Nos. 99-244 and 99-253

IN THE
Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MARATHON OIL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF MARATHON OIL COMPANY

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REPLY BRIEF OF MARATHON OIL COMPANY

The government's brief contradicts both the plain language of petitioners' leases and settled common-law rules of contract construction, breach, and remedies. *First*, the government's argument that the leases incorporated future statutes such as the Outer Banks Protection Act ("OBPA") is contradicted by the plain language of the leases, Pet. App. 175a (§ 1),[1] and was rejected by both courts below. See *id.* at 65a-66a; *id.* at 12a. This Court has repeatedly rejected attempts to read into government contracts a reserved government right to nullify unilaterally its own obligations by enacting subsequent legislation. See *infra*, at 1-9. *Second*, the government's breach was plainly material because it repudiated the very performance for which petitioners had bargained when they paid more than $156 million in up-front bonuses. See *infra*, at 9-14. *Third*, restitution is a remedy for material breach even when expectation damages are uncertain or could be proven to be zero. See *infra*, at 15-16. *Fourth*, there was no waiver of the government's material breach because the government did not provide any performance under the leases after its breach, and petitioners did not accept any such performance. See *infra*, at 16-20.

I. THE OBPA REPUDIATED PETITIONERS' OCS LEASES, ENTITLING THEM TO RESTITUTION.

A. Enactment Of The OBPA Repudiated The Government's Lease Agreements With Petitioners.

It is conceded common ground, see U.S. Br. 31, that petitioners' leases each incorporated the provisions of the Outer Continental Shelf Lands Act ("OCSLA") and the regulations thereunder by reference and made them part of the contracts. The incorporated OCSLA in turn set forth detailed and precise time frames and substantive standards

[1] Citations to "Pet. App." refer to the appendices to the petition filed in No. 99-253.

for government action on petitioners' requests for its approval of the plans and applications necessary for them to explore and develop their Outer Continental Shelf ("OCS") lease tracts. Thus, the government does not dispute that through its incorporation of the OCSLA, the lease contracts imposed on the United States the "necessary reciprocal obligation" to "timely and fairly consider —not necessarily approve, but at least promptly consider —exploration plans properly submitted." Pet. App. 76a.

The government contends, however, that this very same incorporation of the OCSLA also "authorize[d]," U.S. Br. 31, the government to exercise the unilateral power to nullify its own obligation of "timely and fair[] consider-[ation]." Specifically, the government contends, see *id.* at 31-32, that (1) when the leases incorporated the OCSLA and the regulations thereunder, they also "contemplated and authorized," *id.* at 31, that Congress could by future statute make any substantive change to the government's consideration of petitioners' plans that the Secretary of the Interior (the "Secretary") was authorized to make by regulation; (2) the actions mandated by the OBPA could have been required by the Secretary under the OCSLA and its regulations; (3) therefore, the OBPA's "drastic unilateral interference," Pet. App. 67a, with the OCSLA's regulatory scheme "was precisely the type of delay contemplated and authorized by the parties under the[] leases," U.S. Br. 31. As we demonstrate, the government's interpretation is contrary to the plain language of the leases, was rejected by *both* courts below, and is inconsistent with both common sense and numerous opinions of this Court on government contract interpretation.

1. a. The government's argument that the leases "contemplated and authorized" the OBPA, U.S. Br. 31, ignores the critical contractual language. Section 1 of each lease expressly provided that it was:

> [S]ubject to [1] [the OCSLA]; Sections 302 and 303 of the Department of Energy Organization Act ["DEOA"] . . .; [2] all regulations issued *pursuant to such statutes and in existence upon the effective date of th[e] lease[s]*; [3] all regulations issued *pursuant to such statutes in the future* which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, . . . and [4] all other applicable statutes and regulations.

