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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 October 30, 2020 letter of the Massachusetts Attorney General (“MAAG”), concerning the Court’s decision in *Trump v. Vance*, No. 20-2766, 2020 WL 5924199 (2d Cir. Oct. 7, 2020). MAAG’s reliance on *Trump* demonstrates once again that MAAG’s only defense to ExxonMobil’s complaint is to mischaracterize the claims and the factual context.

First, this is not a criminal proceeding. *Trump* concerned a grand jury subpoena investigating potential criminal activity, not a civil investigative demand (“CID”) of the sort unilaterally issued by MAAG. As this Court explained, the “presumption of validity” afforded to grand jury subpoenas “stems from the grand jury’s unique and long-standing role in evaluating the sufficiency of a prosecutor’s evidence against the accused.” *Id.* at *3. MAAG’s CID, which was not vetted by a grand jury, does not receive the same deference. The presumption does not apply.

Second, this Court is not reviewing state-law challenges to a subpoena. *Trump* addressed “state-law challenges of [subpoena] overbreadth and bad faith” in a complaint that did not raise any “separate and discrete constitutional claims.” *Id.* at *5. ExxonMobil’s lawsuit does not seek to quash a subpoena; it asserts violations of ExxonMobil’s First Amendment rights from MAAG’s abuse of state power. This Court is being asked to resolve claims under the U.S. Constitution, not state law.

Third, this case alleges MAAG acted for partisan gain. As recognized in *Trump*, allegations that a subpoena was issued “for partisan political purposes . . . would undoubtedly state a claim of bad faith.” *Id.* at *10. But the *Trump* complaint “nowhere allege[d] that the District Attorney was himself motivated by partisan considerations.” *Id.* Here, MAAG’s abuse of power for partisan, political gain is the gravamen of ExxonMobil’s complaint. ExxonMobil pleaded detailed factual allegations of MAAG’s conduct, which a Texas appellate court recently described as aiming to “regulat[e] the speech of energy companies like Exxon.” *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at *3 (Tex. App. June 18, 2020). ExxonMobil’s allegations more than satisfy the applicable standard.

Respectfully submitted,

/s/ Justin Anderson
Justin Anderson

cc: All counsel of record (by ECF)