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February 23, 2016

Mr. Michael Gans, Clerk
Eighth Circuit Court of Appeals
111 South 10th Street
Room 24.329
St. Louis, MO 63102

Re: *Planned Parenthood Arkansas & Eastern Oklahoma v. Selig*
Eighth Circuit Case No. 15-3271

Dear Clerk Gans:

On February 18, 2016, Plaintiffs-Appellees filed what they claim is a Federal Rule of Appellate Procedure 28(j) letter. The letter summarizes and provides an *amicus* brief filed by the United States in “a similar action” in the Fifth Circuit. The letter and *amicus* brief are not proper under Rule 28(j). The Court should strike them.

Rule 28(j) provides that “[i]f pertinent and significant authorities come to a party’s attention after the party’s brief has been filed . . . a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations.” *Id.* “The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally.” *Id.* The *amicus* brief submitted by Plaintiff-Appellees is not a “pertinent and significant authorit[y]” as contemplated by Rule 28(j). Indeed, an *amicus* brief filed in a different case in a different circuit is not an “authority” at all. The United States did not file an *amicus* brief in this case. Any such *amicus* brief was due on February 5. Plaintiffs-Appellees are abusing the 28(j) process in an attempt to skirt the *amicus* brief deadline—perhaps because the United States’ *amicus* brief was not finalized until February 17.

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In any event, the United States' litigation position concerning whether a statute creates a private right of action enforceable under § 1983, and the scope of any such right, is not due any deference. Moreover, the United States' brief is limited to general legal principles. *See* Br. of United States at 2. It does not substantively address the specifics of this case, where a provider excluded for unethical behavior and misconduct specifically chose not to challenge the exclusion administratively or in state court. The discussion of Arkansas is relegated to a single, brief mention in footnote 17. And the made-for-litigation position that Arkansas's letter terminating Planned Parenthood was not specific enough is hard to take seriously in light of the fact that HHS has not pursued any administrative action against Arkansas.

Best regards,



Colin R. Jorgensen
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CRJ