATION,
Petitioner,

v.

DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

SEAFREEZE SHORESIDE, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

**On Petitions For A Writ Of Certiorari To The
United States Court Of Appeals For The First Circuit**

**BRIEF OF GREEN OCEANS AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE* ¹

Green Oceans is a nonprofit, nonpartisan, grassroots organization dedicated to preserving the health of the ocean and all the life that it sustains. With the support and expertise of individuals from many professional and occupational backgrounds, Green Oceans seeks to protect precious natural resources from the risks of ocean industrialization—especially the multifarious harms caused by construction and operation of massive offshore wind energy turbines and related infrastructure. Green Oceans collaborates regularly with a nationwide network of environmental groups—from Maine to North Carolina and across to the West Coast—all similarly opposed to industrialization of the nation’s coastal waters with wind energy.

To carry out its mission, Green Oceans disseminates scientific and other information. Its website, editorials, and informative social media posts help educate thousands of followers on a weekly basis. Green Oceans also engages in advocacy activities,

¹ Petitioners’ and Respondents’ counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

including, as here, participation in the judicial process. *See* green-oceans.org.

Green Oceans' highest priority concern is protecting 1,400 square miles of ocean waters off Rhode Island and Massachusetts from ongoing and planned construction of hundreds of gigantic wind turbines on the Outer Continental Shelf. The federally approved wind energy project at issue in this appeal, Vineyard Wind 1, will harm the marine environment, imperil human health and safety, threaten national security, and virtually destroy the commercial fishing industry, while doing little to mitigate climate change.

SUMMARY OF ARGUMENT

The Outer Continental Shelf Lands Act (OCSLA), as amended by the Energy Policy Act of 2005, embodies major policy decisions that Congress made to facilitate offshore wind energy development on the Outer Continental Shelf ("OCS") while seeking to prevent or mitigate a multitude of real-world economic, environmental, safety, national security, and other harms and risks created by construction and operation of thousands of enormous wind turbines and related infrastructure. More specifically, OCSLA requires that the Department of the Interior (DOI), through the Bureau of Ocean Energy Management (BOEM), "shall ensure" that each of 12 statutorily specified protective criteria is satisfied before an OCS wind energy project can be approved. *See* 43 U.S.C. § 1337(p)(4).

As part of its anti-fossil fuel agenda, the Biden administration sought to aggressively promote and approve nationwide OCS wind energy, beginning with 1,400 square miles off the New England coast. To facilitate and expedite these efforts, BOEM has reinterpreted its statutory responsibilities under § 1337(p)(4) in order to afford itself “wide discretion” to “weigh” and achieve a “rational balance” among the 12 mandatory criteria, which BOEM has conveniently attempted to transform into mere “goals.” BOEM’s word play, reflected in its recently revised regulation, 30 C.F.R. § 585.102, titled “What are BOEM’s responsibilities under this part?” violates OCSLA’s unequivocal statutory language and defies the legislative history underlying its adoption.

As this Court has explained in *West Virginia v. EPA*, 597 U.S. 697 (2022), and other cases, the major questions doctrine precludes federal regulatory agencies from making major policy decisions without clear congressional authorization. The major questions doctrine applies here because BOEM, to arrogate virtually unfettered power to itself, essentially has second guessed and revised the major policy decisions that Congress incorporated into the 12 mandatory project-approval criteria established by § 1337(p)(4).

The Court should grant certiorari because this is a major questions case with vast potential consequences for the public and the environment. BOEM’s seizure of expansive regulatory power over how electricity is generated affects tens of millions of Americans who

will be forced to incur the high cost of often unreliable and minimally beneficial offshore wind energy. It also threatens the existence of the commercial fishing industry, irreparably harms the ocean environment, and creates grave national security and safety risks.

ARGUMENT

The Court Should Grant Review Because This Is a “Major Questions” Case

A. The major questions doctrine precludes federal agencies from making major policy decisions without clear congressional authorization

The major questions doctrine is a canon of statutory construction. It “refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” *West Virginia v. EPA*, 597 U.S. at 724; *see also Biden v. Nebraska*, 600 U.S. 477, 504 (2023) (“As we explained in [*West Virginia*], while the major questions ‘label’ may be relatively recent, it refers to ‘an identifiable body of law that has developed over a series of significant cases’ spanning decades.”) (quoting *West Virginia*, 597 U.S. at 724).

