# 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.*

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

**BRIEF FOR *AMICI CURIAE* STATES OF DELAWARE, OREGON, CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF DEFENDANTS-APPELLEES**

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## INTEREST OF AMICI CURIAE

Exxon Mobil Corporation ("Exxon") filed this federal court action, which was transferred to the U.S. District Court for the Southern District of New York, in an effort to halt pending investigations in Massachusetts and New York that were initiated by the Attorneys General of those States (the "AGs"). At the core of its allegations, Exxon contends that the Attorneys General cannot investigate potential violations of state law because doing so could "chill" Exxon's future statements about climate change.

The *amici* States have a compelling interest in upholding the traditional authority of their Attorneys General and securities regulators to investigate violations of state law. *Amici* share two specific interests affected by the outcome of this proceeding. First, the *amici* have a substantial and compelling interest in maintaining their ability to investigate fraud and to protect citizens from fraud. Second, the *amici* have an interest in explaining why misleading and deceptive statements, if immunized by Exxon's overbroad reading of the First Amendment, will detrimentally affect investors, consumers, and the financial markets.

State Attorneys General and regulators have taken a wide variety of approaches in setting investigative priorities and choosing how to exercise their statutory authority. But *amici* are united in our conclusion that the AGs'

investigations did not violate the First Amendment and that the district court correctly dismissed this lawsuit.

## ARGUMENT

### I. The States Play a Vital Role In Uncovering Fraud and Regulating the Financial Markets.

States share the fundamental responsibility of protecting the public from fraud. To that end, state legislatures have enacted statutory schemes to protect the public from fraudulent activities, including securities and consumer fraud. States routinely investigate citizen complaints regarding consumer and securities law violations involving deceptive and misleading representations, and also initiate investigations absent a complaint when regulators suspect ongoing or potential fraud. Through this lawsuit, Exxon seeks to abrogate the ability of States to effectively investigate fraud by permitting the targets of fraud investigations to advance implausible claims of viewpoint discrimination in response to investigative subpoenas.[1] That position, however, is unsupported by First Amendment law and would severely interfere with the States' longstanding investigatory and regulatory roles to protect citizens from fraud.

[1] Exxon itself has acknowledged that false statements 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 [the AGs] are investigating. . . . [Exxon]: I agree that … they can conduct an investigation into fraud. No one is disputing the ability to conduct an investigation into fraud").

### A. States Play an Essential Law Enforcement Role by Using Subpoenas and CIDs to Investigate Violations of State Consumer and Investor-Protection Laws.

Attorneys General are the chief law enforcement officers of their States and as such are "permitted broad authority to conduct investigations, based on the complaint of others or on [their] own information, with respect to fraudulent or illegal business practices." *Matter of Schneiderman v. Rillen*, 33 Misc. 3d 788, 789, 930 N.Y.S.2d 855 (Sup. Ct. 2011). Unlike the judiciary, which "is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation," administrative agencies charged with enforcing the law have "a power of inquisition." *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950). That power "does not depend on a case or controversy" but instead can be employed based "merely on a suspicion that the law is being violated, or even just because [the agency] wants assurance that it is not." *Id.*

Most States empower their Attorneys General to enforce state consumer protection laws prohibiting various forms of false, misleading, or unfair business practices. *State Attorneys General: Powers and Responsibilities* 234 (Emily Myers ed., 3d ed. 2013) (hereinafter "*Attorneys General*"); *see also* Del. Code tit. 6 § 2522; Mass. Gen. Laws ch. 93A § 4; N.Y. Exec. Law § 63(12); Or. Rev. Stat. § 646.632. State securities regulators have similarly broad authority to investigate securities fraud pursuant to state securities statutes, many of which are based upon

a version of the Uniform Securities Act.[2] The Uniform Securities Act of 1956 explicitly grants securities regulators the authority to "make such public or private investigations within or outside of this state as [they] deem[] necessary to determine whether any person has violated or is about to violate any provision of this act or any rule or order hereunder, or to aid in the enforcement of this act or in the prescribing of rules and forms hereunder. . . ." Uniform Securities Act § 407(a) (1956).[3]

States vest their Attorneys General with broad discretion and a wide array of investigatory and enforcement tools to effectively pursue their law enforcement responsibilities. Almost all States empower their Attorneys General to investigate potential state-law violations using civil investigative demands ("CIDs")[4] or other administrative subpoenas. *See Attorneys General*, *supra*, at 232–33. Those tools allow Attorneys General to "examine the available evidence, determine whether a violation has occurred and evaluate the strengths of the case, before taking any formal court action." *Id*. The States' subpoena power is typically statutorily

[2] At least 41 States have based their securities laws on a version of the Uniform Securities Act. 12A JOSEPH C. LONG, BLUE SKY LAW § 12:1 (2014).

[3] Many of the States that have not adopted a version of the Uniform Securities Act have statutes that grant securities regulators broad investigative authority. *See, e.g.*, Cal. Corp. Code § 25531; 815 Ill. Comp. Stat. 5/11; N.Y. Gen. Bus. Law § 352; Ohio Rev. Code Ann. § 1707.23.

[4] Some States do not grant CID power to their Attorneys General. *See Attorneys General*, *supra*, at 233.

granted through state consumer protection and deceptive trade practices acts. *See, e.g.*, Del. Code tit. 6 § 2514; Mass. Gen. Laws ch. 93A § 6; N.Y. Exec. Law § 63(8), (12); Or. Rev. Stat. § 646.618. Similarly, state securities regulators have the power to issue investigative subpoenas. *See* Uniform Securities Act § 407(b) (1956); Uniform Securities Act § 602(a), (b) (2002).

States have used their subpoena power to uncover a wide array of fraudulent, misleading, or deceptive practices. For instance, Texas's Attorney General secured a default judgment against NorVergence (a New Jersey-based telecommunications company) for violations of state consumer protection laws, after receiving information from CIDs issued to out-of-state financial firms.[5] Similarly, Michigan's Attorney General subpoenaed information from Toyota Motor Sales USA, a California company, to investigate whether it misled consumers about vehicle safety issues from unintended acceleration.[6] That investigation resulted in a multi-million dollar settlement and restitution to vehicle owners.[7]

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[5] *See* Tex. Att'y Gen., Major Lawsuits and Settlements: NorVergence, *available at* https://www2.texasattorneygeneral.gov/cpd/norvergence.

[6] Mich. Att'y Gen., Press Release, *Cox Demands Vehicle Data from Toyota* (Mar. 24, 2010); *see also* Mich. Att'y Gen., Press Release, *Schuette Announces Settlement with Toyota Over Sudden Unintended Acceleration Recalls* (Feb. 24, 2013).

[7] *See* Wash. Att'y Gen., Press Release, *Multistate Settlement Puts the Brakes on Toyota* (Feb. 14, 2013), *available at*

Nor is it unusual for States to collaborate in their investigations, as New York and Massachusetts have done here. Multistate investigations have produced beneficial results for victims affected by a wide variety of unlawful activity, such as securities fraud,[8] data breaches, predatory mortgage lending, and unlawful and deceptive marketing.[9] In 2016, for example, a coalition of six states investigated

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https://www.atg.wa.gov/news/news-releases/multistate-settlement-puts-brakes-toyota.

[8] Securities regulators' ability to collaborate has amplified the ability to protect investors, as in the following multistate investigations: (i) LPL Financial LLC agreed in May 2018 to pay the states and U.S. territories $26 million to settle a claim involving the sale of unregistered securities; (ii) Morgan Keegan and Morgan Asset Management settled securities law violations uncovered by a joint task force, including state and federal entities, for $200 million in June 2011; (iii) in April 2012 Bankers Life and Casualty Company agreed to pay $9.9 million to end an investigation into their affiliation with UVEST Financial Inc. *See* Press Release, North American Securities Administrators Association, *State Securities Regulators Announce $26 Million Settlement with LPL Financial LLC Involving Sales of Unregistered, Non-exempt Securities* (May 2, 2018), *available at* http://www.nasaa.org/44990/state-securities-regulators-announce-26-million-settlement-with-lpl-financial-llc-involving-sales-of-unregistered-non-exempt-securities/; Carlie Kollath Wells, *Morgan Keegan Settles Investigation for $200M*, DAILY JOURNAL (Jun 22, 2011), *available at* http://www.djournal.com/news/business/morgan-keegan-settles-investigation-for-m/article_69f9b2eb-4d43-5f1e-b6c3-7c2cc102ff88.html; Press Release, North American Securities Administrators Association, *State Securities Regulators Announce Settlement with Bankers Life and Casualty Company* (Apr. 4, 2012), *available at* http://www.nasaa.org/11996/state-securities-regulators-announce-settlement-with-bankers-life-and-casualty-company/.

