U.S. COURT OF APPEALS FOR
THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant, No. 18-1170

v.

MAURA TRACY HEALEY, In her official capacity as Attorney General of the State of Massachusetts, BARBARA D. UNDERWOOD, Attorney General of New York, in her official capacity,

Defendants-Appellees.

REPLY MEMORANDUM OF LAW IN SUPPORT OF NEW YORK ATTORNEY GENERAL'S MOTION TO DISMISS

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Dated: December 24, 2018

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT

Exxon brought this suit to stop the New York Office of the Attorney General (NYOAG) from investigating whether Exxon defrauded New York investors and consumers. Because NYOAG has ended the investigation, Exxon's appeal from the dismissal of its claims is moot.

Exxon attempts to defeat mootness by requesting new relief that is inappropriate and unavailable. Exxon's new request for an order directing that NYOAG return the documents Exxon produced during the investigation fails because Exxon cannot show that it has any Fourth Amendment interest in those documents (*see, e.g.*, Mem. of Law in Supp. of Mot. to Dismiss (Mem.) 11). Exxon's proposed declaratory judgment that NYOAG's *past* conduct was illegal—a collateral attack on NYOAG's antifraud suit against Exxon—is inconsistent with basic principles of federalism and state sovereignty. And Exxon's belated suggestion that the district court could appoint a monitor to oversee potential "bias" at NYOAG fails because Exxon has not shown that any NYOAG employee harbors bias against Exxon or anyone else.

Exxon also invokes the mootness doctrine's voluntary-cessation exception, but that exception does not apply here because there is no

basis to conclude that NYOAG's decision to end the investigation was a strategic litigation ploy, rather than the result of a determination that the investigation was complete.

There is likewise no basis to find that the alleged conduct Exxon challenges is reasonably likely to recur and yet evade review. To the contrary, the constitutional claims that Exxon asserts can ordinarily be reviewed on a motion to quash an investigatory subpoena or as defenses or counterclaims in an enforcement action. If Exxon's claims evade review here despite the three-year duration of this litigation, that is only because Exxon chose to forgo raising those claims in New York state court, and to bring them instead to a Texas district court that lacked any connection with the defendants or the conduct alleged.

Finally, if this Court concludes that the case is moot, it should dismiss the appeal. Equity does not also require vacatur of the judgment below, because Exxon bears part of the responsibility for the closing of NYOAG's investigation. Exxon's own refusal to toll the statute of limitations was an important factor in causing NYOAG to terminate the investigation and file the complaint.

ARGUMENT

EXXON'S APPEAL FROM THE DISTRICT COURT'S DISMISSAL OF ITS COMPLAINT IS MOOT

A. Exxon's Appeal Cannot Give It Meaningful Relief.

Exxon's appeal from the dismissal of its claims against the New York Attorney General is moot because this Court can no longer provide Exxon the relief sought in its complaint. Mem.8-10.

Trying to avoid that outcome, Exxon now requests new categories of relief that it never sought from the district court, and that in any event are unavailable or inappropriate. *First*, Exxon seeks the return of documents on Fourth Amendment grounds, although it produced those documents in response to a state-court subpoena without asserting any Fourth Amendment objection in state court (Mem.11; Motion App'x (M.A.) 139-145). *Second*, Exxon seeks a backward-looking declaratory judgment that NYOAG's closed investigation was illegal, but principles of federalism and state sovereignty bar such a judgment. *Third*, Exxon seeks a court-appointed monitor to scrutinize NYOAG for purported viewpoint bias, relying on statements made by former Attorney General Eric Schneiderman, although both the subpoena-compliance proceeding

and subsequent civil enforcement action were brought not by him but by his successor.

