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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: *State of Delaware v. BP America, Inc., et al.*, No. 22-1096
Defendants-Appellants' Response to Plaintiff-Appellee's Citation of Supplemental Authorities

Dear Office of the Clerk:

The First Circuit's decision in *Rhode Island v. Shell Oil Products Co., LLC*, 2022 WL 1617206 (1st Cir. May 23, 2022), is neither controlling nor persuasive.

Federal Common Law. *Rhode Island* held that displacement of federal common law made removal impermissible. *Id.* at *4–5. That is incorrect because, as Defendants have explained here, the displacement of federal-common-law *remedies* does not mean that Plaintiff can bring its *claims* under state law. Reply Brief at 8–10. *Rhode Island* directly conflicts with the Second Circuit's decision, which rejected this exact argument in a nearly identical case: "[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one," and such an outcome is "too strange to seriously contemplate." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 98–99 (2d Cir. 2021).

***Grable*.** Removal is proper under *Grable* because "federal common law alone governs" Plaintiff's claims. Opening Brief ("OB") at 31. *Rhode Island* did not address this argument. *See* 2022 WL 1617206, at *6.

Federal-Officer Removal. *Rhode Island* relied on a significantly more limited record than exists in this case. For example, the court in *Rhode Island* did not consider the "produc[tion] and supply [of] large quantities of highly specialized fuels to the federal government." OB.43–47. Moreover, Defendants here have submitted unrebutted expert declarations from Professors Mark Wilson and Tyler Priest—historians of military-industrial relations and energy policy, respectively—demonstrating that significant portions of

Defendants' oil and gas production and sales over the last century were conducted under the direction, guidance, supervision, and control of the federal government. *See* OB.37–56.

OCSLA. *Rhode Island*'s conclusion that OCSLA jurisdiction does not exist is inconsistent with the plain meaning of "in connection with" and ignores that Plaintiff's Complaint plainly alleges that Defendants' worldwide "extraction, production, and consumption of oil, coal, and natural gas" have "caused" the rise of "global greenhouse gas pollution" and "a wide range of dire climate-related effects," 3-JA-247–48, for which Plaintiff seeks relief.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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cc: All counsel of record (via ECF)