

March 20, 2023

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 Rule 28(j) Notice of Supplemental Authority

Dear Mr. Gans,

Plaintiff–Appellee State of Minnesota writes concerning the certiorari petition pending in *Suncor Energy (U.S.A.) Inc. et al. v. Board of County Commissioners of Boulder County et al.*, No. 21-1550 (“*Boulder*”). Defendants–Appellants noted by letter on October 4, 2022, that the Supreme Court called for the views of the United States on that petition. The Solicitor General responded on March 16, 2023, stating “[i]n the view of the United States, the petition for a writ of certiorari should be denied.” Ex. A at 1. The United States’ position rebuts Defendants–Appellants’ argument that Minnesota’s claims “are governed exclusively by federal common law” and “arise under federal common law” for jurisdictional purposes. AOB at 13.

The United States’ brief confirms that state-law claims materially similar to Minnesota’s cannot be “recharacterized as claims arising under federal common law” because “the Clean Air Act has displaced any relevant federal common law in this area, and no exception to the well-pleaded complaint rule applies.” Ex. A at 6. The brief explains that the *Boulder* plaintiffs’ state-law claims do not satisfy the well-pleaded complaint rule because “no federal issue is ‘embedded’ within respondents’ *own* articulation of their claims,” *id.* at 10, and no exception applies because neither the Clean Air Act nor the federal common law it displaced completely preempt state law, *id.* at 11–13. The Clean Air Act’s “displacement of any relevant federal common law” in turn “forecloses” the petitioners’ theory that federal common law “‘necessarily and exclusively govern[s]’ respondents’ claims.” *Id.* at 12.

The United States’ brief acknowledges its previous amicus position in *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), which argued that state law claims involving climate change “may well” arise under federal law for jurisdictional purposes, but expressly affirms that because “five courts of appeals that have considered the issue have rejected the position that the government took in *BP*, . . . the United States has reexamined its position and has concluded that state-law claims like those pleaded here should not be recharacterized as claims arising under federal common law.” *Id.* at 7.

Respectfully submitted,

/s/ Victor M. Sher

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cc: All Counsel of Record (via ECF)