PAU Appellate Case: 19-1330 HARQCUMent: 040119332073p

2001 K STREET, NW TELEPHONE (202) 223-7300

WASHINGTON, DC 20006-1047

Date Filed: 04/10/2020 Page: 1

TELEPHONE (212) 373-3000

UNIT 5201, FORTUNE FINANCIAL CENTER

UNIT 5201, FORTUNE FINANCIAL CENTER 5 DONGSANHUAN ZHONGLU CHAOYANG DISTRICT, BEIJING 100020, CHINA TELEPHONE (86-10) 5828-6300

HONG KONG CLUB BUILDING, 12TH FLOOR 3A CHATER ROAD, CENTRAL HONG KONG TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING 2-2 UCHISAIWAICHO 2-CHOME CHIYODA-KU, TOKYO 100-0011, JAPAN TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE 77 KING STREET WEST, SUITE 3100 PO. BOX 226 TORONTO, ONTARIO M5K 1J3 TELEPHONE (416) 504-0520

500 DELAWARE AVENUE, SUITE 200 POST OFFICE BOX 32 WILMINGTON, DE 19899-0032 TELEPHONE (302) 655-4410

WRITER'S DIRECT DIAL NUMBER

(202) 223-7325

WRITER'S DIRECT FACSIMILE

(202) 204-7397

writer's direct e-mail address kshanmugam@paulweiss.com

April 10, 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 file this letter in response to plaintiffs-appellees' letter regarding the Supreme Court's decision in *Rodriguez* v. *Federal Deposit Insurance Corp.*, 140 S. Ct. 713 (2020).

Contrary to plaintiffs' assertions, *Rodriguez* supports defendants' position that federal common law governs this dispute. In *Rodriguez*, the Supreme Court acknowledged that "areas exist in which federal judges may appropriately craft the rule of decision," but declined to "claim a new area for common lawmaking" with respect to tax-refund allocation. 140 S. Ct. at 717. As the Court explained, a new area of federal common law will be recognized only where "necessary to protect uniquely federal interests," *id.* (citation omitted), and no such interest exists concerning "how a consolidated corporate tax refund . . . is *distributed* among group members," *id.* at 718.

Unlike *Rodriguez*, this case does not require the Court to recognize a "new area" for federal common lawmaking. Rather, it is well established that federal common law governs cases concerning "air and water in their ambient or interstate aspects." *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972); see also American

Electric Power Co. v. Connecticut, 564 U.S. 410, 421 (2011); International Paper Co v. Ouellette, 479 U.S. 481, 488 (1987). While plaintiffs contend that "[t]he conduct, parties, and relief at issue in this case"—local governments seeking damages from fossil-fuel producers for local harms—do not fall within existing federal common law, that contention is unpersuasive. Pls.' Br. 27-28. Regardless of the manner in which plaintiffs frame their claims, they are inherently and necessarily seeking damages for climate-change-related injuries resulting from greenhouse-gas emissions. If a patchwork of state laws could regulate that area, the federal government could hardly speak with one voice on the inherently global issue of climate change.

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 2020.04.08.07, updated April 8, 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

April 10, 2020