This Court should reject Exxon's contrived attempts to defeat mootness. Exxon is wrong in asserting that its new requests for relief are "based on events that had not occurred when its complaint was filed" (Plaintiff-Appellant's Opp. Mem. (Opp.) 11 (quotation marks omitted)). Indeed, Exxon's operative complaint belies that assertion. (Joint Appendix (J.A.) 421 (describing Exxon's production of documents to NYOAG), 435 (alleging statements of AG Schneiderman show bias).) In any event, Exxon is entitled to none of this relief.

1. Exxon has not demonstrated that the return of its documents is warranted or available.

Returning Exxon's documents or barring their use would not provide meaningful relief to Exxon, because NYOAG could obtain those same documents in its state-court litigation against Exxon. Mem.10-13. Exxon's contrary argument misunderstands the standards for obtaining discovery in New York state courts. Exxon claims (Opp.13) that "[e]ntire categories" of its produced documents—including those pertaining to its research and communications on climate change—"would not meet the

standard of relevance" for civil discovery. But New York's "liberal" discovery regime allows parties to seek more than relevant documents; it requires disclosure "of any facts bearing on the controversy which will assist preparation for trial." *Forman v. Henkin*, 30 N.Y.3d 656, 661 (2018) (quotation marks omitted). And here, Exxon's research and communications on climate change will "assist preparation for trial" of claims about how its business accounted for climate-change-related risks.

At any rate, the documents at issue satisfy ordinary standards of relevance. Contrary to Exxon's assertion (Opp.13-14), Exxon's research and communications on climate change are highly relevant to the central allegations of NYOAG's complaint: that Exxon "deceive[d] investors and the investment community" about "the company's management of the risks posed to its business by climate change regulation" (M.A.7). And if the documents that Exxon produced to NYOAG ultimately prove irrelevant to NYOAG's complaint, then an order barring their use (Opp.12) will not benefit Exxon in any event.

In claiming that NYOAG deposed more witnesses than New York's Commercial Division Rule 11-d(a) allows, Exxon ignores the provision in those rules for additional depositions by court order. Exxon also cannot

claw back those depositions, because "words, once uttered, cannot" be "retrieved." *In re Grand Jury Proceedings (John Roe)*, 142 F.3d 1416, 1422 (11th Cir. 1998).

Separately, the Eleventh Amendment forbids a federal court from ordering the return of Exxon's documents as retroactive relief for an alleged past Fourth Amendment violation. Mem.13-14. Exxon seeks to couch such an order as a "prospective remedy for an ongoing harm." Opp.15. Yet Exxon's complaint does not allege that the mere holding of its documents constitutes an ongoing harm. Exxon instead rests its Fourth Amendment claim on the "undue burden" it supposedly faces from complying with NYOAG's allegedly "overbroad and irrelevant" subpoena. (J.A.434-435.) But the burden of compliance is not ongoing, now that Exxon has complied, and thus any such burden cannot support prospective relief.

Exxon's complaint likewise undermines its claim of an "ongoing injury" from NYOAG's use, in the state-court action, of evidence gathered during NYOAG's investigation (Opp.17-18). The harm that Exxon's complaint alleged was the issuance of purportedly "baseless and burdensome subpoenas" amounting to a "fishing expedition." (J.A.431, 432.) As we have explained, routine subpoena compliance simply does not

constitute cognizable harm warranting prospective relief (Br. for N.Y. Atty. Gen. (NYOAG Br.) 28, 35-36). But even if it did, now that the compliance proceeding has been terminated and the investigation has concluded, any harm that was threatened by NYOAG's investigation has now come to an end. Equally important, NYOAG's decision to file a civil enforcement action against Exxon shows that the subpoenas revealed apparent securities fraud. Exxon's prior challenge to the investigation does not grant it immunity from all suits for misleading investors about the topics that the investigation focused on.

2. Exxon's other new requests for relief likewise fail.

Exxon's request for declaratory relief fails because its effort to block NYOAG's investigation no longer presents a live dispute. Mem.16. A court may award declaratory relief only in cases "of actual controversy." 28 U.S.C. § 2201(a). Exxon's claim (Opp.18) that a declaratory judgment would have preclusive effect in NYOAG's state-court action simply underscores its real purpose in maintaining this lawsuit: collaterally attacking NYOAG's state-court action.

