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April 10, 2020

VIA ELECTRONIC FILING

Christopher Wolpert
Clerk of Court
U.S. Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Re: *Board of County Commissioners of Boulder County, et al.*
v. Suncor Energy (U.S.A.) Inc., et al., No. 19-1330

Dear Mr. Wolpert:

Pursuant to Federal Rule of Appellate Procedure 28(j), defendants-appellants file this letter in response to plaintiffs-appellees' letter regarding the Supreme Court's decision in *Rodriguez v. Federal Deposit Insurance Corp.*, 140 S. Ct. 713 (2020).

Contrary to plaintiffs' assertions, *Rodriguez* supports defendants' position 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. 140 S. Ct. 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.* (citation omitted), and no such interest exists concerning "how a consolidated corporate tax refund . . . is *distributed* among group members," *id.* at 718.

Unlike *Rodriguez*, this case does not require 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 American*

Electric Power Co. v. Connecticut, 564 U.S. 410, 421 (2011); *International Paper Co v. Ouellette*, 479 U.S. 481, 488 (1987). While plaintiffs contend that “[t]he conduct, parties, and relief at issue in *this case*”—local governments seeking damages from fossil-fuel producers for local harms—do not fall within existing federal common law, that contention is unpersuasive. Pls.’ Br. 27-28. Regardless of the manner in which plaintiffs frame their claims, they are inherently and necessarily seeking damages for climate-change-related injuries resulting from greenhouse-gas emissions. If a patchwork of state laws could regulate that area, the federal government could hardly speak with one voice on the inherently global issue of climate change.

We would appreciate it if you would circulate this letter to the panel at your earliest convenience.

Very truly yours,

/s/ Kannon K. Shanmugam

Kannon K. Shanmugam

cc: Counsel of record (via electronic filing)

**CERTIFICATE OF DIGITAL SUBMISSION,
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I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the foregoing letter, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2020.04.08.07, updated April 8, 2020) and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

/s/ Kannon K. Shanmugam

Kannon K. Shanmugam

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