ADDENDUM

Petition for a Writ of Mandamus
In re MAURA T. HEALEY, Attorney General for the Commonwealth of Massachusetts, U.S. Court of Appeals for the Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts in her official capacity, Defendant.	§ § § § § § § § § §	Civil Action No. 4:16-CV-469-K

ORDER

Plaintiff Exxon Mobil Corporation's Motion for a Preliminary Injunction (Doc. No. 8) and Defendant Attorney General Healey's Motion to Dismiss (Doc. No. 41) are under advisement with the Court. Plaintiff Exxon Mobil Corporation ("Exxon") moves to enjoin Defendant Attorney General Maura Tracy Healey of Massachusetts from enforcing the civil investigative demand ("CID") the Commonwealth of Massachusetts issued to Exxon on April 19, 2016. The Attorney General claims that the CID was issued to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts. Exxon contends that the Attorney General issued the CID in an attempt to satisfy a political agenda. Compliance with the CID would require Exxon to disclose documents dating back to January 1, 1976 that relate to what Exxon possibly knew about climate change and global warming.

Additionally, Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint for (1) lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), (2) lack of subject matter jurisdiction under Rule 12(b)(1) under *Younger v. Harris*, 401 U.S. 37 (1971), (3) lack of subject matter jurisdiction under Rule 12(b)(1) because the dispute is not yet ripe, and (4) improper venue under Rule 12(b)(3). Before reaching a decision on either Plaintiff Exxon's Motion for a Preliminary Injunction or Defendant Attorney General Healey's Motion to Dismiss, the Court **ORDERS** that jurisdictional discovery be conducted.

I. Applicable Law

The Court has an obligation to examine its subject matter jurisdiction *sua sponte* at any time. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."). A district court has broad discretion in all discovery matters, including whether to permit jurisdictional discovery. *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982). "When subject matter jurisdiction is challenged, a court has authority to resolve factual disputes, and may devise a method to . . . make a determination as to jurisdiction, 'which may include considering affidavits, allowing further discovery, hearing oral testimony, or conducting an evidentiary hearing.'" *Hunter v. Branch Banking and Trust Co.*, No. 3:12-cv-2437-D, 2012 WL 5845426, at *1 (N.D. Tex. Nov. 19, 2012) (quoting *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir.

1994)). If subject matter jurisdiction turns on a disputed fact, parties can conduct jurisdictional discovery so that they can present their arguments and evidence to the Court. *In re Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 319 (5th Cir. 2012).

II. The Reason for Jurisdictional Discovery

One of the reasons Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint is for lack of subject matter jurisdiction under Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). The Court particularly wants to conduct jurisdictional discovery to determine if Plaintiff Exxon's Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because of the application of *Younger* abstention. *See Younger*, 401 U.S. at 43–45; *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008) (stating that although *Younger* abstention originally applied only to criminal prosecution, it also applies when certain civil proceedings are pending if important state interests are involved in the proceeding). The Supreme Court in *Younger* "espouse[d] a strong federal policy against federal court interference with pending state judicial proceedings." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

Jurisdictional discovery needs to be conducted to consider whether the current proceeding filed by Exxon in Massachusetts Superior Court challenging the CID warrants *Younger* abstention by this Court. If Defendant Attorney General Healey issued the CID in bad faith, then her bad faith precludes *Younger* abstention. *See Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984). Attorney General Healey's

actions leading up to the issuance of the CID causes the Court concern and presents the Court with the question of whether Attorney General Healey issued the CID with bias or prejudgment about what the investigation of Exxon would discover.

Prior to the issuance of the CID, Attorney General Healey and several other attorneys general participated in the AGs United for Clean Power Press Conference on March 29, 2016 in New York, New York. Notably, the morning before the AGs United for Clean Power Press Conference, Attorney General Healey and other attorneys general allegedly attended a closed door meeting. At the meeting, Attorney General Healey and the other attorneys general listened to presentations from a global warming activist and an environmental attorney that has a well-known global warming litigation practice. Both presenters allegedly discussed the importance of taking action in the fight against climate change and engaging in global warming litigation.

One of the presenters, Matthew Pawa of Pawa Law Group, P.C., has allegedly previously sued Exxon for being a cause of global warming. After the closed door meeting, Pawa emailed the New York Attorney General's office to ask how he should respond if asked by a Wall Street Journal reporter whether he attended the meeting with the attorneys general. The New York Attorney General's office responded by instructing Pawa "to not confirm that [he] attended or otherwise discuss" the meeting he had with the attorneys general the morning before the press conference.

During the hour long AGs United for Clean Power Press Conference, the attorneys general discussed ways to solve issues with legislation pertaining to climate

change. Attorney General Eric Schneiderman of New York and Attorney General Claude Walker of the United States Virgin Islands announced at the press conference that their offices were investigating Exxon for consumer and securities fraud relating to climate change as a way to solve the problem.

Defendant Attorney General Healey also spoke at the AGs United for Clean Power Press Conference. During Attorney General Healey's speech, she stated that "[f]ossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable." Attorney General Healey then went on to state that, "[t]hat's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public." The speech ended with Attorney General Healey reiterating the Commonwealth of Massachusetts's commitment to combating climate change and that the fight against climate change needs to be taken "[b]y quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long." Subsequently, on April 19, 2016, Attorney General Healey issued the CID to Exxon to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts.

The Court finds the allegations about Attorney General Healey and the anticipatory nature of Attorney General Healey's remarks about the outcome of the Exxon investigation to be concerning to this Court. The foregoing allegations about

Attorney General Healey, if true, may constitute bad faith in issuing the CID which would preclude *Younger* abstention. Attorney General Healey's comments and actions before she issued the CID require the Court to request further information so that it can make a more thoughtful determination about whether this lawsuit should be dismissed for lack of jurisdiction.

III. Conclusion

Accordingly, the Court **ORDERS** that jurisdictional discovery by both parties be permitted to aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds.

SO ORDERED.

Signed October 13th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:16-CV-469-K
	§	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	§	
	§	
Defendants.	§	

ORDER

On November 16, 2016, the Court conducted a telephone status conference with the parties. In order to expeditiously conduct the necessary discovery to inform the Court on issues relating to pending and anticipated motions related to jurisdictional matters, the Court orders that Attorney General Healey shall respond to written discovery ten (10) days from the date the discovery is served.

It is further ordered that Attorney General Healey shall appear for her deposition in Courtroom 1627 at 1100 Commerce Street, Dallas, Texas 75242 at 9:00 a.m. on Tuesday, December 13, 2016. Attorney General Schneiderman is also advised to be

available on December 13, 2016 in Dallas, Texas. The Court will enter an Order regarding Attorney General Schneiderman's deposition after he files his answer in this matter. The Court is mindful of the busy schedule of each of the Attorneys General Healey and Schneiderman and will be open to considering a different date for the deposition.

SO ORDERED.

Signed November 17th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

ADR

U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:16-cv-00469-K

Exxon Mobil Corporation v. Healey
Assigned to: Judge Ed Kinkeade
Related Case: 4:16-cv-00364-K
Cause: 42:1983 Civil Rights Act

Date Filed: 06/15/2016
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other Civil Rights
Jurisdiction: Federal Question

Plaintiff

Exxon Mobil Corporation

represented by **Ralph H Duggins**
Cantey Hanger LLP
Cantey Hanger Plaza
600 W 6th St Suite 300
Fort Worth, TX 76102
817/877-2800
Fax: 817/877-2807
Email: rduggins@canteyhanger.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Alix Dean Allison
Cantey Hanger LLP
600 West 6th Street
Suite 300
Fort Worth, TX 76102
817-877-2800
Email: aallison@canteyhanger.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Daniel E Bolia
Exxon Mobil Corporation
1301 Fannin St
Room 1546
Houston, TX 77002
832/648-5500
Fax: 832/625-0379
Email: daniel.e.bolia@exxonmobil.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Daniel Toal
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
212-373-3317
Fax: 212-757-3990
Email: DToal@paulweiss.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Justin Anderson
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, DC 20006
202-223-7300
Fax: 202-223-7420
Email: janderson@paulweiss.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Michele Hirshman
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
212-373-3000
Fax: 212-757-3990
Email: MHirshman@paulweiss.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Nina Cortell
Haynes & Boone LLP
2323 Victory Ave
Suite 700
Dallas, TX 75219
214/651-5579
Fax: 214/200-0411
Email: nina.cortell@haynesboone.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

ADDENDUM 010

Patrick Joseph Conlon
Exxon Mobil Corporation
1301 Fannin St
Suite 1539
Houston, TX 77002
832-624-6336
Fax: 262-313-2402
Email: patrick.j.conlon@exxonmobil.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Philip A Vickers
Cantey Hanger LLP
Cantey Hanger Plaza
600 West 6th St Suite 300
Fort Worth, TX 76102-3685
817/877-2849
Fax: 817/877-2807
Email: pvickers@canteyhanger.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Theodore V. Wells
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
212-373-3317
Fax: 212-757-3990
Email: twells@paulweiss.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

V.

Defendant

Maura Tracy Healey
In her official capacity as Attorney General of the State of Massachusetts

represented by

Douglas A Cawley
McKool Smith
300 Crescent Court
Suite 1500
Dallas, TX 75201
214/978-4972
Fax: 214/978-4044
Email: dcawley@mckoolsmith.com
LEAD ATTORNEY

ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Christophe Courchesne
Office of the Attorney General
One Ashburton Place
18th Floor
Boston, MA 02108
617-963-2423
Fax: 617-727-9665
Email: christophe.courchesne@state.ma.us
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

I Andrew Goldberg
Office of the Attorney General
One Ashburton Place
18th Floor
Boston, MA 02108
617-963-2429
Fax: 617-727-9665
Email: andy.goldberg@state.ma.us
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Melissa Ann Hoffer
Attorney General of Massachusetts
One Ashburton Place
19th Floor
Boston, MA 02108
617-963-2322
Fax: 617-727-9665
Email: melissa.hoffer@state.ma.us
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Peter Charles Mulcahy
Massachusetts Attorney General's Office
One Ashburton Place
18th Floor
Boston, MA 02108
617-963-2068
Fax: 617-727-9665
Email: peter.mulcahy@state.ma.us

ADDENDUM 012

PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Richard Alan Johnston
Massachusetts Attorney General's Office
1 Ashburton Place
20th Floor
Boston, MA 02108
617-963-2028
Email: Richard.Johnston@state.ma.us
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Richard Alan Kamprath
McKool Smith
300 Crescent Court
Suite 1500
Dallas, TX 75201
214/978-4210
Fax: 214/978-4044
Email: rkamprath@mckoolsmith.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Defendant

Eric Tradd Schneiderman
Attorney General of New York, in his official capacity

represented by **Peter D Marketos**
Reese Gordon Marketos, LLP
750 N. St. Paul Street
Suite 610
Dallas, TX 75201
214-382-9803
Fax: 214-501-0731
Email: pete.marketos@rgmfirm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Jeffrey M Tillotson
Lynn Tillotson Pinker & Cox LLP
2100 Ross Avenue, Suite 2700
Dallas, TX 75201
214/981-3800
Fax: 214/981-3839
Email: jtillotson@tillotsonlaw.com
ATTORNEY TO BE NOTICED

ADDENDUM 013

Bar Status: Admitted/In Good Standing

Roderick L Arz
Office of the Attorney General of the State of New York
120 Broadway
New York, TX 11231
212-416-8633
Fax: 212-416-6009
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

S Jason Brown
New York State Office of the Attorney General
120 Broadway
New York, NY 10271
212-416-8085
Fax: 212-416-8942
Email: jason.brown@ag.ny.gov
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Tyler J Bexley
Reese Gordon Marketos LLP
750 N. Saint Paul St.
Suite 610
Dallas, TX 75201
(214) 382-9810
Fax: (214) 501-0731
Email: tyler.bexley@rgmfirm.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

V.

Movant

Leonid Goldstein represented by **Leonid Goldstein**
12501 Tech Ridge Blvd
#1535
Austin, TX 78753
408-921-1110
Email: ah@defyccc.com
PRO SE

Amicus

ADDENDUM 014

State of Maryland
amici

represented by **Thiruvendran Vignarajah**
200 St Paul Place
19th Floor
Baltimore, MD 21202
410-576-6330
Email: tvignarajah@oag.state.md.us
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Amicus

State of New York

represented by **Judith Vale**
Office of the New York Attorney General
120 Broadway
New York, NY 10271
212-416-6274
Email: judith.vale@ag.ny.gov
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Amicus

Proposed Amici Curiae - TEXAS, LOUISIANA, SOUTH CAROLINA, ALABAMA, MICHIGAN, ARIZONA, WISCONSIN, NEBRASKA, OKLAHOMA, UTAH, AND NEVADA

represented by **Austin R Nimocks**
Office of the Texas Attorney General
General Litigation Division
PO Box 12548
Austin, TX 78711
512-936-1400
Fax: 512-370-9337
Email: austin.nimocks@texasattorneygeneral.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Amicus

Bharani Padmanabhan
MD, PhD
TERMINATED: 09/26/2016

represented by **Bharani Padmanabhan**
30 Gardner Road
#6A
Brookline, MA 02445
617-566-6047
PRO SE

V.

ADDENDUM 015

Mediator

ADR Provider represented by **James M Stanton**
Stanton LLP
9400 North Central Expressway
Suite 1304
Dallas, TX 75231
972-233-2300
Fax: 972-692-6812
Email: JMS@stantonllp.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Date Filed	#	Docket Text
06/15/2016	1	COMPLAINT against Maura Tracy Healey filed by Exxon Mobil Corporation. (Filing fee $400; receipt number 0539-7651816) Plaintiff will submit summons(es) for issuance. In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 Declaration(s) Justin Anderson, # 2 Exhibit(s) A-C, # 3 Exhibit(s) D-M, # 4 Exhibit(s) N-R, # 5 Exhibit(s) S-Z, # 6 Exhibit(s) AA-OO, # 7 Cover Sheet) (Duggins, Ralph) (Entered: 06/15/2016)
06/15/2016	2	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Exxon Mobil Corporation. (Duggins, Ralph) (Entered: 06/15/2016)
06/15/2016	3	NOTICE of Related Case filed by Exxon Mobil Corporation (Duggins, Ralph) (Entered: 06/15/2016)
06/15/2016	4	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Michele Hirshman (Filing fee $25; Receipt number 0539-7651942) filed by Exxon Mobil Corporation (Attachments: # 1 Certificate of Good Standing) (Duggins, Ralph) (Entered: 06/15/2016)
06/15/2016	5	New Case Notes: A filing fee has been paid. File to Judge McBryde. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge. Clerk to provide copy to plaintiff if not received electronically. (tln) (Entered: 06/15/2016)
06/15/2016	6	Standing ORDER Concerning Paper Filing in Cases Assigned to District Judge John McBryde...see order for specifics. (Ordered by Judge John McBryde on 6/15/2016) (tln) (Entered: 06/15/2016)

ADDENDUM 016

06/15/2016	7	Court Request for Recusal: Judge John McBryde recused. Pursuant to instruction in Special Order 3-249, the Clerk has reassigned the case to Senior Judge Terry R Means for all further proceedings. Future filings should indicate the case number as: 4:16-cv-00469-Y. (trt) (Entered: 06/15/2016)
06/15/2016	8	MOTION for Preliminary Injunction filed by Exxon Mobil Corporation. (tln) (Entered: 06/15/2016)
06/15/2016	9	Memorandum of Law in Support filed by Exxon Mobil Corporation re 8 MOTION for Preliminary Injunction. (tln) (Entered: 06/15/2016)
06/15/2016	10	Appendix in Support filed by Exxon Mobil Corporation re 8 MOTION for Preliminary Injunction. (Attachments: # 1 part 2, # 2 part 3, # 3 part 4, # 4 part 5, # 5 part 6, # 6 part 7, # 7 part 8) (tln) (Entered: 06/15/2016)
06/15/2016	11	Summons Issued as to Maura Tracy Healey. (tln) (Entered: 06/15/2016)
06/17/2016	12	NOTICE OF RECUSAL: Senior Judge Terry R Means recused. Case is assigned to the docket of Judge Reed C O'Connor. Future filings should indicate the case number as: 4:16-cv-469-O. (Ordered by Senior Judge Terry R Means on 6/17/2016) (tln) (Entered: 06/17/2016)
06/17/2016	13	Court Request for Recusal: Judge Reed C O'Connor recused. Pursuant to instruction in Special Order 3-249, the Clerk has reassigned the case to Judge Sidney A Fitzwater for all further proceedings. Future filings should indicate the case number as: 4:16-cv-364-D. (trt) (Entered: 06/17/2016)
06/17/2016	14	Court Request for Recusal: Judge Sidney A Fitzwater recused. Pursuant to instruction in Special Order 3-249, the Clerk has reassigned the case to Chief Judge Barbara M.G. Lynn for all further proceedings. Future filings should indicate the case number as: 4:16-cv-364-M. (trt) (Entered: 06/17/2016)
06/21/2016	15	ORDER REASSIGNING CASE. Case reassigned to Judge Ed Kinkeade for all further proceedings. All future pleadings shall subsequently be filed under case No. 4:16-CV-469-K. Chief Judge Barbara M.G. Lynn no longer assigned to case. (Ordered by Chief Judge Barbara M.G. Lynn on 6/21/2016) (trt) (Entered: 06/21/2016)
06/21/2016	16	SUMMONS Returned Executed as to Maura Tracy Healey; served on 6/16/2016. (tln) (Entered: 06/21/2016)
06/21/2016	17	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Patrick J. Conlon (Filing fee $25; Receipt number 0539-7670099) filed by Exxon Mobil Corporation (Attachments: # 1 Additional Page(s), # 2 Additional Page(s) Certificate of Good Standing, # 3 Proposed Order) (Allison, Alix) (Entered: 06/21/2016)
06/21/2016	18	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Justin Anderson (Filing fee $25; Receipt number 0539-7670153) filed by Exxon Mobil Corporation (Attachments: # 1 Additional Page(s) Certificate of Good Standing, # 2 Proposed Order) (Allison, Alix) (Entered: 06/21/2016)

ADDENDUM 017

06/21/2016	19	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Daniel J. Toal (Filing fee $25; Receipt number 0539-7670183) filed by Exxon Mobil Corporation (Attachments: # 1 Additional Page(s), # 2 Additional Page(s) Certificate of Good Standing, # 3 Proposed Order) (Allison, Alix) (Entered: 06/21/2016)
06/21/2016	20	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Theodore V. Wells, Jr. (Filing fee $25; Receipt number 0539-7670215) filed by Exxon Mobil Corporation (Attachments: # 1 Additional Page(s), # 2 Certificate of Good Standing, # 3 Proposed Order) (Allison, Alix) (Entered: 06/21/2016)
06/22/2016	21	Joint Motion for Extension of Time to File Answer *Motion for Preliminary Injunction, and to Set Briefing Schedule, and Leave for Defendant to Appear Without Local Counsel for Limited Purpose of Joining this Motion* filed by Exxon Mobil Corporation (Attachments: # 1 Proposed Order) (Cortell, Nina) (Entered: 06/22/2016)
06/22/2016	22	ELECTRONIC ORDER granting 17 Application for Admission Pro Hac Vice of Patrick J. Conlon. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 6/22/2016) (chmb) (Entered: 06/23/2016)
06/22/2016	23	ELECTRONIC ORDER granting 18 Application for Admission Pro Hac Vice of Justin Anderson. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 6/22/2016) (chmb) (Entered: 06/23/2016)
06/22/2016	24	ELECTRONIC ORDER granting 19 Application for Admission Pro Hac Vice of Daniel J. Toal. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 6/22/2016) (chmb) (Entered: 06/23/2016)
06/22/2016	25	ELECTRONIC ORDER granting 20 Application for Admission Pro Hac Vice of Theodore V. Wells, Jr.. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 6/22/2016) (chmb) (Entered: 06/23/2016)
06/22/2016	26	ELECTRONIC ORDER granting 4 Application for Admission Pro Hac Vice of Michele Hirshman. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 6/22/2016) (chmb) (Entered: 06/23/2016)
06/30/2016	27	ORDER re 21 Joint Motion for Enlargement of Time for Responses to Complaint and Motion for a Preliminary Injunction and to Set a Briefing Schedule, and Leave for Defendant to Appear Without Local Counsel for Limited Purpose of Joining this Motion. The Court GRANTS the parties' Joint Motion for Enlargement of Time for Responses to Complaint and Motion for a Preliminary Injunction and to Set a Briefing Schedule. The Court also GRANTS Defendant's Motion for Leave to Proceed Without Local Counsel for, and only for, the purpose of joining the Motion for Enlargement of Time for Responses to Complaint and Motion for a Preliminary Injunction and to Set a Briefing Schedule. (See Order for Specifics) (Ordered by Judge Ed Kinkeade on 6/30/2016) (tln) (Entered: 06/30/2016)

ADDENDUM 018

07/07/2016	28	NOTICE of Attorney Appearance by Douglas A Cawley on behalf of Maura Tracy Healey. (Filer confirms contact info in ECF is current.) (Cawley, Douglas) (Entered: 07/07/2016)
07/07/2016	29	NOTICE of Attorney Appearance by Richard Alan Kamprath on behalf of Maura Tracy Healey. (Filer confirms contact info in ECF is current.) (Kamprath, Richard) (Entered: 07/07/2016)
07/14/2016	30	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Christophe Courchesne (Filing fee $25; Receipt number 0539-7726358) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 07/14/2016)
07/14/2016	31	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney I. Andrew Goldberg (Filing fee $25; Receipt number 0539-7726460) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 07/14/2016)
07/14/2016	32	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Melissa A. Hoffer (Filing fee $25; Receipt number 0539-7726504) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 07/14/2016)
07/14/2016	33	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Richard A. Johnston (Filing fee $25; Receipt number 0539-7726535) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 07/14/2016)
07/14/2016	34	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Peter C. Mulcahy (Filing fee $25; Receipt number 0539-7726557) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 07/14/2016)
07/15/2016	35	ELECTRONIC ORDER granting 30 Application for Admission Pro Hac Vice of Christophe Courchesne. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 7/15/2016) (chmb) (Entered: 07/15/2016)
07/15/2016	36	ELECTRONIC ORDER granting 31 Application for Admission Pro Hac Vice of I. Andrew Goldberg. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 7/15/2016) (chmb) (Entered: 07/15/2016)
07/15/2016	37	ELECTRONIC ORDER granting 32 Application for Admission Pro Hac Vice of Melissa A. Hoffer. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 7/15/2016) (chmb) (Entered: 07/15/2016)
07/15/2016	38	ELECTRONIC ORDER granting 33 Application for Admission Pro Hac Vice of Richard A. Johnston. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 7/15/2016) (chmb) (Entered: 07/15/2016)
07/15/2016	39	ELECTRONIC ORDER granting 34 Application for Admission Pro Hac Vice of Peter C. Mulcahy. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 7/15/2016) (chmb) (Entered: 07/15/2016)

ADDENDUM 019

08/08/2016	40	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $25; Receipt number 0539-7780379) filed by State of Maryland (Attachments: # 1 certificate of good standing). Party State of Maryland added.Attorney Thiruvendran Vignarajah added to party State of Maryland(pty:am) (Vignarajah, Thiruvendran) (Entered: 08/08/2016)
08/08/2016	41	MOTION to Dismiss filed by Maura Tracy Healey (Attachments: # 1 Proposed Order) (Cawley, Douglas) (Entered: 08/08/2016)
08/08/2016	42	Brief/Memorandum in Support filed by Maura Tracy Healey re 41 MOTION to Dismiss (Cawley, Douglas) (Entered: 08/08/2016)
08/08/2016	43	RESPONSE AND OBJECTION filed by Maura Tracy Healey re: 8 MOTION for Injunction (Attachments: # 1 Appendix pp 1-390, # 2 Appendix pp 391-425, # 3 Appendix pp 426-465, # 4 Appendix pp 466-514, # 5 Appendix pp 515-564, # 6 Appendix pp 565-614, # 7 Appendix pp 615-664, # 8 Appendix pp 665-714, # 9 Appendix pp 715-764, # 10 Appendix 765-779) (Cawley, Douglas) (Entered: 08/08/2016)
08/08/2016	44	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee $25; Receipt number 0539-7782378) filed by State of New York. Party State of New York added. (Vale, Judith) (Entered: 08/08/2016)
08/08/2016	45	MOTION for Leave to File Motion to Proceed Without Local Counsel filed by State of Maryland (Attachments: # 1 Proposed Order) (Vignarajah, Thiruvendran) (Entered: 08/08/2016)
08/08/2016	46	MOTION for Leave to File Amicus Brief filed by State of Maryland (Attachments: # 1 Proposed Order) (Vignarajah, Thiruvendran) (Entered: 08/08/2016)
08/08/2016	47	Memorandum of Law filed by State of Maryland re 46 MOTION for Leave to File Amicus Brief (Vignarajah, Thiruvendran) (Entered: 08/08/2016)
08/09/2016	48	Supplemental Document by State of Maryland *Correspondence*. (Vignarajah, Thiruvendran) (Entered: 08/09/2016)
08/09/2016	49	AMENDED DOCUMENT by State of Maryland. Amendment to 48 Supplemental Document. *Amici Curiae Brief*. (Vignarajah, Thiruvendran) (Entered: 08/09/2016)
08/16/2016	50	ADDITIONAL ATTACHMENTS to 40 Application for Admission Pro Hac Vice, by Amicus State of Maryland. (Vignarajah, Thiruvendran) (Entered: 08/16/2016)
08/17/2016	51	Supplemental Document by State of Maryland *Correspondence*. (Vignarajah, Thiruvendran) (Entered: 08/17/2016)
08/17/2016	52	MOTION FOR LEAVE TO PROCEED WITHOUT LOCAL COUNSEL by State of Maryland. Amendment to 45 MOTION for Leave to File Motion to Proceed Without Local Counsel. (Attachments: # 1 Proposed Order) (Vignarajah, Thiruvendran) (Entered: 08/17/2016)
08/17/2016	53	MOTION FOR LEAVE TO FILE A MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION by State of Maryland. Amendment

ADDENDUM 020

		to 46 MOTION for Leave to File Amicus Brief. (Attachments: # 1 Proposed Order) (Vignarajah, Thiruvendran) (Entered: 08/17/2016)
08/17/2016	54	MEMORANDUM OF LAW IN SUPPORT by State of Maryland. Amendment to 49 Amended Document, 47 Brief/Memorandum in Support of Motion. (Vignarajah, Thiruvendran) (Entered: 08/17/2016)
08/24/2016	55	ORDER re 52 MOTION FOR LEAVE TO PROCEED WITHOUT LOCAL COUNSEL. After carefully considering the Motion for Leave to Proceed Without Local Counsel filed by the amici States, the Court GRANTS the motion to the extent that the amici States seek to file a Memorandum of Law in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's Motion for a Preliminary Injunction. However, if the amici States seek to present anything further to the Court in writing or orally, the amici States must obtain local counsel pursuant to Local Rule 83.10(a). (Ordered by Judge Ed Kinkeade on 8/24/2016) (tln) (Entered: 08/24/2016)
08/24/2016	56	ELECTRONIC ORDER granting 40 Application for Admission Pro Hac Vice of Thiruvendran Vignarajah. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 8/24/2016) (chmb) (Entered: 08/24/2016)
08/24/2016	57	REPLY filed by Exxon Mobil Corporation re: 8 MOTION for Injunction (Duggins, Ralph) (Entered: 08/24/2016)
08/24/2016	58	Appendix in Support filed by Exxon Mobil Corporation re 57 Reply *Supplemental Appendix In Support of Motion for Preliminary Injunction* (Attachments: # 1 Exhibit(s) Pages v-45, # 2 Pages 46-122, # 3 Pages 123-168, # 4 Pages 169-177, # 5 Pages 178-185, # 6 Pages 186-199, # 7 Pages 200-284) (Duggins, Ralph) (Entered: 08/24/2016)
08/30/2016	59	ELECTRONIC ORDER granting 44 Application for Admission Pro Hac Vice of Judith N. Vale. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 8/30/2016) (chmb) (Entered: 08/30/2016)
09/08/2016	60	RESPONSE filed by Exxon Mobil Corporation re: 41 MOTION to Dismiss (Duggins, Ralph) (Entered: 09/08/2016)
09/08/2016	61	Appendix in Support filed by Exxon Mobil Corporation re 60 Response/Objection (Duggins, Ralph) (Entered: 09/08/2016)
09/08/2016	62	ELECTRONIC ORDER SETTING HEARING re: 8 MOTION for Injunction. Motion Hearing set for 9/19/2016 at 09:30 AM before Judge Ed Kinkeade in the US Courthouse, Courtroom 1627, 1100 Commerce St., Dallas, TX 75242-1310. (Ordered by Judge Ed Kinkeade on 9/8/2016) (chmb) (Entered: 09/08/2016)
09/08/2016	63	MOTION for Leave to File Brief as Amici Curiae filed by Proposed Amici Curiae - TEXAS, LOUISIANA, SOUTH CAROLINA, ALABAMA, MICHIGAN, ARIZONA, WISCONSIN, NEBRASKA, OKLAHOMA, UTAH, AND NEVADA with Brief/Memorandum in Support. (Attachments: # 1 Additional Page(s) Brief in Support of Motion, # 2 Additional Page(s) Proposed Amicus Brief, # 3 Proposed Order Proposed Order Granting Leave)Attorney Austin R Nimocks added to party Proposed

		Amici Curiae - TEXAS, LOUISIANA, SOUTH CAROLINA, ALABAMA, MICHIGAN, ARIZONA, WISCONSIN, NEBRASKA, OKLAHOMA, UTAH, AND NEVADA(pty:am) (Nimocks, Austin) (Entered: 09/08/2016)
09/09/2016	64	ELECTRONIC ORDER EXPEDITING RESPONSE DEADLINE: re: 63 MOTION for Leave to File Brief as Amici Curiae Any Responses due by 9/13/2016. There shall be no reply unless ordered by the Court. (Ordered by Judge Ed Kinkeade on 9/9/2016) (chmb) (Entered: 09/09/2016)
09/16/2016	65	REPLY filed by Maura Tracy Healey re: 41 MOTION to Dismiss (Cawley, Douglas) (Entered: 09/16/2016)
09/16/2016	66	Appendix in Support filed by Maura Tracy Healey re 65 Reply *Supplemental Appendix in Support of Attorney General Healey's Reply to Motion to Dismiss* (Attachments: # 1 Exhibit(s) Pages 1-7) (Cawley, Douglas) (Entered: 09/16/2016)
09/19/2016	67	ELECTRONIC Minute Entry for proceedings held before Judge Ed Kinkeade: Motion Hearing held on 9/19/2016 re 8 Motion for Injunction filed by Exxon Mobil Corporation. Attorney Appearances: Plaintiff - Justin Anderson; Ted Wells; Sam Rudman; Nina Cortell; Ralph Duggins; and Jack Balagia; Defense - Richard Johnston; Melissa Hoffer; Peter Mulcahy; Douglas Cawley; and Richard Kamprath. (Court Reporter: Todd Anderson) (No exhibits) Time in Court - 2:05. (chmb) (Entered: 09/19/2016)
09/20/2016	68	Notice of Filing of Official Electronic Transcript of Preliminary Injunction Proceedings held on 9-19-16 before Judge Kinkeade. Court Reporter/Transcriber Todd Anderson, Telephone number 214-753-2170. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (105 pages) Redaction Request due 10/11/2016. Redacted Transcript Deadline set for 10/21/2016. Release of Transcript Restriction set for 12/19/2016. (jta) (Main Document 68 replaced on 9/26/2016) (chmb). (Entered: 09/20/2016)
09/22/2016	69	MEDIATION ORDER. The Court hereby appoints Mr. James Stanton with Stanton Law Firm PC, 9400 N. Central Expressway, Ste. 1304, Dallas, Texas 75231 as mediator in this case. The parties are ordered to mediate with Mr. Stanton within sixteen (16) days from the date of this Order at Mr. Stantons earliest convenience and direction. The Court further orders all attorneys and their clients to be present as well as representatives with full settlement authority, unless otherwise directed by Mr. Stanton. Alternative Dispute Resolution Summary form provided electronically or by US Mail as appropriate. (Ordered by Judge Ed Kinkeade on 9/22/2016) (chmb) (Main Document 69 replaced on 9/22/2016) (chmb). (Entered: 09/22/2016)
09/22/2016	70	MOTION for Leave to File an Amicus Brief in Support of Plaintiff's Motion for Preliminary Injunction in Texas filed by Bharani Padmanabhan. (Attachments: # 1 proposed brief) (tln) (Entered: 09/22/2016)

ADDENDUM 022

09/22/2016	71	Memorandum in Support filed by Bharani Padmanabhan re 70 MOTION for Leave to File an Amicus Brief in Support of Plaintiff's Motion for Preliminary Injunction in Texas. (tln) (Entered: 09/22/2016)
09/26/2016	72	ORDER denying 70 Motion for Leave to File as Amicus Curiae in Support of Plaintiff Exxon Mobil Corporation's Motion for Preliminary Injunction. (Ordered by Judge Ed Kinkeade on 9/26/2016) (tln) (Entered: 09/26/2016)
09/26/2016		***Clerk's Notice of delivery: (see NEF for details) Docket No:72. Mon Sep 26 15:34:26 CDT 2016 (crt) (Entered: 09/26/2016)
10/13/2016	73	ORDER: Before reaching a decision on either Plaintiff Exxon's Motion for a Preliminary Injunction or Defendant Attorney General Healey's Motion to Dismiss, the Court ORDERS that jurisdictional discovery be conducted. (Ordered by Judge Ed Kinkeade on 10/13/2016) (chmb) (Entered: 10/13/2016)
10/13/2016		***Clerk's Notice of delivery: (see NEF for details) Docket No:73. Thu Oct 13 12:05:32 CDT 2016 (crt) (Entered: 10/13/2016)
10/17/2016	74	MOTION for Leave to File First Amended Complaint filed by Exxon Mobil Corporation (Duggins, Ralph) (Entered: 10/17/2016)
10/17/2016	75	Brief/Memorandum in Support filed by Exxon Mobil Corporation re 74 MOTION for Leave to File First Amended Complaint (Duggins, Ralph) (Entered: 10/17/2016)
10/17/2016	76	Appendix in Support filed by Exxon Mobil Corporation re 74 MOTION for Leave to File First Amended Complaint, 75 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A, # 2 Exhibit(s) B (Declaration of Justin Anderson), # 3 Exhibit(s) B2 (A - B), # 4 Exhibit(s) B3 (C - F), # 5 Exhibit(s) B4 (G - M), # 6 Exhibit(s) B5 (N - R), # 7 Exhibit(s) B6 (S - W), # 8 Exhibit(s) B7 (X - GG), # 9 Exhibit(s) B8 (HH - KK), # 10 Exhibit(s) B9 (LL - MM), # 11 Exhibit(s) B10 (NN - OO), # 12 Exhibit(s) B11 (PP - TT), # 13 Exhibit(s) B12 (UU - WW), # 14 Exhibit(s) C) (Duggins, Ralph) (Entered: 10/17/2016)
10/19/2016	77	MOTION to Expedite *Briefing and Consideration of Plaintiff's Motion for Leave to Amend* filed by Exxon Mobil Corporation with Brief/Memorandum in Support. (Attachments: # 1 Proposed Order) (Duggins, Ralph) (Entered: 10/19/2016)
10/20/2016	78	MOTION for Reconsideration re 73 Order, *Attorney General Healey's Motion to Reconsider Jurisdictional Discovery Order* filed by Maura Tracy Healey (Attachments: # 1 Proposed Order) (Cawley, Douglas) (Entered: 10/20/2016)
10/20/2016	79	Brief/Memorandum in Support filed by Maura Tracy Healey re 78 MOTION for Reconsideration re 73 Order, *Attorney General Healey's Motion to Reconsider Jurisdictional Discovery Order* (Cawley, Douglas) (Entered: 10/20/2016)
10/20/2016	80	***VACATED PER ORDER No. 82*** ELECTRONIC ORDER EXPEDITING RESPONSE DEADLINE re: 77 MOTION to Expedite *Briefing and Consideration of Plaintiff's Motion for Leave to Amend*. Responses due by NOON on 10/21/2016. There shall be no reply unless ordered by the Court. (Ordered by Judge Ed Kinkeade on 10/20/2016) (chmb) Modified on 10/20/2016 (chmb). (Entered: 10/20/2016)

ADDENDUM 023

10/20/2016	81	***VACATED PER ORDER 82*** ELECTRONIC ORDER EXPEDITING RESPONSE AND REPLY DEADLINES re: 78 MOTION for Reconsideration re 73 Order, *Attorney General Healey's Motion to Reconsider Jurisdictional Discovery Order*. Responses due by 10/27/2016. Replies due by 10/31/2016. (Ordered by Judge Ed Kinkeade on 10/20/2016) (chmb) Modified on 10/20/2016 (chmb). (Entered: 10/20/2016)
10/20/2016	82	ELECTRONIC ORDER VACATING ORDERS 80 and 81. Corrected orders to follow. (Ordered by Judge Ed Kinkeade on 10/20/2016) (Entered: 10/20/2016)
10/20/2016	83	ELECTRONIC ORDER EXPEDITING RESPONSE DEADLINE re: 77 MOTION to Expedite *Briefing and Consideration of Plaintiff's Motion for Leave to Amend*. Responses due by NOON on 10/21/2016. There shall be no Reply unless ordered by the Court. (Ordered by Judge Ed Kinkeade on 10/20/2016) (chmb) (Entered: 10/20/2016)
10/20/2016	84	ELECTRONIC ORDER EXPEDITING RESPONSE AND REPLY DEADLINE re: 78 MOTION for Reconsideration re 73 Order, *Attorney General Healey's Motion to Reconsider Jurisdictional Discovery Order*. Responses due by 10/27/2016. Replies due by 10/31/2016. (Ordered by Judge Ed Kinkeade on 10/20/2016) (chmb) (Entered: 10/20/2016)
10/21/2016	85	RESPONSE filed by Maura Tracy Healey re: 77 MOTION to Expedite *Briefing and Consideration of Plaintiff's Motion for Leave to Amend* (Cawley, Douglas) (Entered: 10/21/2016)
10/21/2016	86	Appendix in Support filed by Maura Tracy Healey re 85 Response/Objection *to Plaintiff's Motion to Expedite Briefing and Consideration of Plaintiff's Motion for Leave to Amend* (Attachments: # 1 Declaration(s) of Peter C. Mulcahy, # 2 Exhibit(s) 1, # 3 Exhibit(s) 2, # 4 Exhibit(s) 3, # 5 Exhibit(s) 4) (Cawley, Douglas) (Entered: 10/21/2016)
10/25/2016	87	MOTION to Intervene filed by Leonid Goldstein. (Attachments: # 1 proposed complaint, # 2 appendix) (tln) (Entered: 10/25/2016)
10/25/2016	88	CERTIFICATE OF INTERESTED PERSONS by Leonid Goldstein. (tln) (Entered: 10/25/2016)
10/25/2016	89	ELECTRONIC ORDER SETTING RESPONSE DEADLINE re: 87 MOTION to Intervene. Any Responses due by 11/04/2016. There shall be no reply unless ordered by the Court. (Ordered by Judge Ed Kinkeade on 10/25/2016) (chmb) (Entered: 10/25/2016)
10/27/2016	90	RESPONSE filed by Exxon Mobil Corporation re: 78 MOTION for Reconsideration re 73 Order, *Attorney General Healey's Motion to Reconsider Jurisdictional Discovery Order* (Duggins, Ralph) (Entered: 10/27/2016)
10/31/2016	91	REPLY filed by Maura Tracy Healey re: 78 MOTION for Reconsideration re 73 Order, *Attorney General Healey's Motion to Reconsider Jurisdictional Discovery Order* (Cawley, Douglas) (Entered: 10/31/2016)

11/03/2016	92	ORDER granting 77 Motion to Expedite Briefing and Consideration of Motion for Leave to Amend. Attorney General Healey's opposition to ExxonMobils Motion for Leave to File a First Amended Complaint (Doc. No. 74) should be filed no later than NOON on November 7, 2016. Plaintiff Exxon Mobil's reply to Attorney General Healeys opposition to its Motion for Leave to File a First Amended Complaint should be filed no later than NOON on November 9, 2016. (Ordered by Judge Ed Kinkeade on 11/3/2016) (ewd) (Entered: 11/03/2016)
11/04/2016	93	RESPONSE filed by Maura Tracy Healey re: 87 MOTION to Intervene (Cawley, Douglas) (Entered: 11/04/2016)
11/07/2016	94	RESPONSE filed by Maura Tracy Healey re: 74 MOTION for Leave to File First Amended Complaint (Cawley, Douglas) (Entered: 11/07/2016)
11/07/2016	95	Appendix in Support filed by Maura Tracy Healey re 94 Response/Objection *to Exxon Mobil Corporation's Motion for Leave to File a First Amended Complaint* (Attachments: # 1 Declaration(s) of Peter Mulcahy, # 2 Exhibit(s) 1, # 3 Exhibit(s) 2, # 4 Exhibit(s) 3, # 5 Exhibit(s) 4, # 6 Exhibit(s) 5) (Cawley, Douglas) (Entered: 11/07/2016)
11/09/2016	96	REPLY filed by Exxon Mobil Corporation re: 74 MOTION for Leave to File First Amended Complaint (Duggins, Ralph) (Entered: 11/09/2016)
11/09/2016	97	Appendix in Support filed by Exxon Mobil Corporation re 96 Reply *in Further Support of Exxon Mobil Corporation's Motion for Leave to File a First Amended Complaint* (Duggins, Ralph) (Entered: 11/09/2016)
11/09/2016	98	REPLY filed by Leonid Goldstein re: 87 MOTION to Intervene (Goldstein, Leonid) (Entered: 11/09/2016)
11/10/2016	99	ORDER granting 74 Motion for Leave to File First Amended Complaint. (Unless the document has already been filed, clerk to enter the document as of the date of this order.) (Ordered by Judge Ed Kinkeade on 11/10/2016) (axm) (Entered: 11/10/2016)
11/10/2016	100	FIRST AMENDED COMPLAINT *for Declaratory and Injunctive Relief* against Maura Tracy Healey, Eric Tradd Schneiderman filed by Exxon Mobil Corporation. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (axm) (Entered: 11/10/2016)
11/10/2016	101	Appendix in Support filed by Exxon Mobil Corporation re 100 First Amended Complaint. (Attachments: # 1 Exhibits A - B, # 2 Exhibits C - F, # 3 Exhibits G - M, # 4 Exhibits N - R, # 5 Exhibits S - W, # 6 Exhibits X - GG, # 7 Exhibits HH - KK, # 8 Exhibits LL - MM, # 9 Exhibits NN - OO, # 10 Exhibits PP - TT, # 11 Exhibits UU - WW) (axm) (Entered: 11/10/2016)
11/11/2016	102	Request for Clerk to issue summons filed by Exxon Mobil Corporation. (Vickers, Philip) (Entered: 11/11/2016)
11/14/2016	103	Summons Issued as to Eric Tradd Schneiderman. (tln) (Entered: 11/14/2016)

ADDENDUM 025

11/14/2016	104	Request for Status Conference filed by Exxon Mobil Corporation (Cortell, Nina) Modified document title and terminated motion event per DJ chambers on 11/16/2016 (bdb). (Entered: 11/14/2016)
11/15/2016	105	NOTICE of Attorney Appearance by Peter D Marketos on behalf of Eric Tradd Schneiderman. (Filer confirms contact info in ECF is current.) (Marketos, Peter) (Entered: 11/15/2016)
11/15/2016	106	NOTICE of Attorney Appearance by Tyler J Bexley on behalf of Eric Tradd Schneiderman. (Filer confirms contact info in ECF is current.) (Bexley, Tyler) (Entered: 11/15/2016)
11/15/2016	107	NOTICE of Attorney Appearance by Jeffrey M Tillotson on behalf of Eric Tradd Schneiderman. (Filer confirms contact info in ECF is current.) (Tillotson, Jeffrey) (Entered: 11/15/2016)
11/15/2016	108	(Document Restricted) Attorney Contact Information (Sealed pursuant to SO 19-1, statute, or rule) filed by Eric Tradd Schneiderman (Bexley, Tyler) (Entered: 11/15/2016)
11/16/2016	109	ELECTRONIC Minute Entry for proceedings held before Judge Ed Kinkeade: Telephone Conference held on 11/16/2016. Attorney Appearances: Plaintiff - Nina Cortell, Justin Anderson, Ted Wells, Pat Conlon, Dan Bolia, and Michele Hirshman. Defense - AG Healey - Richard Johnson, Melissa Hoffer, and Douglas Cawley. AG Schneiderman - Jason Brown, Jeff Tillotson, Pete Marketos and Roderick Arz.. (Court Reporter: Todd Anderson) (No exhibits) Time in Court - :26. (chmb) (Entered: 11/16/2016)
11/16/2016	110	SUMMONS Returned Executed as to Eric Tradd Schneiderman ; served on 11/14/2016. (Duggins, Ralph) (Entered: 11/16/2016)
11/16/2016	111	Request for Status Conference filed by Exxon Mobil Corporation (Cortell, Nina) Modified document title and terminated motion event per DJ chambers on 11/16/2016 (bdb). (Entered: 11/16/2016)
11/16/2016	112	NOTICE of *(Corrected) Request for Status Conference* filed by Exxon Mobil Corporation (Cortell, Nina) (Entered: 11/16/2016)
11/16/2016	113	NOTICE of *Response to Plaintiff's Request for Status Conference* re: 112 Notice (Other) filed by Eric Tradd Schneiderman (Bexley, Tyler) (Entered: 11/16/2016)
11/17/2016	114	Notice of Filing of Official Electronic Transcript of Telephone Conference Proceedings held on 11-16-16 before Judge Kinkeade. Court Reporter/Transcriber Todd Anderson, Telephone number 214-753-2170. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (25 pages) Redaction Request due 12/8/2016. Redacted Transcript Deadline set for 12/19/2016. Release of Transcript Restriction set for 2/15/2017. (jta) (Entered: 11/17/2016)

ADDENDUM 026

11/17/2016	115	NOTICE of *Joining Attorney General Schneidermans Response to Plaintiffs Request for Status Conference* re: 113 Notice (Other) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 11/17/2016)
11/17/2016	116	NOTICE of *[Corrected] Joining Attorney General Schneidermans Response to Plaintiffs Request for Status Conference* re: 113 Notice (Other) filed by Maura Tracy Healey (Cawley, Douglas) (Entered: 11/17/2016)
11/17/2016	117	ORDER: On November 16, 2016, the Court conducted a telephone status conference with the parties. In order to expeditiously conduct the necessary discovery to inform the Court on issues relating to pending and anticipated motions related to jurisdictional matters, the Court orders that Attorney General Healey shall respond to written discovery ten (10) days from the date the discovery is served. It is further ordered that Attorney General Healey shall appear for her deposition in Courtroom 1627 at 1100 Commerce Street, Dallas, Texas 75242 at 9:00 a.m. on Tuesday, December 13, 2016. Attorney General Schneiderman is also advised to be available on December 13, 2016 in Dallas, Texas. The Court will enter an Order regarding Attorney General Schneiderman's deposition after he files his answer in this matter. The Court is mindful of the busy schedule of each of the Attorneys General Healey and Schneiderman and will be open to considering a different date for the deposition. (Ordered by Judge Ed Kinkeade on 11/17/2016) (chmb) (Entered: 11/17/2016)
11/25/2016	118	MOTION TO VACATE 117 ORDER FOR DEPOSITION OF ATTORNEY GENERAL HEALEY AND STAY DISCOVERY, AND FOR A PROTECTIVE ORDER filed by Maura Tracy Healey with Brief/Memorandum in Support. (Cawley, Douglas). (Entered: 11/25/2016)
11/25/2016	119	Appendix in Support filed by Maura Tracy Healey re 118 MOTION to Vacate 117 Order Setting Deadline/Hearing,,,,, (Attachments: # 1 Declaration(s) of Peter C. Mulcahy, # 2 Exhibit(s) 1, # 3 Exhibit(s) 2, # 4 Exhibit(s) 3, # 5 Exhibit(s) 4, # 6 Exhibit(s) 5, # 7 Exhibit(s) 6, # 8 Exhibit(s) 7) (Cawley, Douglas) (Entered: 11/25/2016)
11/26/2016	120	MOTION TO VACATE AND RECONSIDER 117 NOVEMBER 17 ORDER, STAY DISCOVERY, AND ENTER A PROTECTIVE ORDER, filed by Maura Tracy Healey. (Entered: 11/26/2016)
11/26/2016	121	Brief/Memorandum in Support filed by Maura Tracy Healey re 120 MOTION to Vacate 117 Order Setting Deadline/Hearing,,,,, *Corrected* (Cawley, Douglas) (Entered: 11/26/2016)
11/26/2016	122	Appendix in Support filed by Maura Tracy Healey re 120 MOTION to Vacate 117 Order Setting Deadline/Hearing,,,,, *Corrected* (Attachments: # 1 Declaration(s) of Peter C. Mulcahy, # 2 Exhibit(s) 1, # 3 Exhibit(s) 2, # 4 Exhibit(s) 3, # 5 Exhibit(s) 4, # 6 Exhibit(s) 5, # 7 Exhibit(s) 6, # 8 Exhibit(s) 7) (Cawley, Douglas) (Entered: 11/26/2016)
11/26/2016	123	ELECTRONIC ORDER EXPEDITING RESPONSE AND REPLY DEADLINE re: 120 MOTION to Vacate 117 Order Setting Deadline/Hearing,,,,, *Corrected*. Responses due by 3:00 p.m. on 11/29/2016. Replies due by 3:00 p.m. on 12/1/2016. (Ordered by Judge Ed Kinkeade on 11/26/2016) (chmb) (Entered: 11/26/2016)

ADDENDUM 027

11/28/2016	124	MOTION to Dismiss *First Amended Complaint* filed by Maura Tracy Healey (Attachments: # 1 Proposed Order) (Cawley, Douglas) (Entered: 11/28/2016)
11/28/2016	125	Brief/Memorandum in Support filed by Maura Tracy Healey re 124 MOTION to Dismiss *First Amended Complaint* (Cawley, Douglas) (Entered: 11/28/2016)
11/28/2016	126	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Roderick L. Arz (Filing fee $25; Receipt number 0539-8029943) filed by Eric Tradd Schneiderman (Bexley, Tyler) (Entered: 11/28/2016)
11/29/2016	127	RESPONSE filed by Exxon Mobil Corporation re: 120 MOTION to Vacate 117 Order Setting Deadline/Hearing,,,, *Corrected* MOTION to Stay MOTION for Protective Order (Duggins, Ralph) (Entered: 11/29/2016)
11/29/2016	128	Appendix in Support filed by Exxon Mobil Corporation re 127 Response/Objection (Duggins, Ralph) (Entered: 11/29/2016)
12/01/2016	129	ELECTRONIC ORDER granting 126 Application for Admission Pro Hac Vice of Roderick L. Arz. If not already done, Applicant must register as an ECF User within 14 days (LR 5.1(f)). (Ordered by Judge Ed Kinkeade on 12/1/2016) (chmb) (Entered: 12/01/2016)
12/01/2016	130	REPLY filed by Maura Tracy Healey re: 120 MOTION to Vacate 117 Order Setting Deadline/Hearing,,,, *Corrected* MOTION to Stay MOTION for Protective Order (Cawley, Douglas) (Entered: 12/01/2016)
12/05/2016	131	ORDER: Before the Court is Defendant Massachusetts Attorney General Maura Healey's Motion to Reconsider Jurisdictional Discovery Order (Doc. No. 78) and Attorney General Healey's Motion to Vacate and Reconsider November 17 Order, Stay Discovery, and Enter a Protective Order (Doc. No. 120). After careful consideration, the Court DENIES Defendant's Motions. (Ordered by Judge Ed Kinkeade on 12/5/2016) (tln) (Entered: 12/05/2016)
12/05/2016		***Clerk's Notice of delivery: (see NEF for details) Docket No:131. Mon Dec 5 16:11:18 CST 2016 (crt) (Entered: 12/05/2016)
12/05/2016	132	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Jason Brown (Filing fee $25; Receipt number 0539-8047624) filed by Eric Tradd Schneiderman (Attachments: # 1 Proposed Order Proposed Order) (Marketos, Peter) (Entered: 12/05/2016)
12/05/2016	133	MOTION to Dismiss *First Amended Complaint* filed by Eric Tradd Schneiderman (Attachments: # 1 Proposed Order Proposed Order) (Marketos, Peter) (Entered: 12/05/2016)
12/05/2016	134	Brief/Memorandum in Support filed by Eric Tradd Schneiderman re 133 MOTION to Dismiss *First Amended Complaint* (Marketos, Peter) (Entered: 12/05/2016)
12/05/2016	135	MOTION to Quash filed by Eric Tradd Schneiderman (Attachments: # 1 Proposed Order Proposed Order) (Marketos, Peter) (Entered: 12/05/2016)
12/05/2016	136	Brief/Memorandum in Support filed by Eric Tradd Schneiderman re 135 MOTION to Quash (Marketos, Peter) (Entered: 12/05/2016)

ADDENDUM 028

12/05/2016	137	Appendix in Support filed by Eric Tradd Schneiderman re 135 MOTION to Quash , 133 MOTION to Dismiss *First Amended Complaint*, 136 Brief/Memorandum in Support of Motion, 134 Brief/Memorandum in Support of Motion *to Dismiss First Amended Complaint and Motion to Quash* (Marketos, Peter) (Entered: 12/05/2016)
12/06/2016	138	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney S. Jason Brown (Filing fee $25; Receipt number 0539-8048206) filed by Eric Tradd Schneiderman (Marketos, Peter) (Entered: 12/06/2016)
12/06/2016	139	ELECTRONIC ORDER EXPEDITING RESPONSE AND REPLY DEADLINE re: 135 MOTION to Quash . Responses due by 5:00 p.m, on 12/7/2016. Replies due by 5:00 p.m., on 12/8/2016. (Ordered by Judge Ed Kinkeade on 12/6/2016) (chmb) (Entered: 12/06/2016)

PACER Service Center

Transaction Receipt

12/06/2016 14:05:29

PACER Login:	ag0009:2503166:0	**Client Code:**	Exxon
Description:	Docket Report	**Search Criteria:**	4:16-cv-00469-K
Billable Pages:	15	**Cost:**	1.50

ADDENDUM 029

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	NO. 4:16-CV-469
	§	
MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	§	
	§	
Defendant.	§	
	§	

EXXONMOBIL'S COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Exxon Mobil Corporation ("ExxonMobil") brings this action for declaratory and injunctive relief against Maura Healey, the Attorney General of Massachusetts. ExxonMobil seeks an injunction barring the enforcement of a civil investigative demand to ExxonMobil, and a declaration that the civil investigative demand violates ExxonMobil's rights under state and federal law. For its Complaint, ExxonMobil alleges as follows based on present knowledge and information and belief:

INTRODUCTION

1. Frustrated by the federal government's perceived inaction, a coalition of state attorneys general with a goal to end the world's reliance on fossil fuels announced their "collective efforts to deal with the problem of climate change" at a joint press conference, held on March 29, 2016, with former Vice President and private citizen Al Gore as the featured speaker. The attorneys general declared that they planned to "creatively" and "aggressively" use the powers of their respective offices on behalf of the

coalition to force ExxonMobil[1] and other energy companies to comply with the coalition's preferred policy responses to climate change. As the statements of the Attorney General of Massachusetts and others made unmistakably clear, the press conference was a politically motivated event urged on by activists.[2]

2. The press conference was the culmination of years of planning. Since at least 2012, climate change activists and plaintiffs' attorneys have contemplated different means of obtaining the confidential records of fossil fuel companies, including the use of law enforcement power to obtain records that otherwise would be beyond their grasp.[3] At a 2012 workshop entitled "Climate Accountability, Public Opinion, and Legal Strategies," the attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[4] They concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[5]

3. Members of this group of activists and attorneys were on call at the March press conference. During a private session with the attorneys general, a climate change activist and a private environmental lawyer, who has previously sued ExxonMobil, made

---

1 ExxonMobil was formed as a result of a merger between Exxon and Mobil on November 30, 1999. For ease of discussion, we refer to the predecessor entities as ExxonMobil throughout the Complaint.

2 A transcript of the AGs United for Clean Power Press Conference, held on March 29, 2016, was prepared by counsel based on a video recording of the event, which is available at http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across. A copy of this transcript is attached as Exhibit A and is incorporated by reference. *See* Ex. A at App. 1-21. All citations in the format "Ex. _" refer to exhibits to the Declaration of Justin Anderson, dated June 14, 2016, attached hereto.

3 Ex. N at App. 125.

4 *Id.* at App. 119-20, 125, 145-49.

5 *Id.* at App. 125.

presentations on the "imperative of taking action now on climate change" and on "climate change litigation."[6]

4. The attorneys general recognized that the involvement of these individuals—especially a private attorney likely to seek fees from any private litigation made possible by an attorney general-led investigation of ExxonMobil—could expose the special interests behind their investigations. When that same attorney asked the New York Attorney General's office what he should tell a reporter if asked about his involvement, the chief of that office's environmental unit told him not to confirm his attendance at the conference.[7]

5. Statements made by Attorney General Healey and others at the press conference confirmed that the civil investigative demand ("CID") that was thereafter issued and served on ExxonMobil was the product of the activists' misguided enterprise.

6. The Attorney General of New York announced that the attorneys general had joined together to address "th[e] most pressing issue of our time," namely, the need to "preserve our planet and reduce the carbon emissions that threaten all of the people we represent."[8] Although the federal government had not acted, he promised that the assembled "group of state actors [intended] to send the message that [they were] prepared to step into this [legislative] breach."[9] To that end, the New York Attorney General reminded the press that his office "had served a subpoena on ExxonMobil," to investigate "theories relating to consumer and securities fraud."[10]

---

6 Ex. I at App. 76-85.
7 Ex. P at App. 155.
8 Ex. A at App. 2.
9 *Id.* at App. 4.
10 *Id.*

7. The Attorney General of the United States Virgin Islands, Claude Walker, pledged to do something "transformational" to end "rel[iance] on fossil fuel," beginning with "an investigation into a company" that manufactures a "product" he believes is "destroying this earth."[11] Attorney General Walker's "transformational" use of his office's powers includes the issuance of a subpoena signed by a member of his staff but mailed to ExxonMobil in Irving, Texas, by Cohen Milstein, a Washington, D.C., law firm that touts itself as a "pioneer in plaintiff class action lawsuits" and "the most effective law firm in the United States for lawsuits with a strong social and political component."

8. Attorney General Healey similarly pledged "quick, aggressive action" by her office to "address climate change and to work for a better future."[12] She then announced that, in the service of those goals, her office also had commenced an investigation of ExxonMobil and that she already knew what the outcome of the just-launched investigation would be: It would reveal "a troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public."[13] Three weeks later, she served the CID on ExxonMobil.

9. The Massachusetts Attorney General's CID purports to investigate whether ExxonMobil committed consumer or securities fraud by misrepresenting its knowledge of climate change in marketing materials and communications with investors.

10. Its allegations, however, are nothing more than a weak pretext for an unlawful exercise of government power to further political objectives. The statute that purportedly gives rise to the investigation has a limitations period of four years. Mass. Gen. Law ch. 93A, § 2; Mass. Gen. Law ch. 260, § 5A. For more than a decade,

---

[11] *Id.* at App. 16-17.
[12] Ex. A at App. 14.
[13] *Id.*

however, ExxonMobil has widely and publicly confirmed that it "recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant."[14]

11. Despite the limitations period and ExxonMobil's longstanding public recognition of the risks of climate change, the CID nevertheless demands that ExxonMobil produce effectively every document about climate change it has generated or received in the last 40 years, thereby imposing a breathtaking burden on ExxonMobil, which would need to collect and review millions of documents to comply with the CID.

12. Worse still, the CID targets ExxonMobil's communications with the Attorney General's political opponents in the climate change debate—*i.e.*, organizations and individuals who hold views about climate change, and the proper policy responses to it, with which, based on her statements at the press conference, Attorney General Healey disagrees. The organizations identified by the CID each have been derided as so-called "climate deniers," meaning that they have expressed skepticism about the science of climate change or Attorney General Healey's preferred modes of addressing the problem.

13. The statements by the attorneys general at the press conference, their meetings with climate activists and a plaintiffs' attorney, and the remarkably broad scope of the CID unmask the investigation launched by the Massachusetts Attorney General for what it is: a pretextual use of law enforcement power to deter ExxonMobil from participating in ongoing public deliberations about climate change and to fish through decades of ExxonMobil's documents in the hope of finding some ammunition to enhance the Massachusetts Attorney General's position in the policy debate concerning how to

[14] Ex. S at App. 183; *see also* Ex. T at App. 193 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").

respond to climate change. Attorney General Healey is abusing the power of government to silence a speaker she disfavors.

14. Through her actions, Attorney General Healey has deprived and will continue to deprive ExxonMobil of its rights under the United States Constitution, the Texas Constitution, and the common law. ExxonMobil therefore seeks a declaration that the CID violates ExxonMobil's rights under Article One of the United States Constitution; the First, Fourth, and Fourteenth Amendments to the United States Constitution; Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution; and constitutes an abuse of process under the common law. ExxonMobil also seeks an injunction barring enforcement of the CID. Absent an injunction, ExxonMobil will suffer imminent and irreparable harm for which there is no adequate remedy at law.

PARTIES

15. ExxonMobil is a public, shareholder-owned energy company incorporated in New Jersey with principal offices in the State of Texas. ExxonMobil is headquartered and maintains all of its central operations in Texas.

16. Defendant Maura Healey is the Attorney General of Massachusetts. She is sued in her official capacity.

JURISDICTION AND VENUE

17. This court has subject matter jurisdiction over this action pursuant to Sections 1331 and 1367 of Title 28 of the United States Code. Plaintiff alleges violations of its constitutional rights in violation of 28 U.S.C. § 1983. Because those claims arise under the laws of the United States, this Court has original jurisdiction over them. 28 U.S.C. § 1331. Plaintiff also alleges related state law claims that derive from the same

nucleus of operative facts. Each of Plaintiff's state law claims—like its federal claims—is premised on Attorney General Healey's statements at the press conference, her service of the CID, and the CID's demands. This Court therefore has supplemental jurisdiction over those claims. 28 U.S.C. § 1367(a).

18. Venue is proper within this District pursuant to 28 U.S.C. § 1391(b) because all or a substantial part of the events giving rise to the claims occurred in the Northern District of Texas. Specifically, the CID requires ExxonMobil to collect and review a substantial number of records stored or maintained in the Northern District of Texas.

FACTS

A. The "Green 20" Coalition of Attorneys General Announces a Plan to Use Law Enforcement Tools to Achieve Political Goals.

19. On March 29, 2016, the Attorney General of New York, Eric Schneiderman, hosted a press conference in New York City dubbed "AGs United for Clean Power." The purpose of the conference was to discuss the coalition's plans to take "progressive action on climate change," including investigating ExxonMobil.[15] Former Vice President Al Gore was the event's featured speaker, and attorneys general or staff members from over a dozen other states were in attendance. Attorney General Healey attended and participated in the press conference.

20. The attorneys general, calling themselves the "Green 20" (a reference to the number of participating attorneys general), explained that their mission was to "com[e] up with creative ways to enforce laws being flouted by the fossil fuel

[15] Ex. MM at App. 327.

industry."[16] Expressing dissatisfaction with the perceived "gridlock in Washington" regarding climate change legislation, Attorney General Schneiderman said that the coalition had to work "creatively" and "aggressively" to advance that agenda.[17]

21. Attorney General Schneiderman announced that the assembled "group of state actors [intended] to send the message that [it was] prepared to step into this [legislative] breach."[18] He continued:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[19]

22. Attorney General Schneiderman's comments left no doubt that the purpose of the "coordination" was not to investigate alleged violations of law, but "to deal with th[e] most pressing issue of our time," namely, the need to "preserve our planet and reduce the carbon emissions that threaten all of the people we represent."[20]

23. Attorney General Schneiderman declared that the debate about climate change and the range of permissible policy responses to it was over: "[W]e are here for a very simple reason. We have heard the scientists. We know what's happening to the planet. There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the

---

16 Ex. A at App. 3.
17 *Id.* at App. 3-4.
18 *Id.* at App. 4.
19 *Id.* at App. 5.
20 *Id.* at App. 2.

American public that really need to be cleared up."[21] Attorney General Schneiderman reminded the press that his office "had served a subpoena on ExxonMobil," to investigate "theories relating to consumer and securities fraud."[22]

24. Having explained the reason for the conference, Attorney General Schneiderman then introduced former Vice President Al Gore.

25. Attorney General Schneiderman explained that "there is no one who has done more for this cause" than Gore, who recently had been "traveling internationally, raising the alarm," and "training climate change activists."[23] Again, "the cause" to which Attorney General Schneiderman referred was not preventing consumer or securities fraud. Instead, the shared goal of the attorneys general and the former Vice President was to end "our addiction to fossil fuels and our degradation of the planet."[24]

26. In an effort to legitimize what the attorneys general were doing, Gore cited perceived inaction by the federal government to justify action by the Green 20. He observed that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[25]

27. Gore went on to condemn those who question the viability of renewable energy sources, faulting them for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option." He then accused the fossil fuel industry of "using [its] combined political and lobbying efforts to put taxes on

---

21 *Id.* at App. 3.
22 *Id.* at App. 4.
23 *Id.* at App. 6.
24 *Id.*
25 *Id.* at App. 10.

solar panels and jigger with the laws" and said "[w]e do not have 40 years to continue suffering the consequences of the fraud."[26]

28. When it was his turn to speak, Virgin Islands Attorney General Claude Walker began by hailing Vice President Gore as one of his "heroes." Attorney General Walker announced that his office had "launched an investigation into a company that we believe must provide us with information about what they knew about climate change and when they knew it."[27] That thinly veiled reference to ExxonMobil was later confirmed in a press release naming ExxonMobil as the target of his investigation.[28]

29. Continuing the theme of the press conference, Attorney General Walker admitted that his investigation of ExxonMobil was really aimed at changing public policy, not investigating actual violations of existing law:

> It could be David and Goliath, the Virgin Islands against a huge corporation, but we will not stop until we get to the bottom of this and make it clear to our residents as well as the American people that we have to do something transformational. We cannot continue to rely on fossil fuel. Vice President Gore has made that clear.[29]

30. For Attorney General Walker, the public policy debate on climate change is settled: "We have to look at renewable energy. That's the only solution."[30]

31. As for the energy companies like ExxonMobil, Attorney General Walker accused them of producing a "product [that] is destroying this earth."[31] He complained

---

26 *Id.* at App. 8-10.
27 *Id.* at App. 16.
28 Ex. C at App. 53-55.
29 Ex. A at App. 17.
30 *Id.*
31 *Id.*

that, "as the polar caps melt," those "companies [] are looking at that as an opportunity to go and drill, to go and get more oil. Why? How selfish can you be?"[32]

32. During her turn at the podium, Attorney General Healey also began by lauding Gore "who, today, I think, put most eloquently just how important this is, this commitment that we make."[33]

33. The Attorney General then articulated her view that "there's nothing we need to worry about more than climate change," and that the attorneys general "have a moral obligation to act" to alleviate the threat to "the very existence of our planet."[34]

34. Attorney General Healey therefore pledged to take "quick, aggressive action" to "address climate change and to work for a better future."[35] In the service of that goal, she announced that her office was investigating ExxonMobil. Remarkably, she also announced, in advance, the findings of her investigation weeks before she even issued the CID:

> Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.[36]

Attorney General Healey's comments unambiguously reflected her pre-ordained determination that ExxonMobil had engaged in unlawful deception in connection with the debate over climate change policy.

---

[32] *Id.*
[33] *Id.* at App. 13.
[34] *Id.*
[35] *Id.* at App. 14.
[36] *Id.* at App. 13.

35. The political motivations articulated by Attorney General Healey and the other press conference attendees struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. One reporter reacted by asking whether the press conference and the investigations were nothing more than "publicity stunt[s]."[37]

B. The Attorneys General of Other States Condemn the Green 20's Investigations.

36. The press conference drew a swift and sharp rebuke from other state attorneys general who criticized the Green 20 for using the power of law enforcement as a tool to muzzle dissent and discussions about climate change. The attorneys general of Alabama and Oklahoma stated that "scientific and political debate" "should not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."[38] They emphasized that "[i]t is inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time."[39]

37. The Louisiana Attorney General similarly observed that "[i]t 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."[40] Likewise, the Kansas Attorney General questioned the "unprecedented" and "strictly partisan nature of announcing state 'law enforcement' operations in the presence of a former vice president of the United State[s] who,

---

37 *Id.* at App. 18.
38 Ex. D at App. 57.
39 *Id.*
40 Ex. E at App. 59.

presumably [as a private citizen], has no role in the enforcement of the 17 states' securities or consumer protection laws."[41] The West Virginia Attorney General criticized the attorneys general for "abusing the powers of their office" and stated that the desire to "eliminate fossil fuels . . . should not be driving any legal activity" and that it was improper to "use the power of the office of attorney general to silence [] critics."[42]

38. More recently, the Committee on Science, Space, and Technology of the United States House of Representatives launched an inquiry into the investigations undertaken by the Green 20.[43] That committee was "concerned that these efforts [of the Green 20] to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve as the guardian of the legal rights of the citizens and to assert, protect, and defend the rights of the people."[44] Perceiving a need to provide "oversight" of what it described as "a coordinated attempt to attack the First Amendment rights of American citizens," the Committee requested the production of certain records and information from the attorneys general.[45] The activists and the attorneys general have thus far refused to cooperate with the inquiry.[46]

39. Several senators similarly have urged United States Attorney General Loretta Lynch to confirm that the Department of Justice is not and will not investigate United States citizens or corporations on the basis of their views on climate change.[47] The senators observed that the Green 20's investigations "provide disturbing

---

41 Ex. F at App. 61.
42 Ex. G at App. 64-66.
43 Ex. H at App. 69-74.
44 *Id.* at App. 69 (internal quotation marks omitted).
45 *Id.* at App. 72.
46 *See, e.g.*, Ex. Z at App. 235-36; Ex. AA at App. 238-40.
47 *See* Ex. BB at App. 243-245.

confirmation that government officials at all levels are threatening to wield the sword of law enforcement to silence debate on climate change."[48] The letter concluded by asking Attorney General Lynch to explain the steps she is taking "to prevent state law enforcement officers from unconstitutionally harassing private entities or individuals simply for disagreeing with the prevailing climate change orthodoxy."[49]

C. In Closed-Door Meetings, the Green 20 Privately Meet with Climate Activists and Plaintiffs' Lawyers.

40. The impropriety of the statements made by Attorney General Healey and the other members of the Green 20 at the press conference are surpassed only by what they said behind closed doors.

41. In advance of the conference, the chief of the Massachusetts Attorney General's Office's Energy & Environment Bureau indicated that the office sought to "learn the status of states' investigations/plans" and explore avenues for "coordination." The bureau chief also noted that the office was taking actions to "advanc[e] clean energy."[50]

42. During the morning of the press conference, the attorneys general attended two presentations. Those presentations were not announced publicly, and they were not open to the press or general public. The identity of the presenters and the titles of the presentations, however, were later released by the State of Vermont in response to a request under that state's Freedom of Information Act.

---

48 *Id.* at App. 244.
49 *Id*.
50 Ex. J at App. 158-59.

