



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS
NEW YORK CITY BUREAU

November 30, 2018

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

Re: *Exxon Mobil Corp. v. Healey*, No. 18-1170

Dear Ms. Wolfe:

We write on behalf of defendant-appellee New York Attorney General Barbara D. Underwood to respond to plaintiff-appellant Exxon Mobil Corporation's November 20, 2018, letter concerning *National Rifle Ass'n of America (NRA) v. Cuomo*, No. 18-cv-0566, slip op. (N.D.N.Y. Nov. 6, 2018). The district court in that case ruled that the NRA had stated a First Amendment claim by alleging that New York's Governor and financial regulator had threatened financial institutions with "regulatory action if they failed to terminate their relationships with the NRA." *Id.* at 5, 6–8.

Whether or not *NRA* was correct, it rested on allegations that are distinguishable from Exxon's in three respects. *First*, the NRA alleged that the defendants made "direct and implied threats" to take coercive action against financial institutions that the defendants were not investigating, for "send[ing] the wrong message to their clients" by maintaining relationships with the NRA, which the defendants were likewise not investigating. *Id.* at 6, 28 (quotation marks omitted). Exxon, by contrast, alleges no such threats—only that the New York Attorney General investigated it for potential fraud, in violation of state law: an allegation that does not state a First Amendment claim absent allegations that the Attorney General lacked cause to investigate. *See Br. for N.Y. Att'y Gen. (N.Y. Br.)* at 28–33.

Second, the NRA identified protected speech that the investigations allegedly targeted: public advocacy “for Americans’ Second Amendment rights.” *NRA*, slip op. at 11, 28 (quotation marks omitted). Exxon, however, failed to identify any such speech. Instead, its complaint suggests that the Attorney General’s concerns about climate change align with Exxon’s longstanding public recognition of the risks associated with climate change. *N.Y. Br.* at 33–35.

Third, the NRA pleaded First Amendment injury by alleging that the defendants’ alleged threats caused financial institutions to refuse to provide it with essential services, costing it “tens of millions of dollars.” *NRA*, slip op. at 13, 26–27. Those concrete allegations stand in contrast to Exxon’s conclusory assertion that the Attorney General’s investigation may silence Exxon at some undetermined time in the future. *See N.Y. Br.* at 35–36.

Respectfully submitted,

/s/ Scott A. Eisman

Scott A. Eisman
Assistant Solicitor General

Cc: All counsel of record (by ECF)