No. 14-459

In the
Supreme Court of the United States

CENTURY EXPLORATION NEW ORLEANS, LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, contrary to *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604 (2000), and long-standing principles of contract and administrative law, the Department of Interior's email and informal guidance documents unilaterally amending Petitioner's lease obligations were Outer Continental Shelf Lands Act (OCSLA) "regulations" that could validly impose "new and different requirements" (530 U.S. at 616) after Petitioner executed its lease.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Century Exploration New Orleans, LLC (Century Exploration).[1]

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind, and has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government. Among other matters affecting the public interest, PLF attorneys have participated in numerous cases where agencies of the federal government overreached in the manner in which they interpreted law and regulation. Those cases include: *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014), *Horne v. United States Department of Agriculture*, 133 S. Ct. 2053 (2013), *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and *Rapanos v. United States*, 547 U.S. 715 (2006).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

PLF believes that the government must abide by the deals it strikes and that its role as sovereign does not give it carte blanche to rewrite contracts at its whim. Because that is what has occurred to date in this case, the Court should accept the case and grant summary reversal.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

The federal government's reach extends far beyond what it directly manages and controls. This may be a necessary feature of government generally, but the United States Constitution was designed to cabin the federal government's power to prevent unnecessary interferences with individual liberty. And even within its possible constitutional reach, Congress and the federal courts have fashioned rules of administrative procedure, especially with the enactment of the Administrative Procedure Act in 1946, to protect regulated parties and individuals from unlawful and arbitrary government action.

Those administrative safeguards are particularly important as the size, scope, and substantive authority of the administrative state has grown. The government's regulatory reach tends to increase with time, because new regulatory programs are routinely created and because few existing authorities are ever repealed or significantly narrowed. Moreover, public choice theory teaches that government officials administering regulatory programs, particularly bureaucratic staff without electoral constraints, will tend to aggrandize their own authority as each year passes, even with the most benign motives.

Both formal rulemaking, with a hearing and record, and notice-and-comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, provide regulated parties a degree of input and protection from unlawful and arbitrary actions, including a clear opportunity for judicial review. The growth of informal agency statements and guidance documents that fall short of these protections, but still have a significant impact on regulated parties, is a troubling development, especially given the explosive growth of the administrative state. It is the distinction between rulemaking and guidance that gives rise to the important federal question that this case poses for the Court to resolve.

The parties to the oil and gas exploration lease at issue in this case agreed that the lease was subject to statutes and regulations then in existence plus "regulations issued pursuant to the [Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq*. (OCSLA)] in the future which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf and the protection of correlative rights therein." *Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168, 1169 (Fed. Cir. 2014). Century Exploration argues that the relevant agency email and frequently asked questions (FAQs) were issued pursuant to the Oil Pollution Act, 33 U.S.C. § 2701, *et seq*. (OPA), rather than the OCSLA. Pet. at 23-26. That is true, but the decision by the Federal Circuit contains a basic error that is at least as deserving of this Court's attention because of its application in numerous other types of federal leases, grants, and contracts: the agency communications were not "regulations."

The instant case presents critical issues that go well beyond the oil and gas industry. The definition of a "regulation" accepted by the court below will increase the incentives agencies have to regulate by guidance documents and emails, in contravention of statutory law and the due process rights of regulated entities. The fundamental nature of the error below calls out for summary reversal. Alternatively, this Court should review the decision below to reform that practice by establishing the controlling principle that "regulations" that have the force of law are subject to certain minimum administrative safeguards to ensure fidelity to law and prevent arbitrary action.

REASONS FOR GRANTING THE WRIT AND SUMMARY REVERSAL

I

THE LOWER COURT'S TREATMENT OF INFORMAL GUIDANCE DOCUMENTS AS EQUIVALENT TO REGULATIONS CREATES AN IMPORTANT FEDERAL QUESTION THAT THIS COURT SHOULD SETTLE

After the Deepwater Horizon accident, the Department of the Interior (Interior) issued a notice to all lessees (NTL-06), and an accompanying Frequently Asked Questions guidance document, along with an email specifically to Century Exploration, that required Century Exploration to increase its worst-case disaster bond so as to cover a 120-day oil disaster much larger in size and scope than the 30-day disaster that the OPA required Century Exploration to meet. Interior also required it to certify that it had the financial

capability to handle this proposed new disaster. Pet. at 10-11.

