18-1170

In The 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.

Appeal From The United States District Court
For The Southern District of New York

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the National Association of Manufacturers and the Chamber of Commerce of the United States of America each certify that it is a non-profit organization, that it does not have a parent corporation, and that no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF AMICI CURIAE[1]

The National Association of Manufacturers

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM and its member companies are committed to addressing climate change while preserving competitiveness. Manufacturers have pioneered new strategies and technologies to reduce GHG emissions and are using them to set aggressive emissions reduction targets—and in many cases, beat them early. Over

[1] The Amici represent, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for any party authored this brief, no party or party's counsel contributed money that was intended to fund this brief, and no person other than the Amici or their counsel contributed money that was intended to fund this brief. All parties were notified of the Amici's interest in filing this brief. Plaintiff-Appellant Exxon Mobil and Defendant-Appellee Barbara D. Underwood consent to the motion for leave to file an amicus brief. Defendant-Appellee Maura T. Healey does not oppose the motion.

the past decade, manufacturers have reduced GHG emissions by 10 percent while increasing value to the economy by 19 percent.

The Chamber of Commerce of the United States of America

On December 7, 1911, President (later Chief Justice of the United States) William Howard Taft called for a national organization to increase involvement of American business on issues of national governance. A year later, the Chamber of Commerce of the United States of America (the "Chamber") was founded. Today, the Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases like this one that raise issues of concern to the nation's business community.

Unfortunately, government has not always shared President Taft's openness to business participation on issues of public importance. At all levels of government, elected officials who oppose business viewpoints have sought to keep them from being expressed. Rather than explicitly taking an anti-business stance, these restrictions often target speech by corporations to suppress the business viewpoint.

The Chamber plays a key role in advocating for the interests of its members and the broader business community, including their First Amendment rights. The Chamber was a party to the *McConnell v. FEC*, 540 U.S. 93 (2003), litigation challenging the facial constitutionality of the electioneering communication ban on corporate political speech. The Chamber files briefs amicus curiae where the business community's right to political speech is at stake. *See, e.g.*, *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006). And the Chamber also has litigated to preserve its own First Amendment rights of speech and association. *See, e.g.*, *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

The Chamber believes that the global climate is changing, and that human activities contribute to those changes. The Chamber also believes that global climate change poses a serious long-term challenge that deserves serious solutions. And we believe that businesses, through technology, innovation, and ingenuity will offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change. Thus, businesses must be a part of any productive conversation on how to address global climate change. If there are to be thoughtful governmental policies that will have a meaningful impact on global climate change, then under our system of government those policies should come

from Congress and the Executive Branch, and not through the courts or ad hoc efforts from state and local officials against out-of-state corporations.

This appeal raises issues of direct concern to the NAM, the Chamber, and to American industry. The Amici and their members regularly communicate regarding economic and scientific issues, public policy, and political activity. Accordingly, the Amici and their membership have a strong interest in this case.

SUMMARY OF THE ARGUMENT

Private organizations—from businesses to trade associations to think tanks—substantially contribute to the marketplace of ideas. But investigative tactics deployed against private organizations may chill the First Amendment rights of such organizations to engage in scientific research, political speech, and debate over issues of public concern. Indeed, the prosecutorial actions of state attorneys general against business, such as the actions of the Attorneys General ("AGs") of New York and Massachusetts in this case, can be particularly troubling for First Amendment rights. The use of incredibly broad subpoenas and civil investigative demands ("CIDs") to harass and silence those in the business community flies in the face of the First Amendment.

The NAM and the Chamber urge this Court to carefully consider Exxon's claims, keeping fundamental First Amendment principles at the center of its evaluation. The First Amendment prohibits public officials from wielding the

coercive power of the government to silence private organizations—including corporations—with differing or opposing viewpoints on controversial issues of public concern. Corporations, alone, through their participation in trade associations, and in conjunction with other third parties, make substantial and important contributions to science and other issues of public debate. The Court should take this opportunity to reinforce the role of courts to scrutinize government powers wielded to chill corporate speech and to remind officials that the First Amendment must be respected in all uses of government power.

ARGUMENT

I. CORPORATIONS CONTRIBUTE TO IMPORTANT POLICY DISCUSSIONS INVOLVING ECONOMIC, SCIENTIFIC, AND OTHER ISSUES OF PUBLIC CONCERN.

Governmental actions targeting speech should be evaluated in "light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citation and quotation marks omitted). The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes." *Roth v. United States*, 354 U.S. 476, 484 (1957). It "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (quoting *United States v.*

Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Corporations' important contributions to the marketplace of ideas are protected by the First Amendment.

A. Corporations conduct research and advocate on topics across the social, economic, and physical sciences.

In addition to conducting a wealth of research and public policy work on their own, companies regularly work with third parties—including through their trade associations—to research and advocate on controversial issues of public concern. As Harvard Business School Professor George Serafeim observed, corporations "engag[e] not only with environmental and social issues that are important for their future financial performance, but also with issues that are immaterial" to the bottom line.[2]

Examples of corporate participation in the marketplace of ideas are myriad. Corporations have taken central roles in scientific debates on important environmental and health issues. For example, some jurisdictions have recently

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[2] Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research*, 3 (May 27, 2013), https://ssrn.com/abstract=2270579.

banned plastic straws. Companies like Starbucks have championed this.[3] Others, including the members of the American Chemistry Council, have expressed skepticism.[4] Likewise, companies contribute to research (on both sides) about genetically modified organisms[5] and the debate over the health effects of sugar in dietary consumption.[6] Corporations also contribute to public health by developing and promoting life-saving vaccines and medicines.[7]

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[3] *See* Starbucks, *What is the Role and Responsibility of a For-Profit, Public Company?*, https://www.starbucks.com/responsibility (last visited Aug. 10, 2018).

[4] *See* S. Russel, *Using Plastics Means Less Waste in the First Place* (Feb. 2, 2018), https://blog.americanchemistry.com/2018/02/using-plastics-means-less-waste-in-the-first-place/?gclid=EAIaIQobChMIiYWp1Lfd3AIViwOGCh2NXQpfEAMYASAAEgKkFfD_BwE.

[5] *See* Monsanto, *Biotechnology and GMOs*, https://monsanto.com/innovations/biotech-gmos, (last visited Aug. 10, 2018).

[6] *See* Alliance for a Healthier Generation, *Alliance for a Healthier Generation and American Beverage Association Issue First Progress Report on Reducing Beverage Calories* (Nov. 22, 2016), https://www.healthiergeneration.org/news__events/2016/11/22/1646/alliance_for_a_healthier_generation_and_american_beverage_association_issue_first_progress_report_on_reducing_beverage_calories; Keybridge, *Balance Calories Initiative: Baseline Report for the National Initiative* (Mar. 31, 2016), https://www.healthiergeneration.org/_asset/wcn25l/Balance-Calories-Initiative-Baseline-Report_FINAL_MC22417.pdf.

[7] *See* Business Wire, *Merck Announces First Phase Three Studies for PCV-15 (V114) Its Investigational Pneumococcal Disease Vaccine* (Apr. 17, 2018) https://www.businesswire.com/news/home/20180417005324/en/; Impact of World Health Organization, *BRICS' Investment in Vaccine Development on the Global Vaccine Market* (Mar. 31, 2014), http://www.who.int/bulletin/volumes/92/6/13-133298/en.

Corporations have been similarly active in controversial economic debates. Retailers, for example, used economic data to urge Congress to address claimed compliance costs associated with healthcare laws.[8] Like many associations, the NAM supports its members' efforts on trade policy with economic and other business data.[9]

Companies likewise speak out on labor policy, as well as their own practices.[10] The Internet Association has advanced its view regarding the impact of the Nation's immigration laws on the tech sector,[11] and the Chamber has published economic research supporting immigration reforms.[12] And almost 100 companies signed onto an amicus brief in litigation regarding an executive order limiting immigration, claiming that the order "makes it more difficult and

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[8] *See* National Retail Federation, *Health Care Reform*, https://nrf.com/advocacy/policy-agenda/health-care-reform (last visited Aug. 10, 2018).

[9] *See* National Association of Manufacturers, *Trade*, http://www.nam.org/Issues/Trade/ (last visited Aug. 10, 2018).

[10] *See* Uber, *Seattle's Collective Bargaining Ordinance*, https://www.uber.com/drive/seattle/collective-bargaining (last visited Aug. 10, 2018). Notably, Nike's public defense of its own labor practices led to the certiorari grant and subsequent dismissal in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

[11] *See* Internet Association, *Immigration Reform*, https://internetassociation.org/positions/immigration-reform (last visited Aug. 10, 2018).

[12] *See* U.S. Chamber of Commerce, *Immigration Myths and Facts* (Apr. 14, 2016), https://www.uschamber.com/report/immigration-myths-and-facts-0.

expensive for US companies to recruit, hire, and retain some of the world's best employees." Brief of Technology Companies and Other Businesses as Amici Curiae in Support of Appellees, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (17-35105).

Empirical bases for all these issues may be disputed, but public debate is advanced through the diverse contributions of corporations—in conjunction with trade associations, think tanks, and academics—all exercising their First Amendment rights.

B. The First Amendment protects corporations' research and advocacy.

The First Amendment Speech and Petition Clauses protect four interrelated rights, all of which can be implicated when the government abuses its investigative power. Of course, the First Amendment first protects the freedom to speak. It also protects freedom of association, because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citations omitted). Thus, "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460-461.

In addition, the First Amendment protects the right to petition the government. *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). That right is "intimately connected both in origin and in purpose, with the other First Amendment rights," *id.*, and includes objections to popular opinion, political consensus, and government policy, *see Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966). When the right to petition is at issue, a "heightened level of protection" is warranted. *White v. Lee*, 227 F.3d 1214, 1233 (9th Cir. 2000) (quoting *Or. Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991)).

Finally, the First Amendment protects the right *not* to speak. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11 (1986). Forcing a private party to "speak where it would prefer to remain silent" intrudes on its right to decide for itself what it wants to address and when. *Id.* at 18.

These rights are enjoyed by corporations and business organizations. "[S]peech does not lose its protection because of the corporate identity of the speaker." *Id.* at 16 (citation omitted). Corporations and associations have First Amendment rights because the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) ("If the speakers here were

not corporations, no one would suggest that the State could silence their proposed speech."). The Supreme Court has repeatedly affirmed this point.[13]

For more than forty years, the Supreme Court has also made clear that the "purely economic" interests of a speaker do not "disqualif[y] him from protection under the First Amendment." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Protection of economically motivated communication is essential to our "predominantly free enterprise economy." *Id*. at 765; *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

Thus, in *Gordon & Breach Science Publishers S.A. v. American Institute of Physics*, the district court confirmed that an organization's ranking of academic journals in a manner that economically benefitted them fell within the scope of expression fully protected by the First Amendment. 859 F. Supp. 1521, 1540-41 (S.D.N.Y. 1994), *holding adopted and modified by Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48 (2d Cir. 2002). It was immaterial that the organization "stood to benefit from publishing Barschall's results—even that they *intended* to benefit." *Id.* (citation omitted). Indeed, to "hold otherwise would

[13] *See, e.g.*, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

be to squelch the expression of facts and opinions which might not otherwise find ready expression through commercial media." *Id.* at 1541 (citations omitted).

Similarly, in *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, the District of New Jersey held that a corporation's publication of scientific articles in peer-reviewed journals was protected by the First Amendment. 627 F. Supp. 2d 384, 456 (D.N.J. 2009). The Court emphasized that publication of scientific research is protected "even if it contains incorrect statements or erroneous conclusions." *Id.* This is so largely because a federal court is not the appropriate place to dispute the validity of scientific theories, particularly in the context of important First Amendment concerns. *Id.* (stating that "scientific disputes must be resolved by scientific means" (quoting *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005))).

II. EXPANSIVE USE OF GOVERNMENT INVESTIGATORY POWERS CAN CHILL CORPORATIONS' CONTRIBUTION TO THE EXCHANGE OF IDEAS.

All exercises of governmental power, including investigative tactics, must respect the rights protected by the First Amendment. At its core, "[t]he First Amendment is a limitation on government." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment). To be sure, "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Tex. Div., Sons of*

Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015). But the government is not entitled to use its police power to "burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).

A. Government investigations can burden First Amendment rights and therefore should be subject to exacting judicial review.

Government investigations implicate First Amendment protected activities because investigative tactics may discourage inquiry and collaboration on controversial issues and force self-censorship. "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley v. California*, 362 U.S. 60, 65 (1960). As one commentator notes, "coercive discovery chills speech by deterring people from speaking, writing, or joining an organization," and "[a]nonymity and, to a lesser degree, confidentiality foster free expression by relieving an individual's fear that he'll be fired, harassed, or socially ostracized based on the content of his speech." Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards A Heightened Discoverability Standard*, 57 UCLA L. Rev. 841, 847-48 (2010).

Because subpoenas and CIDs destroy anonymity and open internal debates to review and government sanction, they can encourage self-censorship. Under threat of subpoena, for example, a company might decide not to take a controversial public position or discuss a policy proposal with leading experts, its

trade association, or a think tank. "Without protection against government probing, countless conversations might never occur or might be carried on in more muted and cautious tones." Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. Rev. 112, 121-22 (2007). This is why Courts must intervene to protect the "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462.

The AGs' actions implicate the First Amendment Speech and Petition Clauses. In addition to targeting Exxon for its viewpoints, the AGs sought Exxon's communications with twelve organizations, pejoratively labeled "climate deniers," including think tanks associated with two universities.[14] Subpoenaing a company's communications with third-party organizations not only can chill the company's speech, but also may have a pernicious effect on those with whom the company interacts. Such demands "may have the effect of curtailing the freedom to associate" and should be "subject to the closest scrutiny," *NAACP*, 357 U.S. at 460-61.

[14] The CID names the Acton Institute, American Enterprise Institute, Americans for Prosperity, American Legislative Exchange Council, American Petroleum Institute, Beacon Hill Institute at Suffolk University, Competitive Enterprise Institute, Center for Industrial Progress, George C. Marshall Institute, the Heartland Institute, the Heritage Foundation, and the Mercatus Center at George Mason University.

The investigative tactics here also implicate the right to petition. The New York AG stated that his actions were taken in response to "gridlock in Washington," regarding climate change legislation, SAC ¶ 25, JA-1935, and that he would "step into th[e] [legislative] breach" to combat "a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government" to address climate change, SAC ¶ 33, JA-1938-39. This improper focus on the petitioning activity of Exxon and others deserves careful scrutiny. *See NAACP*, 357 U.S. at 460-61.

B. Judicial supervision of investigative tactics has been critical to ensuring the protection of fundamental rights.

To be sure, the government may investigate suspected wrongdoing and use its power to protect the public, but these powers remain subject to the limits of the First Amendment. Even "valid[] and reasonable[]" justifications "cannot save" government action "that is in fact based on the desire to suppress a particular point of view." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985). As this Court has observed, when the First Amendment is implicated, "the usual deference to the administration agency is not appropriate, and protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency." *FEC v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (citation omitted); *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386-88 (D.C. Cir. 1981) ("[T]he

highly deferential attitude which courts usually apply to . . . subpoena enforcement requests . . . has no place where political activity and association . . . form the subject matter being investigated."). In other words, because the political process may be insufficient to protect the First Amendment rights of those expressing unpopular opinions, courts have repeatedly reviewed government investigations for intrusions upon First Amendment rights.

A case from the Ninth Circuit—*White v. Lee*, 227 F.3d 1214 (9th Cir. 2000)—is particularly instructive. There, the court affirmed the denial of qualified immunity to HUD officials where their threats of subpoena "unquestionably chilled" the plaintiffs' exercise of First Amendment rights to oppose a housing project. *Id.* at 1228-29. During its investigation, HUD officials questioned the targets "under threat of subpoena about their views and public statements," directed them "to produce an array of documents and information" and "all correspondence or other documents relating to their efforts in opposition to the project," and "informed them and a major metropolitan newspaper that they had violated the Fair Housing Act." *Id.* at 1220. The Court held that these tactics "would have chilled or silenced a person of ordinary firmness from engaging in future First Amendment activities." *Id.* at 1229.

Similarly, the Supreme Court just recently allowed a First Amendment claim to proceed against a Florida city in a case in which the plaintiff alleged that city

officials developed a plan and ultimately arrested him to retaliate against him for protected speech on matters of public concern: government land use and eminent domain issues. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1944-45 (2018). The plaintiff argued, and the Supreme Court agreed, that he should be able to proceed on his claim that the City had "deprived him of this liberty by retaliating against him" for the exercise of his First Amendment rights opposing government policy, which right the Court noted was "high in the hierarchy of First Amendment values." *Id.* (citation omitted). In allowing the case to proceed despite the existence of probable cause for the arrest, the opinion "underscored that this Court has recognized the 'right to petition as one of the most precious of the liberties . . . .'" *Id.* at 1954 (citation omitted).

Courts have also limited the scope of investigations on First Amendment grounds. As discussed above, the Supreme Court in *NAACP v. Alabama* held that compelled disclosure of NAACP membership records violated the First Amendment because it infringed on the associational rights of the NAACP's members. 357 U.S. at 462-63.[15]

[15] *See also, e.g.*, *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998) (holding that NLRB subpoena to newspaper seeking name of advertiser violated First Amendment because it would chill "the ability of every newspaper and periodical to publish lawful advertisements" and "would curtail available employment opportunities by reducing the free flow of information in the labor market"); *Lubin v. Agora, Inc.*, 882 A.2d 833, 846 (Md. 2005) (holding that

As in these cases, the Court here should look carefully at the substance of the investigative tactics used by the AGs, in order to safeguard Exxon's and third parties' First Amendment rights.

* * *

Investigative tactics like those used here are deeply troubling to companies and associations that engage in economic, scientific, and public policy discussions. The investigation of Exxon and others fomented by private groups was intended to punish certain views and to discourage engagement in the marketplace of ideas. The subpoenas and CIDs used in connection with this case against Exxon and third-party associations and think tanks were remarkable in their scope. They spanned *almost forty years* and essentially sought all documents—including communications, research, and advocacy—related to climate change, decades beyond the longest applicable statute of limitations. The AGs also sought communications between Exxon and many third-party businesses, trade associations, and advocacy groups. It is not hard to imagine the *in terrorem* effect that these tactics could have on debates and speech concerning myriad issues of public concern, because "[t]he threat of sanctions may deter their exercise almost

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subpoenas issued by Maryland Securities Commissioner, seeking subscriber lists, marketing lists, and other documents identifying newsletter subscribers, violated the First Amendment because disclosure of subscriber status and purchase of newsletter "would destroy the anonymity that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms").

as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). This is unacceptable under the First Amendment.

CONCLUSION

Corporations, by themselves and in association with others, are valuable contributors to the marketplace of ideas and debates over public policy. These contributions are protected by the First Amendment. The actions of the AGs here implicate the First Amendment Speech and Petition Clauses by targeting the expressive and collaborative efforts of Exxon and third parties on issues of public concern. This Court should closely scrutinize the AGs' actions and reverse the judgment of the United States District Court for the Southern District of New York.

Dated: August 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32 and Circuit Rule 29.1, I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29.1(c) because this brief contains 4,154 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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