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January 13, 2022

Via ECF

Michael E. Gans
Clerk of Court
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: *State of Minnesota v. American Petroleum Institute, et al.*, No. 21-1752
Plaintiff–Appellee’s Citation of Supplemental Authority

Dear Mr. Gans,

Pursuant to FRAP 28(j), Plaintiff-Appellee submits *Delaware v. BP America Inc.*, Case No. 20-cv-01429-LPS, Dkt. 120 (D. Del. Jan. 5, 2022) (**Ex. A**) (“*Delaware*”) and *West Virginia State University Board of Governors v. The Dow Chemical Co.*, No. 20-1712, 2022 WL 90242 (4th Cir. Jan. 10, 2022) (**Ex. B**) (“*WVSU*”), as supplemental authorities. In both cases, the courts rejected arguments indistinguishable from those advanced by Defendants here.

In *Delaware*, the court granted a motion to remand in a substantially similar state-law action and rejected many of the same removal theories advanced here. The court concluded that: (1) federal common law cannot convert state-law claims into federal ones for jurisdictional purposes, *Delaware* at 5-10; (2) the defendants’ *Grable* arguments failed because they misconstrued the complaint, *id.* at 11-16; (3) federal-officer removal was improper because, *inter alia*, Delaware’s complaint effectively disclaimed injuries arising from the defendants’ “operation of petroleum reserves” and “sales of ‘specialized petroleum products’ to the U.S. military,” *id.* at 17; and (4) OCSLA jurisdiction did not exist because there was no but-for connection between Delaware’s claims and an OCS operation, *id.* at 25-28.

In *WVSU*, the court affirmed an order remanding a university’s lawsuit bringing state-law claims against chemical companies that had owned and operated a facility regulated under RCRA, and EPA had issued RCRA permits requiring cleanup actions at the facility. *WVSU* at 3–4, 11. The court rejected the defendants’ argument that the action was removable under *Grable* as an artfully pled collateral attack on the EPA’s RCRA cleanup because the state-law claims did “not draw on federal law as the exclusive basis, or any basis, for holding Defendants liable for their actions.” *Id.* at 42. The court also rejected the defendants’ argument that removal was proper under the federal officer statute because they had “work[ed] hand-in-hand with EPA for decades, at EPA’s direction, to assist the federal agency in remediating” the facility. *WVSU* at 14. The court reasoned a private firm’s compliance with federal laws does not by itself fall within the scope of the statutory phrase “acting under” a federal official. *Id.* at 26.

Respectfully submitted,

/s/ Victor M. Sher

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cc: All Counsel of Record (via ECF)