



VIA ELECTRONIC FILING

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

April 24, 2020

Re: *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 respond to Defendants-Appellants' April 10, 2020 letter regarding the Fifth Circuit's decision in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020).

In *Latiolais*, the defendant contracted with the Navy to refurbish ships, and the plaintiff sued for his exposure to asbestos during that refurbishment; the Navy required "asbestos for thermal insulation" and exercised close supervision over the refurbishment. *Id.* at 289, 297-98. *Latiolais* does not support federal officer jurisdiction here for two reasons.

First, in *Latiolais*, it was clear that the defendant was "acting under" federal officers; here, Exxon was merely leasing federal lands for its own purposes. *Compare id.* at 291 with Appellees' Br. at 11-16. Second, *Latiolais* does not suggest that the required nexus between the defendant's acts under color of federal office and the plaintiff's claims exists here. *Latiolais* held that it is sufficient if the claim is "connected or associated with an act under color of federal office." 951 F.3d at 296. The Fourth Circuit applied the same standard when Exxon raised the same federal officer argument, based on the same leases, and the Fourth Circuit rejected Exxon's argument. *Mayor & City Council of Baltimore v. BP p.l.c.*, 952 F.3d 452, 466-68 (4th Cir. 2020); *see* Plaintiffs-Appellees' Motion for Summary Affirmance.

Baltimore aside, Exxon's production on the OCS is too remote from the claims under any standard. The focus of Plaintiffs' claims is that Defendants have altered the climate and exacerbated the consequences of that alteration through their total fossil fuel sales and deceptive marketing. Exxon's production under these leases is but a small fraction of its total production, let alone of its

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sales. Defendants do not dispute that the government did not instruct Exxon how much to *sell* across its enterprise overall, or how to promote fossil fuel use. Appellees' Br. at 17.

Respectfully submitted,
/s/ Richard L. Herz
Richard L. Herz
EarthRights International
Counsel for Plaintiffs-Appellees

cc: All Counsel of Record (via ECF)

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

I, Richard Herz, 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 310 words.

April 24, 2020

/s/ Richard Herz

Richard Herz

**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 Webroot SecureAnywhere Endpoint Protection (Version 9.0.28.39) and, according to that program, is free of viruses. I also certify that all required privacy redactions have been made.

April 24, 2020

/s/ Richard Herz

Richard Herz

CERTIFICATE OF SERVICE

I, Richard Herz, 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 April 24, 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.

April 24, 2019

/s/ Richard Herz

Richard Herz