



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 *County of San Mateo v. Chevron Corporation* (“*San Mateo*”), No. 18-15499, ___ F.3d ___, 2020 U.S. App. LEXIS 16643 (9th Cir. May 26, 2020) (Ex. A), as supplemental authority. Like *Mayor & City of Baltimore v. BP, P.L.C.* (“*Baltimore*”), 952 F.3d 452 (4th Cir. 2020)(*see* ECF No. 010110327642), *San Mateo* involves fossil fuel companies’ liability for climate harms suffered by local governmental entities. And like *City of Baltimore*, *San Mateo* supports Plaintiffs’ arguments that under 28 U.S.C. 1447(d), this Court can only review the district court’s refusal to exercise federal jurisdiction under the federal officer statute, and that jurisdiction does not exist under that statute.

First, *San Mateo* confirms that Section 1447(d) limits appellate review to the bases for removal specified in that statute. There, as here, that is the federal officer statute. *San Mateo* rejected the same authorities that Defendants invoke as authorizing plenary review, and concluded that, in passing the Removal Clarification Act against a backdrop of unanimous judicial interpretation of § 1447(d) as permitting review of only the grounds for removal identified in the exception clause, Congress adopted that interpretation. Compare *San Mateo* at **14-19 and Plaintiffs-Appellees’ Reply in Support of Motion For Partial Dismissal at 4 (ECF No. 010110243703), with Defendants’-Appellants’ Br. at 8-10 (citing *Yabama Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 810-813 (7th Cir. 2015); and the Removal Clarification Act of 2011).

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Second, *San Mateo* confirms that the district court here correctly refused to exercise jurisdiction under the federal officer statute, finding that Exxon was not “acting under” federal officers when it developed fossil fuels on the Outer Continental Shelf (OCS) pursuant to lease agreements. *San Mateo*, at **29-31; *accord* Pls.’ Br. at 11-18.

Additionally, *San Mateo* supports Plaintiff-Appellees’ Motion for Summary Affirmance (ECF No. 010110338783). After *Baltimore*, collateral estoppel bars Exxon from relitigating these two issues. Exxon has now had two opportunities to litigate the same issues and its position has been rejected by two Circuits. This Court should not allow it to relitigate the same issues a third time.

Respectfully submitted,

/s/ Richard L. Herz

Richard L. Herz¹

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¹ Based in CT; admitted in NY; does not practice in D.C.’s courts.



**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
Richard L. Herz
Counsel for Plaintiffs-Appellees

**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 349 words.

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