18-1170

United States Court of Appeals
For the Second Circuit

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

v.

MAURA TRACY HEALEY, in her official capacity as Attorney General of the State of Massachusetts, BARBARA D. UNDERWOOD, Attorney General of New York, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICI CURIAE PROFESSORS OF LAW IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of appellees Maura Healey, in her official capacity as Attorney General of Massachusetts and Barbara D. Underwood, in her official capacity as Attorney General of New York.[1]

Amici are law professors who specialize in constitutional law and who have previously published on, or have a professional interest in, the proper interpretation of the First Amendment. Amici include: Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School; Daniel J.H. Greenwood, Professor of Law, Deane School of Law, Hofstra University; Steven Heyman, Professor of Law, Chicago-Kent College of Law; Robert Kerr, Edith Kinney Gaylord Presidential Professor, Gaylord College, University of Oklahoma; Douglas Kysar, Deputy Dean and Joseph M. Field '55 Professor of Law, Yale Law School; Helen Norton, Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law; Tamara R. Piety, Professor of Law, University of Tulsa, College of Law; Frank Pasquale, Professor of Law, University of Maryland;

[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29, counsel has received consent from all parties, through their counsel, to the submission of this brief.

Catherine J. Ross, Fred C. Stevenson Research Professor, George Washington University Law School; and Laurence H. Tribe, Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School.

SUMMARY OF THE ARGUMENT

This is not a climate change case. This is not a First Amendment case. This is a case about protecting investors and consumers from fraud in the economic marketplace.

The financial disclosures and public statements of corporations are critical to informing free markets. Such communications have long been subject to regulation at the federal and state level. State attorneys general are the primary enforcement officers for state securities and consumer protection laws. The risks that corporations face from climate change and its impacts are subject to the same materiality standards for financial disclosures as any other material risks facing publicly traded corporations. Similarly, when a corporation seeks to market its products to consumers it must do so in compliance with federal and state consumer protection laws. There has never been any "political controversy" exception to the proposition that government can impose sanctions against profit-motivated false and misleading speech affecting investors or consumers.

At its core, this case is about whether Exxon—a publicly traded for-profit corporation—qualifies for the freedom of expression protections it claims for its potentially misleading and fraudulent speech about the risks that climate change and its impacts pose to the company's business. Exxon instead tries to deflect the court towards the irrelevant question of whether the attorneys general disagree with Exxon's views on climate policy. This desperate tactic to wield the First Amendment as a sword against statutorily authorized investigations into investor and consumer fraud should be denied.

ARGUMENT

I. Profit-Seeking Companies Have No First Amendment Right to Issue False or Misleading Statements that Deceive Investors

Seeking to wrap itself in the mantle of the First Amendment by characterizing its statements on climate change as "political," Exxon hopes to distract the court from the central conduct under investigation by the Attorneys General: that Exxon has violated laws designed to protect investors and consumers. The facts—including Exxon's longstanding internal knowledge and assessments of financial risks associated with climate change juxtaposed with its contrary or equivocal statements to investors about the scale and scope of those risks and how the company is managing them—demonstrate that the Attorneys General have substantial justification for launching their investigations and for believing that their investigations will bear fruit. Prosecutors are not barred from enforcing investor and

consumer protection statutes when the harm associated with false statements has deleterious consequences not only for investors and consumers, but for the general public as well. Their duty is to investigate and to enforce the law if the evidence supports it.

Exxon's claims that the First Amendment may be wielded to immunize it from an investigation on the basis of little more than speculation about the motives of the Attorneys General represent an unprecedented and dangerous attempt to undermine the rule of law. Even assuming arguendo that a potential *enforcement action* by the Attorneys General might implicate the First Amendment, Exxon's far broader claim that *the investigation itself* violates the First Amendment would create a new precedent for targets to block investigations at their earliest stages by raising arguments about motives. Indeed, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1978) (extending First Amendment protection to commercial speech), the Court cautioned that, "Untruthful speech, commercial or otherwise, has never been protected for its own sake." And, in the more recent Supreme Court case, *United States v. Alvarez*, 567 U.S. 709, 717 (2012), despite concluding that the Stolen Valor Act violated the First Amendment, the Court expressly noted that fraud is one of the "historic and traditional categories of expression" where content-based regulation is permissible. The Supreme Court has never suggested that lies are protected simply because their content may also be of

political interest. Moreover, Exxon itself has admitted that fraudulent communications are not protected by the First Amendment.[2]

