

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

1285 AVENUE OF THE AMERICAS
NEW YORK, NY 10019-6064
TELEPHONE (212) 373-3000

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

HONG KONG CLUB BUILDING, 12TH FLOOR
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

WRITER'S DIRECT DIAL NUMBER

(202) 223-7321

WRITER'S DIRECT FACSIMILE

(202) 204-7393

WRITER'S DIRECT E-MAIL ADDRESS

janderson@paulweiss.com

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

June 5, 2019

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*NOT AN ACTIVE MEMBER OF THE DC BAR

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 New York Attorney General’s (“NYAG”) May 31, 2019 letter concerning the Supreme Court’s decision in *Nieves v. Bartlett*. *Nieves* addressed whether evidence of probable cause doomed a retaliatory arrest claim at summary judgment. Slip op. at 15. The claim, procedural posture, and context are entirely alien to those raised in the captioned appeal.

ExxonMobil has not alleged any form of retaliation, much less a retaliatory arrest. But the NYAG would artificially and improperly constrain ExxonMobil's constitutional claims by imposing legal standards applicable to "split-second judgments" that officers must make "when deciding whether to arrest" a suspect whose "speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" Slip Op. 8. That context bears no resemblance to ExxonMobil's allegation that the Attorneys General made a calculated decision, after consultation with each other and special interests, to discriminate against ExxonMobil's speech by launching a pretextual investigation. A retaliatory arrest standard cannot be applied here. (ExxonMobil's Opening Br. 32–44; Reply Br. 11–20.)

The NYAG also attempts to impose evidentiary burdens applicable on summary judgment even though this appeal concerns a dismissal for failure to state a claim. The NYAG previously urged applying the summary judgment standard in *Hartman v. Moore*, 547 U.S. 250 (2006), but the District Court refused to rely on *Hartman*, which it recognized was "not precisely on point" because the decision concerns "summary judgment." (SPA-34 n.24.) This Court should likewise reject the NYAG's reliance on the summary judgment standard in *Nieves*.

Even if *Nieves* provided an appropriate framework to evaluate ExxonMobil's claims, its application here would compel reversing the District Court's ruling. *Nieves* confirms that *Hartman*'s no-probable-cause requirement is "insufficiently protective of First Amendment rights" because probable cause to arrest for broad-based violations, like jaywalking, would defeat any retaliatory arrest claim. Slip op. at 14. Such broad discretion is equally present here where the Attorneys General can single out virtually anyone for an abusive, pretextual investigation. In this context, the *Hartman* standard does not apply.

Respectfully submitted,

/s/ Justin Anderson

Justin Anderson

cc: All counsel of record (by ECF)