

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CITY OF CHARLESTON,

Plaintiff,

vs.

BRABHAM OIL COMPANY, INC.;
COLONIAL GROUP, INC.; ENMARK
STATIONS, INC.; COLONIAL PIPELINE
COMPANY; PIEDMONT PETROLEUM
CORP.; EXXON MOBIL
CORPORATION; EXXONMOBIL OIL
CORPORATION; ROYAL DUTCH
SHELL PLC; SHELL OIL COMPANY;
SHELL OIL PRODUCTS COMPANY
LLC; CHEVRON CORPORATION;
CHEVRON U.S.A. INC.; BP P.L.C.; BP
AMERICA INC.; MARATHON
PETROLEUM CORPORATION;
MARATHON PETROLEUM COMPANY
LP; SPEEDWAY LLC; MURPHY OIL
CORPORATION; MURPHY OIL USA,
INC.; HESS CORPORATION;
CONOCOPHILLIPS; CONOCOPHILLIPS
COMPANY; PHILLIPS 66; and PHILLIPS
66 COMPANY,

Defendants.

C/A No. 2:20-cv 03579-BHH

**RESPONSE TO PLAINTIFF'S
NOTICE OF SUPPLEMENTAL
AUTHORITY**

We write in response to Plaintiff’s notice—filed on April 6, 2023 (ECF No. 149)—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).¹

Plaintiff notes that the Solicitor General has urged the Supreme Court to deny the pending petition for a writ of certiorari in *Suncor* and incorrectly suggests this means that the Supreme Court is unlikely to grant the petition. In fact, “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.” Plaintiff’s Ex. A 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

¹ This response is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

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.²

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.”

² 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).

Id. at *7 n.11 (majority op.). Although Minnesota's claims belong in federal court regardless, here, unlike in *Minnesota*, Plaintiff *has* brought claims for *both* public *and* private nuisance.

April 17, 2023

Respectfully submitted,

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