43. The first presenter was Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists.[51] His subject was the "imperative of taking action now on climate change."[52]

44. According to the Union of Concerned Scientists, those who do not share its views about climate change and responsive policy make it "difficult to achieve meaningful solutions to global warming."[53] It accuses "[m]edia pundits, partisan think tanks, and special interest groups" of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[54]

45. Frumhoff has been targeting ExxonMobil since at least 2007. In that year, Frumhoff contributed to a publication issued by the Union of Concerned Scientists, titled "Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science,"[55] which brainstormed strategies for "putting the brakes" on ExxonMobil's alleged "disinformation campaign."[56]

46. Matthew Pawa of Pawa Law Group, P.C.[57] hosted the second presentation on the topic of "climate change litigation."[58] The Pawa Law Group, which boasts of its "role in launching global warming litigation,"[59] previously sued ExxonMobil and sought to hold it liable for causing global warming. That suit was dismissed because, as the court properly held, regulating global warming emissions is "a political rather than a legal

---

51 Ex. J at App. 87.
52 Ex. I at App. 77.
53 Ex. K at App. 95-95.
54 *Id.*
55 Ex. LL at 319.
56 *Id.* at 322.
57 Ex. L at App. 109-110.
58 Ex. I at App. 77.
59 Ex. M at App. 112.

issue that needs to be resolved by Congress and the executive branch rather than the courts."[60]

47. Frumhoff and Pawa have sought for years to initiate and promote legal actions against fossil fuel companies in the service of their political agenda and for private profit. In 2012, for example, Frumhoff hosted and Pawa presented at a conference entitled "Climate Accountability, Public Opinion, and Legal Strategies."[61] The conference's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[62]

48. The 2012 conference's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[63] Even then, "lawyers at the workshop" suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[64]

49. Indeed, that conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[65]

50. As recently as January 2016, Pawa and a group of climate activists met to discuss the "[g]oals of an Exxon campaign." The goals included:

---

60 Ex. N at App. 126; *see also Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012).
61 Ex. N at App. 117-18, 146.
62 *Id.* at App. 118.
63 *Id.* at App. 125.
64 *Id.*
65 *Id.* at App. 141.

> To establish in public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm. To delegitimize them 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 & climate into center of 2016 election cycle.[66]

51. The Green 20 press conference thus represented the culmination of Frumhoff and Pawa's collective efforts to enlist state law enforcement officers in their quest to enact their preferred policy responses to global warming and obtain documents for private lawsuits.

52. The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the announced investigations. In an apparent attempt to improperly shield their communications from public scrutiny, the attorneys general drafted—and may have executed—a common interest agreement in connection with the Green 20 conference.[67] In addition, the day after the conference, a reporter from *The Wall Street Journal* called Pawa.[68] In response, Pawa asked the New York Attorney General's Office, "[w]hat should I say if she asks if I attended?"[69] The environmental bureau chief at the office, in an effort to conceal from the press and public the closed-door meetings, responded, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[70]

---

66 *See* Ex. OO at App. 336; *see also* Ex. O at App. 151-53.
67 Ex. NN at App. 333-34.
68 *See* Ex. P at App. 155.
69 *Id.*
70 *Id.*

53. The press conference, the closed-door meetings with activists, and the activists' long-standing desire to expose ExxonMobil's "internal documents" as part of a campaign to put "pressure on the industry," inducing it to support "legislative and regulatory responses to global warming,"[71] form the partisan backdrop against which the CID must be considered. The thoroughly political goals of the activists—which the Massachusetts Attorney General adopted as her own at the press conference—are reflected in the CID itself.

D. The CID Demands 40 Years' of ExxonMobil's Records, Even Though ExxonMobil Could Not Have Violated the Statute Purportedly Under Investigation.

54. Three weeks after the press conference, on April 19, 2016, the Massachusetts Attorney General's Office served the CID on ExxonMobil's registered agent in Suffolk County, Massachusetts.

55. According to the CID, there is "a pending investigation concerning [ExxonMobil's] potential violations of Mass. Gen. Law ch. 93A, § 2."[72] That statute prohibits "unfair or deceptive acts or practices" in "trade or commerce"[73] and has a four-year statute of limitations.[74] The CID specifies two types of transactions under investigation: ExxonMobil's (i) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (ii) "marketing and/or sale of securities" to Massachusetts investors.[75] The requested documents pertain largely to information related to climate change in the possession of ExxonMobil and located at its principal place of business in Texas.

---

71 Ex. N at App. 141.
72 Ex. B at App. 23.
73 Mass. Gen. Law ch. 93A, §2(a).
74 Mass. Gen. Law ch. 260, § 5A.
75 Ex. B at App. 23.

56. ExxonMobil could not have committed the possible offenses that the CID purports to investigate for at least two reasons.

57. First, at no point during the past five years—more than one year before the limitations period began—has ExxonMobil (i) sold fossil fuel derived products to consumers in Massachusetts, or (ii) owned or operated a single retail store or gas station in the Commonwealth.[76]

58. Second, ExxonMobil has not sold any form of equity to the general public in Massachusetts since at least 2010, which is also well beyond the limitations period.[77] In the past decade, ExxonMobil has sold debt only to underwriters outside the Commonwealth, and ExxonMobil did not market those offerings to Massachusetts investors.[78]

59. The CID's focus on events, activities, and records outside of Massachusetts is demonstrated by the items it demands ExxonMobil search for and produce. For example, the CID demands documents that relate to or support 11 specific statements.[79] None of those statements were made in Massachusetts.[80] The CID also seeks ExxonMobil's communications with 12 named organizations,[81] but only one of these organizations has an office in Massachusetts and ExxonMobil's communications with the other 11 organizations likely occurred outside of Massachusetts. Finally, the

---

[76] Any service station that sells fossil fuel derived products under an "Exxon" or "Mobil" banner is owned and operated independently. In addition, distribution facilities in Massachusetts, including Everett Terminal, have not sold products to consumers during the limitations period.

[77] Ex. GG at App. 292.

[78] *Id.* This is subject to one exception. During the limitations period, ExxonMobil has sold short-term, fixed-rate notes, which mature in 270 days or less, to institutional investors in Massachusetts, in specially exempted commercial paper transactions. *See* Mass. Gen. Laws ch. 110A, § 402(a)(10); *see also* 15 U. S. C. § 77c(a)(3).

[79] Ex. B at App. 36-37 (Request Nos. 8-11).

[80] *Id.*

[81] *Id.* at App. 35 (Request No. 5).

CID requests all documents and communications related to ExxonMobil's publicly issued reports, press releases, and Securities and Exchange Commission ("SEC") filings, which were issued outside of Massachusetts,[82] and all documents and communications related to ExxonMobil's climate change research, which also occurred outside of Massachusetts.[83]

60. Even if ExxonMobil had engaged in some theoretically relevant conduct in Massachusetts, ExxonMobil has made no statements in the past four years that could give rise to fraud as alleged in the CID. For more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's *2006 Corporate Citizenship Report* recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and reasoned that "strategies that address the risk need to be developed and implemented."[84] In addition, in 2002, ExxonMobil, along with three other companies, helped launch the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."[85]

61. ExxonMobil has also discussed these risks in its public SEC filings. For example, in its 2006 10-K, ExxonMobil stated that "laws and regulations related to. . . risks of global climate change" "have been, and may in the future" continue to impact its operations.[86] Similarly, in its 2015 10-K, ExxonMobil noted that the "risk of climate

---

82 *Id.* at App. 38-40 (Request Nos. 15-16, 19, 22).
83 *Id.* at App. 34-35, 37-40 (Request Nos. 1-4, 14, 17, 22).
84 Exxon Mobil Corp., *2006 Corporate Citizenship Report* 15 (2007).
85 Stanford University Global Climate & Energy Project, *About Us*, *available at* https://gcep.stanford.edu /about/index.html (last visited Apr. 12, 2016).
86 Exxon Mobil Corp., Annual Report (Form 10-K) 2-3 (Feb. 28, 2007).

change" and "current and pending greenhouse gas regulations" may increase its "compliance costs."[87] Long before the limitations period of Mass. Gen. Law ch. 93A, § 2, ExxonMobil disclosed and acknowledged the risks that supposedly gave rise to the Massachusetts Attorney General's investigation.

62. Resting uneasily with the absence of any factual basis for investigating ExxonMobil's alleged fraud is the heavy burden imposed by the CID. Spanning 25 pages and containing 38 broadly worded document requests, the CID unreasonably demands production of essentially any and all communications and documents relating to climate change that ExxonMobil has produced or received over the last 40 years. For example, the CID requests all documents and communications "concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions . . . and the effects of these emissions on the Climate" since 1976 and all documents and communications concerning "any research, study, and/or evaluation by ExxonMobil and/or any other fossil fuel company regarding the Climate Change Radiative Forcing Effect of" methane since 2010.[88] It also requests all documents and communications concerning papers and presentations given by ExxonMobil scientists since 1976[89] and demands production of ExxonMobil's climate change related speeches, public reports, press releases, and SEC filings over the last 20 years.[90] Moreover, it fails to reasonably describe several categories of documents by, for example, requesting

---

87 Exxon Mobil Corp., Annual Report (Form 10-K) 3 (Feb. 24, 2016).

88 Ex. B at App. 34, 39 (Request Nos. 1, 17).

89 *Id.* at App. 36 (Request Nos. 2-4).

90 *Id.* at App. 36 (Request No. 8 (all documents since 1997)); *id.* at App. 39-40 (Request No. 22 (all documents since 2006)); *id.* at App. 36-39 (Request Nos. 9-12, 14-16, 19 (all documents since 2010)). The CID also demands the testimony of ExxonMobil officers, directors, or managing agents who can testify about a variety of subjects, including "[a]ll the topics covered" in the CID. *Id.* at App. 43 (Schedule B).

documents related to ExxonMobil's "awareness," "internal considerations," and "decision making" with respect to certain climate change matters.[91]

E. The CID Targets Organizations that Have Been Derided by the Press as "Climate Deniers."

63. The CID's narrower requests, however, are in some instances more troubling than its overly broad ones. They appear to target groups simply because they hold views with which Attorney General Healey disagrees. All 12 of the organizations that ExxonMobil is directed to produce its communications with have been identified by environmental advocacy groups as opposing policies in favor of addressing climate change or disputing the science in support of climate change.[92]

F. ExxonMobil's Efforts to Protect its Rights.

64. On April 13, 2016, ExxonMobil brought a declaratory judgment action in a Tarrant County district court against Attorney General Walker and the private attorneys to whom he had delegated his investigative power. ExxonMobil sought a declaration that Attorney General Walker's subpoena was illegal and unenforceable, because it violated several of ExxonMobil's rights under the United States and Texas constitutions, and was an abuse of process under common law.[93]

65. On May 16, 2016, the Attorneys General of Texas and Alabama intervened in that action in an effort to protect the constitutional rights of their citizens.[94] The plea filed by the Texas and Alabama Attorneys General criticized Attorney General Walker and his private attorneys for undertaking an investigation "driven by ideology,

---

91 *See id.* at App. 35-36, 39 (Request Nos. 7-8, 18).
92 *See, e.g.*, Ex. JJ at App. 306-308.
93 Pl's Original Pet. for Declaratory Relief at 22–26, *Exxon Mobil Corp.* v. *Walker*, No. 4:16-cv-00364-K, ECF No. 1-5 (April 13, 2016).
94 Ex. W at App. 214-220.

and not law."[95] The Texas Attorney General called Attorney General Walker's purported investigation "a fishing expedition of the worst kind" and recognized it as "an effort to punish Exxon for daring to hold an opinion on climate change that differs from that of radical environmentalists."[96] The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas "is more than just a free speech case. It is a battle over whether a government official has a right to launch a criminal investigation against anyone who doesn't share his radical views."[97]

66. Two days later, Attorney General Walker and the other defendants removed that case to this Court.[98] In response, ExxonMobil moved to remand the proceedings to state court because, under the reasoning of a recent decision by the Fifth Circuit, ExxonMobil's suit against Attorney General Walker is not ripe in federal court because ExxonMobil faces no sanctions for refusing to comply with Attorney General Walker's subpoena until he moves to enforce it.[99]

67. Unlike Attorney General Walker's subpoena, ExxonMobil faces immediate sanctions if it fails or refuses to comply with Attorney General Healey's CID. Noncompliance with the CID results in the assessment of a "civil penalty."[100] And if ExxonMobil does not respond to the CID, it risks waiving any objections to it. This suit is therefore ripe for adjudication in federal court.

---

95 *Id.* at App. 215.
96 Ex. X at App. 222.
97 Ex. Y at App. 226.
98 *See* Notice of Removal, *Exxon Mobil Corp.* v. *Walker*, No. 4:16-cv-00364-K, ECF No. 1 (May 18, 2016).
99 *See* Memorandum of Law in Supp. of Mot. to Remand, *Exxon Mobil Corp.* v. *Walker*, No. 4:16-cv-00364-K, ECF No. 12 (May 23, 2016).
100 Mass. Gen. Law ch. 93A § 7.

68. June 16, 2016 is the deadline under Massachusetts law (as extended on consent) for objecting to the CID. Under Massachusetts law, ExxonMobil must respond to the CID in a Massachusetts court, because otherwise it risks waiving its objections.

69. Accordingly, ExxonMobil expects to appear specially in Massachusetts to file a protective motion. ExxonMobil plans to file that motion for the sole purpose of preserving its rights, and to avoid an argument that it has waived its objections.[101] Because Massachusetts lacks personal jurisdiction over ExxonMobil, ExxonMobil will appear specially and assert its objections subject to its argument regarding personal jurisdiction. ExxonMobil will also ask the Massachusetts court to stay its consideration of ExxonMobil's objections because ExxonMobil believes that this Court should resolve the enforceability of the CID in the first instance.

THE MASSACHUSETTS ATTORNEY GENERAL'S CID VIOLATES EXXONMOBIL'S RIGHTS

70. The facts recited above demonstrate the pretextual nature of the stated reasons for Attorney General Healey's investigation. The statements made by the Massachusetts Attorney General at the press conference reveal the political purpose of the investigation: to change the political calculus surrounding the debate about policy responses to climate change by (1) targeting the speech of the Massachusetts Attorney General's political opponents, and (2) exposing ExxonMobil documents that may be politically useful to climate activists.

71. The pretextual character of the CID is brought into sharp relief when the scope of the CID—which demands 40 years of records—is contrasted with the four-year limitations period of the statute that purportedly authorizes the investigation.

---

[101] *See Attorney General* v. *Bodimetric Profiles*, 533 N.E.2d 1364, 1365 (Mass. 1989).

72. The CID's demands for millions of documents that span four decades are not justified by any legitimate law enforcement objective. The CID purports to investigate ExxonMobil's deception of Massachusetts consumers and investors in trade or commerce. But ExxonMobil could not have deceived Massachusetts consumers or investors during the statutory period. Accordingly, the CID's demands for millions of documents, which concern only out-of-state activities, are not relevant to any action that Attorney General Healey is authorized to bring.

73. Neither Attorney General Healey nor any other public official may use the power of the state to prescribe what shall be orthodox in matters of public concern. By deploying the law enforcement authority of the Massachusetts Attorney General's Office to target one side of a political debate, her actions violated the First Amendment.

74. It follows from the political character of the CID and its remarkably broad scope that the CID also violates the Fourth Amendment. Its burdensome demands for irrelevant records violate the Fourth Amendment's reasonableness requirement, as well as its prohibition on fishing expeditions.

75. The Massachusetts Attorney General's investigation likewise fails to meet the requirements of due process. She has publicly declared not only that she believes ExxonMobil and other fossil fuel companies pose an existential risk to the planet, but also that she knows how the investigation will end: with a finding that ExxonMobil violated the law.[102] Moreover, Attorney General Healey publicly announced the improper purpose of her investigation: to silence ExxonMobil's voice in the public debate regarding climate change. The improper political bias that inspired the Massachusetts

[102] *Supra* ¶¶ 32-34.

investigation disqualifies Attorney General Healey from serving as the disinterested prosecutor required by the Constitution.

76. In the rush to fill what another attorney general described as a "[legislative] breach" regarding climate change, Attorney General Healey also has impermissibly trod on exclusively federal turf. Her Office's investigation regulates speech that occurs almost entirely outside of Massachusetts. Where a state seeks to regulate out-of-state speech, as the Massachusetts Attorney General's Office did here by issuing the CID, the state improperly encroaches on Congress's exclusive authority to regulate interstate commerce and violates the Dormant Commerce Clause.

77. Finally, the CID constitutes an abuse of process, because it was issued for the improper purposes described above.

EXXONMOBIL HAS BEEN INJURED BY THE CID

78. The Massachusetts CID has injured, is injuring, and will continue to injure ExxonMobil.

79. ExxonMobil is an active participant in the policy debate about potential responses to climate change. It has engaged in that debate for decades, participating in the Intergovernmental Panel on Climate Change since its inception and contributing to every report issued by the organization since 1995. Since 2009, ExxonMobil has publicly advocated for a carbon tax as its preferred method to regulate carbon emissions. Proponents of a carbon tax on greenhouse gas emissions argue that increasing taxes on carbon can "level the playing field among different sources of energy."[103] While the Massachusetts Attorney General and the other members of the Green 20 are entitled to disagree with ExxonMobil's position, no member of that coalition is entitled to silence

[103] Ex. FF at App. 259.

or seek to intimidate one side of that discussion (or the debate about any other important public issue) through the issuance of overbroad and burdensome subpoenas. ExxonMobil intends—and has a Constitutional right—to continue to advance its perspective in the national discussions over how to respond to climate change. Its right to do so should not be violated through this exercise of government power.

80. As a result of the improper and politically motivated investigation launched by the Massachusetts Attorney General, ExxonMobil has suffered, now suffers, and will continue to suffer violations of its rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and under Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution. Attorney General Healey's actions also violate Article One of the United States Constitution and constitute an abuse of process under common law.

81. Acting under the laws, customs, and usages of Massachusetts, Attorney General Healey has subjected ExxonMobil, and is causing ExxonMobil to be subjected, to the deprivation of rights, privileges, and immunities secured by the United States Constitution and the Texas Constitution. ExxonMobil's rights are made enforceable against Attorney General Healey, who is acting under the color of law, by Article One, Section Eight of the United States Constitution, and the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, all within the meaning and contemplation of 42 U.S.C. § 1983, and by Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

82. Absent relief, Attorney General Healey will continue to deprive ExxonMobil of these rights, privileges, and immunities.

83. In addition, ExxonMobil is imminently threatened with further injury that will occur if it is forced to choose between conforming its constitutionally protected speech to Attorney General Healey's political views or exercising its rights and risking sanctions and prosecution.

84. The CID also imminently threatens ongoing injury to ExxonMobil because it subjects ExxonMobil to an unreasonable search in violation of the Fourth Amendment. Complying with this unreasonably burdensome and unwarranted fishing expedition would require ExxonMobil to collect, review, and produce millions of documents, and would cost millions of dollars.

85. If ExxonMobil's request for injunctive relief is not granted, and Attorney General Healey is permitted to enforce the CID, then ExxonMobil will suffer these imminent and irreparable harms. ExxonMobil has no adequate remedy at law for the violation of its constitutional rights.

CAUSES OF ACTION

A. First Cause of Action: Violation of ExxonMobil's First and Fourteenth Amendment Rights

86. ExxonMobil repeats and realleges paragraphs 1 through 85 above as if fully set forth herein.

87. The CID's focus on one side of a policy debate in an apparent effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in that debate contravenes, and any effort to enforce the subpoena would further contravene, the rights provided to ExxonMobil by the First Amendment to the United States Constitution, made applicable to the Commonwealth of Massachusetts by the Fourteenth Amendment, and by Section Eight of Article One of the Texas Constitution.

88. The CID is an impermissible viewpoint-based restriction on speech, and it burdens ExxonMobil's political speech. Attorney General Healey issued the CID based on her disagreement with ExxonMobil regarding how the United States should respond to climate change. And even if the CID had not been issued for that illegal purpose, it would still violate the First Amendment, because it burdens ExxonMobil's political speech, and its demands are not substantially related to any compelling governmental interest.

B. Second Cause of Action: Violation of ExxonMobil's Fourth and Fourteenth Amendment Rights

89. ExxonMobil repeats and realleges paragraphs 1 through 85 above as if fully set forth herein.

90. The issuance of the CID contravenes, and any effort to enforce the subpoena would further contravene, the rights provided to ExxonMobil by the Fourth Amendment to the United States Constitution, made applicable to the Commonwealth of Massachusetts by the Fourteenth Amendment, and by Section Nine of Article One of the Texas Constitution to be secure in its papers and effects against unreasonable searches and seizures.

91. The CID is an unreasonable search and seizure because it constitutes an abusive fishing expedition into ExxonMobil's climate change research over the past 40 years, without any basis for believing that ExxonMobil violated Massachusetts law. Its overbroad and irrelevant requests impose an undue burden on ExxonMobil and violate the Fourth Amendment's reasonableness requirement, which mandates that a subpoena be limited in scope, relevant in purpose, and specific in directive.

C. Third Cause of Action: Violation of ExxonMobil's Fourteenth Amendment Rights

92. ExxonMobil repeats and realleges paragraphs 1 through 85 above as if fully set forth herein.

93. Attorney General Healey's investigation of ExxonMobil contravenes the rights provided to ExxonMobil by the Fourteenth Amendment to the United States Constitution and by Section Nineteen of Article One of the Texas Constitution not to be deprived of life, liberty, or property without due process of law.

94. The CID deprives ExxonMobil of due process of law by violating the requirement that a prosecutor be disinterested. Attorney General Healey's statements at the Green 20 press conference make clear that she is biased against ExxonMobil.

D. Fourth Cause of Action: Violation of ExxonMobil's Rights Under the Dormant Commerce Clause

95. ExxonMobil repeats and realleges paragraphs 1 through 85 above as if fully set forth herein.

96. Article I, Section 8 of the United States Constitution grants Congress exclusive authority to regulate interstate commerce and thus prohibits the States from doing so. The issuance of the CID contravenes, and any effort to enforce the CID would further contravene, the rights provided to ExxonMobil under the Dormant Commerce Clause.

97. The CID effectively regulates ExxonMobil's out-of-state speech while only purporting to investigate ExxonMobil's marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth and its marketing and/or sale of securities to investors in the Commonwealth.

98. The CID demands documents that relate to (1) statements ExxonMobil made outside the Commonwealth, and (2) ExxonMobil's communications with organizations residing outside the Commonwealth. It therefore has the practical effect of primarily burdening interstate commerce.

E. Fifth Cause of Action: Abuse of Process Claim

99. ExxonMobil repeats and realleges paragraphs 1 through 86 above as if fully set forth herein.

100. Attorney General Healey committed an abuse of process under common law by (1) issuing the CID in the absence of a belief that the documents sought are relevant to ExxonMobil's trade or commerce in the Commonwealth, as required by the authorizing statute; (2) having an ulterior motive for issuing and serving the CID, namely, an intent to prevent ExxonMobil from exercising its right to express views with which she disagrees; and (3) causing injury to ExxonMobil's reputation and violating it constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that Attorney General Healey be summoned to appear and answer and that this Court award the following relief:

1. A declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that the issuance of the CID violates ExxonMobil's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution; violates ExxonMobil's rights under Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution; and violates the Dormant Commerce Clause of the United States Constitution;

2. A declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that the issuance of the CID constitutes an abuse of process, in violation of common law;

3. A permanent injunction prohibiting enforcement of the CID;

4. Such other injunctive relief to which Plaintiff is entitled; and

5. All costs of court together with any and all such other and further relief as this Court may deem proper.

Dated: June 15, 2016

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(*pro hac vice* pending)
State Bar No. 24054300
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
(*pro hac vice* pending)
twells@paulweiss.com
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

Justin Anderson
(*pro hac vice* pending)
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 15 2016
12:46 pm
CLERK, U.S. DISTRICT COURT
By _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,

Plaintiff,

v.

MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,

Defendant.

No. 4:16-CV-469-A

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF EXXON MOBIL CORPORATION'S MOTION FOR A PRELIMINARY INJUNCTION

Patrick J. Conlon (*pro hac vice* pending)
Daniel E. Bolia
EXXON MOBIL CORPORATION
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

Theodore V. Wells, Jr. (*pro hac vice* pending)
Michele Hirshman (*pro hac vice* pending)
Daniel J. Toal (*pro hac vice* pending)
Justin Anderson (*pro hac vice* pending)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

Ralph H. Duggins
Philip A. Vickers
Alix D. Allison
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
Tel: (817) 877-2800
Fax: (817) 877-2807

Nina Cortel
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
Tel: (214) 651-5579
Fax: (214) 200-0411

Counsel for Exxon Mobil Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Exxon Mobil Corporation ("ExxonMobil" or the "Company") respectfully submits this memorandum of law in support of its motion for a preliminary injunction.

PRELIMINARY STATEMENT

This case is about freedom of political speech. Even though ExxonMobil's forthright and public recognition of the risks associated with climate change long predates the limitations period and independently forecloses the possibility of securities or consumer fraud in this case, Defendant Maura Healey, the Attorney General of Massachusetts (the "Attorney General"), has misused her law enforcement authority by deploying it against her political opponents in the debate over climate change. Because the Attorney General does not believe that ExxonMobil shares her views on climate change, her office served ExxonMobil with a civil investigative demand ("CID") that requires ExxonMobil to produce 40 years' worth of documents relating to climate change. The Attorney General's actions violate ExxonMobil's constitutional rights and fly in the face of the universally recognized principle that the coercive machinery of law enforcement should not be used to limit debate on public policy.

The Attorney General issued the CID according to a plan devised by state officials, climate change activists, and plaintiffs'-side environmental attorneys who support certain policy responses to climate change and aim to silence those who disagree. The public officials made their intentions known at a joint press conference held on March 29, 2016, featuring the remarks of former Vice President and private citizen Al Gore. During that press conference, a coalition of attorneys general with a goal to end the world's reliance on fossil fuels announced their frustration with perceived congressional inaction on climate change and pledged to use law

enforcement tools "creatively" and "aggressively," not to investigate violations of law, but to impose their preferred policy response to climate change.[1]

This public announcement was the culmination of years of planning. Since at least 2012, climate change activists have sought to obtain the internal records of fossil fuel companies, and they identified the use of law enforcement tools as a particularly powerful means of obtaining records that would be otherwise beyond their grasp.[2] At a 2012 workshop entitled "Climate Accountability, Public Opinion, and Legal Strategies," the attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[3] They concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[4] And, those activists were on call at the press conference. During a private session with the attorneys general, a climate change activist and a private environmental lawyer, who has previously sued ExxonMobil, made presentations on the "imperative of taking action now on climate change" and on "climate change litigation."[5]

The attorneys general recognized that the involvement of these individuals—especially a private attorney likely to seek fees from any private litigation made possible by a government investigation of ExxonMobil—could expose the special interests behind their announcement. When that same private attorney asked the New York Attorney General's office what he should tell a reporter if asked about his involvement, the chief of that office's environmental unit, in an attempt to conceal the private attorney's participation in these meetings from the press and public, told him not to confirm his attendance at the conference.[6] This desire to shield from the

---

1 *See* Ex. A at App. 3 (transcript of press conference prepared by counsel based on video recording). All citations in format "Ex. _" refer to exhibits to the Declaration of Justin Anderson, dated June 14, 2016.
2 Ex. N at App. 125.
3 *Id.* at App. 119-20, 125, 145-49.
4 *Id.* at App. 125.
5 Ex. I at App. 76-85.
6 Ex. P at App. 155.

public the origins of the state officials' initiative speaks volumes about their own assessment of its propriety.

The CID is a product of this misguided enterprise. The CID purports to investigate whether ExxonMobil misled consumers and investors about the risks of climate change, but the pretextual character of the Attorney General's investigation follows from even a brief review of the statute under investigation and of a few facts that are not subject to reasonable dispute. First, the offense that the CID purports to investigate has a four-year statute of limitations.[7] For the last decade, however, ExxonMobil has publicly recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and that "strategies that address the risk need to be developed and implemented."[8] Second, during the limitations period, ExxonMobil has not engaged in the activity supposedly under investigation in Massachusetts.

Having nothing to do with a legitimate investigation, the CID runs afoul of several constitutional provisions. First, the government may not prescribe what shall be orthodox in matters of public concern. Because the CID is aimed at one side of a policy debate and unjustifiably burdens ExxonMobil's political speech, it violates the First Amendment. Second, the CID's demand that ExxonMobil produce four decades' worth of records in connection with a baseless fishing expedition constitutes an unreasonable search of the kind proscribed by the Fourth Amendment. Third, the Attorney General cannot serve as the disinterested prosecutor that due process requires because she has improperly prejudged the outcome of her investigation, as demonstrated by her public comments on the matter. Finally, in the Attorney General's rush to fill a perceived legislative "breach" concerning climate change, she has improperly trod on

---

7 *Infra* Section I.B.2; *see also* Mass. Gen. Law ch. 93A, § 2; Mass. Gen. Law. ch. 260, § 5A.
8 Ex. T at App. 193.

exclusively federal turf and regulated out-of-state speech in violation of the Dormant Commerce Clause.

To protect ExxonMobil's constitutional rights, an injunction should be issued prohibiting the enforcement of the CID.

STATEMENT OF FACTS

A. The "Green 20" Coalition of Attorneys General Announces a Plan to Use Law Enforcement Tools to Achieve Political Goals.

The CID is the product of a coordinated campaign of partisan state officials urged on by climate change activists and attorneys motivated by private interests. This campaign first exposed itself to the public on March 29, 2016, when the Attorney General of New York hosted a press conference in New York City with certain other attorneys general as the self-proclaimed "AGs United for Clean Power."[9] The purpose of the conference was to discuss the coalition's plans to take "progressive action on climate change," including investigating ExxonMobil.[10] Former Vice President Al Gore was the event's featured speaker. The Attorney General, along with attorneys general or staff members from over a dozen other states, attended and participated in the press conference.[11]

The attorneys general, calling themselves the "Green 20," explained that their mission was to "com[e] up with creative ways to enforce laws being flouted by the fossil fuel industry."[12] Expressing dissatisfaction with the perceived "gridlock in Washington" regarding climate change legislation, Eric Schneiderman, the Attorney General of New York, said that the coalition had to work "creatively" and "aggressively" to advance that agenda.[13]

---

9 Ex. A at App. 2-21.
10 *See* Ex. MM at App. 327.
11 *See* Ex. A at App. 2-21.
12 *Id.* at App. 3.
13 *Id.* at App. 3-4.

He announced that the assembled "group of state actors [intended] to send the message that [they were] prepared to step into this [legislative] breach."[14] He continued:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[15]

The purpose of the coalition's "coordination" was "to deal with th[e] most pressing issue of our time," namely, the need to "preserve our planet and reduce the carbon emissions that threaten all of the people we represent."[16] Attorney General Schneiderman declared that the debate about climate change and the range of permissible policy responses to it was over: "[W]e are here for a very simple reason. We have heard the scientists. We know what's happening to the planet. There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up."[17] Attorney General Schneiderman then reminded the press that his office "had served a subpoena on ExxonMobil," to investigate "theories relating to consumer and securities fraud."[18]

Attorney General Schneiderman next introduced Al Gore. Gore cited perceived inaction by the federal government to justify action by state attorneys general, observing that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[19] Gore went on to condemn those who question the viability of renewable energy sources, faulting them

---

14 *Id.* at App. 4.
15 *Id.* at App. 5.
16 *Id.* at App. 2.
17 *Id.* at App. 3.
18 *Id.* at App. 4.
19 *Id.* at App. 10.

for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[20] He then accused the fossil fuel industry of "using [its] combined political and lobbying efforts to put taxes on solar panels and jigger with the laws."[21]

When it was his turn to speak, Claude Walker, the Attorney General of the United States Virgin Islands, began by hailing Gore as one of his "heroes." Attorney General Walker announced that his office had "launched an investigation into a company that we believe must provide us with information about what they knew about climate change and when they knew it."[22] That thinly veiled reference to ExxonMobil was later confirmed in a press release naming ExxonMobil as the target of his investigation.[23] Attorney General Walker admitted that his investigation of ExxonMobil was aimed at changing public policy, not investigating actual violations of existing law: "we will not stop until we get to the bottom of this and make it clear to our residents as well as the American people that we have to do something transformational. We cannot continue to rely on fossil fuel."[24]

During her turn at the podium, the Attorney General began by thanking Gore "who, today, I think, put most eloquently just how important this is, this commitment that we make."[25] She explained that, "in my view, there's nothing we need to worry about more than climate change."[26] The Attorney General therefore pledged to take "quick, aggressive action" to "address climate change and to work for a better future."[27] To advance this shared agenda on climate change policy, the Attorney General announced that she "too, ha[d] joined in

---

20 *Id.*
21 *Id.*
22 *Id.* at App. 16.
23 Ex. C at App. 53-55.
24 Ex. A at App. 17.
25 *Id.* at App. 13.
26 *Id.* at App. 13.
27 *Id.* at App. 14.

investigating the practices of ExxonMobil."[28] She also announced the pre-ordained outcome of that investigation: "We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[29]

The political motivations articulated by the Green 20 struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. One reporter reacted by asking whether the press conference and the investigations were mere "publicity stunt[s]."[30]

B. In Closed-Door Meetings, the Green 20 Privately Meet with Climate Activists and Plaintiffs' Lawyers.

The impropriety of the attorneys general's statements at the press conference is surpassed only by what they said behind closed doors. On the morning of the press conference, the attorneys general attended two presentations.[31] Those presentations were not announced publicly, and they were not open to the press or general public. The identity of the presenters and the titles of the presentations, however, were later released by the state of Vermont in response to a request under that state's Freedom of Information Act.[32]

The first presenter was Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists.[33] His subject was the "imperative of taking action now on climate change."[34] According to the Union of Concerned Scientists, those who do not share its views about climate change make it "difficult to achieve meaningful solutions to global warming."[35]

---

28 *Id.* at App. 13.
29 *Id.*
30 *Id.* at App. 18.
31 Ex. I at App. 76-85.
32 Ex. II at App. 298-304.
33 Ex. J at App. 87-93.
34 Ex. I at App. 78.
35 Ex. K at App. 95.

The group accuses "[m]edia pundits, partisan think tanks, and special interest groups" of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[36]

Matthew Pawa of Pawa Law Group, P.C. hosted the second presentation on the topic of "climate change litigation."[37] The Pawa Law Group, which boasts of its "role in launching global warming litigation," previously sued ExxonMobil and sought to hold it liable for causing global warming.[38] That suit was dismissed because, as the court properly held, "regulating global warming emissions is a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[39]

Frumhoff and Pawa have sought for years to initiate legal actions against fossil fuel companies in the service of their political agenda and for private profit. In 2012, for example, Frumhoff hosted and Pawa presented at a conference entitled "Climate Accountability, Public Opinion, and Legal Strategies."[40] The conference's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[41] The 2012 conference's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[42] Even then, Frumhoff and Pawa suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[43] Indeed, that conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and,

---

36 *Id.* at App. 95-96.
37 Ex. I at App. 77.
38 Ex. M at App. 112.
39 Ex. N at App. 126.
40 *Id.* at App. 119-20, 145-49.
41 *Id.* at App. 117-18.
42 *Id.* at App. 125.
43 *Id.*

more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[44] The press conference thus represented the culmination of Frumhoff and Pawa's collective efforts to enlist state law enforcement officers in their quest to enact their preferred policy responses to global warming.

The attorneys general who attended the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the investigations. The day after the conference, a reporter from *The Wall Street Journal* called Pawa.[45] In response, Pawa asked the New York Attorney General's Office "[w]hat should I say if she asks if I attended?" The environmental bureau chief at the office, in an effort to conceal from the press and public the closed-door meetings, responded "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[46]

C. The CID Demands 40 Years' of ExxonMobil's Records.

The Massachusetts Attorney General's Office served ExxonMobil with the CID three weeks after the conference, on April 19, 2016. The CID demands production of essentially any and all of ExxonMobil's communications and documents related to the subject of climate change, including all documents related to research that ExxonMobil conducted or funded, over the past 40 years.[47] For example, one of the CID's 38 document requests demands all documents "concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions . . . and the effects of these emissions on the Climate."[48]

The CID's more targeted requests are in some instances more troubling than its extraordinary breadth. The CID evinces a particular interest in ExxonMobil's communications

---

44 *Id.* at App. 141.
45 Ex. P at 155.
46 *Id.*
47 *See* Ex. B at App. 23-51 (Request Nos. 1-4).
48 *Id.* at App. 34 (Request No. 1).

with organizations perceived to be on one side of the climate change debate.[49] The CID requests all documents and communications regarding climate change sent to or received from 12 named organizations, all of which have been identified by the media as opposing certain policies in favor of addressing climate change or as disputing the science in support of climate change.[50]

The CID's remarkably broad scope is particularly striking when contrasted with (1) the limitations period of the statute under investigation, and (2) the dearth of any relevant relationship between ExxonMobil and Massachusetts. The CID purports to investigate whether ExxonMobil committed consumer or securities fraud by misrepresenting to the public its understanding regarding the risks of climate change. The limitations period of the relevant statute is four years.[51] During that limitations period, however, ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts.[52] Nor has it marketed or offered any security for sale to the general public in Massachusetts.[53] Massachusetts courts therefore cannot even exercise personal jurisdiction over ExxonMobil in connection with the purported offenses under investigation.

During the four-year limitations period ExxonMobil has, however, publicly and repeatedly acknowledged that climate change presents significant risks that could affect its business.[54] For example, in its 2006 10-K, ExxonMobil stated that the "risks of global climate change" "have been, and may in the future" continue to impact its operations.[55] ExxonMobil's

---

49 *See id.* at App. 35 (Request No. 5).
50 *See, e.g.*, Ex. JJ at App. 306-08.
51 *Infra* Section I.B.2. Mass. Gen. Law ch. 93A, § 2.
52 Ex. HH at App. 295. Any service station that sells fossil fuel derived products under an "Exxon" or "Mobil" banner is owned and operated independently.
53 During the limitations period, ExxonMobil has sold short-term, fixed-rate notes in Massachusetts, in specially exempted commercial paper transactions. *See* Mass. Gen. Laws ch. 110A, § 402(a)(10); *see also* 15 U. S. C. § 77c(a)(3). These notes, which mature in 270 days or less, were sold to institutional investors, not individual customers.
54 *See* Ex. S at App. 183; Ex. T at App. 193.
55 Ex. U at App. 202-03.

forthright and public recognition of the risks associated with climate change long predates the limitations period and independently forecloses the possibility of securities or consumer fraud.

ExxonMobil's deadline to object to the CID is June 16, 2016. While ExxonMobil submits that Massachusetts courts are without personal jurisdiction to entertain an enforcement action, it nevertheless intends to appear specially in Massachusetts to file a protective motion in Massachusetts state court for the sole purpose of preserving its rights in that forum.

LEGAL STANDARD

A federal court should grant a motion for preliminary injunction where the plaintiff demonstrates: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat that it will suffer an irreparable injury unless the motion is granted; (3) that the threatened injury outweighs any potential harm to the enjoined party; and (4) that granting the preliminary injunction will not disserve the public interest. *Tex. Med. Providers Performing Abortion Servs.* v. *Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). ExxonMobil's application satisfies each of these requirements and should be granted.

ARGUMENT

I. ExxonMobil Has a Substantial Likelihood of Prevailing on the Merits.

ExxonMobil must demonstrate a substantial likelihood of success on only one of its claims to satisfy the first prong of its burden. For the reasons that follow, any of the four independent claims pressed in this action meets that requirement.

A. The CID Violates ExxonMobil's First Amendment Rights.

The CID is a direct and deliberate assault on ExxonMobil's First Amendment right to participate in the public debate over climate-change policy. The Attorney General has violated ExxonMobil's right to participate in that debate in two ways. First, as her comments at the press conference made clear, the Attorney General has chosen to regulate ExxonMobil's speech

because she disagrees with ExxonMobil's perceived views about how the United States should respond to climate change. Second, the CID impermissibly intrudes on ExxonMobil's protected political speech.

1. The CID Constitutes Impermissible Viewpoint Discrimination.

(a) Applicable Law

The First Amendment prohibits states from prescribing "what shall be orthodox in politics." *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). For that reason, states may not regulate speech because of the "opinion or perspective of the speaker." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Otherwise, states would be free to "drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Courts therefore review such viewpoint discrimination—state action that regulates speech on the basis of the speaker's opinion—more strictly than any other First Amendment violation. *See Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2223 (2015). Although most infringements on speech are subject to a balancing test, the First Amendment flatly forbids the government from engaging in viewpoint discrimination. *See, e.g.*, *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009).

To determine whether a regulation of speech is viewpoint-based, courts ask "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). When making that assessment, courts may consider a wide range of sources, including the relevant officials' own statements. *See, e.g.*, *Ridley* v. *Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004).

(b) Discussion

The Attorney General's candid recitation of the reasons for her investigation at the press conference establishes that the CID constitutes viewpoint discrimination. From start to finish,

the Attorney General and the other speakers at the press conference faulted ExxonMobil for exercising its right to engage in the national debate about how the United States should respond to climate change. For example, former Vice President Gore accused ExxonMobil of "trying to convince people that renewable energy is not a viable option," and of using "political and lobbying efforts to put taxes on solar panels and jigger with the laws . . . to slow down this renewable revolution."[56]

What Al Gore condemns as efforts to "jigger with the laws," the First Amendment calls "speech." Although the Attorney General couched the reasons for her investigation in slightly different terms, her stated justifications were nevertheless thoroughly and impermissibly tethered to ExxonMobil's alleged opposition to the Attorney General's preferred policy responses to climate change.

Attorney General Healey's statements should be read in the context of the press conference as a whole. Attorney General Schneiderman explained that the Green 20 had joined together "for a very simple reason": to respond to "what's happening to the planet" and stop the "morally vacant forces that are trying to block every step by the federal government to take meaningful action" related to climate change.[57] The purpose of the press conference was to "send[] a message" that the attorneys general were prepared to step into the "battle" over climate change "with an unprecedented level of commitment and coordination."[58] Attorney General Healey similarly announced that she had a "moral obligation" to move the country toward a "clean energy future" and alleviate the threat to "the very existence of our planet." As part of her campaign "to address climate change and to work for a better future," she explained that she was taking "quick, aggressive action" to "hold[] accountable those who have needed to be held

---

56 Ex. A at App. 10.
57 *Id.* at App. 3.
58 *Id.* at App. 5.

accountable for far too long."[59] Statements like these, which expressly link state action to the speaker's viewpoint, are direct evidence of viewpoint discrimination. *Ridley*, 390 F.3d at 88-89.

The CID's demands confirm these impermissible motives. The CID targets organizations that hold dissenting views about climate change that differ from those of the Green 20. The CID demands that ExxonMobil produce its communications with 12 organizations—every one of which has been identified by the media as questioning the climate change policies favored by the Attorney General and her allies or as disputing the science in support of climate change. Where, as here, the government targets speakers because of their views on policy, it engages in impermissible viewpoint discrimination. The content of the CID, joined with the statements made by the Attorney General and her allies, cannot be reconciled with the First Amendment.

2. The CID Cannot Survive the Demanding Test Applicable to Subpoenas that Burden First Amendment Rights.

(a) Applicable Law

A subpoena "that may infringe on First Amendment rights" must pass a two-part test. *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009). The government must show (1) that it has a "compelling interest" in obtaining the materials it seeks, and (2) that there is a "sufficient nexus" between its interest and the information sought. *Id.* Foremost among the categories of speech protected by the First Amendment is political speech. Speech addressing "governmental affairs" and "the manner in which government is operated or should be operated" is well-recognized as political speech entitled to particularly vigilant protection under the First Amendment. *See Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966). "[T]his no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978).

---

[59] *Id.* at App. 13-14.

(b) Discussion

The CID violates the First Amendment for a second and independently sufficient reason: It cannot survive the rigorous test that courts apply to subpoenas that demand materials protected by the First Amendment. The CID requires ExxonMobil to produce documents bearing on its participation in the long-running and still-unresolved national debate about what policy approach the United States should take in response to the risks of climate change. ExxonMobil's research and related communications regarding climate change are an indispensable part of its informed participation in the ongoing national debate. Such documents thus fall comfortably within the protections of the First Amendment. Indeed, speech of the type demanded by the CID, which concerns "public affairs," "is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964). The Attorney General therefore must show that the CID's demands are substantially related to a compelling interest.

The Attorney General can identify no compelling interest that justifies the CID. The only interest the Attorney General and the other attorneys general discussed at the press conference was their collective desire to combat climate change by identifying and suppressing the speech of fossil fuel companies. *See supra* Section I.A.1. The Attorney General's desire to advance her political position by silencing dissenting views cannot qualify as a compelling interest under settled Supreme Court precedent. "[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011).

Even if the Attorney General could identify a compelling state interest, the CID's demands are not substantially related to advancing any such interest. *See Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961). Because her CID intrudes on protected speech, the Attorney General must show "a substantial relation between the information sought and a

subject of overriding and compelling state interest." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 546 (1963). If the "substantial relation" requirement means anything, it means that the CID is overbroad. The CID purports to investigate possible violations of a statute that has a four-year limitations period.[60] In the service of that investigation, the CID demands every document related to climate change that ExxonMobil has produced or received, and all the research it has funded, over the last 40 years. Requests that stretch more than three decades beyond the limitations period cannot possibly qualify as substantially related to any legitimate investigation. *Cf. id.* at 554. The Attorney General cannot show that the CID's exceedingly broad demands are related to any compelling interest, as required by the First Amendment.

B. The CID Is a Burdensome and Baseless Fishing Expedition that Violates the Fourth Amendment.

The CID purports to authorize a fishing expedition into four decades' worth of records from a company with nearly 80,000 employees, despite a marked absence of any basis for suspecting that ExxonMobil violated the law under investigation. The scope of the CID is far too broad, and the burden it imposes is unreasonable.

The CID violates the Fourth Amendment in two ways. First, the Fourth Amendment forbids the government from imposing an unreasonable burden on the recipient of a subpoena. Subpoenas therefore must be restrained and specific. *See See* v. *City of Seattle*, 387 U.S. 541, 544 (1967). And that is particularly true where the materials sought may be protected by the First Amendment. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978). But there is nothing restrained or specific about the CID.

Second, the Fourth Amendment does not permit the government to rifle through all of ExxonMobil's papers on climate change, "relevant or irrelevant, in the hope that something will

[60] *Infra* Section I.B.2. Mass. Gen. Law ch. 93A, § 2; Mass. Gen. Law. ch. 260, § 5A.

turn up." *Fed. Trade Comm'n* v. *Am. Tobacco Co.*, 264 U.S. 298, 306 (1924). Instead, the investigation must follow from a legitimate suspicion that a crime has been committed. *See id.* Where, as here, there is no plausible suggestion that the recipient of a subpoena actually violated the law, a court should enjoin its enforcement. *See Major League Baseball* v. *Crist*, 331 F.3d 1177, 1187-88 (11th Cir. 2003).

1. The CID Imposes an Unreasonable Burden on ExxonMobil.

The CID's document requests are breathtakingly burdensome. When the government demands information from a private party through a subpoena, the Fourth Amendment requires that the subpoena be "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *City of Seattle*, 387 U.S. at 544. If the materials sought to be seized may be protected by the First Amendment, then the Court must apply these requirements with "scrupulous exactitude." *Zurcher*, 436 U.S. at 564.

The CID cannot withstand the examination *Zurcher* requires. The CID contains 38 sweeping demands that span a 40-year period.[61] It requires ExxonMobil to produce virtually every document it has ever sent or received that in any way pertains to climate change.[62] Given the breadth of the requests and the 40-year date range, it would be difficult to overstate the costs ExxonMobil likely would incur in trying to comply with the CID. A reasonable estimate suggests that the requests embrace millions of pages, and ExxonMobil likely would need to spend millions of dollars to comply with the CID's demands.[63] Even if one puts aside the breadth of the requests, the date range alone renders the CID unreasonable. It runs decades longer than periods that have been held to be unreasonable in analogous contexts. *See, e.g.*, *In re Grand Jury Proceedings*, 707 F. Supp. 1207, 1218 (D. Haw. 1989) (eleven years); *In re Grand*

---

61 Ex. B at App. 23-51 (Request Nos. 1-38).
62 *See id.*
63 Declaration of Justin Anderson at vii-ix.

Jury Proceedings Witness Bardier, 486 F. Supp. 1203, 1214 (D. Nev. 1980) (six years). The CID does not withstand a routine application of Fourth Amendment principles, let alone the rigorous examination required where the materials are protected by the First Amendment. *See Zurcher*, 436 U.S. at 564.

2. The CID Is a Baseless Fishing Expedition.

(a) Applicable Law

To qualify as a "reasonable" exercise of governmental authority under the Fourth Amendment, the CID must have been issued pursuant to a legitimate suspicion that the law has been violated. *See Am. Tobacco Co.*, 264 U.S. at 306. That means the government may not "direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." *Id.* Courts therefore examine subpoenas to determine whether the burden they impose is justified by any legitimate possibility that the law has been violated. When it is not, courts enjoin the enforcement of the subpoena. *See Crist*, 331 F.3d at 1187-88.

(b) Discussion

The CID is a baseless fishing expedition. It does not even attempt to limit the scope of its inquiry to documents that might be relevant to a plausible violation of the law. To the contrary, the CID's sweeping demands reveal the pretextual character of the Attorney General's investigation. As discussed in Section I.A, *supra*, the Attorney General's statements at the press conference confirm her true motive: to suppress speech, not enforce the law. That conclusion also follows from the dubious bases for the investigation.

ExxonMobil could not have committed the offenses that the CID purports to investigate, because—both before and throughout the limitations periods—ExxonMobil forthrightly and publicly disclosed the risks associated with climate change. The CID supposedly investigates whether ExxonMobil committed consumer or securities fraud by misrepresenting to the public its

understanding regarding the risks of climate change. The limitations period is four years.[64] Since long before 2012, however, ExxonMobil has publicly recognized the need for action regarding climate change and the potential risks that climate change poses to its business. Since 2002, ExxonMobil has supported the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."[65] ExxonMobil's *2006 Corporate Citizenship Report* recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant."[66] Despite noting that "[c]limate remains an extraordinarily complex area of scientific study," it reasoned that "strategies that address the risk need to be developed and implemented."[67] Moreover, for at least the past ten years, ExxonMobil has discussed the risks associated with climate change in its public Securities and Exchange Commission filings.[68] In its 2006 10-K, ExxonMobil stated that the "risks of global climate change" "have been, and may in the future" continue to impact its operations.[69] Similarly, in its 2009 10-K, ExxonMobil noted that the "risk of climate change" and "pending greenhouse gas regulations" may increase its "compliance costs."[70] ExxonMobil's forthright and public recognition of the risks associated with climate change thus predate the limitations period by years, and foreclose the possibility that it committed securities or consumer fraud under the theory articulated by the Attorney General.

That ExxonMobil could not have violated the law also follows from an examination of the activities the CID purports to investigate. The Attorney General's investigation supposedly

---

64 *Infra* Section I.B.2. Mass. Gen. Law ch. 93A, § 2, M.G.L. ch. 260, § 5A.
65 Ex. DD at App. 253-54.
66 Ex. T at 193.
67 *Id.*
68 *See, e.g.*, Ex. U at 199-203; Ex. V at 206-12.
69 Ex. U at 202-03.
70 Ex. V at 211.

concerns possible violations of Mass. Gen. Law ch. 93A, § 2, which prohibits "unfair or deceptive acts or practices" in "trade or commerce." The CID says that the Attorney General is investigating ExxonMobil's "marketing and/or sale of energy and other fossil fuel derived products" to consumers in the Commonwealth," and its "marketing and/or sale of securities . . . to investors in the Commonwealth."[71]

It is inconceivable that ExxonMobil deceived Massachusetts consumers or investors during the limitations period. At no point during the past five years has ExxonMobil (i) sold fossil fuel derived products to consumers in Massachusetts, or (ii) owned or operated a single retail store or gas station in the Commonwealth.[72] And, ExxonMobil has not sold any form of equity to the general public in Massachusetts in the past five years, nor has it sold debt to the general public in the Commonwealth in the last decade.[73] The materials sought by the CID thus cannot be relevant to any possible violation of the statute. In fact, because ExxonMobil has not engaged in the activities purportedly under investigation in Massachusetts during the limitations period, it has no "suit-related" contacts with Massachusetts and is not subject to the personal jurisdiction of Massachusetts courts. *See Walden* v. *Fiore*, 134 S. Ct. 1115, 1121-23 (2014). The CID is therefore precisely the type of fishing expedition that the Fourth Amendment forbids.

C. The Attorney General Cannot Serve as the Disinterested Prosecutor that Due Process Requires.

The Attorney General's improper statements at the press conference establish that she cannot serve as a disinterested prosecutor. Her comments evinced personal bias against ExxonMobil, improper motives in launching her investigations, and prejudgment of ExxonMobil's liability.

---

71 Ex. B at App. 23.
72 Ex. HH at App. 296.
73 Ex. GG at App. 292-93. This is subject to the one exception discussed above—*i.e.*, short-term, fixed-rate notes, which ExxonMobil has sold to institutional purchasers in the Commonwealth. *See supra* n.52.

1. Applicable Law

Due process guarantees ExxonMobil a prosecutor who will set aside his or her own interest—financial, political, or otherwise—in favor of a single interest: "that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). That requirement bars a prosecutor from "injecting a personal interest . . . into the enforcement process." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). It also prohibits a prosecutor from pursuing a case when he or she is "influenced by improper motives." *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). These fundamental safeguards "help[] to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242. They similarly "preserve[] both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Id.* (citation and internal quotation marks omitted).

These principles require prosecutors to abide by "standards of prosecutorial ethics," including their obligation to "respect the presumption of innocence" and "refrain[] from speaking in public about pending and impending cases except in very limited circumstances." *United States* v. *Bowen*, 799 F.3d 336, 353-54 (5th Cir. 2015). Prosecutors violate these requirements when they make "[i]nflammatory and biased" comments about ongoing matters." *Id.* at 358.

2. Discussion

The Attorney General cannot serve as a disinterested prosecutor in her investigation of ExxonMobil because her statements at the press conference create "an appearance of impropriety" that "undermine[s] [the public] confidence" in her investigation. *U.S. ex rel. S.E.C.* v. *Carter*, 907 F.2d 484, 488 (5th Cir. 1990). As explained above, her statements revealed that her investigation improperly aims to suppress dissenting views about climate change and the proper policy responses to it, not to investigate and enforce potential violations of law. *Supra*

Section I.A. The Attorney General also expressed a personal bias against ExxonMobil and a premature judgment regarding the findings of her investigation.

The Attorney General claimed that "in [her] view," she had a "moral obligation" to combat climate change because "[n]othing is more important."[74] And weeks before even serving the CID, the Attorney General announced the results of her investigation: "We can all see today the troubling disconnect between what Exxon knew . . . and what the company and industry chose to share with investors and with the American public."[75]

Such statements falsely and misleadingly prejudge ExxonMobil's liability, and they have no place in a government investigation. *See Bowen*, 799 F.3d at 354. Statements of this kind—in conjunction with the Attorney General's desire to suppress ExxonMobil's political speech—confirm that the Attorney General cannot conduct her investigation in an even-handed manner, as required by due process. *See Wright* v. *United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (A prosecutor "is not disinterested if he has . . . an axe to grind against the defendant."). The Attorney General's investigation therefore violates due process.

D. The CID Regulates Interstate Commerce, in Violation of the Dormant Commerce Clause.

The CID violates the Dormant Commerce Clause because it overwhelmingly regulates speech that occurs outside of Massachusetts.

1. Applicable Law

The Commerce Clause grants Congress the exclusive power to regulate commerce among the states. *See* U.S. Const. art. I, § 8, cl. 3. Because Congress alone may regulate interstate commerce, states cannot "regulat[e] commerce occurring wholly outside that State's borders." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 332 (1989). A state burdens the flow of interstate

---

74 Ex. A at App. 13.
75 *Id.*

commerce and violates the Dormant Commerce Clause when its action has the "practical effect of controlling conduct outside of the state." *Pharm. Research Mfrs. of Am.* v. *Concannon*, 249 F.3d 66, 79 (1st Cir. 2001). The key question is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

Although many Dormant Commerce Clause cases concern the regulation of out-of-state conduct, the same principles apply when the state seeks to regulate out-of-state speech. For example, in *American Booksellers Foundation* v. *Dean*, the Second Circuit considered whether a Vermont statute that prohibited the distribution of sexually explicit materials to minors over the internet violated the Dormant Commerce Clause. 342 F.3d 96, 99 (2d Cir. 2003). Recognizing that "it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States," the Second Circuit held that the Vermont statute violated the Dormant Commerce Clause because "the rest of the nation [wa]s forced to comply with [Vermont's] regulation or risk prosecution." *Id.* at 103-04 (alteration omitted).

2. Discussion

The Attorney General has improperly used her law enforcement authority to regulate ExxonMobil's out-of-state speech. The CID regulates ExxonMobil's speech outside of Massachusetts, because it requests documents and communications that ExxonMobil made or created exclusively in other states and not in Massachusetts.

The CID demands materials relating to ExxonMobil's public statements and SEC filings. But ExxonMobil maintains its principal offices and all of its central operations in Texas, and these communications were made outside of Massachusetts.[76] The CID likewise demands documents related to ExxonMobil's research into climate change and to various speeches made by ExxonMobil executives regarding climate change. But again, those materials have no

[76] Ex. B at App. 38-40 (Request Nos. 15-16, 19, 22).

connection to Massachusetts.[77] The CID also requests ExxonMobil's communications with 12 organizations.[78] Only one of these organizations has an office in Massachusetts. The Attorney General is hard pressed to identify any document category that has a relevant connection to Massachusetts.

In light of the CID's almost exclusive focus on out-of-state speech, it should come as no surprise that the practical effect of the CID is to burden primarily out-of-state activity. Requiring ExxonMobil to produce the sought-after materials—which in no way relate to Massachusetts—effectively regulates speech that occurred wholly outside of Massachusetts, in violation of the Dormant Commerce Clause.

II. ExxonMobil Faces a Substantial Threat of Irreparable Injury.

To establish that it faces a substantial threat of irreparable injury, a party "need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc.* v. *Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). "A violation of constitutional rights constitutes irreparable harm." *Cohen* v. *Coahoma Cnty.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992); *see Palmer ex rel. Palmer* v. *Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009).

As described in Section I.A, the CID violates ExxonMobil's First Amendment rights. And that is not the only impending deprivation of constitutional rights that ExxonMobil faces. Unless the injunction is granted, ExxonMobil will have two choices: (1) it can comply with the CID, which violates its First, Fourth, and Fourteenth Amendment rights and the Dormant Commerce Clause for the reasons described above, or (2) it can risk an enforcement action—and perhaps a prosecution—that is traceable to unconstitutional motives, which will subject it to

---

[77] Ex. B at App. 23-51 (Request Nos. 1-4, 14, 17, 22; Request Nos. 8-12, 32).
[78] Ex. B at App. 35 (Request No. 5).

precisely the same constitutional harms. Under these circumstances, if ExxonMobil has shown that it is likely to prevail on the merits, then it also faces an impending irreparable harm.

III. The Threatened Injury to ExxonMobil Outweighs any Potential Harm to the Attorney General, and an Injunction Would Serve the Public Interest.

The constitutional injuries ExxonMobil faces far outweigh any harm that would follow from the issuance of the injunction. Enjoining the enforcement of this CID will not frustrate the Attorney General's ability to enforce the law through lawful investigations. Because ExxonMobil's constitutional rights are at stake, enjoining the enforcement of the CID necessarily would serve the public interest in protecting the exercise of those rights. *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012); *White* v. *Baker*, 696 F. Supp. 2d 1289, 1313 (N.D. Ga. 2010).

CONCLUSION

The Attorney General and the Green 20 are entitled to their view that the world should cease relying on fossil fuels. They can campaign on that view, they can support other candidates for public office who share that view, and they can use the considerable platforms provided by their offices to urge their constituents to adopt that view. The Attorney General's office gives her no license, however, to compel by coercive force that which she has not earned through the only method of achieving political change that comports with our political system: persuasion.

Our Constitution "eschew[s] silence coerced by law—the argument of force in its worst form." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (internal quotation marks omitted). Instead, the American system "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id.* Because the CID breaks faith with this basic ingredient of the American bargain, the Attorney General should not be permitted to enforce it.

Dated: June 15, 2016

Respectfully submitted,

EXXON MOBIL CORPORATION
Patrick J. Conlon
(*pro hac vice* pending)
State Bar No. 24054300
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

Theodore V. Wells, Jr.
(*pro hac vice* pending)
twells@paulweiss.com
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

Justin Anderson
(*pro hac vice* pending)
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, a copy of the foregoing instrument was served on the following party via **certified mail, return receipt requested,** in accordance with the Federal Rules of Civil Procedure:

Maura Healey
Office Massachusetts Attorney General's Office
One Ashburton Place
Boston, MA 02108-1518

Philip A. Vickers

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	No. 4:16-CV-469-K

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ATTORNEY GENERAL MAURA HEALEY'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

I. INTRODUCTION

On April 19, 2016, Attorney General Healey issued a civil investigative demand ("CID") from her office in Massachusetts to Exxon Mobil Corporation's ("Exxon") registered agent in Massachusetts to investigate potential unfair and deceptive acts or practices in Exxon's marketing and sale of fossil fuel-derived products and securities to consumers and investors in Massachusetts, in violation of Massachusetts law.[1] Attorney General Healey's CID to Exxon is a straightforward application of her law enforcement authority under Massachusetts law.

Exxon has challenged the validity of the CID in Massachusetts state court and will have a full and fair opportunity to press its claims there. Notwithstanding that fact, Exxon also elected to file a nearly identical suit in this Court and asks the Court to exercise personal jurisdiction over Attorney General Healey—despite the fact that all relevant events alleged in the complaint occurred in Massachusetts or New York and no relevant events occurred in Texas.[2] Moreover, Exxon has asked the Massachusetts court to stay adjudication of its claims until this Court decides this case.

This Court should reject Exxon's transparent attempt at forum-shopping and dismiss this case. Aside from being a duplicative expenditure of the litigants'—and the Court's—resources, Exxon's suit must be dismissed under well-settled law due to several dispositive jurisdictional and procedural defects.

First, this Court lacks personal jurisdiction over Attorney General Healey. The Texas long-arm statute does not reach a nonresident state official acting in her official capacity, and—as recent decisions in the Fifth Circuit and this Court have held on similar facts—exercise of

[1] Complaint (Doc. No. 1) (Compl.), Exhibit (Exh.) B, App. 022.
[2] Exxon's Texas suit includes federal constitutional claims that it did not, but could have, brought in Massachusetts. Those federal constitutional claims are analogous to the Massachusetts constitutional claims Exxon raised in its Massachusetts suit.

personal jurisdiction would violate due process because Attorney General Healey lacks sufficient "minimum contacts" to be haled into court here. *Second*, because there is an ongoing administrative investigation by the Attorney General and a pending Massachusetts judicial proceeding (in which the Attorney General is, today, moving to compel Exxon's compliance with the CID), this case warrants abstention by this Court under *Younger v. Harris*, 401 U.S. 37 (1971). The Massachusetts state court proceeding, which Exxon itself commenced, will provide a full and fair opportunity for Exxon's objections to the CID—constitutional and otherwise—to be heard. *Third*, even if this Court has personal jurisdiction and abstention is not warranted, under the Fifth Circuit's decision in *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016), the case is unripe and must be dismissed. *Finally*, dismissal is mandated because venue for this Massachusetts-centered case is improper in this district.

For the foregoing reasons, the Court should dismiss Exxon's suit.

II. STATEMENT OF FACTS

Attorney General Healey is an elected constitutional officer in the Commonwealth of Massachusetts and is its highest ranking law enforcement official. Mass. Gen. Laws ch. 12, § 3. Attorney General Healey also has various enumerated statutory powers, including enforcement of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("Chapter 93A"), which proscribes unfair and deceptive practices in the conduct of business. Pursuant to Chapter 93A, the Attorney General is authorized to protect investors, consumers, and other persons in the state against unfair and deceptive business practices through such mechanisms as promulgating regulations, conducting investigations through CIDs, and instituting litigation. *See id.* §§ 2(c), 4, and 6. CIDs under Chapter 93A are a crucial tool for gaining information regarding whether an entity under investigation has violated the statute, and they are employed routinely by the Attorney General's Office ("Office").

Attorney General Healey issued the CID to Exxon pursuant to Chapter 93A, § 6, as part of her pending investigation of possible violations of Chapter 93A, § 2, and the regulations promulgated thereunder, relating to Exxon's suspected failure to disclose fully to investors and consumers its knowledge of the serious potential for climate change, the likely contribution of fossil fuels (the company's chief product) to climate change, and the risks of climate change, including risks to Exxon's own assets and businesses. The Office served the CID on Exxon's registered agent in Massachusetts on April 19, 2016, and Exxon confirmed that service was proper.

On June 15, 2016, Exxon filed this action against Attorney General Healey, in her official capacity, alleging that the Attorney General's investigation violates its constitutional rights and is an abuse of process (Doc. No. 1). In support of its claims, Exxon offered little more than two facts: (1) Attorney General Healey issued the CID and (2) she participated in a press conference where she stated that climate change is a major challenge and that she would investigate Exxon based on reports that Exxon knew more about climate change than it revealed to investors.[3] Pointing to no other facts, Exxon asserts in its complaint that Attorney General Healey, "in an apparent effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in that debate" (Compl. ¶ 87):

- "issued the CID based on her disagreement with ExxonMobil regarding how the United States should respond to climate change"—an "illegal purpose . . . not substantially related to any compelling governmental interest" (¶ 88);
- thereby engaged in "an abusive fishing expedition . . . without any basis for believing that ExxonMobil violated Massachusetts law" (¶ 91), "in the absence of a belief that the documents sought are relevant to ExxonMobil's trade or commerce in the Commonwealth" (¶ 100); and
- undertook these actions because "she is biased against ExxonMobil" (¶ 94) and has "an

[3] *See* Compl., Exh. A, App. 001. The Attorney General does not concede the accuracy of the transcript.

ulterior motive . . . namely, an intent to prevent ExxonMobil from exercising its right to express views with which she disagrees" (¶ 100).

Also on June 15, Exxon filed a motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID (Doc. No. 8).

The following day, June 16, 2016, Exxon filed a very similar petition in Massachusetts state court to set aside or modify the CID along with an emergency motion seeking the same relief and to stay the Massachusetts proceeding pending the outcome of this litigation.[4]

III. ARGUMENT

A. THIS COURT LACKS PERSONAL JURISDICTION OVER ATTORNEY GENERAL HEALEY.

To proceed in this Court, Exxon must establish that "both the forum state's long-arm statute and federal due process permit the court to exercise personal jurisdiction." *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Exxon can establish neither here.

1. Texas's Long-Arm Statute Does Not Reach Attorney General Healey in Her Official Capacity.

Texas's long-arm statute does not reach Attorney General Healey because the Attorney General is not a "nonresident" within the meaning of the Texas long-arm statute. The long-arm statute defines "nonresident" as either (1) "an individual who is not a resident of this state" or (2) "a foreign corporation, joint-stock company, association, or partnership." Tex. Civ. Prac. & Rem. Code Ann. § 17.041. Under the Fifth Circuit's recent reading of the statute in a nearly identical posture, *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), the Attorney General fits into neither category.

As in *Stroman*, Exxon seeks to challenge "an out-of-state regulator's enforcement of her

[4] *See* Compl. ¶ 69. A more complete recitation of the facts surrounding Attorney General Healey's investigation, which is unnecessary for the purposes of the Attorney General's motion to dismiss, is provided in the Attorney General's opposition to Exxon's motion for preliminary injunction.

state's statute." *Id.* at 482. Here, Attorney General Healey has acted under express statutory authority to investigate a violation of Massachusetts law. Also as in *Stroman*, the Attorney General is not sued as an "individual," but rather "*in her official capacity*." Compl. ¶ 16 (emphasis added). A government official sued in her official capacity is not an "individual" within the meaning of the long-arm statute. In such a case, under *Ex parte Young*, 209 U.S. 123 (1908), the official's "conduct remains *state action* under the Fourteenth Amendment." *Stroman*, 513 F.3d at 482 (emphasis added). Likewise, the Attorney General does not fit into "the only other class of nonresident defined by the statute"—"a foreign corporation, joint-stock company, association, or partnership"—which "includes business entities but not fellow states." *Id.* at 483. As the Fifth Circuit observed in *Stroman*, the statute does not appear to reach nonresident government officials acting in their official capacity at all. *Id.* at 482-83 ("[T]he Texas statute offers no obvious rationale for including nonresident individuals sued solely in their official capacity under *Ex Parte Young*.").

Additionally, in issuing the CID, the Attorney General did not "do business" in Texas within the meaning of the long-arm statute. The long-arm statute identifies three examples of "doing business": (1) entering into a contract with a Texas resident, to be performed at least in part in Texas; (2) committing a tort in the state; or (3) recruiting Texas residents for employment. Tex. Civ. Prac. & Rem. Code Ann. § 17.042. The Attorney General has engaged in no such acts.[5]

This construction is not only demanded by the language of the statute, but by common sense. It reflects the principles of comity, Texas's respect for its fellow sovereign states, and the

[5] And *Stroman* questioned whether an official-capacity suit like this one could ever reasonably be a "tort" claim within the long-arm statute. *Id.* at 483 ("[O]nly by twisting the ordinary meaning of the terms covered by the long-arm statute is Arizona's regulatory activity intended to be encompassed and adjudicated in Texas courts.").

Texas legislature's understanding that the proper and reasonable place to challenge the official actions of out-of-state officials is in their states—not in Texas.

2. Exercise of Personal Jurisdiction over the Attorney General by This Court Would Violate Due Process.

Even if the Texas long-arm statute purported to reach Attorney General Healey, this Court's exercise of specific personal jurisdiction over her would violate due process.[6] The Attorney General lacks requisite "minimum contacts" with Texas—because she has not "purposely directed [her] activities toward [Texas] or purposely availed [herself] of the privileges of conducting activities there"—and the exercise of personal jurisdiction here would be manifestly unreasonable. *Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 378 (5th Cir. 2002).[7]

a. The Attorney General Lacks the Minimum Contacts with Texas Required for the Court to Exercise Personal Jurisdiction over Her.

"In order for an exercise of personal jurisdiction to be consistent with due process, the nonresident defendant must have some minimum contact with the forum which results from an affirmative act on the part of the nonresident." *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). Here, Attorney General Healey not only lacks "affirmative" minimum contacts with Texas—she lacks any suit-related contacts with Texas at all.

All of the acts on the part of the Attorney General alleged in Exxon's complaint occurred

[6] It is not disputed that the Attorney General lacks the "continuous and systematic general business contacts" with Texas required by due process for general personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). *See Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (holding general personal jurisdiction requires contacts "so constant and pervasive 'as to render [the defendant] essentially at home in the forum State'" (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

[7] Because Attorney General Healey lacks any suit-related contacts with Texas, as discussed below, the second prong of the *Nuovo Pignone* test, "whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts," is not relevant. *Id.*

in Massachusetts or New York. As set forth above, Attorney General Healey issued the CID under Massachusetts's Chapter 93A from her office in Massachusetts, to Exxon's registered agent in Massachusetts. *See* Compl. ¶ 54. The press conference Exxon describes at length in its complaint—which forms no basis for legal action, in any event—took place in New York. Compl. ¶ 19. These realities belie Exxon's spurious assertion that "all or a substantial part of the events giving rise to the claims occurred in the Northern District of Texas." Compl. ¶ 18.

At no point did the Attorney General take *any* "affirmative act" in Texas related to her investigation, let alone "purposefully avail[] [her]self of the privilege of conducting activities" in Texas. *Holt*, 801 F.2d at 777. Likewise, serving the CID on Exxon's registered agent in Massachusetts under Massachusetts law does not "invok[e] the benefits and protections of [Texas's] laws," such that she "should reasonably anticipate being haled into court" in Texas. *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Indeed, Chapter 93A expressly provides for enforcement or objections to CIDs in Massachusetts Superior Court. Mass. Gen. Laws ch. 93A, § 6(7).