Pet. App. 175a (§ 1) (emphases added). Section 1's carefully-nuanced incorporation provisions make clear that the "drafters knew how to [—but did not—] specify . . . future or subsequent legislation because they did exactly that in connection with future regulations." *Id.* at 65a. As the Court of Federal Claims held, the contractual restriction to future regulations "pursuant to" the OCSLA and the DEOA would be "ineffective," "meaningless," and "superfluous," *id.* at 66a, if the incorporation of the OCSLA were interpreted to include, as the government contends, the requirements mandated by *future*, subsequently-enacted statutes.[2] The government's interpretation is thus contrary to basic contract interpretation rules. See *Fortec Constructors* v. *United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); see also *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F.2d 953, 958 (Fed. Cir. 1993) (one provision canot be construed to render a more specific term "superfluous and meaningless"). The Federal Circuit agreed: "To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts . . . ." Pet. App. 12a. The government simply ignores these rulings.

b. In attempting to read the OBPA into the leases, the government relies heavily on one provision of the incorpo-

[2] The government has correctly abandoned, both in this Court and in the Court of Appeals, its prior contention that the OBPA, which was enacted nine years after the leases were executed, was an "other applicable statute[]" under § 1 of the leases.

rated OCSLA, 43 U.S.C. § 1334(a), but ignores its critical language. The first sentence of § 1334(a) limits the Secretary to promulgating "*regulations* . . . necessary to carry out" the "provisions of *this subchapter*." *Id.* (emphases added). "[T]his subchapter" means the OCSLA, 43 U.S.C. §§ 1331-1356. Thus, the restrictive language of § 1334(a) confirms that the leases were not subject to the requirements of future statutes.

Moreover, the OBPA is not a "regulation." Not only was it promulgated by Congress, not the Secretary, but the common meaning of "regulation" is a generally applicable provision of law. Cf. Exec. Order No. 12866 § 3(d), 58 Fed. Reg. 51735, 51737 (1993) (defining "regulation" as "an agency statement of general applicability . . . ."). As the Court of Federal Claims found, however, the OBPA "was not an act of public, general applicability," Pet. App. 96a, but rather was "narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue," *id.* at 91a. See also Marathon Br. 10-11 & n.7. The OBPA did *not* amend the OCSLA and was only applicable to North Carolina leases. The generally applicable "regulations" promulgated by the Secretary under the OCSLA remained effective and unchanged by the OBPA.

c. Finally, the government simply overreads *North American Commercial Co.* v. *United States*, 171 U.S. 110 (1898). There, the lease expressly provided that the private lessee would " 'abide by *all* rules and regulations that the Secretary of the Treasury has heretofore or may *hereafter* establish or make *in pursuance of law* concerning the taking of seals,' " including " 'any restrictions or limitations upon the right to kill seals.' " *Id.* at 125 (emphases added). When a treaty limited seal killing in 1893, the Court merely held that "the treaty was nothing more" than a "direct[ion to] the Secretary *by law* to restrict the killing." *Id.* at 134 (emphasis added). Here, unlike *North*

American, the contract was *not* made subject to all future regulations made " 'in pursuance of law,' " *id.* at 125, but rather only to certain future regulations made "pursuant to such statutes," Pet. App. 175a—*i.e.*, pursuant only to the incorporated OCSLA and DEOA. See *supra*, at 2-4.

2. a. The government is also wrong that the actions mandated by the OBPA could have been required by the Secretary under 43 U.S.C. § 1334(a)(1)(A) & (B) or the OCSLA's existing regulations. Section 1334(a)(1)(A) only applies—in language omitted from the government's quotation, see U.S. Br. 31-32—"at the request of a lessee." Section 1334(a)(1)(B) could not have been used because, as the government's own contemporaneous admissions demonstrate, and the trial court found (quoting the statute), there was no "threat of serious, irreparable, or immediate harm" to the environment, and the government did not act on this basis. See Pet. App. 80a-84a. On June 1, 1990—just 2½ months before the OBPA was enacted—the Department of the Interior ("DOI") had completed a three-volume, 2000-page special environmental report that was "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." J.A. 179. Based on this report, on September 28, 1990—one month after the OBPA's enactment—the DOI issued an environmental assessment of the Manteo Unit's Plan of Exploration ("POE") that concluded that the proposed exploratory activities would have " '*no* significant impact' " on the environment. See J.A. 138-40 (emphasis added). See also Pet. App. 194a (Manteo Unit's POE "w[ould] have only negligible effect on the environment").[3]

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[3] Although the OBPA declared Congress's "concerns about the adequacy of the environmental information available," Pub. L. No. 101-380, § 6003(b)(7), 104 Stat. 484, 555 (1990), the OBPA's findings did not conclude that exploration and development of North Carolina OCS tracts actually posed a risk of serious environmental harm.

