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January 20, 2022

## VIA ECF

Patricia S. Connor  
Clerk of Court  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA 21319

Re: *Mayor and City Council of Baltimore v. BP P.L.C.*, No. 19-1644  
Defendants-Appellants' Response to Plaintiff-Appellee's Citation of Supplemental  
Authorities

Dear Ms. Connor:

*Delaware v. BP America, Inc.* was incorrect, and the defendants have appealed that decision to the Third Circuit. The Fourth Circuit (like the Third) has not yet addressed removal under federal common law, *Grable*, or the Outer Continental Shelf Lands Act ("OCSLA"), and the *Delaware* opinion is flawed.

The *Delaware* court misunderstood the defendants' argument that plaintiff's claims are governed exclusively by federal common law and therefore "arise under" federal law and are removable under 28 U.S.C. § 1331. The opinion assumed that these points are "preemption arguments." 2022 WL 58484, at \*4 (D. Del. Jan. 5, 2022). They are not. Defendants' removal argument instead concerns the antecedent choice-of-law question of which body of law exclusively governs plaintiff's claims. See Supplemental Opening Brief ("SOB") 17–19. Because the *Delaware* court incorrectly considered this issue as a preemption defense, it did not address whether the claims were necessarily governed by federal common law. *Id.* at 11–13. If it had, the *Delaware* court should have concluded that federal common law necessarily and exclusively governs, just as the Second Circuit recently held that nearly identical claims "must be brought under federal common law" because the nominally state-law claims are in fact "federal claims." *City of New York v. Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021).

The *Delaware* court also incorrectly rejected OCSLA jurisdiction on the view that the defendants' production was not a "but-for" cause of plaintiff's alleged injuries. 2022 WL 58484, at \*13–15. This but-for requirement improperly nullifies the statute's alternative prong establishing federal jurisdiction for claims arising "in connection with" OCSLA operations. 43 U.S.C. § 1349(b)(1). The court also overlooked the Supreme Court's recent decision in

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*Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), which confirmed that the “requirement of a ‘connection’ between a plaintiff’s suit and a defendant’s activities” does not necessarily require but-for causation. *Id.* at 1026. Regardless, Defendants’ substantial OCS operations satisfy even the “but-for” standard because Plaintiffs’ allegations necessarily implicate *all* of Defendants’ “extraction” and “manufacturing,” JA.56–57 ¶24(a), including on the OCS.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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*Chevron Corporation and Chevron U.S.A.*

cc: All counsel of record (via ECF)