Basic principles of federalism bar Exxon's strategy. Federal courts have a "longstanding public policy against federal court interference with

state court proceedings," *Younger v. Harris*, 401 U.S. 37, 43 (1971), including civil enforcement proceedings, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013). If Exxon believes that its federal claims bear on its state case, it should assert them as defenses there, rather than using this federal suit to collaterally attack the state-court proceeding.

The substance of Exxon's requested declaration would also violate the Eleventh Amendment. Mem.16-17. Exxon misreads the relevant case law to claim that such a declaration would be proper "'if it might be offered in state-court proceedings as res judicata on the issue of liability'" (Opp.18 (quoting *Green v. Mansour*, 474 U.S. 64, 73 (1985))). *Green* made clear that the Eleventh Amendment bars declaratory judgments aimed at past conduct if such judgments would have preclusive effect in state-court proceedings. 474 U.S. at 73. Although "useful," such judgments "would have much the same effect as a full-fledged award of damages or restitution" for past misconduct, which federal courts cannot grant against States. *Id.*

Exxon's new claim that it could enjoy meaningful relief through a court-appointed monitor to scrutinize NYOAG for purported viewpoint bias is patently meritless. The only bias that Exxon alleges is that of a *prior* New York Attorney General, who did not file the civil enforcement

proceeding about which Exxon now complains. Moreover, even Exxon's allegations about that prior Attorney General fell far short of stating a claim for law-enforcement bias. NYOAG Br. 44-45. Thus, Exxon has not shown any need for ongoing federal judicial oversight of NYOAG.

B. No Exception to Mootness Applies.

1. The voluntary-cessation exception does not apply.

The voluntary-cessation exception to mootness "will not preserve an otherwise moot claim" when, as here, the cessation "was not a unilateral action taken for the deliberate purpose of evading a possible adverse decision by this court." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006) (quotation marks omitted).

Far from "a strategic litigation ploy," *id.*, the closure of the investigation reflected NYOAG's conclusion that it had uncovered evidence of securities fraud, which NYOAG now seeks to remedy through affirmative litigation to benefit investors. The voluntary-cessation exception therefore does not apply here. *See id.*

The "presumption of good faith" by government entities reinforces that conclusion. *See DeMoss v. Crain*, 636 F.3d 145, 151 (5th Cir. 2011). "[W]hen the defendant is not a private citizen but a government actor,

there is a rebuttable presumption that the objectionable behavior will *not* recur." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004). Applying that presumption, this Court should treat NYOAG's conduct as more than "mere litigation posturing." *DeMoss*, 636 F.3d at 151 (quotation marks omitted).

The voluntary-cessation exception does not apply for other reasons too. *First*, there "is no reasonable expectation" that the conduct Exxon challenges "will recur," *MHANY Mgmt. v. County of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (quotation marks omitted)—or any reason to believe that it ever occurred at all. The challenged conduct, as Exxon described it, was NYOAG's investigating "in bad faith to deter ExxonMobil from participating in ongoing public deliberations about climate change and to fish through decades of ExxonMobil's documents." (J.A.398.) But NYOAG's investigation is over, Exxon's complaint failed to show any bad faith, and the only purported bias that Exxon alleged was by a *former* Attorney General.

Equally meritless is Exxon's further contention (Opp.8-9) that NYOAG continues to engage in misconduct by participating in ordinary civil discovery in the state-court enforcement action. Exxon fails to show how

that discovery amounts to a bad faith "fishing expedition" when it is overseen by a court, governed by New York's discovery rules, and contemplated by a court-ordered discovery schedule to which Exxon agreed (Mem.6; M.A.148).