Indeed, the government conceded below that, absent the OBPA, the Secretary would have approved the Manteo Units' POE within the 30-day period set out in the OCSLA. See U.S. Fed. Cir. Br. 39. This simply demolishes the government's argument that the OBPA did nothing that was not already provided for under the OCSLA or existing regulations. *See* Marathon Br. 13.

b. The government's reliance on 30 C.F.R. § 250.10 (b)(4) (1997) (now codified at 30 C.F.R. § 250.110 (b)(4)) is similarly misplaced. This regulation allows the "Regional Supervisor"—not Congress—to suspend a lease when "*necessary* . . . to conduct an environmental analysis.' *Id.* (emphasis added). This provision is obviously inapplicable because "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," J.A. 179, had already been completed.[4]

Indeed, the government ignores that in 1990 the DOI did not invoke § 250.10(b)(4) as a basis for the suspensions. On the contrary, the DOI's notices forthrightly stated that the leases were being suspended as a *consequence* of the OBPA's prohibition on the DOI's approving any POE or drilling permit application, or its permitting any drilling offshore North Carolina. See J.A. 129. See also Pet. App. 80a-81a. Indeed, the notices further stated that the

[4] The government's suggestion, *see* U.S. Br. 35, that petitioners acknowledged in 1992 that their leases "authorized" suspension for the performance of the environmental and socioeconomic studies mandated by the OBPA, *see* OBPA § 6003(d), is simply wrong. Following the DOI's 1992 decision to lift the suspensions it had imposed *sua sponte* in September 1990 as a "[c]onsequen[ce]" of the OBPA, J.A. 129, petitioners requested that their leases be resuspended because "[petitioners] continue[d] to be precluded by that Act [the OBPA] from exploration activity," *id.* at 170, and their appeals of the North Carolina's CZMA objections were still pending, *see id.* at 168-69. They did not request—or acknowledge—that their leases could be suspended under 30 C.F.R. § 250.10 (b)(4) for the OBPA-mandated studies.

leases were being suspended pursuant to 30 C.F.R. § 250.10(b)(7) (1997) (now codified at 30 C.F.R. § 250.110(b)(7)). See J.A. 129, 132. Section 250.10 (b)(7), however, does not authorize suspension for environmental studies, but rather only when "necessary to comply with *judicial decrees* prohibiting production or any other operation or activity, or the permitting of those activities." 30 C.F.R. § 250.10(b)(7) (emphasis added).[5] The government's *post hoc* litigation attempt to rely on a ground—§ 250.10(b)(4)—that was *not* the one that the government cited when it acted is unavailing. See *Johnson* v. *Branch*, 364 F.2d 177, 181 (4th Cir. 1996) (board's decision not to renew contract could be defended only on ground on which it actually relied); Pet. App. 80a-81a; cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (courts "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency").

3. Absent the clearest possible contractual language, this Court has consistently refused to give government contracts the financially "irrational" interpretation that the government again seeks here—under which the government would have the unilateral right to cancel its essential contractual obligations by subsequently enacting new statutes. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 862-64 & n.13, 909-10 (1996) (plurality opinion); *id* at 921 (Scalia, J., concurring in judgment); *id* at 913 (Breyer, J., concurring); *Lynch* v. *United States*, 292 U.S. 571, 577-78 (1934); *Appleby* v. *Delaney*, 271 U.S. 403, 412-13 (1926); *City of Detroit* v. *Detroit Citizens' St. Ry.*, 184 U.S. 368, 384-85, 389, 397-

[5] Indeed, the government stated below that the DOI's invocation of § 250.10(b)(7) was a "mistake." U.S. Fed. Cir. Br. 26. This remains a telling concession becauses it emphasizes that, consistent with § 1 of the leases, *no* regulation under the OCSLA permitted petitioners' leases to be suspended because of the enactment of a future statute.

98 (1902).[6] Indeed, without explicit contractual language to the contrary, incorporation in a government contract of statutes or regulations results in "incorporation of the then-current regulations," not of statutes or regulations as they "change" over time. *Winstar*, 518 U.S. at 868 (plurality opinion); *accord id.* at 922 (Scalia, J., concurring in judgment); *Wood* v. *Lovett*, 313 U.S. 362, 369-70 (1941); *Craft Mach. Works, Inc.* v. *United States*, 926 F.2d 1110, 1115 (Fed. Cir. 1991).