The Attorney General's lack of suit-related Texas contacts is dispositive here. *See Walden v. Fiore*, 134 S. Ct. 1115, 1124-25 (2014) (finding lack of personal jurisdiction when defendant had no contacts with forum, despite plaintiff's contacts with forum). Indeed, in two recent cases, the Fifth Circuit found a lack of personal jurisdiction in Texas over out-of-state regulators who had taken action against a Texas company for doing business in their states in violation of their state laws.

In *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), discussed above, a Texas-based real estate broker sued the Commissioner of the Arizona Department of Real Estate in a Texas federal court to challenge a cease-and-desist order issued by the Commissioner under

Arizona law concerning the broker's activities with Arizona purchasers. Even though the order was served in Texas, the Fifth Circuit held that the exercise of personal jurisdiction by a Texas court over the Commissioner would violate due process. The court found that "the totality of the Commissioner's contacts with Texas involves a cease and desist order and correspondence with [Plaintiff's] attorneys" and, therefore, "the Commissioner, a nonresident state official, could not have reasonably anticipated being haled into federal court in Texas to defend her enforcement of the Arizona statute." *Id.* at 484. Here, unlike the Commissioner in *Stroman*, Attorney General Healey did not serve the CID in Texas; she served it on Exxon in Massachusetts, at the office of its registered agent, therefore making it even less likely she would anticipate being required to defend her enforcement of Massachusetts law in a Texas federal court.

Similarly, in *Stroman Realty, Inc. v. Antt (Stroman II)*, 528 F.3d 382 (5th Cir. 2008), the Fifth Circuit again found a lack of personal jurisdiction in a suit brought by the same plaintiff in Texas against California and Florida officials who, the plaintiff argued, had even more extensive contacts with Texas than in *Stroman*. In *Stroman II*, the officials not only served a cease-and-desist order on the plaintiff in Texas (and commenced enforcement proceedings in their respective states), they also communicated with the Texas Real Estate Commission and Texas Attorney General's office about the plaintiff. *Id.* at 386-87. But the court held that these contacts did not represent "purposeful availment" by the California and Florida officials "of the privileges of conducting business" in Texas. *Id.*

Both *Stroman* cases require dismissal of this action because the Massachusetts Attorney General had no such intentional forum contacts implicating the protection or assistance of Texas's laws—or *any* suit-related contacts at all.[8]

[8] Indeed, the Fifth Circuit has found a *lack* of jurisdiction even when the defendant had

The fact that Exxon is headquartered in Texas and claims to store its responsive documents in Texas is irrelevant to the question of personal jurisdiction. As the Fifth Circuit has noted, "[j]urisdiction must not be based on the fortuity of one party residing in the forum state." *McFadin v. Gerber*, 587 F.3d 753, 760 (5th Cir. 2009). The location of Exxon's headquarters and records does not bear on *the Attorney General's* contacts with Texas—and it is the Attorney General's contacts, not Exxon's, that are relevant here. *See Walden*, 134 S. Ct. at 1126 ("[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.");

---

seemingly substantial contacts with the forum, unlike the Attorney General's lack of contacts in this case. *See Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214 (5th Cir. 2012) (lack of personal jurisdiction when defendant licensed software from and negotiated other licensing agreements with Texas company and software license included a Texas choice of law provision); *McFadin v. Gerber*, 587 F.3d 753 (5th Cir. 2009) (lack of personal jurisdiction in Texas when defendant sent orders for goods to and received commission checks from company in Texas, pursuant to contract underlying dispute with that company); *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309 (5th Cir. 2007) (lack of personal jurisdiction in Texas when defendant negotiated contract with Texas company through communications and visits to Texas and Texas company performed work in Texas); *Religious Tech. Ctr. v. Liebreich*, 339 F.3d 369 (5th Cir. 2003) (lack of personal jurisdiction over defendant estate in Texas in breach of contract action when estate representative negotiated and signed contract at issue in Texas), *reh'g denied*, *clarification granted*, 82 F. App'x 144 (5th Cir. 2003); *Allred v. Moore & Peterson*, 117 F.3d 278 (5th Cir. 1997) (nonresident defendant's service of process on plaintiff in forum state in another action does not support personal jurisdiction over defendant in forum state in abuse of process/malicious prosecution case); *Hydrokinetics, Inc. v. Alaska Mech., Inc.*, 700 F.2d 1026 (5th Cir. 1983) (lack of personal jurisdiction in Texas, even when defendant negotiated contract underlying dispute (for goods to be manufactured in Texas) via phone, letter, and travel to Texas). The U.S. Supreme Court and federal courts in other circuits have reached the same result in similar circumstances. *See Walden v. Fiore*, 134 S. Ct. 1115 (2014) (effect on plaintiff of allegedly unlawful seizure of cash by DEA agent in Georgia, delaying funds' return to plaintiffs in Nevada, not enough to support personal jurisdiction in Nevada in *Bivens* action); *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995) (no personal jurisdiction over New Mexico disciplinary board chief counsel in District of Columbia when she brought ethics enforcement action against attorney in District of Columbia), *amended* July 28, 1995; *Shotton v. Pitkin*, No. Civ-15-0241-HE, 2015 WL 5091984, at *2 (W.D. Okla. Aug. 28, 2015) (dismissing § 1983 case involving Connecticut order against Oklahoma companies "directed to stopping the alleged violations in Connecticut, involving the companies' dealings with Connecticut residents, rather to any other activity that might have been originating from their operations in Oklahoma generally"). *See also Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 333, 338-39 (D. Mass. 2013) (collecting cases to similar effect); *Payne v. Cty. of Kershaw*, No. 3:08-CV-0792-G, 2008 WL 2876592 (N.D. Tex. July 25, 2008) (memorandum decision) (similar).

Moncrief Oil Int'l Inc. v. OAO Gazprom, 481 F.3d 309, 311 (5th Cir. 2007) ("A plaintiff's or third party's unilateral activities cannot establish minimum contacts between the defendant and forum state.").

Likewise, that Exxon claims it would feel some harm or effect from the CID in Texas does not confer jurisdiction over the Attorney General in Texas.[9] Even if the CID resulted in harm to Exxon in Texas, "the plaintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction . . . ." *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (collecting cases).[10]

This Court has reached the same result in cases involving similar facts. In *Saxton v. Faust*, the plaintiffs sued a Utah judge under 42 U.S.C. § 1983 for allegedly violating their First, Fifth, and Fourteenth Amendment rights by sanctioning them for violating discovery and preliminary injunction orders in a case in Utah state court. No. 3:09-CV-2458-K, 2010 WL

---

[9] Acts wholly outside a forum can support personal jurisdiction under the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), but that "type of jurisdiction is rare," *Bustos v. Lennon*, 538 F. App'x 565, 568 (5th Cir. 2013), and limited to circumstances—not present here—where the forum "is the focal point both of the story and of the harm suffered," *Calder*, 465 U.S. at 789, and the defendant "intentionally aimed" his conduct at the forum state. *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 629 (5th Cir. 1999); *see also Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 112 (1987) ("The substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.") (internal quotation marks and citations omitted) (emphasis in original). The "focal point of the story," based on Exxon's allegations, is Massachusetts—where the Attorney General issued the CID to Exxon under Massachusetts law, pursuant to her investigation of Exxon's actions in Massachusetts and the potential impacts of those actions on Massachusetts consumers and investors—not Texas. *See Stroman*, 513 F.3d at 486 ("[T]he Commissioner is not 'expressly aim[ing]' her actions at Texas. Rather, her intent is to uphold and enforce the laws of Arizona.") (internal citations omitted).

[10] Indeed, even if harm to the plaintiff in the forum is foreseeable by the defendant, "[f]oreseeable injury alone is not sufficient to confer specific jurisdiction, absent the direction of specific acts toward the forum." *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 212 (5th Cir. 1999); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("'[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

3446921 (N.D. Tex. Aug. 31, 2010) (Kinkeade, J.). The defendant Utah judge lacked any contacts with Texas; the only contacts alleged by the plaintiffs "are the effects they have felt in Texas" of the judge's orders. This Court found that it lacked personal jurisdiction over the defendant judge, noting that "[t]he Fifth Circuit recently rejected the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling are felt in Texas." *Id.* at *3 (citing *Stroman*, 513 F.3d at 482-85).

The result should be the same here. As the Fifth Circuit noted in *Panda Brandywine Corp. v. Potomac Electric Power Co.*, "[i]f we were to accept [plaintiff's] arguments, a nonresident defendant would be subject to jurisdiction in Texas . . . simply because the plaintiff's complaint alleged injury in Texas to Texas residents regardless of the defendant's contacts, and would have to appear in Texas to defend the suit no matter how groundless or frivolous the suit may be." 253 F.3d 865, 870 (5th Cir. 2001) (internal quotation marks and citations omitted.) Such a result is clearly inconsistent with due process, and Exxon's suit must, therefore, be dismissed.

b. Exercise of Personal Jurisdiction over the Attorney General Would Be Unreasonable in This Case.

Due process also requires that the Court consider whether exercising personal jurisdiction over the Attorney General would be "fair and reasonable." *Nuovo Pignone*, 310 F.3d at 378. Each of the factors relevant to that determination—(1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the states in furthering fundamental, substantive social policies, *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 113 (1987)—weighs heavily against the exercise of jurisdiction.

First, litigating in this Court would impose a heavy burden on Attorney General Healey, whose offices and personnel are located in Massachusetts. Litigating in a faraway state with local counsel—when the matter can be resolved in Massachusetts state courts where Exxon already has a suit pending—would be resource-intensive, expensive, and unnecessary. *See, e.g.*, *Bustos v. Lennon*, 538 F. App'x 565, 568 (5th Cir. 2013) (per curiam) ("The burden on all of the defendants, who live and work outside of Texas and are currently litigating the receivership [underlying the case] in Oregon, would be heavy.").

Second, Texas has little stake in this litigation, beyond the fact that one of its residents, Exxon, is the plaintiff. At issue is Exxon's claim that enforcement of a CID issued by the Massachusetts Attorney General under Massachusetts Chapter 93A to investigate potential harm to Massachusetts consumers and investors would violate Massachusetts legal requirements. The forum with the greatest (indeed, the only significant) interest, therefore, is Massachusetts. *See Stroman*, 513 F.3d at 487 ("[A]lthough a Texas court certainly has an interest in determining the legitimacy of Texas statutes, states have little interest in adjudicating disputes over other states' statutes.") (internal quotation marks omitted).

Third, Exxon's interest in obtaining relief would not be harmed if this Court found that it lacked personal jurisdiction over the Attorney General. Exxon is already pursuing relief in a Massachusetts state court, in a suit to set aside or modify the CID. *See Bustos*, 538 F. App'x at 568 ("[W]e cannot assign great weight to [plaintiff's] interest in seeking relief in two jurisdictions[.]").

Fourth and relatedly, resolution of this matter in the existing Massachusetts proceeding furthers the interests of the interstate judicial system in obtaining the most efficient resolution of controversies. In addition to placing an undue burden on Attorney General Healey, Exxon's

federal suit, which alleges nearly identical claims as its Massachusetts state court suit, would unnecessarily tax this Court's resources. Parallel litigation in two states would be duplicative, inefficient, and unwarranted. *See Bustos*, 538 F. App'x at 569 ("[T]he interstate judicial system's interest in the most efficient resolution of controversies strongly cuts against allowing [plaintiff] to continue his forum-shopping."). Particularly where Exxon has brought both suits, Exxon cannot fairly claim prejudice if this Court dismisses this case and leaves Exxon to its alternative—and much more appropriate—Massachusetts forum.

Finally, the fundamental interests of the several states are not served by the Court hearing this suit. As the Fifth Circuit wrote in *Stroman*, "[a]llowing the Southern District of Texas to exercise jurisdiction over [an Arizona official] creates the possibility that the [official] will have to defend her attempt to enforce Arizona laws in courts throughout the nation . . . los[ing] the benefit of having the laws examined by local state or federal courts—courts that have special expertise interpreting its laws." 513 F.3d at 487. The same reasoning applies to state attorneys general.

Because this Court lacks personal jurisdiction over Attorney General Healey, Exxon's suit must be dismissed.

B. THE COURT SHOULD ABSTAIN FROM HEARING THIS CASE DUE TO ONGOING STATE PROCEEDINGS IN MASSACHUSETTS.

Even if the Court finds that it does have jurisdiction over the Attorney General, it nevertheless should abstain from hearing the case under *Younger v. Harris*, 401 U.S. 37 (1971). Abstention under *Younger* promotes comity and federalism by avoiding undue interference by a federal court "with the legitimate activities of the States." *Id.* at 44. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-11 (1987). In evaluating whether to abstain under *Younger*, the Court must consider: (1) whether there is an ongoing state criminal, civil, or administrative proceeding; (2)

whether the state proceedings involve important state interests; and (3) whether the state court provides an adequate forum to hear the claims raised in the federal complaint. *Women's Cmty. Health Ctr. of Beaumont, Inc. v. Tex. Health Facilities Comm'n*, 685 F.2d 974, 979 (5th Cir. 1982) (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). Where the *Younger* requirements are met, the appropriate remedy is dismissal of the federal case. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). All three *Younger* factors support abstention in this case.

1. There Are Ongoing Civil Proceedings in Massachusetts, Including Exxon's Own Challenge to the Attorney General's CID.

Here, there is a pending state judicial proceeding that warrants *Younger* abstention. In the Massachusetts Superior Court action where Exxon is challenging the CID, the Attorney General has moved (on the same day as this filing) to compel Exxon's compliance with the CID under Chapter 93A, § 6, all in aid of the Attorney General's effort to determine whether Exxon has violated Massachusetts laws protecting consumers and investors. The Attorney General's civil enforcement of state law is a type of proceeding "to which *Younger* has been extended." *Sprint Communications v. Jacobs, Inc.*, 134 S. Ct. 584, 592-93 (2013). *See, e.g.*, *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986) (administrative proceeding to enforce civil rights laws); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil proceeding to recover welfare payments allegedly obtained by fraud). Under *Younger*, a federal court should abstain in favor of state judicial proceedings overseeing state-initiated investigations into the federal plaintiff's wrongdoing. *See Lupin Pharm., Inc. v. Richards*, Civ. No. RDB-15-1281, 2015 WL 4068818, at *4 (D. Md. July 2, 2015) (memorandum decision) (abstaining under *Younger* in § 1983 challenge to Alaska CID in light of state court litigation where Alaska Attorney General was seeking compliance with demand); *Temple of the Lost Sheep, Inc. v. Abrams*, 761 F. Supp.

237, 242 (E.D.N.Y. 1989) ("There is a related ongoing proceeding before the courts of New York, namely, the Attorney General's motion to compel compliance with outstanding subpoenas. Although plaintiffs commenced this federal action some two weeks before the state filed its motion to compel, no 'proceedings of substance on the merits' had yet taken place in this court.").[11]

Moreover, Attorney General Healey's underlying investigation of Exxon, which resulted in the CID at issue, is ongoing and is itself sufficient basis for abstaining. *See Cuomo v. Dreamland Amusements, Inc.*, No. 08-Civ.-6321 JGK, 2008 WL 4369270, at *9 (S.D.N.Y. Sept. 22, 2008) (abstaining where state attorney general had issued administrative subpoena and moved to compel compliance because "*Younger* abstention is rooted in principles of federalism and comity, . . . the state's interest in this case in investigating and possibly prosecuting those who commit crimes within its borders implicate[d] those principles, [and] the subpoenas sufficed to initiate an ongoing state proceeding") (internal citation omitted). Like the other civil and administrative enforcement actions recognized in *Sprint Communications*, the Attorney General's CID warrants *Younger* abstention because it carries significant legal consequences for the recipient if not immediately challenged: the threat of waiving all legal objections. *See Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1365-66 (Mass. 1989) ("[F]ailure to bring . . . a motion [to set aside or modify the CID] pursuant to [Chapter] 93A, § 6(7), constitutes a waiver by the person to whom the C.I.D. is served. . . . The recipient may not remain passive, as Bodimetric has done, raising legal arguments only after the Attorney General brings a motion to compel."). The Chapter 93A procedure is unlike the Mississippi law at issue in *Google, Inc. v. Hood*, discussed below, in which the Fifth Circuit declined to order abstention in favor of an

[11] And here, unlike in *Temple of the Lost Sheep*, Exxon brought both suits.

administrative subpoena from the Mississippi Attorney General, without more, because Mississippi law did not require the recipient to take any immediate action to preserve its rights. 822 F.3d 212, 225-26 (5th Cir. 2016).

2. The State-Court Proceedings in Massachusetts Implicate Important State Interests.

The Massachusetts proceeding concerns undeniably important state interests: the protection of Massachusetts consumers and investors from unfair and deceptive trade practices, the integrity of the Attorney General's investigatory tools under state law, and state judicial oversight. *See, e.g.*, *Juidice v. Vail,* 430 U.S. 327, 335 (1977) (state's "vindicat[ion] [of] the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest"); *Lupin Pharm.*, 2015 WL 4068818, at *4 (citing *Juidice*); *J. & W. Seligman & Co. Inc. v. Spitzer*, No. 05-Civ.-7781 (KMW), 2007 WL 2822208, at *6 (S.D.N.Y. Sept. 27, 2007) (holding that "the enforcement of subpoenas issued pursuant to state law in furtherance of a fraud investigation [] represent an important and legitimate state interest" when abstaining under *Younger* in challenge to New York Attorney General's subpoenas).

3. Exxon Has a Full and Fair Opportunity To Be Heard in Massachusetts State Court on the Very Issues Raised in This Suit.

As the procedural guarantees of Chapter 93A provide, Exxon may file, and indeed has filed, a petition to modify or set aside the CID and for a protective order in Massachusetts state court to object to the CID. Mass. Gen. Laws ch. 93A, § 6(7). Therefore, Exxon has a full and fair opportunity to raise its constitutional and other objections and defenses to the CID in state court, in response to the Attorney General's cross-motion to compel Exxon's compliance with the CID (served today), and in any future action arising from enforcement of the CID by the Attorney General. *See, e.g.*, *Middlesex Cty. Ethics Comm.*, 457 U.S. at 437 (abstention is appropriate

where federal plaintiff has "opportunity to raise" its constitutional claims in "competent state tribunal"); *Juidice*, 430 U.S. at 337.[12]

Exxon's preference for a federal forum for its claims is of no significance to the abstention analysis. *See Forty One News, Inc. v. Cty. of Lake,* 491 F.3d 662, 667 (7th Cir. 2007) ("Although [plaintiff] has a few veiled allusions to 'state tribunal bias and prejudice in prejudging a controversy,' it advances no reason to find that the state court did not provide an adequate opportunity for it to raise its constitutional challenges. . . . [Plaintiff] would prefer to be in federal court, . . . but its preferences and the earlier rulings of the state courts carry no weight under *Younger*. Denial of a preferred federal forum for federal claims is often the result of the application of *Younger* abstention, *see* Tribe, American Constitutional Law § 3–30, at 584, as well as other doctrines promoting comity.").[13]

All three *Younger* criteria are satisfied and, therefore, this Court should abstain in favor

---

[12] *See also Empower Texans, Inc. v. Tex. Ethics Comm'n*, No. A-14-CA-172-SS, 2014 WL 1666389, at *4 (W.D. Tex. Apr. 25, 2014) (abstaining from case regarding ethics commission proceeding) ("Plaintiffs seem particularly disturbed by the thought they might face legal consequences for failing to comply with a subpoena. . . . Plaintiffs' argument is irrelevant. Nothing in *Younger* and its progeny requires Plaintiffs to be immunized from the consequences of their actions while pursuing their legal arguments. True enough, noncompliance with a subpoena may spur a contempt action; noncompliance in the contempt action may lead to the issuance of a fine. But those steps are not taken while Plaintiffs are absent. To the contrary, Plaintiffs can and should be present in the state courts showing cause why they are not complying with the subpoenas and litigating their defenses."); *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 200 (1st Cir. 2015) ("Here, the [state agency] is competent to adjudicate the federal issues presented in this case and adequate review is available in the state courts. The record strongly suggests that the appellants will suffer no harm apart from the typical inconvenience that accompanies defending against charges that have been lodged. That inconvenience is not weighty enough to tip the scales: the *Younger* Court admonished long ago that 'the cost, anxiety, and inconvenience of having to defend against a single [proceeding are not] "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single [proceeding.]'") (quoting *Younger*, 401 U.S. at 46).

[13] Even if a federal forum is necessary, a federal court in Texas is still an improper venue. *See* Section III.D, *infra* at 19.

of the proceedings in Massachusetts. *See Saxton at* *3 (abstaining where there was an ongoing civil judicial action in Utah, the Utah state proceeding involved "[t]he state court contempt process[, which] lies at the very core of a state's judicial system," and the plaintiffs "had recourse under Utah law for the wrongs of which they complained.").[14]

C. ALTERNATIVELY, IF THE COURT DOES NOT ABSTAIN UNDER *YOUNGER*, THIS CASE SHOULD BE DISMISSED AS UNRIPE.

Even if the Court decides that the pending state proceedings do not support abstention under *Younger*, Exxon's suit should be dismissed under *Google, Inc. v. Hood*, which found insufficiently ripe a preemptive federal court challenge to an investigatory subpoena issued by Mississippi Attorney General Hood. 822 F.3d 212, 224-26 (5th Cir. 2016). In *Google*, the district court, agreeing with Google's claims that the subpoena was unconstitutional and otherwise unlawful and adopting many of the arguments that Exxon advances here, granted a broad injunction against the subpoena and enjoined Attorney General Hood's pursuit of any enforcement action against Google. The Fifth Circuit reversed the district court's decision, ordered dismissal of Google's challenges to the subpoena, and vacated the district court's injunction against Attorney General Hood. *Id.* at 228 (relying on *In re Ramirez*, 905 F.2d 97, 100 (5th Cir. 1990), which held that the "motion to quash [a subpoena] was not ripe for judicial action . . . and . . . should have been dismissed for lack of subject matter jurisdiction"). The court held that injunctive relief was not warranted because Google would have an adequate remedy at law when it made its legal objections defending any action to enforce the subpoena that Attorney General Hood might later file. But until then, the action was not ripe. *Google*, 822 F.3d at 226.

[14] The other abstention and legal doctrines promoting comity also support abstention here. *See, e.g.*, *Nationstar Mortg. LLC v. Knox*, 351 F. App'x 844, 852 (5th Cir. 2009) (affirming abstention under doctrine of *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976)); *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 653 (5th Cir. 2002) (affirming abstention under doctrine of *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501-02 (1941)).

As the Fifth Circuit observed with regard to Google's challenge to Attorney General Hood's subpoena, Exxon can assert (and is, in fact, now asserting) its objections to the CID through Massachusetts's statutory state court process for such challenges. *Id.* at 225-26. While its petition to set aside or modify the CID is pending before the Massachusetts Superior Court, it will face no sanction or consequence of not complying with the CID. Moreover, here, Attorney General Healey has taken only the initial steps of opening an investigation and issuing a CID to Exxon; she neither has determined to undertake a Chapter 93A enforcement action against Exxon nor asserted any specific claim. Exxon may defend itself and raise its objections in Massachusetts state court when and if that ultimately occurs. *Id. See also Atl. Richfield Co. v. FTC*, 546 F.2d 646, 649 (5th Cir. 1977) (pre-enforcement relief from administrative subpoenas inappropriate in light of opportunity to bring due process and regulatory procedural objections in any subsequent enforcement proceeding). The dispute is, therefore, not ripe, and the Court should dismiss Exxon's suit.

D. EVEN IF THE COURT FINDS THAT IT HAS PERSONAL JURISDICTION OVER THE ATTORNEY GENERAL, THE NORTHERN DISTRICT OF TEXAS IS AN IMPROPER VENUE.

Finally, the Northern District of Texas is an improper venue for this case. Under 28 U.S.C. § 1391(b), venue is appropriate in any of three places: (1) the judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if neither (1) nor (2) exists, then any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

All three alternatives under § 1391(b) rule out the Northern District of Texas as the proper venue. First, the Office of the Attorney General is in Massachusetts, not Texas. Second,

the events or omissions giving rise to Exxon's claim occurred in Massachusetts, where Attorney General Healey issued the CID to Exxon's registered agent—not Texas. That Exxon resides in Texas or may feel some effect of the CID there "does not necessarily mean that the events or omissions occurred there" for the purposes of venue. *U.S. Risk Ins. Grp., Inc. v. U.S. Risk Mgmt., L.L.C.*, No. 3:11-CV-02843-M, 2012 WL 12827489, at *2 (N.D. Tex. Apr. 16, 2012) (Lynn, J.); *see also Saxton*, 2010 WL 3446921, at *4 (holding venue in Texas improper where plaintiffs brought § 1983 claim against Utah judge based on sanctions order issued in Utah state court case). Ultimately, "[i]n determining whether or not venue is proper, the Court looks to the *defendant's* conduct, and where that conduct took place. Actions taken by a *plaintiff* do not support venue." *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir.1995)) (emphasis added). Exxon's corporate home in Texas is, therefore, not relevant to the venue inquiry.

Third, because the venue indicated by § 1391(b)(1) and (2)—*i.e.*, Massachusetts—is available, any possible alternative under § 1391(b)(3) is not. Even if this Court could exercise personal jurisdiction over Attorney General Healey, the proper venue would still be Massachusetts under § 1391(b)(1), where the Office of the Attorney General is located and where Attorney General Healey conducts her official duties. *See also Saxton*, 2010 WL 3446921, at *4.

Because the Northern District of Texas is an improper venue, the Court should dismiss the case.

IV. CONCLUSION

For the foregoing reasons, the Court should DISMISS Exxon's complaint with prejudice.

Dated: August 8, 2016

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

/s/ *Douglas A. Cawley*

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 8, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

/s/ *Douglas A. Cawley*
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	No. 4:16-CV-469-K

OPPOSITION OF ATTORNEY GENERAL MAURA HEALEY TO PLAINTIFF EXXON MOBIL CORPORATION'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Exxon Mobil Corporation ("Exxon" or the "Company") seeks a preliminary injunction to halt Massachusetts Attorney General Maura Healey's investigation into whether Exxon violated the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("Chapter 93A"), the Massachusetts consumer and investor protection law. Exxon's motion for preliminary injunction—and indeed, its entire lawsuit, which the Attorney General is simultaneously moving to dismiss—is a calculated effort to avoid and delay the Company's compliance with a duly authorized and lawful civil investigative demand ("CID") issued by the Attorney General regarding Exxon's conduct in the Massachusetts marketplace. Moreover, Exxon has filed a nearly identical lawsuit against Attorney General Healey in Massachusetts state court.[1] As set forth in the Attorney General's concurrent brief in support of her motion to dismiss this case, the Massachusetts trial court—not this Court—is the proper forum for Exxon to assert its challenges to the CID issued by the Attorney General. This Court therefore need not reach Exxon's preliminary injunction motion because it should dismiss Exxon's suit for lack of personal jurisdiction over Attorney General Healey, as well as on the other grounds set forth in her motion to dismiss.

Even if the case is not dismissed, Exxon has failed to satisfy its burden to show it is entitled to preliminary injunctive relief. Exxon's claim that it will be irreparably harmed by enforcement of the CID is belied by the fact that Exxon has challenged the CID in Massachusetts state court and thus has a more than adequate remedy there to raise all of its objections, whether under federal or state law, to the CID. Even if Exxon ultimately is required to comply, the

[1] Exxon's Texas suit includes federal constitutional claims that it did not, but could have, brought in Massachusetts. Those federal constitutional claims are analogous to the Massachusetts constitutional claims Exxon raised in its Massachusetts suit.

Company has *already been complying* with a substantially similar subpoena issued by New York Attorney General Eric Schneiderman in late 2015 and *has produced hundreds of thousands pages of documents* to the New York Attorney General's office, without filing any objection in federal or state court. Further, costs Exxon may incur in complying with the CID do not constitute an irreparable harm, particularly given Exxon's resources, and the fact that it is already engaged in the process of identifying and producing documents in response to the New York Attorney General's subpoena. Nor can Exxon demonstrate it is likely to prevail on the merits of its claims, because its constitutional arguments are without basis. The CID does not regulate, compel, or chill Exxon's speech, and the purpose of the Attorney General's investigation is wholly consistent with the First Amendment, which does not protect false, deceptive, or misleading statements in the marketplace. Exxon's other constitutional arguments are equally meritless.

Finally, the public interest and balance of harms strongly favor denying Exxon its requested relief. An injunction barring the Massachusetts Attorney General from carrying out an investigation pursuant to Chapter 93A—a Massachusetts law intended by the Massachusetts Legislature to protect consumers and investors—would impose significant harm on Massachusetts residents. Granting Exxon the relief it seeks also would result in significant interference with the Massachusetts public's entitlement to have its duly enacted laws enforced by the Attorney General. If this Court reaches Exxon's motion for preliminary injunction, it should be denied.

II. LEGAL AND FACTUAL BACKGROUND

A. The Attorney General's Authority to Issue Civil Investigative Demands Under Massachusetts Law

Attorney General Healey is an elected constitutional officer in the Commonwealth of Massachusetts and is the state's highest ranking law enforcement official. Mass. Gen. Laws ch. 12, § 3. The Attorney General also has various enumerated statutory powers, including enforcement of Chapter 93A, which proscribes unfair and deceptive practices in the conduct of business.[2]

The purpose of Chapter 93A is "to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace," *Poznik v. Mass. Med. Prof'l Ins. Ass'n*, 628 N.E.2d 1, 4 (Mass. 1994) (abrogated by statute on other grounds), as well as to provide "proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities," *Commonwealth v. DeCotis*, 316 N.E.2d 748, 752 (Mass. 1974). To that end, section 2 of Chapter 93A prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."

"'*[W]henever [s]he believes* a person has engaged in any method, act or practice declared to be unlawful'" by Chapter 93A, the Attorney General possesses broad powers to investigate the suspected unlawful conduct, including the issuance of CIDs. *Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1367 (Mass. 1989) (quoting and interpreting Attorney General's authority under Mass. Gen. Laws ch. 93A, § 6(1)) (emphasis in original). To initiate an investigation, the Attorney General need only believe that a person or entity is engaging in an act in violation of the statute. *Harmon Law Offices, P.C. v. Att'y Gen.*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013).

[2] Mass. Gen. Laws ch. 12, § 5; Mass. Gen. Laws ch. 93, §§ 8, 9; Mass. Gen. Laws ch. 93A, §§ 4, 6.

CIDs are a crucial tool created by statute to assist the Attorney General in fulfilling her statutory obligation to gain critical information regarding whether the conduct of an entity under investigation amounts to a violation of the statute.[3] In some cases, the information the Attorney General receives through the course of an investigation identifies violations warranting enforcement, and in others, it does not.

Since 2013, the Attorney General's Office ("Office") has issued several hundred CIDs to or regarding companies or individuals suspected of committing unfair and deceptive business practices or other conduct in violation of Massachusetts law. Appendix ("App."), Declaration of Melissa A. Hoffer ("Hoffer Decl."), ¶ 3. Those CIDs included a number issued in connection with joint investigations with other states and the federal government: about twenty-five with other states; about thirty involving the federal government; and some involving joint investigations with other states and the federal government. *Id.*, ¶ 4.[4] CIDs issued pursuant to the

[3] Nearly every other state attorney general has CID or similar authority. *See, e.g.*, Ala. Code § 8-19-9; Alaska Stat. Ann. § 45.50.495; Ariz. Rev. Stat. Ann. § 44-1524; Ark. Code Ann. § 4-88-111; Colo. Rev. Stat. Ann. § 6-1-107; Del. Code Ann. tit. 6, § 2514; Fla. Stat. Ann. § 501.206; Ga. Code Ann., § 10-1-403; Idaho Code Ann. § 48-611; 815 Ill. Comp. Stat. Ann. 505/3; Kan. Stat. Ann. § 50-631; Ky. Rev. Stat. Ann. § 367.240; La. Stat. Ann. § 51:1412; Md. Code Ann., Com. Law § 13-405; Minn. Stat. Ann. § 8.31; Miss. Code. Ann. § 75-24-27; Mo. Ann. Stat. § 407.040; Mont. Code Ann. § 30-14-113; Neb. Rev. Stat. Ann. § 59-1611; N.H. Rev. Stat. Ann. § 358-A:8; N.J. Stat. Ann. § 56:8-3; N.M. Stat. Ann. § 57-12-12; N.Y. Exec. Law § 63; N.C. Gen. Stat. Ann. § 75-10; Ohio Rev. Code Ann § 1345.06; Okla. Stat. Ann. tit. 15, § 758; Or. Rev. Stat. Ann. § 646.618; 71 Pa. Stat. and Cons. Stat. Ann. § 307-3; 9 R.I. Gen. Laws Ann. § 9-1.1-6; S.C. Code Ann. § 39-5-70; S.D. Codified Laws § 37-24-12; Tenn. Code Ann. § 47-18-106; Tex. Bus. & Com. Code Ann. § 17.61; Vt. Stat. Ann. tit. 9, § 2460; Va. Code Ann. § 59.1-201; Wash. Rev. Code Ann. § 19.86.110; Wyo. Stat. Ann. § 40-12-112.

[4] Examples since 2013 (made public through settlement with target companies) include: investigations involving large multistate groups and the federal government (Chase Bank, Ocwen, and HSBC); investigations with small groups of states and the federal government (Citigroup, JP Morgan); a joint investigation with federal authorities (Oppenheimer); a joint investigation with another state (LPL Financial); and a joint investigation with a large multistate group (MoneyGram). App. Exhibit ("Exh.") 1, App. 338-350 (Office press releases). A recent example is the Office's 2016 leadership and participation in a multistate investigation into Volkswagen's "clean diesel" deception,

Office's Chapter 93A investigative authority have addressed, among other things, foreclosure practices of banks, business practices in the pharmaceuticals industry, the marketing and sale of securities, and solicitations and transactions involving other products and services sold in Massachusetts. *Id*.

B. Exxon's Business Activities in Massachusetts

Exxon[5] conducts extensive business in Massachusetts, including sales of its fossil-fuel products directly to the State and to wholesalers and retailers located in Massachusetts and sales of its securities to Massachusetts-based investors, including large financial services companies. Indeed, Exxon is one of the leading suppliers of fossil fuel products in Massachusetts, routinely conducting transactions with hundreds of Massachusetts retailers of Exxon products, including Pep Boys, Advance Auto Parts, Auto Zone, NAPA Auto Parts, Costco, and Target.[6] Most prominently, Exxon distributes fossil fuel products to consumers through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products[7] and through the operation of its own interstate oil pipeline system and major fuel distribution terminals in the Massachusetts cities of Springfield and Everett.[8] Exxon provides advertising and marketing support directly to wholesalers of its products, including those located in Massachusetts.[9] To

---

resulting in a partial settlement providing Massachusetts with nearly $100 million in Chapter 93A civil penalties and environmental mitigation. Exh. 2, App. 352-353 (Office press release).

[5] Exxon is the largest publicly-traded oil and gas corporation in the world. Exh. 3, App. 355.

[6] Exh. 4, App. 357-373 (portion of an Exxon website with the "Where to buy Mobil™ motor oil" store locator results for the Boston zip code 02108).

[7] Exh. 5, App. 375-380 (portions of an Exxon website directing customers to find its branded stations in Massachusetts); Exh. 6, App. 382-383 (portion of an Exxon website for a representative Mobil-branded station in Boston, Massachusetts).

[8] Exh. 7, App. 385 (Exxon webpage describing its interstate oil pipeline system and fuel distribution terminals in the Massachusetts cities of Springfield and Everett).

[9] Exh. 8, App. 387-389 (wholesalers of Exxon products "have access to premier fuel products and innovative consumer pull programs [and] best-in-class marketing and advertising support and dedicated sales expertise"). *See also* Exh. 9, App. 391 (describing Exxon's "retail fuels technology

promote its sales of fossil fuel products, Exxon advertises them in Massachusetts through all types of media, including radio, television, and the Internet. Hoffer Decl. ¶ 15. Recently, Exxon also directly sold products to Massachusetts. An Exxon division entered into a contract to supply the Massachusetts State Police with motor oil for its cruisers from 2011 through 2014. Exxon touted the deal as providing environmental benefits to Massachusetts.[10]

Exxon's business transactions in Massachusetts also include its relationships with Massachusetts securities investors, such as Boston-based institutional shareholders State Street Corporation and Wellington Capital Management, which together held more than $21 billion in Exxon stock as of March 31, 2016, and mutual fund managers such as Boston-based Fidelity Investments.[11] Indeed, Exxon admits it recently has sold securities (short term fixed rate notes) in Massachusetts.[12]

C. 2015 Investigative Reporting and Release of Exxon Documents

In 2015, the Los Angeles Times, in cooperation with the Columbia University School of Journalism,[13] and the news organization InsideClimate News[14] published a series of investigative reports and internal Exxon and other documents establishing that Exxon had a robust climate

---

platform" for Exxon-branded stations and quoting Exxon wholesale manager Grant Doescher describing platform's benefits for "[o]ur stations").

[10] *See* Exh. 10, App. 393-394 (contract) and Exh. 11, App. 396-397 (press release).

[11] *See* Exh. 12, App. 400 (list of largest institutional shareholders); Exh. 13, App. 402 (holdings of Fidelity Independence Fund). Exxon's chief executive officer discussed the Company's environmental performance with a Massachusetts-based investor at the Company's 2014 annual shareholder meeting. *See* Exh. 14, App. 426 (shareholder meeting unofficial transcript).

[12] Memorandum of Law in Support of Exxon's Motion for a Preliminary Injunction ("Memo.") at 10 n.53. Such notes are not exempt from the definition of "security" under Massachusetts law, subjecting such transactions to scrutiny pursuant to Chapter 93A. *Compare* 15 U.S.C. § 77c(a)(3) *with* Mass. Gen. Laws ch. 110A, § 401(k).

[13] Exh. 15, App. 431-445 (Sara Jerving, et al., *What Exxon knew about the Earth's melting Arctic*, L.A. Times, Oct. 9, 2015).

[14] Exh. 16, App. 447-550 (InsideClimate News articles in Exxon: The Road Not Taken series). InsideClimate News was named a finalist for a Pulitzer Prize for its work on the series. Exh. 17, App. 552-553.

change scientific research program in the late 1970s into the 1980s that documented the serious potential for climate change, the likely contribution of fossil fuels (the Company's chief product) to climate change, and the risks of climate change, including risks to Exxon's own assets and businesses.[15] Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius[16] increase could lead to melting of polar ice, rising sea levels, "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[17] One Exxon scientist warned that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)."[18]

Based on these documents showing Exxon's longstanding internal knowledge and more recent Exxon statements, it appears that Exxon may have failed to disclose fully its knowledge of the threats posed by climate change to its businesses and that Exxon continues to make apparently misleading and deceptive statements to investors and consumers. For example, as described above, Exxon understood that warming in excess of two degrees Celsius (about 3.6 degrees Fahrenheit) would pose a significant threat, and it is widely recognized today that, to

---

[15] According to InsideClimate News, its "reporters interviewed former Exxon employees, scientists, and federal officials, and consulted hundreds of pages of internal Exxon documents, many of them written between 1977 and 1986." Neela Banerjee, *et al*., Exxon: The Road Not Taken 2 (InsideClimate News 2015), *available at* https://insideclimatenews.org/content/exxon-road-not-taken (e-book; last accessed Aug. 5, 2016). InsideClimate News also reviewed "thousands of documents from archives including those held at the University of Texas-Austin, the Massachusetts Institute of Technology and the American Association for the Advancement of Science." *Id.* Following the disclosure, Exxon does not dispute the authenticity of the documents. Exh. 18, App. 555-556 (Exxon webpage posting documents).

[16] A 2 to 3 degree Celsius temperature increase is equivalent to a 3.6 to 5.4 degree Fahrenheit increase.

[17] Exh. 19, App. 569-570 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[18] Exh. 20, App. 572 (interoffice memorandum from R.W. Cohen to W. Glass (Aug, 18, 1981)).

avoid the most severe impacts of climate change, carbon dioxide emissions must be reduced to ensure global average temperature increase does not exceed two degrees Celsius above preindustrial levels; that objective formed the basis for the recent Paris Agreement of the parties, including the United States, to the United Nations Framework Convention on Climate Change.[19] In its 2012 World Energy Outlook, the International Energy Agency reported that "[n]o more than one-third of proven reserves of fossil fuels can be consumed prior to 2050 if the world is to achieve the 2 degree Celsius goal."[20] If substantial portions of Exxon's vast fossil fuel reserves are unable to be burned due to carbon dioxide emissions limits put in place to stabilize global average temperature, those assets—valued in the billions—will be stranded, placing shareholder value at risk.[21] Over three decades ago, Exxon understood that climate-driven risk to its businesses, recognizing in 1982, in a memorandum widely distributed to Exxon management, that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion,"[22] and, in 1984, that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[23]

Yet, Exxon continues to maintain that the future is bright for its investors, representing in a 2014 report Exxon prepared for shareholders that "[w]e are confident that none of our

[19] *See* Exh. 21, App. 580, at art. 2 § 1(a) (Paris Agreement). As of August 3, 2016, 180 countries have signed the agreement, and 22 of those countries have formally ratified it.
[20] *See* Exh. 22, App. 609 (executive summary).
[21] Indeed, one financial services provider in New England bluntly concluded that "there are fundamental questions about whether fossil fuel companies like ExxonMobil have a long-term future in the marketplace." *See* Exh. 23, App. 618 (IW Financial, *Managing the Risks of Exposure to Fossil Fuel Companies*).
[22] Exh. 24, App. 626 (memorandum from M.B. Glaser to a broad distribution list of Exxon management, attaching document, "CO_2 'Greenhouse Effect' Summary").
[23] Exh. 19, App. 570 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

hydrocarbon reserves are now or will become 'stranded.'"[24] Exxon made that same representation in 2016 correspondence to the U.S. Securities and Exchange Commission,[25] and likewise represented in a 2016 press release for its "Energy Outlook 2016" that "[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[26]

Exxon also understood in the early 1980s that doubling of atmospheric carbon dioxide would occur "sometime in the latter half of the 21st century," and that "CO_2-induced climate changes should be observable well before doubling."[27] Exxon's scientists agreed with the scientific consensus that "a doubling of atmospheric CO_2 from its pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5) [degrees Celsius]."[28] Exxon understood that "a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alterations in the biosphere."[29] Nevertheless, as of 2016, Exxon continues to tell investors and consumers that "[w]hile most scientists agree climate change poses risks related to extreme weather, sea-level rise, temperature extremes, and precipitation changes, current scientific understanding provides limited guidance

---

[24] *See* Exh. 25, App. 628 (Exxon, *Energy and Carbon—Managing the Risks* (2014)). The 2014 report was prepared, according to Exxon, "in connection with the withdrawal of a prior shareholder proposal" seeking "an analysis of the potential for the Company's oil and gas assets to become stranded as a result of global public policy regarding climate change." Exh. 26, App. 662 (Feb. 29, 2016, Letter from Exxon counsel Louis L. Goldberg, Esq., to Office of Chief Counsel, U.S. Securities and Exchange Commission).

[25] Exh. 26, App. 662.

[26] Exh. 27, App. 670 (press release, "ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity," dated Jan. 25, 2016).

[27] Exh. 28, App. 675 (letter from Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982)).

[28] *Id.*, App. 674. A temperature increase of 1.5 to 4.5 degrees Celsius equals a temperature increase of 2.7 to 8.1 degrees Fahrenheit.

[29] *Id.*

on the likelihood, magnitude, or time frame of these events."[30]

Concerns that Exxon has not adequately disclosed climate risk to Massachusetts investors in its securities appear to be reflected in recent actions by Exxon shareholders (including Massachusetts-based shareholders) to compel the Company to more fully assess and respond to climate risks.[31]

D. Exxon Investigations and Litigation

1. New York Subpoena, Federal Investigation, and Massachusetts CID

On or about November 5, 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon under New York's Martin Act, seeking documents regarding Exxon's climate research and its communications to investors and consumers about the risks of climate change and the effect of those risks on Exxon's business.[32] Exxon is cooperating with the New York subpoena and has produced more than 700,000 pages of documents to New York.[33]

In January 2016, at the request of members of Congress, the Department of Justice asked the Federal Bureau of Investigation to investigate whether Exxon should be prosecuted under the federal Racketeer Influenced and Corrupt Organizations Act, based on the documents released

---

[30] Exh. 29, App. 683 (Exxon webpage, *Meeting global needs—managing climate change business risks*).

[31] In the past year, Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's businesses. The proposals "drew more support than any contested climate-related votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels." Exh. 30, App. 686-687 (Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016); *see also* Exh. 31, App. 691-693 (Natasha Lamb & Bob Litterman, *Really? Exxon left the risk out of its climate risk report*, May 28, 2014) (discussing Exxon's *Energy and Carbon—Managing the Risks* report (Exh. 25)).

[32] Exh. 32, App. 695-699 (*Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times, Nov. 5, 2015).

[33] Exh. 33, App. 706 (comment to InsideClimate News published on July 7, 2016).

by journalists.[34] United States Attorney General Lynch recently confirmed that the investigation is ongoing.[35]

Following the release of the Exxon documents, the Attorney General's Office also reviewed them and other Exxon public statements and representations and determined that an investigation pursuant to Chapter 93A was warranted. Attorneys General Schneiderman and Healey and several other attorneys general met in New York in March 2016 and discussed at a press conference their cooperation on a number of national environmental issues.[36] Attorney General Healey announced that her office also would be investigating Exxon.[37]

On April 19, 2016, the Office served Exxon's Massachusetts registered agent with the CID. The CID seeks documents from Exxon on such topics as "Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions"; research on how the effects of climate change will affect Exxon's costs, marketability, and future profits; and how this information was communicated to consumers and investors.[38]

2. Texas and Massachusetts Cases

On June 15, 2016, Exxon filed the complaint in this action against Attorney General Healey, in her official capacity, alleging that Attorney General Healey's investigation violated its constitutional rights, along with its motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID. The following day, June 16, 2016, Exxon filed in Massachusetts Superior Court a petition to set aside or modify the CID along with an emergency motion seeking the same relief and a stay of the Massachusetts proceedings pending the outcome

[34] Exh. 34, App. 709 (letter from Department of Justice describing referral).
[35] Exh. 35, App. 713 (comment reported in press).
[36] Exh. 36, App. 717-720 (press release regarding press conference, including video recording).
[37] *Id.* (video recording).
[38] Civil Investigative Demand, No. 2016-EPD-36, at 12-20 (Exxon Complaint, Exhibit B).

of the Texas proceeding.[39]

III. ARGUMENT

"A preliminary injunction is an extraordinary remedy," and a decision to grant such relief "is to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). Exxon, as the moving party, fails to meet its heavy burden of satisfying each of the prerequisites for obtaining preliminary injunctive relief. *See id*. In the first instance, as set forth above and in the Attorney General's concurrent brief in support of her motion to dismiss this case, this Court lacks personal jurisdiction over Attorney General Healey and subject matter jurisdiction over this matter, and venue is improper. Exxon therefore cannot succeed on the merits of its claim because the case must be dismissed. And, were that not the case, Exxon's constitutional claims fail on the merits. Exxon also cannot demonstrate it will be irreparably harmed by the issuance of the CID; the potential harm from enjoining the Attorney General's Chapter 93A investigation—to Massachusetts and to the investor and consumer interests that the Attorney General seeks to vindicate—far outweighs any harm to Exxon; and issuing an injunction here would undermine the public's strong interest in investigating potential fraud and deception in the marketplace. *See Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). Exxon's motion should therefore be denied.

---

[39] Exh. 37, App. 722-751. In its Massachusetts papers, Exxon asserted a violation of the free speech provision of the Massachusetts constitution and of other state, but not federal, constitutional and statutory provisions. Massachusetts courts generally interpret the free speech guarantees of the Massachusetts constitution consistently with the First Amendment, with resort to federal case law. *See, e.g.*, *Opinions of the Justices*, 440 N.E.2d 1159, 1160 (Mass. 1982) ("criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution" (citation omitted)). And the Massachusetts courts are, of course, fully capable of adjudicating objections under the federal Constitution to state regulatory activities. *See generally, e.g.*, *Bulldog Investors Gen. P'ship v. Sec'y of Commonwealth*, 953 N.E.2d 691 (Mass. 2010) (reviewing federal constitutional challenges to state securities law enforcement).

A. Exxon Has Not Shown That It Will Suffer Irreparable Harm from the CID.

"Irreparable harm requires a showing that: (1) the harm to Plaintiff[] is imminent[,] (2) the injury would be irreparable[,] and (3) that Plaintiff[] [has] *no other* adequate legal remedy." *GoNannies, Inc. v. GoAuPair.com, Inc.*, 464 F. Supp. 2d 603, 608 (N.D. Tex. 2006) (emphasis added) (citing *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975)). Exxon wrongly claims that the CID violates its constitutional rights and as a result, the "impending deprivation" of those rights constitutes an "impending irreparable harm" warranting a preliminary injunction. *See* Memorandum of Law in Support of Exxon's Motion for a Preliminary Injunction ("Memo.") at 24-25.[40]

Exxon, however, has not and cannot establish irreparable harm. First, Exxon has—*and is availing itself of*—another adequate legal remedy: Exxon has, pursuant to the requirements of Chapter 93A, challenged the Attorney General's CID in Massachusetts Superior Court, and the Massachusetts state courts will consider Exxon's constitutional arguments in due course. *See Google, Inc. v. Hood*, 822 F.3d 212, 225-28 (5th Cir. 2016) (finding no irreparable harm supporting preliminary injunctive relief from state attorney general investigatory subpoena because challengers to such subpoenas have "adequate remedy at law" in state courts hearing future enforcement actions). Judicial review of Exxon's petition to set aside or modify the CID will take place over the next few months, and following a decision by the Massachusetts

[40] In support of its argument that its anticipated constitutional harms constitute irreparable injury, Exxon relies on *Cohen v. Coahoma Cty., Miss.*, 805 F. Supp. 398, 402 (N.D. Miss. 1992) (prisoner established irreparable harm where subject to policy of whipping during interrogation), and *Palmer ex rel. Palmer v. Waxahachi Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (student's First Amendment challenge to a dress code banning expressive t-shirts). These cases neither involved a challenge to a subpoena like the CID nor held that bald allegations of potential future constitutional injury carry a movant's burden to establish irreparable harm. Exxon has not cited any case where a corporation demonstrated imminent constitutional harm by virtue of being required to respond to a consumer and investor fraud investigation.

Superior Court, appeals may be lodged. There is no imminent risk that Exxon will be required to comply with the Attorney General's CID until its petition is adjudicated, and thus *no* irreparable harm will befall Exxon. *See id.* at 227 (vacating preliminary injunction that "covers a fuzzily defined range of enforcement actions that do not appear imminent"). Where recourse is available in Massachusetts courts and there is no imminent risk that Exxon will be forced to comply with the CID until state court proceedings conclude, Exxon cannot establish it will be irreparably harmed. On that basis alone, Exxon's motion should be denied.

Moreover, Exxon has no irreparable harm here, since it has *already produced over 700,000 pages of documents* in response to a similar subpoena issued by the New York Attorney General and is continuing to cooperate with New York's investigation—a fact Exxon fails to mention in its voluminous filings with this Court.[41] Exxon's cooperation with the New York investigation shows that it can readily comply with Massachusetts's investigation into subjects similar to those covered by the Massachusetts CID.[42]

In any event, Exxon has not alleged a single concrete fact that the CID curtails its speech, placing it at risk of imminent harm. To the contrary, Exxon's complaint confirms it is undaunted by the CID: "ExxonMobil intends—and has a Constitutional right—to continue to advance its perspective in the national discussions over how to respond to climate change." Compl., ¶ 79. Although Exxon wrongly accuses the Attorney General of pursuing the investigation for an improper purpose—"to deter" Exxon from "participating in ongoing public deliberations about climate change," *id.*, ¶ 13—Exxon never alleges any fact showing that it was, or will be,

[41] Exh. 33, App. 706. Despite Massachusetts's request for the New York documents in the CID, Exxon has not agreed to share those documents with Massachusetts.
[42] Nor is Exxon at any risk that documents produced in response to the CID will be publicly disseminated now. Mass. Gen. Laws ch. 93A, § 6(6).

deterred.[43] Exxon's conclusory claims that the Attorney General wants to curtail its speech are far too threadbare and speculative to support a showing of imminent harm. *See Univ. of Penn. v. EEOC,* 493 U.S. 182, 195-202 (1990) (affirming denial of relief from administrative subpoena because alleged First Amendment harm to academic freedom too attenuated and speculative to preclude disclosure of peer review materials, citing *Branzburg v. Hayes,* 408 U.S. 665 (1972)); *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972) (affirming trial court denial of injunctive relief in First Amendment challenge to Army regulatory action and holding that unspecified "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989) (affirming denial of protective order against administrative subpoena because "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation" (citation omitted)). In fact, before and after the CID was issued, Exxon has continued to speak about its views on climate change, including with regard to pending investigations and this very litigation.[44] Exxon makes no serious claim that the CID will chill its ability to convey its point of view.[45]

And, finally, neither the litigation costs of challenging the CID in state court nor the administrative costs of compliance with an investigation are a cognizable or irreparable injury to

[43] Exxon follows a similar tact elsewhere in the Complaint, wrongly alleging the Attorney General's purpose is to deter, target, or compel speech, but never alleging how the CID will in fact have that effect. *See* Compl., ¶¶ 83, 87-88.

[44] *See, e.g.*, Exh. 38, App. 753-764 (collecting examples of Exxon's statements).

[45] Exxon will have an opportunity to raise relevant First Amendment challenges in connection with any future enforcement action in state court. *Google*, 822 F.3d at 228 ('"[I]nvocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury. And we cannot say at this early stage of a state investigation that any suit that could follow would necessarily violate the Constitution.").

Exxon, a multinational company with $16.2 billion in profits in 2015.[46] *See Miss. Power & Light Co.*, 760 F.2d at 630 ("time and energy necessarily expended" without an injunction "are not enough"); *Am. Radio v. Mobile S.S. Ass'n*, 483 F.2d 1, 5 (5th Cir. 1973) (finding that need to pursue "litigation of one's claim in . . . state courts" does not constitute irreparable injury warranting injunctive relief); *Cuomo v. Dreamland Amusements, Inc.*, No. 08-Civ.-6321 JGK, 2008 WL 4369270, at *12 (S.D.N.Y. Sept. 22, 2008) (in considering claim of irreparable harm from compliance with state administrative subpoena, "no irreparable injury has been shown because the present detriment to [plaintiff] from the investigation is that it must participate in an investigation," and thus "[t]he costs of such compliance do not constitute irreparable injury").

B. Exxon Has Not Established That It Is Substantially Likely to Prevail on the Merits of Its Constitutional Objections to the CID.

1. The CID Does Not Regulate Speech or Violate the First Amendment.

As a threshold matter, the CID does not regulate or burden any speech and therefore does not "infringe on First Amendment rights." *See* Memo. at 14. Exxon argues that the CID is a "direct and deliberate assault" on its First Amendment rights that "regulates" and "intrudes on" its political speech. *See id*. at 13-15. The CID does no such thing. Subpoenas like the Attorney General's CID "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political association." *SEC v. McGoff*, 647 F.2d 185, 187-88 (D.C. Cir. 1981) (upholding Securities and Exchange Commission subpoena for corporate records relating to transactions with South Africa). The First Amendment does not ordinarily protect routine corporate business records, which are all that the CID requests. A subpoena for corporate records like the CID is a "generally applicable" order "*unconcerned with regulating speech*" and does not even have the incidental (but permissible) "effect of interfering with speech." *Emp't Div.,*

[46] *See* Exh. 39, App. 766.

Dep't of Human Res. v. Smith, 494 U.S. 872, 886 n.3 (1990) (emphasis added). This principle follows from the black letter law that the First Amendment does not prevent government inquiries that seek information from the press, a context with much weightier First Amendment dimensions than a routine inquiry from a state attorney general to a publicly traded company concerning its potentially misleading and deceptive practices in violation of state consumer and investor protection laws.[47] Accordingly, the recipient of such a subpoena is not entitled to special protection under the First Amendment.[48]

Moreover, the First Amendment in no way bars the Attorney General's investigation into whether Exxon's commercial communications with consumers and investors have been false, deceptive, misleading, or fraudulent in violation of Chapter 93A. *See* Section II.C., *supra*. Indeed, such investigations by state attorneys general and federal authorities are commonplace. *See, e.g.*, Section II.A, *supra*; 15 U.S.C. §§ 45, 46(a), 49, 52, 57b-1 (Federal Trade Commission); 15 U.S.C. §§ 77t, 78u (Securities and Exchange Commission). The purpose of her investigation is wholly consistent with the First Amendment, which does not protect false, deceptive, or

---

[47] *See Herbert v. Lando*, 441 U.S. 153, 175 (1979) (no special exemption for media from general rules of pretrial discovery); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565-67 (1978) (no special immunity for press from search warrants); *Branzburg*, 408 U.S. at 688-90 (no First Amendment reporters' privilege in grand jury probe to conceal sources and information conveyed under promise of confidentiality). *See also In re Enforcement of Subpoena*, 767 N.E.2d 566 (Mass. 2002) ("The mere fact that the subpoena calls for production of documents reflecting, inter alia, communications that the witness had with others does not burden speech . . . . A discovery request or subpoena seeking information about a witness's communications does not automatically raise free speech concerns. *Similarly, the fact that the subject matter of the witness's communications may include items that are of current public interest or controversy,* and the fact that the witness is himself a journalist, *do not transform the commission's subpoena into a violation of free speech rights*" (emphasis added).).

[48] The Attorney General thus need not demonstrate a "compelling interest" in the materials sought, or that her requests have a "sufficient nexus" to that interest, as Exxon contends. Memo. at 14. The cases Exxon cites for imposing greater scrutiny concern far-afield inquiries that, for example, directly and imminently threatened the constitutionally protected privacy interests of individuals. *E.g.*, *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 17-18 (D.D.C. 2009).

misleading statements in the marketplace. *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (First Amendment does not limit "restrictions on false, deceptive, and misleading commercial speech"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (government "may, and does, punish fraud directly"); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) ("it is well settled that the First Amendment does not protect fraud"). If the Attorney General concludes as a result of her investigation that the statements are indeed fraudulent and chooses to pursue enforcement action, she may certainly do so consistently with the First Amendment. Accordingly, the Court should disregard Exxon's conclusory and premature First Amendment arguments.

2. The CID Is Fully Consistent with the Fourth Amendment Because It Is Expressly Authorized by Massachusetts Law and Seeks Information Relevant to Potentially Unlawful Conduct.

Under *United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950), the seminal case on the constitutional limits of subpoenas, which Exxon fails to cite in its papers, "law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." To meet constitutional requirements, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" *Id.* at 652-53 (quoting *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946)). Here, the CID is firmly within the Attorney General's legal authorities and is appropriately targeted at information relevant to the investigation. Exxon has failed to establish that the CID is unreasonable.[49]

[49] Exxon's citation of the *American Tobacco* case, Memo. at 17, ignores that its purportedly blanket rule cabining governmental investigations has been "decisively abandoned." *See In re McVane*, 44

As discussed above, the CID is premised on the Attorney General's reasonable belief that Exxon violated or is violating Chapter 93A by making false, misleading, and fraudulent statements about climate change to Massachusetts consumers and investors. *See Harmon Law Offices, P.C. v. Att'y Gen.*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013). The CID seeks Exxon's documents regarding the basis for and background of its public statements; these documents are within Exxon's exclusive control; and Exxon has not shown that any of the CID requests are irrelevant to this inquiry.[50]

Exxon's major objection to the CID's breadth appears to be that some of the CID requests seek documents that are outside the statute of limitations period for Chapter 93A claims. *See* Memo. at 9, 17.[51] Of the document requests in the CID, the large majority seek documents that are recent and plainly relevant to Exxon's conduct within the four-year limitations period. The other requests are tailored to obtain information related to Exxon's past knowledge,

---

F.3d 1127, 1134 (2d Cir. 1995) ("While the Supreme Court early in this century strongly condemned 'fishing expeditions into private papers on the possibility that they may disclose evidence of crime,' *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924), that position was decisively abandoned in [*Okla. Press Publ'g Co.*] and [*Morton Salt Co.*].'"); *United States v. Tyson's Poultry, Inc.*, 216 F. Supp. 53, 68 (W.D. Ark. 1963) ("The term 'fishing expedition' as a characterization of any such investigation has lost its impact during passage of years since that phrase appeared in the *American Tobacco* case, and it is incumbent upon any person objecting to the demands of subpoenas . . . to be more specific in their objections."). The other case Exxon cites, *Zurcher*, concerned search warrants, not subpoenas of business records.

[50] According to public documents, Exxon, with the assistance of other fossil fuel interests and non-governmental entities, also appears to have disseminated misleading statements in order to raise doubts about the credibility of scientific findings demonstrating the risks of climate change, thereby distorting consumer, investor, and public perception of the risks. This conduct is plainly relevant to Exxon's potential violations of Chapter 93A; Demand No. 5 of the CID therefore requests Exxon's communications with these third parties. Such communications may also provide further information regarding Exxon's internal knowledge of climate risks relative to its contemporaneous and later statements to consumers and investors.

[51] Exxon claims it could not have violated Massachusetts law given the limited extent of its Massachusetts activities and the Massachusetts courts' lack of personal jurisdiction over Exxon. In light of Exxon's extensive contacts with Massachusetts, the Court should reject Exxon's effort to inflate this facially meritless argument into a constitutional objection to the CID. *See* Section II.B, *supra*.

statements, and conduct based on the publicly available documents summarized above.

Events occurring *prior* to the limitations period may provide critical evidence regarding whether a violation of law occurred *during* the limitations period. *See, e.g., Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination*, 808 N.E.2d 257, 269-70 (Mass. 2004) (plaintiff who had seasonable claim may use events occurring prior to limitations period as "background evidence" and entity's prior conduct "is relevant as background evidence" to a determination whether subsequent actions by entity constitute violations of applicable law). Understanding what Exxon knew—and for how long it has known it—about the impacts of climate change on its businesses and on the environment is highly relevant to the determination whether Exxon's conduct during the limitations period violated Chapter 93A. Such information can demonstrate that Exxon knew that statements it made during the limitations period were false, misleading, or fraudulent *in light of* Exxon's *prior* knowledge and conduct.

Further, the investigation may reveal facts that would demonstrate other bases for continuing liability, *see, e.g.*, *Taygeta Corp. v. Varian Assocs., Inc*., 763 N.E.2d 1053, 1064-65 (Mass. 2002) (recurring tortious conduct in the form of continuing flow of contaminated groundwater to abutting property constituted continuing nuisance not barred by three-year statute of limitations even though dumping that caused contamination occurred decades before suit), and/or that equitable tolling of the Chapter 93A statute of limitations would be proper, *see, e.g., Lambert v. Fleet Nat'l Bank*, 865 N.E.2d 1091, 1097 (Mass. 2007) (holding that discovery rule applies to Chapter 93A claims); *Szymanski v. Boston Mut. Life Ins. Co*., 778 N.E.2d 16, 20 (Mass. App. Ct. 2002) (same; reversing grant of summary judgment for defendant insurer where question of fact existed whether discovery rule should apply to toll the statute of limitations). Because in this context Exxon cannot establish that its conduct beyond the limitations period is

irrelevant to the Attorney General's investigation, the Company's time-based objections to the CID do not establish that it is entitled to an injunction.

More broadly, Exxon's burden in responding to the CID is neither unusual nor greater than necessary under Massachusetts law. *See Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1367-68 (Mass. 1989) ("Documentary demands exceed reasonable limits only when they 'seriously interfere with the functioning of the investigated party by placing burdens on manpower or requiring removal of critical records.'" (quoting *Matter of Yankee Milk, Inc.*, 362 N.E.2d 207, 212 n.8 (Mass. 1977)). The Court should also consider Exxon's claimed burdens in light of its production of documents to the New York Attorney General, discussed above, and the indisputable ease of duplicating that production for Massachusetts. The CID is reasonable.

3. Exxon's Bias Claim Is Frivolous.

Exxon's due process argument boils down to a contention that the Attorney General's brief statement at a New York press conference in March evinced an improper bias that would prevent her from serving as a "disinterested" prosecutor in the case.[52] The claim is utterly without merit. If credited, it would allow law enforcement targets to disrupt necessary investigations whenever a prosecutor speaks publicly on a matter.

The Attorney General's comments recognized climate change as an environmental matter of grave public concern—consistent with both her authority to protect the environmental resources of Massachusetts, Mass. Gen. Laws ch. 12, § 11D, and with the edicts of federal and state law[53]—and also announced the initiation of the investigation at issue in this case. The

[52] Exxon offensively equates Attorney General Healey to prosecutors found guilty of gross misconduct, bad faith, or a pecuniary conflict of interest, none of which are at issue here.
[53] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (federal law); Global Warming Solutions Act, 2008 Mass. Acts ch. 298, and Green Communities Act, 2008 Mass. Acts ch. 169 (state laws addressing climate change).

statement explained the reasons for the investigation and her reasonable belief that Exxon's statements—as reflected in Exxon's own documents in the public domain as discussed above—may have misled investors, consumers, and the public about the harms caused by climate change, both to Exxon's business and assets and to the environment and human populations. Indeed, *such a belief that Exxon violated state law is the very basis for an investigation*. *See Harmon Law Offices*, 991 N.E.2d at 1103.

Exxon has cited no case holding that such a public statement violates due process by showing improper motive or bias, inappropriate prejudgment of the investigation, or personal animus against Exxon. *See Empower Texans, Inc. v. Tex. Ethics Comm'n*, No. A-14-CA-172-SS, 2014 WL 1666389, at *5 (W.D. Tex. Apr. 25, 2014) ("Plaintiffs' complaint that the [commission] has 'already found them guilty' is . . . hyperbolic."); *All Am. Check Cashing, Inc. v. Corley*, No. 3:16CV55TSL-RHW, 2016 WL 1173120, at *10, *14 (S.D. Miss. Mar. 22, 2016) (abstaining from asserting federal jurisdiction over constitutional case against state banking agency and finding no bad faith where plaintiff "offers only speculation, but no proof, that the Department's purpose in conducting its examination/investigation was other than legitimate").

Exxon's assertions that the Attorney General's statement demonstrates her bias or prejudgment of the investigation's merits disregard the Attorney General's unremarkable authority, as an elected official and a prosecutor, to explain to the public and the press that she is conducting an investigation. "Statements to the press may be an integral part of a prosecutor's job . . . and they may serve a vital public function." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993). *See also Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out on matters of public concern."); Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58

Fordham L. Rev. 865, 888 (1990) ("Prosecutors are publicly accountable; their accountability is measured in part through public information about the prosecutor's office, and about particular cases. Indeed, it is generally accepted that elected prosecutors have an obligation to inform the community about the functioning of their offices."). The Attorney General's statement merely reflects her belief, in light of her Office's review of the public record, that Exxon violated the state's consumer and investor protection laws with respect to its marketing and sale of fossil fuel derived products to consumers and of securities to investors.

That the Attorney General has coordinated with other state attorneys general in conducting this investigation into potential violations by Exxon of our state laws, and engaged with interested third parties on matters of public concern, is of no moment. What Exxon attempts to paint as nefarious is customary and routine practice for her Office and for attorneys general's offices around the country.[54] Attorneys general are advocates for the public interest, charged by statute with enforcing state law against unfair and deceptive business practices through investigations and legal action, and that is what Attorney General Healey is doing in this case.

4. Exxon's Dormant Commerce Clause Argument Is Meritless.

To the Attorney General's knowledge, no court has ever held that issuance of a CID by a state official to investigate violations of a facially neutral, nondiscriminatory consumer protection statute constitutes forbidden regulation of interstate commerce. *Cf. Lupin Pharm., Inc. v. Richards,* Civ. No. RDB-15-1281, 2015 WL 4068818, at *3 n.6 (D. Md. July 2, 2015) (memorandum decision) (noting that plaintiff raised dormant commerce clause challenge to CID

[54] The investigatory practices here with respect to this investigation into Exxon's potential fraudulent misrepresentations regarding the risks of climate change closely parallel the largely successful collaborations of state attorneys general in tobacco litigation and in other multistate investigations described above. *See, e.g.*, Exh. 40, App. 776-778 (background on Master Settlement Agreement from National Association of Attorneys General); Section II.A, *supra*.

but abstaining under *Younger* before reaching the issue). In any case, Exxon has provided no legal authority for this proposition.

As discussed above, the CID does not "regulate" Exxon's speech or activities—in Massachusetts or out of state. Moreover, "the Commerce Clause . . . [is] informed not so much by concerns about [the] defendant as by structural concerns about the effects of state regulation on the national economy." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). Here, Exxon has failed to adduce any facts showing that the CID imposes impermissible burdens on interstate commerce.

C. Granting the Injunction Would Undermine the Attorney General's Investigatory Powers, Harming Massachusetts Consumers and Investors and the Public Interest.

An injunction barring the Attorney General from advancing her investigation would irreparably injure her investigatory efforts under Massachusetts law. "[A]ny time a State is enjoined by a court from effectuating statutes created by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., as Circuit Justice). *See also CUNA Mut. Ins. Soc. v. Att'y Gen.,* 404 N.E.2d 1219, 1221 n.3 (Mass. 1980) ("an order that modified [or set aside] portions of a C.I.D[,] to the extent it was adverse to the Attorney General, had a *final and irreparable effect* on his efforts to obtain certain information" (emphasis added)). Allowing Exxon's motion on this record would open the federal courthouse doors to 42 U.S.C. § 1983 challenges to state-issued subpoenas and CIDs, in disregard of fundamental notions of comity and federalism. Forty state attorneys general, including Attorney General Healey, recently warned the Fifth Circuit Court of Appeals of the dangers of doing so in an amicus brief filed in support of Mississippi Attorney General

Hood when Google, Inc., sought to enjoin an investigation by him.[55]

The Attorney General and Massachusetts courts have a strong, sovereign interest in adjudicating challenges to Chapter 93A CIDs in Massachusetts. An injunction issued here (and any further adjudication of Exxon's claims here) would improperly disregard that interest. *See Lupin Pharm.*, 2015 WL 4068818, at *4 (abstaining in analogous case where, as here, state attorney general was seeking enforcement of CID in state court, triggering judicial oversight). *See also Juidice v. Vail,* 430 U.S. 327, 335-37 (1977); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 487-88 (5th Cir. 2008).

Finally, Massachusetts residents are entitled to vigorous enforcement of state consumer and investor protection laws. *See, e.g.*, *Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 663-64 (7th Cir. 2007) (recognizing significant state interest in protecting citizens against "fraudulent, dishonest and incompetent" business practices); *Arbitron Inc. v. Cuomo*, No. 08-Civ.-8497(DLC), 2008 WL 4735227, at *5 (S.D.N.Y. Oct. 27, 2008) ("[The Attorney General's] lawsuit seeks to enforce the state laws against discrimination and deceptive practices. . . . These interests implicate sufficiently central sovereign functions of state government"). An injunction closing the door on the Attorney General's investigation of Exxon would disregard this strong public interest, and place at significant risk the very consumers and investors Chapter 93A is intended to protect.

IV. CONCLUSION

For the foregoing reasons, Exxon's motion for preliminary injunction should be denied.

[55] *See* Amici Curiae Brief of 40 Attorneys General in Support of Mississippi's Interlocutory Appeal, *Google, Inc. v. Hood,* 5th Cir. No. 15-60205, 2015 WL 4094982 (June 29, 2015); *Google, Inc. v. Hood*, 822 F.3d 212, 215 (5th Cir. 2016).