Under the major questions doctrine, courts

presume that Congress intends to make major policy decisions itself, not leave

those decisions to agencies. . . . To convince [a court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

West Virginia, 597 U.S. at 723 (internal citations and quotation marks omitted); *see also id.* at 716 (“[C]ourts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”) (internal quotation marks omitted); *id.* at 737 (“The major questions doctrine works . . . to protect the Constitution’s separation of powers.”) (Gorsuch, J., concurring).

The major questions doctrine “emphasize[s] the importance of context when a court interprets a delegation to an administrative agency.” *Nebraska*, 600 U.S. at 508 (Barrett, J., concurring). Context is “relevant to the major questions doctrine [because it] is also relevant to interpreting the scope of a delegation.” *Id.* at 513. Importantly, “[c]ontext is not found exclusively within the four corners of a statute.” *Id.* at 511 (internal quotation marks omitted). “[C]larity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.” *Id.* at 514.

B. Whether, and under what conditions, to authorize construction and operation of thousands of massive wind energy turbines on the Outer Continental Shelf are major policy questions

This Court held that *West Virginia* was “a major questions case” because it involved Congress’ supposed delegation to EPA of policymaking authority under the Clean Air Act to “substantially restructure the American energy market.” 597 U.S. at 724. Similarly, the supposed statutory delegation at issue here—policymaking authority to restructure how electricity is produced for tens of millions of Americans on the Atlantic, Pacific, and Gulf coasts—makes this a major questions case. Whether, and under what conditions, to authorize commercial wind energy development on the Outer Continental Shelf—both nationally and for specific projects—are major policy questions that implicate significant economic, environmental, safety, national security, and other concerns.

1. The reckless OCS wind energy expansion program initiated under the Biden administration is national in scope. It will encompass the Atlantic, Pacific, and Gulf coasts and “spawn new supply chains that stretch into America’s heartland.”² As the

² FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (March 29, 2021), available

certiorari petitions explain, “[i]n a rush to replace fossil fuels as this nation’s primary source of electricity, the federal government launched an aggressive, nationwide program to approve 30 gigawatts (GW) of offshore wind energy projects across all three American coasts by 2030.” Seafreeze Pet. at 1.³ According to the Biden administration’s “fact sheet,” “[a]chieving this target also will unlock a pathway to 110 GW by 2050.”⁴ “This offshore wind program will cover millions of acres of federal submerged lands with thousands of turbines, thousands of miles of underwater cables connecting the projects to the electric grid, and thousands of acres of underwater construction, including massive boulders and concrete mattresses.” Responsible Offshore Development Alliance (“RODA”) Pet. at 9-10. “To date, 39 commercial wind leases have been granted on all three coasts.” Seafreeze Pet. at 14.⁵

“[A]pproximately 35 offshore wind projects are in various stages of approval or construction along the

at <https://tinyurl.com/fyw66sey>; *see also* Angel McCoy et al., Offshore Wind Market Report: 2024 Edition v (map of “U.S. offshore wind energy pipeline activity”), available at <https://tinyurl.com/bdare9y7>.

³ A gigawatt is equivalent to 1 billion watts.

⁴ Biden FACT SHEET, *supra*.

⁵ *See* BOEM, Lease and Grant Information (“table of leases and grants that BOEM has executed since the inception of its renewable energy program”), <https://tinyurl.com/3jaj5pm7> (last visited March 17, 2025).

Atlantic coast.” RODA Pet. at 6. The project at issue in this litigation—Vineyard Wind 1—“was the first offshore wind energy project approved by the Interior Department.” *Id.* at 5. Each of the 42 already-constructed *80-story* Vineyard Wind turbines “is almost three times the size of the Statue of Liberty,” *id.* at 20, and taller than the Prudential and Hancock buildings in Boston. These gargantuan turbines, which are pile-driven into the Outer Continental Shelf off the Rhode Island and Massachusetts coasts, are visible for 30 miles, within easy sight of coastal towns frequented by millions of visitors from all over the country for their scenic beauty and beaches.