Even when, unlike here, a government contract provision expressly makes a private party's rights generally subject to *subsequent* statutes or regulations, this Court has not allowed the government to work a forfeiture of the private party's investment by revoking by statute or regulation effectively all of the government's obligations. For example, in *Lynch*, the "form [insurance contract] prescribed provided that the policy should be subject to *all amendments to the original Act*, [and] to *all* regulations then in force *or thereafter adopted*." 292 U.S. at 577 (emphases added). Nonetheless, the Court ruled that once an insured had paid premiums, it was a breach for either a statutory or regulatory change "to curtail the amount of the benefits" owed under the contract. *Id.* at 578. Cf. *City of Detroit*, 184 U.S. at 377-78, 384, 398 (although contract was expressly subject to "further rules, orders or regulations," this did not permit subsequent regulations that unilaterally revoked "material" terms of contract and destroyed prior investment).

Here, the government's position contradicts both sets of precedents. First, even though the contract's language expressly declines to incorporate *future* statutes or the requirements of future statutes, the government seeks such incorporation by implication. See *supra*, at 2-7. Second,

[6] *Winstar* appropriately cited *Appleby* and *Detroit* because federal law controls contract interpretation in Contract Clause cases. *E.g.*, *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942).

it seeks a forfeiture of petitioners' entire investment, to the government's direct pecuniary benefit.[7]

B. The OBPA's Repudiation Was Material.

The government argues that any breach was not "material" because the absolute and open-ended prohibition the OBPA placed on the government's performance of its contractual duties did not go to the " 'essence' " of the parties' agreement. See U.S. Br. 36. This simply mischaracterizes the law, the contracts at issue in this case, and petitioners' claims for restitution. The government also erroneously attempts to apply to the issue of material breach the same "harmless error" in hindsight theory that the Court of Appeals erroneously invoked as a causation (not materiality) theory in denying petitioners the remedy of restitution. See Marathon Br. 36-47.

1. The government's argument ignores the first rule of "material" breach: A breach is material when the defendant fails or refuses to render the very performance that it agreed to "exchange" for the plaintiff's performance. *E.g.*, *Restatement (Second) Of Contracts* § 241 cmt. b (1981); *id.* § 243(1) & cmt. a. See also Marathon Br. 33 (collecting authorities). Thus, if the defendant provides, or announces that it will provide, less than "substantial performance"—*i.e.*, less than " 'almost complete' " performance—its breach is material. II E. Alan Farnsworth, *Farnsworth On Contracts* § 8.16, at 442 & n.2 (1990). Here, the OBPA announced unequivocally that the government was refusing, for a potentially perpetual period, to provide the critical performance—timely and fair consideration—for which petitioners had bargained.

[7] Finally, even if the lease contracts were ambiguous, they would have to be construed against the government, which was the exclusive drafter. *See United States* v. *Seckinger*, 397 U.S. 203, 216 (1970); *Hills Materials Co.* v. *Rice*, 982 F.2d 514, 516-17 (Fed. Cir. 1992); *Restatement (Second) of Contracts* § 206 (1981); *id.* § 207 cmt. a. *See also* Pet. App. 70a-71a n.10.

Petitioners' claims for restitution in this case do *not*, as the government suggests, see U.S. Br. 36-38, rest solely on the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE within the 30-day period prescribed by the OCSLA under 43 U.S.C. § 1340(c)(1). On the contrary, petitioners' claims cover the OBPA's anticipatory repudiation of the government's duties under petitioners' leases with respect to (i) *all* of petitioners' OCS tracts, including the one tract that was not included in the Manteo Unit, and (ii) all POEs and all other future plans that petitioners were entitled to submit. See Marathon Br. 26-31. The OBPA prohibited the Secretary from "approv[ing] *any* exploration plan," "*any* development and production plan" or "*any* application for permit to drill" and from "permit[ing] any drilling," OBPA § 6003(c)(1)(C)-(F) (emphases added)—regardless of whether those plans complied with the OCSLA—for at least 13 months, and potentially forever, see *id.* § 6003(c)(3).[8] Thus, although the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE in September 1990—even though it "fully complie[d] with the law," Pet. App. 194a, and, in the DOI's own words, was "approvable in all respects," *id.*—was an actual "breach by non-performance," *id.* at 76a, it was only one part of a larger repudiation of the government's performance.

