ORAL ARGUMENT HELD ON MAY 6, 2020

Case No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, *et al.*,
Plaintiffs-Appellees

v.

SUNCOR ENERGY (U.S.A), INC., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Colorado (Civ. No. 18-1672)
(The Honorable William J. Martinez, J.)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES

INTRODUCTION

In *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021), the Supreme Court held that 28 U.S.C. § 1447 permits courts of appeals to review all issues in a remand order where one ground for removal was the federal officer removal statute, 28 U.S.C. § 1442. This Court already rejected Defendants-Appellants' federal officer argument; it must now consider the remaining arguments, which the parties have already briefed. Judge Martinez was correct in rejecting each of Defendants' federal jurisdiction arguments, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc. ("Boulder County")*, 405 F. Supp. 3d 947 (D. Colo. 2019), and new caselaw strengthens his decision.

Indeed, at least eight federal courts have rejected Defendants' six remaining arguments; they have a "batting average of .000." *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 U.S. Dist. LEXIS 42190 at *10 n.3. (D. Haw. March 5, 2021). The single outlier, which sided with Defendants on one ground, has been reversed: in *City of Oakland v. BP plc* ("*Oakland*"), 969 F.3d 895 (9th Cir. 2020), the Ninth Circuit rejected Defendants' primary contention that jurisdiction lies because the case purportedly arises under unpled federal common law.

Other recent decisions do not help Defendants. Neither *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), nor *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021), addresses the removal issues

at bar or supports federal jurisdiction here. *City of New York* held only that federal common law *preempted* the plaintiff's state law claims on a motion to dismiss; it explicitly cautioned that it was *not* suggesting that unpled federal common law created removal jurisdiction. While the preemption decision was incorrect – it recognized an unprecedented federal common law at odds with Supreme Court authority, and thus would radically expand federal judicial authority at the expense of states and Congress – it had nothing to do with, and does not support, removal. And while Defendants have suggested that *Ford* supports jurisdiction under the Outer Continental Shelf Lands Act (OCSLA), the case actually concerned specific personal jurisdiction, not OCSLA nor removal, and is plainly irrelevant.

This Court should affirm the district court and leave this case to continue in state court.[1] Federal courts lack jurisdiction over this action.

ARGUMENT

I. Numerous district courts and the Ninth Circuit have rejected the same federal jurisdiction arguments Defendants press here.

Removal jurisdiction is narrow and governed by clear rules. Defendants' arguments conflict with those rules, which is why courts have repeatedly rejected

[1] In October 2019, Defendants moved to dismiss in state court. The Boulder County District Court heard oral argument in June 2020, and ruled on the proper state venue in January 2021.

them.[2] Indeed, since briefing here was completed, the Ninth Circuit in *Oakland*, and at least four district courts, have all rejected Defendants' arguments. *Supra* n.2.

In *Oakland*, the Ninth Circuit rejected the same federal common law, *Grable* (substantial federal question) and complete preemption arguments Defendants present. 969 F.3d at 903-908; *see* Plaintiffs-Appellants' Rule 28(j) letter, Doc. 010110356199, June 3, 2020; *cf.* Appellants' Opening Br. 16-37. Specifically, *Oakland* overturned the district court's holding that there is federal jurisdiction because plaintiffs' claim was necessarily governed by federal common law plaintiffs did not plead. It found that jurisdiction ordinarily lies only if a federal question appears on the complaint's face; removal may not be based on a federal preemption defense. 969 F.3d at 903-04; *see also* Appellees' Br. 20-24. *Oakland* noted only two exceptions to this "well-pleaded-complaint rule": *Grable* and complete preemption. *Id.* at 904-06. The argument that unpled federal common law controls is not among these exceptions.

[2] *E.g.*, *Oakland*, 960 F.3d 570, *opinion amended on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020); *Cty. of San Mateo v. Chevron Corp. ("San Mateo")*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *Mayor & City Council of Baltimore v. BP P.L.C. ("Baltimore")*, 388 F. Supp. 3d 538 (D. Md. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Mass. v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP ("Honolulu")*, No. 20-CV-00163-DKW, 2021 U.S. Dist. LEXIS 27225 (D. Haw. Feb. 12, 2021); *Minn. v. Am. Petroleum Inst.*, No. 20-1636 (JRT/HB), 2021 U.S. Dist. LEXIS 62653 (D. Minn. Mar. 31, 2021); *State of Conn. v. ExxonMobil Corp. ("Connecticut")*, 3:20-cv-1555 (JCH), D.E. 52 (D. Conn. June 2, 2021).

