18-1170

In the United States Court of Appeals for the Second Circuit

EXXON MOBIL CORPORATION,
Plaintiff-Appellant,

v.

MAURA TRACEY HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS, AND 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, Manhattan Division

BRIEF FOR TEXAS AND ELEVEN ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF APPELLANT AND URGING REVERSAL

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Plaintiff-Appellant Exxon Mobil Corporation ("ExxonMobil") challenges the validity of a civil investigative demand ("CID") issued by the Attorney General of Massachusetts, and a subpoena issued by the Attorney General of New York. The Attorneys General issued these instruments to investigate ExxonMobil's supposed violations of consumer protection laws through marketing and selling of fossil fuel-derived products and securities. ExxonMobil filed the underlying lawsuit against the Attorneys General claiming that the CID and subpoena violate its constitutional rights and common law, and are preempted by federal law.

Amici are the States of Texas, Alabama, Arkansas, Georgia, Louisiana, Maine, Michigan, Mississippi, Nebraska, Oklahoma, South Carolina, and Wisconsin, which possess sovereign authority to investigate violations of law. Their chief legal officers have long used that power—including through the issuance of CIDs or subpoenas—to identify and remedy unlawful conduct. This power, however, does not include the right to engage in unrestrained investigative excursions based on pretext to promote one side of an international public policy debate, or chill the expression of viewpoints in those debates.

Soon after the New York and Massachusetts Attorneys General issued their subpoena and CID, several attorneys general expressed their concerns about their tactics in an open letter. Jt. App. 902–05. The letter condemned the actions of the New York and Massachusetts Attorneys General, stating the "effort by our colleagues to police the global warming debate through the power of the subpoena is a grave mistake." *Id.* at 902. The signatories, representing a wide range of viewpoints on climate

change, "agree on at least one thing—this is not a question for the courts. Using law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech." *Id.* As most recognize, "vigorous debate exists in this country regarding the risks of climate change and the appropriate response to those risks. Both sides are well-funded and sophisticated public policy participants. Whatever our country's response, it will affect people, communities, and businesses that all have a right to participate in this debate." *Id.* at 904. The letter called upon the New York and Massachusetts Attorneys General to "stop policing viewpoints." *Id.* at 905.

The unconstitutional abuse of investigative power that forms the basis for ExxonMobil's complaint concerns Amici States because state attorneys general possess an inherent duty to preserve their roles as evenhanded enforcers of the law. Thus, Amici States have a direct and vital interest in the issues before the Court and submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF THE ARGUMENT

This is not a case about the scientific validity of climate change. It's about a fundamental guarantee of our Republic—the ability to have a viewpoint on a topic of public debate and not fear government retaliation for expressing it. The freedom to express a viewpoint unpopular with the government is the very basis for the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). In fact, the Supreme Court reiterated just last term that "governments have no power to

restrict expression because of its message, its ideas, its subject matter, or its content." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quotation marks omitted).

Alongside their oaths to uphold the Constitution, state attorneys general have a constitutional duty to act dispassionately. Attorneys representing the public do not represent an ordinary party in litigation, but "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it should win a case but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The Model Rules of Professional Conduct express this distinctive role: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Model Rules of Prof'l Conduct r.3.8 cmt. (Am. Bar Ass'n 2016).

Here, the New York and Massachusetts Attorneys General are not using their power in an impartial manner. Rather, they are embracing one side of a multi-faceted and robust policy debate, and simultaneously seeking to censor opposing viewpoints. In doing so, they are violating ExxonMobil's constitutional rights, abusing their power, and eroding public confidence in public officers. The district court erred in dismissing ExxonMobil's well-pleaded complaint.

ARGUMENT

I. Attorneys General Must Act Impartially.

New York and Massachusetts' investigations are the product of a cultural movement "committed to aggressively protecting and building upon the recent progress

the United States has made in combatting climate change." Jt. App. 97. The common-interest agreement between the attorneys general who passionately believe in climate change underscores the partiality of their endeavor, as they seek to "limit climate change and ensur[e] the dissemination of *accurate* information about climate change."[1] *Id.* at 654 (emphasis added). In other words, the tactics of the New York and Massachusetts Attorneys General are part of an "aggressive approach" to silence dissenting viewpoints by policing the "truth" about climate change in the marketplace of ideas. *Id.* at 98.

