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February 1, 2016

Re: No. 15-20030; *Environment Texas Citizen Lobby et al. v. ExxonMobil Corp.*; In the Fifth Circuit Court of Appeals

By E-File

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Dear Mr. Cayce:

ExxonMobil respectfully responds to Plaintiffs-Appellants' Rule 28(j) letter concerning the decision on remand in *United States v. CITGO Petroleum Corp.*, 723 F.3d 547 (5th Cir. 2013).

CITGO is a Clean Water Act case in which the United States and Louisiana (not citizen plaintiffs) sued for penalties after two million gallons of oil flooded waterways near a refinery and 30 million gallons of oily wastewater were released. *Id*. at 549-50. Importantly, the district court "found that CITGO had decided to forgo certain maintenance projects that would have prevented the spill in an effort to minimize costs and increase profits." *Id*. at 552. That finding was compounded by a series of findings about the culpability of the defendant, *id*. at 553, which had operated the facility for years despite actual knowledge of the danger. *Id*. at 555. This Court held the district court erred by failing to estimate the economic benefit of avoiding expenditures "'necessary to correct the violation.'" *Id*. at 552.

This case could not be more different. The district court relied on *CITGO*, applying its methodology and finding no "economic benefit of noncompliance." Op. 63-66. First, the court found no credible evidence that the events in question could have been avoided by additional investments, Op. 59-60, 65, so there was no finding of any additional expenditures "necessary to correct the violation."

Second, the court found that – unlike in *CITGO* – ExxonMobil had acted in good faith and demonstrated impressive success in reducing emissions, Op. 58-61, including investing over $1 billion in recent years in environmental improvements and entering into an Agreed Order with TCEQ. Op. 15-19.

With their own evidence of "economic benefit" fully discredited, Op. 64-65, Plaintiffs-Appellants point to the value of environmental improvements negotiated with TCEQ in the Agreed Order. But TCEQ bargained for improvements instead of penalties; citizens cannot "seek the civil penalties that [TCEQ] chose to forgo" lest government regulators' ability to enforce the CAA be "curtailed considerably." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 61 (1987).

CITGO supports affirmance, not reversal, as we will explain in greater detail at oral argument.

Respectfully submitted,

/s/ *Russell S. Post*

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2016, I electronically transmitted this letter to the Clerk of the Court using the Court's ECF System. I further certify that counsel of record for Appellants are being served with a copy of this letter by electronic means via the Court's ECF system, as follows:

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