Dated: August 8, 2016

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

/s/ *Douglas A. Cawley*

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
Fax (617) 727-9665

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 8, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

/s/ *Douglas A. Cawley*
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 4:16-CV-469-K
	§	
MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	§	
	§	
Defendant.	§	
	§	**ORAL ARGUMENT REQUESTED**

REPLY IN SUPPORT OF EXXON MOBIL CORPORATION'S
MOTION FOR A PRELIMINARY INJUNCTION

Patrick J. Conlon (*pro hac vice*)
Daniel E. Bolia
EXXON MOBIL CORPORATION
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

Theodore V. Wells, Jr. (*pro hac vice*)
Michele Hirshman (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Justin Anderson (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
(212) 757-3990 – Fax

Ralph H. Duggins
Philip A. Vickers
Alix D. Allison
CANTEY HANGER LLP
600 W. 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
(817) 877-2807 – Fax

Nina Cortell
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
(214) 200-0411 – Fax

Counsel for Exxon Mobil Corporation

Exxon Mobil Corporation ("ExxonMobil" or the "Company") respectfully submits this reply in support of its motion for a preliminary injunction.[1]

PRELIMINARY STATEMENT

ExxonMobil's opening brief demonstrated how Attorney General Healey's official actions and statements violated ExxonMobil's constitutional rights. The Attorney General offers no real defense of her statements supporting her use of law-enforcement tools to change climate policy or her decision to focus those tools exclusively on entities she views as opposing her policy preferences. Rather than address those revealing statements and actions, the Attorney General instead falls back upon platitudes about the scope of her power to investigate and prosecute fraud. But this case is not about the legitimate exercise of state law-enforcement power. It is about the misuse of government power and the vital role federal courts play in restraining such abuses. While the Attorney General might have the power to issue civil investigative demands ("CIDs"), she does not have the power to use them to restrict speech on matters of public concern. The Attorney General has not defended her actions and statements because they are indefensible, partisan, and unconstitutional. It is the proper role of this Court to put a stop to this misuse of state power.

ARGUMENT

I. ExxonMobil Is Likely to Prevail on the Merits.

A. The Attorney General's Viewpoint Discrimination Violates the First Amendment.

The record demonstrates that the Attorney General issued the CID to silence ExxonMobil and others who she believes disagree with her on climate change policy. That is textbook

[1] "Opp." refers to the memorandum filed by the Attorney General in opposition to ExxonMobil's motion for a preliminary injunction; "Mot." refers to the brief filed by ExxonMobil in support of its motion for a preliminary injunction; and "Compl." refers to the Complaint.

viewpoint discrimination, and the First Amendment prohibits it.

Attorney General Healey admittedly joined certain partisan state attorneys general and private citizen Al Gore to promote the use of state law-enforcement powers to take "progressive action to address climate change" as a remedy for Congress's failure to enact policies favored by the so-called Green 20.[2] Declaring that she had a "moral obligation" to move the country toward a "clean energy future," the Attorney General vowed to take "quick aggressive action" to alleviate a threat to "the very existence of our planet," and she then issued a CID to ExxonMobil demanding, among other things, all communications between ExxonMobil and 12 organizations, each of which has been derided as a so-called climate change "denier."[3] Attorney General Healey's improper motive has been revealed further through her participation in a common interest agreement that was recently obtained by a third party through a public records request.[4] That agreement, which is designed to shield the participants' communications from the public, shows that the purpose of the Attorney General's investigation is entirely political: "limiting climate change and ensuring the dissemination of accurate information about climate change."[5]

The Attorney General makes no attempt to defend her statements at the press conference, the CID's exclusive focus on groups that disagree with her politics, or the execution of a common interest agreement memorializing her intent to regulate speech on a matter of public policy. Instead, she pivots to propositions over which the parties do not disagree and which do not contradict the record of viewpoint discrimination established by ExxonMobil.

First, the Attorney General submits that the First Amendment does not protect "false,

---

2 Supp. App. 78, 81–82, 84–85, 88–89, 272.

3 *See* Supp. App. 84–85, 106.

4 A number of public records requests were issued to various Attorneys Generals' offices. A production by the Attorney General of Rhode Island revealed the existence of this common interest agreement. To date, we understand that Attorney General Healey and other members of the Green 20 have refused to produce any documents in response to the public records requests to their respective offices.

5 Supp. App. 124.

deceptive, or misleading statements in the marketplace." Opp. 2, 17-18. ExxonMobil does not quarrel with the proposition that fraud finds no refuge in the First Amendment. ExxonMobil does, however, contest the Attorney General's belief that the mere invocation of the word "fraud" dispels all First Amendment concerns raised by the CID. Were that so, the State of Alabama could have circumvented the holding of *NAACP* v. *Patterson*, 357 U.S. 449 (1958), simply by claiming it sought the NAACP's membership list in connection with a "fraud" investigation. The Supreme Court has rejected any such sleight of hand, recognizing that "[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). The Attorney General must offer more than her say-so that her investigation pertains to fraud and not the suppression of disfavored speech. But what she has presented amounts to little more than pretext based on (i) selective excerpts from documents that create a misimpression about ExxonMobil's climate research, and (ii) a theory of financial fraud that is half-baked and easily debunked. Behind this pretext lies nothing more than the Attorney General's unconstitutional viewpoint discrimination.

Second, the Attorney General contends that mere "routine corporate business records" are not protected by the First Amendment. Opp. 16-17. The problem here is that the CID is hardly limited to conventional business records like shipping invoices, accounting records, or business plans. Among other things, the CID seeks ExxonMobil's communications with third parties on matters of public policy, as well as ExxonMobil's underlying climate research.[6] Such communications and research are hardly outside the First Amendment's concern. *See, e.g.*, *First Nat. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776-86 (1978).

Even if the Attorney General sought nothing more than routine business records, and those records in fact were not protected by the First Amendment, her argument would still be

[6] Supp. App. 105–113.

incorrect as a matter of law. That is because even if the speech at issue has no "claim upon the First Amendment," a state "may not regulate [its] use based on hostility—or favoritism—towards the underlying message expressed." *R.A.V.* v. *City of Saint Paul*, 505 U.S. 377, 386 (1992). For example, "fighting words" are not protected by the First Amendment, but the state may not ban them based on its disagreement with a speaker's political views. *See id.* at 384-86. Accordingly, it does not matter whether the underlying records are protected by the First Amendment. Where, as here, the demand for records is motivated by viewpoint bias, the First Amendment prohibits the state action the Attorney General has undertaken.

B. The Attorney General's Baseless Fishing Expedition Violates the Fourth Amendment.

Striving to justify her investigation, Attorney General Healey identifies two grounds for investigating ExxonMobil. Both are mere pretexts, which is why she must defend fishing expeditions, like the one she is conducting here, and insist that the Constitution presents no barrier to them. None of this withstands close scrutiny.

Relying on carefully selected excerpts of certain ExxonMobil documents, the Attorney General alleges that ExxonMobil knew about the risks of climate change decades ago and fraudulently concealed that knowledge from the public. Opp. 19. A review of these documents demonstrates that ExxonMobil's internal knowledge was well within the mainstream of thought on the issue—the contours of which remain unsettled even today—and fully consistent with its public statements.[7]

Consider, for example, Attorney General Healey's reference to a 1984 presentation delivered by an ExxonMobil scientist at an environmental conference.[8] The Attorney General claims that the scientist "predict[ed] significant increases in global temperature as a result of the

[7] Supp. App. v to xiii (declaration of J. Anderson, dated Aug. 23, 2016).
[8] Supp. App. 58–71.

combustion of fossil fuels." Opp. 7. Hardly. What the scientist actually said was, if "a number of assumptions" were valid, there could be a three-degree rise in global temperatures "by 2090."[9] And that statement was entirely consistent with the views expressed at the time by the EPA, the National Academy of Sciences ("NAS"), and MIT.[10] ExxonMobil did not have access to special insight on the risks of climate change, nor did it conceal that knowledge from the public. ExxonMobil, like the EPA, NAS, and MIT, was evaluating data and testing theories in an area of science that was evolving. That—and not a scheme to defraud—is why it took another 25 years before the EPA issued an endangerment finding for greenhouse gas emissions.[11] The other documents excerpted by the Attorney General are equally innocuous, as shown in the Anderson Declaration, revealing this theory of fraud as nothing more than a smokescreen for a constitutional tort.

Even more fanciful is the Attorney General's claim that ExxonMobil failed to "disclose" to the public that future climate change regulations are likely to bar further development of its "vast fossil fuel reserves." Opp. 7-9. "Proved reserves," under SEC regulations, encompass only energy sources that ExxonMobil estimates with "reasonable certainty" to be economically producible "under existing economic conditions, operating methods, and government regulations."[12] By definition, therefore, future government regulations, which may or may not be enacted, are not to be considered when measuring and disclosing proved reserves. Even if they were, however, at current production rates, ExxonMobil's proved reserves are expected to

---

9 Supp. App. 70.

10 *See* Supp. App. 64 (noting that the EPA, NAS, and MIT predicted temperature increases of 3°C, 2°C, and 1.5-4.5°C, respectively); *see also* Supp. App. 150 (EPA report from 1983 noting the possibility of a 5°C increase by 2100); Supp. App. 178 (NAS report from 1983 stating that "temperature increases of a couple of degrees or so" were projected for the next century).

11 Supp. App. 184–85.

12 *Modernization of Oil & Gas Reporting*, SEC Release No. 78, File No. S7-15-08, 2008 WL 5423153, at *66 (Dec. 31, 2008).

be produced, on average, within 16 years.[13] Attorney General Healey has identified no regulation—federal, state, or international—within that timeframe that is reasonably likely to prevent ExxonMobil from developing its proved reserves.[14] Instead, the Attorney General points to the advocacy of certain entities calling for such regulations. Opp. 8. It is far from clear, however, that anything will come from that advocacy. Attorney General Healey is well aware of this state of affairs; she and her colleagues identified Congressional inaction as the catalyst for their climate change "investigations."[15] That acknowledgment eviscerates her new claim that the urged laws or regulations will cause ExxonMobil's proved reserves to be "stranded."[16]

The ease with which these two pretexts are rebutted requires the Attorney General to default to a fallback position—namely, that the Constitution permits her to engage in a fishing expedition. Opp. 18 & n.49. But even her lead precedent recognizes that "the disclosure sought shall not be unreasonable," the touchstone of the Fourth Amendment. Opp. 18 (quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652–53 (1950)). And none of her out-of-circuit, lower court decisions can abrogate the Supreme Court's determination that the Fourth Amendment applies with "scrupulous exactitude" when the government demands materials protected by the First Amendment. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978). Where, as here, a subpoena fails to identify any plausibly illegal activity, the Fourth Amendment guarantees corporations and individuals alike the "right to be free from baseless investigations (commonly

---

13 Supp. App. 200.

14 ExxonMobil is not alone in its conclusion that near-term regulations are unlikely to strand proved reserves. Other energy companies have reached the same conclusion. *Compare* Supp. App. 205 (explaining that producing reserves "is essential to meeting growing energy demand worldwide"), *with* Supp. App. 243-44 (noting that projections of stranded assets "do[] not take into account the fact that the demand for oil and gas would be much higher than what can possibly be produced from existing, producing oil and gas fields"), *and* Supp. App. 255 ("Shell does not believe that any of its proven reserves will become 'stranded' as a result of current or reasonably foreseeable future legislation concerning carbon.").

15 Supp. App. 78, 81–82, 88–89, 272.

16 Indeed, the Attorney General's investigation apparently has more to do with picking winners and losers in the marketplace for energy than enforcing the law. The Attorney General expressed interest in working with other members of the so-called Green 20 to clear "Roadblocks To Renewables," and her office was eager to share its plans to "[a]dvanc[e] clean energy." Supp. App. 277, 284.

referred to as 'fishing expeditions')." *Major League Baseball* v. *Crist*, 331 F.3d 1177, 1187 (11th Cir. 2003).[17] Attorney General Healey's fishing expedition runs afoul of settled precedent and should be enjoined.

C. The Attorney General's Bias Violates the Fourteenth Amendment.

Assiduously avoiding any discussion of the actual content of her public statements, Attorney General Healey strains to defend her actions by pointing to her "unremarkable authority, as an elected official and a prosecutor," to inform the public and the press of her investigation. Opp. 22. ExxonMobil does not object to the Attorney General's authority to hold press conferences; it objects to, and is aggrieved by, the improper and unconstitutional bias she exhibited during the extraordinary press conference announcing this investigation.

At the March 29 press conference, Attorney General Healey described her investigation of ExxonMobil as "quick, aggressive action" to "address climate change and to work for a better future."[18] She targeted ExxonMobil to score political points on a matter of public policy. Prejudging the results of the investigation, she informed the public that her office had already found a "troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[19] Those statements reflect unconstitutional bias.

Attorney General Healey argues there has been no violation of the Constitution and, for support, points to decisions addressing alleged strong-arm tactics and bias claims that do not

---

[17] The Attorney General's alternative defenses of the CID are weaker still. The CID is legitimate, she says, because it may turn up some thus far unidentified "bases for continuing liability" and "equitable tolling." Opp. 20. But that description is nearly a canonical articulation of what the Fourth Amendment was designed to forbid. General warrants, which broadly authorized searches for proof of wrongdoing, were reviled by the founding generation and prohibited by the Fourth Amendment. *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014). Where law enforcement seeks ill-defined categories of materials like "evidence of a crime," courts reject the attempted search as a general warrant in disguise. *United States* v. *Stefonek*, 179 F.3d 1030, 1032-33 (7th Cir. 1999).

[18] Supp. App. 85.

[19] Supp. App. 84.

involve any public statements.[20] Irrelevant precedent does not obscure the record of her expressed "improper motives" in pursuing this investigation. *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). Where, as here, an investigation has been initiated due to the alleged "inaction" of a Republican Congress and is undertaken out of bias against a perceived opponent in an ongoing debate over public policy, the due process of law is offended and an injunction is warranted.

D. The Attorney General's Attempted Extraterritorial Regulation Violates the Dormant Commerce Clause.

The CID regulates interstate commerce because it is a state action that has the practical effect of limiting ExxonMobil's speech outside the Commonwealth of Massachusetts. Mot. 22–24. The Attorney General disputes that proposition because she can find no precedent where a CID was held to have violated the Dormant Commerce Clause. Opp. 23-24. But novelty in the means by which the Constitution is violated does not make the injury any less concrete. The Dormant Commerce Clause forbids a state from taking actions that have the "practical effect of controlling conduct outside of the state." *Pharm. Research Mfrs. of Am.* v. *Concannon*, 249 F.3d 66, 79 (1st Cir. 2001). The CID does exactly that: It targets and demands the disclosure of communications about climate change that took place outside of Massachusetts, and it does so because the Attorney General wants to silence views that ExxonMobil expressed outside of Massachusetts. ExxonMobil's opening brief challenged the Attorney General to identify a "relevant connection" between Massachusetts and the materials the CID demands. Mot. 24. That challenge has gone unanswered, demonstrating the absence of any link to Massachusetts and the impropriety of this "progressive action" to regulate out-of-state communications.

---

[20] *See All Am. Check Cashing, Inc.* v. *Corley*, No. 3:16CV55TSL-RHW, 2016 WL 1173120, at *9 (S.D. Miss. Mar. 22, 2016) (alleged strong-arm tactics and press leaks); *Empower Texans, Inc.* v. *Tex. Ethics Comm'n*, No. A-14-CA-172-SS, 2014 WL 1666389, at *1, *5 (W.D. Tex. Apr. 25, 2014) (alleged prejudgment of the case).

II. ExxonMobil Faces an Irreparable Injury.

A violation of constitutional rights constitutes an irreparable harm, "justifying the grant of a preliminary injunction." *Palmer ex rel. Palmer* v. *Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (First Amendment); *Bonnell* v. *Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). Attorney General Healey disputes this settled proposition by claiming that *Google, Inc.* v. *Hood*, 822 F.3d 212 (5th Cir. 2016), held that the availability of state court proceedings renders a constitutional injury no longer irreparable. Opp. 13-14. *Google* stands for no such thing. There, the Fifth Circuit vacated an injunction because the case was unripe, not in deference to a state proceeding. *See* 822 F.3d at 226. *Google* did nothing to alter the well-settled rule that a party whose First Amendment rights are threatened faces an irreparable injury. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

Falling equally wide of the mark is the Attorney General's assertion that ExxonMobil "can readily comply with Massachusetts's investigation" because it has produced certain records to the New York Attorney General. Opp. 14. That argument misconceives the relevant injury. ExxonMobil has been injured, not because complying with the CID would be impossible, but because its constitutional rights have been violated by the demand that it produce documents in an unconstitutionally conceived and executed investigation. Nothing about ExxonMobil's response to a different demand issued by a different state agency under a different statute excuses Attorney General Healey's violation of ExxonMobil's rights.

Finally, the Attorney General suggests that ExxonMobil's injury turns on whether the "CID curtails its speech." Opp. 14–15. Not so. A First Amendment violation premised on viewpoint discrimination does not require proof that any speech has been curtailed, and the Attorney General has identified no authority holding otherwise. In fact, none of the precedents she cites even addresses viewpoint discrimination. They pertain to other First Amendment

claims that, at times, can require that a curtailment of speech be established. Opp. 15. Those precedents have no relevance here.

III. The Public Interest Favors Granting the Injunction.

The public interest is "always" best served by a preliminary injunction that protects First Amendment freedoms. *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012). The public also has an interest in ensuring that state law-enforcement officers exercise their powers constitutionally. Attorney General Healey believes that interest weighs in her favor, pointing to a bipartisan amicus brief filed last year by 40 attorneys general opposing a challenge to a state subpoena. Opp. 24. Here, however, only half as many attorneys general have joined an amicus brief in support of the Attorney General's position. Moreover, numerous attorneys general have publicly criticized Attorney General Healey's investigation. Compl. ¶¶ 36–37.[21] The public interest fully supports a preliminary injunction.

CONCLUSION

Attorney General Healey issued the CID to pressure a perceived political opponent into silence. She announced that intent at the press conference, along with her prejudgment of the results of her investigation. She gave it the force of law in the CID, which targets a single entity that she believes disagrees with her policy perspective. And she memorialized it in a common interest agreement with the express objective of "ensuring the dissemination of accurate information about climate change." These facts are damning, and that is why the Attorney General refuses to engage with them. Notwithstanding any dissatisfaction the Attorney General might have with Congress, our Constitution requires that policy disagreements be resolved at the ballot box. Because a bad-faith investigation is not a constitutionally permissible substitute for the rigors of the democratic process, ExxonMobil's motion should be granted.

[21] Supp. App. 258–69.

Dated: August 24, 2016

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
pro hac vice
State Bar No. 24054300
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
pro hac vice
twells@paulweiss.com
Michele Hirshman
pro hac vice
Daniel J. Toal
pro hac vice
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
(212) 757-3990 – Fax

Justin Anderson
pro hac vice
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
(202) 223-7420 – Fax

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
(817) 877-2807 – Fax

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
(214) 200-0411 – Fax

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

This is to certify that on this 24th day of August 2016, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/ Ralph H. Duggins
Ralph H. Duggins

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	§ § § § § § § § § § § §	No. 4:16-CV-469-K **ORAL ARGUMENT REQUESTED**

EXXON MOBIL CORPORATION'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Patrick J. Conlon (*pro hac vice*)
Daniel E. Bolia
EXXON MOBIL CORPORATION
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

Theodore V. Wells, Jr. (*pro hac vice*)
Michele Hirshman (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Justin Anderson (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

Ralph H. Duggins
Philip A. Vickers
Alix D. Allison
CANTEY HANGER LLP
600 W. 6th St. #300
Fort Worth, TX 76102
Tel: (817) 877-2800
Fax: (817) 877-2807

Nina Cortell
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
Tel: (214) 651-5579
Fax: (214) 200-0411

Counsel for Exxon Mobil Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Exxon Mobil Corporation ("ExxonMobil") respectfully submits this memorandum of law in opposition to Defendant Maura Tracy Healey's motion to dismiss the Complaint.

PRELIMINARY STATEMENT

ExxonMobil brought this action to protect its constitutional rights from Attorney General Healey's misuse of government power to restrict speech she disfavors. The Attorney General has moved to dismiss ExxonMobil's Complaint, but she does not contest the adequacy of the Complaint's allegations. Her motion does not challenge ExxonMobil's claim that Attorney General Healey's politically motivated investigation with preordained results is an unlawful and pretextual device to violate ExxonMobil's rights under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution as well as Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution. Even though she does not dispute that ExxonMobil has pleaded an adequate case against her, the Attorney General nevertheless requests the dismissal of this lawsuit.

Seeking to avoid scrutiny in this Court, Attorney General Healey maintains that no court in Texas may exercise jurisdiction over her. She is wrong. The moment she elected to use the levers of government to cause constitutional torts in Texas, she subjected herself to the jurisdiction of courts in this state. Her arguments about justiciability are equally flawed. The Attorney General's bad faith precludes abstention, and this lawsuit's ripeness has been fully established by the penalties ExxonMobil faces for non-compliance with the Civil Investigative Demand ("CID") and by the Attorney General's motion to compel in Massachusetts state court. Finally, no recognized principle pertaining to venue precludes the adjudication of this lawsuit here, in the district where ExxonMobil's rights have been violated. The Attorney General's motion to dismiss this action should be denied.

STATEMENT OF FACTS

Attorney General Healey has violated ExxonMobil's constitutional rights by misusing the powers of her office. She is engaging in unapologetic viewpoint discrimination, conducting an unlawful fishing expedition, directing a biased investigation with preordained results, and she is seeking to regulate speech and conduct occurring well beyond the borders of the Commonwealth of Massachusetts. Each of these constitutional violations is fully supported by the allegations contained in the Complaint, the adequacy of which the Attorney General has not contested.

A. The Attorney General's Public Statements Demonstrate Viewpoint Bias.

Joining other members of the so-called "Green 20" group of attorneys general at a March 29, 2016 press conference, Attorney General Healey declared that "certain companies" needed to be "held accountable" for expressing a viewpoint on climate change that she disfavored.[1] After acknowledging that "public perception" was her principal concern, she condemned her targets for not sharing her beliefs on "the catastrophic nature of" climate change.[2] Attorney General Healey then pledged to take "quick, aggressive action" to "address climate change" by investigating ExxonMobil.[3] Prejudging the investigation's results, she told the public she had already found a "troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[4]

B. The CID Is a Fishing Expedition that Expressly Targets One Side of a Political Debate.

Three weeks later, the Attorney General issued the CID to ExxonMobil demanding, among other things, all communications between ExxonMobil and 12 organizations,[5] each of

---

1 MTD App. at 13.
2 *Id.*
3 MTD App. at 14.
4 MTD App. at 13.
5 MTD App. at 35.

which has been derided as a so-called climate change "denier." The focus of the CID on entities the Attorney General perceives to be antagonistic to her policy preferences underscores the improper motivation for issuing the CID in the first place—namely, to silence perceived political opponents.

The sheer breadth of the CID also reflects its impropriety, demonstrating that it is nothing more than a transparent fishing expedition forbidden by the Constitution. The CID seeks 38 categories of documents (more than 60 when including sub-categories) on a worldwide basis for a period of 40 years.[6] That burdensome request is allegedly justified by reference to a Massachusetts consumer protection law[7] with a four-year statute of limitations. Mass. Gen. Laws ch. 260, § 5A. But, as set forth in the Complaint, ExxonMobil has not engaged in conduct in the Commonwealth of Massachusetts during the relevant limitations period that could give rise to liability under that statute.[8] The absence of any possible violation of the statute that allegedly forms the basis of the Attorney General's investigation unmasks its pretextual nature and demonstrates that it serves no legitimate law enforcement purpose.

C. Recently Obtained Documents Further Demonstrate the Political Nature of the Green 20 Investigations.

If Attorney General Healey's biased public statements and the CID's express viewpoint discrimination left any room for doubt about the impropriety of her investigation, documents recently obtained through public records requests by third parties put any potential concern to rest.[9] The first set of documents shows the origins of the "Green 20" and that group's focus on politics. A draft set of "Principles" guiding the group's actions included a "Pledge" to "work

[6] MTD App. at 34–42.
[7] MTD App. at 23.
[8] ExxonMobil's Complaint for Declaratory and Injunctive Relief ("Compl.") (Dkt. No. 1) ¶¶ 55–58.
[9] The production of these records pursuant to public records requests demonstrates that ExxonMobil's claims of constitutional torts are likely to be further supported by discovery.

together" to enforce laws "that require progressive action on climate change."[10] Recognizing the overtly political nature of that objective, an employee of the Vermont Attorney General's Office wrote: "We are thinking that use of the term 'progressive' in the pledge might alienate some. How about 'affirmative,' 'aggressive,' 'forceful' or something similar?"[11] Such window dressing does not mitigate the fundamental problem with the Green 20's endeavor: It seeks to use the coercive tools of law enforcement to twist a public debate over policy in the Green 20's favor.

The second set of documents obtained through public record requests exposes the Green 20's efforts to shield its improper activities from public scrutiny. In April and May 2016, seventeen attorneys general, including Attorney General Healey, executed a "Common Interest Agreement" seeking to conceal their own communications about climate change.[12] That agreement, which describes their common interest as "limiting climate change and ensuring the dissemination of accurate information about climate change," shows that the purpose of the Attorney General's investigation is entirely political, pertaining to the promotion of preferred climate change policies.[13] It also shows Attorney General Healey's intent to trample First Amendment rights by restricting speech to what the Green 20 believes is "accurate information" about the risks and policy trade-offs inherent in the climate change debate.

D. The Attorney General Directed the CID and Constitutional Torts at Texas.

The constitutional violations that form the basis of ExxonMobil's Complaint occurred in Texas. ExxonMobil is a Texas-based company with no significant contacts in Massachusetts.

---

[10] MTD App. at 54.

[11] MTD App. at 53.

[12] MTD App. at 57–75. The signatories included representatives of the Attorneys General for California, Connecticut, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, the U.S. Virgin Islands, Virginia, and Washington.

[13] MTD App. at 57. This document was publicly released last month, demonstrating how discovery is likely to reveal further evidence of the Attorney General's improper motive.

Although ExxonMobil designates a Massachusetts-based agent in its registration filing with the Massachusetts Secretary of State, that filing also states that ExxonMobil's "Principal Office" is located in Irving, Texas, and that ExxonMobil has no office in Massachusetts.[14] Nor, as set forth above, has ExxonMobil had any presence in Massachusetts that could give rise to a violation of the Massachusetts consumer protection law the Attorney General purports to be enforcing.[15]

The CID seeks records that are located in Texas and, in turn, is directed at ExxonMobil's speech that originated in Texas. Many of the CID's requests expressly acknowledge those facts. For example, Request 10 asks for documents concerning a speech given by an ExxonMobil executive "in Dallas, Texas."[16] Likewise, Request 16 seeks a broad array of documents concerning a press release that, on its face, was issued from ExxonMobil's headquarters in Irving, Texas.[17] Other requests pertain to matters that are routinely handled at the corporate headquarters of a company, such as the securities filings sought by Requests 19 and 31.[18]

PROCEDURAL HISTORY

ExxonMobil commenced this action in June 2016, with the filing of the Complaint and a motion for a preliminary injunction that has been fully briefed since August 24, 2016. The Attorney General's motion to dismiss the Complaint is scheduled to be fully briefed on October 11, 2016.

Solely to preserve its objections from forfeiture, ExxonMobil filed a petition in Massachusetts state court to set aside the CID. That petition was filed after commencing this action. ExxonMobil contests personal jurisdiction in Massachusetts state court and has requested

---

14 MTD App. at 77.

15 Compl. ¶¶ 57–58.

16 MTD App. at 37.

17 MTD App. at 38–39.

18 MTD App. at 39, 41. The CID also seeks documents even further afield from Massachusetts. Request 8 seeks documents concerning a presentation made in Beijing, China, and Request 11 asks for records concerning a speech given by an ExxonMobil executive in London, England. MTD App. at 36–37.

that the state court stay that second-filed action pending resolution of this lawsuit. The Attorney General has since cross-moved to compel compliance with the CID. Briefing on ExxonMobil's petition and the Attorney General's cross-motion will not conclude until October 10, 2016—more than a month-and-a-half after ExxonMobil's preliminary injunction was fully briefed in this Court.

ARGUMENT

Attorney General Healey does not claim that ExxonMobil has failed to adequately plead a violation of its constitutional rights, yet she nevertheless asks the Court to dismiss this lawsuit because she believes the Court cannot and should not hear ExxonMobil's case. Her motion should be denied. Each objection the Attorney General raises to the jurisdiction of this Court or the justiciability of this matter is easily set aside when measured against the applicable legal standard. This Court is fully empowered to decide ExxonMobil's claims.

I. This Court Has Personal Jurisdiction over the Attorney General.

The Attorney General purposefully and intentionally used the CID to violate ExxonMobil's constitutional rights in Texas, not in Massachusetts. Having purposefully elected to cause an injury in Texas with an intent to restrict speech formulated in and emanating from Texas, the Attorney General cannot now legitimately claim to be beyond the reach of Texas courts.

A. The Texas Long-Arm Statute Reaches the Attorney General.

The exercise of jurisdiction over the Attorney General in this case is fully consistent with the purpose of Texas's long-arm statute, which courts have recognized is "to exploit to the maximum the fullest permissible reach under federal constitutional restraints."[19] *Atwood*

[19] There is no "federal constitutional restraint" on state laws imposing liability on other states or their officials. *See Nevada* v. *Hall*, 440 U.S. 410, 420–21 (1979).

Hatcheries v. *Heisdorf & Nelson Farms*, 357 F.2d 847, 852 (5th Cir. 1966) (internal quotation marks and citation omitted). That is why the statute has been "given the broadest possible construction, subject only to basic constitutional requirements." *Clark Advert. Agency, Inc.* v. *Tice*, 331 F. Supp. 1058, 1059 (N.D. Tex. 1971), *aff'd*, 490 F.2d 834 (5th Cir. 1974); *see also Eyerly Aircraft Co.* v. *Killian*, 414 F.2d 591, 599 (5th Cir. 1969) (noting that the Texas long-arm statute "should be given as broad a reach as due process will permit any 'Long Arm' statute to be given"). Texas courts have thus held that the long-arm statute "reaches 'as far as the federal constitutional requirements for due process will allow.'" *Spir Star AG* v. *Kimich*, 310 S.W.3d 868, 872 (Tex. 2010) (citation omitted).

Applying this reasoning, federal and state precedent establishes that the Texas long-arm statute confers jurisdiction over sister states, their instrumentalities, and their officers. Some courts have expressly confirmed that the Texas long-arm statute reaches sister states. *See, e.g.*, *21 Turtle Creek Square, Ltd.* v. *N.Y. State Teachers' Ret. Sys.*, 425 F.2d 1366, 1368 (5th Cir. 1970) (personal jurisdiction over New York state agency under Texas long-arm statute); *Bd. of Cty. Comm'rs of Beaver Cty., Okla.* v. *Amarillo Hosp. Dist.*, 835 S.W.2d 115, 119 (Tex. App.—Amarillo 1992, no writ) (finding that Texas long-arm statute applied to subdivision of Oklahoma state government).[20] Other courts have implicitly recognized that reach by considering the sufficiency of an out-of-state official's contacts with Texas, which could occur only if the Texas long-arm statute permitted such an inquiry in the first instance. *See, e.g.*, *Gulf Coast Int'l* v. *The Research Corp. of the Univ. of Haw.*, 490 S.W.3d 577, 583–84 (Tex. App.—Houston [1st Dist.]

[20] *21 Turtle Creek Square* relies on Tex. Rev. Civ. Stat. art. 2031b, the predecessor to the current long-arm statute, Tex. Civ. Prac. & Rem. Code Ann. § 17.041 *et seq.* The current statute was a nonsubstantive codification of the prior statute. *See* 1985 Tex. Gen. Laws, ch. 959 (S.B. No. 797). As such, cases interpreting the scope and effect of Article 2031b apply equally to the current long-arm statute.

2016, pet. filed);[21] *Markland* v. *Bay Cty.* [Florida] *Sheriff's Office*, No. 1:14-CV-572, 2015 WL 3430120, at *2–3 (E.D. Tex. May 28, 2015) (adopting report and recommendation); *Payne* v. *Cty. of Kershaw, S.C.*, No. 3:08-CV-0792-G, 2008 WL 2876592, at *2–5 (N.D. Tex. July 25, 2008); *Perez Bustillo* v. *State of Louisiana*, 718 S.W.2d 844, 846 (Tex. App.—Corpus Christi 1986, no writ). Indeed, this very Court did so on different facts in *Saxton* v. *Faust*, No. 3:09 CV-2458-K, 2010 WL 3446921, at *3 (N.D. Tex. Aug. 31, 2010), a case the Attorney General herself cites.

Notwithstanding this precedent, Attorney General Healey claims that out-of-state public officers, like her, are exempt from personal jurisdiction under the Texas long-arm statute. Mem. 4–6.[22] Her argument relies primarily on one decision, *Stroman Realty, Inc.* v. *Wercinski*, 513 F.3d 476 (5th Cir. 2008), which contains language questioning the scope of the long-arm statute in the context of suits against out-of-state public officials. Mem. 4–5. But the Fifth Circuit did not resolve that question in *Stroman* because the out-of-state official "conced[ed] the application . . . of the long-arm statute" and "relieve[d] th[e] court of an obligation to pursue" the matter. 513 F.3d at 483. The Attorney General's argument is therefore premised entirely on dicta. Indeed, a concurring judge joined the *Stroman* opinion except for its "*extensive dicta* . . . about . . . whether the Texas long-arm statute applies." *Id.* at 489 (emphasis added). The discussion in *Stroman* is woefully inadequate to support Attorney General Healey's challenge to settled precedent.

The Attorney General also questions whether her conduct amounts to "doing business" in Texas as illustrated by three examples of such conduct provided in Section 17.042 of the Texas Civil Practice and Remedies Code. Mem. 5. That question is easily answered in the affirmative.

[21] The Research Corporation of the University of Hawaii is a state agency.

[22] "Mem." refers to the Attorney General's Memorandum of Law in Support of her Motion to Dismiss (Dkt. No. 42).

Among the non-exhaustive illustrations set forth in the statute is "commit[ting] a tort in whole or in part in this state." Tex. Civ. Prac. & Rem. Code Ann. § 17.042(2). That is precisely what the Attorney General did when she used her official power to intentionally violate ExxonMobil's constitutional rights which, as described below, are exercised in Texas.

B. Exercising Personal Jurisdiction over the Attorney General Comports with Due Process.

Where, as here, (i) a defendant directed its activities at the forum state, (ii) those activities give rise to legal claims, and (iii) it is fair and reasonable to have the defendant answer those claims in the forum state, due process does not present a barrier to the exercise of jurisdiction.

1. Applicable Law

A defendant is subject to personal jurisdiction where it "has 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Int'l Energy Ventures Mgmt., L.L.C.* v. *United Energy Grp., Ltd.*, 818 F.3d 193, 212 (5th Cir. 2016) (quoting *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945)). In considering whether a defendant is subject to jurisdiction, courts consider: (1) whether the defendant "directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there"; (2) whether the plaintiff's cause of action arose from "the defendant's forum-related contacts"; and (3) "whether the exercise of personal jurisdiction is fair and reasonable." *Vanderbilt Mortg. & Fin., Inc.* v. *Flores*, 692 F.3d 358, 375 (5th Cir. 2012) (citation and internal quotation marks omitted).

A single out-of-state act can support jurisdiction in Texas, so long as the defendant knew or intended that the effects of the action would be felt in Texas. Indeed, "[w]hen a nonresident defendant commits . . . an act outside the state that causes tortious injury within the state, that tortious conduct amounts to sufficient minimum contacts with the state by the defendant to

constitutionally permit courts . . . to exercise personal adjudicative jurisdiction over the tortfeasor." *Guidry* v. *U.S. Tobacco*, 188 F.3d 619, 628 (5th Cir. 1999). Put differently, when a defendant intentionally directs a harm at Texas, it has "purposefully avail[ed] [it]self of the privilege of causing a consequence in Texas," thereby subjecting itself to jurisdiction in Texas courts. *Wien Air Alaska, Inc.* v. *Brandt*, 195 F.3d 208, 213 (5th Cir. 1999) (internal quotation marks and citation omitted); *see also Lewis* v. *Fresne*, 252 F.3d 352, 358–59 (5th Cir. 2001); *Ruston Gas Turbines Inc.* v. *Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993).

To satisfy its burden, a "plaintiff need only present a prima facie case of personal jurisdiction" in the absence of an evidentiary hearing. *Stripling* v. *Jordan Prod.*, 234 F.3d 863, 869 (5th Cir. 2000) (citation omitted). In undertaking its analysis, the Court "must accept the plaintiff's uncontroverted allegations, and resolve in [its] favor all conflicts between the facts contained in the parties' affidavits and other documentation." *Monkton Ins. Servs., Ltd.* v. *Ritter*, 768 F.3d 429, 431 (5th Cir. 2014) (internal quotation marks and citation omitted).

2. Discussion

(a) The Attorney General Directed Her Unlawful Conduct at Texas with an Intent to Cause Injury in Texas.

Attorney General Healey issued the CID to "h[o]ld" ExxonMobil "accountable" for exercising its First Amendment rights.[23] ExxonMobil exercises its First Amendment rights in Texas, where it considers, develops, and releases corporate statements on matters of public concern. The CID, while issued in Massachusetts, is meant to have an impact in Texas, where ExxonMobil speaks and where it stores the communications and other records demanded by the CID. The Attorney General's issuance of the CID is intended to silence a viewpoint emanating from Texas and to unlawfully fish through records stored in Texas, all under the supervision of a

[23] MTD App. at 13.

biased prosecutor.

The Attorney General contends that she cannot be held responsible for directing a constitutional tort at the State of Texas because she issued the CID in Massachusetts and served it on ExxonMobil's registered agent in Massachusetts. Mem. 7. But Attorney General Healey knows that her CID would be a dead letter if its force were limited to Massachusetts. As stated plainly in its registration with the Massachusetts Secretary of State, ExxonMobil's "Principal Office" is located in Irving, Texas, and it has no office in Massachusetts.[24]

The Attorney General knew, when she issued the CID to ExxonMobil's registered agent in Massachusetts, that it would be transmitted to Texas, where ExxonMobil's relevant speech is made and its records are stored. Only by reaching into Texas could the CID accomplish its purpose of restricting a viewpoint the Attorney General disfavors, while facilitating a fishing expedition in ExxonMobil's records. Even though the CID was, as a matter of legal fiction, served through a designated Massachusetts agent, it was, as a matter of fact, "directed [] toward the forum state" of Texas. *Vanderbilt Mortg. & Fin.*, 692 F.3d at 375 (internal quotation marks and citation omitted). The Attorney General cannot avoid jurisdiction in a forum where she has intentionally violated a resident's constitutional rights by laundering the means of that violation through an intermediary.

Because the CID was intentionally directed at Texas, the injuries caused by the Attorney General's violation of ExxonMobil's constitutional rights occurred, as she knew and expected, in Texas. "A plaintiff suing because his freedom of expression has been unjustifiably restricted . . . suffers harm only where the speech would have taken place, as opposed to the district in which . . . the decision to restrict this plaintiff's speech was made." *Kalman* v. *Cortes*, 646 F. Supp. 2d 738, 742 (E.D. Pa. 2009). The speech that Attorney General Healey seeks to restrain

[24] MTD App. at 77.

through the CID emanates from Texas, and ExxonMobil's First Amendment injury has thus occurred in Texas. Similarly, ExxonMobil has no office in Massachusetts, and none of the papers the Attorney General hopes to fish through can be found in Massachusetts. The injury caused by the violation of ExxonMobil's right "to be secure in . . . [its] papers, and effects," U.S. Const. amend. IV, is therefore not suffered in Massachusetts either, but rather where those "papers, and effects" are kept—here, in Texas. *Cf. Walden* v. *Fiore*, 134 S. Ct. 1115, 1124 (2014) (finding jurisdiction lacking in a *Bivens* action for violation of Fourth Amendment rights because the seizure did not take place in the forum).

The Attorney General's direction of constitutional torts at Texas, together with her intentional infliction of injuries on a Texas domiciliary, provide an ample basis for personal jurisdiction. *See, e.g.*, *Lewis*, 252 F.3d at 359 (finding purposeful availment by out-of-state defendants where they sent communications into Texas in furtherance of an intentional tort); *Wien Air*, 195 F.3d at 213 ("When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment."); *see also Bear Stearns Cos.* v. *Lavalle*, No. 3:00 Civ. 1900-D, 2001 WL 406217, at *3–4 (N.D. Tex. Apr. 18, 2001) (jurisdiction existed where "harassing" communications were directed to Texas "because the defendant has knowingly aimed his intentional actions at Texas and knows that the plaintiff will feel the brunt of the injury in Texas").

The precedents that the Attorney General cites in arguing for dismissal are not to the contrary. The Attorney General relies heavily on the *Stroman* cases[25] and suggests they are similar to this matter. In both *Stroman* cases, plaintiff Stroman Realty, based in Texas, sued out-of-state officials who sought to restrict Stroman's agents from engaging in unlicensed real estate

[25] *Stroman Realty, Inc.* v. *Wercinski*, 513 F.3d 476 (5th Cir. 2008) ("*Stroman I*") and *Stroman Realty, Inc.* v. *Antt*, 528 F.3d 382 (5th Cir. 2008) ("*Stroman II*").

sales in the officials' home states. In *Stroman I*, the only contacts between the out-of-state officials and Texas were "a cease-and-desist order [sent into Texas relating to business activities *outside* Texas] and correspondence with Stroman's attorneys." *Stroman I*, 513 F.3d at 484. In *Stroman II*, the Texas contacts consisted of cease-and-desist orders sent to Texas relating to business activities *outside* Texas, letters disclosing the existence of the orders, and a Texas state information request by Florida regulators that was unrelated to Stroman's claims. *Stroman II*, 528 F.3d at 386–87.

The out-of-state officials' contacts with Texas in the *Stroman* cases are fundamentally different from the contacts the Attorney General has made with Texas here. In *Stroman*, there was no allegation that out-of-state officials intended to cause constitutional torts within Texas, or that they harbored an ulterior motive to harm a company they knew to be based in Texas. In short, there was no allegation of intentional misconduct aimed at Texas. Here, by contrast, ExxonMobil alleges that the Attorney General issued the CID to cause constitutional torts in Texas where ExxonMobil exercises its First, Fourth, and Fourteenth Amendment rights. It is in Texas that ExxonMobil issues statements on matters of public concern. It is in Texas that ExxonMobil enjoys the right "to be secure in . . . [its] papers, and effects," and rightfully expects not to be investigated by a biased prosecutor. It is immaterial whether the Attorney General issued the CID through ExxonMobil's registered agent in Massachusetts or through a process server sent directly to ExxonMobil's headquarters in Irving, Texas. The result is the same. The Attorney General has knowingly reached into Texas with the intent to inhibit a Texas resident's participation in the public discourse about climate change. The *Stroman* cases do not excuse this conduct from scrutiny in Texas courts.

Nor does *Saxton* v. *Faust*, No. 3:09 CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31,

2010). In *Saxton*, this Court determined it lacked personal jurisdiction over a Utah judge where the basis for jurisdiction was nothing more than the fact that "the effects of a [Utah] ruling [were] felt in Texas." *Id.* at *3. In so ruling, this Court pointedly noted that "the Saxtons have alleged no other contacts with Texas." *Id.* Once again, the differences between this case and *Saxton* are not of degree, but of kind. *Saxton* involved an out-of-state court ruling that had consequences felt in Texas but was not itself directed at Texas in a tortious manner. In stark contrast, ExxonMobil's uncontroverted allegations include that the Attorney General deliberately directed constitutional torts at Texas and intentionally caused ExxonMobil injuries in this State. The Attorney General's intentional contact with Texas thus made it entirely foreseeable that she would be haled into court in this State.

For these same reasons, there is no relevance to the cases cited by the Attorney General observing that jurisdiction cannot be premised on the mere happenstance of plaintiff's presence in a forum or the unintentional but foreseeable manifestation of effects in a forum. Mem. 9–10 & nn. 9–10. Here, there is much more than ExxonMobil's coincidental presence in Texas, or merely foreseeable effects in Texas. The Attorney General knew she could inhibit ExxonMobil's speech and fish through its corporate records only by reaching into Texas, and by issuing the CID she did exactly that, purposefully and with a specific intent to deprive ExxonMobil of freedoms guaranteed by the Constitution that it enjoys here, in Texas.[26] The Attorney General's incursion into Texas as part of a purposeful violation of ExxonMobil's constitutional rights is not the sort of "random, fortuitous, or attenuated contact[]" that courts have found insufficient to confer jurisdiction. *McFadin* v. *Gerber*, 587 F.3d 753, 759 (5th Cir. 2009) (internal quotation marks and citation omitted).

[26] *See, e.g.*, Compl. ¶¶ 10, 13, 70, 73, 80, 86–88, 100.

(b) ExxonMobil's Claims Arise from the Attorney General's Suit-Related Contacts.

The Attorney General does not address the issue of whether ExxonMobil's claims arise out of her issuance of the CID to a company she knew to be based in Texas seeking documents she could expect to be in Texas. But she cannot contest these facts. This is a clear instance in which the Attorney General has "directed [her] activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities," making jurisdiction "appropriate." *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, Nos. 3:11-CV-03590-K, 3:12-CV-4975-K, 2014 WL 3557392, at *2 (N.D. Tex. July 18, 2014) (Kinkeade, J.).

(c) It Is Fair and Reasonable to Exercise Personal Jurisdiction over the Attorney General.

After establishing that a defendant has contacts with Texas sufficient to support jurisdiction, "'it is rare to say the assertion [of jurisdiction] is unfair.'" *McFadin*, 587 F.3d at 759–60 (quoting *Wien Air*, 195 F.3d at 215). When challenging personal jurisdiction as unfair, the burden rests with the defendant. *Id.* at 759. The Attorney General's arguments fall short of establishing anything unreasonable or unfair about litigating this matter in the state where she directed her tortious conduct.

The Attorney General contends that litigating in Texas would unfairly burden her, Mem. 11–13, but the Fifth Circuit recognizes that "'once minimum contacts are established, the interests of the forum and the plaintiff justify even large burdens on the defendant.'" *McFadin*, 587 F.3d at 764 (quoting *Guidry*, 188 F.3d at 628). Also unavailing is the Attorney General's argument that Texas has little interest in this dispute. Mem. 12. As the Fifth Circuit has recognized, "Texas has an interest in protecting its residents' . . . rights and providing a

convenient forum for its residents to resolve their disputes." *McFadin*, 587 F.3d at 763.[27] In addition, the Texas Attorney General intervened in a state court action brought by ExxonMobil challenging similar constitutional torts wrought by another attorney general member of the Green 20. In his plea in intervention, the Texas Attorney General announced the State's interest in "protect[ing] the due process rights of [its] residents" and "protect[ing] the fundamental right of impartiality in criminal and quasi-criminal investigations."[28]

Attorney General Healey is also wrong to assert that the deprivation of this forum would cause ExxonMobil no hardship because it can seek relief in a Massachusetts state court. Mem. 12. ExxonMobil has already contested the personal jurisdiction of a court in Massachusetts, and it should not be forced to litigate in that forum simply because the Attorney General would prefer to have a matter concerning the intentional violation, in Texas, of constitutional rights of a Texas domiciliary heard by a Massachusetts state court. Nor will litigating in this Court harm the interests of "the interstate judicial system" or subvert "fundamental, substantive social policies." Mem. 11–12. To the contrary, the interests of the interstate judicial system would be harmed by *preventing* a Texas domiciliary from vindicating its rights in Texas against a defendant who intentionally harmed it in Texas. Far from subverting substantive social policies, ExxonMobil seeks only to *promote* the most fundamental of social policies—the right to free speech and the right not to be harassed by an openly biased prosecutor from another state.

Finally, the Attorney General engages in needless alarmism with her claim that this Court's assertion of jurisdiction over her in this case would enable attorneys general to be haled into out-of-state courts across the country. Evaluating personal jurisdiction requires a fact-intensive inquiry, and ExxonMobil's claim of jurisdiction here is based on the specific facts of

[27] *McFadin* dealt with Texas residents' property rights. Texas's interest in protecting fundamental constitutional rights can only be stronger.

[28] MTD App. at 81–82.

this case—the Attorney General's transparent political targeting of ExxonMobil and her specific intent to violate its constitutional rights. On these particular facts, the Court can, and should, permit ExxonMobil to press its claims here.[29]

II. This Court Should Reject the Attorney General's Request for Abstention.

Abstention is a narrow exception to the rule that a federal court with jurisdiction over a matter should hear and decide the case. The Attorney General has invoked that doctrine as further grounds for this Court to leave adjudication of ExxonMobil's claims in the hands of a Massachusetts court. Doing so would be inconsistent with the mandates of *Younger* v. *Harris*, 401 U.S. 37 (1971), in light of the Attorney General's pattern of bad faith and the state forum's inadequacy. This Court should not abstain from reaching the merits of ExxonMobil's claims.

A. Applicable Law

Federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc.* v. *Jacobs*, 134 S. Ct. 584, 590 (2013) (quoting *Cohens* v. *Virginia*, 19 U.S. 264 (1821)). Accordingly, where a federal court has jurisdiction, its "'obligation to 'hear and decide a case is virtually unflagging.'" *Id.* at 591 (quoting *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)). "Parallel state-court proceedings do not detract from that obligation." *Id.* (citation omitted).

Beginning with *Younger* v. *Harris*, however, the Supreme Court recognized that "exceptional circumstances" may justify abstention "within narrow limits" in cases seeking injunctive relief against certain categories of state proceedings. *Sprint*, 134 S. Ct. at 591

[29] If the Court is uncertain that the Attorney General has sufficient contacts with Texas for the exercise of personal jurisdiction, ExxonMobil respectfully requests jurisdictional discovery and an evidentiary hearing to establish that the Attorney General intended to restrict speech and cause other constitutional torts in the State of Texas. *See Valtech Solutions Inc.* v. *Davenport*, No. 3:15-CV-3361-D, 2016 WL 2958927, at *2 (N.D. Tex. May 23, 2016) ("If a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts . . . the plaintiff's right to conduct jurisdictional discovery should be sustained." (citation omitted)). ExxonMobil is prepared to conduct such discovery expeditiously if it is authorized by and helpful to the Court.

(quoting *Younger*, 401 U.S. at 44, and *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). Thus, in certain state proceedings, *Younger* abstention may be appropriate when each of the following conditions is satisfied: (1) the federal proceeding would interfere with an ongoing state judicial proceeding; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has an adequate opportunity in the state proceedings to raise constitutional challenges. *See Bice* v. *La. Pub. Defender Bd.*, 677 F.3d 712, 716 (5th Cir. 2012).

Even if each of these conditions is satisfied, however, abstention is unwarranted where "the state court proceeding was brought in bad faith or with the purpose of harassing the federal plaintiff." *Id.* at 716 n.3. The Fifth Circuit recognizes two circumstances where bad faith bars abstention: "first, when a state commences a prosecution or proceeding to retaliate for or to deter constitutionally protected conduct, [] and second, when the prosecution or proceeding is taken in bad faith or for the purpose to harass." *Bishop* v. *State Bar of Tex.*, 736 F.2d 292, 294 (5th Cir. 1984) (citations omitted). In light of the obligation of federal courts to hear cases within their jurisdiction, "[a] court necessarily abuses its discretion when it abstains outside of the [*Younger*] doctrine's strictures." *Bice*, 677 F.3d at 716 (quotation marks and citation omitted).

B. Discussion

1. The Attorney General's Bad Faith Precludes Abstention.

The Attorney General's bad faith in issuing the CID makes abstention under *Younger* inappropriate. The Attorney General's "investigation" was initiated "to retaliate for or to deter constitutionally protected conduct"—in this case, ExxonMobil's participation in scientific and policy discussions about climate change.[30] *Bishop*, 736 F.2d at 294. The Attorney General's

[30] Notably, the Attorney General's motion to dismiss does not suggest that ExxonMobil's participation in climate research and policy advocacy is anything but protected speech.

public statements, the viewpoint bias memorialized in the CID, and the objective set forth in the common interest agreement fully support that conclusion.

At the press conference preceding issuance of the CID, Attorney General Healey stated that she intended to "hold[] accountable" those who "have needed to be held accountable for far too long" for, in her view, having "misled the public" about what she considered "the catastrophic nature" of climate change.[31] The CID reflected this priority, as it targeted ExxonMobil's communications with supposed "climate deniers."[32] Viewpoint discrimination is also amply documented in the common interest agreement, in which the Attorney General claimed to share an interest with other law enforcement officers in "ensuring the dissemination of accurate information about climate change"—that is, information *she* believes to be "accurate" based on her viewpoint.[33] All of this evidence demonstrates that the Attorney General issued the CID to "deter constitutionally protected conduct." *Bishop*, 736 F.2d at 294. She used her investigative powers to target ExxonMobil based on what she believes to be its incorrect viewpoint on climate change and to advance her own policy goals by silencing perceived opponents. Abstention is unwarranted on this record. *See Schlagler* v. *Phillips*, 166 F.3d 439, 443 (2d Cir. 1999) (*Younger* bad faith "exception should apply" where "the prosecution is in retaliation for past speech or shows a pattern of prosecution to inhibit speech beyond the acts being prosecuted").[34]

It is equally clear that the motion to compel compliance with the CID was filed to harass ExxonMobil, which is an independent ground for finding bad faith. The pretextual nature of the

---

[31] MTD App. at 13–14.
[32] MTD App. at 35.
[33] MTD App. at 57.
[34] The fact that the Attorney General could theoretically impose liability for ExxonMobil's speech does not immunize an investigation that was undertaken for ulterior motives. A showing that a prosecution was brought to constrain the exercise of constitutional rights "will justify an injunction regardless of whether valid convictions conceivably could be obtained." *Fitzgerald* v. *Peek*, 636 F.2d 943, 945 (5th Cir. 1981).

Attorney General's investigation has been laid bare in ExxonMobil's reply memorandum in support of its motion for a preliminary injunction.[35] That memorandum debunked the theories presented by Attorney General Healey to defend her actions and unmasked them as mere pretexts for an investigation designed to harass a perceived political opponent.[36] ExxonMobil cannot have violated the statute invoked by the Attorney General to justify her investigation because it engaged in no covered conduct during the limitations period.[37] This is a textbook example of state officials investigating "in bad faith without hope of obtaining a valid conviction," *Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971), and "using or threatening to use prosecutions, *regardless of their outcome*, as instrumentalities for the suppression of speech," *Wilson* v. *Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (citation omitted, emphasis in original).[38]

2. Even Absent Bad Faith, *Younger* Abstention Is Inappropriate.

Even if the evidence of Attorney General Healey's bad faith is set aside, *Younger* abstention would still be unwarranted.

First, the Commonwealth of Massachusetts has no "important interest" in aiding the Attorney General's violation of ExxonMobil's constitutional rights. To be sure, the Commonwealth of Massachusetts has an interest in the "protection of Massachusetts consumers and investors," upholding "the integrity of the Attorney General's investigatory tools," and retaining "state judicial oversight" over legitimate law enforcement actions brought by the Attorney General. Mem. 16. But this case does not involve the protection of consumers, the

[35] Reply in Supp. of Exxon Mobil Corporation's Mot. for a Prelim. Inj. (Dkt. No. 57).
[36] *Id.* at 4–7.
[37] MTD App. at 100–01; Compl. ¶¶ 55–58.
[38] Insofar as any doubt might remain about the existence of bad faith here, an evidentiary hearing is appropriate before the Court rules on the Attorney General's motion to dismiss. *See Kern* v. *Clark*, 331 F.3d 9, 11–12 (2d Cir. 2003). If the Court concludes that further development of the record is helpful, ExxonMobil stands ready to conduct discovery and present evidence at a hearing to probe the bad faith motivations underpinning the Attorney General's politically motivated investigation.

proper use of investigative tools, or a legitimate law enforcement action. This case is about the misuse of law enforcement power, under the pretext of protecting consumers, to commit constitutional torts.

The Commonwealth of Massachusetts has no legitimate interest in enabling state officials to commit constitutional torts against citizens of other states. The Fifth Circuit has recognized as much, holding that "[w]ith respect to the interests of the State, it by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights." *Wilson*, 593 F.2d at 1383; *see also LaSalle Bank, N.A.* v. *City of Oakbrook Terrace*, No. 05 C 3191, 2006 WL 59497, at *6 (N.D. Ill. Jan. 9, 2006) (rejecting abstention based on government's "campaign of vindictiveness" in retaliation for exercise of First Amendment rights); *Jordan* v. *Reis*, 169 F. Supp. 2d 664, 668–69 (S.D. Tex. 2001) (declining to abstain where prosecution was brought in retaliation for exercise of First Amendment rights); *Wichert* v. *Walter*, 606 F. Supp. 1516, 1526 (D.N.J. 1985) (refusing abstention where the only interest was "the Board's interest in retaliating against plaintiff and chilling his further speech"). Under this precedent, Massachusetts has no legitimate interest in promoting the Attorney General's misuse of law enforcement tools to cause constitutional torts.

Second, abstention is inappropriate because ExxonMobil does not have "an adequate opportunity in the state proceedings to raise constitutional challenges." *Bice*, 677 F.3d at 716 (internal quotation marks and citation omitted). While the Attorney General submits that ExxonMobil should litigate its constitutional claims in Massachusetts state court, Mem. 16–17, she has failed to establish that her preferred forum has personal jurisdiction over ExxonMobil. ExxonMobil has expressly contested jurisdiction in its filings with the Massachusetts state court,

which were made solely to avoid a claim by her of forfeiture.[39] The absence of personal jurisdiction in Massachusetts makes that forum inadequate to vindicate ExxonMobil's constitutional rights. Compelling ExxonMobil to proceed in a forum where it has no relevant ties would only compound the injury caused by Attorney General Healey's constitutional violations.[40]

III. ExxonMobil's Constitutional Claims Are Ripe for Adjudication.

The Attorney General's challenge to the ripeness of ExxonMobil's claims cannot be taken seriously. At least two independent grounds establish ripeness here: (i) the self-executing nature of the CID and (ii) the state court proceedings to compel compliance with the CID. The Attorney General's belief that a plaintiff's theoretical ability to press claims in a state court makes a case unripe in federal court is as novel as it is wrongheaded.

Challenges to subpoenas and other instruments demanding the production of records are unripe only if "the issuing agency could not itself sanction non-compliance." *Google* v. *Hood*, 822 F.3d 212, 224 (5th Cir. 2016). The CID is not such an instrument. To the contrary, it is a self-executing demand for records, which permits the imposition of sanctions for non-compliance without a need for prior court intervention. Under Massachusetts law, the failure to comply with a CID can result in the imposition of a $5,000 civil penalty. *See* Mass. Gen. Laws ch. 93A, § 7. Unlike other provisions of the relevant statute that require the involvement of a

---

[39] MTD App. at 96, 117–18.

[40] The Attorney General half-heartedly invokes the abstention doctrines of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) and *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). Mem. 18 n.14. Neither doctrine merits abstention in this case. *Pullman* abstention requires "an unclear issue of state law that, if resolved, would make it unnecessary for us to rule on the federal constitutional question"—which is not present here. *Nationwide Mut. Ins. Co.* v. *Unauthorized Practice of Law Comm.*, 283 F.3d 650, 653 (5th Cir. 2002). And *Colorado River* abstention requires consideration of six factors, none of which the Attorney General addresses despite the fact that it is her burden to do so. *See Turner* v. *Pavlicek*, No. H-10-00749, 2011 WL 4458757, at *4–5 (S.D. Tex. Sept. 22, 2011). If the Attorney General's reply memorandum of law addresses these factors for the first time, either the argument should not be entertained, or ExxonMobil should be given an opportunity to respond.

court, the provision permitting the imposition of civil money penalties for failure to appear does not, by its terms, require court intervention.[41] This penalty is imposed administratively.[42] The fact that ExxonMobil may face a "current consequence for resisting" the CID makes a challenge to the CID ripe. *Google*, 822 F.3d at 226.

Even if the CID were not self-executing, however, the Attorney General's motion to enforce the CID makes ExxonMobil's claims ripe. While the Attorney General states that she "has taken only the initial steps of opening an investigation and issuing a CID to Exxon," Mem. 19, she has in fact done more. On the same day she filed this motion to dismiss, the Attorney General also moved to compel ExxonMobil's compliance with the CID in Massachusetts state court.[43] This action eliminates any doubt about the ripeness of ExxonMobil's claims in this Court. *Cf. Google*, 822 F.3d at 225 (holding that review of a non-self-executing subpoena was unripe so long as the state official "ha[d] not brought an enforcement action"); *Lone Star Coll. Sys.* v. *EEOC*, No. H-14-529, 2015 WL 1120272, at *7 (S.D. Tex. Mar. 12, 2015) ("These claims are not ripe for review because there is no final agency action or a move to enforce a subpoena."). By seeking to enforce the CID, the Attorney General has presented ExxonMobil with further immediate consequences for non-compliance, which makes the claim ripe.

Finally, the Attorney General contends that availability of a state forum for a claim causes a federal action based on that claim to be unripe. Mem. 18–19. This is not the law.

---

[41] *Compare* Chapter 93A § 7 ¶ 1 ("Any person who fails to appear … shall be assessed a civil penalty of not more than five thousand dollars") *with id.* ¶ 2 ("The attorney general may file in the superior court of the county in which such person resides … or of Suffolk county if such person is a nonresident or has no principal place of business in the commonwealth … a petition for an order of such court for the enforcement of this section and section six.").

[42] Further confirming that civil money penalties can be imposed administratively, Chapter 93A § 7 contemplates the filing of an action in court to "enforce this section," *i.e.*, the provision providing for imposition of civil money penalties. This would make no sense if the court itself were imposing the penalties in the first place, underscoring the fact that it is the Attorney General who assesses such penalties administratively, and, if they remain unpaid, may seek a court order enforcing them.

[43] MTD App. at 120–23.

Accepting this proposition would shut the doors of federal courthouses by imposing a state court exhaustion requirement for § 1983 plaintiffs—like ExxonMobil here—claiming the violation of federal constitutional rights. But the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights," *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), and, as a result, "there is no general exhaustion requirement for § 1983 plaintiffs," *Wudtke* v. *Davel*, 128 F.3d 1057, 1063 (7th Cir. 1997). No such requirement should be judicially created here.

IV. Venue Is Proper in this District.

As the Attorney General recognizes, venue is proper in any district in which "a substantial part of the events or omissions giving rise to a claim occurred." Mem. 19 (citing 28 U.S.C. § 1391(b)(2)). And when evaluating a claim of improper venue, a court "must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff." *Gruber Hurst Johansen & Hail, LLP* v. *Hackard & Holt*, No. 3:07-CV-1410-G, 2008 WL 137970, at *5 (N.D. Tex. Jan. 15, 2008). The Complaint alleges the Attorney General violated ExxonMobil's rights in this district by discriminating against a viewpoint emanating from Irving, Texas.

The location of ExxonMobil's injury provides a sound basis for venue. In First Amendment cases, the location of a plaintiff's injury is sufficient to establish venue in that district. *See Asgeirsson* v. *Abbott*, 773 F. Supp. 2d 684, 693 (W.D. Tex. 2011) (holding that "[v]enue is proper in this Court because 'a substantial part of the events . . . giving rise to the claim'—the alleged suppression of First Amendment rights of Plaintiffs"—occurred in that district), *aff'd*, 696 F.3d 454 (5th Cir. 2012). And a First Amendment injury has been held to be located at the plaintiff's principal place of business, because that is where its "First Amendment rights have been denied." *Fund for La.'s Future* v. *La. Bd. of Ethics*, No. 14-0368, 2014 WL

1514234, at *12 (E.D. La. Apr. 16, 2014).

Here, the CID has caused ExxonMobil to suffer violations of its First Amendment rights (among others) in the Northern District of Texas.[44] Indeed, the Texas Attorney General recognized that these injuries were being suffered in Texas when, signifying the State's interest in protecting the rights of its citizens, he intervened in a related action seeking to stop an improper investigation "driven by ideology, and not law."[45] In addition, many of the millions of documents sought by the Attorney General's unconstitutional fishing expedition are located in the Northern District of Texas.[46] They pertain to activities ExxonMobil has undertaken in this district, including, among others, statements made at a shareholder meeting in Dallas and documents concerning a 2016 press release issued in Irving, Texas.[47] Venue is therefore proper.

CONCLUSION

The Attorney General does not contest the adequacy of ExxonMobil's constitutional claims but nevertheless seeks to avoid scrutiny in this Court. There is no valid basis to grant that relief. This Court has jurisdiction over the Attorney General, abstention is unwarranted, ExxonMobil's claims are ripe, and venue is proper. The Court should deny the Attorney General's motion to dismiss and allow this action to proceed.

---

44 Compl. ¶¶ 15, 70–81.
45 MTD App. at 82.
46 Compl. ¶¶ 18, 55; Anderson Decl. (Dkt. No. 1, Ex. 1) ¶ 3.
47 *See, e.g.*, MTD App. at 37–39.

Dated: September 8, 2016

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
pro hac vice
State Bar No. 24054300
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
pro hac vice
twells@paulweiss.com
Michele Hirshman
pro hac vice
Daniel J. Toal
pro hac vice
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
pro hac vice
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

This is to certify that on this 8th day of September 2016, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/ Ralph H. Duggins
Ralph H. Duggins

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	No. 4:16-CV-469-K **ORAL ARGUMENT REQUESTED**

ATTORNEY GENERAL HEALEY'S REPLY TO EXXON MOBIL CORPORATION'S OPPOSITION TO ATTORNEY GENERAL HEALEY'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The controlling precedents of the United States Supreme Court and the Fifth Circuit, as recently applied by this Court in *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010), require this case to be dismissed for lack of personal jurisdiction. Federal courts have consistently dismissed cases against out-of-state government officials whose sole connection to a forum was an alleged harm to a plaintiff residing there. Exxon's repeated incantation of bad faith on the part of Attorney General Healey does not change this analysis. Exxon fails to cite any law that would support an exception to the established precedents requiring this Court to decline jurisdiction. Even if there were jurisdiction, this Court should abstain because Exxon has a fully adequate remedy for adjudicating the challenges it has raised to Attorney General Healey's civil investigative demand ("CID") in an almost identical action in the Massachusetts state courts.

II. ARGUMENT

A. THE ATTORNEY GENERAL DOES NOT CONCEDE THE SUFFICIENCY OF EXXON'S CLAIMS.

Despite Exxon's repeated assertions to the contrary, Opp. at 1, 2, 25,[1] the Attorney General does not concede the adequacy of Exxon's claims and reserves her right to challenge their sufficiency.[2] The bald, baseless allegations in Exxon's complaint (and other filings) that the Attorney General has, out of personal animus and in bad faith, undertaken an investigation to chill Exxon's purportedly constitutionally protected speech plainly fails to meet the pleading standards of Rule 8(a)(2). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of

[1] "Opp." refers to Exxon's Opposition to the Attorney General's Motion to Dismiss. "Mem." refers to the Attorney General's Memorandum in Support of the Motion to Dismiss. "PI Opp." refers to the Attorney General's Opposition to Exxon's Motion for Preliminary Injunction. "Compl." refers to the Complaint.
[2] The Attorney General has the right to, and will if needed, challenge the sufficiency of Exxon's pleadings in a future filing. Fed. R. Civ. P. 12(h)(2).

the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Exxon's textbook "conclusory statements" are insufficient to support its claims. *See* Mem. at 3-4.

Exxon's pleadings are similar to those the Supreme Court dismissed in *Iqbal*. There, the plaintiff claimed that Attorney General John Ashcroft and FBI Director Robert Mueller "'each knew of, condoned, and willfully and maliciously agreed to subject' [him] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,'" naming "Ashcroft as the 'principal architect' of the policy" and "Mueller as 'instrumental in [its] adoption, promulgation, and implementation.'" *Id.* at 669. The *Iqbal* Court disregarded the plaintiff's conclusory statements as not entitled to a presumption of truth and held that the plaintiff's complaint lacked the "factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible'" required to survive a motion to dismiss. *Id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

Similarly here, removing the conclusory statements referenced above, Exxon offers little more than the fact of the CID, the New York press conference,[3] and now a routine common interest agreement to support its claim that the Attorney General issued the CID as part of an intentional, malicious effort to violate Exxon's constitutional rights.[4] Those facts are insufficient. Contrary to Exxon's narrative (but supported by documents included with its complaint), Attorney General Healey has a clear, supported basis for believing investigation of Exxon is

[3] A transcript of the Attorney General's remarks, excerpted from the attachments to Exxon's papers, is appended as Supplemental Appendix Exhibit ("Supp. App. Ex.") A.

[4] Exxon's allegations are not dissimilar to the allegations against Attorney General Hood in *Google v. Hood*, which the Fifth Circuit did not even entertain in its decision vacating the injunction against him. 822 F.3d 212, 228 (5th Cir. 2016) ("invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury").

warranted based on her Office's review of public disclosures regarding Exxon's scientific knowledge of the risks posed by fossil fuel use to the climate and potential failure to disclose those risks to investors and consumers. See Compl., Ex. G, App. 065; Ex. CC, App. 249, 250-51. That belief is further supported by the fact that the FBI is investigating the matter, as confirmed by the U.S. Attorney General, *id*., Ex. BB, App. 243-45; several lawmakers have called for the Department of Justice to investigate, *id*., Ex. F, App. 061; and at least two other jurisdictions are also investigating, *id*., including the New York Attorney General, who has issued a subpoena to Exxon. *Id*., Ex. A, App. 004; Ex. O, App. 153; Ex. CC, App. 247. As in *Iqbal*, "[a]s between that 'obvious alternative explanation'" for the CID "and the purposeful, invidious discrimination [Exxon] asks us to infer, discrimination is not a plausible conclusion." 556 U.S. at 682.

B. EXXON MISAPPLIES PERSONAL JURISDICTION PRECEDENTS FROM THE FIFTH CIRCUIT AND THE SUPREME COURT.

At each stage of the personal jurisdiction inquiry—whether the Texas long-arm statute reaches the Attorney General and whether the exercise of personal jurisdiction would be consistent with due process—Exxon relies on a misapplication of the law and unsubstantiated allegations of conspiracy and bias. As such, Exxon's theory of personal jurisdiction must fail.

1. The Long-Arm Statute Does Not Reach the Attorney General.

Texas's long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.041 *et seq.*, does not reach an individual, out-of-state official, sued in her official capacity, as the Attorney General is here. *See Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482-83 (5th Cir. 2008) ("[T]he Texas statute offers no obvious rationale for including nonresident individuals sued solely in their official capacity under *Ex Parte Young*.").

Exxon dismisses the Fifth Circuit's reading as mere "dicta."[5] Opp. at 8. That the Fifth

[5] The defendant in *Stroman* "conced[ed] the application of the 'tort' provision of the long-arm statute,"

Circuit explicitly opined on the absence of an "obvious rationale" for including within the long-arm's reach a nonresident individual sued solely in her official capacity strongly suggests that it would find long-arm jurisdiction over Attorney General Healey unlawful.[6] Tellingly, none of the cases on which Exxon relies contradicts the Fifth Circuit's reading.

Exxon offers four cases for the general proposition that the long-arm statute reaches as far as due process will allow.[7] As the Fifth Circuit noted in *Stroman*, however, "while the long-arm statute is coextensive with the limits of procedural due process for those people and entities and activities *that it describes*, the legislature may not have opened the courthouse doors to include this case." *Id.* at 483 (emphasis added). Moreover, *none* of Exxon's four cases involves an individual, out-of-state official, sued in his or her official capacity, and three of them were decided roughly forty years before the Fifth Circuit's opinion in *Stroman*.

Exxon then offers seven more cases purporting to illustrate that the long-arm statute reaches individual, out-of-state officials, sued in their official capacities.[8] Only three of those cases, however, actually involve such officials, and *none* of them addresses or contradicts the *Stroman* Court's reading of the statute. In fact, two of them—*Payne v. Cty. of Kershaw*, No. 3:08-CV-0792-G, 2008 WL 2876592 (N.D. Tex. July 25, 2008), and this Court's decision in *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010)—follow the *Stroman* Court's "reject[ion of] the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling are felt in Texas," even with allegations

---

thereby "reliev[ing] th[e] court of an obligation to pursue these interpretive questions." *Id.* at 483. Attorney General Healey does not so concede.