While Amici States have authority to conduct investigations to protect consumers, unveil fraud, and stop deceptive trade practices, these inquiries must be supported by a "reasonable belief" that there has been, or is about to be, unlawful false, misleading, or deceptive acts or practices in the conduct of any trade or commerce. *See, e.g.*, Tex. Bus. & Com. Code §§ 17.46, 17.47, 17.60, 17.61. And while the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established," *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948), "[s]imply labeling an action one for 'fraud,' of course, will not carry the day," *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 617 (2003).

[1] This ideology was on full display at the March 29, 2016 press conference of the so-called "AGs United for Clean Power." Former Vice President Al Gore alleged that commercial interests (such as ExxonMobil) are "committing fraud in their communications." Jt. App. 472.

A. Attorneys general may not employ legal power to suppress a viewpoint in a public policy debate.

The authority to investigate fraud does not legitimize the chilling of constitutional freedom to engage in an ongoing policy debate of international importance. The First Amendment condemns government action that restricts or chills speech because of the message conveyed. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.") (citing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

Indeed, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The First Amendment generally prevents government from proscribing speech and expressive conduct for the mere disapproval of the ideas expressed. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) (expressive conduct); *Cantwell v. Connecticut*, 310 U.S. 296, 309–311 (1940) (speech). And the "'loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury.'" *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The heart of viewpoint discrimination is the government preferring one message to another. *See Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S.

789, 804 (1984) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *see also Cornelius v. NAACP*, 473 U.S. 788, 806 (1985) (noting that "government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Viewpoint discrimination occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. And these protections extend to private corporations. *Citizens United*, 558 U.S. at 342-43.

While the New York and Massachusetts Attorneys General claim interests in consumer protection and prevention of securities fraud as the basis for their actions, proffering what may be on their face "reasonable grounds" for these actions does not save them from being "a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811. The actions of New York and Massachusetts before and after the March 29, 2016 press conference show that their investigations and document requests are designed to chill speech about climate change. This is exactly the type of speech the First Amendment protects. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

1. The New York and Massachusetts Attorneys General are targeting critics.

The First Amendment is concerned with "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas." *Hill v. Colorado*, 530 U.S. 703, 719 (2000). Thus, it stands as a bulwark against government action designed to suppress ideas or information, or to manipulate the public debate through coercion rather than persuasion. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 597-603 (1967).

New York and Massachusetts' actions chill ExxonMobil's (and others') speech on the topic of climate change. *See White v. Lee*, 227 F.3d 1214, 1239 (9th Cir. 2000) (holding that a federal investigation into opponents of a housing project chilled their speech in violation of the First Amendment). Using government power to suppress one side of a policy debate is a prior restraint on speech, which is tantamount to censorship. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963); *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Labeling a so-called investigation (into an unsettled area of science and public policy) as "fraud" certainly "raise[s] the specter that the Government [is] effectively driv[ing] certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

If our society refuses to tolerate both the proponents and critics of ideas vying for acceptance, then the marketplace of ideas becomes a mere oligarchy of indoctrination. As Justice Holmes put it:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of

> their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

ExxonMobil's complaint is full of *prima facie* evidence, obtained without discovery, that the New York and Massachusetts Attorneys General marshaled a well-planned effort to silence ExxonMobil and other "climate deniers" through the abusive use of CIDs and investigative subpoenas. As the complaint avers, and which the Court must accept as true at this stage of the case, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the purpose of New York and Massachusetts' subpoenas and CID is to "delegitimize ExxonMobil as a political actor," Jt. App. 410 ¶48.

In November 2015, after issuing the subpoena to ExxonMobil, Attorney General Schneiderman publicly declared the purpose of his investigation was to investigate ExxonMobil's alleged "shift" in "point of view" on climate change. Jt. App. 401 ¶22, 573.

In January 2016, according to emails discussing the planning of the meeting, attorneys and activists met at the offices of the Rockefeller Family Fund in New York City to discuss goals of an "Exxon campaign," which sought "to delegitimize [ExxonMobil] as a political actor" and "to force officials to disassociate themselves from Exxon." Jt. App. 410 ¶48. The goals of the "Exxon campaign" are:

- To establish in the public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) towards climate chaos and grave harm.
- To delegitimize Exxon as a political actor.