The court rejected the application of *Grable* because, even assuming plaintiffs' allegations could give rise to a federal common law claim, the claim did not require "interpretation of a federal statute" or resolution of any federal issue that would control other cases, and Defendants' invocation of federal interests did not create federal jurisdiction. *Id.* at 904-07. The court also found that the Clean Air Act does not "completely" preempt claims for climate harms. *Id.* at 905-08; *accord* Appellees' Br. 45-50.

Similarly, the recent decisions in *Honolulu* and *Minnesota*, like this case, involve claims against fossil fuel producers (including Exxon) for misrepresenting the risks of fossil fuels and thus contributing to climate alteration. *Honolulu* rejected Defendants-Appellants' federal common law, federal preemption and *Grable* arguments, 2021 U.S. Dist. LEXIS 27225 at *12 n.8 (citing *Oakland*, 969 F.3d at 906-908). It also held that the case did not arise out of operations on the Outer Continental Shelf, or a federal enclave. *Id.* at *12-15, 29-30. *Minnesota* likewise rejected Defendants' arguments about federal common law, *Grable*, the OCSLA and federal enclaves. 2021 U.S. Dist. LEXIS 62653 at *12-25, 29-33.

Every case that has considered Defendants' federal jurisdiction arguments has found them lacking. This Court should not be the first to hold otherwise.

II. *City of New York* is irrelevant, as the case itself explicitly held, and it was wrongly decided.

City of New York does not support Defendants' argument that unpled

federal common law creates jurisdiction. It expressly addressed only preemption, and made clear it did *not* suggest federal common law would create jurisdiction; in any event, its preemption analysis is incorrect. Appellees' Br. 20-34. *City of New York* provides no reason to break with the unbroken string of cases finding federal jurisdiction to be absent.

A. *City of New York* distinguished the jurisdiction issue here from the preemption issue it decided.

City of New York did *not* hold that federal common law creates federal *jurisdiction* where plaintiffs have not pled a federal common law claim. That case was filed in federal court under diversity jurisdiction, and the decision – finding that plaintiff's state law claims were *preempted* by federal common law, 993 F.3d at 90-94 – arose on a substantive motion to dismiss. This was ordinary preemption, which is not a basis for removal. Indeed, the Second Circuit expressly "reconcile[d]" its federal common law holding "with the parade of recent opinions holding that 'state-law claim[s] for public nuisance [brought against fossil fuel producers] do[] not arise under federal law,'" for removal purposes. *Id.* at 93 (quoting *Oakland*, 960 F.3d at 575 and collecting cases, including Judge Martinez's decision below).

City of New York noted that in the many cases finding jurisdiction to be lacking, plaintiffs brought state-law claims in state court and defendants sought to remove them by arguing they raised federal preemption defenses. *Id.* at 94. Thus, the only issue was whether defendants' defenses could "create federal-

question jurisdiction . . . in light of the well-pleaded complaint rule." *Id.* A federal preemption defense, however, does not create federal jurisdiction. *Id.* (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987)); *see also* Appellees' Br. 18-22.[3] By contrast, in *City of New York*, the plaintiff sued in federal court, so the court could address the preemption defense. 993 F.3d at 94.

Since *City of New York* asserted that its holding is *consistent* with the "fleet of cases" finding removal to be impermissible, *id.*, it provides no basis to issue the first ruling that federal question jurisdiction lies over these state claims. *See Connecticut*, 3:20-cv-1555 (JCH), D.E. 52 at 15 n.7 (district court in Second Circuit rejecting notion that *City of New York* supports federal *jurisdiction*).

B. *City of New York*'s preemption holding conflicts with Supreme Court precedent and Congress' decision to preserve state law.

Even if *City of New York*'s holding that federal common law preempted the claims were relevant, it is incorrect for three reasons. *First*, *City of New York* is premised on the notion that state law liability for defendants' fossil fuel production would regulate of out-of-state *emissions*. 993 F.3d at 90-91, 93. But as the district court found, Plaintiffs here do not seek to impose liability on or regulate emitters; they allege that Defendants *sold* and *promoted* their fossil fuels knowing that (when used) they would alter the climate, and that they misrepresented the dangers of fossil fuel use to preserve their sales, all with

[3] *Accord, e.g., Oakland*, 969 F.3d at 903-04, 907 n.6; *Boulder County*, 405 F. Supp. 3d at 956, 963-64; *Rhode Island*, 393 F. Supp. 3d at 148-49; *Baltimore*, 388 F. Supp. 3d at 553-55.