[9] *See* D.C. Att'y Gen., Press Release, *Attorney General Racine Announces $5.5 Million Multistate Settlement with Nationwide Insurance over Data Breach* (August 9, 2017), *available at* https://oag.dc.gov/release/attorney-general-racine-announces-55-million; Tex. Att'y Gen., Press Release, *Attorney*

Volkswagen for falsely marketing and advertising that their vehicles were environmentally friendly when the vehicles, in fact, emitted harmful oxides of nitrogen at rates many times higher than permitted by law. That investigation led to a settlement involving 38 states that required Volkswagen to pay $570 million and compensate victims affected by Volkswagen's fraud.[10] More recently, 41 Attorneys General joined forces to investigate five major pharmaceutical manufacturers for possible unlawful marketing or distribution of opioids.[11] These types of multistate investigations are vital for States to effectively investigate fraudulent and deceptive conduct that crosses state lines.

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*General Abbott Reaches $21 Million Settlement Benefitting Victims of Predatory Mortgage Lending* (July 12, 2007), *available at* https://www2.texasattorneygeneral.gov/oagnews/release.php?id=2093; Tex. Att'y Gen., Press Release, *Attorney General Abbott Halts Unlawful Marketing of Pain Killer* (May 10, 2007), *available at* https://www2.texasattorneygeneral.gov/oagnews/release.php?id=2003; Ill. Att'y Gen., Press Release, *Madigan Announces Settlements with For-Profit Education Management Corporation* (Nov. 16, 2015), *available at http://www.illinoisattorneygeneral.gov/pressroom/2015_11/20151116.html*.

[10] *See* Or. Att'y Gen., Press Release, *Governor Kate Brown and Attorney General Rosenblum Announce Settlements with Volkswagen over Emissions Fraud; Includes $85 Million for Oregon* (June 28, 2016), available at https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1186.

[11] *See* Cal. Att'y Gen., Press Release, *Attorney General Becerra Calls For Answers from Opioid Manufacturers and Distributors* (Sept. 19, 2017), *available at https://oag.ca.gov/news/press-releases/attorney-general-becerra-calls-answers-opioid-manufacturers-and-distributors%C2%A0%C2%A0*.

State laws also generally place limits on the authority of state Attorneys General to use CIDs and other administrative subpoenas in pursuit of their investigations. Statutes in some States limit requests to documents that are relevant to the inquiry, and may require the Attorney General to provide notice and protect the confidentiality of subpoenaed information.[12] State courts also play a role in ensuring that CIDs and subpoenas comply with those legal requirements. For example, recipients can generally challenge a CID and administrative subpoena.[13] Moreover, in some States—including New York and Massachusetts—CIDs are not self-executing.[14] As a result, those Attorneys General cannot penalize or sanction noncompliance absent a court order.

Recipients routinely raise objections to CIDs and other administrative subpoenas in state courts, and those courts are fully capable of protecting objectors' state and federal rights. State courts have ably resolved objections based on federal constitutional grounds, including assertions that a CID infringed on

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[12] *See, e.g.*, Mass. Gen. Laws ch. 93A, § 6; N.M. Stat. Ann. § 57-12-12; Or. Rev. Stat. § 646.618(1); Wash. Rev. Code §§ 19.86.080, 19.86.100.

[13] *See, e.g.*, Mass. Gen. Laws ch. 93A, § 6(7); Mass. R. Civ. P. 26(c); N.M. Stat. Ann. § 57-12-12(G); Or. Rev. Stat. § 646.618(2); Wash. Rev. Code §§ 19.86.080, 19.86.110; *see also* N.Y. C.P.L.R. 2304.

