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February 18, 2022

VIA ECF

Clerk of the Court
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *City of Hoboken v. Chevron Corp., et al.*, No. 21-2728
Defendants-Appellants' Response to Plaintiff-Appellee's Citation of Supplemental Authorities

Dear Office of the Clerk:

Nothing in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 2022 WL 363986 (10th Cir. 2022) ("Op."), justifies denying federal jurisdiction here.

Federal Officer Removal: The Tenth Circuit confirmed defendants act under federal officers when they "produce essential government products," and "[w]artime production" is "the paradigmatic example." Op. *6. This standard is easily satisfied: Defendants here "produce and supply large quantities of highly specialized fuels to the federal government" that are "required to conform to exact DOD specifications" to meet unique military needs. Opening Br. ("OB") 50; *see id.* at 47–52. These activities are "critical efforts the federal superior would need to undertake itself in the absence of a private contract." Op. *6.

This evidence was not before the Tenth Circuit, where the record closed in 2018 and removal was premised solely on ExxonMobil's OCS leases. Op. *4–8. As to OCS leases, the more extensive record here (including unrebutted expert declarations) establishes the federal government "actively direct[ed] the terms of access, locations, methods and pacing of development, and rates of production" on the OCS, 7-JA-1433, which served national security goals the government would otherwise have to implement itself. OB.40–44; 43 U.S.C. § 1332(3).

Federal Common Law: The Tenth Circuit erred by conflating artful pleading with complete preemption and thus focusing exclusively on "congressional intent." Op. *13. But it is our *constitutional structure*—not Congress—that renders Plaintiff's interstate-emissions

claims exclusively federal in nature. Reply Br. 3–4, 11–12. "[F]ederal law applies because our constitutional structure 'does not permit the controversy to be resolved under state law.'" *Id.* at 12 (citation omitted).

Grable: Removal is independently proper under *Grable* because "'federal common law *alone* governs'" Plaintiff's claims. OB.31. The Tenth Circuit declined to consider this argument because it deemed it waived. Not so here.

OCSLA: The court erred in nullifying the statute's "in connection with" prong by requiring "but-for" causation. OB.65. Regardless, Plaintiff's complaint here alleges it was injured by Defendants' "fossil fuels," *e.g.*, 2-JA-42, a substantial portion of which were produced on the OCS, OB.60.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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cc: All counsel of record (via ECF)