[6] Exxon also argues that issuing the CID qualifies as "doing business" in Texas under the long-arm statute, claiming that doing so was "commit[ting] a tort" in Texas. Opp. at 8. The *Stroman* Court disagreed, noting that "only by twisting the ordinary meaning of the terms covered by the long-arm statute is Arizona's regulatory activity intended to be encompassed and adjudicated in Texas courts." *Id.*

[7] Opp. at 6-7.

[8] Opp. at 7-8.

of unconstitutional conduct, as in *Saxton*. 2010 WL 3446921, at *3.[9]

There is no jurisdiction over Attorney General Healey under the Texas long-arm statute.

2. Even If the Long-Arm Statute Reached Defendant Attorney General Healey, Her Contacts With Texas—Not Plaintiff Exxon's—Are the Focus of This Court's Jurisdictional Analysis and Supreme Court Precedent Confirms Exercising Personal Jurisdiction Over Her Would Violate Due Process.

Exxon wrongly argues that personal jurisdiction over Attorney General Healey in Texas would be consistent with due process because she allegedly acted intentionally to harm Exxon in Texas.[10] Even if Exxon pleaded sufficient facts to support its allegations—and it cannot and does not—those allegations would be insufficient under controlling precedent for the exercise of personal jurisdiction consistent with due process.

As the Supreme Court recently underscored in its unanimous opinion in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), even under the *Calder* "effects" test for personal jurisdiction that Exxon invokes, the core analysis is still of "the defendant's contacts *with the forum State itself, not the defendant's contacts with persons who reside there*." *Id.* at 1122 (emphasis added). "The crux of *Calder*," the Court wrote, was that "the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens," thereby "connect[ing] the defendants' conduct to *California*, not just to a plaintiff who lived there." *Id.* at 1123-24.

Here, there is no such connection between the Attorney General and the State of Texas. The only connection Exxon alleges between the Attorney General and Texas is that the Attorney General intentionally issued the CID in order to harm Exxon, which resides in Texas. The Supreme Court specifically rejected finding personal jurisdiction on such a basis in *Walden*:

[9] The remaining case, *Perez Bustillo v. Louisiana*, 718 S.W.2d 844 (Tex. App. 1986), did not inquire into whether the long-arm statute applied, instead finding a lack of jurisdiction on minimum contacts grounds.
[10] Exxon's theory apparently derives from the personal jurisdiction "effects" test set forth in *Calder v. Jones*, 465 U.S. 783 (1984), though Exxon does not cite *Calder* by name.

> Petitioner's actions in [Massachusetts] did not create sufficient contacts with [Texas] simply because [s]he allegedly directed h[er] conduct at plaintiffs whom [s]he knew had [Texas] connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections "decisive" in the jurisdictional analysis. It also obscures the reality that none of petitioner's challenged conduct had anything to do with [Texas] itself.

Id. at 1125. Moreover, "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum" and "is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum *in a meaningful way*." *Id.* (emphasis added); *see also Stroman*, 513 F.3d at 486 ("We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident.") (citing *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 481 F.3d 309, 314 (5th Cir. 2007) and *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 870 (5th Cir. 2001)). "[V]iewed through the proper lens" of *Calder*—"whether the defendant's actions connect him to the *forum*"—it is clear that the Attorney General's issuance of the CID to Exxon's registered agent in Massachusetts does not connect her to Texas in any meaningful way and, as such, personal jurisdiction is lacking. *Walden*, 134 S. Ct. at 1124.

Importantly, under Exxon's expansive theory, personal jurisdiction over a defendant would obtain so long as the plaintiff claimed some intentional harmful effect in its favored forum, notwithstanding the complete absence of any facts establishing a meaningful connection between the defendant and the forum. Such a rule would eviscerate jurisdictional due process limits that are intended to "protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id.* at 1122.

In any case, as set forth above, Exxon has not made—and cannot make—a prima facie showing of intentional harm. As discussed in Part II.A, *supra*, Exxon offers only conclusory

statements about the Attorney General's supposedly unconstitutional motives and a handful of facts to support its allegations that the Attorney General maliciously intends to trample Exxon's constitutional rights in Texas. It is not enough for Exxon merely to assert that Attorney General Healey, in bad faith, willfully and improperly targeted Exxon; to find personal jurisdiction over the Attorney General on that basis, without more, would defeat core constitutionally-guaranteed due process limits on the exercise of jurisdiction.

Further, for several of the same reasons that it cannot establish irreparable harm for purposes of its motion for a preliminary injunction, Exxon has not and cannot establish that it has suffered any injury, constitutional or otherwise, by virtue of receiving the CID, given that the New York Attorney General has issued a substantially similar subpoena to Exxon, *see* Compl. Ex. CC, App. 247, which Exxon has not challenged and with which it is complying. *See* PI Opp. at 1-2; 10. There is no logic to Exxon's claim that the mere issuance of Attorney General Healey's CID constitutes a grievous, tortious harm, while Exxon cooperates, without challenge, with essentially the same request, issued by the New York Attorney General. Likewise, Exxon has vowed that it will continue undaunted in its speech regarding climate change, *see* Compl. at ¶ 79, PI Opp. at 14, evidencing no suppression or chilling or harm to any speech rights whatsoever.

In the absence of any facts to support its allegations of intentional harm—and under the correct interpretation of relevant precedent—Exxon's attempts to distinguish this case from the governing *Stroman* cases and *Saxton* are unavailing.[11] The result here should be the same as in

[11] Indeed, the Attorney General is not aware of any case in which a federal court exercised personal jurisdiction over an out-of-state attorney general who challenged jurisdiction. In fact, several federal courts have held that they lacked jurisdiction over an out-of-state attorney general. *See, e.g.*, *Turner v. Abbott*, 53 F. Supp. 3d 61, 68 (D.D.C. 2014) (holding court lacked jurisdiction over Texas Attorney General); *Cutting Edge Enterprises, Inc. v. Nat'l Ass'n of Attorneys Gen.*, 481 F. Supp. 2d 241, 246 (S.D.N.Y. 2007) (holding court lacked personal jurisdiction over forty state attorneys general); *B & G Prod. Co. v. Vacco*, No. CIV.98-2436 ADM/RLE, 1999 WL 33592887, at *5 (D. Minn. Feb. 19, 1999) (holding court lacked personal jurisdiction over New York attorney general in suit to enjoin enforcement

those cases: this Court should find a lack of personal jurisdiction and dismiss Exxon's case.

C. THE COURT SHOULD ABSTAIN BECAUSE NO EXCEPTIONS TO THE YOUNGER DOCTRINE APPLY.

Younger abstention warrants dismissal of this action.[12] Exxon readily acknowledges that it has initiated a lawsuit, pending before the Massachusetts Superior Court, where it has filed hundreds of pages of briefing, affidavits, and supporting materials, many the same as filed here, seeking the same relief it seeks here. *See* Supp. App. Ex. B. Exxon will therefore have a full and fair opportunity to raise its constitutional and other objections to the CID. *See* Mem. at 13-18. Indeed, the statute authorizing the CID states that those receiving a CID must comply, "unless otherwise provided by the order of a court of the commonwealth" of Massachusetts. Mass. Gen. Laws ch. 93A, § 7. Exxon has not alleged that the statutorily prescribed method of challenging CIDs is inadequate. Exxon's failure to allege that Massachusetts courts cannot adequately safeguard its rights should be fatal to its argument. *See Peralta v. Caldwell*, No. 15-1385, 2015 WL 7451206, *4 (E.D. La. Nov. 23, 2015) (dismissing case against Louisiana officials because "the bad-faith prosecution exception does not apply unless the complaining party can show that the state judicial proceedings as a whole are unfair").[13]

Relying on the same unsupported allegations discussed above, Exxon claims that the exception for "bad faith" or harassing state proceedings should apply to bar *Younger* abstention

---

of New York environmental laws against plaintiff in New York).

[12] Exxon's only new argument addressed to the core *Younger* factors—that Exxon has no remedy in Massachusetts courts because they have no personal jurisdiction over Exxon, Opp. at 21—actually supports *Younger* abstention here. Exxon has briefed lack of jurisdiction extensively in the Massachusetts case. If the Massachusetts courts agree that they lack personal jurisdiction over Exxon, despite the unassailable evidence of Exxon's wide-ranging commercial contacts with Massachusetts, see PI Opp. at 5-6, the Attorney General would be left with no recourse to enforce her CID, and all of the claims Exxon raises here would be moot.

[13] Nor would such an allegation be cognizable here. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 (1987) ("[W]e cannot say that [the state] courts, when this suit was filed, would have been any less inclined than a federal court to address and decide the federal constitutional claims.").

in this case. Opp. at 18-20 (citing *Bishop v. State Bar of Tex.*, 736 F.2d 292, 294 (5th Cir. 1984)). It does not. "The bad faith exception is narrow and is to be granted parsimoniously." *Wightman v. Tex. Supreme Ct.*, 84 F.3d 188, 190 (5th Cir 1996). Accordingly, Exxon bears a "heavy burden" in proving bad faith. *Stewart v. Dameron*, 460 F.2d 278, 279 (5th Cir. 1972).

"Bad faith" cannot be established with conclusory allegations of improper prosecutorial motives and prejudgment. *Wightman*, 84 F.3d at 190-91 (rejecting application of bad faith exception in bar discipline case where plaintiff alleged First Amendment violations because "more than . . . allegation is required," plaintiff failed to "offer some *proof*" of bad faith, and "extensive and lengthy" state procedures "protect [plaintiff] against bad faith behavior").[14]

Exxon's allegations fail to show improper bias or prejudgment. PI Opp. at 21-23. Indeed, in all of its voluminous filings, Exxon provides nothing more than supposition and innuendo and fails even to allege any concrete facts warranting further investigation.[15] Contrary to Exxon's conjured conspiracy, the Attorney General's investigation is grounded in a reasonable belief that Exxon has misled Massachusetts investors and consumers. *See supra* Part II.A.

The Massachusetts courts are fully authorized to adjudicate Exxon's arguments that the Attorney General's investigation is improper in motive or scope. *See* Mass. Gen. Laws ch. 93A, § 6(5) (forbidding CIDs that would not be proper in judicial subpoenas); *id.* § 6(7) (providing for

[14] *See also Phelps v. Hamilton*, 122 F.3d 885, 889-91 (10th Cir. 1997) (affirming abstention despite claims of personal animus, biased political statements, and twenty prosecutions of anti-homosexual church members); *Brooks v. N.H. Supreme Ct.*, 80 F.3d 633, 639 (1st Cir. 1996) (bias claim to defeat abstention insufficient where "pasted together from various bits and pieces of marginally relevant information"); *Startzell v. City of Philadelphia*, No. Civ. A. 04–5547, 2004 WL 2884210, *2-*4 (E.D. Pa. Dec. 10, 2004) (noting that bad faith exception is "*very* narrow" and collecting examples of bad faith prosecution that "expose the weakness" of plaintiffs' allegation of retaliation for protected speech).

[15] The Court should not indulge Exxon's desire to conduct further factual investigation of the Attorney General's investigation, especially where Exxon has already submitted to the Court several affidavits and dozens of irrelevant documents that fail to even hint at bad faith. *See, e.g., Kenneally v. Lungren*, 967 F.2d 329, 334-35 (9th Cir. 1992) (affirming decision not to take proffered testimony on applicability of bad faith exception).

protective orders in same circumstances as Mass. R. Civ. P. 26(c)). No exception to *Younger* abstention applies, and the Court should dismiss the complaint.[16]

D. THE NORTHERN DISTRICT OF TEXAS IS AN IMPROPER VENUE.

Exxon's only argument for this Court being the proper venue for its claims is identical to its "effects" argument for personal jurisdiction in Texas, *see supra* Part II.B.2, and is therefore equally specious. The "events" from which Exxon's claims arise—the Attorney General's issuance of the CID in Massachusetts and the press conference in New York—did not occur in Texas. 28 U.S.C. § 1391(b)(2) (venue lies in district where "a substantial part of the events or omissions giving rise to the claim occurred").[17] In this context, and for the reasons discussed in the Attorney General's initial brief, this case should be dismissed for improper venue. *See* Memo. at 19-20.

III. CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court dismiss Exxon's case with prejudice.

[16] Should the Court decline to abstain, the case is unripe under *Google, Inc. v. Hood*, because, as *Google* holds, premature federal court intervention in the early stages of state investigations is improper, especially given the need for comity with state courts. 822 F.3d 212, 226 (5th Cir. 2016); Memo. at 15. The Attorney General's enforcement of the CID is not imminent, since the AGO is not in a position to oblige compliance until Exxon's pending objections are fully adjudicated in Massachusetts courts, including any appeals. Nor is Exxon's invocation of the Attorney General's authority to seek the assessment of a civil penalty germane: the Attorney General has not sought to have penalties imposed for noncompliance with the CID, and, in any case, any such penalties can only be imposed by order of the Massachusetts courts. *See* Mass. Gen. Laws. c. 93A, § 7 ("The attorney general may file in the superior court . . . a petition for an order of such court for the enforcement of this section . . . .").

[17] In neither case cited by Exxon for its "effects"-based venue argument did the defendant reside or engage in challenged conduct outside the district's state. Indeed, in one of the cases, venue was not contested at all. *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 693 (W.D. Tex. 2011).

Dated: September 16, 2016

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ *Douglas A. Cawley*

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 16, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ *Douglas A. Cawley*
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts in her official capacity, Defendant.	§ § § § § § § § § §	Civil Action No. 4:16-CV-469-K

ORDER

The Court hereby appoints Mr. James Stanton with Stanton Law Firm PC, 9400 N. Central Expressway, Ste. 1304, Dallas, Texas 75231 as mediator in this case. The parties are **ordered** to mediate with Mr. Stanton **within sixteen (16) days from the date of this Order** at Mr. Stanton's earliest convenience and direction. The Court further **orders** all attorneys and their clients to be present as well as representatives with full settlement authority, unless otherwise directed by Mr. Stanton.

SO ORDERED.

Signed September 22, 2016.

Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	No. 4:16-CV-469-K

ATTORNEY GENERAL HEALEY'S MOTION
TO RECONSIDER JURISDICTIONAL DISCOVERY ORDER

Defendant Massachusetts Attorney General Maura Healey hereby requests that the Court grant her Motion to Dismiss (Doc. No. 41) and, alternatively, moves that the Court reconsider and vacate its Order of October 13, 2016 (Doc. No. 73), that jurisdictional discovery by both parties be permitted, pending further consideration of the Motion to Dismiss.

As set forth in Attorney General Healey's opening brief in support of her motion to dismiss (Doc. No. 42), at 4-13, in her reply to Plaintiff Exxon Mobil Corporation's ("Exxon") opposition to that motion (Doc. No. 65), at 3-8, and in her brief accompanying this motion ("Br."), at 3-7, Exxon has failed to establish that the Texas long-arm statute and due process permit personal jurisdiction in this Court over Attorney General Healey. Deciding the case on the fully briefed issue of personal jurisdiction now pending before the Court will limit the potential for federal intrusion into the Massachusetts state court's authority to determine the lawfulness of the subject civil investigative demand issued by Attorney General Healey pursuant to Massachusetts law, *see* Br. at 5-6, and will avoid the potential for improper investigation into

privileged or protected information and contentious discovery disputes, *see id.* at 9-10.

PRAYER

For these reasons, the Attorney General requests that the Court grant Attorney General Healey's Motion to Dismiss (Doc. No. 41) and, alternatively, moves that the Court reconsider and vacate its Order of October 13, 2016 (No. 73), that jurisdictional discovery by both parties be permitted, pending further consideration of the Motion to Dismiss. In the event that the Court neither dismisses the complaint nor reconsiders its Order, the Attorney General requests that the Court transfer the action to the District of Massachusetts or stay its order to allow the Attorney General to seek immediate review by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys,

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: October 20, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 20, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley
Douglas. A. Cawley

CERTIFICATE OF CONFERENCE

On October 19, 2016, I conferred with Ralph Duggins, an attorney representing Exxon Mobil Corporation in this action, and advised Mr. Duggins that Attorney General Healey would be filing a motion to reconsider the jurisdictional discovery order in the case. Counsel for Exxon responded that Exxon opposes the motion and would not consent to the relief sought in the motion.

s/ Richard A. Kamprath
Richard A. Kamprath

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	No. 4:16-CV-469-K

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ATTORNEY GENERAL HEALEY'S MOTION TO RECONSIDER JURISDICTIONAL DISCOVERY ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This Court should rule on Attorney General Healey's pending motion to dismiss on personal jurisdiction grounds before requiring the parties to engage in expensive and potentially protracted discovery related to the application of *Younger* abstention. The Court not only has authority to decide the motion to dismiss, but must do so here where binding Supreme Court and Fifth Circuit precedent, as recently applied by this Court in *Saxton v. Faust*,[1] precludes this Court from exercising personal jurisdiction over Attorney General Healey.

II. STATEMENT OF FACTS

On September 19, 2016, this Court heard argument on Exxon Mobil Corporation's ("Exxon") motion for a preliminary injunction, and the Court permitted counsel for Attorney General Healey to address the arguments set forth in her fully briefed motion to dismiss, inasmuch as it was relevant to Exxon's need to show a likelihood of success on the merits in order to obtain injunctive relief. Attorney General Healey also argued, in part, that Exxon could not establish that it would suffer irreparable harm as a result of her civil investigative demand ("CID"), since Exxon had already produced over 700,000 pages of documents to the New York Attorney General in response to his similar subpoena, issued under New York's Martin Act. Tr. 55:3-8. (Doc. No. 68). Exxon confirmed that it had produced those documents and was, at the time of the September 19 hearing, still cooperating with the New York subpoena. Tr. at 88:1-90:21. Near the close of argument, the Court had this exchange with counsel for Exxon:

> THE COURT: . . . Is it true what [counsel for Attorney General Healey] said about y'all cooperating in New York and not cooperating with them?
>
> MR. ANDERSON: Your Honor, we were served with a subpoena before the press conference, and we are cooperating with it.

[1] No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010).

> THE COURT: Yes? No? Or whatever?
>
> MR. ANDERSON: Yes.
>
> THE COURT: So why the heck are we having this big fight? . . . Why are y'all poking this bear? If you are agreeing to cooperate there, why aren't you cooperating with them?

Tr. 88:1-13. After argument, the Court instructed the parties to confer and attempt to work out a resolution. The Court gave the parties one week, until September 26, to report back, and made clear that if the parties could not resolve the matter, the Court would appoint a mediator.

On September 20, the day after the hearing, the AGO learned from public news reports that, in August of 2016, the United States Securities and Exchange Commission ("SEC") had opened an investigation into "how Exxon Mobil Corp. values its assets in a world of increasing climate change regulations."[2] Exxon has confirmed that it is cooperating with the SEC investigation.[3] Exxon made no mention of the SEC investigation at the September 19 hearing before this Court.

On September 28, Exxon and representatives from the Attorney General's Office ("AGO") met in Boston but were unable to reach a resolution, and so informed the Court by letter.[4] The Court appointed the Honorable James Stanton as mediator (Docket No. 69), and the parties met with Judge Stanton in Dallas on October 6, where again no resolution was reached. On October 13, this Court ordered (Doc. No. 73, the "Order") that "jurisdictional discovery by both parties" be permitted "to aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds." Order at 6. Specifically, this Court sought additional facts to assist its

---

[2] *SEC Probes Exxon Over Accounting for Climate Change*, THE WALL STREET JOURNAL, Sept. 20, 2016, *available at* http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593 (last accessed Oct. 19, 2016).

[3] *Id.*

[4] The letter confirmed that Attorney General Healey's involvement in the mediation did not constitute a waiver of her arguments with respect to the Court's jurisdiction, including her argument that the Court lacks personal jurisdiction over her.

determination whether to abstain from hearing this suit under *Younger v. Harris*, 401 U.S. 37 (1971). Order at 3.

On October 17, Exxon moved to amend its complaint to add the New York Attorney General as a defendant, and to "add new claims for federal preemption and for conspiracy to deprive [Exxon] of its constitutional rights." Exxon Mobil Corp.'s Memorandum of Law in Support of Its Motion for Leave to File a First Amended Complaint (Doc. No. 75) at 1.

III. ARGUMENT

A. THIS COURT LACKS PERSONAL JURISDICTION OVER ATTORNEY GENERAL HEALEY AND SHOULD DISMISS EXXON'S COMPLAINT NOW ON THAT BASIS.

As set forth in detail in Attorney General Healey's opening brief in support of her motion to dismiss and reply to Exxon's opposition to that motion, both of which she incorporates by reference in full here, Exxon has failed to establish that the Texas long-arm statute and federal due process permit this Court's exercise of personal jurisdiction over Attorney General Healey. *See* Memorandum of Law in Support of Defendant Attorney General Healey's Motion to Dismiss (Doc. No. 42, "Mem.") at 4-13; Attorney General Healey's Reply to Exxon Mobil Corporation's Opposition to Attorney General Healey's Motion to Dismiss (Doc. No. 65, "Reply") at 3-8. As construed by the Fifth Circuit, the Texas long-arm statute does not reach a foreign state official sued in her official capacity, as the Attorney General was here. Mem. at 4-6; Reply at 3-5. And, this Court's exercise of personal jurisdiction over Attorney General Healey would violate due process because (1) she lacks the minimum contacts with Texas necessary to establish personal jurisdiction; and (2) the Court's exercise of jurisdiction would be unreasonable. As to the latter issue, litigating in this Court would place a heavy burden on Attorney General Healey, Texas has little stake in the litigation, Exxon has an adequate remedy in the Massachusetts courts to pursue its claims, duplicative litigation of Exxon's nearly identical

Massachusetts claims undermines the judicial interest in efficient resolution of controversies, and, finally, this Court's exercise of personal jurisdiction here would set a dangerous precedent of requiring public officials to defend their attempts to investigate potential violations of their own state laws in courts throughout the country. Mem. at 6-13; Reply at 5-8; Memorandum of Law for Amici Curiae States of Maryland et al. in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's Motion for a Preliminary Injunction (Doc. No. 54, "Amici States Br.") at 18-20; *see generally Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008); *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010).[5] Nothing in Exxon's motion for leave to amend its complaint and supporting papers changes the fact that this Court lacks personal jurisdiction over Attorney General Healey, or otherwise provides any basis for this Court not to decide Attorney General Healey's pending motion to dismiss.[6]

It is firmly established that this Court can decide the essential question of personal jurisdiction over the defendant before considering whether it would have subject matter jurisdiction over the claims asserted. In *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574 (1999), the Supreme Court explained "there is no unyielding jurisdictional hierarchy. Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry." *Id.* at 578. The Fifth Circuit has read *Ruhrgas* "to direct lower courts facing multiple grounds for dismissal to consider the complexity of subject-matter jurisdiction issues raised by the case, *as well as concerns of federalism*, and of judicial economy and restraint in determining

[5] As discussed in the Attorney General's principal brief, Mem. at 18-19, and the Amici States' brief, Amici States Br. at 10-16, under the reasoning of the recent Fifth Circuit decision in *Google, Inc. v. Hood*, Massachusetts courts' competence to hear Exxon's claims provides another dispositive basis for dismissal. 822 F.3d 212, 224-26 (5th Cir. 2016).
[6] If the Court grants the motion to dismiss, it need not resolve Exxon's motion to amend.

whether to dismiss claims due to a lack of personal jurisdiction before considering challenges to its subject-matter jurisdiction." *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000) (emphasis added). *Cf. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (holding that court may dismiss suit on grounds of *forum non conveniens* without first establishing its own jurisdiction).

In *Ruhrgas*, the Supreme Court found that it was appropriate to resolve first the question of personal jurisdiction where, as here, "the absence of personal jurisdiction is the surer ground[.]"[7] 526 U.S. at 578. In order to assess the Attorney General's alternative ground for dismissal—*Younger* abstention—the Court has ordered discovery into the basis for Attorney General Healey's issuance of the CID, specifically whether she was biased or pre-judged the outcome of the investigation. Order at 4. However, under Massachusetts law, the Attorney General may *only* issue a CID *if she believes that the target is violating Chapter 93A. See* Mass. Gen. Laws ch. 93A, § 6(1); *Harmon Law Offices, P.C. v. Att'y Gen.*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013); Attorney General Healey's Opposition to Exxon's Motion for Preliminary Injunction (Doc. No. 43, "PI Opp.") at 3, 21-22. In other words, the Attorney General's belief that Exxon has violated Chapter 93A does not, under Massachusetts law, constitute bias; rather, it is a legally *required* predicate to issuance of a CID. *Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1367 (Mass. 1989); *Harmon Law Offices*, 991 N.E.2d at

[7] Indeed, the "effects" on Exxon in Texas of Attorney General Healey's actions outside Texas cannot support personal jurisdiction under binding precedents of the Supreme Court and the Fifth Circuit. *See* Reply at 5-8; *Walden v. Fiore*, 134 S. Ct. 1115, 1124-25 (2014); *Stroman*, 513 F.3d at 486 ("We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident.").

1103.[8] An inquiry into the basis for the Attorney General's CID therefore necessarily implicates a substantial question of Massachusetts state law.

Deciding the case on the fully briefed issue of personal jurisdiction now pending before this Court, rather than ordering discovery on Attorney General Healey's alternative abstention argument, will limit the potential for federal intrusion into the Massachusetts state court's authority to determine the lawfulness of a CID issued by the Massachusetts Attorney General pursuant to Massachusetts law. "Where, as here, [the] district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law," and other jurisdictional inquiries raise "difficult" questions, it is proper to first decide the issue of personal jurisdiction. *Ruhrgas*, 526 U.S. at 588. Indeed, on these facts, a reviewing court could well find that the Court has committed reversible error by declining to resolve first Attorney General Healey's well-supported motion to dismiss Exxon's complaint for lack of personal jurisdiction—a decision that effectively requires her office to litigate and expend significant resources in Texas, to her detriment, despite her consistent objection to personal jurisdiction.

If the Court lacks personal jurisdiction over the Attorney General, it cannot order discovery on one of the Attorney General's three other arguments for dismissal. "The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). *See also Ruhrgas*, 526 U.S. at 577 ("Jurisdiction is power to declare the law, and *[w]ithout jurisdiction the court cannot proceed at all in any cause*.") (emphasis added).

[8] Accordingly, bias or bad faith would be far more likely where a prosecutor or regulator begins an investigation *without* a belief that the target has violated the law, where the statute authorizing the investigation requires such a belief, as it does here. *Cf. Kroger Texas Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 (Tex. 2006) (element of malicious prosecution claim is that prosecutor lacked probable cause).

Considering personal jurisdiction before *Younger* abstention is all the more appropriate here because, contrary to the Order's characterization, *Younger* abstention is more prudential than jurisdictional. That is, *Younger* limits the circumstances in which a federal court can properly *exercise* its jurisdiction. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986) ("*Younger* abstention . . . does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced.").[9] Accordingly, this Court need not—and indeed should not—conduct jurisdictional discovery on *Younger* abstention and instead should dismiss the case for lack of personal jurisdiction.

B. THE FACTS INFORMING THE DECISION TO ISSUE THE CID ARE ALREADY IN THE RECORD BEFORE THIS COURT, RENDERING FURTHER INQUIRY INTO THE BASIS FOR A STATE ATTORNEY GENERAL'S INVESTIGATION UNWARRANTED AND IMPROPER.

The Court has before it now evidence on which AGO relied in reaching a decision to issue the CID. *See* PI Opp. at 6-11; *see, e.g.*, App. Exhibits 15, 16 (journalistic accounts of Exxon misconduct), 19, 20, 24, 28 (internal Exxon documents), 25, 26, 27, 29, 38 (recent Exxon statements). The Court in its Order, *see* Order at 4-5, cites to several of Exxon's allegations, yet does not appear to have considered the ample substantive evidence in the record on which AGO relied in determining to issue the CID—materials that show the good faith basis for Attorney General Healey's investigation of Exxon. In fact, the Attorney General had an exceptionally strong basis for issuing a CID in this instance, since the AGO had the opportunity to review a

[9] Because the abstention doctrine relates to subject matter jurisdiction, courts have approved of raising abstention, as the Attorney General did here, under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See, e.g.*, *Saxton*, 2010 WL 3446921, at *1; *Sabre Oxidation Technologies, Inc. v. Ondeo Nalco Energy Services LP*, No. Civ. A. H-04-3115, 2005 WL 2171897, *2 (S.D. Tex. Sept. 6, 2005) (abstention "raises the question of whether a court should exercise subject matter jurisdiction" and "is properly considered under Fed. R. Civ. P. 12(b)(1)"); *Beres v. Village of Huntley, Ill.*, 824 F. Supp. 763, 766 (N.D. Ill. 1992) (same).

significant number of internal Exxon documents illustrating Exxon's advanced knowledge of climate change and the likely impacts of efforts to address climate change on Exxon's business. This is not a case where jurisdictional discovery will yield significant additional facts—indeed, in cases where jurisdictional discovery is unlikely to lead to relevant facts, courts routinely deny requests for such discovery, and appellate courts typically uphold such denials. *See, e.g., Alpine View Co. Ltd. v. Atlas Copco AB,* 205 F.3d 208, 221 (5th Cir. 2000) (affirming denial of discovery that "could not have added any significant facts"); *Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 447 (5th Cir. 1979) ("Further discovery could not have added any significant facts and would only have been expensive and burdensome for the nonresident [party].").

The Court should not open the door to an inquiry into the motivations of the Attorney General or her staff. The AGO regularly issues CIDs to investigate violations of Massachusetts law, often as part of joint investigations with other federal and state law enforcement agencies. *See* PI Opp. at 4-5. The extraordinary step ordered here—permitting investigation of the investigators—would turn a state law enforcement proceeding on its head by allowing Exxon to conduct an investigation into Attorney General Healey's motives for issuing the CID before she is even able to receive a single document from Exxon or depose a single Exxon witness. *Cf. Stockman v. Fed. Election Comm'n,* 138 F.3d 144, 154 (5th Cir. 1998) ("[A]llowing the person under investigation to bring suit in district court any time he felt aggrieved by the investigation could compromise the ability of the agency to investigate and enforce the Act."). And, as the actions of the U.S. Attorney General, *see* Reply at 3, and now the SEC confirm, Attorney General Healey's investigation is not, as Exxon would have the Court believe, a baseless fishing expedition designed to serve a political agenda. Rather, it is a very serious investigation into the central question whether Exxon misled and deceived investors and consumers regarding the

impacts of climate change, and the effects on Exxon's business of efforts to address those impacts.

"[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (describing showing necessary to authorize discovery by defendants raising claims of selective criminal prosecution). Nothing Exxon has presented to the Court—a brief statement at a press conference announcing an investigation, a CID issued to further that investigation, and a set of irrelevant allegations involving other officials and organizations—supports the factual inquiry the Court has authorized. *Cf. Rocky Mountain Gun Owners v. Williams*, 119 F. Supp. 3d 1308, 1315 (D. Colo. 2015) (finding jurisdictional discovery on *Younger* "bad faith" exception unwarranted because "the evidence cited by the plaintiffs is not sufficient to justify further discovery on the issue of bad faith or harassment of the plaintiffs by [the defendant]," plaintiffs' evidence failed to demonstrate that defendant targeted conservative groups such as plaintiffs, and "there is no basis to conclude that the complaint brought by [the defendant] was frivolous or was undertaken without a reasonably objective hope of success").[10]

The only likely outcome of the discovery that the Court has ordered is an improper and vexatious investigation into privileged or protected information and contentious discovery disputes that this Court would be obliged to supervise. The Attorney General is a high-level governmental official and expects to object strenuously to any effort to depose her. *See In re McCarthy*, 636 Fed. Appx. 142, 143 (4th Cir. 2015) ("It is well established that high-ranking

[10] Moreover, it is common practice for state attorneys general to make public announcements of civil investigations. *See, e.g.*, Press Release, "Attorney General Paxton Announces Investigation of Volkswagen," dated September 24, 2015, *available at* https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-announces-investigation-of-volkswagen (last accessed Oct. 18, 2016) (noting Texas attorney general's role on executive committee of multi-state environmental and consumer fraud investigation).

government officials may not be deposed or called to testify about their reasons for taking official actions absent 'extraordinary circumstances.'"); *In re F.D.I.C.*, 58 F.3d 1055, 1062 (5th Cir. 1995) (granting petition for mandamus to prevent deposition of members of FDIC board of governors; that officials "considered the preferences (even political ones) of other government officials concerning how [official] discretion should be exercised does not establish the required degree of bad faith or improper behavior").[11] Moreover, the remaining information about the Attorney General's investigation not currently in the public domain consists largely of attorney work product and other privileged materials, and the Attorney General expects to oppose any effort by Exxon to obtain those materials.[12]

In any event, as the Fifth Circuit recently held in *Google, Inc. v. Hood*, objections such as Exxon's to the investigation are properly resolved by the relevant state court. *See* 822 F.3d 212, 224-26 (5th Cir. 2016) ("[C]omity should make us less willing to intervene when there is no current consequence for resisting the subpoena and the same challenges raised in the federal suit could be litigated in state court.") (citing *O'Keefe v. Chisholm*, 769 F.3d 936, 939-42 (7th Cir. 2014), where "federal plaintiff's ability to litigate subpoena in state court counseled against

[11] *See also Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) ("Only where there is a clear showing of misconduct or wrongdoing is any departure from th[e] rule [that the judiciary may not probe the mental processes of an executive or administrative officer] permitted."); *Buono v. City of Newark*, 249 F.R.D. 469, 470 n.2 (D.N.J. 2008) (refusing deposition of Mayor of Newark using same analysis).

[12] *See, e.g., In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569-71 (5th Cir. 2006) (recognizing "existence of a law enforcement privilege" relating to ongoing investigations); *Branch v. Phillips Petrol. Co.*, 638 F.2d 873, 880-82 (5th Cir. 1981) (applying executive privilege in declining to enforce subpoena seeking intra-agency memoranda and advisory recommendations from government "[t]o the extent that the documents withheld . . . are internal working papers in which opinions are expressed, policies are formulated, and actions are recommended"); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-33 (D.D.C 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967) (applying executive privilege in declining to order discovery or in camera review of Department of Justice "documents integral to an appropriate exercise of the executive's decisional and policy-making functions").

injunctive relief even though the district court reasoned that the defendants' 'bad faith' conduct justified an injunction").

C. VENUE IS IMPROPER IN THIS COURT.

Venue remains improper in this Court. *See* Mem. at 19-20; Reply at 10. All of the "events" that Exxon describes in its complaint and that the Court discusses in its Order occurred *outside Texas*. These facts do not support venue in this Court. *See* 28 U.S.C. § 1391(b)(2) (venue lies in district where "a substantial part of the events or omissions giving rise to the claim occurred"); *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) ("the fact that a plaintiff residing in a given judicial district feels the effects of a defendant's conduct in that district does not mean that the events or omissions occurred in that district"). Under these circumstances, the Court should dismiss the lawsuit. *See Saxton*, 2010 WL 3446921, at *4 (dismissing lawsuit because, *inter alia*, venue was improper where "all of the events the Saxtons complain of occurred in Utah"). Alternatively, the lack of proper venue in this district warrants transfer to the District of Massachusetts, where Attorney General Healey resides and the pending motions clearly could be adjudicated. *See* 28 U.S.C. § 1406(a).

IV. CONCLUSION

The Attorney General renews her Motion to Dismiss, and the Court should DISMISS Exxon's complaint with prejudice. In the alternative, the Court should reconsider and vacate its Order of October 13, 2016, pending further consideration of the Motion to Dismiss. In the event that the Court neither dismisses the complaint nor reconsiders its Order, the Attorney General respectfully requests that the Court transfer the action to the District of Massachusetts or stay its order to allow the Attorney General to seek immediate review by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: October 20, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 20, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	§ § § § § § § § § § § §	No. 4:16-CV-469-K

EXXON MOBIL CORPORATION'S OPPOSITION TO
DEFENDANT'S MOTION FOR RECONSIDERATION

Patrick J. Conlon (*pro hac vice*)
Daniel E. Bolia
EXXON MOBIL CORPORATION
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

Theodore V. Wells, Jr. (*pro hac vice*)
Michele Hirshman (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Justin Anderson (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

Ralph H. Duggins
Philip A. Vickers
Alix D. Allison
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
Tel: (817) 877-2800
Fax: (817) 877-2807

Nina Cortell
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
Tel: (214) 651-5579
Fax: (214) 200-0411

Counsel for Exxon Mobil Corporation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes

Other Authorities

Exxon Mobil Corporation ("ExxonMobil") respectfully submits this brief in opposition to Defendant Maura Tracy Healey's motion to reconsider the Court's October 13, 2016 Order (Dkt. 73) that directed the parties to conduct discovery on the applicability of *Younger* abstention (the "Discovery Order"), a doctrine invoked by the Attorney General in support of her pending motion to dismiss.

PRELIMINARY STATEMENT

Having asked this Court to abstain under *Younger*, Attorney General Healey cannot now be heard to complain about discovery to evaluate whether bad faith precludes application of that doctrine. Nor can she present her groundless complaints in a motion for reconsideration, which serves the narrow purpose of correcting manifest errors of law and alerting the Court to new facts or law that could not have been presented earlier. Attorney General Healey does not even acknowledge that standard for obtaining reconsideration, much less attempt to meet it. Instead, she reminds the Court—once again—of her power under state law to conduct investigations and of her belief that no Texas court has personal jurisdiction over her. Those arguments are of course known to this Court, having been presented by the Attorney General in prior briefing and during extensive oral argument. Rehashing previously made arguments is an abuse of a motion for reconsideration. And this abusive repetition does not cause her arguments to be any more persuasive now than when they were originally presented.

Rather than identify any clear legal error or raise new facts or law, the Attorney General suggests that the Discovery Order was an improper exercise of this Court's broad discretion to order discovery on threshold jurisdictional questions. The argument is baseless. It is both right and proper for federal courts to verify subject matter jurisdiction before proceeding to the merits of a case, and the Attorney General identifies no authority—binding or persuasive—that holds

otherwise. Far from being an abuse of the Court's broad discretion in this area, the Discovery Order is entirely appropriate and justified under the circumstances to address whether bad faith precludes *Younger* abstention. While the Attorney General might prefer that this Court consider personal jurisdiction prior to subject matter jurisdiction, there is no legal requirement that it do so. Even if there were such a rule, personal jurisdiction would either be found simply on the current record or would require discovery at least as broad as that contemplated by the Discovery Order to develop the record on the Attorney General's intent to commit a constitutional tort in Texas. Having no basis in law or fact, the Attorney General's motion for reconsideration should be denied.

STATEMENT OF FACTS

On August 8, 2016, Attorney General Healey moved to dismiss ExxonMobil's complaint. (Dkt. 41.) The memorandum of law in support of that motion devoted five of its twenty pages (25 percent) to arguing that this Court must abstain from hearing this case pursuant to *Younger* v. *Harris*, 401 U.S. 37 (1971). (Dkt. 42.) On September 8, 2016, ExxonMobil opposed the Attorney General's motion to dismiss, arguing, among other things, that *Younger* abstention was unwarranted because the Attorney General's investigation of ExxonMobil was undertaken in bad faith. (Dkt. 60 at 18–20.)

On October 13, 2016, the Court entered the Discovery Order directing the parties to develop an appropriate record on which to assess the Attorney General's request that this Court abstain from hearing this case pursuant to *Younger*. Further discovery was appropriate in light of ExxonMobil's allegations of fact supporting the bad faith exception to *Younger* abstention, including (i) the Attorney General's public statements suggesting bias and a predetermination of ExxonMobil's guilt and (ii) her participation in a closed-door meeting with climate activists and plaintiffs' lawyers that was intentionally concealed from the press and public. (Discovery Order

4–6.) To develop the factual record that would enable the Court to assess the applicability of the bad faith exception, the Court directed both parties to take discovery that would "aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds." (*Id.* at 6.) Pursuant to the Discovery Order, ExxonMobil has recently served discovery requests on Attorney General Healey.

ARGUMENT

I. The Attorney General Has Failed to Carry Her Burden of Identifying New Facts or Law that Would Justify Reconsideration.

Attorney General Healey's motion for reconsideration does little more than remind the Court of her belief that personal jurisdiction is lacking and that her motives for investigating ExxonMobil should not be questioned. Neither of those arguments is new; they were presented to this Court previously in written and oral argument. Having already been submitted to this Court, these arguments cannot support a motion for reconsideration, which is not a vehicle for "rehashing old arguments or advancing theories of the case that could have been presented earlier." *Securities & Exchange Commission* v. *Arcturus*, No. 3:13-CV-4861-K, 2016 WL 3654430, at *1 (N.D. Tex. July 8, 2016) (internal quotation marks and citation omitted). A motion for reconsideration is properly used only for the "narrow purpose" of "allow[ing] a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (internal quotation marks and citation omitted). The Attorney General's brief does not even acknowledge that narrow purpose, much less attempt to comply with it. That is reason enough to deny reconsideration.

A fair reading of the Attorney General's supporting brief indicates that her motion is not brought for a proper purpose. First, Attorney General Healey does not maintain that the Court committed a manifest error of law or fact by (i) ordering discovery on her application for *Younger* abstention or (ii) evaluating subject matter jurisdiction prior to ruling on personal

jurisdiction. Nowhere in her brief does the Attorney General claim that the Court lacks power to order discovery on a jurisdictional issue, nor is ExxonMobil aware of any such limitation. And, as described in greater detail below, the Court's authority in this area is well-recognized as broad and discretionary. Likewise, the Attorney General does not contend that this Court must rule on personal jurisdiction prior to examining subject matter jurisdiction. Conceding that federal courts "[c]ustomarily" resolve subject matter jurisdiction prior to personal jurisdiction, the best Attorney General Healey can do is remind the Court that it "can" reach personal jurisdiction prior to subject matter jurisdiction if it wishes to do so. (Mem. 4.[1]) But there is no legal obligation for the Court to exercise its discretion in the manner the Attorney General might prefer.

Second, the Attorney General's motion raises no new facts. Instead, the motion reiterates the Attorney General's perspective on the factual record that was before this Court when the parties appeared for oral argument. In her brief, Attorney General Healey excuses her biased comments at the March 29, 2016 press conference as a meaningless "brief statement" and dismisses the balance of the evidence as "a set of irrelevant allegations." (Mem. 9.) But she identifies no new facts that would bear on the appropriateness of discovery to probe whether the investigation of ExxonMobil was brought in bad faith.

That is the fundamental flaw in the Attorney General's motion for reconsideration: It contains nothing new. All of the arguments supporting the Attorney General's motion either were, or could have been, presented in her motion to dismiss the complaint. With this motion, Attorney General Healey seeks only to re-litigate the precise arguments regarding personal jurisdiction, ripeness, and venue that were raised in her memoranda of law in support of her

[1] "Mem." refers to the Attorney General's Memorandum of Law In Support of her Motion for Reconsideration (Dkt. 79).

motion to dismiss. A motion for reconsideration does not provide a vehicle for doing that, which, on its own, provides a fully sufficient basis to deny the motion.

II. The Court Has Broad Discretion to Ensure the Proper Exercise of Its Jurisdiction.

Courts should determine the propriety of subject matter jurisdiction "at the earliest possible stage in the proceedings." *In re MPF Holdings US LLC*, 701 F.3d 449, 457 (5th Cir. 2012). To ensure that this examination is not inappropriately limited, "[i]t is well settled that 'a district court has broader power to decide its own right to hear the case than it has when the merits of the case are reached.'" *Kuwait Pearls Catering Co.* v. *Kellogg, Brown & Root Servs.*, Civ. A. H-15-0754, 2016 WL 1259518, at *14 n.19 (S.D. Tex. Mar. 31, 2016) (quoting *Williamson* v. *Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). It is therefore recognized that "jurisdictional discovery may be warranted if the issue of subject matter jurisdiction turns on a disputed fact." *In re MPF Holdings*, 701 F.3d at 457 457 (citing *In re Eckstein Marine Serv. LLC*, 672 F.3d 310, 319–20 (5th Cir. 2012)). And when the court must resolve a factual dispute that is "decisive of a motion to dismiss for lack of jurisdiction, it must give plaintiffs an opportunity for discovery and a hearing that is appropriate to the nature of the motion to dismiss." *McAllister* v. *FDIC*, 87 F.3d 762, 766 (5th Cir. 1996); *see also Box* v. *Dallas Mexican Consulate Gen.*, 487 F. App'x 880, 884 (5th Cir. 2012) (per curiam) (dismissal for lack of subject matter jurisdiction vacated because plaintiff had not been afforded discovery). The Fifth Circuit has also made clear that district courts have "broad discretion in all discovery matters," including discovery addressing a defendant's assertion that jurisdiction is improper. *Seiferth* v. *Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006) (quoting *Wyatt* v. *Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982)); *see also Box*, 487 F. App'x at 884 (observing that district courts have broad discretion with respect to discovery, including into the exercise of subject matter jurisdiction).

Courts recognize that the exceptions to the *Younger* doctrine present issues of fact that often cannot be resolved on pleadings and papers alone. *See, e.g.*, *Tex. Ass'n of Bus.* v. *Earle*, 388 F.3d 515, 517 (5th Cir. 2004) (district court held an evidentiary hearing before determining whether *Younger* applied). That is why when, as here, a complaint contains allegations that "would, if proven, be sufficient to merit federal intervention, the court has the discretion to allow discovery, and to take testimony at a hearing on a motion for a preliminary injunction and/or a motion to dismiss on *Younger* grounds." *Cobb* v. *Supreme Judicial Court of Mass.*, 334 F. Supp. 2d 50, 54 (D. Mass. 2004). In fact, numerous courts have held that discovery should be conducted when a bona fide factual dispute must be resolved prior to abstaining or declining to abstain under *Younger*. *See, e.g.*, *Kern* v. *Clark*, 331 F.3d 9, 12 (2d Cir. 2003) ("[T]he district court erred by concluding, without holding an evidentiary hearing" that no *Younger* exception applied.); *Sica* v. *Connecticut*, 331 F. Supp. 2d 82, 87 (D. Conn. 2004) ("[W]hen a plaintiff seeks to avail herself of the *Younger* exceptions, a district court ordinarily should hold an evidentiary hearing.").

Assembly of a full record through discovery is especially proper where, as here, a plaintiff invokes the bad faith exception to *Younger*, which presents an inherently factual question. *See, e.g.*, *Trower* v. *Maple*, 774 F.2d 673, 674 (5th Cir. 1985) (describing an earlier order in the litigation vacating grant of dismissal on *Younger* grounds and remanding for evidentiary hearing on bad faith); *Wilson* v. *Thompson*, 593 F.2d 1375 (5th Cir. 1979) (district court took evidence to determine applicability of bad faith exception). That is why courts have held that "[e]videntiary hearings are properly convened, if not in some instances required, in deciding whether to abstain" in cases where bad faith is alleged. *Wightman-Cervantes* v. *Texas*, No. 3:03-CV-3025-D, 2005 WL 770598, at *5 (N.D. Tex. Apr. 6, 2005); *see also Wilson* v. *Emond*, No. 3:08-CV-1399, 2009 WL 1491511, at *2 (D. Conn. May 28, 2009) ("If there is a

question of fact as to whether a defendant acted in bad faith, then an evidentiary hearing is required."). Indeed, the Fifth Circuit has vacated district court decisions where no proper evidentiary hearing was conducted and remanded for "the appropriate evidentiary hearing required [by *Younger*], in which [the] plaintiff shall be allowed to introduce evidence regarding his allegations of bad faith prosecution and harassment." *Stewart* v. *Dameron*, 448 F.2d 396, 397 (5th Cir. 1971).

In light of this authoritative precedent, the Attorney General has no valid basis to question this Court's power and desire to develop an adequate factual record before determining whether abstention under *Younger* is warranted.

III. Personal Jurisdiction, which Need Not Be Addressed Prior to Abstention, Is Not Lacking and Would Also Require Fact Finding.

The Attorney General's motion boils down to one essential proposition: She would prefer that this Court reach personal jurisdiction prior to ruling on *Younger* abstention. But the Court is under no obligation to proceed in the manner that the Attorney General prefers. As Attorney General Healey recognizes, there is "no unyielding jurisdictional hierarchy" requiring the Court to address personal jurisdiction before the jurisdictional inquiry raised by *Younger*, and "[c]ustomarily, a federal court first resolves doubts about its jurisdiction over subject matter" before turning to personal jurisdiction. (Mem. 4 (quoting *Ruhrgas AG* v. *Marathon Oil*, 526 U.S. 574 (1999))); *see also Washington* v. *Los Angeles County Sheriff's Department*, 833 F.3d 1048, 1060 (9th Cir. 2016) (stating that *Younger* "operates as a jurisdictional bar to § 1983 relief"). When considering threshold questions of jurisdiction and justiciability, it is the Court's discretion—not Attorney General Healey's preference—that controls. *See Sinochem Int'l Co. Ltd.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway to choose among threshold grounds" when considering whether to dismiss a complaint.); *see also*

Wellogix, Inc. v. *SAP America, Inc.*, 648 F. App'x 398, 400 (5th Cir. 2016) (addressing prudential doctrine of *forum non conveniens* before jurisdictional question).

The Attorney General offers three reasons why, in her view, the Court should address her personal jurisdiction argument before turning to her request for *Younger* abstention: (i) personal jurisdiction is more easily ascertained; (ii) the question of bias presents a conflict between state and federal law, which should be avoided; and (iii) the Court lacks power to order discovery on bad faith if it lacks personal jurisdiction. None of these arguments has merit.

A. The Personal Jurisdiction Inquiry Is Not Straightforward and Requires Further Factual Development.

Attorney General Healey submits that a ruling on personal jurisdiction provides an easier path—a "surer ground"—compared to *Younger* abstention for resolving her motion to dismiss. (Mem. 5.) But the only thing "sure" about her personal jurisdiction argument is that it should be rejected, either on this evidentiary record or on a more fully developed one.

The Attorney General reiterates the argument, previously placed before this Court in her motion to dismiss, that the Fifth Circuit's decision in *Stroman Realty, Inc.* v. *Wercinski*, 513 F.3d 476 (5th Cir. 2008), "construed" the Texas long-arm statute not to apply to out-of-state officials like her. (Mem. 4.) That is wrong. As an initial matter, the passage of *Stroman* on which the Attorney General so heavily relies is plainly dicta. The Fifth Circuit observed that the particular circumstances of that case "relieve[d] the court of an obligation to pursue the[] interpretive question[]" of whether the long-arm statute applied to out-of-state officials. 513 F.3d at 483. Further, Judge Barksdale's concurrence in *Stroman* objected to "the opinion's extensive dicta, including parts about: whether the Texas long-arm statute applies . . . ." *Id.* at 489. But even this dicta is inaccurately characterized by the Attorney General. The *Stroman* court did not, as the Attorney General suggests, "construe" the Texas long arm statute to omit out-of-state officials, but rather said only that "[w]hether the long-arm statute's definition of nonresidents ignores or

subsumes the *Ex Parte Young* fiction is uncertain." *Id.* at 483. The Attorney General thus substantially oversells both the *Stroman* court's dicta about the Texas long-arm statute and the weight that such dicta should be given.

By contrast, both the Texas Supreme Court and the Fifth Circuit have construed the Texas long-arm statute and found that it "reaches as far as the federal constitutional requirements for due process will allow." *Spir Star AG* v. *Kimich*, 310 S.W.3d 868, 872 (Tex. 2010) (internal quotation marks and citation omitted); *see also Atwood Hatcheries* v. *Heisdorf & Nelson Farms*, 357 F.2d 847, 852 (5th Cir. 1966) (stating that the purpose of the Texas long-arm statute is "to exploit to the maximum the fullest permissible reach under federal constitutional restraints." (internal quotation marks and citation omitted)). As ExxonMobil demonstrated in its brief opposing the motion to dismiss, the due process clause permits personal jurisdiction over an out-of-state actor, like Attorney General Healey, who knowingly and intentionally reached into Texas with a specific intent to deprive a Texas domiciliary of its constitutional rights. *See, e.g.*, *Wien Air Alaska, Inc.* v. *Brandt*, 195 F.3d 208, 213 (5th Cir. 1999); *Lewis* v. *Fresne*, 252 F.3d 352, 358–59 (5th Cir. 2001); *Ruston Gas Turbines Inc.* v. *Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Bear Stearns Cos.* v. *Lavalle*, No. 3:00 Civ. 1900-D, 2001 WL 406217, at *3–4 (N.D. Tex. Apr. 18, 2001). If anything is "sure," it is that the Attorney General's arguments based on personal jurisdiction are unavailing.

Even if the Court chose to honor the Attorney General's preference that personal jurisdiction be considered now, which it has no obligation to do, the result would be either a rejection of that argument on the merits or a direction to conduct *broader* discovery than that contemplated in the Discovery Order. It would not be the elimination of discovery, as Attorney General Healey submits. That is because Attorney General Healey's bad faith (or lack thereof) bears directly on the question of whether she intended to direct a constitutional tort at Texas and

cause injuries to be felt by ExxonMobil in Texas. And if there is any doubt about the sufficiency of the evidentiary record on that issue, further discovery is required. *See, e.g.*, *Valtech Solutions Inc.* v. *Davenport*, No. 3:15-CV-3361-D, 2016 WL 2958927, at *2 (N.D. Tex. May 23, 2016) ("If a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts . . . the plaintiff's right to conduct jurisdictional discovery should be sustained." (internal citation and quotation marks omitted)); *see also Walk Haydel & Assocs., Inc.* v. *Coastal Power Prod. Co.*, 517 F.3d 235, 241–42 (5th Cir. 2008) (finding error where, in jurisdictional discovery, the court allowed only a narrow document request—and not interrogatories, full requests for production, requests for admission, and depositions—and therefore "substantially curtail[ed] the amount of discovery that could be obtained"); *Next Techs., Inc.* v. *ThermoGenisis, LLC*, 121 F. Supp. 3d 671, 676 (W.D. Tex. 2015) (permitting jurisdictional discovery to determine, *inter alia*, whether the court could exercise specific personal jurisdiction over defendants alleged to have "directed" activities into Texas).

Discovery directed at Attorney General Healey's intent to commit a constitutional tort for the purposes of the personal jurisdiction inquiry would fully subsume the discovery on bad faith already ordered in connection with *Younger* abstention. To accept the Attorney General's suggested preference would therefore result in more discovery, not less.

B. There Is No Conflict with Massachusetts Law to Be Avoided.

The Attorney General also urges the Court to dismiss this case on personal jurisdiction grounds so that it can avoid an alleged conflict between federal and state law. According to the Attorney General, a federal prohibition on prejudging the results of investigations conflicts with Massachusetts law, which requires that she prejudge the results of her investigations. (Mem. 5–6.) The Attorney General's argument is premised on Mass. Gen. Laws c. 93A, § 6(1), which provides that a civil investigative demand ("CID") may issue "whenever [the Attorney General]

believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful." But the Attorney General's attempt to manufacture a crisis of federalism—in essence, claiming that all of her investigations are by definition tainted by bias impermissible under federal law—cannot be taken seriously.

For starters, the Attorney General's argument omits the next clause of Mass. Gen. Laws c. 93A, § 6(1), which states that the purpose of a CID is "to ascertain whether in fact such person has engaged in or is engaging in" a prohibited practice. The statutory purpose of a CID is thus to investigate whether *a suspicion* of unlawful conduct is well founded. This interpretation of Massachusetts law is confirmed by the Attorney General's prior statements to this Court. In opposing ExxonMobil's motion for a preliminary injunction, the Attorney General explained that her office "has issued several hundred CIDs to or regarding companies or individuals *suspected of* committing unfair and deceptive business practices." (Dkt. 43 at 4 (emphasis added).)

Properly construed, Massachusetts law does not require the Attorney General to unconstitutionally prejudge the results of all of her investigations, but rather requires, like federal law, only that a CID be based on a legitimate suspicion that a law has been broken, and not amount to an impermissible fishing expedition. *See Major League Baseball* v. *Crist*, 331 F.3d 1177, 1187 (11th Cir. 2003) (Fourth Amendment prohibits "fishing expeditions"). And a showing of reasonable suspicion or probable cause does not constitute impermissible bias in violation of the Fourteenth Amendment. There is thus no conflict between Massachusetts and federal law, much less one to be avoided by vacating the Discovery Order.

C. The Court Does Not Lack Authority to Examine Its Own Jurisdiction.

The Attorney General next makes the extraordinary claim that the Court cannot order discovery into its ability to hear this case because the Court may later determine that it lacks personal jurisdiction over the Attorney General. (Mem. 6–7.) This argument is flatly contrary to

the "well-settled" principle that "'a district court has broader power to decide its own right to hear the case than it has when the merits of the case are reached.'" *Kuwait Pearls Catering Co.* v. *Kellogg, Brown & Root Servs.*, Civ. A. H-15-0754, 2016 WL 1259518, at *14 n.19 (S.D. Tex. Mar. 31, 2016) (quoting *Williamson* v. *Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). Courts regularly permit jurisdictional discovery in cases where jurisdiction is subsequently found to be lacking. *See, e.g.*, *721 Bourbon, Inc.* v. *House of Auth, LLC*, 140 F. Supp. 3d 586 (E.D. La. 2015) (granting motion to dismiss for lack of personal jurisdiction after a period of jurisdictional discovery); *Chemguard Inc.* v. *Dynax Corp.*, No. 4:08-CV-057-Y, 2010 WL 363481 (N.D. Tex. Feb. 2, 2010) (same). Were the Attorney General correct, the concept of jurisdictional discovery would not exist at all. This is not, and cannot be, the law.

That is why the Attorney General's claim that it would be "reversible error" to permit discovery on *Younger* abstention before ruling on personal jurisdiction rings hollow. (Mem. 6.) This Court is imbued with "broad discretion in all discovery matters," which, even in the ordinary course, "will not be disturbed" by the Fifth Circuit "unless there are unusual circumstances showing a clear abuse." *Seiferth*, 472 F.3d at 270 (citation and quotation marks omitted). The Attorney General's suggestion is particularly misguided here, where no appealable order exists and any relief could be obtained only by a writ of mandamus. Fifth Circuit law is clear, however, that a writ of mandamus may issue only where the petitioner's right to the writ "is clear and indisputable." *In re LeBlanc*, 559 F. App'x 389, 392 (5th Cir. 2014) (citation and quotation marks omitted). And it is equally clear that where, as here, "a matter is within the district court's discretion, the litigant's right to a particular result cannot be clear and indisputable." *Id.* (citing *Kmart Corp.* v. *Aronds*, 123 F.3d 297, 300–01 (5th Cir.1997) (quotation marks omitted)). As a result, the Fifth Circuit has held that "interlocutory review of ordinary discovery orders is generally unavailable, through mandamus or otherwise." *LeBlanc*,

559 F. App'x at 392 (citing *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381 (2004) (quotation marks omitted)).[2]

IV. The Attorney General's Desire Not to Participate in or Cooperate with Court-Ordered Discovery Does Not Supply a Basis for Reconsideration.

Having failed to demonstrate that the Court cannot or should not develop a record to assess the *Younger* argument she put before it, the Attorney General next asks the Court not to permit discovery and, if it does, shockingly promises not to cooperate in the discovery the Court has ordered.

A. The Court Need Not Accept the Attorney General's Definition of an Adequate Record for Considering *Younger* Abstention.

The Attorney General claims that the Court need not supplement the record to address her *Younger* argument because, in her view, the Court has before it all the evidence it needs to validate the legitimacy of her investigation. (Mem. 7–8.) The problem, according to the Attorney General, is that the Court "does not appear to have considered the ample substantive evidence in the record on which [the Attorney General] relied in determining to issue the CID." (Mem. 7.) Nothing in the record supports the notion that this Court failed to consider any material put forward by the Attorney General. In any event, as shown by ExxonMobil's reply in support of its motion for a preliminary injunction (Dkt. 57 at pp. 4–5) and at oral argument, the documents which the Attorney General claims "illustrat[e] Exxon's advanced knowledge of climate change" (Mem. 8) cannot fairly be read to support that proposition. Instead, the Attorney General's supposed good faith theory appears to rely on cherry-picking documents and taking quotes out of context to backfill a premise about ExxonMobil's knowledge that is not supported by the full record. The Attorney General's complaint is thus not that the Court has failed to

[2] For this reason, the Attorney General's conclusory request that discovery be stayed pending review by the Fifth Circuit (Mem. 11) should similarly be denied. *See, e.g.*, *David* v. *Signal Int'l, LLC*, 37 F. Supp. 3d 836, 840 (E.D. La. 2014) (denying stay pending mandamus petition "in light of the fact that mandamus relief is unlikely to be granted" (citing *LeBlanc*, 559 F. App'x at 392–93)).

consider the materials she has put forward but that those materials have failed to persuade the Court that her investigation was initiated in good faith.

B. Discovery Is Merited by the Extraordinary Record.

Attorney General Healey next claims that it would be improper for the Court to "open the door to an inquiry into the motivations of the Attorney General or her staff." (Mem. 8.) The Court did not open this door; the Attorney General did, when she announced an illegitimate basis for her investigation at a press conference, executed an agreement with other Attorneys General to suppress dissenting views, and invoked *Younger* abstention in her motion to dismiss. The Attorney General likewise complains that the Discovery Order improperly permits "investigation of the investigators." (*Id.*) But this is not a case where, as the Attorney General suggests, ExxonMobil is bringing a lawsuit because it "fe[els] aggrieved by the investigation" but lacks any valid basis to complain. (Mem. 8 (citing *Stockman* v. *Fed. Election Comm'n*, 138 F.3d 144, 154 (5th Cir. 1998)).) This is an extraordinary case, with an extraordinary record in which the Attorney General met in secret with climate activists and private tort litigators, after which she publicly declared, before her investigation began, both that she was pursuing it for illegitimate political purposes and that she had already pre-determined its outcome. The Attorney General concedes that "extraordinary circumstances" can justify compelling government officials to respond to discovery requests regarding their actions. (Mem. 10 (citing *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995)).) This is just such a case where discovery is merited.

C. No Privilege or Protection Stands in the Way of the Discovery Ordered by the Court.

The Attorney General next pledges that she will resist complying with the Discovery Order if it is not vacated. To back up this pledge, the Attorney General lists a number of privileges and protections she vows to assert "strenuously" to withhold documents and prevent

testimony relevant to her bad faith. (Mem. 9–10.) None of those privileges or protections stands in the way of the discovery the Court has ordered.[3]

Attorney General Healey first claims that any documents requested by ExxonMobil would be protected by the law enforcement privilege. (Mem. 10 n.12.) But the law enforcement privilege only "protect[s] government documents relating to an ongoing *criminal* investigation"—not documents concerning an "investigation" conducted pursuant to a *civil* investigative demand. *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569–70 n.2 (5th Cir. 2006) (emphasis added); *U.S. ex rel. Becker* v. *Tools & Metals, Inc.*, No. 3:05-2301-L, 2011 WL 856928, at *3 (N.D. Tex. Mar. 11, 2011). Similarly, the "executive privilege" invoked by the Attorney General (Mem. 10 n.12) cannot provide the blanket exemption from discovery she seeks, but rather can be asserted only "with reference to specific documents or specific deposition questions." *Exxon Corp.* v. *Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981). And even though the privilege can shield certain documents reflecting the mental processes of executive officers, "where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable." *Singer Sewing Mach. Co.* v. *NLRB*, 329 F.2d 200, 208 (4th Cir. 1964) (collecting cases); *cf. Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C 1966) (applying executive privilege in a case where "no charge of governmental misconduct or perversion of governmental power is advanced"). Nor can the Attorney General hide in the shadow of the attorney work product doctrine. Certain materials prepared by the Attorney General's office in anticipation of litigation may be discoverable if ExxonMobil has a substantial need for these documents and cannot obtain them by any other means without undue hardship. Fed. R. Civ. P. 26(b)(3).

[3] Should any discovery disputes arise between the parties, the Court is fully capable of resolving them, including with the assistance of a magistrate judge or special master.

Additionally, although the Attorney General makes a number of already-debunked claims about the "exceptionally strong basis" for her "very serious" investigation (Mem. 7–8), she argues that her status as a "high-level government official" means that she cannot be forced to give testimony to actually back up these claims. (Mem. 9–10.) As the Fifth Circuit has held, however, even high-level government officials may be compelled to testify when, as here, "there has been a strong showing of bad faith or improper behavior." *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995); *see also Pension Benefit Guar. Corp.* v. *LTV Steel Corp.*, 119 F.R.D. 339, 344 (S.D.N.Y. 1988) (permitting deposition of the Executive Director of a government agency based on the "narrow, albeit serious charge that the PBGC exercised its statutory authority under ERISA for an improper purpose"). The doctrine underlying the Attorney General's stated plan to evade giving testimony thus cannot protect her, but rather simply begs the question of whether she acted in bad faith.

V. The Attorney General's Further Attempts to Re-Litigate the Motion to Dismiss Are Unavailing

Finally, the Attorney General attempts to re-litigate additional branches of her motion to dismiss by restating her position that this dispute is unripe and venue is improper. For the reasons set forth in ExxonMobil's opposition to the Attorney General's motion to dismiss (Dkt. 60 at 22–24), this case is ripe for adjudication because ExxonMobil faces an immediate penalty for non-compliance with the CID; that is to say, the CID is self-executing. *See Google* v. *Hood*, 822 F.3d 212 (5th Cir. 2016). As also stated in ExxonMobil's opposition to the motion to dismiss (Dkt. 60 at 24–25), venue is proper because the Attorney General seeks to impinge on the First Amendment rights of ExxonMobil, which has a principal place of business in this District, and a First Amendment injury has been held to be located at the plaintiff's principal

place of business. *Fund for La.'s Future* v. *La. Bd. of Ethics*, No. 14-0368, 2014 WL 1514234, at *12 (E.D. La. Apr. 16, 2014).[4]

CONCLUSION

By rehashing arguments already presented to this Court, the Attorney General has failed to meet the applicable legal standard for reconsideration. That failure, standing alone, would be sufficient grounds to deny her motion. But even if that failure was excused, the motion would remain meritless. This Court has broad discretion to order discovery on threshold matters like *Younger* abstention, particularly when, as here, they have been raised by a party as a basis for relief. While the Attorney General might prefer that this Court consider personal jurisdiction prior to evaluating *Younger* abstention, there is no legal requirement that it do so. And were the Court to consider personal jurisdiction, it would either find it established by the existing record or require discovery at least as broad as that contemplated by the Discovery Order to determine whether the Attorney General intentionally directed a constitutional tort at Texas. Neither the Attorney General's announced refusal to comply with the Discovery Order nor her re-litigation of ripeness and venue provide a sound basis for reconsideration. In light of the Attorney General's failure to comply with the applicable legal standard or present this Court with any substantive grounds for reconsidering the Discovery Order, her motion for reconsideration should be denied.

[4] The Attorney General also requests that the Court transfer this action to the District of Massachusetts, but she fails to discuss any of the factors relevant to determining whether to transfer a pending action and the request should be denied on that basis alone. If the Attorney General attempts to address these factors in reply, ExxonMobil requests an opportunity to respond. Further, the fact that this request was first made in a motion to reconsider the Discovery Order—and not in the Attorney General's motion to dismiss, or in opposition to ExxonMobil's motion for a preliminary injunction—suggests that it is being sought to escape the scrutiny of this Court, and not for convenience of the parties or in the interests of justice. *See* 28 U.S.C.§ 1404(a).

Dated: October 27, 2016

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
pro hac vice
State Bar No. 24054300
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
pro hac vice
twells@paulweiss.com
Michele Hirshman
pro hac vice
mhirshman@paulweiss.com
Daniel J. Toal
pro hac vice
dtoal@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

Justin Anderson
pro hac vice
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of October 2016, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/Ralph H. Duggins
RALPH H. DUGGINS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	No. 4:16-CV-469-K

DEFENDANT ATTORNEY GENERAL MAURA HEALEY'S REPLY TO PLAINTIFF EXXON MOBIL CORPORATION'S OPPOSITION TO HER MOTION TO RECONSIDER JURISDICTIONAL DISCOVERY ORDER

Defendant Massachusetts Attorney General Maura Healey submits this reply to Plaintiff Exxon Mobil Corporation's ("Exxon") Opposition (Doc. No. 90, "Reconsider Opp.") to her Motion to Reconsider Jurisdictional Discovery Order (Doc. No. 78, "Motion to Reconsider"). Nothing Exxon has argued warrants departure from the directive of *Ruhrgas* and *Alpine View Co. Ltd.* that the Court should immediately address Attorney General Healey's clear, dispositive argument that the Court lacks personal jurisdiction. *See Ruhrgas AG v. Marathon Oil*, 526 U.S. 574, 578 (1999); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000). Moreover, the existing record as well as facts that arose after this Court's October 13 jurisdictional discovery order (Doc. No. 73, the "Order") and Attorney General Healey's Motion to Reconsider, demonstrate the good faith basis for Attorney General Healey's civil investigative demand ("CID"). Finally, Exxon's recent actions confirm that it intends to use the Order to attempt to obtain improper and unprecedented discovery from Attorney General Healey, New

York Attorney General Schneiderman, several other sitting state attorneys general, and staff members reporting to nearly half of the states' attorneys general, in an effort to evade legitimate inquiries into whether Exxon broke laws protecting consumers and investors by making misleading statements regarding climate change and failing to disclose the effects of efforts to address climate change on Exxon's businesses and assets.

I. RECONSIDERATION OF THE ORDER IS WARRANTED UNDER THE APPLICABLE STANDARD.

Attorney General Healey's Motion satisfies the applicable standard for reconsideration of interlocutory orders. Fed. R. Civ. P. 54(b) (interlocutory orders may be "revised at any time before the entry of a judgment"); *Judicial Watch v. Dep't of the Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (reconsideration appropriate "as justice requires"). The Order did not account for the Supreme Court's directive, articulated in *Ruhrgas,* that a district court properly should decide first the issue of personal jurisdiction where no complex question of state law is presented and other jurisdictional inquiries raise "difficult" questions. *Ruhrgas*, 526 U.S. at 588; *see also Alpine View Co.*, 205 F.3d at 213. Because the *Ruhrgas* directive is dispositive in this case, reconsideration of the Order is warranted.

Exxon's complaint and supporting papers repeatedly refer to statements made by Attorney General Healey at a March press conference, which Exxon alleges demonstrate that Attorney General Healey has prejudged the outcome of her investigation. *See, e.g.*, Compl. ¶¶ 8, 32-34, 75, 94. Those statements, however, merely show that Attorney General Healey holds a belief that Exxon has or is engaged in conduct prohibited by the Massachusetts consumer protection statute ("Chapter 93A"). This is not an "unconstitutional prejudg[ment]," as Exxon suggests. Reconsider Opp. at 11. Rather, it is a state law directive. Specifically, Massachusetts law *requires* the Attorney General to believe there has been a violation of Massachusetts law

prior to issuing a CID.[1] *See* Mass. Gen. Laws. c. 93A § 6(1); *Harmon Law Offices, P.C. v. Att'y Gen.*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013). As *Ruhrgas* teaches, given the requirements of Massachusetts consumer protection law that would be at issue in any *Younger* subject matter jurisdiction analysis, principles of comity and federalism strongly weigh in favor of this Court first resolving Attorney General Healey's Motion to Dismiss on the "surer" personal jurisdiction grounds.