The performance that the government promised to "exchange" was the government's adherence to the OCSLA's regulatory scheme and, in particular, its requirement of "timely and fair[] consider[ation]," Pet. App. 76a, of petitioners' plans and applications. The "essence" of the government's promise was *not*—as the government contends—merely to give petitioners a "priority," U.S. Br.

[8] In fact, the OBPA's general moratorium was not ultimately lifted until nearly six years after its enactment, and then only because the Act was repealed by Congress. *See* Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996).

36, over others in seeking necessary regulatory approvals. Any "priority" for government consideration would have been meaningless if the government did not in fact obligate itself to consider petitioners' plans and applications "timely and fairly." Indeed, if the government had not assumed the "necessary reciprocal obligation," Pet. App. 76a, of timely and fair consideration, the contracts would have been both illusory, see 1 R. Lord, *Williston on Contracts* § 1:2, at 11 (4th ed. 1990); *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in judgment) (a " 'promise to regulate [you] in this fashion for as long as we choose to regulate [you] in this fashion' . . . is an absolutely classic description of an illusory promise"), and an act of utter "madness" on petitioners' part, see *id.* at 910 (plurality opinion). See Pet. App. 76a, 84a.

Nor can the government's breach be accurately characterized as merely an immaterial "delay" in the performance of the government's obligations. First, as enacted, the OBPA's "moratorium" was *indefinite*. See Marathon Br. 29. As late as April 1, 1996, the Court of Federal Claims found that "there is no evidence that the suspension will be lifted anytime in the future." Pet. App. 84a. No authority supports the proposition that announcement of a possibly perpetual delay of performance of a party's entire obligation is immaterial.[9]

Second, the contract's and the OCSLA's 30-day period for action on a POE meant that DOI was required to decide based on "available" environmental information, see 43 U.S.C. § 1346(d), and could not undertake new en-

[9] In fact, the "delay" here proved to be nearly six years—far longer than other delays in the government's performance of its contractual obligations that have been held to be material. *See Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d 211, 215 (Ct. Cl. 1980) (one-month delay in conveying property); *Northern Helex Co.* v. *United States*, 455 F.2d 546, 550 (Ct. Cl. 1972) (two-year delay in payments); *Overstreet* v. *United States*, 55 Ct. Cl. 154, 174 (Ct. Cl. 1920) (five-week delay in payment).

vironmental studies in reaching its POE decision when the available information was itself adequate. See Mobil Br. 4 & n.3. A lessee willing to agree to justify a POE based on existing information may be entirely unwilling to pay more than $156 million for the right to do so against a moving target of ever-increasing and changing demands for new information. For example, here, the Secretary found the Manteo Unit's POE to be "approvable in all respects" when judged against the extensive available information in September 1990, Pet. App. 194a, but later noted not only that the OBPA required him to consider different information, see OBPA § 6003(d) (requiring the Secretary to undertake "socioeconomic studies"), but also that the OBPA Panel's "definition of adequacy [of information] . . . was *far more* restrictive and narrow than [his] charge under [OCSLA]." Pet. App. 201a.

In short, the OBPA denied petitioners the performance for which they had bargained in return for the more than $156 million they paid, and was therefore a material breach. As the trial court found, the OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions and permit approvals." Pet. App. 68a.

2. The government also contends that the OBPA's repudiation and actual breach were not "material" because, in hindsight, "exploration was concurrently stalled in any event" due to North Carolina's Coastal Zone Management Act ("CZMA") objections. U.S. Br. 39. As the government itself concedes, the critical issue in determining whether the government's breach of petitioners' lease contracts was material "is not whether petitioners could, in fact, *ultimately* achieve performance under the contract." *Id.* (emphasis added). Rather, whether the breaching party's repudiated performance was material must be measured no later than the moment of repudiation. See II Farnsworth, *supra*, § 8.16, at 443 n.3.

Any contrary "hindsight" approach to materiality would defeat a fundamental purpose of the materiality test: to allow a court to determine whether the breach gave the non-breaching party an *immediate* right to suspend its performance. See *id.* § 8.15, at 436; *id.* § 8.16, at 442; see also Marathon Br. 34-35. Moreover, a critical purpose of the materiality test "is to secure the parties' expectation of an exchange of performances," *Restatement (Second) of Contracts* § 241 cmt. b, and whether there was such an "agreed exchange," 5 Arthur Linton Corbin, *Corbin on Contracts* § 1107, at 575 (1964), is necessarily determined at the time of the contract.