2. The OCS wind energy program unavoidably implicates a constellation of serious economic, environmental, safety, national security, and other concerns. The potential and *actual* adverse impacts of BOEM’s “bold,” “ambitious,” “rapid offshore wind deployment,”⁶ are so obvious and troubling, President Trump expressly recognized them in a Presidential Memorandum issued on the same day he was inaugurated as the nation’s 47th President. The Presidential Memorandum explains that the leasing and permitting of offshore wind projects “may lead to *grave harm*—including negative impacts on navigational safety interests, transportation interests, national security interests, commercial

⁶ Biden FACT SHEET, *supra*.

interests, and marine mammals” (emphasis added).⁷ In light of “the importance of marine life, impacts on ocean currents and wind patterns, effects on energy costs for Americans—especially those who can least afford it—and to ensure that the United States is able to maintain a robust fishing industry for future generations,” the President ordered “a comprehensive assessment and review of Federal wind leasing and permitting practices.” *Id.*

The Green Oceans website (green-oceans.org) highlights many of these grave concerns, which underlie, and are inextricably intertwined with, major policy decisions regarding whether OCS wind energy development should be authorized, and if so, under what conditions. These concerns include the following:

- **Economic concerns.** Offshore wind energy is devastating to the commercial fishing industry and extremely costly to consumers. *See* Green Oceans, *Offshore Wind & The Economy*.⁸

For example, BOEM’s Record of Decision (“ROD”) for the Vineyard Wind project confirms that the impact of the planned actions on commercial fisheries are “Major.” ROD at 16 (Table 3-2); *see also id.* at 39

⁷ Presidential Memorandum, Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government’s Leasing and Permitting Practices for Wind Projects (Jan. 20, 2025), available at <https://tinyurl.com/mtzrj64u>; *see* Seafreeze Pet. at 13-14.

⁸ <https://tinyurl.com/4retd9cn>.

(“[I]t is anticipated that there will be negative economic impacts to commercial fisheries.”).⁹ Words like “major” and “negative” do not begin to tell the story: BOEM concedes that “due to the placement of the [Vineyard Wind] turbines it is likely that the entire 75,614 acre area will be *abandoned* by commercial fisheries due to difficulties with navigation.” *Id.* (emphasis added). As the RODA certiorari petition explains, “construction of turbines, underwater cables, and other obstacles has rendered fishing in [the Vineyard Wind lease] area nearly impossible and perilous,” and “[t]hose who can still access parts of the area are experiencing a dramatic decline in their catch . . . due to the altered marine environment.” RODA Pet. at 14-15; *see also* Seafreeze Pet. at 8. Multiply this obliteration of an historic and essential New England industry by dozens of OCS wind energy leases already granted or planned on all three coasts, and “the devastating impact [OCS wind energy] projects will have on the nation’s commercial fishing industry” will be vast. RODA Pet. at 14.

Because offshore wind is the most expensive form of electricity, it also is economically detrimental to consumers—“especially those who can least afford it.” Presidential Memorandum, *supra*. The transmission and distribution of electricity from OCS wind turbines to homes and businesses is extraordinarily costly. This

⁹ BOEM Record of Decision, Vineyard Wind 1 Offshore Wind Energy Project Construction and Operations Plan (May 10, 2021), available at <https://tinyurl.com/bdf62bse>.

is partially due to the high cost of maintaining as well as constructing thousands of miles of underwater cables and related infrastructure to bring electricity ashore. And because wind energy is intermittent—a turbine typically produces energy only about 40% of the time, or about 9 to 10 hours per day—consumers must incur the additional cost of a backup source of electric power, such as from traditional fossil fuel power plants. *See* Allen Brooks, *The Benefits of Offshore Wind Come at a High Cost*;¹⁰ Miles Bidwell, *The Myth of Offshore Wind*.¹¹

- **Environmental concerns.** Healthy oceans combat climate change; offshore wind energy does not. The countless adverse environmental impacts of OCS wind energy are profound. *See* Green Oceans, *The Ocean & Climate Change*;¹² Green Oceans, *Offshore Wind & the Environment*.¹³ Construction and operation of OCS wind energy turbines and related infrastructure threaten to pollute enormous sections of pristine ocean, thereby destroying or harming a multitude of fish habitats and other sea life. Millions of gallons of fuels, coolants and lubricants could spill or leak into the ocean due to faulty equipment or major storms. Offshore wind substations dump heated chlorinated water into the ocean, killing fish larvae

¹⁰ Available at <https://tinyurl.com/yeva6ssj>.

¹¹ Available at <https://tinyurl.com/283z5u2r>.

¹² <https://tinyurl.com/5ytm2vhv>.

