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October 19, 2021

BY ELECTRONIC FILING

Christopher M. Wolpert
Clerk of Court
United States Court of Appeals for the Tenth Circuit
Byron White U.S. 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), appellants file this letter in response to appellees' letter regarding *City of Hoboken* v. *Exxon Mobil Corp.*, Civ. No. 20-14243, 2021 WL 4077541 (D.N.J. Sept. 8, 2021).

Appellants' argument for removal based on federal common law rests on two premises: first, that federal common law necessarily provides the rule of decision for climate-change claims like those asserted here, *see* Supp. Br. 4-9; and second, that federal courts have jurisdiction under 28 U.S.C. §§ 1331 and 1441 over claims necessarily governed by federal common law, *see* Supp. Br. 9-15. In *Hoboken*, the district court disagreed with both premises, concluding that the plaintiff's claims were "premised solely on state law," and further concluding that the application of federal common law "does not provide [a district court] with subject-matter jurisdiction" but rather constitutes a mere "preemption defense." 2021 WL 4077541, at *6.

The decision in *Hoboken* is incorrect on both scores. As appellants have explained (Supp. Br. 6-7), the Second Circuit squarely held in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), that putative state-law claims materially similar to those asserted here were a "quintessential example" of transboundary pollution

claims that must be governed by federal common law under established Supreme Court precedent. That holding supports the first premise in appellants' argument—namely, that federal common law necessarily governs appellees' claims even if they are pleaded under state law. As to the second premise, federal common law applies only where "state law cannot be used." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981). Accordingly, where (as here) the "basic scheme of the Constitution" requires the application of federal common law, *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011), state law is entirely displaced, and there is nothing for federal law to preempt. For that reason, the *Hoboken* court erred in treating the invocation of federal common law as a preemption defense without jurisdictional import.

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

Respectfully submitted,

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam

cc: All counsel of record (via electronic filing)

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, hereby certify that, on October 19, 2021, a copy of the foregoing letter was filed through the Court's electronic filing system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM