

No. 18-55481

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

*Plaintiff-Appellant,*

v.

**EXXON MOBIL OIL CORPORATION,**

*Defendant -Appellee.*

On Appeal from the United States District Court  
for the Central District of California  
No. 17-mc-66 CBM (PJWx)  
Honorable Consuelo B. Marshall

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**AMICUS CURIAE BRIEF OF CALIFORNIA ATTORNEY GENERAL  
XAVIER BECERRA ON BEHALF OF THE PEOPLE OF THE STATE  
OF CALIFORNIA FOR APPELLANT UNITED STATES OF  
AMERICA**

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## INTRODUCTION

The explosion at the former ExxonMobil refinery in Torrance, California (Torrance Refinery) on February 18, 2015 shook the surrounding area, showering nearby communities with dust and ash. This accident is a vivid reminder that industrial facilities pose significant potential risks to the environment and communities that surround them, as well as facility workers. The workers, surrounding communities, and indeed the public in general, rely on State and local regulatory agencies to ensure that the environment and public health are protected from chemical accidents. Those regulatory agencies, in turn, rely on Appellant United States Chemical Safety and Hazard Investigation Board's (the Board) thorough investigation of chemical accidents to inform their regulatory programs. The information gathered by the Board and its recommendations assist those agencies in determining whether and what regulatory actions are necessary to protect the public.

The Board is appealing the district court's failure to enforce five subpoenas that would allow it to determine whether ExxonMobil adequately analyzed and prepared for the risk and potential consequences of the Torrance Refinery explosion. The requested information is relevant to the Board's investigation of the



explosion and squarely within the Board's subpoena authority.<sup>1</sup> This is because the Board's investigation authority is intertwined with the Board's mandate to recommend safety measures that prevent or minimize the consequences of future chemical accidents. Given the facts of this case, the Board's investigation would be incomplete without an investigation of the potential hazards and safety measures taken by ExxonMobil to protect workers and the nearby communities. Further, the information is vital to assure the protection of the residents of the communities surrounding the Torrance Refinery and refineries across the State. We respectfully urge this Court to remand this matter with instructions to the district court to enforce the subpoenas.

### **INTEREST OF AMICI**

California Attorney General Xavier Becerra submits this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).<sup>2</sup> The Attorney General submits this brief in his capacity as the chief law officer of the State of California and pursuant to his responsibility to protect the environment and natural resources of California for the benefit of the People. Cal. Const. art. V, § 13; Cal. Gov't

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<sup>1</sup> *EEOC. v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). To minimize duplication with the brief filed by the Board, this brief does not discuss case law regarding enforcement of investigative subpoenas.

<sup>2</sup> This brief is filed on behalf of the Attorney General and not on behalf of any other California agency or office.

Code §§ 12600-12612; *D'Amico v. Bd. of Med. Exam'rs*, 11 Cal.3d 1, 14-15 (1974).

California has a keen interest in ensuring that it has access to as broad a range of environmental protection tools as possible, including the information obtained from full, complete, and robust investigations by the Board. This interest is particularly acute where refineries are concerned. Refineries are often situated in low-income communities and communities of color and, like many other facilities that may contribute to environmental pollution, disproportionately impact those communities. Because these communities are on the frontlines in dealing with pollution burdens, regulatory agencies must be particularly diligent in ensuring that safety measures that will protect them are identified and implemented.

Appellee ExxonMobil's refusal to comply with subpoenas regarding the Torrance Refinery explosion, and the district court's decision not to enforce these subpoenas, undermines the Board's ability to satisfy its statutory mandate. Here, denying the Board information necessary to conduct a complete investigation of the Torrance Refinery explosion limits its capacity to identify measures necessary to prevent or mitigate future chemical accidents and their consequences. Limiting the Board's investigatory powers in this way compromises State and local agencies' ability to protect public health and safety in California. Further, it denies the surrounding communities' access to information necessary to allow effective

participation in the decision-making processes that affect their neighborhoods and their health.

## **ARGUMENT**

### **I. THE BOARD’S OBLIGATION TO RECOMMEND CHEMICAL SAFETY MEASURES WOULD BE UNDERMINED BY THE DISTRICT COURT’S NARROW READING OF THE BOARD’S AUTHORITY.**

In *United States v. Transocean Deepwater Drilling, Inc.*, the Fifth Circuit aptly summarized the Board’s “public safety mission” as “investigating accidental releases of hazardous substances into the ambient air” and “reporting to the public its findings and recommendations for preventing and minimizing the risk of industrial chemical accidents.” 767 F.3d 485, 488 (5th Cir. 2014).

The Board is required to investigate chemical accidents that have “the potential to cause substantial property damage or a number of deaths or injuries among the general public.” 42 U.S.C. § 7412(r)(6)(E). In each investigation, the Board has three related obligations: to investigate the accident, to report on that investigation to the public, and to recommend safety measures. The Board’s duties to investigate the “facts, conditions and circumstances” of the accidental release and to report its findings to the public are specified in Paragraph (i) of section 112(r)(6)(C) of the Clean Air Act Amendments of 1990. 42 U.S.C. § 7412(r)(6)(C). The Board’s duty to recommend measures to prevent future

accidental releases and to minimize the consequences of accidents that do occur is set forth in Paragraph (C)(ii). *Id.*

The requirements of Paragraphs (C)(i) and (C)(ii)—to investigate accidents and to recommend safety measures—are “inextricably intertwined,” as ExxonMobil itself acknowledged.<sup>3</sup> It follows that the scope of the Board’s investigations under Paragraph (C)(i) must be sufficiently broad to enable the Board to make the safety recommendations required by Paragraph (C)(ii). Put differently, the Board’s obligation to make safety recommendations, including recommending measures to prevent or minimize the consequence of accidents, informs what information the Board must gather in its investigations.

The Board is seeking information to help it determine whether to recommend measures to prevent and reduce the consequences of a future explosion. Without the ability to conduct a complete investigation, the Board may not have the information it needs to recommend a full set of safety measures. The recommended safety measures are intended to protect the workers at refineries and chemical

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<sup>3</sup> Exxon Mobil’s Opp. to Pet. to Enforce Admin. Subpoenas Issued by U.S. Chem. Safety & Hazard Investigation Bd. at 18, *United States v. Exxon Mobil Oil Corp.*, Case No. 2:17-mc-00066-CBM-PJWx, ECF No. 19. ExxonMobil’s acknowledgement contradicts its argument that the scope of the Board’s investigatory authority is determined solely by Paragraph (i) of section 112(r)(6)(C), which explicitly conveys that authority, and not at all by Paragraph (ii).

plants and the surrounding communities, and they are the people who will be most harmed by restricting the Board's ability to investigate.

## **II. THE BOARD'S THOROUGH INVESTIGATION AND RESULTING RECOMMENDATIONS WILL MAKE SURROUNDING COMMUNITIES AND CALIFORNIA SAFER**

The Board's investigations and recommendations help make California safer. Preventing and mitigating chemical accidents is a shared responsibility of federal, State, and local agencies, as reflected in the Board's obligation to recommend measures that state and local agencies can take to reduce the likelihood or consequences of chemical accidents. 42 U.S.C. § 7412 (r)(6)(C)(ii). In California, the Board has investigated five chemical accidents over the past two decades.<sup>4</sup> Four of these investigations involved accidental releases at refineries.<sup>5</sup> The Board's

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<sup>4</sup> U.S. Chemical Safety & Hazard Investigation Board, *Tosco Avon Refinery Petroleum Naphtha Fire Investigation Report*, Report No. 99-014-I-CA (Mar. 21, 2001); U.S. Chemical Safety & Hazard Investigation Board, *Sterigenics Investigation Report*, Report No. 2004-11-I-CA (Mar. 28, 2006); U.S. Chemical Safety & Hazard Investigation Board, *Chevron Richmond Refinery Fire Investigation Report*, Report No. 2012-03-I-CA (Jan. 28, 2015); U.S. Chemical Safety & Hazard Investigation Board, *Tesoro Martinez Refinery Process Safety Culture Case Study*, Report No. 2014-020-I-CA (Aug. 2, 2016); U.S. Chemical Safety & Hazard Investigation Board, *ExxonMobil Torrance Refinery Electrostatic Precipitator Explosion Investigation Report*, Report No. 2015-02-I-CA (Feb. 8, 2015). See also U.S. Chemical Safety & Hazard Investigation Board, *Completed Investigations*, <https://www.csb.gov/investigations/completed-investigations/> (last visited Oct. 8, 2018).

<sup>5</sup> See *id.*

recommendations in these investigations have proven critical to the development of California's regulatory programs relating to refineries.

For example, the Board made significant recommendations following its investigation of the August 2012 fire at the Chevron refinery in Richmond, California.<sup>6</sup> Contra Costa County incorporated some of those recommendations into its chemical safety ordinance.<sup>7</sup> Likewise, a statewide refinery task force incorporated Board recommendations into its proposed modifications of State regulations.<sup>8</sup> Ultimately, as a result of the Board's Chevron refinery investigation, California's Accidental Release Prevention Program utilized recommendations

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<sup>6</sup> U.S. Chemical Safety & Hazard Investigation Board, *Chevron Richmond Refinery Fire Investigation Report*, Report No. 2012-03-I-CA (Jan. 28, 2015); *see also* Vanessa Allen Sutherland, U.S. Chemical Safety & Hazard Investigation Board, *Comment on Docket No. EPA-HQ-OEM-2015-0725, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Action, Section 112(r)(7)*, at 5 (May 10, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0428>

<sup>7</sup> U.S. Chemical Safety & Hazard Investigation Board, Recommendations Status Change Summary, Chevron Refinery Fire, Recommendation No. 2012-3-I-CA-R07 (May 11, 2018), [https://www.csb.gov/assets/recommendation/status\\_change\\_summary\\_contra\\_costa\\_county\\_\(chevron\\_r07\)\\_c-aaa.pdf](https://www.csb.gov/assets/recommendation/status_change_summary_contra_costa_county_(chevron_r07)_c-aaa.pdf).

<sup>8</sup> Interagency Working Group on Refinery Safety, *Improving Public and Worker Safety*, at 14 (February 2014), <https://calepa.ca.gov/wp-content/uploads/sites/6/2016/10/Publications-Reports-2014yr-RefineryRpt.pdf>

from the Board when it adopted extensive process safety management regulations specifically applicable to refineries in 2017.<sup>9</sup>

In addition, as Congress intended, the Board's safety recommendations may be relevant to other regulatory agencies, such as those that regulate air emissions or enforce worker safety standards, as well as industry organizations and labor groups.<sup>10</sup> As an independent agency with expertise in investigating and preventing chemical accidents, the Board is uniquely positioned to investigate the refinery explosion and evaluate the adequacy of existing regulations, whether it be regulations relating to air emissions, emergency preparedness, risk management, or worker safety.<sup>11</sup> The Board's complete investigation of the Torrance Refinery

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<sup>9</sup> The Board considers its recommendations relating to the Chevron refinery fire as "closed" with "acceptable" action having been taken by California regulatory agencies. *E.g.*, U.S. Chemical Safety & Hazard Investigation Board, Recommendations Status Change Summary, Recommendation Number 2012-3-I-CA-R09 (May 30, 2018), [https://www.csb.gov/assets/recommendation/status\\_change\\_summary\\_ca\\_\(chevron\\_r9\)\\_c-aa.pdf](https://www.csb.gov/assets/recommendation/status_change_summary_ca_(chevron_r9)_c-aa.pdf); *see also* Cal. Code Regs. tit. 19, article 6.5. California's Accidental Release Prevention Program has delegated authority from the U.S. Environmental Protection Agency (U.S. EPA) for prevention of accidental releases pursuant to section 112(r) of the Clean Air Act. Cal. Health & Saf. Code § 25531.

<sup>10</sup> U.S. Chemical Safety & Hazard Investigation Board, *About the CSB*, <https://www.csb.gov/about-the-csb/> (last visited Oct. 8, 2018).

<sup>11</sup> The Board's website asserts that "Congress designed [the Board] to be non-regulatory and independent of other agencies so that its investigations might, where appropriate, review the effectiveness of regulations and regulatory enforcement." U.S. Chemical Safety & Hazard Investigation Board, *Mission*, <https://www.csb.gov/about-the-csb/mission/> (last visited Oct. 8, 2018).

explosion, and a resulting complete set of safety recommendations, will provide regulators and the public alike with essential information about improvements necessary to adequately protect workers and the nearby communities from another explosion.<sup>12</sup>

### **III. THE COMMUNITIES SURROUNDING THE TORRANCE REFINERY ARE ENTITLED TO DISCLOSURE OF A COMPLETE INVESTIGATION REPORT.**

Risk disclosure, as well as risk reduction, is a fundamental purpose of section 112(r) of the Clean Air Act Amendments of 1990. Thus, in addition to its obligation to investigate and recommend safety measures, the Board has an independent obligation to report to the public. Section 112(r)(6)(C)(i) requires the Board to “report to the public in writing the facts, conditions, and circumstances and the cause or probable cause” of each accidental release it investigates. 42 U.S.C. § 7412(r)(6)(C)(i). In this case, the communities adjacent to the Torrance Refinery are entitled to information about the explosion, the potential

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<sup>12</sup> U.S. EPA has also adopted recommendations from many of the Board’s investigation reports into the 2016 amendments to its chemical accident prevention regulations. U.S. EPA, *Response to Comments on the 2016 Proposed Rule Amending EPA’s Risk Management Program Regulations* (March 14, 2016; 81 FR 13637), Docket No. EPA-HQ-OEM-2015-0725 (Dec. 19, 2016), at 21, <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0729>. U.S. EPA noted that section 112(r) provides for U.S. EPA to adopt the Board’s chemical accident prevention and mitigation recommendations. *Id*



consequences of that or a future explosion, and potential additional safety measures that can be taken to prevent another explosion.

Congress first established the public's right to know about nearby chemical hazards in the 1986 Emergency Planning & Community Right-to-Know Act (EPCRA). 42 U.S.C. §11001. The Clean Air Act Amendments of 1990 section 112(r) provisions that created the Board are an extension of EPCRA and likewise have disclosure as a fundamental purpose.<sup>13</sup>

Disclosure of a complete investigation report and a full set of recommendations would also promote public safety by causing the operators of the Torrance Refinery and other refineries to consider additional safety measures. It is widely recognized by both regulators and academics that disclosure of environmental hazards leads to safer operations. Professor Karkkainen describes the disclosure of information regarding hazards as a form of "informal regulation," leading environmental managers to manage more safely.<sup>14</sup>

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<sup>13</sup> Senator Lautenberg, one of the sponsors of the chemical accident prevention measures, noted the connection, stating, "[i]n another important step, the amendments build on the Emergency Planning and Community Right-To-Know Program enacted in 1986 by establishing a program to reduce the threat of chemical accidents." 136 Cong. Rec. S3748-01, S3776 (1990), 1990 WL 46582 (stating); *see also* Van R. Delhotal, *The General Duty to Prevent Accidental Releases of Extremely Hazardous Substances: The General Duty Clause of Section 112(r) of the Clean Air Act*, 13 J. Energy Nat. Resources & Envtl. L. 61, 77 (1993).

<sup>14</sup> Bradley Karkkainen, *Information As Environmental Regulation: TRI and Performance Benchmarking, Precursor to A New Paradigm?*, 89 Geo. L.J. 257,

In the wake of the Torrance Refinery explosion, it is essential for the Board to provide the communities neighboring the facility with information about the risks of refinery explosions and the adequacy of the facility's safety measures. Both open government and environmental justice considerations are furthered by "enhancing the people's right to know about the potentially hazardous environmental exposures in their own backyards."<sup>15</sup>

Further, the inequitable distribution of environmental hazards is well documented.<sup>16</sup> Facilities emitting air pollutants are disproportionately located in low-income communities and communities of color.<sup>17</sup> Refineries in California are no exception to this trend.<sup>18</sup> In this case, the Torrance Refinery is located adjacent

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316-323 (2001). *See also* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613, 619 (1999).

<sup>15</sup> Danielle M. Purifoy, *EPCRA: A Retrospective on the Environmental Right-to-Know Act*, 13 Yale J. Health Pol'y, L. & Ethics 375, 379 (2013).

<sup>16</sup> Center for Effective Government, *Living in the Shadow of Danger, Poverty, Race, and Unequal Chemical Facility Hazards* (2016), <https://www.foreffectivegov.org/shadow-of-danger> (last visited Oct. 5, 2018); Jean D. Brender, et al., *Residential Proximity to Environmental Hazards and Adverse Health Outcomes*, 101 Am. J. Pub. Health S1, S37-S52 (2011).

<sup>17</sup> P. Mohai, et al., *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial Facilities: Evidence From the Americans' Changing Lives Study*, 99 Am. J. Pub. Health S3, S649-S656 (2009); I. Mikati, et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health, No. 4, 480-485 (April 2018).

<sup>18</sup> Seventy-five percent of California's refineries are located in or near environmental justice communities. Office of Environmental Health Hazard Assessment, *Tracking and Evaluation of Benefits and Impacts of Greenhouse Gas Limits in Disadvantaged Communities: Initial Report 9*, 57 (February 2017),

to low-income communities and communities of color that are overburdened by pollution.<sup>19</sup> The potential impact of refinery explosions on low-income communities and communities of color heightens the need for a thorough investigation into the Torrance Refinery explosion.<sup>20</sup>

With information about potential risks and available safety measures, workers, neighboring communities, and the public in general would be empowered to effectively participate in the public review and decision-making processes that affect their neighborhoods and their health.

## CONCLUSION

The Board's charge is to ensure that when chemical accidents occur, regulators, industry, and the public learn everything possible from them. The

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<https://oehha.ca.gov/media/downloads/environmental-justice/report/oehhaab32report020217.pdf>.

<sup>19</sup> The neighborhood adjacent to the Torrance Refinery is more burdened and more vulnerable to pollution than 95% of the State according to the California Office of Environmental Health Hazard Assessment's environmental justice screening tool, CalEnviroScreen. CalEnviroScreen is a tool that uses environmental, health, and socioeconomic information to rank every census tract in the State. CalEnviroScreen 3.0 (updated June 2018), <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>; see also Office of Environmental Health Hazard Assessment, *CalEnviroScreen 3.0 Report* (January 2017), <https://oehha.ca.gov/media/downloads/calenviroscreen/report/ces3report.pdf>.

<sup>20</sup> Executive Order 12898 requires the Board, like all federal agencies, to "promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations." 59 Fed. Reg. 7629 (Feb. 11, 1994).

Board must be able to conduct a complete investigation of the Torrance Refinery explosion to ensure adequate safety measures are identified and implemented. We urge this Court to direct the district court to enforce the subpoenas as requested by the Board.

Respectfully submitted,

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Dated: October 8, 2018

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