Here, at the times the contracts were entered and repudiated, the government's "timely and fair[] consider[ation]" of petitioners' plans and applications was undoubtedly material because it formed the critical performance that the government agreed to provide in exchange for the more than $156 million petitioners paid up front. Moreover, at the time of the repudiation in August 1990, as the government conceded below, absent the OBPA, "timely and fair[] consider[ation]" would have meant approval. See U.S. Fed. Cir. Br. 39; see also Pet. App. 194a. Furthermore, North Carolina did not file its CZMA objection to the Manteo Unit's POE until November 1990, three months *after* the OBPA's repudiation, and the Secretary of Commerce did not decline to override that objection until September 1994. Marathon Br. 14-15 & n.10. Indeed, North Carolina's strenuous efforts before and during August 1990 to obtain enactment of the OBPA would have been nonsensical if it were already clear that exploration would be stopped by the State's CZMA objection.[10]

[10] The government misleadingly creates the impression that petitioners' leases were already suspended immediately prior to the OBPA's enactment in August 1990 by its repeated statements that the "lease suspension first went into effect *before* the OBPA was enacted, in July 1989." U.S. Br. 44; *see id.* at 10. This refers to

Even viewed with 20/20 hindsight—which is *not* the legally proper approach—the government's repudiation was material. For example, it is undisputed that, absent the OBPA, the Secretary would have approved the Manteo Unit's POE in September 1990. See U.S. Fed. Cir. Br. 39. Similarly, absent the OBPA, among other things, the same administration might well have overruled North Carolina's CZMA objection before or during 1992. See Marathon Br. 10-13. And North Carolina might have compromised to avoid this prospect. To be sure, because of the OBPA, exactly what would have happened is uncertain, but the law of contracts does not allow a defendant that has breached a contract to take advantage of uncertainly that its breach created. See *id.* at 46-47 (citing authorities).[11]

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a suspension under the 1989 Memorandum of Understanding ("MOU") that *expired* on June 1, 1990, when the DOI issued its environmental report. *See* J.A. 83; Marathon Br. 8. North Carolina's July 1990 CZMA objection to petitioners' NPDES permit application (not to their POE), which did not bar exploration, *see* Marathon Br. 12 n.8, and petitioners' response, merely made the leases "eligible for suspension under the MOU," U.S. Br. 31, "upon Mobil's application," J.A. 83. But Mobil had made no such application at the time the OBPA was enacted. Thus the DOI suspended the leases as a "[c]onsequen[ce]" of the OBPA on September 21, 1990. *See* J.A. 129. *See also* U.S. Fed. Cir. Br. 17 (leases were suspended "[i]n light of the enactment of the OBPA").

[11] The government also suggests that an award of restitution against the government would impose an impermissible "coercive sanction" against beneficial changes in environmental policy. *See* U.S. Br. 3, 38. This Court has previously rejected the same government argument that normal common-law monetary remedies for breach of contract are an improper "coercive sanction" when the government breaches a contract to comply with salutary regulatory changes. *See United States* v. *Winstar Corp.*, 518 U.S. 839, 882-85, 896-97, 903 & n.51 (1996) (plurality opinion); *id.* at 911, 917 (Breyer, J., concurring) (citing "environmental legislation" as example); *id.* at 923 (Scalia, J., concurring in judgment); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 24, 29-32 (1977) (breach not excused by State's interest in "environmental protection and energy conservation"); *Missouri, K. & T. Ry.* v. *Oklahoma*, 271 U.S. 303, 309-10 (1926).

C. Petitioners' Remedy Is Not Limited To The Recovery Of Expectation Damages For Delay.

In its final argument to avoid the normal rules of restitution, the government implies that, even if the OBPA had materially breached petitioners' leases—which it did, see *supra*, at 1-9—petitioners' recovery should be "limited" to expectation "damages" for "delay." U.S. Br. 24, 43-44. But the government does not dispute the overwhelming authority cited by Marathon, see Marathon Br. 37-41, 46, including *Nash* v. *Towne*, 72 U.S. (5 Wall.) 689, 702 (1866), and *Restatement (Second) of Contracts* § 373 cmts. b, d & illus. 1, 10, that restitution for material breach is not limited by the amount of expectation damages, even when those damages are either, as here, uncertain, see *supra*, at 14, or even could be proven to be zero. Nor does the government dispute that the sole case it cites, *Sun Oil Co.* v. *United States*, 572 F.2d 786 (Ct. Cl. 1978), is inapposite because the plaintiffs in that case did not seek *restitution*. See Marathon Br. 42-43.