catastrophic effects in Colorado. *See Boulder County*, 405 F. Supp. 3d at 969; *accord* Compl. ¶ 542.[4] The distinction between liability for emitters versus sellers is critical. While exceedingly narrow federal common law existed where States sued to enjoin out-of-state emitters, *infra*, courts consistently permit state claims seeking damages for in-state injuries against nationwide sellers of harmful products like tobacco or asbestos; indeed, courts have repeatedly rejected calls for a generalized interstate federal common law, even when substantial federal interests are at stake. Appellees' Br. 27-28.[5]

Clearly, fossil fuel use by non-parties and the resulting emissions are a part of the causal chain leading from Defendants' tortious conduct to Plaintiffs' instate injuries. But this case no more regulates those users or emissions than tobacco, opioid or lead paint litigation regulates smokers, opioid users or painters.[6]

Second, even if this case did challenge emissions, it clearly falls outside the narrow federal common law recognized by the Supreme Court. Appellees' Br. 24-

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[4] Other courts too have correctly rejected the erroneous emissions regulation characterization. *See, e.g., Mayor of Baltimore v. BP P.L.C.,* No. ELH-18-2357, 2019 U.S. Dist. LEXIS 97438, at *32-33 (D. Md. June 10, 2019).

[5] *E.g., Jackson v. Johns-Manville Sales Corp.,* 750 F.2d 1314 (5th Cir. 1985) (refusing to apply federal common law); *see also In re Nat'l Prescription Opiate Litig.,* 440 F. Supp. 3d 773, 799 (N.D. Ohio 2020); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013); *People v. ConAgra Grocery Prods. Co.,* 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017).

[6] *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), rejected the parallel argument that a state mining ban *really* regulated uranium milling and use in power plants, a preempted field. *Id.* at 1904-05 (three-justice op. of Gorsuch, J.). "[R]egulating an upstream activity . . . is not preempted simply because a downstream activity falls within a federally occupied field." *Id.* at 1914-15 (three-justice op. of Ginsburg, J.).

29. *City of New York* erroneously asserted that federal common law governs all interstate pollution cases. 993 F.3d at 91. But in fact, it only applies to suits "by one State to abate pollution emanating from another." *Am. Elec. Power Co. ("AEP") v. Conn.*, 564 U.S. 410, 421 (2011); *see also Oakland*, 969 F.3d at 906 (stating that the Supreme Court has not recognized "a federal common law of public nuisance relating to interstate pollution.") Thus, it requires an affected *state* suing to *enjoin* an out-of-state *polluter*, Appellees' Br. 26-27, as Exxon previously told the Ninth Circuit in arguing that federal common law did *not* apply to a climate alteration case. Supp. App. 70-75. Since Plaintiffs are not states, and "do not . . . seek injunctive relief . . . to reduce emissions," *Boulder County*, 405 F. Supp. 3d at 971, federal common law does not preempt.

Federal common law only applies to this limited category of pollution cases because judicial lawmaking is only proper regarding disputes implicating the conflicting rights of *States*, Appellees' Br. 25-26, like disputes over borders, *Rhode Island v. Massachusetts,* 37 U.S. 657 (1838), or shared resources, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The Constitution only allows judges to make federal law in such cases given the uniquely federal interest in adjudicating a State's claim to a remedy without having to submit to a neighboring State's law. *See Illinois v. City of Milwaukee*

("Milwaukee I"), 406 U.S. 91, 107 (1972).[7] Otherwise, States have "great latitude" to protect their citizens; these are "matters of local concern." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quotation marks omitted); Appellees' Br. 28-29.

In expanding federal common law beyond cases involving States seeking to enjoin out-of-state emissions, *City of New York* blew far past the constitutional limits on judicial lawmaking. Indeed, while federal common law has been recognized as a *sword* that allows States to "appeal to federal common law to *abate* a public nuisance," *Milwaukee v. Illinois ("Milwaukee II")*, 451 U.S. 304, 309-10 (1981) (emphasis added), *City of New York* created a *shield*, barring plaintiffs from all relief. And it suggested that *any* state law that touches interstate pollution is preempted because it conflicts with "federal interests." 993 F.3d at 91-92. But as Exxon argued in *Kivalina*, no uniquely federal interest in climate alteration justifies a broad new federal preemption of traditional state authority. Supp. App. 70-75; *see also* Appellees' Br. 31-34.

Indeed, merely "[i]nvoking some brooding federal interest . . . should never be enough" to preempt state law; a specific "constitutional text or a federal statute [must] do[] the displacing." *Va. Uranium*, 139 S. Ct. at 1901 (three-justice op. of Gorsuch, J.) (internal quotations omitted); *accord id.* at 1909 (three-justice op. of Ginsburg, J.). But *City of New York* merely cited a perceived need for a uniform rule – "that most generic (and lightly invoked) of alleged federal

[7] As Exxon noted, only *States* are afforded access to a federal common law public nuisance *remedy*. Appellants' Br. 29; Supp. App. 74-75 (citing *Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906)); *accord Milwaukee I*, 406 U.S. at 107.

interests." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994); *see* 993 F.3d at 85-86, 90, 93. That is not enough.[8]

If promoting oil production were a preemptive federal interest, judges could strike down almost any claim involving petroleum companies. Worse, there are important federal interests in many national problems. *City of New York*'s rationale would expand federal preemption into all sorts of new realms.

Plaintiffs bring traditional Colorado state tort claims for injuries in Colorado. Those claims do not implicate conflicting states' rights, or the Constitution.

Third, there can be no preemption here, even if federal common law might otherwise apply, because Congress *preserved* state law claims in the Clean Air Act (CAA). *Oakland*, 969 F.3d at 907-08. *City of New York* subverts Congress' decision *not* to preempt state tort claims.

City of New York found that the CAA displaced federal common law. 993 F.3d at 95. But where a federal statute displaces federal common law, state law

[8] *City of New York* thought a uniform rule was needed because a damages award would regulate producers' out-of-state acts. 993 F.3d at 92. But States may hold out-of-state actors liable for in-state harms. *Young v. Masci*, 289 U.S. 253, 258-59 (1933); *Calder v. Jones,* 465 U.S. 783, 789 (1984). That does not justify federal common law-making. Appellees' Br. 27. *City of New York* also invoked uniformity to avoid upsetting some balance Congress allegedly struck between preventing global warming and other federal interests. 993 F.3d at 93. But Congress has *not* enshrined any such balance in statutory text, and the Supreme Court bars federal common law-making based on such guessing at Congress' intent. *O'Melveny & Myers*, 512 U.S. at 88-89; *Va. Uranium*, 139 S. Ct. at 1907-08 (three-justice op. of Gorsuch, J.); *id.* at 1915 (Ginsburg, J. concurring) (since Congress did not regulate the conduct at issue, it "struck no balance."); Appellees' Br. 33-34.

claims cannot be superseded by the no-longer-operative federal common law. Appellees' Br. 29-31; *San Mateo*, 294 F. Supp. 3d at 937. This is because, when Congress addresses a question previously governed by federal common law, "the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee*, 451 U.S. 304 at 312-13. And courts cannot "supplement" comprehensive statutes like the CAA; "matters left unaddressed . . . are presumably left subject to . . . state law." *O'Melveny & Myers*, 512 U.S. at 85.

Thus, the proper question is whether *Congress* preempted state law, and Congress did not intend the CAA to do so. *City of New York* broke new ground, ruling that even where a statute does not directly preempt state law, it can do so cryptically by displacing federal common law. 993 F.3d at 98-100. This is contrary to *AEP*, which held that "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability . . . of a state lawsuit depends, *inter alia*, on the *preemptive effect of the federal Act*." 564 U.S. at 429 (second emphasis added).

City of New York would allow judges to preempt where neither the Constitution nor Congress intended to deprive plaintiffs of any remedy – which would be "implausible" in any event. *See Medtronic, Inc.*, 518 U.S. at 487 (refusing to read a statute to preempt state tort claim while providing no relief). Judges have no power to preempt where the prerequisite for preemption is absent. Supreme Court precedent forbids such a striking judicial expansion of dormant federal power at the expense of Congress' will and traditional state

authority.

III. *Ford* is irrelevant to the OCSLA.

Defendants have suggested that they intend to argue that the decision in *Ford* strengthens their OCSLA arguments, but *Ford* is entirely irrelevant to OCSLA. *Ford* held that specific jurisdiction does not require a "strict causal relationship" between the defendant's in-state activity and the litigation, noting it had "never framed the specific jurisdiction inquiry as always requiring proof of causation." 141 S. Ct. at 1026. This decision does not govern OCSLA jurisdiction, where courts historically apply a "but for" test and only find jurisdiction where there is a direct connection to the Outer Continental Shelf (OCS). *See* Appellees' Br. 52-53. *Ford*'s specific jurisdiction rule – which implicates very different concerns – does not overturn OCSLA's removal test. *See, e.g., Speidell v. United States*, 978 F.3d 731, 739 (10th Cir. 2020) (to be "intervening" precedent, a Supreme Court ruling must "obviously contradict or invalidate" a prior ruling).