Interior imposed these new demands without putting any of them through the procedural requirements for regulations, *see* APA, 5 U.S.C. § 553, let alone by submitting the notice to Congress pursuant to the Congressional Review Act (CRA) (5 U.S.C. §§ 801-808). Interior's decision to ignore the differences between regulations, rules, and informal guidance documents, and the lower courts' approval of that course of conduct, creates an important federal question for this Court to resolve: namely, whether the definition of "regulation" that the federal courts have previously accepted has been modified *sub silentio* by the executive branch in favor of increased government authority via "guidance," with the approval of the courts, or whether the traditional definitions of "regulation" and "rules" are still intact and definitions upon which Americans can rely.

A. Informal Guidance Documents May Clarify the Law, but Not Create It

Guidance documents are interpretive rules or statements of policy that may clarify existing regulatory requirements. They may not create new obligations upon private parties "without the traditional requirements imposed on legislative rulemaking." Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 Harv. L. Rev. 1755, 1784 (2013) (citing Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1332-55 (1992)). Yet in the instant case, the notice, FAQ, and e-mail created new obligations for Century—obligations amounting to

approximately $120 million in additional costs—all outside the legislative rulemaking process that new regulations would have gone through if Interior had followed the lease and imposed changes via regulations issued pursuant to OCSLA.

Interior's course of conduct conflicts with how federal administrative law is designed to operate. When an agency does not merely interpret existing regulations, but rather creates new demands that it intends to bind, the agency must observe the legislative processes laid down by Congress. *See* APA, 5 U.S.C. § 553; *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979). These statutory procedures for developing legislative rules serve values important to a fair and effective administrative process and for the maintenance of a democratic system of limited government. *See* Anthony, 41 Duke L.J. at 1314 (citing Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 402-09 (1985)).

B. Interior Did Not Treat the Relevant Guidance Document as a "Rule" Pursuant to the Administrative Procedure Act

The APA includes a broad definition of the term "rule" in 5 U.S.C. § 551(4). Other sections of chapter 5 set forth procedures for particular types of rules and rulemakings. The term "rule" in section 551(4) includes adjudicatory rulemakings, notice-and-comment regulations, interpretive rules, and some guidance documents. Since the APA does not define the term "regulation," that term has a less precise, colloquial meaning, but they are a subset of all APA rules. The common understanding of the word "regulation," and that which is probably most

frequently used in administrative law cases, is an agency statement resulting from formal adjudicatory rulemakings pursuant to 5 U.S.C. § 554 or notice-and-comment regulations pursuant to 5 U.S.C. § 553. *See* Sean Croston, *It Means What It Says: Deciphering and Respecting the APA's Definition of "Rule*,*"* 53 Washburn L.J. 27, 27-28 (Fall 2013) (explaining that regulations are a subcategory of rules under the APA).

Yet Interior did not treat the guidance documents at issue in this case as any type of "rule" under section 551(4), nor did Interior follow the legal requirements for all rules pursuant to the APA. If an agency document is not a "rule" pursuant to the APA, it is hard to see how it could be a "regulation" in either the formal or informal sense.

Interior did not treat the informal guidance document at issue as a "rule" because it did not follow chapter 8 of the APA, 5 U.S.C. §§ 801-808, which requires *any* type of rule to be submitted to Congress for review before it goes into effect. As explained below, the best reading of chapter 8 is that the guidance documents at issue are not even legally "in effect" as of today, but it is enough in this case to show that Interior did not treat the guidance document as a rule prior to this litigation. Even if Interior can follow its own guidance documents internally when determining whether to grant *new* leases, any assertion that its email and FAQs are federal "rules," and thus also "regulations," binding on *existing* leases, is contradicted by its own conduct.

The congressional review mechanism for new agency rules, known as the Congressional Review Act (CRA), *id.*, requires that covered agencies promulgating a rule must submit a report to each

House of Congress and to the Comptroller General that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed a major rule), and the proposed effective date of the rule. 5 U.S.C. § 801(a)(1). *See also* Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade at CRS-2.[2]

Executive agencies must comply with the congressional presentment requirements of the CRA before any rule can take effect. 5 U.S.C. § 801(a)(1)(A). The Department of Interior bureaus responsible for issuing rules and regulations relating to oil and gas leasing know these requirements. They collectively submitted at least twelve proposed rules to the Government Accountability Office (GAO) and Congress related to the OCSLA in the last four years.[3]

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[2] *Available at* http://assets.opencrs.com/rpts/RL30116_2008058.pdf (last visited Nov. 18, 2014) (CRS Report).

[3] Those twelve regulations include seven submitted by the Bureau of Ocean Energy Management Regulation and Enforcement: Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf—Acquire a Lease Non-Competitively, 77 Fed. Reg. 1019 (Jan. 9, 2012); Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Civil Penalties, 76 Fed Reg. 38,294 (June 30, 2011); Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf—Acquire a Lease Non-Competitively, 76 Fed. Reg. 28,178 (May 16, 2011); Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 75 Fed. Reg. 76,632 (Dec. 9, 2010); Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf—Acquire a Lease Non-Competitively, 75 Fed. Reg. 72,679 (Nov. 26, 2010); Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and

(continued...)

The searchable database maintained by the GAO for tracking CRA filings[4] does not show that the relevant FAQ, NTL-06, or similar agency statement, was ever submitted to Congress in compliance with chapter 8 of the APA.

One of the OCSLA rules submitted to Congress references NTL-06,[5] but casually, and it does not incorporate NTL-06 by reference or in any other meaningful manner. If a congressional bill was never

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[3](...continued)
Environmental Management Systems, 75 Fed. Reg. 63,610 (Oct. 15, 2010); and Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 75 Fed. Reg. 63,346 (Oct. 14, 2010); four submitted by the Bureau of Safety and environmental Enforcement: Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Adjustment of Service Fees, 78 Fed. Reg. 60,208 (Oct. 1, 2013); Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Revisions to Safety and Environmental Management Systems, 78 Fed. Reg. 20,423 (Apr. 5, 2013); Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 77 Fed. Reg. 50,856 (Aug. 22, 2012); and Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 77 Fed. Reg. 50,856 (Aug. 22, 2012); and one submitted by the Bureau of Ocean Energy Management: Timing Requirements for the Submission of a Site Assessment Plan (SAP) or General Activities Plan (GAP) for a Renewable Energy Project on the Outer Continental Shelf (OCS), 79 Fed. Reg. 21,617 (Apr. 17, 2014).

[4] *Available at* http://www.gao.gov/legal/congressact/fedrule.html.

[5] Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement, Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 75 Fed. Reg. 63,346 (Oct. 14, 2010).

presented to the President for his signature or veto pursuant to U.S. Const., art. I, § 7, cls. 2-3, the constitutional presentment requirement for that bill would not be satisfied if a subsequent bill referencing the earlier bill's title or number was presented to the President. *Cf. I.N.S. v. Chadha*, 462 U.S. 919, 945-48, 958-59 (1983) (rejecting pragmatic and functional arguments for ignoring the formal bicameralism and presentment requirements of the Clause). By analogy, a brief reference to or description of NTL-06 does satisfy the presentment requirements of Section 801. Instead, such *sub rosa* "presentment" would defeat the purpose of the CRA, which is designed to permit Congress to review each independent rule when promulgated and consider whether to promptly pass a resolution of disapproval. *See* 142 Cong. Rec. E571-01 (daily ed. Apr. 19, 1996) and 142 Cong. Rec. S3683-01 (daily ed. Apr. 18, 1996) (identical Joint Explanatory Statements of the House and Senate sponsors of the CRA). Nevertheless, Interior's submission of those twelve other regulations to Congress proves beyond question that Interior knew how to ensure those agency statements would be treated as rules.