A. Securities Laws Do Not Violate the First Amendment by Prohibiting Corporations from Issuing False or Deceptive Statements to Markets

Free and fair markets depend on accurate information, much of which also will be politically salient.[3] Securities laws ensure that investors and markets have accurate information without implicating First Amendment concerns. Although the states are not charged with enforcing federal securities laws, these federal analogs are instructive about the scope that state laws may occupy without violating the First Amendment. As detailed below, issuers of securities are required to make

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[2] As the lower court explained in its opinion:

> As the Court has explained, and Exxon has agreed, false statements to the market or the public are not protected speech. *See* Hr'g Tr. at 34:16-35:1 ("[The COURT]: But you don't have the right to lie in your securities filings. That's what they are investigating. If they are wrong, then they don't have a case. If they are right, then Exxon should be held to account. Do you agree with that? [EXXON]: I agree that that is the fact that. . . they can conduct an investigation into fraud. No one is disputing the ability to conduct an investigation into fraud.").

SPA-42.

[3] *See, e.g.*, SEC Commissioner Luis Aguilar, "Capital Formation from the Investor's Perspective," Speech to AICPA (Dec. 3, 2012), https://www.sec.gov/news/speech/2012-spch120312laahtm. Explaining that:

> Investors must have confidence in the integrity of capital markets to invest their savings in stocks, bonds, mutual funds and other securities. They must have confidence that the markets are fair and that the rules are effectively enforced. And they must have confidence that the information available is meaningful, accurate, and complete.

disclosures about information that would be "material" to the decisions of a reasonable investor and to avoid false, deceptive, and misleading statements.[4] Significantly, the Supreme Court case *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978), explicitly recognized that the securities laws regulate communications without offending the First Amendment: "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities [and] corporate proxy statements." (Citations omitted). It is not surprising, therefore, that defendants in the overwhelming majority of securities cases do not even try to raise a First Amendment claim, because such claims are baseless.

In contrast, securities cases where an "expressive interest" is at stake, such as those involving reporting on financial issues by the press, have prompted discussion of First Amendment issues; however, even in these cases, courts have rejected First Amendment claims where the content of the speech at issue was misleading or deceptive. *See SEC v. Wall Street Publishing Institute,* 851 F.2d 365, 376 (D.C. Cir. 1988) (First Amendment does not limit SEC power to require disclosure in magazine to combat misleading aspect of articles touting particular company's stock in exchange for consideration); *SEC v. Huttoe*, 1988 WL 34078092 (D.D.C. 1998)

[4] *See, e.g.*, 15 U.S.C. § 77k; 15 U.S.C. § 77*l*; 15 U.S.C. § 78j; 15 U.S.C. 78n; 17 C.F.R. § 240.10b-5.

(First Amendment does not bar injunction or disgorgement of profits when defendant touted a company's stock in an investment newsletter without disclosing the material facts that he was receiving consideration in exchange and that he was selling the same securities).The Securities and Exchange Commission's ("SEC") power to regulate speech relating to the purchase and sale of securities "is at least as broad as with respect to the general rubric of commercial speech"—a general rubric that does not protect false or misleading speech. *Wall Street Publishing Institute,* 851 F.2d at 373. No court at any level has held that a corporation whose securities are publicly traded can use the First Amendment to avoid regulations of the financial markets barring materially false or misleading speech.

Indeed, Exxon itself has often been investigated by regulatory bodies. For example, Exxon received inquiries from the SEC in 2013 and 2016 regarding the company's rationale for refusing to report impairments or write-downs of its reserves in its annual reports.[5] Such disclosures are essential to investors, regardless

[5] Letter from David Rosenthal, Vice President and Controller, ExxonMobil to H. Roger Schwall, Assistant Director, Division of Corporate Finance, SEC (Oct. 24, 2016) (posing multiple questions regarding company's evaluation of reserves and potential impairments), https://www.sec.gov/Archives/edgar/data/34088/000003408816000090/filename1.htm; Letter from Patrick T. Mulva, Vice President and Controller, ExxonMobil to H. Roger Schwall, Assistant Director, Division of Corporate Finance, SEC at 3-4 (Oct. 18, 2013) (Question 3 and company response regarding failure to report an impairment of natural gas reserves despite public statements by executives that company was "making no money" on natural gas),

of whether Exxon's write-down decisions might be motivated by its political positions.