Contrary to Exxon's argument, no additional discovery is necessary to decide Attorney General Healey's Motion to Dismiss. Exxon has made no prima facie showing supporting a need for discovery on personal jurisdiction because such discovery would be entirely futile: Exxon's argument that Attorney General Healey's actions outside Texas justify personal jurisdiction ignores the bar of the Texas long-arm statute and is, on its merits, wrong as a matter of law. *See Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) ("Such reasoning improperly attributes a plaintiff's forum connections to the defendant. . . ."); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482-83 (5th Cir. 2008) (finding Texas long-arm statute not to reach "nonresident individuals sued solely in their official capacity under *Ex Parte Young*"); *id.* at 486 ("We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident."); *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921, *3 (N.D. Tex. Aug. 31, 2010). Moreover, Exxon does not cite a single case authorizing jurisdictional discovery against a nonresident state official in comparable circumstances. Instead, in several

[1] Exxon fails to acknowledge that having a "suspicion," Reconsider Opp. at 11, and holding a belief are not synonymous. Merriam-Webster's dictionary defines a belief as "a conviction of the truth of some statement or the reality of some being or phenomenon especially when based on an examination of evidence." *See* http://www.merriam-webster.com/dictionary/belief. Attorney General Healey properly held, and continues to hold, a belief, based on her Office's review of Exxon's documents and statements, that Exxon has or is engaged in conduct prohibited by Chapter 93A.

cases in which federal courts considered but denied personal jurisdiction over foreign state attorneys general, none entertained discovery. *See, e.g.*, *Turner v. Abbott*, 53 F. Supp. 3d 61, 68 (D.D.C. 2014); *Cutting Edge Enter., Inc. v. Nat'l Ass'n of Att'ys Gen.*, 481 F. Supp. 2d 241, 246-49 (S.D.N.Y. 2007); *B & G Prod. Co. v. Vacco*, No. CIV.98-2436 ADM/RLE, 1999 WL 33592887, at *5 (D. Minn. Feb. 19, 1999).

II. THE COURT SHOULD NOT IGNORE THE AMPLE RECORD FACTS SUPPORTING THE GOOD FAITH BASIS FOR ATTORNEY GENERAL HEALEY'S CID, NOR THE SERIES OF NEW FACTS CONFIRMING THAT GOOD FAITH BASIS.

In issuing its Order, it appears that the Court relied solely on Exxon's allegations of bad faith, and may not have considered the substantial record facts supporting Attorney General Healey's good faith basis for issuing the CID. Contrary to Exxon's assertions, Reconsider Opp. at 13, Attorney General Healey submitted substantial evidence, in the form of Exxon's own documents, which credibly illustrates that Exxon's top-tier scientists, reporting to Exxon management, had advanced knowledge of climate change decades ago. The documents show Exxon's knowledge that fossil fuel combustion was contributing to increased concentrations of atmospheric carbon dioxide, which in turn would be expected to cause increased global average temperatures, with an array of potential significant risks, and that likely policy responses would include efforts to shift away from reliance on fossil fuels. *See* Compl., Ex. G, App. 065; Ex. CC, App. 249, 250-51; *see also* Opposition of Attorney General Healey to Plaintiff Exxon Mobil Corporation's Motion for a Preliminary Injunction (Doc. 43) at 6-10 & cited documents.

In addition to the record facts already before the Court, a series of more recent developments further confirms the good faith basis for Attorney General Healey's investigation. First, as discussed in Attorney General's opening brief in support of her Motion to Reconsider (Doc. No. 79, "Motion to Reconsider Mem."), it came to light the day after the Court's

September 19 hearing that the United States Securities and Exchange Commission has opened an investigation into "how Exxon Mobil Corp. values its assets in a world of increasing climate change regulations," with which Exxon is cooperating. *See* Motion to Reconsider Mem. at 2. Attorney General Healey's CID seeks to investigate similar issues and related questions.

Second, the New York Supreme Court has now compelled Exxon to comply with a subpoena to Exxon's auditor as part of the New York Attorney General's investigation of Exxon, providing further evidence that Attorney General Healey's investigation is well founded and has a good faith basis. As set forth in her Opposition to Plaintiff's Motion to Expedite Briefing and Consideration of Plaintiff's Motion for Leave to Amend (Doc. No. 85, "Mot. to Exp. Opp. Mem."), on Friday, October 14, 2016, in conjunction with his investigation of Exxon, Attorney General Schneiderman filed with the New York Supreme Court an application, brought by order to show cause, to compel compliance with a subpoena he issued on August 19, 2016, to Exxon's auditor, PricewaterhouseCoopers ("PWC"). Mot. Exp. Opp. Mem. at 4.[2] On October 18, the New York Supreme Court issued a show cause order to PWC and Exxon, and a hearing was held on October 24. On October 26, the New York Supreme Court granted the New York Attorney General's application to compel full production of Exxon-related documents from PWC, ruling that Exxon's claims of privilege were erroneous. Decision and Order, *In the Matter of the Application of the People of the State of New York*, No. 451962/16, slip op. at 5 (N.Y. Sup. Ct. Oct. 26, 2016), *available at* https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=ESmDXs9FdUeDz6lZw6v74w==&system=prod (accessed Oct. 31, 2016).

[2] On Monday, October 17, Exxon filed its Motion to Amend in this Court, which failed to mention the New York proceeding. Later that same day, Exxon filed its opposition to the application in the New York proceeding—which similarly made no mention of the fact that Exxon had just filed its Motion to Amend with this Court, seeking to enjoin the New York investigation. Mot. Exp. Opp. Mem. at 4.

Finally, on Friday, October 28, two days after the New York Supreme Court ordered Exxon and PWC to comply with the New York Attorney General's August subpoena, Exxon announced a thirty-eight percent drop in earnings as a result of low energy prices, and "acknowledged that it faced what could be the biggest accounting revision of its reserves in its history."[3] Exxon's profits in the last twelve months are the lowest since 1999.[4] The Wall Street Journal reported that Exxon, under investigation by the U.S. Securities and Exchange Commission and New York State, disclosed that about 4.6 billion barrels of oil in its reserves, primarily in Canada, may be too expensive to tap, noting that "[t]hough Exxon didn't mention climate change or regulators in its disclosure, most of the assets it said may not be economic are among the most scrutinized by climate change activists: Canada's tar sands."[5] The Journal reported that Canada's government has proposed to charge a price for carbon emissions, and observed that "[l]onger term, Exxon faces headwinds from regulators aimed at reducing carbon dioxide and other greenhouse gas emissions, measures that are widely expected to fall most heavily on its industry."[6] As set forth in the record before the Court, Exxon was aware nearly forty years ago that efforts to address climate change presented a risk to its assets; Exxon's October 28 disclosure confirms the obvious—that any factor that reduces demand for its fossil fuel products, including efforts to shift away from using such fuels to avoid climate change, will adversely affect Exxon earnings.

---

[3] Clifford Krauss, *Exxon Concedes It May Need to Declare Lower Value for Oil in Ground*, N.Y. TIMES, Oct. 28, 2016, http://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-value-for-oil-in-ground.html.

[4] Bradley Olson & Lynn Cook, *Exxon Warns on Reserves As It Posts Lower Profit: Oil producer to examine whether assets in an area devastated by low price and environmental concerns should be written down*, WALL ST. J., Oct. 28, 2016, http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202.

[5] *Id.*

[6] *Id.*

III. EXXON REVEALED ITS INTENT TO SEEK ABUSIVE AND VEXATIOUS DISCOVERY FROM ATTORNEY GENERAL HEALEY AND MANY OTHER STATE LAW ENFORCEMENT OFFICIALS.

As a result of the New York state court proceeding discussed above, Attorney General Healey has learned of new facts regarding Exxon's discovery strategy. At the October 24 hearing on the New York Attorney General's application to compel compliance with his subpoena of PWC, Exxon's counsel Theodore Wells stated:

> . . . Judge Kinkeade on Thursday [October 13] issued an opinion, and his opinion said that ***we were going to get discovery against the Mass. AG, as we read it, the other attorney generals***, because we had made a sufficient showing of bad faith under the *Younger* doctrine, and that's when we decide to join them on Monday, but it's because of what happened in that opinion. . . . ***[R]ight now we have the right, as we read the order, to take the deposition of both the Mass. AG people and really everybody, as we read it, that was at that March 29th conference. And we would like to get the New York AG in the case as we work out these discovery issues. . . . We are going to try to take depositions of the state AG's.***

Tr. of Show Cause Hearing at 54-55 (emphasis added).[7]

Mr. Wells's representations to the New York Supreme Court confirm that Exxon intends to use this Court's Order as a blank check to depose both the New York and Massachusetts Attorneys General, "the Mass. AG people," and "really everybody" at the March 29 press conference, Tr. of Show Cause Hearing at 54-55, which would include several other sitting attorneys general and staff from the offices of nearly half of the country's state attorneys general. *See* Compl. App. Exh. A, at App. 002.[8]

---

[7] *Available at* https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=rybBsd0eV_PLUS_x7P/dCFLc97g==&system=prod (accessed Oct. 31, 2016).

[8] As further evidence of Exxon's intent, on October 24, without any offer to meet and confer on parameters for discovery, Exxon served her with over one hundred discovery requests, despite her pending Motion, among them a number of interrogatories and requests for admission improperly seeking information related to the *Massachusetts* court's jurisdiction over Exxon in the separate, pending *Massachusetts* litigation that Exxon filed.

The good faith factual basis for Attorney General Healey's investigation is in the record currently before this Court. By allowing Exxon to engage in such discovery, the Order would, however, constitute an unprecedented federal judicial intervention into state law enforcement investigations, setting a dangerous precedent that threatens to erode states' traditional investigatory authority. Exxon's proposal would also ignite months, if not years, of litigation over discovery—while the question whether Exxon broke the law goes unexamined.[9]

CONCLUSION

The Court should DISMISS Exxon's complaint with prejudice. In the alternative, the Court should reconsider and vacate its Order of October 13, 2016, pending further consideration of the Motion to Dismiss. In the event that the Court neither dismisses the complaint nor reconsiders its Order, the Attorney General respectfully requests that the Court transfer the action to the District of Massachusetts[10] or stay its order to allow the Attorney General to seek immediate review by the United States Court of Appeals for the Fifth Circuit.

[9] As well, the continuation of this lawsuit before this Court has already opened the door to a request for intervention (Doc. No. 87) inspired by Exxon's conspiracy theory-fueled efforts to avoid legitimate inquiries by the New York and Massachusetts Attorneys General, and now the United States Securities and Exchange Commission, into its potential unlawful conduct in failing to disclose to consumers and investors its knowledge of climate change and climate-driven risks to its business and assets. Responding to such requests will further burden Attorney General Healey's and the Court's resources.

[10] Exxon's request for additional briefing on transfer is superfluous, as transfer for improper venue under 28 U.S.C. § 1406(a) raises the same analysis raised by Attorney General Healey's fully briefed argument that venue is improper in this Court and, in any event, the Court could transfer the case *sua sponte*. *See, e.g.*, *Duru v. Georgia*, No. 3:15–cv–1884–B–BN, 2015 WL 4742517, *3 (N.D. Tex. Aug. 10, 2015); *Glazier Group, Inc. v. Mandalay Corp.*, Civ. A. No. H-06-2752, 2007 WL 2021762, at *13 (S.D. Tex. July 11, 2007).

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ *Douglas A. Cawley*

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: October 31, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 31, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ *Douglas A. Cawley*
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	§ § § § § § § § § § § § § § §	NO. 4:16-CV-469-K

EXXONMOBIL'S FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Exxon Mobil Corporation ("ExxonMobil") brings this action seeking declaratory and injunctive relief against Eric Tradd Schneiderman, the Attorney General of New York, in addition to Maura Tracy Healey, the Attorney General of Massachusetts. Attorneys General Schneiderman and Healey have joined together with each other as well as others known and unknown to conduct improper and politically motivated investigations of ExxonMobil in a coordinated effort to silence and intimidate one side of the public policy debate on how to address climate change. ExxonMobil seeks an injunction barring the enforcement of a subpoena issued by Attorney General Schneiderman and a civil investigative demand ("CID") issued by Attorney General Healey to ExxonMobil, and a declaration that the subpoena and CID violate ExxonMobil's rights under federal and state law. As demonstrated in this amended pleading, the same claims and arguments asserted against Attorney General Healey apply

with equal force against Attorney General Schneiderman. For its First Amended Complaint, ExxonMobil alleges as follows based on present knowledge and information and belief:

INTRODUCTION

1. Frustrated by the federal government's apparent inaction on climate change, Attorney General Schneiderman assembled a coalition of state attorneys general, including Attorney General Healey, to use law enforcement powers as a means of promoting a shared political agenda. According to an agreement executed by its members, this coalition embraced two goals.[1] First, it sought to "limit[] climate change" by pressing for a reduction in the use of fossil fuels.[2] Second, the coalition explicitly advocated for restrictions on speech and debate to accomplish that political agenda, listing as an objective "ensuring the dissemination of accurate information about climate change."[3] The coalition's agreement was concealed from the public until third parties recently obtained it from one coalition member under public records laws. Other coalition members continue to resist similar demands for transparency.

2. The coalition first publicly surfaced when Attorney General Schneiderman hosted a press conference in New York City on March 29, 2016,[4] with former Vice President and private citizen Al Gore as the featured speaker.[5] Attorney General Schneiderman pledged that the coalition would "deal with the problem of climate

---

1 *See* Paragraphs 52 to 53 below; *see also* Ex. R at App. 171–74.
2 Ex. V at App. 196.
3 *Id.*
4 *See* Paragraphs 27 to 39 below.
5 A transcript of the AGs United for Clean Power Press Conference, held on March 29, 2016, was prepared by counsel based on a video recording of the event, which is available at http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across. A copy of this transcript is attached as Exhibit B and is incorporated by reference.

change" by using law enforcement powers "creatively" and "aggressively" to force ExxonMobil[6] and other energy companies to support the coalition's preferred policy responses to climate change.[7] Considering climate change to be the "most pressing issue of our time," Attorney General Schneiderman said the coalition was "prepared to step into this [legislative] breach."[8]

3. Attorney General Healey similarly pledged "quick, aggressive action" by her office to "address climate change and to work for a better future."[9] She announced an investigation of ExxonMobil that she had already determined would reveal a "troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public."[10] The statements of Attorney General Schneiderman, Attorney General Healey, Mr. Gore and others made clear that the press conference was a purely political event.

4. It was also the result of years of planning and lobbying by private interests.[11] For nearly a decade, climate change activists and certain plaintiffs' attorneys have sought to obtain the confidential records of energy companies as a means of pressuring those companies to change their policy positions. A 2012 workshop examined ways to obtain the internal documents of companies like ExxonMobil for the purpose of "maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[12] The attendees at that

---

6 ExxonMobil was formed as a result of a merger between Exxon and Mobil on November 30, 1999. For ease of discussion, we refer to the predecessor entities as ExxonMobil throughout the Complaint.
7 Ex. B at App. 9 –10.
8 *Id.* at App. 9, 11.
9 *Id.* at App. 21.
10 *Id.* at App. 20.
11 *See* Paragraphs 40 to 51 below.
12 Ex. C at App. 56.

workshop concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[13]

5. In the months leading up to the press conference, these activists and attorneys met at the offices of the Rockefeller Family Fund in New York to discuss the "[g]oals of an Exxon campaign," which included to "delegitimize [it] as a political actor" and to "force officials to disassociate themselves from Exxon."[14]

6. The leadership of this group of activists and attorneys attended a meeting with "sympathetic state attorney[s] general" prior to the March 29 press conference. While this Court and the public have not been told what was discussed, a copy of the agenda for the meeting includes presentations on the "imperative of taking action now on climate change" and on "climate change litigation."[15]

7. Members of the coalition recognized that the behind-the-scenes involvement of these individuals—especially a private attorney likely to seek fees from any private litigation made possible by an attorney general-led investigation of ExxonMobil—could expose the special interests behind their so-called investigations and the bias underlying their deployment of law enforcement resources for partisan ends. When that same private attorney asked Attorney General Schneiderman's office what he should tell a reporter if asked about his involvement, Lemuel Srolovic, Chief of the Environmental Protection Bureau, asked the private attorney not to confirm his attendance at the conference.[16]

---

13 *Id.* at 40.
14 Ex. D at App. 67.
15 Ex. E at App. 70.
16 Ex. F at App. 80.

8. The investigations launched by Attorneys General Schneiderman and Healey amount to nothing more than an unlawful exercise of government power to further political objectives. The shifting justifications they have presented for their investigations are pretexts that have become more and more transparent over time.[17] Invoking state laws with limitations periods no longer than six years, the Attorneys General claim to be investigating whether ExxonMobil committed consumer or securities fraud by misrepresenting its knowledge of climate change.

9. But for more than a decade, ExxonMobil has widely and publicly confirmed[18] that it "recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant."[19] ExxonMobil has also publicly advocated a tax on carbon emissions since 2009.[20] Moreover, in conducting its business, ExxonMobil addresses the potential for future climate change policy by estimating a proxy cost of carbon, which seeks to reflect potential policies governments may employ related to the exploration, development, production, transportation or use of carbon-based fuels.[21] This cost, which in some regions may approach $80 per ton by 2040, has been included in ExxonMobil's Outlook for Energy for several years.[22] Further, ExxonMobil requires all of its business lines to include, where appropriate, an estimate of greenhouse gas-related emissions costs in their economics when seeking funding for capital investments.[23] Despite the applicable limitations periods and ExxonMobil's longstanding

---

17 *See* Paragraphs 74 to 76 below.
18 *See* Paragraphs 63 to 64 below.
19 Ex. G at App. 93; *see also* Ex. H at App. 103 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").
20 Ex. T at App. 182.
21 Ex. T at App. 190.
22 *Id.*
23 *Id.*

public recognition of the risks associated with climate change, the subpoena and the CID seek documents going back nearly four decades, seeking anything having to do with the issue.

10. Worse still, the New York Attorney General's subpoena and the Massachusetts Attorney General's CID target ExxonMobil's communications with those who the Attorneys General perceive to have different political viewpoints in the climate change debate. The subpoena seeks ExxonMobil's communications with oil and gas trade associations and industry groups that advocate on energy policy, and the CID demands ExxonMobil's communications with a list of organizations labeled by the coalition as so-called "climate deniers," *i.e.*, those who have expressed skepticism about the science of climate change or the coalition's preferred policies regarding climate change.[24] The CID also identifies statements made by ExxonMobil about the tradeoffs inherent in climate change policy and demands that ExxonMobil produce records supporting those disfavored statements.

11. Recent events have fully unmasked the pretextual nature of these investigations and the improper bias and unconstitutional objectives animating them.[25] When Attorney General Schneiderman launched his investigation, he claimed to be investigating ExxonMobil's scientific research in the 1970s and 1980s. Subject to the assertion of privilege, including First Amendment privileges, ExxonMobil initially provided documents to Attorney General Schneiderman with the expectation that his office would conduct a neutral, even-handed investigation. As events unfolded over the

[24] *See* Paragraphs 66 and 73 below.
[25] *See* Paragraphs 74 to 76 below.

ensuing months—including the politicized press conference in March and the secret agreement's coming to light over the summer—that expectation has evaporated.

12. Within the last month, and well after ExxonMobil commenced this action, Attorney General Schneiderman continued his practice of providing unprecedented briefings to the press on the status of his "investigation" of ExxonMobil and announced his expectation that a "massive securities fraud" will be uncovered. During one of those briefings, Attorney General Schneiderman conceded that he has abandoned his original inquiry into ExxonMobil's historical scientific research and is now pursuing a new theory of investor fraud. That shift further demonstrates that Attorney General Schneiderman is simply searching for a legal theory—any legal theory—to continue his efforts to pressure ExxonMobil and intimidate one side of a public policy debate.[26]

13. It is now indisputable that the subpoena and the CID were issued in bad faith to deter ExxonMobil from participating in ongoing public deliberations about climate change and to fish through decades of ExxonMobil's documents in the hope of finding some ammunition to enhance the coalition's, and its climate activist confederates', position in the policy debate over climate change. Through their actions, Attorneys General Schneiderman and Healey have deprived and will continue to deprive ExxonMobil of its rights under the United States Constitution, the Texas Constitution, and the common law.

14. ExxonMobil therefore seeks a declaration that the subpoena and the CID violate its rights under Articles One and Six of the United States Constitution; the First, Fourth, and Fourteenth Amendments to the United States Constitution; Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution; and constitutes an abuse of

[26] *See* Paragraphs 74 to 81 below.

process under the common law. ExxonMobil also seeks an injunction barring further enforcement of the subpoena and the CID. Absent an injunction, ExxonMobil will suffer imminent and irreparable harm for which there is no adequate remedy at law.

PARTIES

15. ExxonMobil is a public, shareholder-owned energy company incorporated in New Jersey with principal offices in the State of Texas. ExxonMobil is headquartered and maintains all of its central operations in Texas.

16. Defendant Eric Tradd Schneiderman is the Attorney General of New York. He is sued in his official capacity.

17. Defendant Maura Tracy Healey is the Attorney General of Massachusetts. She is sued in her official capacity.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over this action pursuant to Sections 1331 and 1367 of Title 28 of the United States Code. Plaintiff alleges violations of its constitutional rights in violation of Sections 1983 and 1985 of Title 42 of the United States Code. Because those claims arise under the laws of the United States, this Court has original jurisdiction over them. 28 U.S.C. § 1331. Plaintiff also alleges related state law claims that derive from the same nucleus of operative facts. Each of Plaintiff's state law claims—like its federal claims—is premised on statements by Attorneys General Schneiderman and Healey at the press conference and during the course of their investigations, their issuance of the subpoena and the CID, the demands made therein, and their intention to muzzle ExxonMobil's speech in Texas. This Court therefore has supplemental jurisdiction over those claims. 28 U.S.C. § 1367(a).

19. Venue is proper within this District pursuant to Section 1391(b) of Title 28 of the United States Code because all or a substantial part of the events giving rise to the claims occurred in the Northern District of Texas. The subpoena was emailed to ExxonMobil in Texas, and both the subpoena and CID target and seek to suppress speech emanating from Texas. They also require ExxonMobil to collect and review a substantial number of records stored or maintained in the Northern District of Texas.

FACTS

A. Attorney General Schneiderman Opens His Investigation of ExxonMobil with a Press Leak Followed by a Television Interview.

20. In November 2015, ExxonMobil received Attorney General Schneiderman's subpoena at its corporate headquarters in Irving, Texas.[27] Within hours, the press was reporting on the subpoena's issuance and its contents. An article in *The New York Times* reported that the subpoena "demand[ed] extensive financial records, emails and other documents" and that the "focus" of the investigation was on "the company's own long running scientific research" on climate change.[28] The article identified as sources "people with knowledge of the investigation," all of whom "spoke on the condition of anonymity saying they were not authorized to speak publicly about investigations."[29] To state the obvious, ExxonMobil did not alert *The New York Times* or any other media to the subpoena's existence or its contents.

21. This press leak was unsettling. It is customary for law enforcement officials to maintain confidentiality of their investigations, both to protect the integrity of the investigative process and to avoid unfair prejudice to those under investigation. But

[27] Ex. I at App. 108.
[28] Ex. A at App. 2.
[29] *Id.* at App. 2–3.

Attorney General Schneiderman's investigation of ExxonMobil has been conducted with a marked disregard for traditional concerns about confidentiality or unfair prejudice. Before ExxonMobil had even accepted service of the subpoena, it had received multiple media inquiries about the subpoena and could read about the investigation in online news accounts.[30]

22. Within a week of issuing the subpoena, Attorney General Schneiderman appeared on a *PBS NewsHour* segment, entitled "Has Exxon Mobil misle[d] the public about its climate change research?"[31] During that appearance, Attorney General Schneiderman described the focus of his investigation on ExxonMobil's purported decision to "shift[] [its] point of view" and "change[] tactics" on climate change after "being at the leadership of doing good scientific work" on the issue "[i]n the 1980s."[32] Attorney General Schneiderman said his probe extended to ExxonMobil's "funding [of] organizations."[33] While he did not refer to them expressly as his political adversaries, he derided them as "climate change deniers" and "climate denial organizations."[34] Those organizations included the "American Enterprise Institute, . . . the American Legislative Exchange Council, . . . [and the] American Petroleum Institute."[35]

23. Renewable energy was another focus of the interview. Attorney General Schneiderman said he was "concerned about" ExxonMobil's purported "overestimating the costs of switching to renewable energy," but he did not explain how any supposed error in that estimate could conceivably constitute a fraud or mislead any consumer.[36]

---

30 Ex. A at App. 2–7; Ex. J at App. 110–112.
31 Ex. K at App. 114.
32 *Id.* at App. 115.
33 *Id.* at App. 116.
34 *Id.* at App. 116, 118.
35 *Id.* at App. 116.
36 *Id.*. at App. 117.

24. Attorney General Schneiderman did not discuss ExxonMobil's oil and gas reserves or its assets at all during this interview.

25. Later that month at an event sponsored by *Politico* in New York, Attorney General Schneiderman said that ExxonMobil appeared to be "doing very good work in the 1980s on climate research" but that its "corporate strategy seemed to shift" later.[37] Attorney General Schneiderman claimed that the company had funded organizations that he labeled "aggressive climate deniers," again specifically naming his perceived political opponents at the American Enterprise Institute, the American Legislative Exchange Council, and the American Petroleum Institute.[38] Attorney General Schneiderman admitted that his "investigation" of ExxonMobil was merely "one aspect" of his office's efforts to "take action on climate change," commenting that society's failure to address climate change would be "viewed poorly by history."[39]

26. After this initial flurry of statements to the press, relative quiet followed, and ExxonMobil attempted in good faith to produce records demanded by the subpoena. It provided Attorney General Schneiderman with documents related to its historical research on global warming and climate change.

B. The "Green 20" Coalition Plans to Use Law Enforcement Tools for Political Goals.

27. The playing field changed on March 29, 2016, when Attorney General Schneiderman hosted a press conference in New York City. Calling themselves the "AGs United For Clean Power" and the "Green 20," Attorneys General Schneiderman and Healey were joined by other state attorneys general and Al Gore to announce their

[37] Ex. L at App. 123.
[38] *Id.*
[39] *Id.* at App. 124.

plan to take "progressive action to address climate change" by investigating ExxonMobil.[40] Attorneys general or staff members from over a dozen other states were in attendance, as was Claude Walker, the Attorney General of the United States Virgin Islands.

28. Expressing dissatisfaction with the supposed "gridlock in Washington" regarding climate change legislation, Attorney General Schneiderman said that the coalition had to work "creatively" and "aggressively" to respond to "th[e] most pressing issue of our time," namely, the need to "preserve our planet and reduce the carbon emissions that threaten all of the people we represent."[41]

29. Attorney General Healey agreed, opining that "there's nothing we need to worry about more than climate change."[42] She considered herself to have "a moral obligation to act" to remedy what she described as a threat to "the very existence of our planet," and she vowed to take "quick, aggressive action" to "address climate change and to work for a better future."[43]

30. Echoing those themes, Attorney General Walker stated that "the American people . . . have to do something transformational" because "[w]e cannot continue to rely on fossil fuel."[44] In private communications with other members of the Green 20 coalition, Attorney General Walker expressed his hope that the coalition's efforts would "identify[] other potential litigation targets" and "increase our leverage" against

---

40 Ex. M at App 127.
41 Ex. B at App. 9–11.
42 *Id.* at App. 20.
43 *Id.* at App. 20–21.
44 Ex. B at App. 24.

ExxonMobil to replicate or improve on an $800 million settlement he had previously obtained against another energy company.[45]

31. For the Green 20, the public policy debate on climate change was over and dissent was intolerable. Attorney General Schneiderman declared that he had "heard the scientists" and "kn[e]w what's happening to the planet."[46] To him, there was "no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up."[47] Clearing up that "confusion"—what the First Amendment safeguards as protected political speech—was an express objective of the Green 20.

32. According to Attorney General Healey, "[p]art of the problem has been one of public perception," causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[48] She promised that those who "deceived" the public—by disagreeing with her about climate change—"should be, must be, held accountable."[49] Mr. Gore agreed, denouncing those he accused of "deceiving the American people . . . about the reality of the climate crisis and the dangers it poses to all of us."[50]

33. The attorneys general embraced the renewable energy industry, in which Mr. Gore is a prominent investor and promoter, as the only legitimate response to climate change. Attorney General Schneiderman said, "We have to change conduct" to "mov[e] more rapidly towards renewables."[51] Attorney General Healey promised to "speed our

---

45 Ex. N at App. 131, 134.
46 Ex. B at App. 10.
47 *Id.*
48 *Id.* at App. 20.
49 *Id.*
50 *Id.* at App. 14.
51 *Id.* at App. 27–28.

transition to a clean energy future"[52] According to Attorney General Walker, "[w]e have to look at renewable energy. That's the only solution."[53] Mr. Gore urged the coalition of state attorneys general to investigate his business competitors for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[54]

34. The assembled attorneys general had nothing but praise for Mr. Gore, whose financial interests aligned with their political agenda. Attorney General Schneiderman enthused that "there is no one who has done more for this cause" than Mr. Gore, who recently had been "traveling internationally, raising the alarm," and "training climate change activists."[55] Equally embracing the public support of Mr. Gore, Attorney General Healey praised him for explaining so "eloquently just how important this is, this commitment that we make," and she thanked him for his "inspiration" and "affirmation."[56] Virgin Islands Attorney General Walker hailed the former Vice President as one of his "heroes."[57]

35. In an effort to legitimize what the attorneys general were doing, Mr. Gore cited perceived inaction by the federal government as the justification for action by the Green 20. He observed that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[58] Reading from the same script, Attorney General Schneiderman pledged that the Green 20 would "step into th[e] [legislative]

---

52 *Id.* at App. 21.
53 *Id.* at App. 24.
54 *Id.* at App. 17.
55 *Id.* at App. 13.
56 *Id.* at App. 20.
57 *Id.* at App. 23.
58 *Id.* at App. 17.

breach" created by this alleged federal inaction.[59] He then showed that his subpoena was a tool for achieving his political goals:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[60]

36. Attorney General Schneiderman linked the coalition's political efforts to his investigation of ExxonMobil, reminding the audience that he "had served a subpoena on ExxonMobil" to investigate "theories relating to consumer and securities fraud."[61] He also suggested that ExxonMobil faced a presumption of guilt in his office, arguing that ExxonMobil had been "using the best climate models" to determine "how fast the sea level is rising" and to "drill[] in places in the Arctic where they couldn't drill 20 years ago" while telling "the public for years that there were no 'competent models,' . . . to project climate patterns, including those in the Arctic."[62] Attorney General Schneiderman went on to suggest there was something illegal in ExxonMobil's alleged support for "organizations that put out propaganda denying that we can predict or measure the effects of fossil fuel on our climate, or even denying that climate change was happening."[63]

37. Attorney General Healey was equally explicit in her prejudgment of ExxonMobil. She stated that there was a "troubling disconnect between what Exxon

---

[59] *Id.* at App. 11.
[60] *Id.* at App. 12.
[61] *Id.* at App. 11.
[62] *Id.*
[63] *Id.*

knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[64] Those conclusions were announced weeks before she even issued the CID to ExxonMobil.

38. The political motivations articulated by Attorneys General Schneiderman, Healey, and Walker, Mr. Gore, and the other press conference attendees struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. The overtly political tone of the conference even prompted one reporter to ask whether the press conference and the investigations were "publicity stunt[s]."[65]

39. Even some members of the coalition were apprehensive about the expressly political focus of its ringleader. Attorney General Schneiderman's office circulated a draft set of "Principles" for the "Climate Coalition of Attorneys General" that included a "[p]ledge" to "work together" to enforce laws "that require progressive action on climate change."[66] Recognizing the overtly political nature of that pledge, an employee of the Vermont Attorney General's Office wrote: "We are thinking that use of the term 'progressive' in the pledge might alienate some. How about 'affirmative,' 'aggressive,' 'forceful' or something similar?"[67]

C. In Closed-Door Meetings, the Green 20 Meet with Private Interests.

40. The impropriety of the statements made by Attorneys General Schneiderman and Healey and the other members of the Green 20 at the press conference is surpassed only by what is currently known about what they said behind closed doors.

---

64 *Id.* at App. 20.
65 *Id.* at App. 25.
66 Ex. M at App. 127.
67 *Id.* at App. 126.

41. During the morning of the press conference, the attorneys general attended two presentations. Those presentations were not announced publicly, and they were not open to the press or general public. The identity of the presenters and the titles of the presentations, however, were later released by the State of Vermont in response to a request by a third party under that state's Freedom of Information Act.

42. The first presenter was Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists.[68] His subject was the "imperative of taking action now on climate change."[69]

43. According to the Union of Concerned Scientists, those who do not share its views about climate change and responsive policy make it "difficult to achieve meaningful solutions to global warming."[70] It accuses "[m]edia pundits, partisan think tanks, and special interest groups" of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[71]

44. Frumhoff has been targeting ExxonMobil since at least 2007. In that year, Frumhoff contributed to a publication issued by the Union of Concerned Scientists, titled "Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science."[72] This essay brainstormed strategies for "[p]utting the [b]rakes" on ExxonMobil's alleged "[d]isinformation [c]ampaign" on climate change.[73]

---

68 Ex. O at App. 138.
69 Ex. E at App. 70.
70 Ex. P at App. 146.
71 *Id.* at App. 146–47.
72 Ex. Q at App. 160, 163.
73 *Id.* at App. 166.

45. Matthew Pawa of Pawa Law Group, P.C., hosted the second presentation on the topic of "climate change litigation."[74] The Pawa Law Group, which boasts of its "role in launching global warming litigation,"[75] previously sued ExxonMobil and sought to hold it liable for causing global warming. That suit was dismissed because, as the court properly held, regulating greenhouse gas emissions is "a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[76]

46. Frumhoff and Pawa have sought for years to initiate and promote litigation against fossil fuel companies in the service of their political agenda and for private profit. In 2012, for example, Frumhoff organized and Pawa presented at a workshop entitled "Climate Accountability, Public Opinion, and Legal Strategies."[77] The workshop's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[78]

47. The 2012 workshop's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of fossil fuel companies like ExxonMobil.[79] Even then, "lawyers at the workshop" suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[80] The conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, *in maintaining pressure on the industry*

---

74 Ex. E at App. 70.
75 Ex. S at App. 176.
76 Ex. C at App. 41; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871–77 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).
77 Ex. C at App. 30–31, 61, 63.
78 *Id.* at App. 32–33.
79 *Id*. at App. 40–41.
80 *Id.* at App. 40.

that could eventually lead to its support for legislative and regulatory responses to global warming."[81]

48. In January 2016, Pawa and a group of climate activists met at the Rockefeller Family Fund offices to discuss the "[g]oals of an Exxon campaign."[82] The goals included:

- To establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm.
- To delegitimize [ExxonMobil] 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 drive divestment from Exxon.
- To drive Exxon & climate into [the] center of [the] 2016 election cycle.[83]

49. The investigations by the New York and Massachusetts Attorneys General and the Green 20 press conference represented the culmination of Frumhoff and Pawa's collective efforts to enlist state law enforcement officers to join them in a quest to silence political opponents, enact preferred policy responses to climate change, and obtain documents for private lawsuits.

50. The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the announced investigations. The day after the

[81] *Id.* at App. 56 (emphasis added).
[82] Ex. D at App. 67.
[83] *Id.*; *see also* Ex. U at App. 192–94.

conference, a reporter from *The Wall Street Journal* contacted Pawa.[84] Before responding, Pawa dutifully asked Lemuel Srolovic, Chief of Attorney General Schneiderman's Environmental Protection Bureau, "[w]hat should I say if she asks if I attended?"[85] Mr. Srolovic—the Assistant Attorney General who had sent the New York subpoena to ExxonMobil in November 2015—encouraged Pawa to conceal from the press and the public the closed-door meetings. He responded, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[86]

51. The press conference, the closed-door meetings with activists, and the activists' long-standing desire to obtain ExxonMobil's "internal documents" as part of a campaign to put "pressure on the industry," inducing it to support "legislative and regulatory responses to global warming,"[87] form the partisan backdrop against which the New York and Massachusetts investigations must be considered.

D. The Green 20 Attempt to Conceal their Misuse of Power from the Public.

52. Recognizing the need to avoid public scrutiny, Attorneys General Schneiderman, Healey, and fifteen others entered into an agreement pledging to conceal their activities and communications in furtherance of their political agenda from the public. In April and May of 2016, the Green 20 executed a so-called "Climate Change Coalition Common Interest Agreement," which memorialized the twin goals of this illicit enterprise.[88] The first goal listed in the agreement, "limiting climate change," reflected the coalition's focus on politics, not law enforcement.[89] The second goal, "ensuring the dissemination of accurate information about climate change," confirmed the coalition's

84 Ex. F at App. 80.
85 *Id.*
86 *Id.*
87 Ex. C at App. 40, 56.
88 Ex. V at App. 196–214.
89 *Id.* at App. 196.

willingness to violate First Amendment rights to carry out its agenda.[90] They appointed themselves as arbiters of what information is "accurate" as regards climate change and stood ready to use the full arsenal of law enforcement tools at their disposal against those who did not toe their party line.

53. To conceal communications concerning this unconstitutional enterprise from public disclosure, the signatories agreed to maintain the confidentiality of their communications by pledging that, "unless required by law," the parties "shall . . . refuse to disclose" any "(1) information shared in organizing a meeting of the Parties on March 29, 2016, (2) information shared at and after the March 29 meeting . . . and (3) information shared after the execution of this Agreement."[91] The common interest agreement stifles not only public debate about the motivations and legality of the Green 20, but also prevents the public from learning of the political genesis of the Green 20.

E. The Attorneys General of Other States Condemn the Green 20's Investigations.

54. The overtly political nature of the March 29 press conference drew a swift and sharp rebuke from other state attorneys general who criticized the Green 20 for using the power of law enforcement as a tool to muzzle dissent and discussions about climate change. The attorneys general of Alabama and Oklahoma stated that "scientific and political debate" "should not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."[92] They emphasized that "[i]t is

[90] *Id.*
[91] *Id.* at App. 196–97
[92] Ex. X at App. 225.

inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time."[93]

55. The Louisiana Attorney General similarly observed that "[i]t 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."[94] Likewise, the Kansas Attorney General questioned the "'unprecedented'" and "strictly partisan nature of announcing state 'law enforcement' operations in the presence of a former vice president of the United State[s] who, presumably [as a private citizen], has no role in the enforcement of the 17 states' securities or consumer protection laws."[95] The West Virginia Attorney General criticized the attorneys general for "abusing the powers of their office" and stated that the desire to "eliminate fossil fuels . . . should not be driving any legal activity" and that it was improper to "use the power of the office of attorney general to silence [] critics."[96]

56. In addition, on June 15, 2016, attorneys general from thirteen states wrote a letter to their "Fellow Attorneys General," in which they explained that the Green 20's effort "to police the global warming debate through the power of the subpoena is a grave mistake" because "[u]sing law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech."[97] The thirteen attorneys further described the Green 20's investigations as "far from routine" because (i) they "target[] a particular type of market participant," namely fossil fuel companies; (ii) the Green 20 had aligned itself "with the competitors of [its] investigative targets";

---

93 *Id.*
94 Ex. Y at App. 227.
95 Ex. QQ at App. 435.
96 Ex. RR at App. 438–39.
97 Ex. SS at App. 444.

and (iii) "the investigation implicates an ongoing public policy debate."[98] In conclusion, they asked their fellow attorneys general to "[s]top policing viewpoints."[99]

57. The actions of Defendants and their Green 20 allies caught the eye of Congress. The Committee on Science, Space, and Technology of the United States House of Representatives launched an inquiry into the investigations undertaken by the Green 20.[100] That committee was "concerned that these efforts [of the Green 20] to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve as the guardian of the legal rights of the citizens and to assert, protect, and defend the rights of the people."[101] Perceiving a need to provide "oversight" of what it described as "a coordinated attempt to attack the First Amendment rights of American citizens," the Committee requested the production of certain records and information from the attorneys general.[102] The attorneys general have thus far refused to voluntarily cooperate with the inquiry.[103]

58. After Attorney General Schneiderman refused to turn over documents requested by the House Committee and criticized its "unfounded claims about the NYOAG's motives,"[104] the House Committee issued subpoenas to Attorney General Schneiderman, Attorney General Healey, and eight environmental organizations in order to "obtain documents related to coordinated efforts to deprive companies, nonprofit organizations, scientists and scholars of their First Amendment rights."[105] It further

98 *Id.*
99 *Id.* at App. 447.
100 Ex. Z at App. 229.
101 *Id.* (internal quotation marks omitted).
102 *Id.* at App. 232.
103 *See, e.g.*, Ex. TT at App. 449; Ex. UU at App. 453.
104 Ex. AA at App. 237.
105 Ex. BB at App. 240.

criticized the attorneys general for "hav[ing] appointed themselves to decide what is valid and what is invalid regarding climate change."[106]

59. Several senators have urged United States Attorney General Loretta Lynch to confirm that the Department of Justice is not investigating, and will not investigate, United States citizens or corporations on the basis of their views on climate change.[107] The senators observed that the Green 20's investigations "provide disturbing confirmation that government officials at all levels are threatening to wield the sword of law enforcement to silence debate on climate change."[108] The letter concluded by asking Attorney General Lynch to explain the steps she is taking "to prevent state law enforcement officers from unconstitutionally harassing private entities or individuals simply for disagreeing with the prevailing climate change orthodoxy."[109]

F. The Subpoena and the CID Reflect the Improper Political Objectives of the Green 20 Coalition.

60. The twin goals of the Green 20—advancing a political agenda and trammeling constitutional rights in the process—are fully reflected in the subpoena and the CID.

The New York Subpoena

61. Attorney General Schneiderman is authorized to issue a subpoena only if (i) there is "some factual basis shown to support the subpoena";[110] and (ii) the information sought "bear[s] a reasonable relation to the subject matter under investigation and the public purpose to be served."[111] Neither standard is met here.

---

106 *Id.*
107 Ex. DD at App. 248.
108 *Id.*
109 *Id.*
110 *Napatco, Inc.* v. *Lefkowitz*, 43 N.Y.2d 884, 885–86 (1978).
111 *Myerson* v. *Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256 (1973).

62. The New York subpoena purports to investigate whether ExxonMobil violated New York State Executive Law Article 5, Section 63(12), General Business Law Article 22-A or 23-A and "any related violation, or any matter which the Attorney General deems pertinent thereto."[112] These statutes have at most a six-year limitations period.[113]

63. During the six-year limitations period, however, ExxonMobil made no statements that could give rise to fraud as alleged in the subpoena. For more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's *2006 Corporate Citizenship Report* recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and reasoned that "strategies that address the risk need to be developed and implemented."[114] In addition, in 2002, ExxonMobil, along with three other companies, helped launch the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."[115]

64. ExxonMobil has also discussed these risks in its public SEC filings. For example, in its 2006 10-K, ExxonMobil stated that "laws and regulations related to . . . risks of global climate change" "have been, and may in the future" continue to impact its operations.[116] Similarly, in its 2015 10-K, ExxonMobil noted that the "risk of climate

---

112 Ex. EE at App. 251.
113 *See, e.g.*, *State ex rel. Spitzer* v. *Daicel Chem. Indus., Ltd.*,840 N.Y.S.2d 8, 11–12 (1st Dep't 2007); *Podraza* v. *Carriero*, 630 N.Y.S.2d 163, 169 (4th Dep't 1995); *State* v. *Bronxville Glen I Assocs.*, 581 N.Y.S.2d 189, 190 (1st Dep't 1992).
114 Ex. H at App. 103.
115 Ex. FF at App. 270.
116 Ex. GG at App. 277–78.

change" and "current and pending greenhouse gas regulations" may increase its "compliance costs."[117] Long before the six-year statute of limitations period, ExxonMobil disclosed and acknowledged the risks that supposedly gave rise to Attorney General Schneiderman's investigation.

65. Notwithstanding that six-year limitations period and the absence of any conduct within that timeframe that could give rise to a statutory violation, the document requests in the subpoena span 39 years and extend to nearly every document ExxonMobil has ever created that in any way concerns climate change. For example, the subpoena demands "[a]ll Documents and Communications" from 1977 to the present, "[c]oncerning any research, analysis, assessment, evaluation, modelling or other consideration performed by You, on Your behalf, or with funding provided by You Concerning the causes of Climate Change."[118]

66. The subpoena includes 10 other similarly sweeping requests, such as (i) a demand for all documents and communications that ExxonMobil has produced since 1977 relating to "the impacts of Climate Change"; and (ii) exemplars of all "advertisements, flyers, promotional materials, and informational materials of any type" that ExxonMobil has produced in the last 11 years concerning climate change.[119] Other requests target Attorney General Schneiderman's perceived political opponents in the climate change debate by demanding ExxonMobil's communications with trade associations and industry groups that seek to promote oil and gas interests.[120]

---

117 Ex. HH at App. 284.
118 Ex. II at App. 257–58 (Request No. 1).
119 *Id.* at App. 258–59 (Request Nos. 2, 8).
120 *Id.* at App. 258 (Request No. 6).

67. In response to some of these requests, ExxonMobil asserted First Amendment privileges, including in connection with ExxonMobil scientists' participation in non-profit research organizations.

68. Moreover, almost all of the sweeping demands in the subpoena reach far beyond conduct bearing any connection to the State of New York. Ten of the eleven document requests make blanket demands for all of ExxonMobil's documents or communications on a broad topic, with no attempt to restrict the scope of production to documents or communications having any connection to New York.[121] Only two of the requests even mention New York.[122] And, while the subpoena seeks ExxonMobil's communications with five named organizations, only one of them is based in New York.[123]

The Massachusetts CID

69. The CID was served by Attorney General Healey on ExxonMobil's registered agent in Suffolk County, Massachusetts, on April 19, 2016. According to the CID, there is "a pending investigation concerning [ExxonMobil's] potential violations of [Mass. Gen. Laws] ch. 93A, § 2."[124] That statute prohibits "unfair or deceptive acts or practices" in "trade or commerce"[125] and has a four-year statute of limitations.[126] The CID specifies two types of transactions under investigation: ExxonMobil's (i) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (ii) "marketing and/or sale of securities" to Massachusetts

[121] *Id.* at App. 258–59 (Request Nos. 1, 10).
[122] *Id.* at App. 259 (Request Nos. 9, 11).
[123] *Id.* at App. 258 (Request No. 6).
[124] *Id.* at App. 286.
[125] Mass. Gen. Laws ch. 93A, §2(a).
[126] Mass. Gen. Laws ch. 260, § 5A.

investors.[127] The requested documents pertain largely to information related to climate change in the possession of ExxonMobil in Texas where it is headquartered and maintains its principal place of business.

70. ExxonMobil could not have committed the possible offenses that the CID purports to investigate for at least two reasons. First, at no point during the past five years—more than one year before the limitations period began—has ExxonMobil (i) sold fossil fuel derived products to consumers in Massachusetts, or (ii) owned or operated a single retail store or gas station in the Commonwealth.[128] Second, ExxonMobil has not sold any form of equity to the general public in Massachusetts since at least 2011, which is also well beyond the limitations period.[129] In the past decade, ExxonMobil has sold debt only to underwriters outside the Commonwealth, and ExxonMobil did not market those offerings to Massachusetts investors.[130]

71. The CID's focus on events, activities, and records outside of Massachusetts is demonstrated by the items it demands that ExxonMobil search for and produce. For example, the CID demands documents that relate to or support 11 specific statements.[131] None of those statements were made in Massachusetts.[132] The CID also seeks ExxonMobil's communications with 12 named organizations,[133] but only one of these organizations has an office in Massachusetts and ExxonMobil's communications

---

127 Ex. II at App. 86.

128 Any service station that sells fossil fuel derived products under an "Exxon" or "Mobil" banner is owned and operated independently. In addition, distribution facilities in Massachusetts, including Everett Terminal, have not sold products to consumers during the limitations period.

129 Ex. JJ at App. 317.

130 *Id.* This is subject to one exception. During the limitations period, ExxonMobil has sold short-term, fixed-rate notes, which mature in 270 days or less, to institutional investors in Massachusetts, in specially exempted commercial paper transactions. *Id.*; *see* Mass. Gen. Laws ch. 110A, § 402(a)(10); *see also* 15 U. S. C. § 77c(a)(3).

131 Ex. II at App. 299–300 (Request Nos. 8–11).

132 *Id.* (Request Nos. 8–11).

133 *Id.* at App. 298 (Request No. 5).

with the other 11 organizations likely occurred outside of Massachusetts. Finally, the CID requests all documents and communications related to ExxonMobil's publicly issued reports, press releases, and Securities and Exchange Commission ("SEC") filings, which were issued outside of Massachusetts,[134] and all documents and communications related to ExxonMobil's climate change research, which also occurred outside of Massachusetts.[135]

72. The absence of any factual basis for investigating ExxonMobil's alleged fraud is glaring, particularly in light of the heavy burden imposed by the CID. Spanning 25 pages and containing 38 broadly worded document requests, the CID unreasonably demands production of essentially any and all communications and documents relating to climate change that ExxonMobil has produced or received over the last 40 years. For example, the CID requests all documents and communications "concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions . . . and the effects of these emissions on the Climate" since 1976 and all documents and communications concerning "any research, study, and/or evaluation by ExxonMobil and/or any other fossil fuel company regarding the Climate Change Radiative Forcing Effect of" methane since 2010.[136] It also requests all documents and communications concerning papers and presentations given by ExxonMobil scientists since 1976[137] and demands production of ExxonMobil's climate change related speeches, public reports, press releases, and SEC filings over the last 20 years.[138] Moreover, it fails

---

134 *Id.* at App. 301–03 (Request Nos. 15–16, 19, 22).
135 *Id.* at App. 297–98, 300–03 (Request Nos. 1–4, 14, 17, 22).
136 *Id.* at App. 297, 302 (Request Nos. 1, 17).
137 *Id.* at App. 297–98. (Request Nos. 2–4).
138 *Id.* at App. 299 (Request No. 8 (all documents since April 1, 1997)); *id.* at App. 302–03 (Request No. 22 (all documents since 2006)); *id.* at App. 299–302 (Request Nos. 9–12, 14–16, 19 (all documents since 2010)). The CID also demands the testimony of ExxonMobil officers, directors, or managing

to reasonably describe several categories of documents by, for example, requesting documents related to ExxonMobil's "awareness," "internal consideration," and "decision making" with respect to certain climate change matters.[139]

73. The CID's narrower requests, however, are in some instances more troubling than its overly broad ones. They appear to target groups simply because they hold views with which Attorney General Healey disagrees. All 12 of the organizations that ExxonMobil is directed to produce its communications with have been identified by environmental advocacy groups as opposing policies in favor of addressing climate change or disputing the science in support of climate change.[140] The CID also targets statements that are not in accord with the Green 20's preferred views on climate change. These include statements of pure opinion on policy, such as the suggestion that "[i]ssues such as global poverty [are] more pressing than climate change, and billions of people without access to energy would benefit from oil and gas supplies."[141]

G. Attorney General Schneiderman Shifts Investigative Theories in a Search for Leverage over ExxonMobil in a Public Policy Debate.

74. After receiving Attorney General Schneiderman's subpoena, ExxonMobil made a good-faith effort to comply with his request for information about its climate change research in the 1970s and 1980s. ExxonMobil provided his office with well over one million pages of documents, at substantial cost to the Company, with the expectation that a fair and impartial investigation would be conducted. Less than a month ago, and well after ExxonMobil commenced this action against Attorney General Healey, the

---

agents who can testify about a variety of subjects, including "[a]ll topics covered" in the CID. *Id.* at App. 306 (Schedule B).

139 *Id.* at App. 298–99, 302 (Request Nos. 7–8, 18).

140 *See, e.g.*, Ex. VV at App. 455–57.

141 *See, e.g.*, Ex. II at App. 299–300 (Request No. 9).

spokesman for Attorney General Schneiderman stated that ExxonMobil's "historic climate change research" was no longer "the focus of this investigation."[142]

75. Rather than close the investigation, however, Attorney General Schneiderman simply unveiled another theory. As he explained in a lengthy interview published in *The New York Times*, Attorney General Schneiderman now focused on the so-called "stranded assets theory." His office intended to examine whether ExxonMobil had overstated its oil and gas reserves and assets by not accounting for "global efforts to address climate change" that might require it in the future "to leave enormous amounts of oil reserves in the ground"—*i.e.*, cause the assets to be "stranded."[143] Without offering—or possessing—any supporting evidence whatsoever, Attorney General Schneiderman inappropriately opined that there "may be massive securities fraud" at ExxonMobil based on its estimation of proved reserves and the valuation of its assets.[144]

76. Attorney General Schneiderman has directed ExxonMobil to begin producing documents on its estimation of oil and gas reserves, and ExxonMobil has engaged in a dialogue with his office about that request. It is now apparent that Attorney General Schneiderman is simply searching for a legal theory, however flimsy, that will allow him to pressure ExxonMobil on the policy debate over climate change. With the filing of this lawsuit, ExxonMobil is challenging what has now been revealed as a manifestly improper investigation being conducted in bad faith.

142 Ex. KK at App. 321.
143 Ex. MM at App. 351.
144 *Id.*

H. An Investigation of ExxonMobil's Reporting of Oil and Gas Reserves and Assets Is a Thinly Veiled Pretext.

77. Attorney General Schneiderman's decision to investigate ExxonMobil's reserves estimates under a stranded asset theory is particularly egregious because it cannot be reconciled with binding regulations issued by the SEC, which apply strict guidelines to the estimation of proved reserves.

78. Those regulations prohibit companies like ExxonMobil from considering the impact of future regulations when estimating reserves. To the contrary, they require ExxonMobil to calculate its proved reserves in light of "*existing* economic conditions, operating methods, and *government regulations*."[145] The SEC adopted that definition of proved reserves as part of its efforts to provide investors with a "comprehensive understanding of oil and gas reserves, which should help investors evaluate the relative value of oil and gas companies."[146] The SEC's definition of proved oil and gas reserves thus reflects its reasoned judgment about how best to supply investors with information about the relative value of energy companies, as well as its balancing of competing priorities, such as the agency's desire for comprehensive disclosures, that are not unduly burdensome, and which investors can easily compare. Attorney General Schneiderman's theory of "massive securities fraud" in ExxonMobil's reported reserves cannot be reconciled with binding SEC regulations about how those reserves must be reported.

79. The same rationale applies to Attorney General Schneiderman's purported investigation of the impairment of ExxonMobil's assets. The SEC recognizes as authoritative the accounting standards issued by the Financial Accounting Standards

---

145 *Modernization of Oil & Gas Reporting*, SEC Release No. 78, File No. S7-15-08, 2008 WL 5423153, at *66 (Dec. 31, 2008) (emphasis added).

146 *Id.* at *1.

Board ("FASB").[147] The FASB's rules concerning the impairment of assets require ExxonMobil to "incorporate [its] own assumptions" about future events when deciding whether its assets are impaired.[148] Contravening those rules, the Attorney General's theory requires that ExxonMobil adopt his assumptions about the likelihood of possible future climate change regulations and then incorporate those assumptions into its determination of whether an asset has been impaired. Attorney General Schneiderman cannot hold ExxonMobil liable for complying with federal law.

80. Attorney General Healey's investigation also purports to encompass the same unsound theory of fraud.[149] The decision to embrace this theory speaks volumes about the pretextual nature of the investigations being conducted by Attorneys General Schneiderman and Healey. To read the relevant SEC rules is to understand why ExxonMobil may not account for future climate change regulations when calculating its proved reserves. And to read the applicable accounting standards is to understand why it is impermissible for the Attorneys General to impose their assumptions about the financial impact of possible future climate change regulations on companies that are required to develop their own independent assumptions. The Attorneys General's claims that they are conducting a bona fide investigation premised on ExxonMobil's supposed failure to account for the Attorneys Generals' expectations regarding the financial impact of future regulations thus cannot be taken seriously. Their true objectives are clear: to

---

147 *See* Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333–401 (May 1, 2003).

148 *See* FASB Accounting Standards Codification 360-10-35-30; *see also* Statement of Financial Accounting Standards No. 144 ¶ 17.

149 Ex. NN at App. 367, 372; Opp'n. of Att'y Gen. Maura Healey to Pl. Exxon Mobil Corp.'s Mot. for Prelim. Inj. at 8, *ExxonMobil* v. *Healey*, No. 4:16-cv-00469-K (N.D. Tex. Aug. 8, 2016) (Dkt. No. 43) ("If substantial portions of Exxon's vast fossil fuel reserves are unable to be burned due to carbon dioxide emissions limits put in place to stabilize global average temperature, those assets—valued in the billions—will be stranded, placing shareholder value at risk.").

fish indiscriminately through ExxonMobil's records with the hope of finding some violation of some law that one of them might be empowered to enforce, or otherwise to harass ExxonMobil into endorsing the Green 20's policy views regarding how the United States should respond to climate change.

81. The desire of Attorneys General Schneiderman and Healey to impose liability on ExxonMobil for complying with SEC disclosure requirements, and the accounting methodologies incorporated in them, would create a direct conflict with federal law. Even if the New York or Massachusetts Attorneys General were to seek only to layer additional disclosure requirements beyond those imposed by the SEC, this would frustrate, and pose an obstacle to, Congress's and the SEC's efforts to create a uniform market for securities and provide consistent metrics by which investors can measure oil and gas companies on a relative basis.

I. ExxonMobil Files Suit to Protect its Rights.

82. ExxonMobil has challenged members of the Green 20 for violating its constitutional rights. Attorney General Walker issued a subpoena to ExxonMobil on March 15, 2016.[150] ExxonMobil responded by seeking a declaratory judgment that Attorney General Walker's subpoena was illegal and unenforceable because it violated ExxonMobil's rights under the United States and Texas constitutions.[151]

[150] Ex. WW at App. 459–77.
[151] Ex. LL at App. 323–49.

83. The Attorneys General of Texas and Alabama intervened in that action in an effort to protect the constitutional rights of their citizens. They criticized Attorney General Walker for undertaking an investigation "driven by ideology, and not law."[152] The Texas Attorney General called Attorney General Walker's purported investigation "a fishing expedition of the worst kind" and recognized it as "an effort to punish Exxon for daring to hold an opinion on climate change that differs from that of radical environmentalists."[153] The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas "is more than just a free speech case. It is a battle over whether a government official has a right to launch a criminal investigation against anyone who doesn't share his radical views."[154]

84. On June 30, 2016, Attorney General Walker and ExxonMobil entered into a joint stipulation of dismissal, whereby the Attorney General agreed to withdraw his subpoena and ExxonMobil agreed to withdraw its litigation challenging the subpoena.

85. ExxonMobil commenced this action on June 15, 2016, seeking a preliminary injunction from this Court that would bar Attorney General Healey from enforcing the CID. In an attempt to defend Attorney General Healey's constitutionally infirm CID, Attorney General Schneiderman, along with other attorneys general, filed an amicus brief on August 8, 2016.[155] They argued that Attorney General Healey has a

---

152 Ex. OO at App. 395.
153 Ex. CC at App. 244–45.
154 Ex. W at App. 216.
155 Mem. of Law for *Amici Curiae* States of Maryland, New York, Illinois, Iowa, Maine, Minnesota, Mississippi, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia and the U.S. Virgin Islands in Support of Def.'s Mot. to Dismiss and in Opp'n. to Pl.'s Motion for a Prelim. Inj. at 1, *Exxon Mobil Corp.* v. *Healey*, No. 4:16-CV-469-K (N.D. Tex. Aug. 8, 2016) (Dkt. No. 47).

"compelling interest in the traditional authority" of her office "to investigate and combat violations of state law."[156]

86. Recognizing that there was nothing "traditional" about Attorney General Healey's use of state power, attorneys general from eleven states filed an amicus brief in support of ExxonMobil's preliminary injunction motion.[157] "As chief legal officers" of their respective states, they explained that their investigative power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates."[158] As a result, they noted that "[u]sing law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech."[159] They concluded, "Regrettably, history is embroiled with examples where the legitimate exercise of law enforcement is soiled with political ends rather than legal ones. Massachusetts seeks to repeats that unfortunate history. That the statements and workings of the 'AG's United for Clean Power' are entirely one-sided, and target only certain participants in the climate change debate, speaks loudly enough."[160]

87. ExxonMobil's motion for a preliminary injunction against Attorney General Healey has been briefed and argued and is now submitted before this Court.

THE SUBPOENA AND CID VIOLATE EXXONMOBIL'S RIGHTS

88. The facts recited above demonstrate the pretextual nature of the stated reasons for the investigations conducted by Attorneys General Schneiderman and Healey.

---

156 *Id.*
157 Br. of Texas, Louisiana, South Carolina, Alabama, Michigan, Arizona, Wisconsin, Nebraska, Oklahoma, Utah, and Nevada as *Amici Curiae* in Supp. of Pl.'s Mot. for Prelim. Inj. at Attachment 2, *Exxon Mobil Corp.* v. *Healey*, No. 4:16-CV-469-K (N.D. Tex. Sept. 8, 2016) (Dkt. No. 63).
158 *Id.* at 1.
159 *Id*.
160 *Id.* at 9.

The statements Attorneys General Schneiderman and Healey made at the press conference and after, the climate change coalition common interest agreement, and recently released emails reveal the improper purpose of the investigations: to change the political calculus surrounding the debate about policy responses to climate change by (1) targeting speech that the Attorneys General perceive to support political perspectives on climate change that differ from their own, and (2) exposing ExxonMobil's documents that may be politically useful to climate activists.

89. The pretextual character of the investigations is brought into sharp relief when the scope of the subpoena and the CID—which demand nearly 40 years of records—are contrasted with the, at most, six-year limitations periods of the statutes that purportedly authorize the investigations.

90. Neither Attorney General Schneiderman nor Attorney General Healey (nor, indeed, any other public official) may use the power of the state to prescribe what shall be orthodox in matters of public concern. By deploying the law enforcement authority of their offices to target one side of a political debate, their actions violated—and continue to violate—the First Amendment.

91. It follows from the political character of the subpoena and the CID and their remarkably broad scope that they also violate the Fourth Amendment. Their burdensome demands for irrelevant records violate the Fourth Amendment's reasonableness requirement, as well as its prohibition on fishing expeditions. Indeed, the evolving justifications for the New York and Massachusetts inquiries confirm that they are investigations driven by the identity of the target, not any good faith belief that a law was broken.

92. The investigations also fail to meet the requirements of due process. Attorneys General Schneiderman and Healey have publicly declared not only that they believe ExxonMobil and other fossil fuel companies pose an existential risk to the planet, but also the improper purpose of their investigations: to silence ExxonMobil's voice in the public debate regarding climate change and to pressure ExxonMobil to support polices the Attorneys General favor. Even worse, Attorney General Schneiderman has publicly accused ExxonMobil of engaging in a "massive securities fraud" without any basis whatsoever, and Attorney General Healey declared, before her investigation even began, that she knew how it would end: with a finding that ExxonMobil violated the law.[161] The improper political bias that inspired the New York and Massachusetts investigations disqualifies Attorneys General Schneiderman and Healey from serving as the disinterested prosecutors required by the Constitution.

93. In the rush to fill what Attorney General Schneiderman described as a "[legislative] breach" in Congress regarding climate change, both he and Attorney General Healey have also openly and intentionally infringed on Congress's powers to regulate interstate commerce. Their investigations seek to regulate speech and conduct that occur almost entirely outside of New York and Massachusetts. Where a state seeks to regulate and burden out-of-state speech, as the subpoena and the CID do here, the state improperly encroaches on Congress's exclusive authority to regulate interstate commerce and violates the Dormant Commerce Clause.

94. Attorneys General Schneiderman and Healey's new focus on ExxonMobil's reporting of proved reserves and assets is equally impermissible. They seek to hold ExxonMobil liable for not taking into account possible future regulations

[161] Ex. B at App. 20–21.

concerning climate change and carbon emissions when estimating proved reserves and reporting assets. But that theory cannot be reconciled with the SEC's requirement that ExxonMobil calculate its proved reserves based only on "existing" regulations, not future regulations. This facet of the investigation, therefore, impermissibly conflicts with, and poses an obstacle to, the goals and purposes of federal law. That conflict is also present in the Attorneys General's investigation of how ExxonMobil determines under binding accounting rules whether an asset has become impaired.

95. The subpoena and the CID also constitute an abuse of process because they were issued for the improper purposes described above.

96. ExxonMobil asserts the claims herein based on the facts available to it in the public record from, among other things, press accounts and freedom of information requests made by third parties. ExxonMobil anticipates that discovery from Attorneys General Schneiderman and Healey, as well as third parties, will reveal substantial additional evidence in support of its claims.

EXXONMOBIL HAS BEEN INJURED BY THE SUBPOENA AND THE CID

97. The subpoena and the CID have injured, are injuring, and will continue to injure ExxonMobil.

98. ExxonMobil is an active participant in the policy debate about potential responses to climate change. It has engaged in that debate for decades, participating in the Intergovernmental Panel on Climate Change since its inception and contributing to every report issued by the organization since 1995. Since 2009, ExxonMobil has publicly advocated for a carbon tax as its preferred method to regulate carbon emissions. Proponents of a carbon tax on greenhouse gas emissions argue that increasing

taxes on carbon can "level the playing field among different sources of energy."[162] While Attorneys General Schneiderman and Healey and the other members of the Green 20 are entitled to disagree with ExxonMobil's position, no member of that coalition is entitled to silence or seek to intimidate one side of that discussion (or the debate about any other important public issue) through the issuance of baseless and burdensome subpoenas. ExxonMobil intends—and has a constitutional right—to continue to advance its perspective in the national discussions over how best to respond to climate change. Its right to do so should not be violated through this exercise of government power.

99. As a result of the improper and politically motivated investigations launched by Attorneys General Schneiderman and Healey, ExxonMobil has suffered, now suffers, and will continue to suffer violations of its rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and under Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution. Attorneys General Schneiderman's and Healey's actions also violate Articles One and Six of the United States Constitution and constitute an abuse of process under common law.

100. Acting under the laws, customs, and usages of New York and Massachusetts, Attorneys General Schneiderman and Healey have subjected ExxonMobil, and are causing ExxonMobil to be subjected, to the deprivation of rights, privileges, and immunities secured by the United States Constitution and the Texas Constitution. ExxonMobil's rights are made enforceable against Attorneys General Schneiderman and Healey, who are acting under the color of law, by Article One, Section Eight of the United States Constitution, and the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, all within the meaning and

[162] Ex. PP at App. 402.

contemplation of 42 U.S.C. § 1983, and by Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

101. Absent relief, Attorneys General Schneiderman and Healey will continue to deprive ExxonMobil of these rights, privileges, and immunities.

102. In addition, ExxonMobil is threatened with further imminent injury that will occur if it is forced to choose between conforming its constitutionally protected speech to Attorneys General Schneiderman and Healey's shared political views or exercising its rights and risking sanctions and prosecution.

103. The subpoena and the CID also threaten ongoing imminent injury to ExxonMobil because they subject ExxonMobil to an unreasonable search in violation of the Fourth Amendment. Complying with this unreasonably burdensome and unwarranted fishing expeditions would require ExxonMobil to collect, review, and produce millions more documents, and would cost millions of dollars.

104. If ExxonMobil's request for injunctive relief is not granted, and Attorneys General Schneiderman and Healey are permitted to persist in their investigations, then ExxonMobil will suffer these imminent and irreparable harms. ExxonMobil has no adequate remedy at law for the violation of its constitutional rights.

CAUSES OF ACTION

A. First Cause of Action: Conspiracy

105. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

106. The facts set forth herein demonstrate that, acting under color of state law, Attorneys General Schneiderman and Healey have agreed with each other, and with others known and unknown, to deprive ExxonMobil of rights secured by the law to all,

including those guaranteed by the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

107. In furtherance of these objectives, Attorneys General Schneiderman and Healey have, among other things, issued the unlawful subpoena and CID and entered the common interest agreement described above at paragraphs 52–53. The subpoena and CID were issued without having a good faith basis for conducting any investigation, and with the ulterior motive of preventing ExxonMobil from enjoying and exercising its rights protected by the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

108. ExxonMobil has been damaged, and has been deprived of its rights under the United States and Texas Constitutions, as a proximate result of the unlawful conspiracy entered into by Attorneys General Schneiderman and Healey. The conduct of Attorneys General Schneiderman and Healey therefore violates both 42 U.S.C. § 1985 and the Texas common law.

B. Second Cause of Action: Violation of ExxonMobil's First and Fourteenth Amendment Rights

109. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

110. The focus of the subpoena and the CID on one side of a policy debate—in an apparent effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in that debate—contravenes, and any effort to enforce the subpoena or CID would further contravene, the rights provided to ExxonMobil by the First

Amendment to the United States Constitution, made applicable to the State of New York and the Commonwealth of Massachusetts by the Fourteenth Amendment, and by Section Eight of Article One of the Texas Constitution.

111. The subpoena and the CID are impermissible viewpoint-based restrictions on speech, and they burden ExxonMobil's political speech. Attorneys General Schneiderman and Healey issued the subpoena and the CID based on their disagreement with ExxonMobil regarding how the United States should respond to the risks of climate change. And even if the subpoena and the CID had not been issued for that illegal purpose, they would still violate the First Amendment, because they burden ExxonMobil's political speech without being substantially related to any compelling governmental interest.

C. Third Cause of Action: Violation of ExxonMobil's Fourth and Fourteenth Amendment Rights

112. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

113. The issuance of the subpoena and the CID contravenes, and any effort to enforce the subpoena would further contravene, the rights provided to ExxonMobil by the Fourth Amendment to the United States Constitution, made applicable to the State of New York and the Commonwealth of Massachusetts by the Fourteenth Amendment, and by Section Nine of Article One of the Texas Constitution, to be secure in its papers and effects against unreasonable searches and seizures.

114. The subpoena and CID are each unreasonable searches and seizures because each of them constitutes an abusive fishing expedition into 40 years of ExxonMobil's records, without any legitimate basis for believing that ExxonMobil

violated New York or Massachusetts law. Their overbroad and irrelevant requests impose an undue burden on ExxonMobil and violate the Fourth Amendment's reasonableness requirement, which mandates that a subpoena be limited in scope, relevant in purpose, and specific in directive.

D. Fourth Cause of Action: Violation of ExxonMobil's Fourteenth Amendment Rights

115. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

116. The investigations conducted by Attorneys General Schneiderman and Healey contravene the rights provided to ExxonMobil by the Fourteenth Amendment to the United States Constitution and by Section Nineteen of Article One of the Texas Constitution not to be deprived of life, liberty, or property without due process of law.

117. The subpoena and CID deprive ExxonMobil of due process of law by violating the requirement that a prosecutor be disinterested. The statements by Attorneys General Schneiderman and Healey at the Green 20 press conference and elsewhere make clear that they are biased against ExxonMobil.

E. Fifth Cause of Action: Violation of ExxonMobil's Rights Under the Dormant Commerce Clause

118. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

119. Article I, Section 8 of the United States Constitution grants Congress exclusive authority to regulate interstate commerce and thus prohibits the States from doing so. The issuance of the subpoena and the CID contravenes, and any effort to enforce the subpoena and the CID would further contravene, the rights provided to ExxonMobil under the Dormant Commerce Clause.

120. The subpoena and the CID effectively regulate ExxonMobil's out-of-state speech while only purporting to investigate ExxonMobil's marketing and/or sale of energy and other fossil fuel derived products to consumers in New York and Massachusetts and its marketing and/or sale of securities to investors in New York and Massachusetts.

121. The subpoena and the CID demand documents that relate to (1) statements ExxonMobil made outside New York and Massachusetts, and (2) ExxonMobil's communications with organizations residing outside New York and Massachusetts. The subpoena and CID therefore have the practical effect of primarily burdening interstate commerce.

F. Sixth Cause of Action: Federal Preemption

122. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

123. Article VI, Clause 2 of the United States Constitution provides that the laws of the United States "shall be the supreme law of the land." Any state law that imposes disclosure requirements inconsistent with federal law is preempted under the Supremacy Clause.

