

June 30, 2022

**Via ECF**

Michael E. Gans  
Clerk of Court  
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  
Plaintiff–Appellee’s Citations of Supplemental Authority

Dear Mr. Gans,

Plaintiff–Appellee State of Minnesota writes in response to Defendants–Appellants’ letter of June 17 attaching as “supplemental authority” the petition for certiorari taken from the Tenth Circuit’s decision affirming remand in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (2022). The letter and attached petition are an improper attempt by Defendants–Appellants to file a supplemental brief without leave.

Rule 28(j) permits a party to advise the Court of “pertinent and significant authorities” that come to the party’s attention after briefing closes. Fed. R. App. P. 28(j). Defendants’ June 17 letter, signed by counsel for Defendant–Appellant Exxon Mobil Corp. in this matter, attaches a certiorari petition Exxon submitted in another case, *signed by the same counsel*. Compare Entry ID 5168840 at 1, *with id.* at 43. The petition lists 32 judicial decisions in its Table of Authorities, at least 28 of which are cited in one or more of the parties’ briefs in this Court or have been submitted under Rule 28(j) in the case of more recent opinions. Of the four that are not already before the Court, the most recent is *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019). Every authority cited in the petition was available to Defendants in the normal course of briefing, and this Court has repeatedly stressed that “Rule 28(j) is not a vehicle for parties to say what they could and should have argued in their briefs.” *Sasser v. Hobbs*, 735 F.3d 833, 841 n.3 (8th Cir. 2013). To the extent Exxon’s petition discusses issues not contained in Defendants–Appellants’ briefs, this Court has been equally clear that “an appellant cannot raise arguments for the first time in a Rule 28(j) letter.” *United States v. Kicklighter*, 413 F.3d 915, 918 (8th Cir. 2005); *United States v. \$284,950.00 in U.S. Currency*, 933 F.3d 971, 975 n.3 (8th Cir. 2019) (same).

The Court should see Defendants–Appellants’ June 17 letter and attached petition for the improper and untimely supplemental brief that it is, strike it from the docket, and not consider it.

Respectfully submitted,

/s/ Victor M. Sher

Victor M. Sher

**Sher Edling LLP**

*Counsel for Plaintiff–Appellee*

cc: All Counsel of Record (via ECF)