The OCSLA test is rooted in statutory text, while the specific jurisdiction rule is judicially created and rooted in constitutional concerns, and they are not identical. To be sure, that language is similar. *Compare Ford*, 141 S. Ct. at 1026 ("our most common formulation of the rule demands that the suit arise out of *or relate to* the defendant's contacts with the forum") (emphasis added, internal quotation marks omitted) *with* 43 U.S.C. §1349(b)(1) (providing for jurisdiction over claims "arising out of, or *in connection with*, any operation conducted on the outer Continental Shelf") (emphasis added). But the phrase "arising out of"

appears in a wide array of statutes covering all sorts of different contexts[9]; the same words "may be variously construed . . . when they occur in different statutes." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). And *Ford*, of course, did not apply a statute at all.

Significantly, the inquiries are motivated by fundamentally different concerns. Specific jurisdiction concerns a state's authority to address harms that occur within the state and reflects "two sets of values – treating defendants fairly and protecting interstate federalism." *E.g., Ford*, 141 S.Ct. at 1024-25 (internal quotations omitted). By contrast, OCSLA "define[s] a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). A strict causation standard would make little sense in the personal jurisdiction context where more than one state may have specific jurisdiction "because of another 'activity [or] occurrence' involving the defendant that takes place in the State." *Ford*, 141 S. Ct. at 1026 (2021). By contrast, a "but for" requirement is well suited for OCSLA, where the inquiry is binary – either there is federal jurisdiction or there isn't. There is no reason to think that *Ford* intended to question, let alone overturn, the law in this entirely different context.

Examples of where OCSLA jurisdiction exists include where a person is injured on an OCS oil rig, *In re Asbestos Prods. Liab. Litig. (No. VI),* 673 F. Supp.

[9] *See, e.g.,* 28 U.S.C. § 2680(j); 9 U.S.C. §2; 42 U.S.C. § 233(e); 42 U.S.C. § 2297h-7(a)(1); 10 U.S.C. § 2734a(b).

2d 358, 370 (E.D. Pa. 2009); where oil spilled from such a rig, *In re Deepwater Horizon,* 745 F. 3d 157, 162 (5th Cir. 2014); or in contract disputes directly relating to OCS operations, *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.,* 754 F.2d 1223, 1225 (5th Cir. 1985). All such cases involve a direct connection between the claims and physical operations on the OCS that is lacking here. *See, e.g., Par. of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, 64 F. Supp. 3d 872, 898 (E.D. La. 2014) (finding no jurisdiction where relationship OCS operations "too remote and attenuated"); *Fairfield Indus. v. EP Energy E&P Co.,* L.P., No. H-12-2665, 2013 U.S. Dist. LEXIS 196376, at *12-13 (S.D. Tex. May 2, 2013) (finding no jurisdiction where dispute is "far removed" from OCS activity).

Regardless, even if the standard Defendants now appear to advocate for applied, jurisdiction would still not lie under OCSLA. Defendants bear the burden of establishing federal removal jurisdiction, *see, e.g., Dutcher v. Matheson,* 733 F.3d 980, 985 (10th Cir. 2013), and yet they have made no effort to satisfy it. Defendants have said nothing other than that some unknown percentage of their overall production takes place on the OCS.

Their argument that there is federal jurisdiction if *any* oil sourced from the OCS is some *part* of the conduct that creates the injury would dramatically expand the statute's scope. Defendants have offered no limiting principle. Any spillage of oil or gasoline anywhere that involved any OCS-sourced oil – or any commercial claim over such a commodity – could be removed to federal court. They clearly cannot mean that, but they do not suggest how much is enough or

how much is involved here. That does not meet their burden.

Defendants cite no case holding that injuries associated with downstream uses of OCS-derived fuels create jurisdiction and nothing in *Ford* supports such a dramatic shift. Extending OCSLA jurisdiction to cover state law claims for injuries in a landlocked state hundreds of miles from the OCS would lead to absurd results Congress could not have intended.

CONCLUSION

This Court should not accept jurisdictional arguments that every other federal court has rejected. The decision below should be affirmed.

Dated: July 16, 2021

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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 that, pursuant to this Court's June 25, 2021 Order, the attached Brief of Appellees is proportionally spaced, has a typeface of 13 points or more, and is no longer than 15 pages.

July 16, 2021

/s/ Richard Herz
Richard Herz

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 Brief of Appellees, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Webroot SecureAnywhere (updated July 16, 2021) 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.

July 16, 2021

/s/ Richard Herz
Richard Herz

CERTIFICATE OF SERVICE

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, that, on this date, the attached Brief of Appellees was filed with the Clerk of the Court through the electronic-filing system. I further certify that all parties required to be served have been served.

July 16, 2021

/s/ Richard Herz
Richard Herz