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February 22, 2022

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:

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 Common Law: The Tenth Circuit erred by conflating "artful pleading" with complete preemption and therefore focused exclusively on "congressional intent." Op. *13. But the artful-pleading doctrine is not limited to whether Congress chooses to preempt state-law claims. Reply Br. 12, 19–20. Here, it is our *constitutional structure* that renders Plaintiff's interstate-emissions claims exclusively federal in nature. Principal Supp. Br. ("PSB") 5–11. Federal law is exclusive because "'our federal system does not permit the controversy to be resolved under state law.'" *Id.* at 9 (citation omitted).

Relatedly, Plaintiff points to the description of *Kivalina* as holding that "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the [Clean Air Act]." Op. *12. But as the Second Circuit explained, there is no state law to "snap back into action" once federal common law is displaced, because "federal common law governed this issue in the first place." *City of New York v. Chevron Corp.*, 993 F.3d 81, 98 (2021). State law has never governed such interstate and international claims; indeed, it "cannot be used" at all here. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 n.7 (1981).

Grable: The court erred by failing to treat the nuisance claim as a collateral attack on federal regulatory and foreign policy. Op. *17-18; *cf.* Opening Br. ("OB") 31–37. Moreover, Defendants here invoke federal disclosure laws that *Boulder* did not consider. OB.35–36.

Federal Enclaves: The Tenth Circuit's analysis was limited to the location of *injuries*. Op. *21. Here, Plaintiffs' claims encompass global production and emissions, and thus *conduct* that occurred on federal enclaves. OB.46.

OCSLA: The court erred in nullifying the statute's "in connection with" prong by requiring "but-for" causation. PSB.25. Regardless, Plaintiff's complaint here alleges it was injured by Defendants' "fossil fuel products," JA.92, a substantial portion of which were produced on the OCS, PSB.22 & n.3.

Sincerely,

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous Jr.
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cc: All counsel of record (via ECF)