¹³ <https://tinyurl.com/mr2pk46u>.

and zooplankton. Trenching and laying the underwater cables for transmitting power from the turbines creates sediment plumes that choke sea life. And once installed, these high-voltage cables produce electromagnetic fields that could potentially cause birth defects in lobsters and other forms of sea life, and disrupt the abilities of sharks and many other species that use the earth's magnetic fields to orient, navigate, and find prey to survive.

There also are the well-publicized lethal effects of offshore wind energy construction on whales (including the endangered North Atlantic right whale) and other sea mammals. One theory is that the thunderous pile driving and seismic surveys essential for offshore wind energy construction deafen, confuse, and/or alarm whales, causing them to become disoriented and collide with ships or become stranded. *See Green Oceans, Underwater Noise Pollution.*¹⁴ Recognizing the threat to whales, the National Oceanic and Atmospheric Administration (NOAA) has granted offshore wind developers thousands of “incidental take authorizations,” *i.e.*, permission to harm or harass whales. *See Lisa Quattrochi Knight, and Bill Thompson, Commentary: Whales are Dying — Is there a link to offshore wind? (Feb. 1, 2023);*¹⁵ *see also* *Seafreeze Pet.* at 13 (OCS wind energy projects

¹⁴ <https://tinyurl.com/4ydz3usf>.

¹⁵ Available at <https://tinyurl.com/2y4xsw5y>. The authors are co-founders and President and Vice President of Green Oceans.

“will affect endangered species, especially species that use sound to communicate like the critically endangered North Atlantic right whale . . . which inhabits the Vineyard Wind 1 project area”).

- **Safety concerns.** OCS wind turbines are enormous. Each of the three blades on an OCS wind turbine is about 350 feet in length and weighs approximately 70 tons. Blade failure is a well-known risk. When blades fall off and break apart, they release microplastics that are transported long distances in ocean currents and are potentially toxic to humans as well as marine life. *See* Elizabeth Quattrocki Knight, M.D., Ph.D., *Blade Debris Health Risks*;¹⁶ *Green Oceans, Offshore Wind and Human Health*;¹⁷ *Green Oceans, Plastic Pollution*.¹⁸ As the certiorari petitions discuss, in July 2024 one of the newly installed Vineyard Wind turbine blades broke apart and scattered thousands of pounds of plastic and other debris that washed ashore on Massachusetts, Rhode Island, and Long Island beaches. *See* RODA Pet. at 20-21; Seafreeze Pet. at 15.

OCS wind turbines also create dangerous navigation hazards and obstacles for military, commercial, emergency, and recreational vessels.

¹⁶ Available at <https://tinyurl.com/4afhu4c2>.

¹⁷ <https://tinyurl.com/53vzk3wd>.

¹⁸ <https://tinyurl.com/5n9bpssr>.

See Green Oceans, Offshore Wind Energy as a threat to National Security (discussing navigation safety risks);¹⁹ Green Oceans, Offshore Wind Industry’s Impact on Search and Rescue;²⁰ Green Oceans, Offshore Wind, Fishing & Recreation.²¹ As noted above, President Trump’s Memorandum recognizing the grave harms of offshore wind energy development specifically cites the “negative impacts on navigational safety interests.” Presidential Action Memorandum, *supra*.

• **National Security.** There also are alarming reasons why “[o]ffshore wind projects pose a serious threat to our national defense.” Green Oceans, Offshore Wind Energy as a Threat to National Security, *supra*. One reason is wind turbine interference with military radar and sonar, such as the Cape Cod Space Force Station’s early missile detection system—the only one of its kind on the East Coast. *See id.*; *see also* Green Oceans, Offshore Wind & National Security.²² A recent U.S. Department of Energy Report to Congress explains that

[a]s wind turbines continue to expand both in size and number, they can interfere with

¹⁹ <https://tinyurl.com/4ytb8nx6>.

²⁰ <https://tinyurl.com/3m4r5nbr>.

²¹ <https://tinyurl.com/ycxuku76>.

²² <https://tinyurl.com/2vcbjh9a>.

radar systems. The clutter created by wind turbines typically increases the false alarm detection rate of a radar. To suppress this, the radar system will raise the threshold for what is considered a detection and, as a result, may miss actual targets.