The SEC also launched an investigation into Exxon's climate accounting practices, and only ended its investigation after Exxon adjusted its reported reserves downward by 19 percent.[6] In fact, Exxon's own shareholders have brought suit against the company for climate related securities fraud and have survived a motion to dismiss.[7] On the consumer side, in 1996, the Federal Trade Commission ("FTC") filed a complaint against Exxon for deceptive advertising about high octane gasoline.[8] Exxon settled those claims, agreed to run ads correcting misconceptions about high octane fuel, produce an educational brochure, and to refrain from making claims about engine cleaning ability of gasolines without scientific evidence to back

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https://www.sec.gov/Archives/edgar/data/34088/000003408813000039/filename1.htm.

[6] Ed Crooks, "ExxonMobil avoids action from SEC on climate reporting," Financial Times (Aug. 3, 2018) https://www.ft.com/content/78e652f6-9744-11e8-b747-fb1e803ee64e; Clifford Krauss, "Exxon concedes it may need to declare lower value for oil in ground," New York Times (Oct. 28, 2016) https://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-value-for-oil-in-ground.htm;

[7] *Ramirez v. Exxon Mobil Corp*., 2018 WL 3862083, *14 (N.D. Tex. Aug. 14, 2018).

[8] Federal Trade Commission, Press Releases, "Ads for Exxon Gasoline are Deceptive, FTC Charges," https://www.ftc.gov/news-events/press-releases/1996/09/ads-exxon-gasoline-are-deceptive-ftc-charges (last visited Sept. 17, 2018).

them up.[9] When Exxon "speaks" to the markets, it has an obligation to do so in compliance with the laws.

Federal strictures with respect to materially false statements or omissions by a publicly traded for-profit corporation like Exxon are extensive. Section 11 of the Securities Act of 1933 establishes a civil cause of action if a registration statement contains "an untrue statement of material fact or omit[s] to state a material fact required to be stated therein or necessary in order to make the statements therein not misleading." 15 U.S.C. § 77k. Section 12 of the Act creates a civil cause of action and strict liability for materially misleading facts or omissions of facts needed to make the statements not misleading that appear in a prospectus or oral communication in connection with an offer or sale of a security. 15 U.S.C. § 77*l*. An issuer can escape liability only by a showing of reasonable care. The Act contains no exception for false statements which are of political, as well as financial, interest.

Similarly, the Securities Exchange Act of 1934 prohibits false and misleading statements or omissions in connection with the purchase or sale of securities. Section 10(b) and SEC Rule 10b-5 broadly prohibit actions in a wide variety of contexts including periodic reporting, statements to the press or over the internet. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5; *SEC v. Rana Research, Inc.,* 8 F.3d 1358, 1360, 1362-

[9] Federal Trade Commission, Press Releases, "FTC Finalizes Exxon Settlement," https://www.ftc.gov/news-events/press-releases/1997/09/ftc-finalizes-exxon-settlement (last visited Sept. 17, 2018).

63 (9th Cir. 1993) (materially false statements in press release reasonably calculated to affect investing public). In this circumstance, liability requires a showing that the defendant intentionally or recklessly created the false statement or omission. *Ernst & Ernst v. Hochfelder,* 425 U.S. 193 (1976). In addition, Section 14(a) and SEC Rule 14a-9 prohibit the use of materially misleading statements in connection with the solicitation of shareholder proxies. *See* 15 U.S.C. § 78n; 17 C.F.R. 240.14a-9. Significantly, proxy solicitations always have included statements concerning resolutions relating to issues of social and political moment.[10]

Thus, Exxon has been subject to extensive federal regulation of its statements relevant to investors, and this regulation has long been deemed to be consistent with First Amendment requirements.

B. The State Securities Laws at Issue Here Properly Regulate Fraud and Misleading Speech to Investors and Markets

In addition to federal authority, there is no question that states also have the power to protect investors by preventing fraud or deceit with respect to securities.

