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VIA ECF

Patricia S. Dodszuweit
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 Ms. Dodszuweit:

This Court should decline to follow the Ninth Circuit's decision in *City & County of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022). The decision does not address Defendants' arguments for removal based on federal common law or *Grable*, and its reasoning with respect to federal-officer removal and OCSLA is mistaken for many of the same reasons set forth in Defendants' response to Plaintiff-Appellee's 28(j) letter regarding *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022). *See City of Hoboken v. Chevron Corp.*, No. 21-2728 (May 6, 2022), Dkt. No. 124. Moreover, the panel did not address multiple bases for federal-officer removal that are presented here, including government oversight and direction of Defendants during World War II and Defendants' decades-long production of specialized fuels for the U.S. military. *See* 39 F.4th at 1106–10; Opening Brief at 41–47.

The panel also applied an approach inconsistent with this Court's binding precedents when analyzing whether Defendants had raised a colorable federal defense for purposes of federal-officer removal. *Compare, e.g.*, 39 F.4th at 1110 (requiring defense to "arise from official duties"), *with In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 473–74 (3d Cir. 2015) ("What matters is that a defense raises a federal question, not that a federal duty forms the defense."). The Supreme Court has sided with this Court's approach. *See, e.g.*, *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999) (requiring "a nexus" only between "the charged conduct and asserted official authority," not between the colorable defense and the asserted official authority); *Mesa v. California*, 489 U.S. 121, 130 (1989) (requiring only that a defendant's counter-argument be "equally *defensive* and equally *based in federal law*" (emphases added)). The panel also failed to "credit [the defendants'] theory of the case," *Acker*, 527 U.S. at 432, and took "a narrow,

grudging interpretation" of the statute, *Willingham v. Morgan*, 395 U.S. 402, 407 (1969), contravening Supreme Court precedent. The *Honolulu* defendants intend to petition the U.S. Supreme Court for a writ of certiorari.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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cc: All counsel of record (via ECF)