Restitution enforces the principle that contracts are based on consent. Thus, when there is a material breach or repudiation, restitution requires the "return of the consideration paid for an unperformed promise." *Restatement of Restitution*, Part I, intro. note, at 5 (1937). As the trial court found, petitioners never would have provided their consideration of more than $156 million in up-front "bonuses" without the government's bedrock promise of timely and fair consideration of their plans and applications. See Pet. App. 76a.

As with the government's other arguments, the government implicitly seeks a special exemption from the normal common-law rules. This Court has consistently refused to open that door because it would undermine "the Government's capacity as a reliable, straightforward contractor,"

Winstar, 518 U.S. at 886 (plurality opinion), "with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements," not only in federal property contracts, but in contracts implementing "federal regulatory or welfare" programs, *id.* at 884 (plurality opinion).

II. PETITIONERS DID NOT WAIVE THEIR RESTITUTION CLAIMS BECAUSE THEY DID NOT RECEIVE ANY POST-BREACH CONTRACT PERFORMANCE.

Finally, the government contends that petitioners "waived" any claim for material breach or repudiation because, by (i) submitting the Manteo Unit's POE to the DOI two days after the OBPA was enacted, (ii) contesting North Carolina's CZMA objections, and (iii) requesting suspensions of their leases, petitioners "demand[ed] and obtain[ed] . . . contract performance from the United States" after the repudiation and breach of their leases. U.S. Br. 41-42.[12] This argument contradicts settled law.

Petitioners' submission of the Manteo Unit's POE could not have been a waiver because "[t]he injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation." *Restatement (Second) of Contracts* § 257 (1981). *Accord id.* § 257 cmt. a & reporter's note (collecting authorities); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.22, at 483-84 (4th ed. 1990); 4 Arthur Linton Corbin, *Corbin on Contracts* § 981, at 938 (1951); *Bu-Vi-Bar Petroleum Corp.* v. *Krow*, 40 F.2d 488, 492 (10th Cir. 1930); *Kostelac* v. *United States*, 247 F.2d 723, 728-29 (9th Cir. 1957). As Professor Farnsworth has explained, "the injured party's response

[12] The government's first two waiver arguments have themselves been waived because they were not made before the trial court. The government's waiver argument before the Court of Federal Claims dealt solely with petitioners' September 1992 requests to re-suspend their leases. *See* C.A. App. 1004.

in trying to save the deal does not amount to an election; that [injured] party is not precluded from reconsidering at any time before retraction and treating the contract as terminated." II Farnsworth, *supra*, § 8.22, at 484 (footnote omitted). Cf. *Friederichsen* v. *Renard*, 247 U.S. 207, 213 (1918) ("At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended."). In short, "one who has received a definite repudiation is not to be penalized for his efforts to bring about its retraction and to get that which is his due without a law suit." 4 Corbin, *supra*, § 981, at 940.

This accords with the general rule that waiver of material breach requires that the nonbreaching party make an implicit "promise to perform in spite of" the breaching party's position that it will provide "only a *part* performance." *Restatement (Second) of Contracts* § 246(1) & cmt. c (emphasis added). No such promise can be inferred here because the government's position, to this day, *see* U.S. Br. 30-33, 37 n.17, is that it has not breached and thus has offered full performance at all times. See *Utex Exploration Co.* v. *Garwood*, 246 F.2d 547, 552 (10th Cir. 1957) (where defendant's "honest" but incorrect "construction of the contract" was that plaintiff lessee could not mine "green pillars," plaintiff did not waive that material breach by continuing to mine "red pillars"). Moreover, no waiver has occurred because petitioners have not in fact received or accepted any partial performance from the government after the breach. See, *e.g.*, *Restatement (Second) of Contracts* § 373 cmt. a; *id.* § 246(1); II Farnsworth, *supra*, § 8.19, at 458-59; *Restatement of Restitution* § 68 cmt. b (1937). Indeed, waiver would not occur here unless petitioners accepted "tangible benefits" such as "money and property" from the breaching party's post-breach performance. *Walbrook Ins. Co.* v. *Spiegel*, [1993-94 Transfer Binder]

Fed. Sec. L. Rep. (CCH) ¶ 98,020, at 98,307-08 (C.D. Cal. 1993) (not waiver to accept "intangible benefits" such as information provided pursuant to contract clause after breach). At most, petitioners' actions preserved the *status quo* in order to avoid forfeiture of their $156 million investment in the event that the courts determined that there had been no material breach. That is not a waiver. Cf. *Restatement of Restitution* § 68 cmt. b (not waiver where plaintiff "continues to perform only for the purpose of preserving what he had already invested in [his] performance").