124. Federal law requires ExxonMobil to calculate and report its proved oil and gas reserves based on "existing economic conditions, operating methods, and government regulations." This requirement reflects the SEC's reasoned judgment about how best to supply investors with information about the relative value of oil and gas companies, as well as its balancing of competing priorities, such as the agency's desire for comprehensive disclosures, that are not unduly burdensome, and which investors can easily compare. Similarly, accounting standards recognized as authoritative by the SEC

require ExxonMobil to use its own assumptions about future events when determining whether assets are impaired, not the assumptions of the Attorneys General. Attorneys General Schneiderman and Healey have stated that they seek to impose liability on ExxonMobil for failing to account for what they believe will be the financial impact of as-yet-unknown "carbon dioxide emissions limits put in place to stabilize global average temperature" in estimating and reporting ExxonMobil's proven reserves and valuing its assets. The Attorneys General therefore would seek to punish ExxonMobil for complying with federal law and the accounting standards embedded therein.

125. Even if the New York or Massachusetts Attorneys General were to seek only to layer additional disclosure requirements concerning oil and gas reserves and asset valuations beyond those imposed by the SEC, this would frustrate, and pose an obstacle to, Congress's and the SEC's efforts to create a uniform market for securities and provide consistent metrics by which investors can measure oil and gas companies on a relative basis.

126. Because these investigations under New York and Massachusetts law create a conflict with, and pose an obstacle to, federal law, the application of New York and Massachusetts law to this case is preempted.

G. Seventh Cause of Action: Abuse of Process

127. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

128. Attorneys General Schneiderman and Healey committed an abuse of process under common law by (1) issuing the subpoena and the CID to ExxonMobil without having a good faith basis for conducting an investigation; (2) having an ulterior motive for issuing and serving the subpoena and the CID, namely, an intent to prevent

ExxonMobil from exercising its right to express views with which they disagree; and (3) causing injury to ExxonMobil's reputation and violating its constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that Attorneys General Schneiderman and Healey be summoned to appear and answer and that this Court award the following relief:

1. A declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that the subpoena and the CID violate ExxonMobil's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution; violate ExxonMobil's rights under Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution; and violate the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution;

2. A declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that the issuance of the subpoena and the CID constitute an abuse of process, in violation of common law;

3. A preliminary and permanent injunction prohibiting enforcement of the subpoena and of the CID;

4. Such other injunctive relief to which Plaintiff is entitled; and

5. All costs of court together with any and all such other and further relief as this Court may deem proper.

Dated: October 17, 2016

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(*pro hac vice*)
State Bar No. 24054300
patrick.j.conlon@exxonmobil.com
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
(*pro hac vice*)
twells@paulweiss.com
Michele Hirshman
(*pro hac vice*)
mhirshman@paulweiss.com
Daniel J. Toal
(*pro hac vice*)
dtoal@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

Justin Anderson
(*pro hac vice*)
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, a copy of the foregoing instrument was served on the following party via the Court's CM/ECF system in accordance with the Federal Rules of Civil Procedure:

Maura Healey
Massachusetts Attorney General's Office
One Ashburton Place
Boston, MA 02108-1518
Phone: (617) 727-2200

/s/ Ralph H. Duggins
Ralph H. Duggins

REESE GORDON MARKETOS
COMMERCIAL TRIAL LAWYERS

Pete Marketos
Partner

pete.marketos@rgmfirm.com
p (214) 382-9803
f (214) 501-0731

November 16, 2016

Via E-File
The Honorable Ed Kinkeade
United States District Court for the Northern District of Texas
1100 Commerce Street, Room 1625
Dallas, Texas 75242-1003

Re: *Exxon Mobil Corp. v. Eric Tradd Schneiderman, Attorney General of New York, in his official capacity, and Maura Tracy Healey, Attorney General of Massachusetts, in her official capacity;* Docket No. 4:16-CV-00469-K

Dear Judge Kinkeade:

In our status conference this morning, Your Honor asked the parties to work together on the special master proposal suggested by the Court during the call. To that end, we consulted with our clients, and Jeff Tillotson and I spoke at length with Nina Cortell and Justin Anderson this afternoon. We explained that there are payment concerns with respect to a special master in general. We also specifically discussed conflict concerns.

Rather than throwing up roadblocks, however, we told Exxon's counsel that we understood the Court expected us to come up with a solution that would resolve the discovery issues that led to Exxon's request for a status conference on Monday. We proposed that the parties consent to a magistrate to address the jurisdictional and other discovery disputes while the Court is in trial. That proposal would resolve both the payment and conflict concerns above. Exxon's counsel stated that they would discuss that proposal with their client and get back to us. We have not yet heard from Exxon on that proposal.

We recognize that Your Honor needs no reminder from lawyers of the option to refer matters to a magistrate. Nonetheless, we thought the solution a simple one and wanted Your Honor to know we had proposed it.

Sincerely yours,

Pete Marketos

cc: All counsel of record *via e-file*

CERTIFICATE OF SERVICE

The undersigned certifies that on November 16, 2016, the foregoing document was submitted to the clerk of the U.S. District Court, Northern District of Texas, using the electronic case filing system (CM/ECF) of the court. I certify that the document was served on all known counsel of record electronically as authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Pete Marketos

McKool Smith

Douglas A. Cawley
Direct Dial: (214) 978-4972
dcawley@McKoolSmith.com

300 Crescent Court
Suite 1500
Dallas, TX 75201

Telephone: (214) 978-4000
Facsimile: (214) 978-4044

November 17, 2016

The Honorable Ed Kinkeade
U.S. District Judge
United States District Court
1100 Commerce Street, Room 1625
Dallas, Texas 75242

RE: *Exxon Mobil Corporation v. Maura Tracy Healey, Attorney General of Massachusetts, in her official capacity*; Case No. 4:16-cv-469-K, In the United States District Court for the Northern District of Texas, Fort Worth Division.

Dear Hon. Judge Kinkeade:

As a followup to Mr. Marketos' letter of last night, Attorney General Healey joins Attorney General Schneiderman in agreeing to the referral of discovery issues to a magistrate judge of the court.

Regards,

s/ Douglas A. Cawley

Douglas A. Cawley

cc: All counsel of record

CERTIFICATE OF SERVICE

The undersigned certifies that on November 17, 2016, the foregoing document was submitted to the clerk of the U.S. District Court, Northern District of Texas, using the electronic case filing system (CM/ECF) of the court. I certify that the document was served on all known counsel of record electronically as authorized by Federal Rule of Civil Procedure 5(b)(2).

s/ Douglas A. Cawley
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	No. 4:16-CV-469-K

MOTION TO VACATE AND RECONSIDER NOVEMBER 17 ORDER, STAY DISCOVERY, AND ENTER A PROTECTIVE ORDER

Defendant Massachusetts Attorney General Maura Healey respectfully requests that the Court: (1) vacate and reconsider its Order of November 17, 2016 (Doc. No. 117, "Second Discovery Order"), directing Attorney General Healey to appear for a deposition at the United States District Court for the Northern District of Texas on December 13,2016; (2) stay discovery until dispositive motions filed in response to the First Amended Complaint are decided; and (3) issue a protective order precluding Exxon from taking the deposition of Attorney General Healey. The Court should vacate and reconsider the Second Discovery Order and stay discovery for several reasons, as detailed in the accompanying Memorandum of Law.

1. On November 10, 2016, the Court granted Exxon's motion to amend its complaint to add the New York Attorney General as a defendant and to add additional claims (Doc. No. 99), and on the same day, Exxon filed its First Amended Complaint (Doc. No. 100, "Amended Complaint"). The Court's October 13, 2016 discovery order (Doc. No. 73, "First Discovery

Order") is based on Exxon's *initial* Complaint, which has been superseded by the First Amended Complaint, and is, therefore, moot. Discovery should be stayed pending filing of defendants' responsive pleadings (due November 28, 2016) and resolution of any dispositive motions in connection with Exxon's Amended Complaint.

2. Well-established precedent requires that depositions of high-ranking officials only occur in exceptional circumstances that are not present here.

3. Ordering discovery here for the purpose of challenging an administrative subpoena is improper and Exxon has failed to satisfy its burden of showing the need for such discovery.

4. As set forth in Attorney General Healey's Motion to Reconsider the Court's First Discovery Order (Doc. Nos. 78 and 79), discovery on the question whether to apply *Younger* abstention in this case is unwarranted, where the Court lacks personal jurisdiction over Attorney General Healey and the Court must dismiss the case on that ground. In any event, the record reflects ample evidence of Attorney General Healey's good faith basis for issuing a civil investigative demand ("CID") to Exxon.

5. Discovery should be stayed while the Court has the opportunity to fully consider the substantial arguments raised concerning personal jurisdiction and the lack of need for jurisdictional discovery. The Attorney General deserves to have her arguments considered by the Court and have the opportunity to seek appellate review, if necessary, before discovery were to actually commences.

PRAYER

For these reasons, Attorney General Healey requests that the Court vacate and reconsider its Second Discovery Order, stay discovery until dispositive motions filed in response to the First

Amended Complaint are decided, and issue a protective order precluding Exxon from taking the deposition of Attorney General Healey.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys,

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: November 25, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 26, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ *Douglas A. Cawley*
Douglas. A. Cawley

CERTIFICATE OF CONFERENCE

On November 22, 2016, Melissa Hoffer conferred by phone with Paul Weiss, an attorney representing Exxon Mobil Corporation in this action, and advised him that Attorney General Healey would be filing a motion to reconsider the jurisdictional discovery order in the case on Wednesday, November 23, 2016. Counsel for Exxon did not consent to the relief sought in the motion. On November 23, 2016, Melissa Hoffer informed Justin Anderson, an attorney representing Exxon Mobil Corporation, by e-mail that Attorney General Healey would instead be filing her motion to reconsider on Friday, November 25, 2016. Mr. Anderson acknowledged recipt of the e-mail.

s/ Richard A. Kamprath
Richard A. Kamprath

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	)	No. 4:16-CV-469-K

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE ORDER FOR DEPOSITION OF ATTORNEY GENERAL HEALEY AND STAY DISCOVERY, AND FOR A PROTECTIVE ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Attorney General Healey respectfully requests that the Court vacate its Order of November 17, 2016, (Doc. No. 117, "Deposition Order," Appendix Exhibit ("App. Exh.") 1), stay discovery and all proceedings in this case pending resolution of her motions to dismiss, and issue a protective order barring ExxonMobil's ("Exxon") deposition of her on December 13, which Exxon has also now noticed, from going forward. This Court has still not ruled on Attorney General Healey's August 8, 2016, motion to dismiss Exxon's first complaint on the grounds that the Court lacks personal jurisdiction over her, the case is not ripe, and venue is improper in this district—each of which may be decided on the basis of clear, controlling legal precedent without any factual development.[1] Nevertheless, the Court's *sua sponte* Deposition Order directs Attorney General Healey to (i) appear for a deposition at the federal courthouse in Dallas on December 13, and (ii) respond to "written discovery ten (10) days from the date the discovery is served." The Court set the Dallas location for the deposition, despite the fact that Exxon itself had noticed a deposition of Attorney General Healey to take place in Boston, Massachusetts, at the offices of its local counsel. Moreover, because written discovery had been served by Exxon on Attorney General Healey on October 24, 2016, the Court's order makes the discovery responses due on a date that had already passed.[2] The Court ordered this deposition

---

[1] Attorney General Healey will be filing on November 28 her motion to dismiss Exxon's First Amended Complaint (Doc. No. 100), which will advance these same arguments.

[2] Exxon informed the Court during the November 16, 2016, telephone status conference with the parties (Doc. No. 114, App. Exh. 2, at 020), that it had served its written discovery on the Attorney General on October 24, 2016, and thus the ten-day period ordered by the Court had already passed before issuance of the Second Discovery Order. As Attorney General Healey reported to the Court she would do during the status conference, she now has filed timely

and written discovery even though the Massachusetts Superior Court will hear on December 7, 2016, argument on the merits of Exxon's motion to set aside the civil investigative demand ("CID") issued by Attorney General Healey to Exxon, as provided under Massachusetts law. *See* Mass. Gen. Laws ch. 93A, § 6(7).

In issuing both its October 13, 2016, order authorizing discovery against the Attorney General (Doc. No. 73, "Jurisdictional Discovery Order," App. Exh. 3), and its Deposition Order directing her to travel to Texas for a deposition, despite this Court's clear lack of personal jurisdiction over her, the clear absence of a ripe dispute, and the fact that this Court is an improper venue for the dispute, the Court has made errors of law and abused its discretion.

Further, long-settled Supreme Court and Fifth Circuit precedent make plain that it is wholly improper here to order the deposition of Attorney General Healey, as the chief law enforcement officer for the state of Massachusetts. *See, e.g.*, *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *In re Stone*, 986 F.2d 898, 904-05 (5th Cir. 1993); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995).

And, in any event, Exxon is not entitled to discovery in an action contesting an administrative subpoena. The Court acted *sua sponte* in authorizing discovery in mid-October, even though a party resisting a lawful administrative subpoena has a substantial burden to meet to obtain discovery from the government. *See Davila v. United States*, 713 F.3d 248, 263-64 (5th Cir. 2013).

Allowing discovery to go forward here would set a troubling precedent by allowing the *target* of a state government investigation to confound and effectively halt law state enforcement

---

objections under Rule 26, but not responses, to this discovery. App. Exh. 2 at 013.

efforts by filing suit in the target's favored federal forum and permitting the target to "investigate the investigator"—even in the absence of personal jurisdiction, and without requiring the target to satisfy its lawful burden to obtain such extraordinary discovery.

Accordingly, the Court should vacate the Jurisdictional Discovery and Deposition Orders, stay all discovery, issue a protective order prohibiting Exxon from taking the deposition of Attorney General Healey, and defer all activity in this action by Exxon while the Massachusetts Superior Court considers Exxon's motion to set aside the CID. *See In re Office of Inspector Gen.*, 933 F.2d 276, 277-78 (5th Cir. 1991) (vacating district court orders that allowed discovery by party resisting administrative subpoena and ordering court to defer all action in preemptive challenge to subpoena); *In re FDIC,* 58 F.3d at 1060 (issuing writ of mandamus to preclude testimony of three members of the Board of the FDIC when magistrate judge "clearly abused his discretion" in permitting deposition in absence of findings of exceptional circumstances).

II. BACKGROUND

Attorney General Healey issued her CID to Exxon in April 2016, as authorized by the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 6. She did so because the information her office had reviewed, principally Exxon's own documents and statements, supports her belief that Exxon has engaged in unfair or deceptive acts or practices that have harmed Massachusetts investors and consumers. *Id.*, § 2. The New York Attorney General already had issued a similar subpoena to Exxon, with which Exxon had been complying at the time Attorney General Healey issued her CID; by the fall of 2016, Exxon had produced over a million pages of documents to New York. Later, in August 2016, the United States Securities and Exchange Commission opened its own investigation into Exxon's representations to

shareholders in light of its knowledge of climate change.[3] Exxon itself announced on October 28 that it anticipates it will need to make the largest ever write down of the valuation of its fossil fuel reserves in the history of the company[4]; and shareholders commenced an action against Exxon on November 7, in this very District, alleging federal securities violations in connection with Exxon's failure to disclose the impacts of climate change on the value of its assets. *See Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-3111-L (N.D. Tex. Nov. 7, 2016).

III. PRIOR PROCEEDINGS

As set forth in Attorney General Healey's prior filings with the Court, *see* Memorandum of Law in Support of Motion to Reconsider (Doc. No. 79), at 1-3, Attorney General Healey's Opposition to Exxon's Motion for Leave to File an Amended Complaint, Doc. No. 94, at 3-4, following the September 19, 2016, hearing on Exxon's motion for a preliminary injunction, the Court ordered the parties to meet and confer, and then to mediate, their dispute over Exxon's decision to provide over a million pages of documents to the New York Attorney General in response to his similar subpoena, but none to Attorney General Healey.[5] *See also* Transcript of

---

[3] Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, WALL ST. J., Sept. 20, 2016, available at http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593.

[4] Clifford Krauss, *Exxon Concedes It May Need to Declare Lower Value for Oil in Ground*, N.Y. TIMES, Oct. 28, 2016, http://www.nytimes.com/2016/10/29/business/energy-environment/exxon-concedes-it-may-need-to-declare-lower-value-for-oil-in-ground.html; Bradley Olson & Lynn Cook, *Exxon Warns on Reserves As It Posts Lower Profit: Oil producer to examine whether assets in an area devastated by low price and environmental concerns should be written down*, WALL ST. J., Oct. 28, 2016, http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202.

[5] The New York Attorney General subsequently moved in New York State court to compel compliance with its November 5, 2015 subpoena to Exxon, on November 14, 2016. *See* Memorandum of Law in Support of Motion to Compel, App. Exh. 4. The New York court will

Preliminary Injunction Hearing, App. Exh. 6, at 142. Shortly after the parties reported to the Court that mediation had been unsuccessful, the Court, acting *sua sponte*, issued its Jurisdictional Discovery Order, and Attorney General Healey immediately sought reconsideration of that Order. In response to the Jurisdictional Discovery Order, Exxon served on Attorney General Healey over 100 requests for written discovery and documents[6], noticed depositions of her and two of her staff,[7] noticed the depositions of New York Attorney General Schneiderman and two of his staff, and subpoenaed eleven third parties.[8] The Court has not ruled on Attorney General Healey's motion to reconsider the Jurisdictional Discovery Order. App. Exh. 2 at 012.

On November 16, 2016, the Court held a telephone conference on the status of discovery pursuant to the Jurisdictional Discovery Order and asked the parties to consent to appointment of the Honorable James Stanton (whom the Court previously had assigned as a paid mediator) as a discovery special master, to be paid at the rate of $750 per hour by the parties. *Id.* at 021-026. Later that same day, the New York Attorney General's office ("AGO") informed the Court that it could not consent to the appointment of Judge Stanton, due to costs, and, as an alternative, proposed the appointment of a federal magistrate judge to oversee discovery. Nov. 16, 2016, Ltr. from NY AGO (Doc. No. 113). On November 17, Attorney General Healey joined that proposal.

---

hear argument on the motion to compel on December 15, 2016. *See* Docket Appearance Detail, *In the Matter of the Application of the People of the State of New York*, No. 451963/2016 (N.Y. S. Ct.), App. Exh. 5.

[6] Those requests include 33 requests for documents, several of which include sub-requests; 24 interrogatories, some of which contain subsidiary interrogatories; and 74 requests for admission.

[7] On November 18, Exxon agreed to withdraw without prejudice the deposition notices of those two staff attorneys.

[8] Those subpoenas have a return date of November 23, 2016.

Nov. 17, 2016, Ltr. from MA AGO (Doc. No. 116). Later on November 17—and fewer than twenty-four hours after the New York Attorney General informed the Court that he could not consent to the appointment of a paid special master—the Court entered its Deposition Discovery Order directing Attorney General Healey to appear for a deposition in the federal courthouse in Dallas, Texas on December 13, 2016. The Court also advised New York Attorney General Schneiderman to be available for a deposition on December 13, and stated that it would enter an order to that effect once Attorney General Schneiderman filed his answer to the Amended Complaint.[9]

The contentious, even baiting, nature of the discovery sought by Exxon pursuant to the Court's *sua sponte* Jurisdictional Discovery Order demonstrates why permitting discovery here is unwarranted, and, to the extent it is a reasonable indicator of the types of questions Exxon would direct to Attorney General Healey at her deposition, it illustrates precisely why depositions of high ranking officials is heavily disfavored. For example, Interrogatory No. 24 asks Attorney General Healey to: "State, identify, and describe the basis for Your belief that investigating a single company will help combat or limit climate change." In Request for Admission No. 13, Exxon asks Attorney General Healey to "Admit that, as of March 29, 2016, You had formed a belief that the United States should work towards a 'clean energy future.'" In Request No. 20, Exxon seeks production of: "Any and all documents concerning or reflecting Your speeches regarding climate change, renewable energy, or ExxonMobil." Such discovery improperly seeks to inquire into the Attorney General's policy beliefs, the details of the

[9] Meanwhile, the Massachusetts Superior Court has set a hearing date for Exxon's challenge to the CID for December 7, 2016. *See* Notice of Hearing, App. Exh. 7.

investigation, her deliberative process and mental impressions, and is well beyond the scope of what could be permissible in this action.

IV. ARGUMENT

A. THE COURT ABUSED ITS DISCRETION IN ORDERING DISCOVERY WHERE IT IS EVIDENT THAT IT LACKS PERSONAL JURISDICTION AND THE CASE IS UNRIPE, AND VENUE IS IMPROPER.

To proceed in this Court, Exxon must establish that "both the forum state's long-arm statute and federal due process permit the court to exercise personal jurisdiction." *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Exxon can establish neither here. In *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008) (*Stroman*), the Court found personal jurisdiction lacking in a suit in Texas by a Texas company against an Arizona state official challenging her enforcement of Arizona law against the plaintiff. *Stroman* compels the Court to dismiss this case on the same grounds without discovery or further proceedings. *See also Saxton v. Faust*, No. 3:09-cv-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010) (dismissal suit in Texas against Idaho judge for lack of personal jurisdiction). This Court can, and should, decide the essential question of personal jurisdiction over the defendant before considering other dispositive grounds for dismissal. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

In addition, Exxon's suit should be dismissed under *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016), which found unripe a challenge to an investigatory subpoena issued by Mississippi Attorney General Hood. *Id*. at 224-26. Reversing the district court, the Fifth Circuit ordered dismissal of Google's challenge to the subpoena and vacated the district court's injunction against Attorney General Hood. *Id.* at 228. The court held that injunctive relief was

not warranted because Google would have an adequate remedy at law defending any action to enforce the subpoena that Attorney General Hood might later file in a Mississippi state court. For that reason, the action was not ripe. *Id.* at 226.

Further, dismissal is mandated because venue is improper in this district under 20 U.S.C. § 1391(b). Venue is improper because the defendant does not reside in Texas; the events giving rise to Exxon's purported claims did not occur in Texas; and the court lacks jurisdiction over the defendants. No discovery or fact development is necessary in this regard. The failure to address plainly improper venue, at the outset of a case, is an abuse of discretion. *See In re: Volkswagen of America, Inc*., 545 F.3d 304 (5th Cir. 2008) (granting mandamus petition after finding that the district court committed a "clear abuse of discretion" in retaining venue).

In these circumstances, the Court should not have authorized discovery by Exxon. *See Ruhrgas,* 526 U.S. at 577 ("[W]ithout jurisdiction the court cannot proceed at all in any cause . . . .") (internal citations omitted). Instead, "concerns of federalism, and of judicial economy and restraint" should have guided the Court to dismiss Exxon's claims for lack of personal jurisdiction before considering more complex bases for dismissal. *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000). Indeed, the Court's Jurisdictional Discovery Order acknowledges that its questions about *Younger* abstention are independent of other grounds for dismissal raised by Attorney General Healey. See App. Exh. 3 at 034. As *Stroman* teaches, there is no reason to examine abstention doctrines, when there is a jurisdictional basis for dismissal. 513 F.3d at 482 n.3. Accordingly, the Court should now vacate the discovery orders, stay further proceedings, and rule on the Attorney General's impending motion to dismiss.

B. THE COURT WAS NOT EMPOWERED TO ORDER A DEPOSITION OF ATTORNEY GENERAL HEALEY, AND COMPOUNDED ITS ERROR BY PURPORTING TO ORDER THAT SHE TRAVEL TO TEXAS TO BE DEPOSED.

The federal courts of appeal, including the Fifth Circuit, have repeatedly recognized that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985); *accord*, *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) ("exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted. . . [T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.") (internal citations omitted); *In re Stone*, 986 F. 2d 898, 904 (5th Cir. 1993) (deposition of high-ranking government officials justified only in "egregious" cases); *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir.1993) (parties noticing the deposition of a high ranking official must demonstrate "a special need or situation compelling such testimony."); *In re Office of Inspector Gen.*, 933 F.2d 276, 277-78 (5th Cir. 1991) (exceptional circumstances required to depose high-ranking government officials).

These cases derive from *United States* v. *Morgan*, 313 U.S. 409 (1941), which emphasized that federal courts may not properly compel the testimony of agency decision-makers to probe their mental processes. And *Morgan* admonished against exactly what the Court has ordered here: the deposition of a high-ranking official regarding the reasons for taking official action, "including the manner and extent of [her] study of the record and [her] consultation with subordinates." *Id*. at 422; *see also Lederman v. New York City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013). Authorizing this inquiry works a substantial intrusion

on Massachusetts's sovereign interest in investigation violations of its state law. *Cf. Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp*., 429 U.S. 252, 268 n.18 (1977) ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government).[10]

That is particularly true here, where the Court acted *sua sponte* in issuing its Deposition Order, and Exxon has failed entirely to meet its burden to make the "strong showing" of exceptional circumstances required to permit the deposition of Attorney General Healey. *See, e.g.*, *EEOC v. Exxon Corp*., No. 3:95-cv-1311, 1998 WL 50464, at *1 (N.D. Tex. 1998) (vacating order for deposition of EEOC chairman where "Exxon has failed to make the strong showing necessary for a finding of exceptional circumstances" based on its contention that "Chairman Casellas may have personal knowledge of the facts at issue in this case because of statements he made to the media and because he is a top policy maker for the Commission"); *see also In re Office of Inspector Gen.*, 933 F.2d at 278 ("[W]e have concluded that it is normally

[10] For these reasons, every court of appeals to consider the question has concluded that it is an appropriate exercise of an appellate court's mandamus authority to preclude the testimony of high-ranking officials absent an exceptional showing of need. *See, e.g.*, *In re United States*, 624 F.3d 1368, 1373 (11th Cir. 2010) (issuing a writ of mandamus to preclude the deposition of the EPA Administrator); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) ("The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere.") (issuing writ of mandamus to preclude deposition of the Vice President's chief of staff); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (issuing writ of mandamus to preclude testimony of Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (issuing writ of mandamus to preclude testimony of three members of the Board of the FDIC); *United States Board of Parole* v. *Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (issuing writ of mandamus to preclude deposition of members of the Board of Parole); *see also In re Northern Marianas Islands*, 694 F.3d 1051 at 1059-1061; *In re SEC ex rel Glotzer*, 374 F.3d 184, 187-192 (2d Cir. 2004) (issuing writ of mandamus to preclude deposition of SEC attorneys).

inappropriate to 'probe the mental processes and motives of the individual decision-maker, rather than to question the objective legal validity of the institutional decision.'") (quoting *Kent Corp. v. NLRB*, 530 F.2d 612, 620 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976)).

Indeed, the basis for the discovery Orders, as articulated by the Court—the "question of whether Attorney General Healey issued the CID with bias or prejudgment about what the investigation of Exxon would discover," App. Exh. 3 at 036-037, which the Court linked to its analysis of whether *Younger* abstention applies here—does not constitute exceptional circumstances that would warrant taking the deposition of a high ranking official. *Cf. Fed. Trade Comm'n v. Standard Oil*, 449 U.S. 232, 241 (1980) (whether federal agency had "reason to believe" defendant violated FTC Act, and could therefore proceed with investigation, was not ripe for judicial review during investigative phase). And moreover, as explained below, there is no conceivable need for discovery in these proceedings, especially at this early stage.[11]

Courts should be particularly reluctant to permit the direct examination of a government prosecutor at the outset of her investigation. Doing so imposes "systemic costs of particular concern." *Wayte v.United States*, 470 U.S. 598, 607-08 (1985) ("Examining the basis of a prosecution delays the . . . proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."); *see United States v. Hamm*, 659 F.2d 624, 628 (5th Cir. 1981); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 71-73 (1984)

[11] And even where "extraordinary circumstances" are present—which is not the case here—even a high-ranking public official who has "first-hand knowledge" related to the litigation should not be deposed if other persons can "provide the necessary information." *Bogan* v. *City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007).

(identifying interests injured by allow respondent to challenge underlying basis of EEOC's notice of investigation); *cf. Fed. Trade Comm'n v. Standard Oil*, 449 U.S. 232, 241 (1980) (whether federal agency had "reason to believe" defendant violated FTC Act not ripe for judicial review). Turning an investigation into "trial-like proceeding" would "make a shambles of the investigation and stifle the agency in its gathering of facts." *Hannah v. Larche*, 363 U.S. 420, 443-44 (1960).

An additional reason for protecting officials is to protect their time. *In re FDIC*, 58 F.3d at 1060 ("High ranking government officials have greater duties and time constraints than other witnesses.") (quoting *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir.) (per curiam), cert. denied, 510 U.S. 989 (1993)). But, the Court's Deposition Discovery Order, in fact, appears designed to *maximize* the burden placed upon Attorney General Healey, by requiring her to travel from Boston to Dallas for a deposition, thus consuming at least two business days. *Cf. Kessler*, 985 F.2d at 512 (vacating order for 30-minute telephonic deposition of FDA commissioner as too burdensome). Appearing for this deposition would interfere substantially with Attorney General Healey's responsibilities and impair her effectiveness as the state's chief law enforcement officer. *See In re EEOC*, 709 F. 2d 392, 398 (5th Cir. 1983) ("efficiency of the EEOC would suffer terribly if its commissioners were subject to deposition in every routine subpoena enforcement proceeding"). In addition, preparing and appearing for this particular deposition would unnecessarily keep Attorney General Healey from performing her official duties. *Kessler*, 985 F.2d at 512 (11th Cir.1993) (parties noticing the deposition of a high ranking official must demonstrate "a special need or situation compelling such testimony").

C. THERE IS NO JUSTIFICATION FOR AUTHORIZING ANY DISCOVERY BY EXXON IN THIS COLLATERAL ACTION RESISTING THE ATTORNEY GENERAL'S LAWFUL MASSACHUSETTS CID.

The role of a court in an action challenging an administrative subpoena is "strictly limited." *Sandsend Fin. Cons. v. Federal Home Loan Bank Bd.*, 878 F.2d 875, 879 (5th Cir.1989) (citing *FTC v. Texaco*, 555 F.2d 862, 872 (D.C.Cir. 1977)); *see Burlington N. R.R. Co. v. Office of Inspector Gen.*, 983 F.2d 631, 637-38 (5th Cir.1993) (recognizing the "summary nature of administrative subpoena enforcement proceedings"). In general, a party like Exxon is "not entitled to engage in counter-discovery to find grounds for resisting a subpoena." *In re Office of Inspector Gen.*, 933 F.2d at 278 (internal citations omitted). Courts disfavor expansive litigation challenging administrative subpoenas because, fundamentally, "law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). The interest in summary disposition also pertains where the party resisting the subpoena has filed a preemptive action, as Exxon has here. *See In re Office of Inspector Gen.*, 933 F.2d at 277 (ordering district court to "defer and suspend all activity, specifically including discovery" in a railroad's preemptive suit challenging administrative subpoena).

Here, the Court abused its discretion in ordering discovery *sua sponte*, where Exxon had a heavy burden to demonstrate the need for and propriety of discovery. "As the party opposing dismissal and requesting discovery, the plaintiffs bear the burden of demonstrating the necessity of discovery." *Davila v. United States*, 713 F.3d 248, 263–64 (5th Cir. 2013) (citing *Freeman v. United States*, 556 F.3d 326, 341–42 (5th Cir. 2009); *see also SEC v. McGoff*, 647 F.2d 185, 187-88 (D.C. Cir. 1981) (upholding Securities and Exchange Commission subpoena; rejecting

discovery notwithstanding assertion that investigation was "politically motivated"). Because the Court ordered discovery *sua sponte*, Exxon has at no time shown why discovery is necessary in these proceedings, and indeed it is not.

D. NO DISCOVERY IS NECESSARY OR APPROPRIATE TO EXPLORE WHETHER "BAD FAITH" PRECLUDES *YOUNGER* ABSTENTION.

In evaluating whether to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), the Court must consider: (1) whether there is an ongoing state criminal, civil, or administrative proceeding; (2) whether the state proceedings involve important state interests; and (3) whether the state court provides an adequate forum to hear the claims raised in the federal complaint. *Women's Cmty. Health Ctr. of Beaumont, Inc. v. Tex. Health Facilities Comm'n*, 685 F.2d 974, 979 (5th Cir. 1982) (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)). Abstention should be ordered "absent bad faith, harassment or a patently invalid state statute." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013). These exceptions, however, provide only a "very narrow gate for federal intervention in pending state [] proceedings." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). "The bad faith exception to *Younger* is extremely narrow and applies only in cases of proven harassment or prosecutions undertaken without hope of obtaining valid convictions." *McNatt v. Texas*, 37 F.3d 629 (5th Cir. 2004) (per curiam); *see also Wightman v. Tex. Sup. Ct.*, 84 F.3d 188, 190 (5th Cir. 1996) (bad faith exception to *Younger* is narrow and granted "parsimoniously").

The concerns identified in the Court's Jurisdictional Discovery Order would not trigger the "bad faith" exception to *Younger*, and so cannot justify discovery. The Court's basis for ordering jurisdictional discovery was that certain statements Attorney General Healey made, if true, may show bias or prejudgment about what the investigation would discover, constituting

bad faith in issuing the CID. App. Exh. 3 at 036-037. The Court misapprehends what Massachusetts law requires for the issuance of a CID by the Attorney General. A belief on her part that Exxon had engaged in unfair business practices would not constitute bad faith; rather, under Massachusetts law, the Attorney General may *only* issue a CID *if she believes that the target is violating Chapter 93A. See* Mass. Gen. Laws ch. 93A, § 6(1); *Harmon Law Offices, P.C. v. Att'y Gen.*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013); Attorney General Healey's Opposition to Exxon's Motion for Preliminary Injunction (Doc. No. 43, "PI Opp.") at 3, 21-22. In other words, the Attorney General's belief that Exxon has violated Chapter 93A does not, under Massachusetts law, constitute bias; rather, it is a legally *required* predicate to issuance of a CID. *Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1367 (Mass. 1989); *Harmon Law Offices*, 991 N.E.2d at 1103.

Moreover, as Attorney General Healey has shown in prior submissions, it is common for state Attorneys General to coordinate on investigations, *see* Attorney General Healey's Opposition to Plaintiff's Motion for Preliminary Injunction (Doc. No. 43) at 4 (discussing joint investigations), and it is common for state attorneys general to make statements to press about those investigations.[12] Attorney General Healey issued her CID to Exxon, as set forth above, because the information the AGO reviewed supports a belief that Exxon has violated and is violating the Massachusetts consumer protection act, and therefore met the threshold required for issuance of CIDs.

---

[12] *See, e.g.*, Office of the Attorney General of Texas, "Attorney General Paxton Announces Investigation of Volkswagen," Sept. 24, 2015, available at https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-announces-investigation-of-volkswagen.

The determination as to the application of the bad faith exception to *Younger* abstention is properly made by reviewing the information that the Attorney General had before her at the time the CID was issued. *Smith v. Hightower*, 693 F.2d 359, 374 (5th Cir. 1982). As set forth in her motion to reconsider the Jurisdictional Discovery Order, that Order cited only *allegations made by Exxon* as grounds justifying jurisdictional discovery; the Court appears to have ignored completely the ample facts in the record and cited by Attorney General Healey that show the good faith basis for issuance of the CID. *See* App. Exh. 3 at 036-037. For example, the AGO reviewed numerous internal Exxon documents made public in 2015 as a result of investigative reports by journalists, Memorandum of Law in Support of Motion to Reconsider, at 7-8 (referencing numerous appended documents, totaling more than 200 pages), illustrating Exxon's extensive knowledge—decades ago—of climate change, and the likely effects of climate change on ecological systems and Exxon's own business. Attorney General Healey also reviewed statements and representations made by Exxon, *id.*, that appear to be inconsistent with Exxon's knowledge of climate change and its impacts on ecological systems and Exxon's business and assets. Under the Fifth's Circuit's test for determining whether bad faith precludes application of *Younger* abstention, those facts are sufficient to establish that the CID was issued in good faith, and it is reversible error not to consider a target's wrongdoing in determining a prosecutor's bad faith. *Hightower*, 693 F.2d at 369 (evidence of violations supports inference that prosecutor is fulfilling her duty in good faith).[13] In light of these facts, Exxon cannot meet its burden of

[13] In *Hightower*, the Fifth Circuit held that the district court erred in failing to consider evidence of crimes and wrongdoing in determining whether the prosecution was brought in good or bad faith. *Id.* at 369. Strong evidence of a good-faith basis for prosecution precludes a finding of bad faith, even where a bad faith motive exists—and no such motive exists here. *Id.* at 369 n.25; *see*

proving that the CID was issued in bad faith, so there is no need for jurisdictional discovery.

Further, answering the question whether the AGO had sufficient information upon which to form a belief that there may have been a violation of Chapter 93A does not require the deposition of Attorney General Healey. Attorney General Healey has already apprised the Court of her sufficient grounds for issuing the CID. Exxon itself has placed much such evidence into the record before this Court. *See, e.g.*, Exxon First Amended Complaint, App. at Exh. NN.

E. DISCOVERY SHOULD BE STAYED UNTIL AFTER THE COURT RULES ON MOTIONS TO DISMISS THE AMENDED COMPLAINT.

On November 10, 2016, this Court granted Exxon's motion to amend its complaint to add the New York Attorney General as a defendant and to add certain additional claims (Doc. No. 99). On the same day, Exxon filed its first amended complaint (Doc. No. 100, "Amended Complaint"). The Massachusetts Attorney General anticipates filing a motion to dismiss all claims in the Amended Complaint on November 28, 2016.

The Court's Jurisdictional Discovery Order is based on Exxon's initial Complaint, which has been superseded by Exxon's Amended Complaint. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (amended complaint was "the only effective complaint"). The First Discovery Order is therefore moot and should be vacated. All discovery should be stayed pending filing of

---

also Wilson v. Thompson, 593 F.2d 1375, 1388 (5th Cir. 1979) (remanding bad faith determination to district court to determine whether the state's purpose in bringing a criminal prosecution was to retaliate for or deter constitutionally protected conduct and, even if it was, whether the State would have reached the same decision to prosecute if any impermissible purpose had not been considered); *Bunch v. City of Wichita Falls*, No. Civ.A.7:05 CV 97, 2005 WL 1766363, at * 1 (N.D. Tex. Jul. 26, 2005) ("Assuming *arguendo* that Plaintiffs [established that criminal prosecution was motivated in part by retaliation for or deterrence of protected conduct], the evidence presented . . . clearly showed that the City would have fined Plaintiffs anyway.")

defendants' responsive pleadings and resolution of any dispositive motions directed to Exxon's Amended Complaint. Accordingly, no purpose will be served in permitting discovery while the motions are pending.

V. CONCLUSION

For the reasons stated here, Attorney General Healey respectfully requests that the Court vacate the Jurisdictional and Deposition Discovery Orders, issue a protective order preventing the December 13 deposition from going forward, and stay all discovery and other proceedings in this case until it has ruled on her impending motion to dismiss the amended complaint.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (pro hac vice)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (pro hac vice)
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (pro hac vice)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (pro hac vice)
andy.goldberg@state.ma.us
Peter C. Mulcahy (pro hac vice)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL

One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: November 25, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 25, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	)	No. 4:16-CV-469-K

DEFENDANT ATTORNEY GENERAL MAURA HEALEY'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendant, Massachusetts Attorney General Maura Healey, by and through counsel, hereby moves to dismiss this case pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

1. The Attorney General's Office ("AGO") issued a civil investigative demand ("CID") to Exxon Mobil Corporation's ("Exxon") registered agent in Boston, Massachusetts, on April 19, 2016. The Attorney General issued the CID to Exxon pursuant to Mass. Gen. Laws ch. 93A, § 6, to investigate potential unfair and deceptive acts or practices in Exxon's marketing and sale of fossil fuel-derived products and securities to consumers and investors in Massachusetts, in violation of Massachusetts law.

2. On June 15, 2016, Exxon filed the complaint initiating this case, alleging that the CID violated its constitutional rights and was an abuse of process.

3. On June 16, 2016, Exxon also filed a petition and an emergency motion to set aside or modify the CID or issue a protective order in Massachusetts Superior Court, with allegations very similar to those in the aforementioned complaint. *See In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Attorney General*, No. 16-CV-1888F (Mass. Super. Ct. Jun. 16, 2016).

4. On November 10, 2016, the Court granted Exxon's motion to amend its original complaint and file its First Amended Complaint (Doc. No. 100).

5. The Court should dismiss this case with prejudice for several reasons.

6. First, the Court should dismiss this case under Rule 12(b)(2), because it lacks personal jurisdiction over Attorney General Healey. The Texas long-arm statute does not reach the Attorney General when sued in her official capacity, and the Attorney General lacks "minimum contacts" with Texas, such that exercise of personal jurisdiction over her by the Court would be unfair and unreasonable and, therefore, in violation of due process. The Court should dismiss this case for lack of personal jurisdiction without further inquiry. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000).

7. Second, the Court should dismiss this case under Rule 12(b)(1), because the dispute is not ripe under *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016), where Exxon has the opportunity to challenge the CID and any future enforcement in the Massachusetts Superior Court.

8. Third, the Court should dismiss this case under Rule 12(b)(3), because this district is an improper venue, given that the Attorney General's offices are located in Massachusetts, and the events underlying Exxon's complaint—*i.e.*, the issuance of the CID—occurred in

Massachusetts, not Texas.

9. Fourth, the Court should dismiss Exxon's Texas state law claims under Rule 12(b)(1) because they are barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

10. Fifth, the Court should dismiss this case under Rule 12(b)(1) because abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is warranted here. There are ongoing state civil proceedings in Massachusetts related to the CID at issue here; those proceedings implicate important state interests; and the Massachusetts state court provides an adequate forum to hear the claims raised in this matter.

11. Sixth and finally, the Court should dismiss this case under Rule 12(b)(6) because the First Amended Complaint does not satisfy the minimum pleading standards of Rule 8(a)(2) by failing to state plausible grounds for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

PRAYER

For these reasons and those set out in the Memorandum of Law in Support of Defendant Attorney General Maura Healey's Motion to Dismiss the First Amended Complaint, the Court should DISMISS Exxon's First Amended Complaint as to Attorney General Healey with prejudice.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys,

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: November 28, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 28, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley
Douglas. A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	)	No. 4:16-CV-469-K

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ATTORNEY GENERAL MAURA HEALEY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Constitutional Provisions

I. INTRODUCTION

Exxon Mobil Corporation's ("Exxon") First Amended Complaint (Doc. No. 100; hereinafter, "Complaint" or "Compl."), like its original complaint, is subject to immediate dismissal because, first and foremost, this Court lacks personal jurisdiction over Attorney General Healey. As the Fifth Circuit has observed, a foreign state official sued in her official capacity is not subject to suit as a "non-resident" "doing business" in Texas under the state's long-arm statute. And were that not the case, an assertion of jurisdiction would violate due process because Attorney General Healey has had no contacts with the State of Texas in connection with the Civil Investigative Demand ("CID") she served on Exxon in Massachusetts. For these reasons alone, the Court should dismiss the case now, before any further inquiry into other grounds for dismissal and the resulting affront to Massachusetts's state sovereignty that continued proceedings would entail.

There are additional grounds for immediate dismissal of this action, none of which requires any factual inquiry. First, the case is unripe under *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016). There, the Fifth Circuit rejected Google's request to enjoin enforcement of an administrative subpoena served by the Mississippi Attorney General because Google had an adequate remedy at law in the Mississippi courts; here, Exxon has a remedy in Massachusetts state court. Second, dismissal is mandated because venue remains improper in this district under 28 U.S.C. § 1391(b). And third, Exxon's state-law claims under Texas Constitution and common law are plainly barred by the Eleventh Amendment under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), and should be dismissed for lack of subject matter jurisdiction.

Fourth, Exxon's petition to set aside Attorney General Healey's CID will be heard on the merits on December 7, 2016, in Massachusetts state court. Those state proceedings provide the

statutorily prescribed forum for Exxon to raise its objections to the CID under Massachusetts law, and to the extent the case is not immediately dismissed for lack of personal jurisdiction or the other dispositive grounds identified above, dismissal is warranted under *Younger v. Harris*, 401 U.S. 37 (1971).

Finally, Exxon's Complaint and voluminous attachments contain no facts that plausibly support its fanciful conspiracy theories about Attorney General Healey's motives. Instead, they confirm that Attorney General Healey's CID was issued based on her belief, well-supported by evidence in publicly-released internal Exxon documents and apparently inconsistent public statements by Exxon, that Exxon, in violation of the Massachusetts consumer protection statute, has misled Massachusetts consumers and investors about the contribution of its products to climate change and the risks posed by climate change to its business and assets. Indeed, other investigators are scrutinizing Exxon's disclosures on the same and related issues, including the United States Securities and Exchange Commission, the FBI, and the New York Attorney General, with whose year-old investigative subpoena Exxon was complying until the company added him as a defendant to this lawsuit in its First Amended Complaint.

II. STATEMENT OF PRIOR PROCEEDINGS

Attorney General Healey is the chief law enforcement official of the Commonwealth of Massachusetts. Mass. Gen. Laws ch. 12, § 3. Attorney General Healey also has various enumerated statutory powers, including enforcement of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("Chapter 93A"), which proscribes unfair and deceptive practices in the conduct of trade or commerce. Pursuant to Chapter 93A, the Attorney General is authorized to protect investors, consumers, and other persons in the state against unfair and deceptive business practices by promulgating regulations, conducting investigations through

CIDs, and instituting litigation. *See* Mass. Gen. Laws ch. 93A, §§ 2(c), 4, and 6. CIDs under Chapter 93A are a crucial tool for gaining information regarding whether an entity under investigation has violated the statute, and they are employed routinely by the Attorney General's Office.

On April 19, 2016, the Attorney General issued a CID to Exxon pursuant to Chapter 93A, § 6. The CID was served on Exxon's registered agent in Massachusetts, and Exxon confirmed that service was proper. *See* Compl. ¶ 69. Attorney General Healey issued the CID as part of her investigation of whether Exxon violated Chapter 93A, § 2, and the regulations promulgated thereunder, by failing to disclose fully to investors and consumers its knowledge of the serious potential for climate change, the likely contribution of fossil fuels (the company's chief product) to climate change, and the risks of climate change, including to Exxon's own assets and businesses.

On June 15, 2016, Exxon filed this action against Attorney General Healey, in her official capacity, alleging that the Attorney General's investigation violates its constitutional rights and is an abuse of process (Doc. No. 1). Also on June 15, Exxon filed a motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID (Doc. No. 8). The following day, June 16, 2016, Exxon filed a petition in Massachusetts state court under Chapter 93A, § 6(7), to set aside or modify the CID along with an emergency motion seeking the same relief and to stay the Massachusetts proceeding pending the outcome of this litigation.

Attorney General Healey moved to dismiss this Texas action on August 8, 2016 (Doc. No. 41), pursuant to an agreed schedule approved by the Court. Attorney General Healey urged dismissal on the grounds that the Court lacked personal jurisdiction over her, the Court should abstain under *Younger*, the case was unripe under *Google*, and venue was improper in this

district. The Court did not schedule a hearing on the Attorney General's motion to dismiss.

The Court did, however, hear argument on Exxon's motion for a preliminary injunction on September 19, 2016. At the hearing, counsel for Attorney General Healey outlined the arguments set forth in her fully briefed motion to dismiss, as these demonstrate that Exxon cannot demonstrate a likelihood of success on the merits in order to obtain injunctive relief. In addition, counsel explained that Exxon faced no irreparable harm, since it had already produced hundreds of thousands of pages of documents to the New York Attorney General in response to a similar subpoena issued by him in November 2015. *See* Hearing Transcript. (Doc. No. 68) 88:1-13. Upon learning of Exxon's compliance with the New York subpoena, the Court directed the parties to attempt to resolve Exxon's refusal to produce any documents to Massachusetts and subsequently ordered the parties to participate in mediation. The parties were unable to reach a resolution. On October 13, 2016, the Court entered an order (Doc. No. 73) authorizing discovery to ascertain whether the bad faith exception to *Younger* abstention applies in this case.[1]

On October 17, 2016, Exxon moved for leave to amend its original complaint in this action to add the New York Attorney General as a defendant, enjoin the New York investigation, and add certain claims against Attorney General Healey (Doc. No. 74). Attorney General Healey opposed that motion because, *inter alia*, that amendment would be futile, since the Court would

[1] On October 20, 2016, Attorney General Healey filed a motion (Doc. No. 78) seeking reconsideration of the discovery order, arguing that, under *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) and *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000), the Court should grant her pending motion to dismiss on personal jurisdiction grounds before reaching *Younger* abstention, and without further factual inquiry. The Court has not taken action on the motion for reconsideration. On October 24, without any offer to meet and confer on parameters for discovery, Exxon served the Attorney General with over one hundred discovery requests and, on November 3, served deposition notices for Attorney General Healey, as well as the New York Attorney General and two senior attorneys in his office. On November 9, Exxon served subpoenas for documents on 11 non-party individuals and organizations. On November 17, the Court issued an order (Doc. No. 117) requiring Attorney General Healey to respond to Exxon's discovery by ten days from service (November 3, a date that had already passed), and to appear at a deposition in Dallas on December 13, despite the fact that Exxon had noticed the deposition of Attorney General Healey to occur in Boston, Massachusetts. On November 25, Attorney General Healey filed a motion to vacate and reconsider the November 17 order and for a stay of discovery and a protective order barring Attorney General Healey's deposition (as corrected, Doc. No. 120).

still lack personal jurisdiction over her. On November 10, 2016, the Court granted Exxon's motion to amend its original complaint and file its First Amended Complaint.[2]

III. ARGUMENT

A. THIS COURT LACKS PERSONAL JURISDICTION OVER ATTORNEY GENERAL HEALEY.

To proceed in this Court, Exxon must establish that "both the forum state's long-arm statute and federal due process permit the court to exercise personal jurisdiction." *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Exxon can establish neither here. The posture of this case is nearly identical to the controlling Fifth Circuit case of *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008) (*Stroman*), which found personal jurisdiction lacking in a suit filed by a Texas company in Texas against an Arizona state official challenging her enforcement of Arizona law against the plaintiff. *Stroman* compels the Court to dismiss this case on personal jurisdiction grounds without further proceedings regarding the Attorney General's other grounds for dismissal. *See infra* Part III.A.3.

1. Texas's Long-Arm Statute Does Not Apply to Attorney General Healey.

The Texas long-arm statute permits assertion of jurisdiction over "a nonresident [who] does business in this state." Tex. Civ. Prac. & Rem. Code Ann. § 17.042. The statute does not apply to Attorney General Healey because the Attorney General is not a "nonresident" within the meaning of the statute. The long-arm statute defines "nonresident" as either (1) "an individual who is not a resident of this state" or (2) "a foreign corporation, joint-stock company, association, or partnership." Tex. Civ. Prac. & Rem. Code Ann. § 17.041. In addition, the

[2] A more complete recitation of the facts surrounding Attorney General Healey's investigation, which is unnecessary for purposes of the Attorney General's motion to dismiss, is provided in the Attorney General's opposition to Exxon's motion for preliminary injunction (Doc. No. 43). The Court may find additional authorities supporting dismissal of this case in Attorney General's prior briefing in support of her original motion to dismiss (Doc. Nos. 42, 65) and of her motion to reconsider the Court's discovery order (Doc. Nos. 79, 91). *See generally* 6 Charles Alan Wright et al., Federal Practice and Procedure § 1476 (3d ed. 2016) (suggesting courts should consider earlier dispositive motions addressed to defects that are repeated in amended pleadings).

Attorney General has not "do[ne] business" in Texas by initiating an investigation under Massachusetts law of whether Exxon has deceived Massachusetts investors and consumers. As such, the Texas long-arm statute is inapplicable. As in *Stroman*, the Attorney General is not sued as an individual but rather "is acting in and was sued in her official capacity for enforcing [her state's] statutes." *Stroman*, 513 F.3d at 482. *See* Compl. ¶ 17 (Attorney General Healey sued "in her official capacity"). Attorney General Healey has acted under express statutory authority to investigate a violation of Massachusetts law. And as in *Stroman*, Exxon seeks to challenge "an out-of-state regulator's enforcement of her state's statute." *Id.* at 482. A state official sued in her official capacity is not an "individual" within the meaning of § 17.041 of the long-arm statute because, under *Ex parte Young*, 209 U.S. 123 (1908), the official's "conduct remains *state action* under the Fourteenth Amendment." *Stroman*, 513 F.3d at 482 (emphasis added). Likewise, the Attorney General does not fit into "the only other class of nonresident defined by the statute"—"a foreign corporation, joint-stock company, association, or partnership"—which "includes business entities but not fellow states." *Id.* at 483. As the Fifth Circuit observed in *Stroman*, the statute does not appear to reach nonresident government officials acting in their official capacity at all. *Id.* at 482-83 ("[T]he Texas statute offers no obvious rationale for including nonresident individuals sued solely in their official capacity under *Ex Parte Young*.").

Additionally, in issuing the CID, the Attorney General did not "do business" in Texas within the meaning of the long-arm statute. The long-arm statute identifies three examples of "doing business": (1) entering into a contract with a Texas resident, to be performed at least in part in Texas; (2) committing a tort in the state; or (3) recruiting Texas residents for employment. Tex. Civ. Prac. & Rem. Code Ann. § 17.042. The Attorney General has engaged in no such acts. Although Exxon has contended otherwise, *Stroman* found that an official-capacity suit like this

one does not reasonably constitute a "tort" claim within the long-arm statute. *Stroman*, 513 F.3d at 483 ("[O]nly by twisting the ordinary meaning of the terms covered by the long-arm statute is Arizona's regulatory activity intended to be encompassed and adjudicated in Texas courts.").

2. Exercise of Personal Jurisdiction Over the Attorney General in Texas Would Violate Due Process.

Even if the Texas long-arm statute purported to reach Attorney General Healey, this Court's exercise of specific personal jurisdiction over her would violate due process.[3] The Attorney General lacks requisite "minimum contacts" with Texas—because she has not "purposely directed [her] activities toward [Texas] or purposely availed [herself] of the privileges of conducting activities there"—and the exercise of personal jurisdiction here would be manifestly unreasonable. *Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 378 (5th Cir. 2002) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)); *see also Stroman*, 513 F.3d at 483 ("exercising personal jurisdiction over the [Arizona] Commissioner in the Southern District of Texas would violate due process").[4]

a. The Attorney General Lacks the Minimum Contacts with Texas Required for the Court to Exercise Personal Jurisdiction Over Her.

"In order for an exercise of personal jurisdiction to be consistent with due process, the nonresident defendant must have some minimum contact with the forum which results from an affirmative act on the part of the nonresident." *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). Where, as here, the plaintiff asserts specific (or case-linked) jurisdiction, "the defendant's suit-related conduct

[3] Personal jurisdiction "may be general or specific." *Stroman*, 513 F.3d at 484. It is not disputed that the Attorney General lacks the "continuous and systematic general business contacts" with Texas required by due process for general personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

[4] Because Attorney General Healey lacks any suit-related contacts with Texas, as discussed below, the second prong of the *Nuovo Pignone* test, "whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts," is not relevant. 310 F.3d at 378.

must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). The analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id*. at 1122. These limits, imposed by due process, "principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id*. (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980)).

Here, Attorney General Healey not only lacks "affirmative" minimum contacts with Texas, she lacks—and Exxon has not adequately alleged—any suit-related contacts with Texas at all. All of the acts on the part of the Attorney General alleged in Exxon's Complaint occurred in Massachusetts or New York. As set forth above, Attorney General Healey issued the CID under Massachusetts's Chapter 93A from her office in Massachusetts, to Exxon's registered agent in Massachusetts. *See* Compl. ¶ 69. The press conference Exxon describes at length in its Complaint—which forms no basis for legal action, in any event—took place in New York. Compl. ¶¶ 2, 27. These realities belie Exxon's spurious assertion that "all or a substantial part of the events giving rise to the claims occurred in the Northern District of Texas." Compl. ¶ 19. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (court should not credit "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements").

At no point did the Attorney General take *any* "affirmative act" in Texas related to her investigation, let alone "purposefully avail[] [her]self of the privilege of conducting activities" in Texas. *Holt*, 801 F.2d at 777. Likewise, serving the CID on Exxon's registered agent in Massachusetts under Massachusetts law does not "invok[e] the benefits and protections of [Texas's] laws, such that she "should reasonably anticipate being haled into court" in Texas. *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Indeed, Chapter 93A expressly provides

for enforcement or objections to CIDs *only* in Massachusetts Superior Court. Mass. Gen. Laws ch. 93A, §§ 7.

The Attorney General's lack of suit-related Texas contacts is dispositive here. *See Walden*, 134 S. Ct. at 1124-26 (finding lack of personal jurisdiction when defendant had no contacts with forum State, even though plaintiff resided in forum and alleged she experienced injury there). Indeed, in recent cases, the Fifth Circuit found that out-of-state regulators who had taken action against a Texas company for doing business in their states in violation of their state laws lack the required minimum contacts to support personal jurisdiction in Texas. In *Stroman*, discussed above, a Texas-based real estate broker sued the Commissioner of the Arizona Department of Real Estate in a Texas federal court to challenge a cease-and-desist order issued by the Commissioner under Arizona law concerning the broker's activities with Arizona purchasers. Because "the totality of the Commissioner's contacts with Texas involves a cease and desist order [that was served in Texas] and correspondence with [Plaintiff's] attorneys," the Fifth Circuit held that "the Commissioner, a nonresident state official, could not have reasonably anticipated being haled into federal court in Texas to defend her enforcement of the Arizona statute." 513 F.3d at 484.[5] Similarly, in *Stroman Realty, Inc. v. Antt (Stroman II)*, 528 F.3d 382 (5th Cir. 2008), the Fifth Circuit again found a lack of personal jurisdiction in a suit brought by the same plaintiff in Texas against California and Florida officials who not only served a cease and desist order on the plaintiff in Texas (and commenced enforcement proceedings in their respective states) but also communicated with the Texas Real Estate Commission and Texas Attorney General's office about the plaintiff. *Id.* at 386-87. But the court held that these contacts

[5] The court also found consequential that, unlike cases where personal jurisdiction is reasonable because the defendant is engaged in a commercial, profit-making enterprise with a connection to the forum state, "the Commissioner was not engaged in commercial transactions to obtain a commercial benefit by acting in a governmental capacity to enforce Arizona law." *Stroman*, 513 F.3d at 485 (citing *Kulko v. Super. Ct.*, 436 U.S. 84, 96-98 (1978)).

did not represent "purposeful availment" by the California and Florida officials "of the privileges of conducting business" in Texas. *Id.* Here, unlike the defendants in *Stroman* and *Stroman II*, Attorney General Healey did not serve the CID in Texas or have any contact with the State of Texas in connection with the investigation, therefore making it even less likely she would anticipate being required to defend her enforcement of Massachusetts law in a Texas federal court. Accordingly, both *Stroman* cases require dismissal of this action.[6]

b. *Because the Attorney General's Lack of Contacts with the State of Texas Precludes Jurisdiction, It Is Irrelevant that Exxon Alleges It Experienced Harm in Texas.*

Exxon's theory of personal jurisdiction—based solely on its allegation of "injury" in Texas—was emphatically rejected in the Supreme Court's unanimous opinion in *Walden v. Fiore*, 134 S. Ct. 1115 (2014). That case reaffirmed that the due process analysis considers only "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." 134 S. Ct. at 1122. Accordingly, the Court held that it was not enough for the plaintiff to allege, as Exxon does here, that a defendant's actions elsewhere have harmed the plaintiff in the forum State. *Id*. at 1125-26. And before *Walden*, the Fifth Circuit had reached the same conclusion. *See Stroman*, 513 F.3d at 486 ("We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident.") (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 314 (5th Cir. 2007) and *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 870 (5th Cir. 2001)); *see also Bustos v. Lennon*, 538 F. App'x 565, 568 (5th Cir. 2013) (effects "jurisdiction is rare").

Here, there is no such connection between the Attorney General and the State of Texas. The only connection Exxon alleges between the Attorney General and Texas is that the Attorney

[6] *See also* cases cited in Memorandum of Law in Support of Attorney General Healey's Motion to Dismiss (Doc. No. 42) at 9 n.8.

General intentionally issued the CID in order to harm Exxon, which is located in Texas. The Supreme Court specifically rejected finding personal jurisdiction on such a basis in *Walden*:

> Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections "decisive" in the jurisdictional analysis. It also obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself.

134 S. Ct. at 1125 (citation omitted). Moreover, as *Walden* explains, the "effects" test that Exxon advances is not supported by *Calder v. Jones*, 465 U.S. 783 (1984): "*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum" and "is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum *in a meaningful way*." 134 S. Ct. at 1125 (emphasis added).[7] "[V]iewed through the proper lens— whether the *defendant's* actions connect him to the *forum*"—it is clear that the Attorney General's issuance of the CID to Exxon's registered agent in Massachusetts does not connect her to Texas in any meaningful way and, as such, personal jurisdiction is lacking. *Id.* at 1124. *See also Stroman*, 513 F.3d at 486 ("[T]he Commissioner is not 'expressly aim[ing]' her actions at Texas. Rather, her intent is to uphold and enforce the laws of Arizona.") (internal citations omitted).

This Court has reached the same result in cases involving similar facts. In *Saxton v. Faust*, the plaintiffs sued a Utah judge under 42 U.S.C. § 1983 for allegedly violating their First, Fifth, and Fourteenth Amendment rights by sanctioning them for violating discovery and

[7] "The crux of *Calder*," the Court wrote, was that the defendants wrote an allegedly defamatory article "for publication in California that was read by a large number of California citizens," thereby "connect[ing] the defendants' conduct to *California*, not just to a plaintiff who lived there." 134 S. Ct. at 1123-24

preliminary injunction orders in a case in Utah state court. No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010) (Kinkeade, J.). The defendant Utah judge lacked any contacts with Texas; the only contacts alleged by the plaintiffs "are the effects they have felt in Texas" of the judge's orders. This Court found that it lacked personal jurisdiction over the defendant judge, noting that "[t]he Fifth Circuit recently rejected the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling are felt in Texas." *Id.* at *3 (citing *Stroman*, 513 F.3d at 482-85). The result should be the same here.

Importantly, under Exxon's expansive theory, personal jurisdiction over a defendant would obtain so long as the plaintiff claimed some intentional harmful effect in its favored forum, notwithstanding the complete absence of any facts establishing a meaningful connection between the defendant and the forum. Such a rule would eviscerate jurisdictional due process limits that are intended to "protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden*, 134 S. Ct. at 1122; *see also Stroman*, 513 F.3d at 486-87 (rejecting "an interpretation of personal jurisdiction under which . . . any state official seeking to enforce her state's laws . . . could potentially be subjected to suit in any state where the validity of her [actions] were in question").

In any case, Exxon has not made—and cannot make—a prima facie showing of intentional harm. As discussed in Part III.F, *infra*, Exxon's conclusory assertions and unsupported allegations are woefully inadequate to this task. To find personal jurisdiction over the Attorney General on that basis, without more, would defeat core constitutionally-guaranteed due process limits on the exercise of jurisdiction.

c. *Exercise of Personal Jurisdiction Over the Attorney General Would Be Unreasonable in This Case.*

Due process also requires that the Court consider whether exercising personal jurisdiction

over the Attorney General would be "fair and reasonable." *Nuovo Pignone*, 310 F.3d at 378. Each of the factors relevant to that determination—(1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the states in furthering fundamental, substantive social policies, *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 113 (1987)—weigh heavily against jurisdiction.

First, litigating in this Court is imposing and will continue to impose a heavy burden on Attorney General Healey, who has been compelled by the Local Rules to engage local counsel and whose offices and personnel are located in Massachusetts, despite the fact that the matter can be efficiently resolved in Massachusetts state courts, to which Chapter 93A assigns exclusive jurisdiction over enforceability of CIDs.[8] Exxon already has a suit pending in that forum, and argument on the CID will be held on December 7, 2016. *Second*, Texas has little stake in this litigation, beyond the fact that one of its residents, Exxon, is the plaintiff. The forum with the greatest (indeed, the only significant) interest is Massachusetts because at issue is the legality of enforcing a CID issued by the Massachusetts Attorney General under a Massachusetts statute, Chapter 93A. *See Stroman*, 513 F.3d at 487 ("[A]lthough a Texas court certainly has an interest in determining the legitimacy of Texas statutes, states have little interest in adjudicating disputes over other states' statutes.") (internal quotation marks and citation omitted). *Third*, Exxon's interest in obtaining relief would not be harmed if this Court found that it lacked personal jurisdiction over the Attorney General in light of Exxon's parallel lawsuit in Massachusetts state court. *Fourth* and relatedly, resolution of this matter in the existing Massachusetts proceeding furthers the interests of the interstate judicial system in obtaining the most efficient resolution of

[8] Mass. Gen. Laws, ch. 93A, §§ 6 (7), 7 (designating Massachusetts Superior Court exclusive forum for objections to CIDs and Attorney General's enforcement of CIDs).

controversies. Parallel litigation in two states would be duplicative, inefficient, and unwarranted. Particularly where Exxon has brought both suits, Exxon cannot fairly claim prejudice if this Court dismisses this case. *Finally*, the fundamental interests of the several states are not served by the Court hearing this suit. As the Fifth Circuit wrote in *Stroman*, "[a]llowing the Southern District of Texas to exercise jurisdiction over [an Arizona official] creates the possibility that [she] will have to defend her attempt to enforce Arizona laws in courts throughout the nation . . . los[ing] the benefit of having the laws examined by local state or federal courts—courts that have special expertise interpreting its laws." 513 F.3d at 487. The same reasoning applies to state attorneys general. *See* Memorandum of Law for Amici Curiae States of Maryland et al. (Doc. No. 54, "Amici States Br.") at 18-20. Indeed, numerous federal courts have held that they lacked jurisdiction over an out-of-state attorney general. *See, e.g.*, *PTI, Inc. v. Philip Morris Inc*., 100 F. Supp. 2d 1179, 1189 & 1189 n.8 (C.D. Cal. 2000) (cited with approval in *Stroman*, 513 F.3d at 487) ("conflict with state sovereignty is perhaps the most compelling factor [demonstrating the unreasonableness of asserting jurisdiction]—requiring the states to submit to California jurisdiction constitutes an extreme impingement on state sovereignty").[9]

3. The Court Should Consider Personal Jurisdiction Before Any Other Ground for Dismissal.

It is firmly established that this Court can and should decide the essential question of personal jurisdiction over the defendant before considering other dispositive grounds for dismissal. In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), the Court explained "there is no unyielding jurisdictional hierarchy," and "there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry." *Id.* at 578. The Fifth Circuit has

[9] *See also Turner v. Abbott*, 53 F. Supp. 3d 61, 68 (D.D.C. 2014); *Cutting Edge Enters., Inc. v. Nat'l Ass'n of Att'ys Gen.*, 481 F. Supp. 2d 241, 246 (S.D.N.Y. 2007); *B & G Prod. Co. v. Vacco*, No. CIV.98-2436 ADM/RLE, 1999 WL 33592887, at *5 (D. Minn. Feb. 19, 1999).

read *Ruhrgas* "to direct lower courts facing multiple grounds for dismissal to consider the complexity of subject-matter jurisdiction issues raised by the case, *as well as concerns of federalism,* and of judicial economy and restraint in determining whether to dismiss claims due to a lack of personal jurisdiction before considering challenges to its subject-matter jurisdiction." *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000) (emphasis added).

In *Ruhrgas*, the Supreme Court found that it was appropriate to resolve first the question of personal jurisdiction where, as here, "the absence of personal jurisdiction is the surer ground[.]" 526 U.S. at 578. In order to assess the Attorney General's alternative ground for dismissal—*Younger* abstention, *see infra* Part III.E—the Court has ordered discovery into the basis for Attorney General Healey's issuance of the CID, specifically whether she was biased or pre-judged the outcome of the investigation.[10] The Attorney General vigorously disputes any suggestion of bad faith, or that an exception to *Younger* abstention applies here. However, under Massachusetts law, the Attorney General may only issue a CID if she believes that the target is violating Chapter 93A. *See* Mass. Gen. Laws ch. 93A, § 6(1); *Harmon Law Offices, P.C. v. Att'y Gen.*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013); Attorney General Healey's Opposition to Exxon's Motion for Preliminary Injunction (Doc. No. 43) at 3, 21-22. In other words, the Attorney General's belief that Exxon has violated Chapter 93A does not, under Massachusetts law, constitute bias; rather, it is a legally required predicate to issuance of a CID. *Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364, 1367 (Mass. 1989); *Harmon Law Offices*, 991 N.E.2d at 1103. An inquiry into the basis for the Attorney General's CID therefore necessarily implicates a

[10] Attorney General Healey vigorously disputes that this exception applies at all because Exxon's conclusory allegations do not meet Exxon's prima facie burden to show bad faith on the part of the Attorney General and the Massachusetts courts. *See Wightman v. Tex. Sup. Ct.*, 84 F.3d 188, 190-91 (5th Cir 1996) (ruling that exception "is narrow and is to be granted parsimoniously" in rejecting exception's application to bar discipline case where plaintiff alleged First Amendment violations because "more than . . . allegation is required" and "extensive and lengthy" state procedures "protect [plaintiff] against bad faith behavior"); *Smith v. Hightower*, 693 F.2d 359, 369 (5th Cir. 1982) (holding that trial court committed reversible error by ignoring strong evidence of plaintiff's wrongdoing, which supports inference that prosecutor is not acting in bad faith under *Younger*).

substantial question of Massachusetts state law. Deciding the case on the issue of personal jurisdiction now pending before this Court will limit the potential for federal intrusion into the Massachusetts state court's authority to determine the lawfulness of a CID issued by the Massachusetts Attorney General pursuant to Massachusetts law. "Where, as here, [the] district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law," and other jurisdictional inquiries raise "difficult" questions, it is proper to decide first the issue of personal jurisdiction. *Ruhrgas,* 526 U.S. at 588.

The *Stroman* decision compels this course here. Although the defendant Arizona commissioner moved for dismissal on multiple grounds, including personal jurisdiction, the district court dismissed the case on *res judicata* and abstention grounds without reaching personal jurisdiction. *Stroman,* 513 F.3d at 481. The Fifth Circuit found that the district court should have first considered personal jurisdiction: "Why the district court failed to consider personal jurisdiction over the Commissioner in a Texas federal court is unclear. This court *must do so*." *Id.* at 482 (emphasis added).

Because this Court lacks personal jurisdiction over Attorney General Healey, it *cannot* proceed in any fashion in this case, including to order discovery on one of the Attorney General's other arguments for dismissal. "The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). *See also Ruhrgas*, 526 U.S. at 577 ("[J]urisdiction is power to declare the law, and *[w]ithout jurisdiction the court cannot proceed at all in any cause*.") (emphasis added; citation and quotation marks omitted). Exxon's suit must be dismissed.

B. THIS CASE SHOULD BE DISMISSED AS UNRIPE.

Exxon's suit also should be dismissed under *Google, Inc. v. Hood*, which found unripe a

federal court challenge to an investigatory subpoena issued by Mississippi Attorney General Hood. 822 F.3d at 224-26. In *Google,* reversing the district court, the Fifth Circuit ordered dismissal of Google's challenges to the subpoena and vacated the district court's injunction against Attorney General Hood. *Id.* at 228. The court held that injunctive relief was not warranted because Google would have an adequate remedy at law defending any action to enforce the subpoena that Attorney General Hood might later file in a Mississippi state court. For that reason, the challenge was not ripe. *Google,* 822 F.3d at 226.

Exxon is in the same position as Google. Exxon is asserting its objections to the CID through the Massachusetts state court process for such challenges. Mass. Gen. Laws. ch. 93A, § 6(7). *Cf. Google,* 822 F.3d at 225-26. While its petition to set aside or modify the CID is pending before the Massachusetts Superior Court, it will face no sanction or consequence for not complying with the CID. Moreover, here Attorney General Healey has taken only the initial steps of issuing a CID to Exxon and asking the Massachusetts Superior Court to enforce the CID in the face of Exxon's blanket challenges—but she neither has determined to undertake a Chapter 93A enforcement action against Exxon nor asserted any specific claim. Exxon may defend itself and raise its objections in Massachusetts state court when and if that ultimately occurs. *Id. See In re Ramirez,* 905 F.2d 97, 98 (5th Cir. 1990) (dismissing action to quash investigatory subpoena for lack of subject matter jurisdiction "because of the availability of an adequate remedy at law if, and when, the agency files an enforcement action"); *Atl. Richfield Co. v. FTC*, 546 F.2d 646, 649 (5th Cir. 1977) (pre-enforcement relief from administrative subpoenas inappropriate in light of opportunity to bring due process and regulatory procedural objections in any subsequent enforcement proceeding). The dispute is, therefore, not ripe, and the Court should dismiss Exxon's suit. *See also* Amici States Br. at 10-16.