[10] When companies seek to exclude shareholder proposals under Rule 14a-8(i)(7), which prohibits shareholder proposals directing the company's conduct of its day-to-day business, one recognized defense of the shareholder proposal is that it "transcend[s] the day-to-day business matters" of the company precisely because it involves "sufficiently significant social policy issues." *See* Division of Corporate Finance Staff, Legal Bulletin No. 14A (Jul. 12, 2002), https://www.sec.gov/interps/legal/cfslb14a.htm.

Section 18(c)(1)(A)(i) of the Securities Act of 1933 recognizes that the states retain jurisdiction to regulate fraud or deceit with respect to securities. 15 U.S.C. 77r.

Both Massachusetts and New York have conferred power on their Attorneys General to protect investors. Chapter 93A of the Massachusetts General Laws authorizes the Attorney General to protect investors against deceptive corporate practices by launching investigations aided by civil investigative demands, instituting litigation, and promulgating regulations.[11] Similarly, New York's Martin Act confers quite broad powers on its Attorney General to protect investors. N.Y. General Business Law, ch. 20, art. 23-a, § 352. The Attorneys General of Massachusetts and New York are operating within the permissible scope of their powers in undertaking investigations relating to misleading or deceptive statements by Exxon because of those statements' impacts on investors. This should come as no surprise to Exxon given that in recent years its largest shareholders have questioned the adequacy of the company's climate risk reporting, and major ratings agencies and market analysts have emphasized the need for businesses, especially within the fossil fuel sector, to assess and disclose financial risks associated with climate change and a transition to the low carbon economy.[12]

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[11] Mass. Gen. Law. c. 93A §§ 4, 6; *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 94 N.E.3d 786 (Mass. 2018) (petition for certiorari filed on Sept. 10, 2018).

[12] *See* BlackRock, "Vote Bulletin Exxon May 2017," (May 31, 2017), https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-

C. Securities Laws Routinely and Appropriately Regulate Communications of Public Interest

The securities laws necessarily regulate communications that are of public interest. Information affecting or about the financial situation of publicly traded companies is of interest to both investors and to the general public and will often be relevant to ongoing political debates.[13] The laws extend to false and misleading press releases about companies. *In re Vivendi Securities Litigation, S.A.,* 838 F.3d 233 (2d Cir. 2016) (media company liable for false press releases about financial condition); *Zak v. Chelsea Therapeutics Int'l, Ltd.,* 780 F.3d 597 (4th Cir. 2015) (press release misled public about likelihood of FDA approval for company's drug). They also prohibit companies from making misleading statements about the harm associated

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exxon-may-2017.pdf ("[W]e remain concerned that Exxon's reporting does not substantially address a 2-degree scenario. Importantly, the report does not address the impact that scenario could have on the performance of the business."); Ilya Serov, et al., "Moody's to analyse carbon transition risk based on emissions reduction scenario consistent with Paris agreement," Moody's Investors Service (Jun. 28, 2016), https://www.eenews.net/assets/2016/06/29/document_cw_01.pdf; ; Joe Carroll, Exxon Mobil Loses Top Credit Rating It Held Since Depression, Bloomberg (Apr. 26, 2016), https://www.bloomberg.com/news/articles/2016-04-26/exxon-mobil-loses-top-credit-rating-it-held-since-depression.

[13] As the recent case of Elon Musk shows, the reach of securities laws does not stop at the margins of financial reports and investor materials, as Exxon implies by attacking the requests by the Attorneys General for information about statements made by Exxon executives in public speeches. When a communication has implications for the value of the company, even a tweet may give rise to fraud. SEC, "Elon Musk Charged with Securities Fraud for Misleading Tweets," (Sept. 27, 2018), https://www.sec.gov/news/press-release/2018-219.

with their products. *In re Pfizer, Inc., Securities Litigation,* 819 F.3d 642 (2d Cir. 2016) (summary judgment not available regarding company's role in promulgating false statements denying risks associated with medication); *Silverstrand v. AMG Pharmaceuticals, Inc.,* 707 F.3d 96 (1st Cir. 2013) (strict liability for company's failure to disclose adverse effects of medication); *Conn. Ret. Plans & Trust Funds v. Amgen Inc.* 660 F.3d 1170 (9th Cir. 2013) (class certified against company regarding failure to disclose adverse effects of medication).