[14] *See, e.g.*, Cal. Gov't Code §§ 11186–11188; Mass. Gen. Laws ch. 93A, § 7; N.Y. C.P.L.R. 2308; Or. Rev. Stat. § 646.626(1); Wash. Rev. Code §§ 19.86.080, 19.86.110.

speech protected by the First Amendment or constituted an unreasonable search under the Fourth Amendment.[15] Additionally, state courts may review whether a CID is authorized by state law, directed at relevant information, and proper in scope and burden.[16] Indeed, Exxon availed itself of those state court protections here when it challenged—unsuccessfully—the Massachusetts Attorney General's CID on the same constitutional grounds asserted in this federal action. *See In re Civil Investigative Demand No. 2016-EPD-36*, No. SUCV20161888F, 2017 WL 627305 (Mass. Super. Jan. 11, 2017); *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 327, 94 N.E.3d 786 (2018) (denying Exxon's appeal).

### B. States Also Play an Important Role in Regulating the Financial Markets.

Along with investigative authority, state securities regulators have authority to regulate state registration and examination requirements for investment advisers and broker-dealers. States have the authority to register and regulate investment advisers and their representatives with less than $100,000,000 in assets under

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[15] *See, e.g.*, *Lubin v. Agora, Inc.*, 882 A.2d 833, 842–49 (Md. 2005) (First Amendment); *Scott v. Ass'n for Childbirth at Home*, 430 N.E.2d 1012, 1019–23 (Ill. 1981) (First and Fourth Amendments); *Matter of Hirschorn v. Attorney-General of the State of N.Y.*, 402 N.Y.S.2d 520, 521–22 (N.Y. Sup. Ct.), *aff'd*, 404 N.Y.S.2d 932 (N.Y. App. Div. 1978) (First Amendment).

[16] *See, e.g.*, *Lynch v. Conley*, 853 A.2d 1212, 1214–16 (R.I. 2004); *Matter of Abrams v. Thruway Food Mkt. & Shopping Ctr., Inc.*, 147 A.D.2d 143, 144–45, 147 (2d Dep't 1989).

management. *See* 17 C.F.R. § 275.203A-1(a). States also have the authority to license broker-dealer agents, with limited exceptions,[17] and to regulate broker-dealers and their agents so long as their regulations with respect to net capital, custody, margin, financial responsibility, records, bonding, and reporting requirements are consistent with federal law. *See* 15 U.S.C. § 78o(i)(1).[18]

In ensuring that state registrants follow state law, the Uniform Securities Act of 1956 permits state regulators to "at any time or from time to time" subject state registered broker-dealers and investment advisers "to such reasonable periodic, special, or other examinations by representatives of the [Administrator], within or without this state, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors . . . ." Uniform Securities Act § 203(e) (1956). Securities regulators maintain broad power to conduct examinations and inspect books and records to effectively regulate investment advisors and broker-dealers. *See, e.g.*, *SEC v. Olsen*, 354 F.2d 166, 170 (2nd Cir.

[17] There is a de minimis exception to broker-dealer agent registration prohibiting States from registering agents that meet certain requirements. 15 U.S.C. § 78o(i)(1).

[18] As the district court correctly concluded, federal regulations do not preempt a state issued subpoena or civil investigative demand. Federal securities laws explicitly say that states should retain their "jurisdiction under the laws of such state to investigate and bring enforcement actions." 15 U.S.C. § 78bb(f)(4); *see also FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (enforcement of a subpoena or a civil investigative demand is preempted only when there is a "patent lack of jurisdiction").

1965) ("[T]he legislative history of the 1960 amendment to the Investment Advisers Act which gave the Commission power to require that records be kept and made available for inspection indicates Congress felt it was necessary for effective regulation in this field."). State regulators use those examinations to deter and stop fraud.

Courts have long recognized that state securities laws, as remedial statutes, should be liberally construed to protect investors. As the Supreme Court has described, securities laws are remedial legislation that "should be construed broadly to effectuate [their] purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). State courts share the same view. *See, e.g.*, *King v. Pope*, 91 S.W.3d 314, 323-24 (Tenn. 2002) ("[S]ecurities laws are remedial in character, designed to prevent frauds and impositions upon the public, and consequently should be liberally construed to effectuate the purpose of the acts.") (quotation marks omitted); *Carrington v. Arizona Corp. Comm'n*, 18 P.3d 97, 99 (Ariz. Ct. App. 2000) ("[C]ourts give the Commission 'wide berth' when they review the validity of Commission investigations.").

Regulators must be able to investigate entities that are suspected of obtaining investment through misrepresentations to ensure the public's ability to rely on the representations of public securities filings, and thereby permit the public to receive the full benefits of an open and honest market. This statement is true regardless of

whether those misrepresentations involve issues of public concern or are subject to partisan debate. Otherwise, fraudulent practices in the context of securities offerings will proliferate, causing harm to investors and a general loss of trust in the financial markets.

Through this lawsuit, Exxon is also attempting to prevent state securities regulators from investigating whether Exxon committed securities fraud. A ruling that shields subjects from bona fide fraud investigations would carry broad and undesirable consequences. It would provide a tool for parties seeking to hinder, delay or avoid securities regulators' fraud investigations through the issuance of a subpoena, as well as their ability to conduct examinations and regulate the registration of securities and investment professionals. It could spur securities professionals who are under investigation, or securities issuers that are the target of an investigation, to run into court to attempt to evade duly authorized state subpoenas by raising First Amendment challenges premised on purported political motivations. State securities regulators would have to defend the First Amendment challenges in court, thereby delaying their attempt to uncover and remedy securities fraud and otherwise regulate securities and investment professionals. And targets of statutorily-mandated investment adviser and broker-dealer examinations, and persons seeking to avoid state registration requirements for

securities industry professionals, could likewise seek to use the First Amendment as a means of obstructing States' efforts to protect investors.

## II. The First Amendment Does Not Preclude States from Conducting Proper Anti-Fraud Investigation and Securities Regulation.

The trial court properly dismissed Exxon's First Amendment claims, determining that "Exxon's allegations fall well short of plausibly alleging that [the AGs] are motivated by an improper purpose." *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 712 (S.D.N.Y. 2018). Although Exxon insists that the district court's opinion would, if upheld, "limit the expressive options for dissenters across the political spectrum," Exxon Brief p. 26, the practical effect of that decision will to be properly prevent entities from evading state fraud investigations merely by raising implausible allegations of viewpoint discrimination.

It is axiomatic that the First Amendment does not give any company *carte blanche* to deceive or mislead investors or consumers. As the Supreme Court has explained, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Rather, "[w]here false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 723 (2012); *see also Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S.

600 (2003) (holding that the First Amendment does not bar fraud actions asserted under state law where the claims are based on allegations of false and misleading representations); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) ("[F]or commercial speech to receive [constitutional] protection, it at least must concern lawful activity and not be misleading.") (quotation marks omitted); *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than inform it[.]"); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (the "intentional lie" is "no essential part of any exposition of ideas") (quotations omitted).

The First Amendment also does not bar States from conducting proper investigations to uncover fraud. Although States cannot "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (citation omitted), that restriction does not prevent States from enforcing laws against fraudulent speech, as "[l]aws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech," *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 233 F.3d 981, 992 (7th

Cir. 2000); *see also SEC v. Pirate Investor LLC*, 580 F.3d 233, 255 (4th Cir. 2009) ("Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment"). "So long as the emphasis" of an action for fraud is on what was "misleadingly convey[ed] . . . such actions need not impermissibly chill protected speech." *Illinois ex rel. Lisa Madigan*, 538 U.S. at 619.[19] Thus, "[j]ust as government may seek to inform the public and prevent fraud . . . so it may vigorously enforce antifraud laws to prohibit [entities] from obtaining money on false pretenses or by making false statements." *Id*. at 623–24 (quotation marks omitted).

