

March 24, 2020

VIA ECF

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *City of New York v. BP P.L.C., et al.*, No. 18-2188

Dear Ms. Wolfe:

Defendant-Appellee Chevron writes in response to Plaintiff-Appellant's March 6, 2020 letter regarding the Supreme Court's decision in *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020). Contrary to Plaintiff's assertions, *Rodriguez* supports the district court's conclusion that federal common law governs this dispute.

In *Rodriguez*, the Supreme Court acknowledged that "areas exist in which federal judges may appropriately craft the rule of decision," but declined to "claim a new area for common lawmaking" with respect to tax refund allocation. *Id.* at 717. As the Court explained, a new area of federal common law will be recognized only where "necessary to protect uniquely federal interests," *id.*, and no such interests exist concerning "how a consolidated corporate tax refund ... is *distributed* among group members," *id.* at 718.

Unlike *Rodriguez*, this case does not ask the Court to recognize a "new area" for federal common lawmaking. Rather, it is well established that federal common law governs cases concerning "air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *see also Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("Environmental protection is undoubtedly an area ... in which federal courts may ... 'fashion federal law.'"); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("[I]nterstate water pollution is a matter of federal, not state, law."). And while Plaintiff contends "there is no uniquely federal interest in the *specific topic*" here, Dkt. 248 at 2 (emphasis added)—namely, "local harms resulting from fossil-fuel production," *id.*—the district court rightly rejected this argument. "[R]egardless of the manner in which the City frames its claims," the district court correctly reasoned, it "is seeking damages for global-

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warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels," Dkt. 153 at 12. If such conduct could be regulated by a patchwork of 50 states' laws, the federal government would be effectively precluded from speaking with one voice on the inherently *global* issue of climate change.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous Jr.
GIBSON, DUNN & CRUTCHER LLP
Counsel for Defendant-Appellee Chevron Corporation

cc: All counsel of record (via ECF)