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FILED VIA ECF

Honorable John R. Tunheim
 Chief Judge
 United States District Court for the District of Minnesota
 Diana E. Murphy United States Courthouse
 300 South Fourth Street - Suite 202
 Minneapolis, MN 55415

RE: Minnesota v. American Petroleum Institute et al., No. 0:20-cv-01636-JRT-HB

Dear Chief Judge Tunheim:

American Petroleum Institute writes on behalf of all defendants to update the Court of recent developments in *BP P.L.C. v. Mayor & City Council of Baltimore* (No. 19-1189), a climate case similar to this case currently pending before the Supreme Court. Defendants referenced the *City of Baltimore* case in their Consolidated Opposition to Remand (ECF No. 44 at p. 43, n.30 (noting possibility that Supreme Court might address federal common law issues in *City of Baltimore*)).

The Solicitor General has filed a brief for the United States in *City of Baltimore* making three points that are relevant to the jurisdictional issues before this Court and, by so doing, enhances the likelihood the Supreme Court will address these issues in that case.

First, the United States' brief supports the proposition that these cases arise under federal, not state law. U.S. Br. at 26-27 (attached) (“As this Court explained in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), certain cross-boundary tort claims associated with air and water pollution involve a subject that “is meet for federal law governance.”). This supports Defendants’ argument in their Consolidated Opposition to Remand that *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), and *AEP* support federal jurisdiction in these climate cases. See ECF No. 44 at 12-32.¹

¹ The United States took the same position in an amicus brief in support of rehearing before the Ninth Circuit in *City of Oakland v. B.P. p.l.c.*, 969 F.3d 895 (9th Cir. 2020), telling the court that “[i]nterstate pollution claims fall within this rule [of federal common law] and arise in an inherently federal area in which state law does not apply.” U.S. Br. as Amicus Curiae in Support of the Petition for Rehearing at 4, *City of Oakland*, 969 F.3d 895 (No. 18-16663). The United States’ brief in *Baltimore* incorporated its Ninth Circuit briefing by reference. See U.S. Br. at 26.

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Second, the United States' brief makes clear that federal common law is a valid ground for removal of a nominal state claim to federal court, separate and apart from *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), or the complete preemption doctrine. U.S. Br. at 26 (“[C]laims may be removable under 28 U.S.C. § 1441(a) on the ground that, although nominally couched as state-law claims, they are inherently and necessarily federal in nature.”). This supports Defendants’ argument that federal common law provides a third, independent ground for removal. *See* ECF No. 44 at 32-43.

Third, the United States’ brief makes clear that displacement of the federal cause of action for nuisance by the Clean Air Act does not affect federal jurisdiction itself. U.S. Br. at 27 (“Any putative tort claims that seek to apply the law of an affected State to conduct in *another* State, by contrast, continue to arise under ‘federal, not state, law’ for jurisdictional purposes, given their inherently federal nature, [*Int’l Paper Co. v. Ouellette*, 479 U.S. [478 U.S. 481, 488 (1987)]—even if such claims may be displaced by the Clean Air Act.”). This rebuts the Attorney General’s argument in his Motion to Remand that cases like *AEP* and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), mean there is no federal common law to support removal. Plaintiff’s Memorandum in Support of Remand, ECF No. 35 at 11-17. The case is first determined to be federal in nature and only then does the court consider whether a federal cause of action exists. U.S. Br. at 26 (citing *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947)).

Again, the fact that the Solicitor General’s Office addressed these issues in its brief makes it more likely the Supreme Court will address these issues in its decision in *City of Baltimore*.

We further advise the Court that the Supreme Court has set oral argument in the *City of Baltimore* case for January 19, 2021.

Respectfully submitted,



Andrew G. McBride
Counsel for American Petroleum Institute

Enclosure

cc: All counsel of record