



**VIA ELECTRONIC FILING**

Cristopher M. Wolpert  
Clerk of the Court  
United States Court of Appeals for the Tenth Circuit  
Byron White Court House  
1823 Stout Street  
Denver, CO 80257

March 31, 2020

**Re: Rule 28(j) letter - *Boulder Cty. Commissioners, et al v. Suncor Energy et al*, No. 19-1330**

Dear Mr. Wolpert,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellees submit *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020) (Ex. A), as supplemental authority in support of their argument that their claims are not “governed by” federal common law and therefore cannot be removed. *See* Plaintiffs-Appellees’ Br. (Pls.’ Br.) at 24-34.

In *Rodriguez*, the Supreme Court (Gorsuch, J.) unanimously held that a dispute over how to distribute a tax refund between affiliated corporations that filed a consolidated tax return must be decided under state law – not federal common law. 140 S. Ct. at 717. *Rodriguez* confirmed the “necessarily modest role” of federal common law and that “before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied . . . the most basic being” that federal common law must be “necessary to protect uniquely federal interests.” *Id.*; *accord* Pls.’ Br. at 31-34.

*Rodriguez* supports Plaintiffs’ position that before applying federal common law, courts must home in on the specific dispute between the parties and determine whether *that* dispute implicates uniquely federal interests. Even though *Rodriguez* arose in a predominately federal area – federal bankruptcy and tax proceedings – it was ultimately irrelevant that the federal government had an interest in “regulating how it *receives* taxes from corporate groups . . . or in regulating the *delivery* of any tax refund due to a corporate group . . . [or in] ensur[ing] that others in the group have no recourse against federal coffers once it pays the group’s designated agent.” 140 S. Ct. at 717. The specific dispute between the specific parties – “determining how a consolidated corporate tax

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refund, once paid to a designated agent, is *distributed* among group members” – did not implicate uniquely federal interests. *Id.* at 717-18.

Thus, even if Defendants had shown a unique federal interest in controlling emissions *at their source*, there would still be no federal jurisdiction: the issue here is Defendants’ liability for *selling* and *promoting* fossil fuels at levels that harmed Plaintiffs; and they have failed to show a unique federal interest in that subject. Pls.’ Br. at 25-29, 31-34.

Respectfully submitted,  
/s/ Sean Powers  
Sean Powers  
EarthRights International  
*Counsel for Plaintiffs-Appellees*

cc: All Counsel of Record (via ECF)

**CERTIFICATE OF COMPLIANCE  
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Sean Powers, counsel for appellees – Board of County Commissioners of Boulder County, Board of County Commissions of San Miguel County, and the City of Boulder – and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 28(j), that the body of the attached letter contains 348 words.

March 31, 2020

/s/ Sean Powers

**Sean Powers**

**CERTIFICATE OF DIGITAL SUBMISSION, ANTIVIRUS SCAN, AND PRIVACY  
REDACTIONS**

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual that the attached Letter, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using McAfee LiveSafe (Version 16.0, updated Mar. 1, 2010) and, according to that program, is free of viruses.

March 31, 2020

/s/ Sean Powers

**Sean Powers**

**CERTIFICATE OF SERVICE**

I, Sean Powers, counsel for appellees – Board of County Commissioners of Boulder County, Board of County Commissions of San Miguel County, and the City of Boulder – and a member of the Bar of this Court, certify, that, on March 31, 2020, the attached Letter was filed with the Clerk of the Court through the electronic-filing system. I further certify that all parties required to be served have been served.

March 31, 2019

/s/ Sean Powers

**Sean Powers**