Moreover, the Supreme Court has recognized that an entity's fraudulent statements do not receive First Amendment protection merely because "many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety." *Central Hudson*, 447 U.S. at

[19] State securities and consumer protection laws prohibiting false and misleading statements in connection with the offer and sale of securities reflect those constitutional principles. *See, e.g.*, Del. Securities Act § 73-201(b) ("It is unlawful for any person, in connection with the offer, sale or purchase of securities … [t]o make any untrue statement of 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 are made, not misleading"); N.Y. Gen. Bus. Law Art. 23-A (granting the Attorney General the power to investigate those employing or seeking to employ "any deception, misrepresentation, concealment, suppression, fraud, false pretense, or false promise" relating to "the purchase, exchange, investment advice, or sale of securities or commodities"); Mass. Gen. Laws ch. 93A § 2 (prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce").

562–63 n.5; *accord Bolger*, 463 U.S. at 67–68 (mailings held to constitute commercial speech "notwithstanding the fact that they contain discussions of important public issues"). In fact, fraudulently deceptive and misleading statements about an entity's own products, projections, or research are readily avoidable because the entity "knows more . . . than anyone else" about its products and internal practices, and, as such, those statements should be "easily verifiable." *Virginia State Board of Pharmacy*, 425 U.S. at 772 n. 24; *see also Central Hudson*, 447 U.S. at 564 n.6 (noting that because corporate speakers "have extensive knowledge of both the market and their products," they are "well situated to evaluate the accuracy of their messages").

Furthermore, an entity cannot avoid complying with state fraud investigations merely because its securities filings reference a matter of public concern. *See, e.g.*, *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 46 (D.D.C. 2018) (denying motion to enjoin enforcement of a Congressional subpoena where injunction was sought on grounds that subpoena violated plaintiff's First Amendment rights; explaining that "[t]o hold otherwise would be to allow any entity that provides goods or services to a customer who engages in political activity to resist a subpoena on the ground that its client engages in political speech."). Nor can an entity immunize itself from fraud investigations simply by claiming viewpoint discrimination any time the suspected fraud touches on a

politically-charged topic or matter of ongoing debate. *See, e.g.*, *United States v. Alvarez*, 617 F.3d 1198, 1205 n.4 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012) ("[L]aws targeting false statements of fact . . . are unlikely to directly express or relate to identifiable viewpoint[.]"); *American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1222 (11th Cir. 2009) ("A preference in favor of factual accuracy is not unconstitutional viewpoint discrimination").

The reality is that most fraud lives in the shadows, hidden from government oversight. Although entities frequently make statements publicly, whether those statements are fraudulently false or misleading often depends—as in this case—on whether those statements comport with the entity's non-public, internal knowledge or practices. *See Illinois ex rel. Lisa Madigan*, 538 U.S. at 622–23 ("It is one thing to compel every fundraiser to disclose its fee arrangements . . . quite another to take fee arrangements into account in assessing whether particular affirmative representations designedly deceive the public."); *State v. Moody's Corp.*, 54 Conn. L. Rptr. 116, 2012 WL 2149408, at *9 (Conn. Super. Ct. May 10, 2012) (First Amendment "protection does not give the defendants license to misrepresent to consumers the manner in which they operate their business or arrive at their opinions").

Here, New York and Massachusetts issued subpoenas to investigate suspected fraud, concerned that Exxon's public statements did not match its

internal practices. Whether those suspicions ultimately are confirmed, neither Exxon nor any other entity should be permitted to drag a bona fide fraud investigation through the federal court system on the barest of allegations. Sanctioning that type of litigation would breed an entirely new and costly wave of defensive litigation by those seeking to delay or avoid state investigations. At the same time, it would needlessly stretch the time and resources of States that seek to engage in their traditional law enforcement functions—a role central to this country's divided sovereignty. *See Burt v. Titlow*, 571 U.S. 12, 19 (2013) (recognizing that dual sovereignty is "a foundational principle of our federal system"). *Amici* respectfully request that this court, as the district court did below, protect the States' investigatory and regulatory role.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Dated: October 12, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, this brief was served via CM/CMF on all registered counsel and transmitted to 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.

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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 4,205 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 Times New Roman) using Microsoft Word 2016 (the same program used to calculate the word count).

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