Exxon takes out of context NYOAG's statement that it has closed "this specific investigation of Exxon" (Mem.6). That statement reflects that although NYOAG's investigations do not automatically close upon the filing of a complaint, NYOAG has chosen to close *this* investigation. NYOAG has never suggested it will investigate Exxon anew for the same conduct (Opp.8). Moreover, because courts presume that prosecutors have "legitimate grounds" for their actions, *Hartman v. Moore*, 547 U.S. 250, 263 (2006), there is no reason to believe any future NYOAG investigation of Exxon, or any suit against Exxon by NYOAG, would lack a legitimate basis (Opp.9).

Second, Exxon fails to show that it faces any ongoing constitutional injuries from NYOAG's routine law-enforcement conduct. Although Exxon alleges that NYOAG's investigation sought "to silence" or "intimidate" it (J.A.431), Exxon has never identified any speech that the investigation targeted, much less chilled (NYOAG Br. 33-36). And even if Exxon had identified harm, NYOAG would have "completely and irrevocably

eradicated" that when it closed its investigation, *MHANY*, 891 F.3d at 603 (quotation marks omitted).

Exxon is wrong in citing NYOAG's state-court action as an ongoing harm flowing from NYOAG's investigation. That action undermines Exxon's alleged harms by showing that NYOAG had a legitimate reason to investigate. NYOAG Br. at 29-33, 40-41, 45, 49-50. Exxon cites nothing to support its conclusory charge that the state-court action "is yet another form of abusive and discriminatory official action" based on a "disagreement over policy" (Opp.10)—let alone to overcome the presumption that NYOAG had "legitimate grounds" to sue, *Hartman*, 547 U.S. at 263. Moreover, if Exxon seriously believed this charge, it likely would have moved to dismiss the suit—which it has declined to do (Mem.6).

2. The claims Exxon alleges are not likely to recur yet evade review.

First, Exxon's claim of biased and abusive litigation is supported only by allegations about statements made by former AG Schneiderman, and thus appears to be personal to him. Exxon has not alleged that any current member of NYOAG is biased against Exxon. Accordingly, there is no basis to conclude that the alleged conduct is "capable of repetition"

as required for the exception to mootness invoked by Exxon. That exception applies only when there is "a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quotation marks omitted).

Second, even assuming some reasonable prospect of repetition, there is no basis to conclude that the conduct would evade review, as required by the exception. Three years is not "too short" (Opp.20) a timeframe in which to litigate the federal claims Exxon alleges. In the normal course, a party that believes an investigatory subpoena violates its constitutional rights objects to the subpoena or moves to quash it on that basis. NYOAG Br. 5.[1] Had Exxon done so, it could have obtained "complete judicial review," *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978), of its federal claims and defenses. Instead, Exxon undertook "a sprawling litigation involving four different judges, at least three lawsuits, [and] innumerable motions." (Special App'x 43 n.31.) Exxon cannot now complain that the three-year investigation that it

[1] The party also can assert the constitutional violations as defenses or as counterclaims in any ultimate enforcement action. Mem.6.

declined to challenge through the appropriate state procedures—which would have entitled it to complete relief—has now ended.

C. Dismissal Is Appropriate.

Exxon's own cited authority defeats its argument (Opp.21-22) that dismissal would be inappropriate here. *See Haley v. Pataki*, 60 F.3d 137, 139 (2d Cir. 1995) (dismissing appeal as moot). To be sure, courts will vacate the judgment below when "the unilateral action of the party who prevailed in the lower court" moots the appeal. *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (quotation marks omitted). But NYOAG's actions here were not unilateral; Exxon stopped agreeing to toll the limitations period for NYOAG to bring an enforcement action. The equities thus do not favor vacating the district court's judgment for NYOAG. *See id.* (vacatur doctrine "is rooted in equity").

CONCLUSION

The Court should grant NYOAG's dismissal motion.

Dated: New York, New York
December 24, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Megan Chu