- To force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example, by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc.
- To call into question climate advantages of fracking, compared to coal.
- To drive divestment from Exxon.
- To drive Exxon and climate change into the center of the 2016 election cycle.

Id.

Then at the March 2016 press conference, the New York and Massachusetts Attorneys General declared their campaign of viewpoint discrimination against ExxonMobil:

- Attorney General Healey and Attorney General Schneiderman spoke about the negative effects of climate change and the importance of taking action in the fight against climate change. *Id.* at 402–03, 467–70, 478–79.
- Attorney General Schneiderman reminded everyone of his ongoing investigation of ExxonMobil and Attorney General Healey reiterated that companies in the fossil fuel industry, such as ExxonMobil, must be held accountable for deceiving investors and the public. *Id.* at 406–07, 469, 478.
- Attorney General Healey stated that there was a troubling disconnect between what ExxonMobil knew about climate change and what ExxonMobil told investors and the public regarding climate change. *Id.* at 406–07, 478.

In other words, the New York and Massachusetts Attorneys General declared ExxonMobil's (and others') views on climate change to be "deceiv[ing]" or incorrect. *Id.* at 404 ¶32, 478. That is textbook viewpoint discrimination against ExxonMobil's alleged views on climate change. *See United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality) (viewpoint discrimination involves an "inten[t] to discourage one viewpoint and advance another") (citations and internal quotation marks omitted); *Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–176 (1976) ("to permit one side of a debatable public question to have a monopoly in expressing its views . . .is the antithesis of constitutional guarantees") (footnote omitted).

Moreover, immediately before the March 29, 2016 AGs United for Clean Power press conference, the attorneys general met with Mr. Matthew Pawa, an attorney and climate change activist, and Mr. Peter Frumhoff, a climate change activist and director of science and policy at the Union of Concerned Scientists. Jt. App. 408–09. Messrs. Pawa and Frumhoff are well-known for their desire to punish climate deniers and promotion of "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation" and "strategies to win access to internal documents" of fossil fuel companies. *Id.* at 409 ¶46.

To conceal the coordinated nature of New York and Massachusetts' intended censorship, the day after the AGs United for Clean Power press conference, Mr. Pawa asked the Office of the New York Attorney General how he should respond if asked by a reporter from *The Wall Street Journal* whether he attended the closed door

meeting with the attorneys general. The Office of the New York Attorney General responded by instructing Mr. Pawa "to not confirm that you attended or otherwise discuss the event." *Id.* at 410–11 ¶50. These actions are the hallmark of an organized campaign to engage in unconstitutional viewpoint discrimination and chill speech.

2. The New York and Massachusetts Attorneys General are abusing their power.

New York and Massachusetts are abusing the power reserved to them under the U.S. Constitution, and under their own laws governing the administration and use of that power. The Fourth Amendment limits the scope of administrative subpoenas. *See Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208–11 (1946). Where subpoenaed materials may be protected by the First Amendment, the requirements of the Fourth Amendment are applied with "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485 (1965). As such, so-called "fishing expeditions," like this one, are proscribed and "[i]t is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *Fed. Trade Comm'n v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924).

Government abuse of subpoena power runs afoul of the First Amendment. "The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. Fed. Elec. Comm'n*, 333 F.3d 168, 175 (D.C. Cir. 2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976) (disclosure of campaign contributions); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (disclosure of membership lists)). Thus, the government must have a compelling interest for the

disclosure of such information from private parties. *Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 271 (2d Cir. 1981) (citing cases). A First Amendment privilege against disclosures exists where such "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009) (quotation omitted).

For example, subpoenas seeking investigative notes as well as the names of contacts have been held to be an invalid chilling of the free exercise of political speech and association under the First Amendment. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012) (finding "invalid" under First Amendment "subpoenas demanding that [a] paper . . . disclose its reporters' notes and reveal information about anyone who visited the [Phoenix] New Times's website" because subpoenas would "chill speech"); *Local 1814*, 667 F.2d at 272 (holding disclosure of contributors would chill speech); *see also Pebble Ltd. P'ship v. EPA*, 310 F.R.D. 575, 582 (D. Alaska 2015) (subpoenas are invalid when they have "the tendency to chill the free exercise of political speech and association which is protected by the First Amendment").

The tactics of the New York and Massachusetts Attorneys General—seeking over 40 years of documents and communications with third party organizations deemed on the wrong side of the climate debate—exceed their lawful powers. Jt. App. 401 ¶22, 417 ¶66, 419–20 ¶71. Massachusetts is subject to a four-year statute of limitations for the law it purportedly seeks to enforce. Mass. Gen. Laws ch. 260, § 5A (referring to Mass. Gen. Laws ch. 93A, § 2). And New York limits the Attorney

General's investigatory period to three years. *Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082–83 (N.Y. 2001).

The Constitution safeguards the freedom to engage in open and candid discussions about significant issues. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (opinion of Powell, J.) ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)). But the mere occurrence of such discussions is threatened by the chill of "investigations" hanging in the air. Thus, New York and Massachusetts' actions not only seek to silence certain participants in a public debate, but also harm everyone, stifling consumers and those seeking information in order to evaluate various viewpoints.

B. Climate change is the subject of legitimate international debate.

The New York and Massachusetts Attorneys General falsely presume that the scientific debate about climate change is settled, along with the related and equally important debate on how to respond to what science has found. Yet, the most undeniable fact about climate change is that, like so many other areas of science and public policy, the debate remains unsettled, the research is far from complete, and the path forward is unclear. "Scientists continue to disagree about the degree and extent of global warming and its connection to the actions of mankind,"[2] as do many others.

[2] Craig D. Idso, *Why Scientists Disagree About Global Warming: The NIPCC Report on Scientific Consensus*, Nongovernmental International Panel on Climate Change (NIPCC) (Heartland Inst. 2016), http://climatechangereconsidered.org/.

Moreover, science does not teach the public policy response to its data and findings; it merely provides a starting point.

Modern science helps us better understand our world. It constantly subjects to scrutiny various hypotheses against objective data. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993). But scientific theories are subject to change because of new data, enhanced measurements, or other unforeseen factors. *Cf.* Karl Popper, The Logic of Scientific Discovery 44, 47 (1959). Thus, "[s]cientific controversies must be settled by the methods of science rather than by the methods of litigation." *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994).

Accordingly, the intersection of science, law, and public policy should be approached with caution and objectivity, and not the finality sought through litigation and legal maneuvers. Disastrous results take root when government invests itself in only one side of a scientific debate since "bad ideas can persist in science for decades, and surrounded by myrmidons of furious defenders they can turn into intolerant dogmas."[3] Unfortunately,

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[3] Matt Ridley, *The Climate Wars and the Damage to Science*, Global Warming Policy Foundation Essay 3 at 3 (2015), http://www.thegwpf.com/content/uploads/2015/11/climate-wars.pdf. In addition to being former Science Editor of the *Economist*, "Matt Ridley is one of the world's foremost science writers. His books have sold over a million copies and been translated into 30 languages. His new book *The Evolution of Everything* was published in 2015. He is a member of the [Global Warming Policy Foundation]'s Academic Advisory Council. As a landowner, he receives a wayleave income from a coal-mining company." In the words of Ridley,

> I am not a full sceptic of climate change, let alone a 'denier'. I think carbon-dioxide induced warming during this century is likely, though I think it is unlikely to prove rapid and dangerous. So I don't agree with those who say

> [t]his is precisely what has happened with the climate debate and it is at risk of damaging the whole reputation of science. The "bad idea" in this case is not that climate changes, nor that human beings influence climate change; but that the impending change is sufficiently dangerous to require urgent policy responses. In the 1970s, when global temperatures were cooling, some scientists could not resist the lure of press attention by arguing that a new ice age was imminent. Others called this nonsense and the World Meteorological Organization rightly refused to endorse the alarm. That's science working as it should. In the 1980s, as temperatures began to rise again, some of the same scientists dusted off the greenhouse effect and began to argue that runaway warming was now likely. At first, the science establishment reacted skeptically and a diversity of views was aired. It's hard to recall now just how much you were allowed to question the claims in those days.[4]

Even the premise that "97% of all climate scientists agree on climate change" is pseudo-science. This self-serving conclusion is derived from a poll involving only seventy-nine scientists—hardly a statistically-relevant sample.[5] Moreover, of those seventy-nine scientists, 97% believe that climate change is man-made—not that it is dangerous.[6] A more recent poll of 1854 members of the American Meteorological

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> the warming is all natural, or all driven by the sun, or only an artefact of bad measurement, but nor do I think anything excuses bad scientific practice in support of the carbon dioxide theory, and every time one of these scandals erupts and the scientific establishment asks us to ignore it, I wonder if the extreme sceptics are not on to something. I feel genuinely betrayed by the profession that I have spent so much of my career championing.

Id. at 10.

[4] *Id.* at 4.

[5] *Id.* at 7.

[6] *Id.*

Society found 52% believe climate change is man-made.[7] Indeed, throughout all aspects of society,

> there has been a systematic and thorough campaign to rule out the middle ground [on climate change] as heretical: not just wrong, but mistaken, immoral and beyond the pale. That's what the word "denier", with its deliberate connotations of Holocaust denial, is intended to do. For reasons I do not fully understand, journalists have been shamefully happy to go along with this fundamentally religious project. Politicians love this polarizing because it means they can attack a straw man.[8]

With the debate concerning the scope and sources of climate change still raging in scientific and public circles, the New York and Massachusetts Attorneys General are using their powers to not only tilt the scales in favor of one side, but also to prevent dissenters from sharing their points of view.

II. Politicized investigations undermine public confidence.

The press conference of the "AGs United for Clean Power" demonstrates that Massachusetts and New York commenced their investigations precisely for the reasons the First Amendment forbids. "It is one thing to use the legal system to pursue public policy outcomes; but it is quite another to use prosecutorial weapons to intimidate critics, silence free speech, or chill the robust exchange of ideas." Jt. App. 685.

Allowing law enforcement to violate constitutional rights is to "violate the sacred trust of the people." *United States v. Costa*, 356 F. Supp. 606, 609 (D.D.C. 1973). It undermines "the right of the people to be secure in their persons, houses,

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[7] *Id.*

[8] *Id.* at 6.

papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948) (emphasis added).

The New York and Massachusetts Attorneys General repeat an unfortunate history of law enforcement soiled with political ends. That the statements and workings of the "AGs United for Clean Power" are one-sided, and target only certain participants in the climate change debate, speaks loudly enough.[9] Viewpoint discrimination exists when the government silences speech, *Smith v. Cty. of Suffolk*, 776 F.3d 114, 118 (2d Cir. 2015), and although animus is not necessary to prove viewpoint discrimination, it is sufficient, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). New York and Massachusetts revealed their retaliatory animus toward ExxonMobil through public statements targeting "climate deniers." Jt. App. 397 ¶10, 401 ¶22, 402 ¶25, 574. The purpose of their campaign, by their own admission, is "to delegitimize Exxon as a political actor," and, "to force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example, by refusing campaign donations, refusing to take meetings, calling for a price

[9] "[T]his fraud investigation targets only 'fossil fuel companies' and only statements minimizing climate change risks. If it is possible to minimize the risks of climate change, then the same goes for exaggeration. If minimization is fraud, exaggeration is fraud." Jt. App. 900. It is also worth noting that "[e]leven of the 17 attorneys general who participated [in the "AGs United for Clean Power" press conference] are the same folks who took part in the 2010 sue-and-settle law-suit that used federal courts to try to force the adoption of the federal energy regulations that became the [EPA's] 'Power Plan.'" *Id.* at 893.

on carbon, etc." *Id.* at 410 ¶48, 525. This clear, *prima facie* evidence of animus shows that the motives of the New York and Massachusetts Attorneys General is not to uncover the truth and pursue justice, but rather to fulfill an improper agenda unworthy of a sovereign's chief law enforcement official. Where the express and recorded goal of government actors is to politically delegitimize an opposing viewpoint, the proper role of government is awry and room for federal court intervention is permitted. The New York and Massachusetts Attorneys General viewpoint-based investigations, laced with animus toward the investigated party, are unconstitutional and an abuse of authority.

Conclusion

The Court should reverse the judgment of the district court and remand this case for further proceedings.

Respectfully submitted.

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Certificate of Service

On August 10, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ David J. Hacker
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,748 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word 2016 (the same program used to calculate the word count).

/s/ David J. Hacker
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