False statements about U.S. foreign relations in circumstances where the statements are material to investors are also subject to securities laws without regard to their relevance to ongoing public policy debates. *SEC v. Pirate Investor LLC.,* 580 F.3d 233 (4th Cir. 2009) (sale of false tip about the exact date of an allegedly forthcoming uranium agreement between the U.S. and Russia that, if true, would have benefitted a U.S. company); *SEC v. Hitachi, Ltd.,* Fed. Sec. L. Rep. 98, 864 (D.D.C. 2015) (company paid undisclosed bribes to the South African ruling party in violation of the Federal Corrupt Practices Act); *City of Pontiac General Employees Ret. Syst. v. Wal-Mart Stores,* 278 F. Supp.3d 1128 (W.D. Ark. 2017) (Wal-Mart's largest subsidiary engaged in bribery and downplayed it in SEC filing after learning of a *New York Times* investigation). Obviously, there can be no exception to the application of securities laws simply because a communication also relates to a public issue.

Indeed, the securities laws routinely regulate communications that are of public interest, if only because nearly every company's prospects could be affected by politically motivated regulatory changes. Specifically, the securities laws apply to misleading or deceptive corporate communications regarding environmental issues. The Second Circuit has long held companies liable for misleading investors on the environmental harms associated with their production process or their products.[14] Significantly, *United Paperworker International Union v. International Paper Co.,* 985 F.2d 1190 (2d Cir. 1993), held that a proxy statement violated the securities laws when it offered a "rather glowing description of the Company's environmental spirit, performance, and sense of responsibility," because it misleadingly omitted substantial instances of "environmental derelictions or non-compliance." *Id*. at 1198.

D. The Financial Risks of Climate Change Are Material to Investors

Exxon's largest shareholders have called for better financial reporting on climate change risks, and major ratings agencies and market analysts have emphasized the need for businesses, especially within the fossil fuel sector, to assess and disclose financial risks associated with climate change and a transition to a low

[14] *See, e.g., Meyer v. Jinkosolor Holdings Co.,* 761 F.3d 245 (2d Cir. 2014) (allegations that company misled investors about serious pollution problems in its Chinese production plants); *SEC v. Aerokinetic Energy Corp.,* 44 Fed. Appx. 382 (11th Cir. 2011) (upholding $800,000 money judgment based on false claim that product does not pollute).

carbon economy.[15] First, investment managers of over $60 trillion have committed to principles of investing that seek to minimize the impact of fossil fuels on the climate.[16] Second, information about future harm from fossil fuels is likely to reduce demand as consumers are more likely to invest in green alternatives or in automobiles with better mileage.[17] Third, the failure to reveal the risk and the continued deception is relevant to an investor's determination of whether to vote for members of the corporate board and shareholder proposals.[18] Finally, even assuming arguendo that Exxon has no duty to disclose specifics about the impacts of climate change on its business, the statements it has chosen to make about those impacts in financial disclosures and public statements must be accurate.[19] Indeed, if Exxon has engaged in the deceit being investigated, it has done so *precisely* because reasonable

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[15] *Supra* note 12.

[16] *See* Signatories of the United Nations, Principles for Responsible Investment, https://www.unpri.org/about.

[17] Wood Mackenzie, "2035: Can electric vehicles put the brakes on oil demand?," (Apr. 11, 2017), https://www.woodmac.com/news/editorial/2035-electric-vehicles-oil-demand/; Pilita Clark, et al., "Oil groups 'threatened' by electric cars," Financial Times (Oct. 18, 2016), https://www.ft.com/content/b42a72c6-94ac-11e6-a80e-bcd69f323a8b;

[18] Steven Mufson, "Financial Firms lead shareholder rebellion against ExxonMobil climate change policies," Washington Post (May 31, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/31/exxonmobil-is-trying-to-fend-off-a-shareholder-rebellion-over-climate-change/?utm_term=.6d3e9f9c1b77.

[19] *See, e.g.*, 17 C.F.R. § 240.10b-5(b) ("It shall be unlawful . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances" under which they were made, not misleading.)

investors would take the information into account, and *precisely* because it believes its profits would suffer if the truth were known.

The SEC has emphasized that the securities laws require companies to provide clearly stated, particular, non-deceptive information about the risks climate change presents to a company. SEC, *Commission Guidance Regarding Disclosure Related to Climate,* 75 Fed. Reg. 6290, 6294 (Feb. 8, 2010). In fact, the SEC approvingly cited the New York Attorney General's settlements with three energy companies regarding climate disclosures as examples in its climate guidance.[20] This includes important information relevant to the impact of climate change on a reasonable investor's decision making with regard to shareholder resolutions or the decision to invest or not. *Id.* at 6293. Although the Securities Act of 1933 does not explicitly require companies to report on the possible effects of future legislation on a company's prospects, nothing prohibits the states from so requiring, and the Act itself requires "reporting such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading." 17 C.F.R. § 240.12b-20. Finally, the SEC has also concluded, with respect to Exxon specifically, that shareholder proxy proposals about climate change are properly a part of corporate governance.[21] Thus, the

[20] SEC, Climate Guidance at n. 21.
[21] Ernest Scheyder, "Exxon Mobil must allow climate change vote: SEC," Reuters (Mar. 23, 2016), http://www.reuters.com/article/us-exxon-mobil-shareholders-

provisions of Section 14(a) of the Securities Exchange Act and Rule 14a-9 apply to climate change in general and to Exxon in particular. 15 U.S.C. § 78n; 17 C.F.R. 240.14a-9.

Since investors require accurate environmental information, securities laws expressly prohibit misleading environmental statements, the SEC requires the disclosure of specific environmental information, and the SEC has held that climate change proposals are within the scope of corporate governance. Clearly, the First Amendment does not preclude the Attorneys General from investigating the possible false or misleading nature of a publicly traded corporation's environmental and climate change statements.

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exclusive-idUSKCN0WP2TG (regarding climate change proposals directed at Exxon by the New York State Common Retirement Fund, the Church of England, and the University of California Retirement Plan); Bradley Olson and Nicole Friedman, "Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests," Wall Street Journal (May 25, 2016), http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192 (same); Ernest Scheyder, "Exclusive: New York asks SEC to force climate vote onto Exxon proxy," Reuters (Feb. 24, 2016), http://www.reuters.com/article/us-exxon-mobil-shareholders-exclusive-idUSKCN0VX0FC; In both 2015 and 2016, a plurality of shareholder proxy proposals involved environmental issues. James R. Copland and Margaret M. O'Keefe, "Environmental Issues," Proxy Monitor (2016), http://www.proxymonitor.org/Forms/2016Finding2.aspx.

II. Profit-Seeking Companies Have No First Amendment Right to Issue False or Misleading Statements that Deceive Consumers

Consumers also stand to suffer significant economic consequences as a result of climate change and its impacts. Whether that pain comes at the gasoline pump during times of market scarcity resulting from severe weather events,[22] or in the form of taxes levied to shore up fossil fuel infrastructure in areas where flooding from storm surges has become more frequent,[23] or global economic losses,[24] consumers have a vital stake. Exxon and other major international oil companies understand that the issue of climate change is important to consumers and investors alike, and they compete with one another regarding the role that they have taken in addressing the issue of climate change.[25]

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[22] Kirsten Korosec, "Why Hurricane Harvey Is Causing Gas Prices to Spike in Your State," Fortune (Aug. 31, 2017), http://fortune.com/2017/08/31/hurricane-harvey-gas-prices-national/; Kent Bernhard, Jr., "Pump prices jump across U.S. after Katrina," NBC News (Sept. 1, 2005), http://www.nbcnews.com/id/9146363/ns/business-local_business/t/pump-prices-jump-across-us-after-katrina/.

[23] Will Weissert, "Big Oil asks government to protect it from climate change," AP (Aug. 22, 2018), https://apnews.com/4adc5a2a2e6b45df953ebcba6b63d171.

