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June 12, 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 write in response to plaintiffs-appellees' letter regarding *County of San Mateo v. Chevron Corp.*, 2020 WL 2703701 (9th Cir. May 26, 2020), and *City of Oakland v. BP p.l.c.*, 2020 WL 2702680 (9th Cir. May 26, 2020).

In *San Mateo*, the Ninth Circuit affirmed the district court's remand order, with the panel holding that it was bound by prior precedent to review only the federal-officer ground for removal and that removal was not permissible on that ground. 2020 WL 2703701, at *5, *9. In this circuit, however, the scope of appellate review of remand orders is an open question. Indeed, the Ninth Circuit indicated that, if it were "writing on a clean slate, [it] might conclude" that defendants' interpretation of 28 U.S.C. § 1447(d) is the "more persuasive" one. 2020 WL 2703701, at *5. With respect to the merits of federal-officer removal, the panel's holding was incorrect: as defendants have explained, ExxonMobil clearly acted under the federal government's "close direction," *id.* at *6, when extracting fossil fuels pursuant to federal lease agreements. *See* Reply Br. 20-22.

In *Oakland*, the Ninth Circuit held that the district court erred in concluding that it had federal-question jurisdiction and remanded for further proceedings. 2020

WL 2702680, at *9. But contrary to plaintiffs' suggestion, the Ninth Circuit did not expressly address defendants' argument that a case is removable when the facts pleaded on the face of the complaint demonstrate that federal common law must supply the substantive rule of decision. While the defendants in *Oakland* made that same argument, the Ninth Circuit's opinion addressed only removal under *Grable* and the doctrine of complete preemption. *See id.* at *5-*7. Defendants' submission here is that federal common law provides an *independent* basis for removal—an argument the Ninth Circuit did not discuss. For reasons defendants have explained, the Ninth Circuit erred in rejecting removal on the grounds that it did in fact address. *See Reply Br.* 13-19.

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,
ANTIVIRUS SCAN, AND PRIVACY REDACTIONS**

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 2020.05.31.03, updated May 31, 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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