The CRA employs the broadest term in the APA to define the documents that must be presented to Congress before they can take effect (which includes all rules thought of colloquially as regulations, plus interpretive rules, and many guidance documents). Section 804(3) incorporates the definition of a "rule" found at 5 U.S.C. § 551(4), which defines a rule to mean "the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy,"

although it carves out some minor exclusions not applicable here.

The legislative history of Section 551(4) indicates that the term "rule" is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well." Attorney General's Manual on the Administrative Procedure Act 13 (1948). The drafters of Section 804(3) chose to incorporate it for that very reason. The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make," including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. *Avoyelles Sportsmen's League, Inc. v. March*, 715 F.2d 897, 908 (5th Cir. 1983); *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980) ("the breadth of this definition [of rule] cannot be gainsaid"); CRS Report at CRS-2-3. Thus, a broad range of agency action is subject to congressional review. *Id.* at CRS-3.

Interior does comply with the CRA when it issues many rules and regulations relating to the OCSLA. *See* note 3, *supra*. So if the notice, e-mail, and FAQ at issue in this case were intended to have the binding effect on existing leases that Interior and the lower courts determined they did, then Interior would have complied with its legal duty to submit these documents to Congress pursuant to the CRA. A diligent search of the GAO on-line database for CRA filings does not show that the guidance documents at issue were ever submitted to Congress.

Whether federal courts could review a claim directly challenging whether Interior's guidance documents are in "in effect" at all is unclear, because the lower courts have split on the scope of judicial review for compliance with some aspects of the CRA. *See*, *e.g.*, CRS Report at CRA-28-34 (arguing that the best reading of the CRA text is to allow limited judicial review of whether rules are in effect as a matter of law, and in the case of textual ambiguity, arguing that the contemporaneous legislative history unambiguously supports that reading of the text); Testimony of Todd F. Gaziano Before the U.S. House of Representatives, Committee on Judiciary, Subcommittee on Commercial and Administrative Law Regarding "The Tenth Anniversary of the Congressional Review Act" at 9-10 (Mar. 30, 2006) (explaining why the limitation on judicial review in section 805 of the CRA prevents courts from reviewing major rule determinations and the sufficiency of congressional procedures, but does not preclude courts from ruling on whether rules are in effect by operation of law).[6]

The important point in this case, however, is not whether the guidance documents are technically *in effect* or not. The issue in this case is whether they are "regulations" in the context of the federal lease. If they are not "rules" under the APA, then they cannot be a *subset* of "rules" that are commonly referred to as

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[6] Although the lower courts are split on the scope of judicial review over some aspects of the CRA, this Court has reversed even uniform lower court denials of judicial review under the APA. In *Sackett v. EPA*, 132 S. Ct. 1367, this Court overturned the universal hostility of five federal circuits and ten district courts to provide a judicial forum under the APA, and this Court's decision was unanimous.

"regulations." The failure of Interior to treat them as "rules" under the CRA when it treated many other OCSLA documents as "rules" is highly probative evidence of Interior's own conclusion prior to litigation with Century Exploration; namely, that Interior imposed its multi-million dollar changes to its contract with Century Exploration not by regulation, as the contract required, but by informal guidance documents.

II

THE IMPORTANT FEDERAL QUESTION OF THE MEANING OF "REGULATIONS" EXTENDS FAR BEYOND THE OIL AND GAS LEASE IN THIS CASE

The use of informal guidance documents may inform the public about agency positions—but the misuse of such documents to bind private parties carries great costs. If such nonlegislative actions can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency officials will surely use them. Anthony, 41 Duke L.J. at 1317. Agency officials will do so because it allows the agency to avoid public participation in the development of the rule. *See* 5 U.S.C. § 553(c). Further, it allows the agency to avoid having to justify the impacts of the rule to the public.[7] *Id.*

[7] That the executive branch of the government believes it useful to avoid the public understanding the impact of federal regulations on their daily lives is well illustrated by MIT economics professor Jonathan Gruber's comments regarding how Congress and President Obama successfully remade the American health care system. *See* Ilya Somin, *Key architect of Obamacare admitted that it was passed by exploiting political ignorance*, The Volokh Conspiracy, *available at* http://www.washingtonpost.com/news/ (continued...)