The cases cited by the government do not hold that merely urging a breaching party to perform in full or preserving the *status quo* waives a claim for material breach. *Dingley* v. *Oler*, 117 U.S. 490 (1886), held that there had been no repudiation, only a partial breach, see *id.* at 501-04; and *Smoot's Case*, 82 U.S. (15 Wall.) 36 (1872), held that there was no breach at all, see *id.* at 49-50. All of the appellate cases cited by the government involved the plaintiff's acceptance of the *benefits* of the defendant's *partial performance after* the breach. *E.g.*, *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991) (Plaintiffs' "decision to *continue receiving benefits* pursuant to the [contract] was tantamount to an election to affirm the contract." (emphasis added)).

Here, as the government concedes, petitioners' submission of the Manteo Unit's POE was, at most, "urging continued performance under the leases," U.S. Br. 42, and thus merely afforded the government the opportunity to retract its repudiation of the leases. The government refused to retract in April 1992 by refusing to approve the pending POE, despite the Secretary's certification that sufficient information existed to allow him to "consider approval of the exploration activities currently proposed." See Pet. App. 202a. Petitioners promptly gave notice that

a suit was being considered if then-pending legislation did not provide compensation, see C.A. App. 1005, 1008, and in fact filed suit in October 1992, see J.A. 2, shortly after Congress adjourned.

Nor did petitioners waive the OBPA's material breach by seeking the Secretary of Commerce's override of North Carolina's CZMA objections. Petitioners certainly did not receive any benefits from their administrative appeals because the Secretary of Commerce sustained North Carolina's objections. And petitioners likewise did not receive any "contract performance," U.S. Br. 41—*i.e.*, consideration under the pre-OBPA regulatory scheme—because the Secretary of Commerce's decision relied in large part on the "concerns" expressed in the OBPA's findings, and the later opinion of the Review Panel that it had created. See J.A. 247 (citing OBPA); see also *id.* at 224, 227 n.35, 232-33, 239, 244 (citing Review Panel's report).

Finally, petitioners did not waive the OBPA's material breach by requesting reinstated lease suspensions after the DOI announced on September 9, 1992, that it was lifting the OBPA-induced suspensions imposed in September 1990, and thus that the annual rental payments would no longer be stayed, see J.A. 165-66. First, lease "suspensions" are not the "contract performance," U.S. Br. 41, that petitioners bargained for; on the contrary, contract performance required timely and fair consideration of petitioners' plans and applications. See *supra*, at 2, 11. Second, petitioners' requests were based on (i) the OBPA's continuing interference with their contract rights, see J.A. 170-71, and (ii) petitioners' challenge to North Carolina's CZMA objections. See *id.* at 168-69; U.S. Br. App. 2a. Thus, petitioners did not seek any suspension to which they were not otherwise entitled either (i) because of the government's material breach, see Marathon Br. 33-35, or (ii) under the 1989 Memorandum of Understanding—

a separate contract which specifically provided for suspensions if North Carolina made a CZMA objection, see J.A. 83. Accordingly, the suspensions did not imply a "promise [by petitioners] to perform" despite the government's material breach, as *Restatement (Second) of Contracts* § 246(1) requires. See *Restatement of Restitution* § 68 cmt. b (it is not affirmance for a plaintiff to take a position that would be the same if there was disaffirmance); *Chicago Washed Coal Co.* v. *Whitsett*, 116 N.E. 115, 116 (Ill. 1917) ("accept[ing] payment" did not waive right to rescind when plaintiff had right to payment "whether the contract was canceled or not").[13] At most, the suspensions merely preserved the *status quo* pending resolution of this case.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[13] Not only were petitioners' September 1992 requests for suspension, *see* J.A. 168-71, made after they gave notice that a suit was being considered, *see supra*, at 18-19, their 1995 request, *see* U.S. Br. App. 2a, was made *three years* after they had filed suit for restitution for material breach.