PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K STREET, NW
TELEPHONE (202) 223-7300
WASHINGTON, DC 20006-1047

1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019-6064
TELEPHONE (212) 373-3000

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

SUITES 3601 – 3606 & 3610
36/F, GLOUCESTER TOWER
THE LANDMARK
15 QUEEN'S ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

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

535 MISSION STREET, 24TH FLOOR
SAN FRANCISCO, CA 94105
TELEPHONE (628) 432-5100

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
P.O. 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

KANNON K. SHANMUGAM

TELEPHONE (202) 223-7325
FACSIMILE (202) 204-7397

E-MAIL: kshanmugam@paulweiss.com

March 2, 2022

BY ELECTRONIC FILING

Mr. Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: *State of Minnesota* v. *American Petroleum Institute, et al.*, No. 21-1752; *American Petroleum Institute, et al.* v. *State of Minnesota*, No. 21-8005

Dear Mr. Gans:

Under Federal Rule of Appellate Procedure 28(j), appellants write in response to appellee's letter regarding *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, 2022 WL 363986 (10th Cir. Feb. 8, 2022) ("Op.").

The Tenth Circuit erred in two respects by rejecting federal common law as a basis for removal. *First*, the court concluded that federal common law could not govern the municipalities' claims because the Clean Air Act displaced federal common law. *See* Op. *12. But the Second Circuit held the opposite, correctly reasoning that federal common law must govern climate-change claims because they are "simply beyond the limits of state law." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 92 (2021). That Circuit also properly concluded that state law does not "snap back into action" after statutory displacement of federal common law. *See id.* at 98. And although the Clean Air Act may ultimately displace the State's claims, that is a merits question irrelevant to the question of federal jurisdiction. *See* Reply Br. 2-3.

Second, the Tenth Circuit deepened a circuit conflict by holding that artfully pleaded claims governed by federal common law are not removable. *See* Reply Br. 12 (citing cases). And the Tenth Circuit incorrectly held that claims pleaded under

state law are removable only when a federal statute completely preempts state law. *See* Reply Br. 10-11; *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213 (8th Cir. 1997).

With respect to federal-officer jurisdiction: the record here is more robust than the one before the Tenth Circuit, and the Tenth Circuit confirmed that "[w]artime production" is "the paradigmatic example" of private conduct at the direction of a federal officer. Op. *6. Appellants have undertaken "critical efforts the federal [government] would need to undertake itself in the absence of a private contract" by, *inter alia*, supplying military fuels. *Id.*

The Tenth Circuit's holdings on *Grable* jurisdiction and OCSLA are erroneous for the reasons explained in appellants' briefing. *See* Br. 34-40, 47-50.

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, counsel for defendants-appellants Exxon Mobil Corporation and ExxonMobil Corporation, and a member of the bar of this Court, certify that, on March 2, 2022, the foregoing document was filed through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam