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January 24, 2019

BY ECF

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

Re: *Exxon Mobil Corp. v. Healey*, No. 18-1170 — Response to FRAP 28(j) Letter

Dear Ms. Wolfe:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in response to the letter submitted by the Massachusetts Attorney General on January 17, 2019. In that letter, the Attorney General notified this Court that the United States Supreme Court denied ExxonMobil's petition in a related case. Before the Supreme Court, ExxonMobil sought review of the Supreme Judicial Court of Massachusetts's ruling that it could exercise personal jurisdiction over the company notwithstanding its limited contacts with Massachusetts.

The Supreme Court's decision not to hear ExxonMobil's challenge is irrelevant to the issues before this Court. Whether ExxonMobil is subject to personal

Catherine O'Hagan Wolfe, Clerk

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jurisdiction in Massachusetts was neither raised in this appeal nor in the District Court. Nevertheless, the Attorney General claims the denial of certiorari should be deemed relevant because it confirms that the state court ruling precludes the claims raised in this appeal. That is incorrect. ExxonMobil has never asserted that Supreme Court review might deprive the state court's ruling of preclusive force.

To the contrary, as argued at pages 53–61 of ExxonMobil's opening brief and pages 30–37 of its reply, ExxonMobil contends that res judicata does not bar its claims against the Attorney General because the limited-purpose state court proceedings did not reach and were incapable of entertaining any of the constitutional claims asserted in this earlier-filed action. It is undisputed that the state court never adjudicated ExxonMobil's constitutional claims, expressly stating it would "not address Exxon's arguments regarding free speech." (JA-1017 n.2.) Nor was ExxonMobil afforded a full and fair opportunity to litigate its constitutional claims in the summary state court proceedings, which merely allowed ExxonMobil to test the validity of the civil investigative demand under state law. Hence, in the absence of a "final judgment on the merits," the Attorney General cannot establish the elements for claim preclusion. *See Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 843 (2005).

Because the Supreme Court, like the Massachusetts state courts, did not consider the constitutional claims presented in this case, the Supreme Court's denial of certiorari does not bolster the Attorney General's position.

Respectfully submitted,

/s/ Justin Anderson
Justin Anderson

cc: All counsel of record (by ECF)