

# GIBSON DUNN

Gibson, Dunn & Crutcher LLP

333 South Grand Avenue  
Los Angeles, CA 90071-3197  
Tel 213.229.7000  
www.gibsondunn.com

Theodore J. Boutros, Jr.  
Direct: +1 213.229.7804  
Fax: +1 213.229.6804  
TBoutros@gibsondunn.com

April 9, 2020

## VIA ECF

Maria R. Hamilton  
Clerk of Court  
U.S. Court of Appeals for the First Circuit  
John Joseph Moakley U.S. Courthouse  
1 Courthouse Way, Suite 2500  
Boston, MA 02210

Re: *State of Rhode Island v. Shell Oil Prods. Co., et al.*, No. 19-1818

Dear Ms. Hamilton:

Defendant-Appellant Chevron writes in response to Plaintiff-Appellee's April 6, 2020 letter regarding the Supreme Court's decision in *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020). Contrary to Plaintiff's assertions, *Rodriguez* reaffirmed the existence of federal common law and supports the conclusion that federal common law governs this dispute.

In *Rodriguez*, the Supreme Court acknowledged that "areas exist in which federal judges may appropriately craft the rule of decision," but declined to "claim a new area for common lawmaking" with respect to tax refund allocation. *Id.* at 717. As the Court explained, a new area of federal common law will be recognized only where "necessary to protect uniquely federal interests," *id.*, and no such interests exist concerning "how a consolidated corporate tax refund ... is *distributed* among group members," *id.* at 718.

Unlike *Rodriguez*, this case does not require the Court to recognize a "new area" for federal common lawmaking. Rather, it is well established that federal common law governs cases concerning "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *see also Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("Environmental protection is undoubtedly an area ... in which federal courts may ... 'fashion federal law.'"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("[I]nterstate water pollution is a matter of federal, not state, law."). And while Plaintiff contends that its "claims in this case do not arise under federal common law" because states *also* "have a legitimate interest in combatting the adverse effects of climate change on their residents," Pltf's 28(j) Letter at 1, the case they cite involved only *in-state* regulation of

Maria R. Hamilton

April 9, 2020

Page 2

transportation fuels. *See Am. Fuel & Petrochem. Mfrs. v. O’Keeffe*, 903 F.3d 903, 907–08 (9th Cir. 2018). *O’Keeffe* has no relevance here because Plaintiff’s claims are based on *global* conduct such that “a uniform standard of decision is necessary to deal with the issues raised in plaintiffs’ complaints.” *California v. BP P.L.C.*, 2018 WL 1064293, at \*3 (N.D. Cal. Feb. 27, 2018).

Sincerely,

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous Jr.  
GIBSON, DUNN & CRUTCHER LLP  
Counsel for Defendant-Appellant  
Chevron Corporation and Chevron U.S.A.

cc: All counsel of record (via ECF)