



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1598

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
www.ma.gov/ago

December 14, 2018

VIA THE CM/ECF SYSTEM

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the
Second Circuit
40 Foley Square
New York, NY 10007

**Subj: No. 18-1170 – *Exxon Mobil Corp. v. Healey* – Response to Exxon
Mobil Corp.'s Fed. R. App. P. 28(j) Letter**

Dear Clerk Wolfe:

Contrary to Exxon Mobil Corporation's claims in its November 20, 2018 letter, the district court's decision in *National Rifle Association (NRA) of America v. Cuomo*, No. 1:18-CV-0566 (N.D.N.Y. Nov. 6, 2018), is inapposite for the following reasons.

First, the district court below and the district court in *NRA* applied the same FRCP 12(b)(6) standards, *compare NRA*, slip op. 2-3, *with* Mass.A.G. Br. (Br.) Addendum (Add)-33; *see* Br. 18-19, 22-26, and reached divergent results based on the very different allegations before them. Indeed, while Exxon asserts that the district court refused to consider its allegations in "context," Ltr. 1, the court did the opposite; it rejected Exxon's attempt to "cherry-pick[]" the record and did "[r]ead" Exxon's allegations "in context," Br. Add-36.

Second, the *NRA* district court did not "reject[]" arguments relevant here. Ltr. 2. In her brief to this Court, the Attorney General did not rest her argument on the necessity of "actual chilled speech," *id.*; instead, she argued, *inter alia*, that Exxon's concessions below and in its complaint refute any claim that the civil investigative demand regulates Exxon's speech at all, Br. 29-31 & n.16. The Attorney General has a right both to investigate whether Exxon defrauded consumers and investors and to inform the public about that investigation's existence, Br. 27-31, 44-45, regardless of the additional leeway under the government speech and commercial speech doctrines (neither of which were explored by the court below).

Catherine O'Hagan Wolfe
Subj: No. 18-1170 – 28(j) Letter

December 14, 2018
Page 2 of 2

Third, the *NRA* district court did not opine on whether “a reasonable basis to investigate” fraud can defeat a viewpoint discrimination claim; that issue was not before that court, as Exxon’s omission of any corresponding citation makes clear. Ltr. 2; *see* Br. 32-35. *NRA* concerns allegations that New York officials “threat[ened] retaliatory enforcement against” third parties “that do not sever ties with the NRA,” *NRA*, slip op. 25, “to suppress the ... gun promotion advocacy” of the NRA, an advocacy organization, *id.* at 28. Those allegations have no analogue in this case, which concerns a state antifraud investigation into marketing and sales of products and securities to consumers and investors by Exxon, a publicly traded corporation.

Respectfully submitted,

/s/ Seth Schofield

Seth Schofield
Senior Appellate Counsel
Assistant Attorney General
Energy and Environment Bureau

Cc: All Counsel of Record (by ECF)