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April 12, 2023

VIA ECF

The Honorable Stephanie A. Gallagher
United States District Judge
United States District Courthouse
101 W. Lombard Street
Baltimore, Maryland 21202

Re: *City of Annapolis, Maryland v. BP P.L.C., et al., and Anne Arundel County, Maryland v. BP P.L.C., et al.*, Case Nos. 21-cv-00772-SAG and 21-cv-01323-SAG

Dear Judge Gallagher:

We write in response to Plaintiffs’ notice—filed on April 3, 2023 (*Annapolis*, ECF No. 189; *Anne Arundel*, ECF No. 166)—regarding the United States’ Amicus Brief in *Suncor Energy (U.S.A.) Inc. et al. v. Board of County Commissioners of Boulder County et al.*, No. 21-1550, and the Eighth Circuit’s decision in *Minnesota v. American Petroleum Institute*, No. 21-1752, 2023 WL 2607545 (8th Cir. Mar. 23, 2023).

Plaintiffs note that the Solicitor General has urged the Supreme Court to deny the pending petition for a writ of certiorari in *Suncor* and incorrectly suggest this means that the Supreme Court is unlikely to grant the petition. In fact, the article that Plaintiffs cite explains that “the [Supreme] Court is likely to still grant a petition . . . even if the [Solicitor General] has recommended denying.” David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 274 (2009).

Moreover, the Solicitor General’s position here may actually *increase* the odds of the Court granting the petition because the United States has now taken conflicting positions on these issues. Indeed, the Solicitor General conceded that the recommendation followed “the change in Administration,” as a result of which “the United States has reexamined its [prior] position.” Plaintiffs’ Ex. B at 7. The United States had previously taken the position that climate change-related claims similar to those asserted here are properly removable because “they are inherently and necessarily federal in nature.” See Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189) (citing *City of Oakland v. B.P. p.l.c.*, No. 18-16663 (9th Cir.), Dkt. 198). This unusual

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about-face weighs in favor of Supreme Court review, as it underscores that the issues of federal jurisdiction are uncertain and unresolved—and signals that the Supreme Court’s intervention and resolution are necessary in these cases of national importance. The Supreme Court often grants review when, as here, the government concedes that it is changing its position.¹

The Eighth Circuit’s decision also increases the chances of Supreme Court review. Indeed, one prominent Judge explained in concurrence that these lawsuits “take[] aim at the production and sale of fossil fuels worldwide,” “seek[] a global remedy for a global issue,” and “present[] a clash over regulating worldwide greenhouse gas emissions and slowing global climate change.” 2023 WL 2607545, at *8–9 (Stras, J., concurring). And although Judge Stras felt constrained to remand the case to state court under existing law, he urged the Supreme Court to review this issue because he believed, as explained in his concurrence, that these cases “*should*” be removable to federal court. *Id.* at *11. The majority decision also *supports* removal here. That court’s conclusion—that Minnesota’s claims of common-law fraud and violations of Minnesota’s consumer-protection statutes did not relate to the defendants’ military fuel production—was largely premised on the fact that “Minnesota has no nuisance claim in its complaint,” and the Eighth Circuit recognized that “a nuisance claim creates a stronger case for federal jurisdiction.” *Id.* at *7 n.11 (majority op.). Although Minnesota’s claims belong in federal court regardless, here, unlike in *Minnesota*, Plaintiffs *have* brought claims for *both* public *and* private nuisance.

According to Plaintiffs, the fact that several courts of appeals in climate-change-related cases have affirmed remand “suggests that the Supreme Court is unlikely to grant any of the petitions.” Notice at 2. But that is just what the plaintiffs told the Supreme Court regarding the first of these climate-change cases that the Supreme Court heard several years ago, which involved the scope of appellate review under 28 U.S.C. § 1447(d). *See* Br. of Respondent Mayor & City Council of Balt. in Opposition at 9, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), No. 19-1189, 2020 WL 3651169, at *10 (June 29, 2020) (“Given the near-unanimity of the courts of appeal in interpreting Section 1447(d), there is no meaningful conflict for this Court to resolve.”). Yet the Supreme Court not only granted that petition, it reversed, repudiating the position that the courts of appeals had adopted in the climate-change cases.

¹ In several recent instances, the Supreme Court has granted review after receiving a brief from the United States reversing its prior position on a question presented by the petition and recommending denial. *See, e.g.*, Br. for U.S. as Amicus Curiae at 10, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. Dec. 8, 2021), 2021 WL 9146629 (acknowledging change in position); Br. for U.S. in Opp. at 20, *Koons v. United States*, 138 S. Ct. 1783 (2018) (No. 17-5716), 2017 WL 6313955 (acknowledging change in position); Br. for U.S. at 29 n.2, *Beckles v. United States*, 580 U.S. 256 (2017) (No. 15-8544), 2016 WL 5116851 (acknowledging that the government has changed its view on the first question presented); Br. for U.S. as Amicus Curiae at 16–17, *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (No. 06-179), 2007 WL 1511526 (repudiating position taken in previous invitation brief because government changed its view of the statute at issue).

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Should Your Honor have any questions or wish to discuss this matter, counsel can be available at Your Honor's convenience.

Respectfully,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

/s/ Ty Kelly

Ty Kelly

cc: All counsel (via CM/ECF)