U.S. Dep't of Energy, Update on the Efforts of the Wind Turbine Radar Interference Mitigation Working Group (Feb. 2024).²³ The affected radar systems include those that “support air traffic control and flight safety, severe weather forecasting and warnings, coastal sea-surface and maritime surveillance, oceanographic measurements, and homeland and national defense missions.” *Id.* Further, “[t]o date, no mitigation technology has been able to fully restore the technical performance of impacted radars.” Offshore Wind Energy as a threat to National Security, *supra*.

Another major concern is that “[g]rid instability and insufficiency pose a significant national security risk because electricity underpins essential infrastructure . . . Any significant prolonged outage could leave the government and emergency services unable to respond . . . and would undermine the military.” *Id.* The prospect of offshore wind energy outages is real, especially given the threat of

²³ Available at <https://tinyurl.com/yc7rxnb8>.

cybersecurity attacks by the nation's high-tech adversaries such as China and Russia.

These economic, environmental, safety, and national security concerns explain why authorization of OCS wind energy development, both nationally and on a project-specific basis, implicate major policy questions.

C. OCSLA addresses the major policy questions intertwined with development of offshore wind energy by mandating that each of 12 statutorily specified criteria is satisfied before an OCS wind energy project can be approved

“Agencies have only those powers given to them by Congress” *West Virginia*, 597 U.S. at 724. The OCSLA provision at issue in this litigation, section 8(p), 43 U.S.C. § 1337(p), was added to the statute by the Energy Policy Act of 2005. It authorizes the Secretary of the Interior (through BOEM) to “grant a lease, easement, or right-of-way on the outer Continental Shelf for activities . . . that produce or support . . . transmission of energy from sources other than oil and gas.” *Id.* §§ 1337(p)(1) & (p)(1)(C). In other words, § 1337(p) is the source of BOEM’s “authority to manage the development of energy on the [OCS] from sources other than oil and gas, including renewable energy through the issuance of leases . . . that produce or support the production, transportation, or transmission of energy.” 30 C.F.R.

§ 585.100 (Authority); *see also* Pet.App. 7a (First Circuit description of OCSLA).²⁴

Section 1337(p) not only authorizes BOEM to approve OCS wind energy development, but also expressly limits BOEM’s discretion to do so, both in general and as to each specific project. OCSLA’s “Congressional declaration of policy” states in part that “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, *subject to environmental safeguards*,” *id.* § 1332(3) (emphasis added), and “in such a manner that . . . the *right to navigation and fishing* . . . shall not be affected.” *Id.* § 1332(2) (emphasis added). Consistent with this policy, Congress in section 8(p)(4), 43 U.S.C. § 1337(p)(4), titled “Requirements,” mandated that the “Secretary *shall ensure* that any activity under this subsection is carried out in a manner that provides for” 12 specified criteria (emphasis added).

More specifically, § 1337(p)(4) requires the Secretary, *i.e.* BOEM, to ensure that an OCS wind energy project provides for, *inter alia*,

- “safety”

²⁴ Both certiorari petitions have reproduced and paginated the First Circuit’s opinion in the same manner.

- “protection of the environment,” including “prevention of waste” and “conservation of natural resources on the outer Continental Shelf”;
- “protection of natural security interests of the United States”; and
- “prevention of interference with reasonable uses . . . of the exclusive economic zone [and] the high seas,” and “consideration of . . . any other use of the sea or seabed, including use for a fishery, a sealane . . . or navigation.”

Id. §§ 1337(p)(4)(A), (B), (C), (D), (F), (I), (J)(ii).

These and the other statutory prerequisites specified in § 1337(p)(4) for BOEM approval of each and every OCS wind energy project are regulatory guardrails. They embody the major policy decisions that Congress made when it decided to authorize offshore wind energy development, but only if each of the § 1337(p)(4) is met for each project. These mandatory approval criteria expressly reflect the economic, environmental, safety, national security, and other concerns intertwined with those major policy decisions.

D. The major questions doctrine applies because nothing in OCSLA authorizes BOEM to second guess how Congress addressed the major policy questions intertwined with development of offshore wind energy

“An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325 (2014). But this is exactly what BOEM has done in connection with the § 1337(p)(4) criteria for approval of OCS wind energy projects. Because these mandatory criteria embody Congress’ major policy decisions regarding the conditions under which OCS wind energy projects can be approved—and nothing in § 1337(p)(4) or elsewhere in OCSLA authorizes BOEM to alter them—the major questions doctrine precludes BOEM’s attempt to assign itself practically unfettered discretion to approve whatever OCS wind projects it chooses, no matter what the consequences to the public, industry, or the ocean environment.