[24] Jason Channell, et al., "Energy Darwinism II: Why a Low Carbon Future Doesn't Have to Cost the Earth," Citigroup (Aug. 2015), https://ir.citi.com/E8%2B83ZXr1vd%2Fqyim0DizLrUxw2FvuAQ2jOlmkGzr4ffw4YJCK8s0q2W58AkV%2FypGoKD74zHfji8%3D (concluding that damage to GDP from negative impacts of climate change would be roughly $72 trillion).

[25] ExxonMobil, Form 10-k, 1 (Feb. 28, 2018) ("There is competition within the industries and also with other industries supplying the energy, fuel and chemical needs of both industrial and individual consumers."), https://www.sec.gov/Archives/edgar/data/34088/000003408818000015/xom10k20

A. Consumer Protection Laws Do Not Violate the First Amendment When Regulating Misleading or Deceptive Speech

The Attorneys General have a reasonable basis to investigate Exxon because of the possibility of fraud based on the proposition that Exxon's public statements differ from its internal knowledge regarding the harms associated with its products. If Exxon misrepresented its own assessment of its products' harms in an attempt to deceive the public, no First Amendment defense is plausible.

The tobacco industry's attempts to hide the truth about the health effects of cigarettes is a close analog to this investigation. In *United States v. Philip Morris USA, Inc.,* 566 F.3d 1095 (D.C. Cir. 2009), nine tobacco companies were held liable under the Racketeer Influenced and Corrupt Organizations Act for a conspiracy to deceive consumers about the health effects associated with cigarettes. "Evidence was produced that the defendants disseminated advertisements, publications, and public statements denying any adverse health effects of smoking and promoting their 'open question' strategy of sowing doubt.'" *Id.* at 1106.[26] Their deceptive campaign also relied on entities that falsely purported to be independent in an effort to create

17.htm. *See also*, ExxonMobil, "EnergyLivesHere," (last visited Oct. 11, 2018), https://corporate.exxonmobil.com/en/company/multimedia/energy-lives-here (touting the company's efforts to reduce greenhouse gas emissions and address other environmental issues).

[26] Although these publications were addressed to the general public, the court concluded that these statements were designed to deceive consumers. *Id.* at 1124.

"marketable science" in pursuit of the deceptive campaign. *Id.* at 1108. Although the very purpose of the campaign was to make the health effects of tobacco an "open question," the district court concluded that the companies' claims about the health effects of tobacco were knowingly false, and the D.C. Circuit agreed. *Id.* at 1116-24. The false statements were material because they would be important to a reasonable person, whether or not a specific person or persons purchased cigarettes because of the false statements. *Id.* at 1122.

The facts of *Philip Morris USA* have much in common with the conduct that the Attorneys General investigations seek to probe at Exxon. Here, too, the harm associated with the company's products was revealed by scientific evidence known to the companies, and the factual statements at issue related to a public controversy. Here, too, the company argues that most of the speech in question was political speech protected under the First Amendment despite its overwhelmingly commercial nature. And here, too, the First Amendment does not protect fraud. *See id.* at 1123.

B. Exxon's Communications Here Are at Most Commercial Speech, Not Political Speech

The Supreme Court has extended some limited protection to commercial speech, it has explained that the First Amendment affords commercial speech less protection than political speech. Moreover, the Court has made clear that the First Amendment only protects commercial speech to the extent that it furthers and

informs listeners' (that is, consumers') informational interests, and false and misleading commercial speech frustrates rather than furthers those First Amendment interests by undermining listeners' decision-making and thus their exercise of autonomy. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (explaining that the "extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides"); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 563 (1980) (observing that the "First Amendment's concern for commercial speech is based on the informational function of advertising.") (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). For this reason, as the Court has noted, consumer protection laws create public and private benefits that derive from confidence in the accuracy and reliability of speech in the commercial arena. *Bates v. State Bar,* 433 U.S. 350, 383 (1977).

