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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 Products*, No. 19-1818
Defendants-Appellants' Response to Plaintiff-Appellee's Citation of Supplemental Authorities

Dear Ms. Hamilton:

Delaware v. BP America, Inc. was incorrect, and the defendants have appealed that decision to the Third Circuit. The First 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* Principal Supplemental Brief ("PSB") 16–18. 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 6–11. 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 necessarily "federal claims." *City of New York v. Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021).

The *Delaware* court also incorrectly rejected removal under OCSLA 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 *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 Plaintiff's allegations necessarily implicate *all* of Defendants' "extraction" and "production," JA.24 ¶3, including on the OCS.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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cc: All counsel of record (via ECF)