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BY ECF

Catherine O'Hagan Wolfe
Clerk of Court
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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)