In addition, commercial speech is more verifiable in that the disseminator has superior knowledge about the product, *Virginia State Board of Pharmacy,* 425 U.S. at 771 n. 24; *Bates,* at 381, and because it is more hardy in that the financial self-interest that underpins commercial speech makes it less likely that the disseminator

will be chilled from engaging in protected speech. *Id.* at 383; *Central Hudson,* 447 U.S. 557, 562-66.[27]

Commercial speech includes advertisements for products and services but is not limited to that category of expression. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 67 & n.14 (1983); *Semco, Inc. v. Amcast, Inc.,* 52 F.3d 108, 112-14 (6th Cir. 1995) (commercial speech need not appear in the form of an advertisement). When Exxon "speaks" about harms associated with its product, it has knowledge far superior to the vast body of consumers of its products. *See Bates,* 433 U.S. at 383. As one of the wealthiest and most powerful companies in the world, with a powerful profit motive to continue to sell its products, it is unlikely to be deterred from providing information about its products simply because it is required to confine itself to truthful statements. *See Central Hudson,* 447 U.S. at 561-66. Furthermore, consumer protection, like investor protection, necessitates that claims about product impact are accurate and reliable, and confidence in this protection will promote more confidence in the accuracy and reliability of factual claims made in the marketplace. *See Bates*, 433 U.S. at 383. Finally, Exxon's statements about how its products affect

[27] Despite Exxon's claims that the investigation has chilled the company's "speech," in 2017 Exxon reported spending $11.4 million in federal lobbying and $1.1 million in state lobbying; $747,000 through its political action committee; and $510,000 in political contributions to state and federal candidates. *See* ExxonMobil, "Political Contributions and Lobbying," (last visited Oct. 11, 2018) https://corporate.exxonmobil.com/en/current-issues/accountability/political-contributions-and-lobbying/political-contributions-and-lobbying.

climate change—and the environment more broadly—are made for profit seeking purposes, not as a public-spirited contribution to public dialogue. *See Central Hudson,* 447 U.S. at 561-66.

Crucially, deception about the harmful effects of products is commercial speech even when the issue of that harm is a matter of public controversy.[28] Speech about climate change addresses a public issue, but so did the speech about the harmful effects of tobacco, eggs, and other products in cases where courts have found corporate communications to be commercial speech. *See, e.g., Nat'l Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 570 F.2d 157 (7th Cir. 1977) (First Amendment claim of egg producers rejected when they sought falsely to deny the existence of scientific evidence concerning the relationship between eggs and heart and circulatory disease).

* * *

Besides its contradiction with settled First Amendment doctrine, Exxon's extraordinary claim depends upon an abuse of Supreme Court precedent regarding

[28] The reliance of amici National Association of Manufacturers and Chamber of Commerce of the United States on *Sorrell v. IMS Health Inc*., 564 U.S. 552 (2011) is misplaced. In that case, although the Court struck down a content-based Vermont statute, it maintained the principle that content-based restrictions can be permissible in the case of commercial speech, especially when the government has a legitimate interest in protecting consumers from "commercial harms" such as fraud. *Id*. at 579.

corporations and the First Amendment. In *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010), the Supreme Court rejected a public interest in limiting corporate political activity based on protecting shareholders. The Court suggested that any overreach or abuse by corporate management could be "corrected by shareholders 'through the procedures of corporate democracy.'" *Id.* at 362 (quoting *Bellotti*, 435 U.S. 765, 794).

But here, Exxon is being investigated precisely for *misleading shareholders* in a manner that frustrates those "procedures of corporate democracy." It is not just that Exxon, the largest publicly traded international oil company in the world, is not polling shareholders about how it should address the issue of climate change in its advertisements or in its public statements. Nor is it just that some of Exxon's major shareholders disagree, in fact, with the ways in which Exxon's management has misstated the financial risks of climate change. The very subject of the investigation is whether Exxon's management have perpetrated fraud against its own investors, one which prevented the (limited) "procedures of corporate democracy" from functioning. *Citizens United* cannot mean that management has a constitutional right to mislead a corporation's own shareholders.

CONCLUSION

The First Amendment does not protect a publicly traded corporation from an attorney general's investigation into potential violations of state laws prohibiting corporations from misleading investors about the financial risks associated with their securities and from misleading consumers about their products. This Court should affirm the District Court's decision.

Respectfully submitted,

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Dated: October 12, 2018
Boston, Mass.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29 and 32

Pursuant to Federal Rule of Appellate Procedure 29 and 32 and Circuit Rule 29.1, I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as modified by Circuit Rule 29.1(c), because this brief contains 5,670 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f);

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, Times New Roman-style font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 12, 2018, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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