By any reasonable measure, the executive branch's regulatory reach has increased markedly in recent years in shaping: (i) healthcare markets, through regulations, guidance documents, and executive memoranda purportedly issued pursuant to the Patient Protection and Affordable Care Act (ACA),[8] (ii) financial markets, through similar directives under the Dodd-Frank Wall Street Reform and Consumer

[7](...continued)
volokh-conspiracy/wp/2014/11/11/key-architect-of-obamacare-admitted-that-it-was-passed-by-exploiting-political-ignorance/ (last visited Nov. 18, 2014).

[8] Examples of the ACA leading to regulatory overreach are too many to list, but include IRS's delay of the deadline for obtaining coverage, known as Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 53,646 (Aug. 30, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-08-30/pdf/2013-21157.pdf, the Centers for Medicare & Medicaid Services (CMM)'s bulletin expanding exemptions to the ACA, *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf; as well as CMM's guidance granting ACA waivers to businesses, Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014, *available at http:*//www.cms.gov/CCIIO/Resources/Files/approved_applications_for_waiver.html; Health & Human Services' (HHS) regulation exempting "self-insured" plans that do not use a third party administrator, known as Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744 (Mar. 11, 2014); and IRS regulations requiring Treasury to grant subsidies for coverage purchases through all Exchanges—not only those established by states under section 1311 of the Act, but also by HHS under section 1321. *See* Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011); 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012).

Protection Act,[9] (iii) industrial production, through extensive environmental and wildlife regulations issued by various federal agencies,[10] and (iv) even private contracting, including regulations and guidance documents issued by the Consumer Financial Protection Bureau.[11]

Repeatedly, the courts have criticized federal agencies for relying on guidance documents inconsistent with regulations in their dealings with private parties. *See, e.g., Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1011 (D.C. 2014) (rejecting EPA's application of guidance directive as inconsistent with regulation); *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 746-50 (6th Cir. 2012) (rejecting EPA's interpretation of regulation as set out in EPA "guidance memorandum").

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[9] Rules and informal guidance documents for implementation of Dodd-Frank, *available at* http://www.mofo.com/~/media/Files/PDFs/DoddFrank/140930FinalRulesStudiesByAgency.pdf (last visited Nov. 18, 2014).

[10] Recent EPA informal guidance documents masquerading as enforceable rules include its fact sheet addressing stormwater discharges from construction sites, Revisions to the Construction and Development Effluent Guidelines; Final Rule, *available at* http://water.epa.gov/scitech/wastetech/guide/construction/upload/Revisions-to-the-Construction-and-Development-Effluent-Guidelines-Final-Rule-Factsheet.pdf, and its Background on Establishing New Source Performance Standards (NSPS) Under the Clean Air Act, *available at* http://www2.epa.gov/sites/production/files/2013-09/documents/111background.pdf (last visited Nov. 18, 2014).

[11] More than forty informal guidance documents issued by the Consumer Financial Protection Bureau are *available at* http://www.consumerfinance.gov/guidance/ (last visited Nov. 18, 2014).

Perhaps most importantly in this case, the lower court's decision to allow Interior to use informal guidance documents to impose the overwhelming financial burdens it imposed here allowed the agency to avoid altogether the CRA's requirement that any rule imposing economic costs greater than $100 million, or imposing a major increase in costs on industry, be reported to Congress beforehand for approval. *See* 5 U.S.C. § 804(2)(A)-(C). It is understandable why Interior saw fit to revisit its contracts with oil lessees after the Deepwater Horizon incident, but the way in which Interior chose to change the terms of the contract between Century Exploration and the agency was simply a material breach of the contract.

CONCLUSION

Interior's email and informal guidance documents unilaterally amending Petitioner's lease obligations were not OCSLA regulations that could validly impose new and different requirements after Petitioner executed its lease. For this reason, along with the other reasons advanced by Century Exploration, the judgment of the lower court should be summarily reversed. Alternatively, this Court should grant the petition to establish the differences between rulemaking and guidance, and emphasize that the constitutional structure of our government requires

public confidence that the executive branch will be held to its word.

DATED: November, 2014.

Respectfully submitted,

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