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February 22, 2018

BY ECF

Hon. Valerie E. Caproni
United States District Judge
United States District Court for the
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 240
New York, NY 10007

Re: *Exxon Mobil Corp.* v. *Healey & Schneiderman*, 17-cv-2301-VEC

Dear Judge Caproni:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") to respond to the New York Attorney General's ("NYAG") February 16, 2018 letter, which alerted this Court to the Second Circuit's recent decision in *Citizens United* v. *Schneiderman*, No. 16-3310 (2d Cir. Feb. 15, 2018). (ECF No. 263.) Far from supporting the NYAG's position in this litigation, *Citizens United* shows why the NYAG is wrong to urge the summary dismissal of ExxonMobil's First Amendment claims. *Citizens United* reaffirms the well-settled proposition that viewpoint discrimination, of

the sort ExxonMobil has alleged here, is subject to the highest level of scrutiny under the Constitution. The claims at issue in *Citizens United*, which pertained to the enforcement of a content-neutral disclosure scheme, did not involve viewpoint discrimination and were accordingly reviewed under a less exacting standard. Nothing about the analysis in or holding of *Citizens United* supports the relief the NYAG seeks here.

The plaintiffs in *Citizens United* brought facial and as-applied challenges under the First Amendment to a "content-neutral" disclosure requirement that charitable organizations identify their donors in annual submissions. *Citizens United*, slip op. at 8, 29. Because the challenged regulations were not "content-based" and did not "discriminate among speakers," the Second Circuit applied only the "lower degree" of intermediate scrutiny when it rejected that First Amendment claim. *Id.* at 15. Intermediate scrutiny is not appropriate in this case, however, because ExxonMobil has alleged that the Attorneys General took adverse action against it because of ExxonMobil's viewpoint on climate policy. As the Second Circuit reiterated in *Citizens United*, courts must apply "strict scrutiny in First Amendment cases" where, as ExxonMobil has alleged here, the government targets "particular speech because of the topic discussed or the idea or message expressed'" or to "prevent[ ] expression from disfavored speakers." *Id.* at 14. Claims of overt viewpoint discrimination go to the heart of the First Amendment and raise far different questions than those applicable to content-neutral regulations.

The NYAG is also wrong to suggest that ExxonMobil's detailed allegations of the Attorneys General's bias are somehow similar to those presented in *Citizens United*, which the Second Circuit faulted for being a "bare assertion that the Attorney General has a vendetta." NYAG Ltr. 2 (quoting *Citizens United*, slip op. at 24). Far from being a "bare assertion," ExxonMobil's pleadings contain plausible and specific factual allegations of the Attorneys General's intent to engage in viewpoint discrimination, as demonstrated by their statements to the public, the investigatory instruments they issued, and the closed-door meetings and communications among and between members of the "Green 20" and private interests. (ECF No. 249 at 3-9.) And while the Second Circuit recognized that "the First Amendment does not *prevent* anti-fraud enforcement," *Citizens United*, slip op. at 24 n.4 (emphasis added), its balancing of competing interests under intermediate scrutiny lends no support to the NYAG's suggestion that it may extinguish any First Amendment concerns by "[s]imply labeling an action one for 'fraud,'" *Illinois ex rel. Madigan* v. *Telemarketing Assocs.*, 538 U.S. 600, 617 (2003).

Finally, *Citizens United* confirmed that this case is ripe for review. As the Second Circuit held, "[b]ecause the dispute presents legal questions and there is a concrete dispute between the parties, the issues are fit for judicial decision." *Citizens United*, slip op. at 32. Rejecting arguments mirroring those previously advanced by the Attorneys General (ECF No. 217 at 22; ECF No. 220 at 13–14), the Second Circuit found "no reason to require the parties to go through these further formalities in order to

determine whether issuance of" of the challenged instruments "was legitimate." *Id.* at 33. The same should apply here.

Respectfully submitted,

s/ Justin Anderson
Justin Anderson

cc: Counsel of record (by ECF)