1. The mandatory nature of § 1337(p)(4)’s plain language is indisputable: BOEM “shall ensure” that the project-approval criteria are satisfied. The First Circuit agreed that “the OCSLA criteria are ‘mandatory.’” Pet.App. 44a; *see Nat’l Ass’n of Homebuilders v. Def. of Wildlife*, 551 U.S. 644, 661 (2007) (“By its terms, the statutory language is mandatory Congress’ use of a mandatory ‘shall’ . . . impose[s] discretionless obligations.”) (cleaned up).

Although resort to the legislative history of § 1337(p)(4) is unnecessary, it confirms congressional intent. As discussed in a December 2020 legal memorandum from the DOI Solicitor to the Secretary of the Interior, § 1337(p)(4) (referred to as subsection 8(p)(4) in the memorandum), as originally proposed by DOI, merely identified “factors” for the Secretary to “consider” when deciding whether to grant a lease for an OCS project. Dec. 2020 Mem. at 7.²⁵ But

[i]n the final statutory language, those factors . . . are instead written as requirements that the Secretary *must ensure* are met by any activity approved under subsection 8(p)(4). The textual changes between the amendment as proposed and as adopted reveal a shift from mere considerations to *affirmative requirements* with which all approvals must comply.

Id. (emphasis added). Although the Biden administration, to advance its own agenda, rescinded the December 2020 legal memorandum, that does not

²⁵ DOI, Mem. from Solicitor to Secretary (M37059) (Dec. 14, 2020), available at <https://tinyurl.com/532p7xbd>.

change either the statute’s legislative history or congressional intent.²⁶

2. As discussed above, “context,” including “surrounding circumstances,” is important to application of the major questions doctrine. *See Biden v. Nebraska*, 600 U.S. at 508, 514 (Barrett, J., concurring). “Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.” *Id.* at 508.

Here, application of the major questions doctrine to BOEM’s elastic interpretation of its responsibilities under § 1337(p)(4) is informed by the surrounding circumstances. They demonstrate that BOEM has *reinterpreted* § 1337(p)(4)—and in so doing, revised the congressional policy decisions that this critical provision reflects—for the purpose of arrogating to itself the regulatory power and discretion needed to fulfill a (now former) presidential administration’s OCS energy-related political agenda.

To facilitate the Biden administration’s “bold,” “ambitious,” and “rapid” OCS wind energy program,²⁷ DOI’s Principal Deputy Solicitor, in an April 9, 2021 memorandum to the new Secretary, withdrew his

²⁶ The Solicitor’s memorandum focused on BOEM’s statutory duties under § 1337(p)(4)(I) in connection with ensuring “prevention of interference with reasonable uses” of the ocean, *e.g.* commercial fishing, but his opinion emphasized the mandatory nature of all of the § 1337(p)(4) approval criteria.

²⁷ Biden FACT SHEET, *supra*.

predecessor's December 14, 2020 memorandum, and replaced it with a self-serving reinterpretation of § 1337(p)(4). According to this new and expedient legal opinion, § 1337(p)(4) merely imposes “a general requirement that an agency accomplish one or more broadly defined goals.” April 2021 Mem. at 1.²⁸ More specifically, the April 2021 memorandum asserts that § 1337(p)(4) “require[s] only that the Secretary *strike a rational balance* between Congress’s enumerated goals,” and that “[i]n making this determination, the Secretary retains *wide discretion to weigh those goals* as an application of her technical expertise and *policy judgment*.” *Id.* at 2 (emphasis added). According to the memorandum, § 1337(p)(4) “*does not require* the Secretary to ensure that the goals are achieved to a particular degree.” *Id.* at 5 (emphasis added).

The following month, May 2021, BOEM issued its Record of Decision (ROD) for the Vineyard Wind project, the first such OCS project to be approved. The ROD quotes from the Biden administration’s April 2021 DOI legal memorandum and recites its assertions about BOEM’s supposed “wide discretion” under § 1337(p)(4) “to determine the *appropriate balance* between two or more goals that conflict or

²⁸ DOI, Mem. from the Principal Deputy Solicitor to the Secretary (M-37067) (April 9, 2021), available at <https://tinyurl.com/mr3xvhp5>.

otherwise are in tension (emphasis added);”²⁹ *see also* ROD, App. B (Compliance Review) (same).

