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January 25, 2022

VIA ECF

Molly C. Dwyer  
Clerk of Court  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

Re: *City and County of Honolulu v. Sunoco LP*, No. 21-15313; *County of Maui v. Chevron USA Inc.*, No. 21-15318  
Defendants-Appellants' Response to Plaintiffs-Appellees' Citation of Supplemental Authorities

Dear Ms. Dwyer:

Contrary to Plaintiffs' assertion, the Fourth Circuit's decision in *West Virginia State University Board of Governors v. Dow Chemical Company*, — F.4th —, 2022 WL 90242 (4th Cir. 2022), confirms that federal jurisdiction exists here.

*Dow Chemical* involved a challenge to Dow's operation of a chemical facility adjacent to property owned by West Virginia State University. Dow was required to, and did, obtain permits from the EPA under the Resource Conservation and Recovery Act ("RCRA"). See 2022 WL 90242, at \*2. Dow removed to federal court, invoking federal-officer jurisdiction on the basis that it was "acting under" the direction of the EPA by taking actions required by the permits. *Id.* at \*5. The Fourth Circuit rejected Dow's argument. The court "distinguished between entities subject to 'intense regulation' and those 'acting under' federal authority," *id.* at \*8, and held that Dow was merely "adher[ing] to minimum remedial measures to operate the facility for [its] own purpose," rather than serving, as Defendants do here, as "a private contractor hired by the federal government to complete tasks to further government projects or goals, like building military equipment." *Id.* at \*11 (emphases added). In fact, the court described "matters involving private contractors working on behalf of the federal government" as "the archetype case" of "acting under" jurisdiction. *Id.* at \*7 (emphasis added).

As Defendants recently explained, see ECF 97, Defendants acted as government contractors in providing products to the government and performing jobs the government otherwise would have had to perform itself to fulfill its core national security responsibilities. See Opening Br. 28-52. Defendants supplied "highly specialized fuels" conforming to "exact

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DOD specifications to meet unique operational needs of the U.S. military[.]” *Id.* 29. They supplied and managed the Strategic Petroleum Reserve, *id.* 38, and operated National Petroleum Reserve No. 1 at Elk Hills “‘in the employ’ of the Navy,” *id.* 49. And they produce the government’s oil and gas from the OCS under Congress’s directive and federal officers’ supervision. *Id.* 41-48. Defendants’ activities are the “archetype case” of acting under jurisdiction. *Dow Chemical*, 2022 WL 90242, at \*7.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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

cc: All counsel of record (via ECF)