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VIA ELECTRONIC FILING

Christopher 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

June 3, 2020

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

Dear Mr. Wolpert,

Plaintiffs-Appellees submit *City of Oakland v. BP, PLC* ("*Oakland*"), No. 18-16663, __ F.3d __, 2020 U.S. App. LEXIS 16644 (9th Cir. May 26, 2020) (Ex. A), as supplemental authority. *Oakland* held that cities' state-law claims against fossil fuel companies (including Defendant-Appellant ExxonMobil) for climate injuries do not arise under federal law, rejecting the same arguments Defendants raise here.

The district court in *Oakland* held, as Defendants argue, that federal jurisdiction lies because plaintiffs' "claim was 'necessarily governed by federal common law,'" *id.* at *11; Def. Br. at 16-27, but the Ninth Circuit disagreed. It noted that an action arises under federal law only if a federal question appears on the complaint's face; removal may not be based on a federal preemption defense. *Id.* at *14. It held that neither exception to this rule – substantial federal question and complete preemption (both of which Defendants argue, Def. Br. at 27-37) – provides jurisdiction.

First, plaintiffs' claim "fail[ed] to raise a substantial federal question," because it did not require "interpretation of a federal statute" or resolution of any federal issue that would control other cases. *Oakland* at *20. This is so even if plaintiffs' allegations could give rise to a federal common law claim, although "it is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution." *Id.* at **20-21 (citing *AEP v. Connecticut,* 564 U.S. 410, 423 (2011)). Defendants' invocation of various

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"'federal interests,' including energy policy, national security, and foreign policy," did not raise a substantial federal law question for removal purposes. *Id.* at **21-22 (citations omitted).

Second, *Oakland* found no "complete" preemption under the Clean Air Act. The statute "does not indicate that Congress intended to preempt every state law cause of action within the scope of the Clean Air Act," and "does not provide . . . a substitute cause of action." *Id.* at **22-24 (citations omitted).

Although, under 28 U.S.C. §1447(d), this Court should not reach "arising under" jurisdiction, *Oakland* supports affirmance.

Respectfully submitted,

/s/ *Richard L. Herz*
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[1] Based in CT; admitted in NY; does not practice in D.C.'s courts.

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**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 9.0.28.48) and, according to that program, is free of viruses. I also certify that all required privacy redactions have been made.

/s/ *Richard L. Herz*
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**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 350 words.

/s/ *Richard L. Herz*
Richard L. Herz
Counsel for Plaintiffs-Appellees