Along the same lines, BOEM subsequently revised the regulation that sets forth BOEM’s self-description of its duties under § 1337(p)(4). Between October 2011 and July 2024, 30 C.F.R. § 585.102 (“What are BOEM’s responsibilities under this part?”), closely tracked the language of § 1337(p)(4). The regulation began by stating that “BOEM will ensure that any activities authorized in this part are carried out in a manner that provides for . . . [listing the 12 approval criteria].” But effective July 14, 2024, § 585.102 now begins as follows: “BOEM will ensure that any activities authorized in this part are carried out in a manner that provides for and reaches a *rational balance* among the following *goals* to the extent they conflict or are otherwise in tension, none of which inherently outweighs or supplants any other” (emphasis added). The revised regulation’s assertion that the § 1337(p)(4) approval criteria may “conflict” or be “in tension” with each other is just a pretext for BOEM’s supposed authority to “balance” them rather than ensure that each is satisfied.

In short, BOEM, with the assistance of the DOI Solicitor’s office, has transformed the mandatory project-approval criteria established by § 1337(p)(4) into “goals.” And BOEM has arrogated to itself “wide discretion” and “policy judgment” to achieve whatever

²⁹ ROD at 9.

“rational balance” of those goals it needs to contrive in order to approve an OCS project such as Vineyard Wind. The major questions doctrine precludes BOEM from performing this bureaucratic sleight of hand and revising the major policy decisions that Congress addressed by enacting § 1337(p)(4).

“Context also includes common sense,” *Nebraska*, 600 U.S. at 512 (Barrett, J., concurring), and common sense confirms that BOEM, to serve its own purposes, essentially has rewritten the unequivocal text of § 1337(p)(4). Despite the huge expanse of the Atlantic Outer Continental Shelf, BOEM has granted leases and approved wind energy projects that obstruct prime commercial fishing areas, and also trigger serious environmental, safety, and national security concerns. This supposed “rational” balance of OCSLA’s “goals” not only reflects BOEM’s own policy priorities, but also directly conflicts with the statutory requirement that BOEM “shall ensure” that each of the 12 criteria for approval of an OCS wind energy project is satisfied.

“[A]n initiative of this scope, cost, and political salience is not the type Congress lightly delegates to an agency.” *Nebraska*, 600 U.S. at 520 (Barrett, J. concurring). Where, as here, “an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy [the Court] typically greet[s] its announcement with a measure of skepticism” (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (internal citation and quotation marks omitted). Such

skepticism is warranted here, especially now that the Court in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), has overruled *Chevron* deference.

3. The First Circuit panel’s discussion as to why “BOEM must have ‘discretion’ in considering whether each statutory criterion is satisfied” is a red herring. Pet.App. 44a-45a. The issue here is not whether a specific criterion is satisfied for a particular project, but instead, whether, as BOEM contends, it has broad discretion to balance the criteria as it sees fit, rather than ensure that each is satisfied. The First Circuit panel, like the district court, erroneously asserted that “BOEM must ‘balance’ the statutory mandate to develop energy projects on the Outer Continental Shelf with the twelve statutory criteria for which it must provide.” *Id.* at 45a. Even assuming that OCSLA includes a “mandate” to develop OCS wind energy, OCSLA neither expressly nor impliedly requires, or authorizes, such balancing, much less whatever BOEM conveniently considers to be a “rational balance.”

Section 1337(p) is straightforward: “The Secretary . . . *may* grant a lease.” 43 U.S.C. § 1337(p)(1) (emphasis added). But the Secretary “*shall* ensure that any activity” under § 1337(p), *i.e.*, granting a lease for an OCS wind energy project, “is carried out in a manner that provides for” each of the 12 criteria. *Id.* § 1337(p)(4) (emphasis added). Each criterion must be met. There is no hint in the statute that Congress intended that BOEM can or should balance the 12 criteria against each other, or balance them

collectively or individually against the statutory objective of supporting production of offshore wind energy. If Congress wanted any such balancing, the statute would have said so. Instead, Congress addressed the major policy questions of whether, and under what conditions, to authorize OCS wind energy development by allowing approval of a project only if it satisfies each of the 12 criteria, including those that expressly take into account economic, environmental, safety, and national security concerns.

BOEM's attempt to reinterpret the statute so that it can make its own politically expedient policy judgments as to what conditions should be satisfied for approval of OCS wind energy projects is barred by the major questions doctrine. The Court should grant certiorari and so hold.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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