C. THE NORTHERN DISTRICT OF TEXAS REMAINS AN IMPROPER VENUE.

The Court also should dismiss because the Northern District of Texas is an improper venue for this case. This basis for dismissal also requires no fact development, as Exxon's amended complaint alleges no basis for venue in this district. *See* 28 U.S.C. § 1391 (b) (venue only proper in the judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or if neither (1) nor (2) exists, then any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action).

First, the office of the Attorney General is in Massachusetts, not Texas. *Second*, the events or omissions giving rise to Exxon's claim occurred in Massachusetts, where Attorney General Healey issued the CID to Exxon's registered agent—not Texas. That Exxon resides in Texas or may feel some effect of the CID there "does not necessarily mean that the events or omissions occurred there" for the purposes of venue. *U.S. Risk Ins. Grp., Inc. v. U.S. Risk Mgmt., L.L.C.*, No. 3:11-CV-02843-M, 2012 WL 12827489, at *2 (N.D. Tex. Apr. 16, 2012) (Lynn, J.); *see also Saxton*, 2010 WL 3446921, at *4 (holding venue in Texas improper where plaintiffs brought § 1983 claim against Utah judge based on sanctions order issued in Utah state court case). Ultimately, "[i]n determining whether or not venue is proper, the Court looks to the *defendant's* conduct, and where that conduct took place. Actions taken by a *plaintiff* do not support venue." *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) ("[The] fact that a plaintiff residing in a given judicial district feels the effects of a defendant's conduct in that district does not mean that the events or omissions occurred in that district.") (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir. 1995)). Exxon's corporate home in Texas is, therefore, not relevant to the venue inquiry. *Third*, because the venue indicated

by § 1391 (b)(1) and (2) —*i.e.*, Massachusetts—is available, any possible alternative under § 1391 (b)(3) is not. Venue is improper in Texas, and the Court must dismiss Exxon's suit. *Cf. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (holding that court may dismiss suit on grounds of *forum non conveniens* without first establishing its own jurisdiction); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 181, 185 (1979) (holding venue improper without deciding other "difficult" jurisdiction issue).

D. EXXON'S STATE LAW CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT.

Several of the "causes of action" in Exxon's Complaint, in whole or in part, allege violations of the Texas Constitution or "common law." Compl., First Cause (Texas common law conspiracy), ¶ 108; Second Cause (Texas Constitution), ¶ 110; Third Cause (Texas Constitution), ¶ 113; Fourth Cause (Texas Constitution), ¶ 116; Seventh Cause ("abuse of process" under "common law"), ¶¶ 127-28.[11] These claims are barred by the Eleventh Amendment, which prohibits lawsuits in federal court against state officials based on alleged violations of state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (contrary result would "conflict[] directly with the principles of federalism that underlie the Eleventh Amendment"). Thus, the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908)—which authorizes suits for prospective injunctive relief against state officials based on ongoing violations of *federal* law—is "inapplicable in a suit against state officials on the basis of *state* law." *Pennhurst*, 465 U.S. at 106 (emphasis added). And the doctrine applies as readily to "state-law claims brought into federal court under pendent jurisdiction" because such jurisdiction cannot authorize "evasion of the immunity guaranteed by the Eleventh Amendment."

[11] There is no federal common law "abuse of process" cause of action, leaving Exxon's seventh count to rest only on state law. *Rodriguez v. Ritchey*, 539 F.2d 394, 408 (5th Cir. 1976), *on reh'g*, 556 F.2d 1185 (5th Cir. 1977) (Tjoflat, J., concurring in part and dissenting in part) (citing *Wheeldin v. Wheeler*, 373 U.S. 647 (1963)).

Id. at 121.

The *Pennhurst* doctrine is applied widely and uniformly across federal courts, including the Fifth Circuit. *See Hernandez v. Tex. Dep't of Human Servs.*, 91 Fed. App'x 934, 935 (5th Cir. 2004) (per curiam) ("[T]he Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court."); *Kitchens v. Tex. Dep't of Human Res.*, 747 F.2d 985, 986 (5th Cir. 1984) (under *Pennhurst*, "the court below had no power to entertain [pendent state law claim] regardless of the existence or fate of her other causes of action"). Because Exxon's state-law claims ask this Court to pass judgment on the Attorney General's compliance with Texas—not federal—law, all are barred by the Eleventh Amendment and must be dismissed for lack of jurisdiction.

E. THE COURT SHOULD ABSTAIN FROM HEARING THIS CASE DUE TO ONGOING STATE PROCEEDINGS IN MASSACHUSETTS.

If the Court finds that it has jurisdiction over the Attorney General, that Exxon's claim is ripe, and that venue is proper—and it should not—it should abstain from hearing the case under *Younger v. Harris*, 401 U.S. 37 (1971). All three *Younger* factors support abstention in this case. *See Women's Cmty. Health Ctr. of Beaumont, Inc. v. Tex. Health Fac. Comm'n*, 685 F.2d 974, 979 (5th Cir. 1982) (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (court must consider whether there is an ongoing state criminal, civil, or administrative proceeding; the state proceedings involve important state interests; and the state court provides an adequate forum to hear the claims raised in the federal complaint). Where the *Younger* requirements are met, the appropriate remedy is dismissal of the federal case. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

First, there is a pending state judicial proceeding that warrants *Younger* abstention. In

Massachusetts Superior Court, Exxon is challenging the CID,[12] and the Attorney General has moved to compel Exxon's compliance with the CID, both under the exclusive provisions of Chapter 93A. Mass. Gen. Laws ch. 93A, §§ 6(7), 7. The Attorney General's civil enforcement of state law is a type of proceeding "to which *Younger* has been extended." *Sprint Commc'ns v. Jacobs, Inc.*, 134 S. Ct. 584, 592-93 (2013). A federal court should abstain in favor of state judicial proceedings overseeing state-initiated investigations into the federal plaintiff's wrongdoing.[13]

Second, the Massachusetts proceeding concerns undeniably important state interests: the protection of Massachusetts consumers and investors from unfair and deceptive trade practices, the integrity of the Attorney General's investigatory tools under state law, and state judicial oversight. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 335 (1977) (state's "vindicat[ion] [of] the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest").[14]

Third, as the procedural guarantees of Chapter 93A provide, Exxon has filed a petition in Massachusetts state court to modify or set aside the CID. Mass. Gen. Laws ch. 93A, § 6(7). Therefore, Exxon has a full and fair opportunity to raise its constitutional and other objections and defenses to the CID in state court. *See, e.g.*, *Middlesex Cty. Ethics Comm.*, 457 U.S. at 437 (abstention is appropriate where federal plaintiff has "opportunity to raise" its constitutional

[12] Exxon's Texas suit includes federal constitutional claims that it did not, but could have, brought in Massachusetts. Those federal constitutional claims are analogous to the Massachusetts constitutional claims Exxon raised in its Massachusetts suit.

[13] *See also Lupin Pharm., Inc. v. Richards*, Civ. No. RDB-15-1281, 2015 WL 4068818, at *4 (D. Md. July 2, 2015) (memorandum decision) (abstaining under *Younger* in § 1983 challenge to Alaska civil investigative demand in light of state court litigation where Alaska Attorney General was seeking compliance with demand); *Temple of the Lost Sheep, Inc. v. Abrams*, 761 F. Supp. 237, 242 (E.D.N.Y. 1989).

[14] *See also Lupin Pharm.*, 2015 WL 4068818, at *4 (citing *Juidice*); *J. & W. Seligman & Co. Inc. v. Spitzer*, No. 05-Civ.-7781 (KMW), 2007 WL 2822208, at *6 (S.D.N.Y. Sept. 27, 2007) ("[T]he enforcement of subpoenas issued pursuant to state law in furtherance of a fraud investigation [] represent an important and legitimate state interest.").

claims in "competent state tribunal").[15] Exxon has failed to allege that Massachusetts courts cannot adequately safeguard its rights through the statutorily prescribed method of challenging CIDs, and Exxon's preference for a federal forum for its claims is of no significance to the abstention analysis. *See Forty One News, Inc. v. Cty. of Lake*, 491 F.3d 662, 667 (7th Cir. 2007) ("Denial of a preferred federal forum for federal claims is often the result of the application of *Younger* abstention . . . .").[16]

Should the Court reach abstention, all three *Younger* criteria are satisfied and, therefore, this Court should abstain in favor of the proceedings in Massachusetts.[17] And, for the reasons set forth above (at *supra* note 10) and in Attorney General Healey's motion to vacate the Court's November 17 discovery order, the Court should do so without further factual inquiry.

F. EXXON'S COMPLAINT DOES NOT STATE PLAUSIBLE GROUNDS FOR RELIEF, IN VIOLATION OF THE MINIMUM PLEADING STANDARDS OF THE FEDERAL RULES.

As well, the Court should dismiss the Complaint because its bald, baseless allegations that the Attorney General has, out of personal animus and in bad faith, undertaken an investigation to chill Exxon's political speech plainly fails to meet the pleading standards of Rule 8(a)(2). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Exxon's textbook "conclusory statements" are insufficient to support its claims.

---

[15] *See also Juidice*, 430 U.S. at 337; *cf. Att'y Gen. v. Colleton*, 444 N.E.2d 915, 921 (Mass. 1982) (affirming trial court's denial, on state constitutional grounds, of Attorney General motion to compel compliance with CID).

[16] *See also Saxton at* *3 (abstaining where there was an ongoing civil judicial action in Utah, the Utah state proceeding involved "[t]he state court contempt process[, which] lies at the very core of a state's judicial system," and the plaintiffs "had recourse under Utah law for the wrongs of which they complained").

[17] The other abstention and legal doctrines promoting comity also support abstention here. *See, e.g., Nationstar Mortg. LLC v. Knox*, 351 F. App'x 844, 852 (5th Cir. 2009) (affirming abstention under doctrine of *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976)); *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 653 (5th Cir. 2002) (affirming abstention under doctrine of *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941)).

Exxon effectively offers no more than three facts: (1) the CID was issued, (2) the Attorney General participated in a press conference where she stated that climate change is a major challenge and that she would investigate Exxon based on reports that Exxon knew more about climate change than it revealed to investors and consumers, and (3) the Attorney General is a party to a routine common interest agreement with other state attorneys general covering climate change-related litigation.[18] Pointing to no other facts applicable to Attorney General Healey, Exxon asserts in its Complaint that she, "in an *apparent* effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in [a policy] debate" (¶ 110, emphasis added):

- "issued . . . the CID based on [her] disagreement with ExxonMobil regarding how the United States should respond to climate change"—an "illegal purpose . . . not substantially related to any compelling governmental interest" (¶ 111);
- thereby engaged in "an abusive fishing expedition . . . without any legitimate basis for believing that ExxonMobil violated . . . Massachusetts law" (¶ 114); and
- undertook these actions because she is "biased against ExxonMobil" (¶ 117) and has "an ulterior motive . . . namely, an intent to prevent ExxonMobil from exercising its right to express views with which [she] disagree[s]" (¶ 128).

Removing the conclusory statements referenced above and their repetition throughout the Complaint, Exxon offers solely the three facts—the CID, the press conference, and the common interest agreement—to support its claims that the Attorney General issued the CID as part of an intentional, malicious effort to violate Exxon's constitutional rights and federal law.[19]

Those facts are insufficient. As is clear from documents Exxon itself attached to its Complaint, Attorney General Healey has a clear, supported basis for believing investigation of Exxon is warranted based on her office's review of a significant number of internal Exxon

[18] *See, e.g.*, Compl. ¶¶ 18, 107. A transcript of the Attorney General's remarks at the press conference can be found in Exhibit B of the Complaint, App. 020-021, the accuracy of which Attorney General Healey does not concede.

[19] Exxon's allegations are not dissimilar to the allegations against Attorney General Hood in *Google*, which the Fifth Circuit did not even entertain in its decision vacating the injunction against him. 822 F.3d at 228.

documents illustrating Exxon's advanced knowledge of climate change and the likely adverse impacts on Exxon's business of efforts to address climate change. Compl., Ex. A, App. 004-006; Ex. J, App. 111-112; Ex. NN, App. 357-361; Ex. RR, App. 439. Based on this review and her broad authority to issue CIDs unless they are arbitrary and capricious, *Att'y Gen. v. Bodimetric Profiles*, 533 N.E.2d 1364 (Mass. 1989)), she has amply satisfied the statutory requirement that the Attorney General have a "belief" that the target of an investigation has violated or is violating the statute. That belief is further supported by the fact that other jurisdictions are investigating the same conduct, Compl., Ex. QQ, App. 435, including the FBI, as confirmed by the U.S. Attorney General, *id.*, Ex. DD, App. 247-249.[20] As in *Iqbal*, "[a]s between that 'obvious alternative explanation'" for the CID "and the purposeful, invidious discrimination [Exxon] asks us to infer, discrimination is not a plausible conclusion." 556 U.S. at 682. *See also SEC v. McGoff*, 647 F.2d 185, 194 (D.C. Cir. 1981) (upholding subpoena against "diffuse speculations" regarding its political motive).

Exxon's new claims against Attorney General Healey—conspiracy and preemption—fare no better. As for conspiracy, Exxon has not even bothered to cite a specific subsection of 42 U.S.C. § 1985 to support its federal conspiracy claims, nor does Exxon even attempt to track the elements of a cognizable claim under the statute. *Compare* Compl. ¶¶ 106-08 *with, e.g., Burns-Toole v. Byrne*, 11 F.3d 1270, 1276 (5th Cir. 1994) ("[I]n order to assert a claim under § 1985(3), a plaintiff must allege some class-based animus."). And Exxon's preemption claim does not even identify a federal statutory provision that could preempt Attorney General Healey's CID, and

[20] As was disclosed in press reports, the U.S. Securities and Exchange Commission ("SEC") also is investigating Exxon's accounting practices, including the valuation of its reserves, in light of the future impacts of climate change regulation on its business and other factors. *See* Doc. Nos. 95-4, 95-5. On October 28, 2016, Exxon announced a thirty-eight percent drop in earnings as a result of low energy prices, and "acknowledged that it faced what could be the biggest accounting revision of its reserves in its history." Doc. No. 95-4. The SEC investigation and Exxon's own accounting decisions further confirm that Exxon's narrative of unconstitutional persecution is implausible.

that omission is fatal in light of the general rule that federal law does not preempt action by state authorities to protect investors from deception and fraud. Compl. ¶¶ 122-126; *see also id.* ¶¶ 77-81 (citing federal regulations and policy statement). *See, e.g.*, *Firefighters' Ret. Sys. v. Regions Bank*, 598 F. Supp. 2d 785, 795 (M.D. La. 2008) ("federal securities laws generally do not preempt similar state law causes of action" (quoting *Finance & Trading, Ltd. v. Rhodia, S.A.*, No. 04 Civ. 6083 (MBM), 2004 WL 2754862, at *7 (S.D.N.Y. Nov. 30, 2004)); 15 U.S.C. § 77r(c)(1) (preserving state authority to investigate "fraud or deceit" despite preemption of certain state regulation of securities).

The Complaint is wholly insufficient to satisfy Rule 8(a)(2) and should be dismissed for failure to state a claim. *See Travis v. City of Glenn Heights, Tex.*, No. 3:13-CV-01080-K, 2013 WL 5508662, at *3 (N.D. Tex. Oct. 3, 2013) (Kinkeade, J.) ("this Court will not strain to find inferences favorable to [plaintiff's] claims").

IV. CONCLUSION

For the foregoing reasons, the Court should DISMISS Exxon's Complaint as to Attorney General Healey with prejudice.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: November 28, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 28, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas. A. Cawley
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	§ § § § § § § § § § § § § § §	NO. 4:16-CV-469-K

EXXON MOBIL CORPORATION'S OPPOSITION TO MAURA TRACY HEALEY'S MOTION TO VACATE THE ORDER FOR HER DEPOSITION, TO STAY DISCOVERY, AND FOR A PROTECTIVE ORDER

Patrick J. Conlon (*pro hac vice*)
Daniel E. Bolia
EXXON MOBIL CORPORATION
1301 Fannin Street
Houston, TX 77002
Tel: (832) 624-6336

Theodore V. Wells, Jr. (*pro hac vice*)
Michele Hirshman (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Justin Anderson (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

Nina Cortell
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
Tel: (214) 651-5579
Fax: (214) 200-0411

Ralph H. Duggins
Philip A. Vickers
Alix D. Allison
CANTEY HANGER LLP
600 W. 6th St., Suite 300
Fort Worth, TX 76102
Tel: (817) 877-2800
Fax: (817) 877-2807

Counsel for Exxon Mobil Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Exxon Mobil Corporation ("ExxonMobil") respectfully submits this opposition to the motion (Dkt. 120) of Defendant Maura Tracy Healey (the "Attorney General") to vacate the Court's order requiring her deposition (the "Deposition Order") (Dkt. 117), to stay discovery, and for a protective order.[1]

PRELIMINARY STATEMENT

The Attorney General's motion to vacate the Deposition Order is unauthorized by rule or precedent, recycles the same arguments presented previously, and offers no compelling reason for this Court to reconsider its ruling on the need for discovery. It continues the Attorney General's pattern of resisting the very discovery required to resolve her challenge to this Court's jurisdiction. As with the Attorney General's prior motion for reconsideration of the Court's October 13, 2016 discovery order, the instant application presents no new facts or law that the Attorney General has not raised before. Instead, the Attorney General reprises the same arguments concerning personal jurisdiction, venue, ripeness, and governmental privilege. These arguments were unpersuasive when first made and have not become more cogent with repetition.

As ExxonMobil demonstrated in opposition to the Attorney General's motion to reconsider the Court's October 13, 2016 discovery order, the Court is well within the bounds of its discretion to examine the exercise of its subject matter jurisdiction under *Younger* before taking up the Attorney General's personal jurisdiction argument—which, itself, would merit discovery as broad as that the Court has already ordered. Nor has the Court overstepped any bounds by ordering the deposition of the Attorney General where, as here, ExxonMobil has made a substantial showing that she misused her law enforcement powers and the Attorney General has identified no other party or non-party from whom ExxonMobil can obtain the relevant

[1] Citations herein to "Mem." are references to the Attorney General's Memorandum of Law in Support of the Motion to Vacate Order for Deposition of Attorney General Healey and Stay Discovery, and for a Protective Order, dated November 25, 2016 (Dkt. 121).

information. As set forth herein, and in ExxonMobil's opposition to the Attorney General's prior motion to reconsider the October 13, 2016 discovery order (Dkt. 90), the Court is well within its discretion to direct the parties to assemble a proper record to facilitate review of the Attorney General's abstention argument. Discovery should be permitted to proceed, and this latest motion should be denied.

STATEMENT OF FACTS

On August 8, 2016, Attorney General Healey moved to dismiss ExxonMobil's complaint. (Dkt. 41.) Among other grounds for dismissal, the Attorney General argued that this Court should abstain from hearing this case pursuant to *Younger* v. *Harris*, 401 U.S. 37 (1971). (Dkt. 42 at 13–17.) On September 8, 2016, ExxonMobil opposed the Attorney General's motion to dismiss, arguing, among other things, that abstention was unwarranted because the Attorney General's investigation of ExxonMobil was undertaken in bad faith. (Dkt. 60 at 18–20.)

On October 13, 2016, the Court entered an order directing the parties to develop a record on which to assess the Attorney General's request that this Court abstain under *Younger*. (Dkt. 73.) Further discovery was appropriate in light of ExxonMobil's allegations of fact supporting the bad faith exception to *Younger*, including the Attorney General's (i) statements suggesting bias and a predetermination of ExxonMobil's liability and (ii) participation in a closed-door meeting with climate activists and plaintiffs' lawyers that was intentionally concealed from the press and public. (*Id.* at 4–6.) To develop the factual record that would enable the Court to assess the Attorney General's *Younger* abstention argument, the Court directed the parties to take discovery that would "aid the Court in deciding whether this lawsuit should be dismissed on jurisdictional grounds." (*Id.* at 6.) Pursuant to the October 13 order, ExxonMobil served on October 24, 2016 document requests, interrogatories, and requests for admission on Attorney

General Healey. On November 3, 2016, ExxonMobil noticed the Attorney General's deposition for December 6, 2016.

On November 10, 2016, the Court granted ExxonMobil's motion for leave to file an amended complaint to assert additional claims against Attorney General Healey and add New York Attorney General Eric Schneiderman as a defendant. (Dkt. 99.) ExxonMobil's first amended complaint—filed by the Clerk of the Court on November 10, 2016—contains all of the allegations set forth in the prior complaint upon which the Court premised the October 13 discovery order. It also adds additional allegations concerning Attorney General Healey's conspiracy with others to violate ExxonMobil's constitutional rights, and asserts a claim that the Attorney General's latest theory of ExxonMobil's supposed liability is preempted by federal law. (*See* Dkt. 100 at ¶¶ 77–81, 105–08.)

On November 14, 2016, Attorney General Schneiderman moved in New York State Court to compel ExxonMobil's production of documents concerning its oil and gas reserve estimates and its asset impairment calculations, purportedly pursuant to a subpoena issued in November 2015. Explaining his haste in rushing to New York State Court to enforce a year-old subpoena, Attorney General Schneiderman explained in his motion papers that he was concerned this Court might issue a "federal injunction barring New York courts from enforcing [the] subpoena to Exxon." That motion was denied the following week.[2] In light of the New York Attorney General's acknowledged effort to short-circuit the proceedings in this Court by asking a New York court to compel compliance with a subpoena that is one of the subjects of this action,

[2] Contrary to Attorney General Healey's statement to the Court (Mem. 4–5 n.5), that motion is not pending and is not set for argument on December 15, 2016. Indeed, the New York Attorney General's motion was denied in open court during a hearing on November 21, 2016, in which the Judge determined that documents concerning ExxonMobil's reserves and impairments were not within the scope of the November 2015 subpoena unless they concerned climate change. That decision has been reported in the legal media. *See, e.g.*, Stewart Bishop, *NY AG, Exxon Spar over Climate Change Probe*, Law360 (Nov. 21, 2016, 8:48 PM), https://www.law360.com/articles/865025/print?section=energy.; *see also* Ex. A at App. 2.

as well as Attorney General Healey's repeated statements that she would not cooperate with the Court's October 13, 2016 discovery order, ExxonMobil requested, and the Court granted, a telephonic conference, which was held on November 16, 2016. (Dkt. 109.)

During the November 16, 2016 teleconference, the Court inquired of Attorney General Healey's counsel whether the Attorney General would comply with the October 13, 2016 discovery order. The answer was an unequivocal "no."[3] On November 17, 2016, the Court issued the Deposition Order directing the Attorney General to appear for her noticed deposition on December 13, 2016 at the Court in Dallas, Texas. (Dkt. 117.) The record is clear that the Attorney General never had any intention of complying with the Court's Deposition Order. In conformity with a propensity to litigate in the press, the first to know of her refusal was not the Court or counsel, but rather the *Boston Herald*. On November 21, 2016—two business days after the Court issued the Deposition Order—a reporter asked the Attorney General whether she had plans to travel to Texas for the Court-ordered deposition. Her response: "No, I don't and we will take it up on appeal."[4]

The Attorney General's motion to vacate followed on November 25, 2016 (as subsequently corrected on November 26). The Attorney General advances four main arguments in support of her application. First, she reprises her arguments that her motion to dismiss should have been granted without any discovery. Second, she once again seeks to relitigate whether her deposition is warranted on the facts. Third, she rehashes the argument that, in her view, the Court has all the record it needs to determine whether abstention is appropriate. Fourth, and

[3] Ex. B at App. 13.

[4] *See* Chris Villani, *AG Healey Vows to Fight Judge's Deposition Order in Exxon Case* – Boston Herald, (Nov. 21, 2016), http://www.bostonherald.com/news/local_coverage/2016/11/ag_healey_vows_to_fight_judge_s_deposition_order_in_exxon_case.

finally, Attorney General Healey asks the Court to stay discovery pending her filing of a motion to dismiss ExxonMobil's first amended complaint.

For the reasons set forth below, none of these arguments has any merit, and the motion should be denied.

ARGUMENT

I. The Attorney General's Motion Is Unauthorized and Procedurally Improper.

As an initial matter, Attorney General Healey cites no procedural vehicle or legal standard for her so-called "motion to vacate" the Court's Deposition Order, and ExxonMobil is unaware of any federal or local rule that permits the Attorney General to make such a motion. For this reason alone, the Attorney General's "motion to vacate" should be denied.

To the extent that Attorney General Healey's "motion to vacate" can be construed as a second motion for reconsideration of the Court's October 13, 2016 discovery order, the application also should be denied because it rests on "rehashing old arguments or advancing theories of the case that could have been presented earlier." *Sec. & Exch. Comm'n* v. *Arcturus Corp.*, No. 3:13-CV-4861-K, 2016 WL 3654430, at *1 (N.D. Tex. July 8, 2016) (quoting *Reneker* v. *Offill*, No. 3:08-CV-1394-D, 2012 WL 3599231, at *1 n.1 (N.D. Tex. Aug. 22, 2012)).

In the alternative, if the Attorney General's "motion to vacate" is considered to be a motion for relief from an order under Fed. R. Civ. P. 60(b)(6), the motion also should be denied because the Attorney General fails even to acknowledge, much less carry, her burden to demonstrate the "extraordinary circumstances" that could justify relief under that rule. *Evenson* v. *Sprint/United Mgmt. Co.*, No. 3:08-CV-0759-D, 2011 WL 3702627, at *4 (N.D. Tex. Aug. 23, 2011).

Regardless of how the Court interprets the Attorney General's "motion to vacate," her failure to identify, or even attempt to meet, any procedural ground or legal standard for the requested relief provides a threshold reason for denying the motion in its entirety.

Even if the Court were to proceed to the merits of the Attorney General's motion, it should be dismissed for the additional reasons set forth below.

II. The Court Was Within the Bounds of Its Discretion in Ordering Jurisdictional Discovery Before Rejecting Every One of the Attorney General's Alternative Arguments for Dismissal.

The Attorney General's motion to vacate the Deposition Order and stay discovery simply repeats the same arguments already made in her prior submissions, while adding no new facts or law that supply a basis to forgo the discovery the Court has already determined is necessary to evaluate the Attorney General's request for *Younger* abstention.

A. The Court Need Not Reach the Attorney General's Personal Jurisdiction Argument, Which Would in Any Event Merit Additional Discovery.

The Attorney General begins by stating, once again, her position that the Court lacks personal jurisdiction over her and should grant her motion to dismiss immediately on this basis. (Mem. 7.) As demonstrated in ExxonMobil's prior submissions, however, the Court is under no obligation to address the Attorney General's arguments for dismissal in her preferred order. (Dkt. 90 at 7–9.) Instead, when considering matters of jurisdiction and justiciability, it is the Court's discretion—not the Attorney General's preference—that controls. *See Sinochem Int'l Co. Ltd.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (stating that "a federal court has leeway 'to choose among threshold grounds'" when considering whether to dismiss a complaint (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999))); s*ee also Wellogix, Inc.* v. *SAP Am., Inc.*, 648 F. App'x 398, 400 (5th Cir. 2016) (addressing prudential doctrine of *forum non conveniens* before jurisdictional question). Indeed, in prior briefing the

Attorney General herself has conceded that "[c]ustomarily, a federal court first resolves doubts about its jurisdiction over subject matter"—including questions of *Younger* abstention—before turning to personal jurisdiction." (Dkt. 79 at 4 (quoting *Ruhrgas*, 526 U.S. at 578).) The Attorney General offers no reason to deviate from that custom.

Even if the Court indulged the Attorney General's preference and considered personal jurisdiction at this juncture, the result would be either a finding of jurisdiction or the continuation of discovery. As set forth in ExxonMobil's prior submissions, the Texas Supreme Court has made clear that the State's long-arm statute extends to the outer boundaries of due process, and the Fifth Circuit has held that due process poses no obstacle to the exercise of jurisdiction over an out-of-state actor who, like the Attorney General, intentionally directs tortious conduct at Texas and intends for injuries resulting from that conduct to be suffered in Texas.[5] Neither the Fifth Circuit's dicta in *Stroman* v. *Wercinski*, 513 F.3d 476 (5th Cir. 2008), nor the decision reached on a starkly different record in *Saxton* v. *Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921 (N.D. Tex. Aug. 31, 2010), undermines the propriety of jurisdiction over an out-of-state actor who reaches into Texas with the intent of violating the constitutional rights, and stifling the speech, of a Texas resident.

At a minimum, the Attorney General's own statements, quoted in ExxonMobil's pleadings, "suggest with reasonable particularity the possible existence of the requisite contacts" resulting from the Attorney General's bad faith and intentional direction of constitutional torts at ExxonMobil in Texas. *Valtech Sols., Inc.* v. *Davenport*, No. 3:15-CV-3361-D, 2016 WL 2958927, at *2 (N.D. Tex. May 23, 2016) (internal citations omitted) (quoting *Toys "R" Us, Inc.*

[5] Dkt. 90 at 9 (citing, *e.g.*, *Spir Star AG* v. *Kimich*, 310 S.W.3d 868, 872 (Tex. 2010); *Wien Air Alaska, Inc.* v. *Brandt*, 195 F.3d 208, 213 (5th Cir. 1999); *Lewis* v. *Fresne*, 252 F.3d 352, 358–59 (5th Cir. 2001); *Ruston Gas Turbines Inc.* v. *Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Bear Stearns Cos.* v. *Lavalle*, No. 3:00 Civ. 1900-D, 2001 WL 406217, at *3–4 (N.D. Tex. Apr. 18, 2001)); Dkt. 60 at 9–12 (same).

v. *Step Two, SA*, 318 F.3d 446, 456 (3d Cir. 2003)). In such cases, "the plaintiff's right to conduct jurisdictional discovery should be sustained." *Id.* (quoting *Step Two*, 318 F.3d at 456); *see also Next Techs., Inc.* v. *ThermoGenisis, LLC*, 121 F. Supp. 3d 671, 676 (W.D. Tex. 2015) (permitting jurisdictional discovery to determine, *inter alia*, whether the court could exercise specific personal jurisdiction over defendants alleged to have "directed" activities into Texas). The consideration of the Attorney General's arguments in her preferred sequence therefore will not enable the parties to forgo discovery, but rather will simply beg the same question of whether the Attorney General harbored an intent to direct her unlawful conduct at Texas and stifle speech she knew to be emanating from Texas.[6]

B. This Case Is Ripe for Adjudication.

Nor, as the Attorney General contends, is this dispute unripe. Distinguishing this case from *Google* v. *Hood*, 822 F.3d 212 (5th Cir. 2016)—the authority on which the Attorney General exclusively relies—the civil investigative demand ("CID") served on ExxonMobil is self-executing and carries an immediate penalty for non-compliance that does not, by its terms, require the intervention of a court. In fact, the CID served on ExxonMobil includes as an exhibit the provision of Massachusetts law stating that failure to comply is punishable by a civil penalty of $5,000.[7] Even if the CID were not self-executing, the Attorney General has rendered this dispute ripe by seeking to enforce the CID in Massachusetts state court. *Google*, 822 F.3d at 225 (dispute concerning a non-self-executing subpoena was unripe so long as the state official "ha[d] not brought an enforcement action"); *Lone Star Coll. Sys.* v. *EEOC*, No. H-14-529, 2015 WL 1120272, at *7 (S.D. Tex. Mar. 12, 2015) ("These claims are not ripe for review because there is

[6] Indeed, were the Court to determine that it needed discovery to ensure an adequate record to assess the Attorney General's personal jurisdiction argument, that would appear to moot one of the Attorney General's primary objections to discovery.

[7] Dkt. 10-1 at App. 044.

no final agency action or a move to enforce a subpoena."). The Attorney General's actions have therefore made this matter ripe.

C. Venue Is Properly Laid in this District.

The Attorney General is also mistaken in claiming that venue is improper. Venue is properly laid in this District because the Attorney General intends to impinge on the free speech rights of ExxonMobil, which has a principal place of business in this District, and a First Amendment injury has been held to be located at the plaintiff's principal place of business. *Fund for La.'s Future* v. *La. Bd. of Ethics*, No. 14-0368, 2014 WL 1514234, at *12 (E.D. La. Apr. 16, 2014).[8] As a result, a substantial part of the events giving rise to the claim—ExxonMobil's injuries—occurred in this District. 28 U.S.C. § 1391(b).

[8] The Attorney General asserts that the failure to address venue at this juncture would merit the issuance of a writ of mandamus by the Fifth Circuit. The case cited for this proposition, *In re Volkswagen*, 545 F.3d 304 (5th Cir. 2008), is inapposite. In *Volkswagen*, the Fifth Circuit found mandamus warranted on facts a far cry from those here, observing that "[t]he errors of the district court—applying the stricter *forum non conveniens* dismissal standard, misconstruing the weight of the plaintiffs' choice of venue, treating choice of venue as a § 1404(a) factor, misapplying the *Gilbert* factors, disregarding the specific precedents of this Court in *In re Volkswagen I*, and glossing over the fact that not a single relevant factor favors the Singletons' chosen venue—were extraordinary errors." *Id.* at 318. In this case, by contrast, the Court is well within the bounds of its discretion to assemble a record to weigh the abstention argument that the Attorney General herself raised. *See Allied Chem. Corp.* v. *Daiflon*, 449 U.S. 33, 36 (1980) (per curiam) (stating that, as a general rule, mandamus relief is not available to control an exercise of discretion, because "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" (citation omitted)).

III. The Deposition of Attorney General Healey Is Well Supported by Both the Record and Applicable Law.

The Attorney General does not dispute that the Court has the power to compel her to give testimony explaining the basis for her unlawful and politically motivated investigation, but rather claims that the Court abused its discretion in finding that "exceptional" and "extraordinary" circumstances justify her deposition in this case. (Mem. 9–12.) Nothing could be further from the truth. The compelling record of the misuse of prosecutorial authority, and the applicable case law, amply support the deposition of the Attorney General.

A. The Record Supports an Inference that Attorney General Healey Has Misused Her Prosecutorial Powers and Supports Further Inquiry by Deposition.

The record supporting the Attorney General's misuse of her prosecutorial authority is extraordinarily strong and supports further inquiry through a deposition. As the Court set forth in the October 13, 2016 Discovery Order, "[p]rior to the issuance of the CID, Attorney General Healey and several other attorneys general participated in the AGs United for Clean Power Press Conference on March 29, 2016 in New York." (Dkt. 73 at 4.) "At the meeting, Attorney General Healey and the other attorneys general listened to presentations from a global warming activist and an environmental attorney that has a well-known global warming litigation practice. Both presenters allegedly discussed the importance of taking action in the fight against climate change and engaging in global warming litigation." (*Id.*)

"One of the presenters, Matthew Pawa of Pawa Law Group, P.C., has [] previously sued Exxon for being a [purported] cause of global warming. After the closed door meeting, Pawa emailed the New York Attorney General's office to ask how he should respond if asked by a *Wall Street Journal* reporter whether he attended the meeting with the attorneys general. The New York Attorney General's office responded by instructing Pawa 'to not confirm that [he]

attended or otherwise discuss' the meeting he had with the attorneys general the morning before the press conference." (*Id.*)

During the press conference itself, Attorney General Healey "stated that '[f]ossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable.' Attorney General Healey then went on to state that, '[t]hat's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.' The speech ended with Attorney General Healey reiterating the Commonwealth of Massachusetts's commitment to combating climate change and that the fight against climate change needs to be taken '[b]y quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long.'" (*Id.* at 5.) As the Court rightly observed in the October 13, 2016 Discovery Order, the "anticipatory nature" of Attorney General Healey's comments bespeak bias and suggest an "investigation" with an impermissibly pre-ordained outcome. (*Id.* at 5.)[9]

The Attorney General's actions following the March 29 press conference have only confirmed the improper motive underlying her investigation. On April 29, 2016—ten days after serving the CID—a representative of Attorney General Healey's office signed a common interest

[9] The Attorney General attempts to create a false equivalency between her own conduct at the March 29 Press Conference and instances where other attorneys general have issued press releases regarding investigations. In particular, Attorney General Healey analogizes her actions to the September 24, 2015 announcement that the Texas Attorney General was joining in a multi-state investigation of Volkswagen's diesel emissions scandal. (Mem. 15 n.12.) What the Attorney General neglects to mention is that the Texas Attorney General announced an inquiry only ***after*** the Environmental Protection Agency had issued a formal notice of violation to Volkswagen on September 18, 2015 after extensive investigation and, indeed, after Volkswagen had ***publicly admitted*** the conduct that was being investigated on September 21, 2015. There is thus no valid comparison between Attorney General Healey's conduct in this case and the type of activity that she insists is "common" for attorneys general to engage in. (Mem. 15.)

agreement with other attorneys general seeking to conceal their activities from the public.[10] The stated purposes of this agreement were "limiting climate change and ensuring the dissemination of accurate information about climate change"—removing any doubt that Attorney General Healey and other signatories intended to use their investigative powers to regulate speech on a matter of public debate and concern if the speech deviated from what they believe to be "accurate."[11]

In sum, as the Court recognized in the October 13, 2016 discovery order and the Deposition Order flowing from it, the preparatory, closed-door meeting with non-law enforcement officials, the comments at the March 29 press conference, together with the steps taken thereafter to shield the activities of the Attorney General and her co-conspirators from public view, provide exceptionally strong bases to require Attorney General Healey to explain why her "investigation" is not, as the facts suggest, a pre-ordained exercise designed to deter ExxonMobil (and others) from exercising rights secured by the First Amendment.

B. None of the Cases Cited by Attorney General Healey Provides a Basis to Vacate the Court's Deposition Order.

None of the cases relied upon by the Attorney General compels a different result. Instead, these cases permit depositions of government officials where, as here, there is an exceptionally strong record suggesting the misuse of prosecutorial power, and the government official in question has unique, personal knowledge of the circumstances in dispute.

In *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985), the D.C. Circuit upheld the denial of a deposition of the Secretary of Labor because, unlike here, plaintiff had "not suggested any information in the possession of these officials (regarding general enforcement proceedings) that it could not obtain from published reports and available

[10] Dkt. 101-5 at App. 202.
[11] Dkt. 101-5 at App. 196.

agency documents." *Id.* at 587. The Fifth Circuit's decision of *In re Stone*, 986 F.2d 898 (5th Cir. 1993)—cited for the proposition that depositions of officials are permitted only in "egregious" cases—did not concern depositions at all, but rather whether a district judge could require government representatives with settlement authority to attend conferences as a matter of course. *Id.* at 900.

The Eleventh Circuit's decision of *In re United States (Kessler)*, 985 F.2d 510 (11th Cir. 1993), is similarly far afield. In *Kessler*, the Eleventh Circuit denied a deposition of the FDA administrator because, again unlike this case, "testimony was available from alternate witnesses" and the witness "did not assume office until . . . over two years after the case was sent to the Justice Department for further action" and thus "could not have been responsible for selectively prosecuting the defendants." *Id.* at 512–13.

Contrary to the Attorney General's characterization, the decision of the Fifth Circuit in *In re Office of Inspector General*, 933 F.2d 276 (5th Cir. 1991), actually recognizes that discovery should be permitted in subpoena enforcement proceedings where there has been a presentation of "meaningful evidence that the agency is attempting to abuse its investigative authority." *Id.* at 278 (quotation marks omitted). And the *Inspector General* court's treatment of the question of deposing government officials simply confirms what the Attorney General has already conceded—that such depositions are appropriate in "extraordinary circumstances." *Id.*

The Attorney General's description of *EEOC* v. *Exxon Corp.*, No. Civ.A. 3–95–CV–1311–H1, 1998 WL 50464 (N.D. Tex. Jan. 20, 1998), is also distorted. Attorney General Healey claims that the court in *EEOC* denied Exxon's request for a deposition of the EEOC chairman "based on its contention that 'Chairman Casellas may have personal knowledge of the facts at issue in this case because of statements he made to the media and because he is a top policy

maker for the Commission.'" (Mem. 10 (quoting *EEOC*, 1998 WL 50464, at *1).) Instead, the court found the deposition unnecessary because the witness "ha[d] submitted an affidavit wherein he specifically states he has no personal knowledge of any claim or defense asserted in this action, and that his only involvement in the case was to cast his vote to authorize the filing of suit in his capacity as a member of the Commission." *EEOC*, 1998 WL 50464, at *1. *EEOC* thus bears no resemblance to this case, where Attorney General Healey has provided no reason to believe she is unaware of the facts the Court has directed the parties to provide to it.

Finally, the Fifth Circuit's decision *In re FDIC*, 58 F.3d 1055 (5th Cir. 1995), is likewise inapposite. In *FDIC*, the Fifth Circuit quashed deposition notices to FDIC officials because "the FDIC retained discretion with regard to the disposition of" the assets in question, and, "[a]bsent a showing of contrary provisions of law or contract" cabining that discretion, depositions directed at the exercise of that discretion could not be premised on "bad faith or improper behavior." *Id.* at 1062. That is a far cry from the situation here, in which (to state the obvious) the Attorney General has no discretion to misuse her prosecutorial powers to stifle ExxonMobil's speech in an attempt to place a thumb on the scale of an ongoing policy debate.[12]

In sum, Attorney General Healey finds no refuge in the cases she cites in attempting to escape a deposition in this matter. Instead, when properly read in context, the cases fully support the deposition of the Attorney General where, as here, there is an uncommonly strong record suggesting the misuse of prosecutorial authority, and the deponent personally participated in, and appears to have unique knowledge of, the matters in dispute.

---

[12] The additional, out-of-Circuit authority cited by the Attorney General simply stands for the unremarkable proposition that depositions of high-ranking officials are disfavored unless the official has unique knowledge or the information cannot be obtained elsewhere. *See, e.g.*, *Lederman* v. *New York City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013); *Bogan* v. *City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). The Attorney General has not identified any subordinate or other individual who could provide the information the Court has requested and, indeed, as described below, the Attorney General is resisting any discovery that could conceivably provide the pertinent facts or identify other knowledgeable subordinates.

C. The Policy Rationales Offered by the Attorney General Also Do Not Supply a Basis to Vacate the Court's Deposition Order.

The Attorney General's position having no basis in the record or the applicable case law, she then cites a number of policy rationales that, in her view, militate against requiring her to give testimony in this case. None has merit.

First, the Attorney General objects that permitting inquiry into her investigation constitutes "a substantial intrusion on Massachusetts's sovereign interest in investigation [sic] violations of its state law." (Mem. 9–10.) But the Attorney General ignores that this is an action under 42 U.S.C. § 1983, and the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). Massachusetts can have no legitimate "sovereign interest" in wielding its investigative powers as a cudgel to violate ExxonMobil's constitutional rights and inhibit its speech. The discovery the Court has ordered is squarely aimed at determining whether Massachusetts has any sovereign interest meriting this Court's deference and, as a result, abstention. Taken to its logical end, the Attorney General's argument that her prerogative should be respected would abrogate Section 1983 and would always prevent inquiry into the question of whether government power is being constitutionally exercised.

Second, the Attorney General suggests that courts should be reluctant to permit examination of government investigators during their investigation, because doing so will impose "systemic costs" that could "chill law enforcement." (Mem. 11–12 (quoting *Wayte* v. *United States*, 470 U.S. 598, 607–08 (1985).) But as the Supreme Court recognized in its next breath in *Wayte*, "'[s]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints'" and "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard'" such as "the exercise of protected statutory and constitutional rights."

470 U.S. at 608 (quoting *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979), and citing *United States* v. *Goodwin*, 457 U.S. 368, 372 (1982)). Once again, the Attorney General's objection to participating in discovery simply requires the Court to assess, as it is seeking to do through the discovery it has ordered, whether there is a credible allegation that her authority has been, or is being, misused.

Third, and finally, the Attorney General asks the Court to forgo her deposition because her time is valuable. (Mem. 12.) However, the Deposition Order reflects that the Court is both aware, and respectful, of the duties that the Attorney General must exercise, and therefore stated that it is open to alternative dates for the Attorney General's deposition if necessary.[13]

IV. The Court Did Not Abuse Its Discretion by Ordering Discovery.

The Attorney General next argues that the Court erred in permitting discovery because discovery is not favored in actions that (unlike this one) solely challenge an administrative subpoena, and, further, that the Court abused its discretion by not compelling ExxonMobil to meet a heavy burden before discovery is granted. (Mem. 13–14.) Both arguments are red herrings.

First, this action is not, as the Attorney General's argument suggests, a mere challenge to an administrative subpoena. By this action, ExxonMobil is indeed seeking to protect constitutional rights that the subpoena would seek to infringe, but is also seeking a declaration that the totality of the actions of Attorneys General Healey and Schneiderman—along with others—has infringed on its rights. ExxonMobil is, further, independently seeking redress for Attorney General Healey's tortious abuse of process and civil conspiracy under Texas common law. Simply put, this case does not fit into the box in which the Attorney General seeks to put it.

[13] Attorney General Healey also complains that the Court "compounded its error" by requiring her to appear for a deposition in Dallas. Although that complaint does not supply a basis to vacate the Deposition Order, ExxonMobil stands ready to conduct this deposition at whatever location the Court prefers.

But even if it did, discovery would still be permitted. Indeed, the case Attorney General Healey relies on most heavily—*In re Office of Inspector General*—affirmatively recognizes that discovery should go forward where there has been a presentation of "meaningful evidence that the agency is attempting to abuse its investigative authority." 933 F.2d at 278 (quotation marks omitted).

Second, the Attorney General complains that ExxonMobil has not met a "heavy burden" of showing that discovery is necessary. This argument is an exercise in revisionist history and turns the posture of these proceedings upside down. ExxonMobil did not request, and does not have the burden to justify, discovery. Instead, the Court determined, after the benefit of full briefing and oral argument on ExxonMobil's motion for a preliminary injunction, that discovery was necessary to weigh the abstention argument that the Attorney General herself raised. It is therefore not ExxonMobil's burden to show that discovery is necessary, it is the Attorney General's burden to show that the *Younger* abstention argument she continues to press can be resolved without the need for discovery—a burden she has failed to carry.

V. The Court Has Already Determined That It Lacks an Adequate Record to Resolve the Question of the Attorney General's Bad Faith, and the Attorney General Offers No Reason to Revisit that Determination.

Perhaps recognizing the lack of merit in the preceding argument, Attorney General Healey next pivots to rehash the contention made in her prior motion for reconsideration that the record already before the Court is adequate to determine that she issued the CID in good faith and as required by Massachusetts law. (Mem. 14–17.) These arguments—addressed in the briefing on ExxonMobil's motion for a preliminary injunction and the Attorney General's prior motion for reconsideration—are entirely meritless.

A. The Present Factual Record Does Not Mandate a Conclusion that the Attorney General Issued the CID in Good Faith.

As for her good faith factual basis for issuing the CID, the Attorney General complains that the Court cited "only allegations made by Exxon" in the October 13, 2016 discovery order and "appears to have ignored completely the ample facts in the record and cited by Attorney General Healey that show the good faith basis for issuance of the CID." (Mem. 16.) There are two problems with this contention.

First, although it is literally true that the Court cited "allegations made by Exxon" in the October 13, 2016 discovery order, the suggestion that the order was premised on bare allegations is misleading at best. Indeed, the "allegations made by Exxon" on which the Court relied were undisputedly *the Attorney General's own words*, as well as documentary evidence of communications between attorneys general and environmental activists that were turned over pursuant to freedom of information requests made by third parties.

Second, as ExxonMobil demonstrated in opposing the Attorney General's prior motion for reconsideration, and as shown at oral argument on ExxonMobil's motion for a preliminary injunction, the documents which the Attorney General claims "illustrat[e] Exxon's extensive knowledge—decades ago—of climate change" (Mem. 16) cannot fairly be read to support that statement. Instead, the Attorney General's supposed good faith theory is reliant on cherry-picking documents and taking quotes out of context to reverse engineer a premise about ExxonMobil's knowledge that is not supported by the full record. The Attorney General's complaint is thus, once again, not that the Court has failed to consider the materials she has put forward but that those materials have failed to persuade the Court that her investigation was initiated in good faith.

B. The Attorney General's Anticipatory Comments at the March 29 Press Conference Are Neither Required Nor Immunized by Massachusetts Law.

The Attorney General also contends that the Court "misapprehends what Massachusetts law requires for the issuance of a CID by the Attorney General." (Mem. 15.) If only the Court understood that Massachusetts law *requires* the Attorney General to prejudge the results of her investigations, the argument goes, it would understand that her anticipatory comments at the March 29 press conference were not indicative of bad faith. ExxonMobil's opposition to the Attorney General's prior motion for reconsideration has already debunked this tortured reading of Massachusetts law, which amounts to nothing more than a post-hoc attempt to rationalize the Attorney General's extraordinary comments at the March 29 press conference. (Dkt. 90 at 11.).

Indeed, the Attorney General's argument omits the clause of Mass. Gen. Laws c. 93A, § 6(1), which states that the purpose of a CID is "to ascertain whether in fact [the target of a CID] has engaged in or is engaging in" a prohibited practice. Contrary to the Attorney General's claim, the statutory purpose of a CID is thus to investigate whether a *suspicion* of unlawful conduct is well founded. This interpretation of Massachusetts law comports with the Attorney General's prior statements to this Court. In opposing ExxonMobil's motion for a preliminary injunction, the Attorney General explained that her office "has issued several hundred CIDs to or regarding companies or individuals *suspected* of committing unfair and deceptive business practices." (Dkt. 43 at 4 (emphasis added).) The Court should not credit the Attorney General's attempt to normalize her comments at the March 29 press conference by characterizing them as required by Massachusetts law.[14]

[14] Tellingly, although the Attorney General suggests that Massachusetts law requires her to make judgments regarding the liability of a target for a CID, she has cited no other instances in which she made comments like those she made about ExxonMobil at the March 29 press conference.

VI. Discovery Should Not Be Stayed Because of the Amended Complaint.

Finally, the Attorney General asserts that the October 13, 2016 discovery order is moot in light of the filing of ExxonMobil's first amended complaint. (Mem. 17–18.) That is not so. The Attorney General's recently filed motion to dismiss the first amended complaint (Dkt. 124) raises the same *Younger* abstention argument that gave rise to the Court's October 13, 2016 discovery order. (Dkt. 125 at 20–22.) Attorney General Healey's motion also asserts the same personal jurisdiction argument as her prior motion (*id.* at 5–16) which, as set forth above, should be either rejected on the current record or considered only after discovery at least as broad as that already ordered by the Court. Under such circumstances, it would be a futile injection of needless delay to impose a stay on already-proceeding discovery that will be necessary in all events. *See, e.g.*, *Sprint Sols., Inc.* v. *Cell Xchange, Inc.*, 49 F. Supp. 3d 1074, 1077 n.3 (M.D. Fla. 2014) ("Even if the [Court] determined that the discovery was rendered moot, given the filing of the Second Amended Complaint and, as discussed below, the determination that Plaintiffs appear to state a valid federal claim, requiring Plaintiffs to re-serve the discovery requests upon the TCX Defendants at this juncture would prove an exercise in futility.").

CONCLUSION

For the reasons set forth above, there is no merit to Attorney General Healey's repetitious motion seeking to evade the very discovery this Court has determined is necessary to evaluate the Attorney General's motion to dismiss for lack of subject matter jurisdiction. The Attorney General offers no new facts or law that could, or should, justify a departure from this Court's direction that the parties assemble a proper record to weigh the *Younger* abstention argument that the Attorney General herself made in the first instance. Having no basis in law, fact, or logic, the Attorney General's motion should be denied, and discovery should be permitted to proceed.

Dated: November 29, 2016

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(*pro hac vice*)
State Bar No. 24054300
patrick.j.conlon@exxonmobil.com
Daniel E. Bolia
State Bar No. 24064919
daniel.e.bolia@exxonmobil.com
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

/s/ Nina Cortell
Nina Cortell
State Bar No. 04844500
nina.cortell@haynesboone.com
HAYNES & BOONE, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219
(214) 651-5579
Fax: (214) 200-0411

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.
(*pro hac vice*)
twells@paulweiss.com
Michele Hirshman
(*pro hac vice*)
mhirshman@paulweiss.com
Daniel J. Toal
(*pro hac vice*)
dtoal@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

/s/ Ralph H. Duggins
Ralph H. Duggins
State Bar No. 06183700
rduggins@canteyhanger.com
Philip A. Vickers
State Bar No. 24051699
pvickers@canteyhanger.com
Alix D. Allison
State Bar. No. 24086261
aallison@canteyhanger.com
CANTEY HANGER LLP
600 West 6th Street, Suite 300
Fort Worth, TX 76102
(817) 877-2800
Fax: (817) 877-2807

Justin Anderson
(*pro hac vice*)
janderson@paulweiss.com
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Counsel for Exxon Mobil Corporation

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of November 2016, a true and correct copy of the foregoing document was filed electronically via the CM/ECF system, which gave notice to all counsel of record pursuant to Local Rule 5.1(d).

/s/ Ralph H. Duggins
RALPH H. DUGGINS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	)	No. 4:16-CV-469-K

ATTORNEY GENERAL HEALEY'S REPLY IN SUPPORT OF HER MOTION TO VACATE DISCOVERY ORDER AND STAY DISCOVERY, AND FOR A PROTECTIVE ORDER

This Court's October 13 and November 17, 2016, discovery orders (respectively, the "Jurisdictional Discovery Order" (Doc. No. 73), and the "Deposition Order," (Doc. No. 117)) have predictably ignited resource-intensive disputes over discovery, now involving three parties and multiple non-party recipients of subpoenas, that will only escalate—despite the fact that this Court plainly lacks personal jurisdiction over Attorney General Healey. The Court acknowledged at oral argument on Exxon's motion for a preliminary injunction that it had recently relied on *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), to dismiss a similar action against a non-resident state government official, and bluntly demanded of Exxon's counsel, "[h]ow the heck do I have jurisdiction?" *See* Tr. of Sept. 19 argument (Doc. No. 68) at 87. The answer is that Fifth Circuit and Supreme Court precedent makes clear that this Court does not have personal jurisdiction. Moreover, the matter is not ripe, and venue here is improper.

Exxon's counsel predicted to another court that discovery disputes arising from the Jurisdictional Discovery Order would consume months of the parties' and this Court's time, *see* Tr. of Show Cause Hearing at 54-55 (Motion to Amend Opp. App. Exh. 1 (Doc. No. 95-2) at 055-056), and then set about to ensure that result by immediately serving extensive, improper and burdensome discovery on Attorney General Healey. Exxon's Court-sanctioned, sweeping counter-discovery into the grounds for Attorney General Healey's civil investigative demand ("CID") is the precise type of "exhaustive inquisition into the practices of regulatory agencies" forbidden by the Fifth Circuit. *In re Office of Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991). Exxon's purported justification for the discovery—adopted by the Court in its Orders—rings hollow given that Exxon was itself cooperating with the New York Attorney General's similar subpoena, six months after the March press conference it complains of, until the Jurisdictional Discovery Order enticed Exxon to add him as a defendant here.[1] And, Exxon continues to cooperate with the U.S. Securities and Exchange Commission's ongoing investigation, which is focused on matters similar to those at issue in Attorney General Healey's CID.

This Court should reject Exxon's ploy to shift the focus from the *investigations of Exxon's conduct* by two state attorneys general to the *investigators themselves* to avoid a ruling on the obvious jurisdictional failures of its lawsuit. The Court should vacate its Orders, stay discovery, and address Attorney General Healey's motion to dismiss for lack of personal

[1] Exxon also no doubt realized after the September 19 argument that its cooperation with the New York Attorney General's subpoena made it difficult, if not impossible, for Exxon to obtain its requested relief—an injunction of Attorney General Healey's CID—from this Court, since its cooperation establishes that compliance with the substantially similar Massachusetts CID would not cause Exxon irreparable harm. Recently, the New York Attorney General moved to compel Exxon's further compliance with that subpoena. Exxon's account of the November 21 hearing on that motion, Opp. at 3 n.2, is contradicted by the very article it cites, which confirms that Exxon is under New York state court direction to reach agreement with the New York Attorney General on a schedule to comply. Stewart Bishop, *NY AG, Exxon Spar over Climate Change Probe*, LAW360 (Nov. 21, 2016) https://www.law360.com/articles/865025/print?section=energy (subscription required) (cited in Opp. at 3 n.2).

jurisdiction, as *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) instructs, and for lack of ripeness and improper venue.

A. THE ATTORNEY GENERAL'S MOTION IS PROPERLY BEFORE THIS COURT.

For the reasons set forth in her Memorandum of Law in Support of Her Motion to Vacate Order for Deposition and Stay Discovery and for a Protective Order (Doc. No. 121, "Vacate Mem.") at 9-12, the Court erred in issuing *sua sponte* its Deposition Order commanding Attorney General Healey's deposition in Dallas, Texas, on December 13, and she immediately moved to vacate it. Pursuant to Fed. Rules Civ. P. 60(b)(6) and 54(b) and this Court's inherent authority to control its docket and reconsider its orders (particularly those entered absent a request by any party), the Court is fully empowered to grant this relief. *See, e.g.*, *Hand v. United States*, 441 F.2d 529, 531 (5th Cir. 1971); 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2864 (3d ed. 2016); *see also Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 259 F. Supp. 2d 471, 475 (M.D. La. 2002) ("The plain meaning of [Rule 54(b)] is that a court retains jurisdiction over all the claims in a suit and may alter any earlier decision at its discretion until final judgment has been issued on a claim or on the case as a whole.").[2]

Further, as Attorney General Healey argued in her opening brief, Exxon's First Amended Complaint mooted the Jurisdictional Discovery Order; that Order should therefore be vacated. Vacate Mem. at 17. Attorney General Healey cannot be required to comply with an Order that has no legal effect.

[2] Attorney General Healey's prior Motion for Reconsideration (Doc. No. 78) of the Court's Jurisdictional Discovery Order, filed on *October 20*, obviously did not address the Court's Deposition Order, which was issued on *November 17*. The arguments presented in her Motion to Vacate therefore do not constitute a "rehashing" of prior arguments, as Exxon asserts. Opp. at 5.

B. NO DISCOVERY IS NECESSARY TO RESOLVE THE ATTORNEY GENERAL'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

Exxon asserts that, even if this Court vacated the Jurisdictional Discovery Order as it relates to the application of *Younger v. Harris*, 401 U.S. 37 (1971), discovery would still be necessary to determine whether the Court has personal jurisdiction over Attorney General Healey. Exxon is wrong. Apparently continuing to rely on a flawed understanding of the "effects" jurisdiction described in *Calder v. Jones*, 465 U.S. 783 (1984), Exxon argues that the Attorney General's remarks at the March 29, 2016, press conference in New York show that she intentionally directed a constitutional tort at Exxon in issuing the CID, harming Exxon in Texas. Even if that were true—which Attorney General Healey strongly disputes—it would be an insufficient basis to support "effects" jurisdiction under the Supreme Court's personal jurisdiction jurisprudence.

As the Supreme Court remarked in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), construing *Calder*: "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts *with the forum*"—*i.e.*, with Texas itself—and "not just [with] the plaintiff." *Id.* at 1123 (emphasis added). In contrast with the "ample" variety of actions directed toward and into California by the defendant in *Calder*, *id.*, Exxon points only to Attorney General Healey's remarks at the press conference in New York in March 2016, and, implicitly, her issuance of the CID to Exxon in Massachusetts in April 2016 to justify personal jurisdiction. *See* Opp. at 7. None of these actions, however, could reasonably be described as "contacts *with the forum*"—*i.e.*, contacts *with Texas*, as opposed to Exxon—and Exxon has not suggested that Attorney General Healey has any other such contacts with Texas. *Id.* at 1123.

Instead, Exxon, the plaintiff, attempts to refocus the jurisdictional analysis on its *own*

presence in Texas and the alleged foreseeable "injuries resulting from [defendant Attorney General Healey's] conduct to be suffered in Texas." Opp. at 7. This logic was rejected—unanimously—by the Supreme Court in *Walden*. *Id.* at 1125. Here, as in *Walden*, Exxon's presence in Texas and its "claimed injury do[] not evince a connection between" *Attorney General Healey* and Texas, let alone a "meaningful" one. *Id.* Indeed, as in *Walden*, Exxon "would have experienced this same [alleged, intentional harm] wherever else" it might have established its principal place of business. *Id.* As such, there is no hint of any plausible basis for personal jurisdiction over Attorney General Healey to be found by jurisdictional discovery.[3]

C. EXXON'S ARGUMENTS FOR VENUE AND RIPENESS ARE WITHOUT MERIT.

Exxon makes no pretense of arguing that discovery is warranted for Attorney General Healey's other dispositive grounds for dismissal. Instead, Exxon argues first that, as a matter of law, venue is proper because Exxon's principal place of business is in this district and this district is the location of its alleged harm. Opp. at 9. That Exxon resides in Texas or may feel some effect from the CID there, however, does not control the venue analysis; what matters is "the *defendant's* conduct, and where that conduct took place," and none of the Attorney General's conduct took place in Texas. *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) (emphasis added) ("[T]he fact that a plaintiff residing in a given judicial district feels the effects of a defendant's conduct in that district does not mean that the events or omissions occurred in that district.") (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th

[3] In any event, jurisdictional discovery may not rest "on vague assertions that additional discovery will produce needed, but unspecified, facts." *Freeman v. United States*, 556 F.3d 326, 341–42 (5th Cir. 2009) (quoting *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir.1980)); *see also Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 (5th Cir. 2014) (affirming denial of jurisdictional discovery when facts not disputed and requesting party "unable to state how the discovery he requested would change the jurisdictional determination"); *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir. 1982) (when "the lack of personal jurisdiction is clear, discovery would serve no purpose and should not be permitted.").

Cir. 1995)); *see also Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921, at *4 (N.D. Tex. Aug. 31, 2010) (Kinkeade, J.) (holding venue in Texas improper where plaintiffs brought § 1983 claim against Utah judge based on sanctions order issued in Utah state court case). Exxon's decision to maintain its principal place of business in Texas or store its responsive documents there is, therefore, not relevant to the venue inquiry.[4]

Exxon also argues that this case is, in fact, ripe for adjudication. Exxon is wrong because, as the Fifth Circuit has recognized, Exxon may defend itself and raise objections in Massachusetts state court when—and if—an actual enforcement action against it ultimately occurs. *Google, Inc. v. Hood*, 822 F.3d 212, 225-26 (5th Cir. 2016). *See also In re Ramirez*, 905 F.2d 97, 98 (5th Cir. 1990) (dismissing action to quash investigatory subpoena for lack of subject matter jurisdiction "because of the availability of an adequate remedy at law if, and when, the agency files an enforcement action"); *Atl. Richfield Co. v. FTC*, 546 F.2d 646 (5th Cir. 1977) (pre-enforcement relief from administrative subpoenas inappropriate in light of opportunity to bring due process and regulatory procedural objections in any subsequent enforcement proceeding). To evade this outcome, Exxon wrongly insists that the CID is self-executing, but that is unquestionably not the case under Massachusetts law; Attorney General Healey has no independent ability to impose a civil penalty without a court order. The Attorney General has moved to compel Exxon's compliance with the CID in the context of Exxon's blanket challenge

[4] Exxon accuses Attorney General Healey of misconstruing the Fifth Circuit's decision in *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008), Opp. at 9 n.8, but Exxon is mistaken. "When venue is challenged, the court must determine whether the case falls within one of the three categories set out in [28 U.S.C.] § 1391(b). If it . . . does not, venue is improper, and the case *must* be dismissed or transferred under § 1406(a)." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 577 (2013) (emphasis added). *Volkswagen* makes clear that even discretionary decisions on proper venue may be vacated through mandamus if the district court committed a "clear abuse of discretion" producing a "patently erroneous result." 545 F.3d at 310. Here, as in *Volkswagen*, it would be extraordinary error not to dismiss or, instead, transfer venue to the District of Massachusetts, where "the only connection between this case and the [Northern] District of Texas is plaintiff['s] choice to file there." *Id.* at 318 (citation omitted).

to the CID in Massachusetts Superior Court under Massachusetts law, Mass. Gen. Laws ch. 93A, § 6(7), but Exxon will face no consequence for not complying with the CID while its petition to set aside or modify it is pending before the Superior Court—nor until its appeals are exhausted. Moreover, Attorney General Healey has only *initiated an investigation* by issuing a CID under Chapter 93A; she has neither determined to undertake an enforcement action against Exxon under that law nor asserted any specific claim under any other state law. The dispute is, therefore, not ripe.

D. EXXON'S ALLEGATIONS DO NOT EVIDENCE THE EXTRAORDINARY CIRCUMSTANCES REQUIRED TO JUSTIFY DEPOSING ATTORNEY GENERAL HEALEY.

Exxon does not dispute that testimony of high ranking officials can be gained only in extraordinary circumstances, and its only response is to argue that the facts here—Attorney General Healey's remarks at a press conference,[5] a pre-press conference briefing to attorneys general by an environmental attorney and a scientist, and the existence of a routine common interest agreement—constitute such circumstances. [6] Opp. at 10. But allegations such as

[5] Contrary to Exxon's implication otherwise, Opp. at 19 n.14, Attorney General Healey and other state attorneys general regularly discuss their offices' open civil investigations, especially when those investigations respond to public information that suggests wrongdoing. *See, e.g.*, Robert Weisman, *AG warns maker on hepatitis drug costs*, BOSTON GLOBE, Jan. 27, 2016, *available at* http://www.bostonglobe.com/business/2016/01/27/calls-gilead-lower-price-hepatitis-medicines/CNykZWySat0LiYY4cUZfRO/story.html; Felice J. Freyer, *AG Maura Healey continues probe of Connector software developer*, BOSTON GLOBE, May 18, 2015, *available at* https://www.bostonglobe.com/metro/2015/05/17/massachusetts-attorney-general-maura-healey-continues-probe-connector-software-developer/KTU4qzm8FVxKXZXmGWZY2I/story.html; Lana Shadwick, *Texas AG Vows 'Aggressive Investigation' of Planned Parenthood*, BREITBART, July 29, 2015, *at* http://www.breitbart.com/texas/2015/07/29/texas-ag-vows-aggressive-investigation-of-planned-parenthood/.

[6] Exxon goes so far as to assert that an e-mail between a conference attendee and an employee of the New York Attorney General's Office somehow demonstrates Attorney General Healey's bad faith, Opp. at 10, though Exxon points to not a single fact to show that Attorney General Healey or anyone in her Office was even aware of that correspondence prior to Exxon obtaining it, via state public records requests made by Exxon's third-party surrogates, and then attaching it as an exhibit to its complaint. Such grounds are not a sufficient basis to obtain deposition testimony from Attorney General Healey. *See EEOC v. Exxon*

Exxon's, on which this Court relied in issuing its Orders, do not even come close to satisfying the high bar to obtain a top executive's testimony. The Fifth Circuit has been adamant that, "a defendant is not entitled to engage in counter-discovery to find grounds for resisting a subpoena." *In re Office of Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991) (granting mandamus and vacating discovery order). Absent a "substantial demonstration" including "meaningful evidence that [an] agency is attempting to abuse its investigative authority," *no* such discovery is permissible. *Id.* Exxon's anemic allegations and conclusory statements in no way constitute "meaningful evidence" sufficient to meet this standard.

Exxon suggests that, since the Court has acted *sua sponte*, Exxon has no burden here to demonstrate that discovery is necessary to support its claim that *Younger* abstention is barred by alleged bad faith on the part of Attorney General Healey.[7] Opp. at 17. In any case, the facts alleged by Exxon are insufficient to show bad faith—to the extent Exxon has a burden, it has failed to meet it, and the Court's reliance on those facts as a basis for its Orders was error. Attorney General Healey has no burden here; moreover, as she has argued, it is reversible error for the Court to ignore, as it appears to have done, the extensive record facts that demonstrate her good faith basis for issuing the CID. Vacate Mem. at 16 & 16 n.3; *see Smith v. Hightower*, 693 F.2d 359, 369 (5th Cir. 1982).

Notwithstanding Exxon's unavailing efforts to distinguish and mischaracterize the cases on which Attorney General Healey relies, those cases uniformly stand for the longstanding proposition that a federal court's authority is narrowly circumscribed with respect to ordering or

---

Corp., No. Civ.A. 3:95-cv-1311-H, 1998 WL 50464, at *2 (N.D. Tex. Jan. 20, 1998) (Sanders, J.) (deposition unwarranted where Exxon failed to make any showing that official had knowledge of a letter and information contained therein).

[7] Indeed, Exxon admits that it did not request discovery, perhaps because it recognizes it could not meet its heavy burden. Opp. at 17.

permitting the depositions of high ranking officials. The U.S. Supreme Court took pains in *United States v. Morgan* to point out that the district court erred when, "over the government's objection," it authorized the deposition of the Agriculture Secretary, concluding "the Secretary should never have been subjected to examination," because it was not the court's role to probe his "mental processes." 313 U.S. 409, 422 (1941) (internal quotation omitted).

The Fifth Circuit, in *In re Stone v. IRS*, held it was an abuse of discretion for the district court to order a federal government official to attend a settlement conference—a far less onerous burden than a deposition—observing, "[t]his court, as well, has recognized that the government must sometimes be treated differently," since high-ranking officials "could never do their jobs if they could be subpoenaed for every case involving their agency." 986 F.2d 898, 904 (5th Cir. 1993); *see also In re Office of Inspector Gen.*, 933 F.2d at 278 (citing *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). In *In re FDIC v. 11,950 Acres of Land*, the Fifth Circuit granted mandamus, holding that the magistrate had abused his discretion by permitting depositions of FDIC board members where he "apparently made no attempt" to find exceptional circumstances. 58 F.3d 1055, 1060 (5th Cir. 1995). There, the Fifth Circuit found no "strong showing of bad faith or improper behavior," notwithstanding claimant's "allegations of misconduct (including conspiracy and cover-up) and assertions of gross abuse of power by government agencies and officials." *Id.* at 1062.

The Eleventh Circuit granted mandamus and ordered the district court to quash a subpoena issued to an official where no "extraordinary circumstances" justified taking his testimony. *In re United States (Kessler)*, 985 F.2d 510, 512-13 (11th Cir. 1993). The Second Circuit recently followed suit, affirming the district court's issuance of a protective order to prohibit the depositions of the mayor and deputy mayor of New York City, where plaintiffs

failed to demonstrate "exceptional circumstances" and "did not identify with particularity the information the needed, nor did they contend [defendant officials] had first-hand knowledge about the litigated claims, or that the relevant information could not be obtained elsewhere." *Lederman v. New York City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013). And, in another case in this district in which Exxon attempted to gain the deposition testimony of a high-ranking government official, the court found that Exxon's mere contention that the EEOC Chairman "may have personal knowledge of the facts at issue because of statements he made to the media and because he is a top policy maker" was insufficient. *EEOC v. Exxon Corp.*, No. Civ.A. 3:95-cv-1311-H, 1998 WL 50464, at *1 (N.D. Tex. Jan. 20, 2008) (Sanders, J.). While the official in that case had submitted an affidavit stating he lacked personal knowledge, the court held that even if Exxon could establish that the official had personal knowledge of the lawsuit, that would not be sufficient grounds to permit discovery from him, and further found that "Exxon's speculation" that the official had information about the Department of Justice's involvement in the case concerning possible ethical violations by Exxon experts did not meet the exceptional circumstances test. *Id.* at *2.

The facts alleged by Exxon are plainly insufficient to justify the deposition of Attorney General Healey, and the Court's Deposition Order must be vacated.

CONCLUSION

For the foregoing reasons, the Court should grant Attorney General Healey's motion to vacate its discovery orders and stay discovery, and for a protective order.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By her attorneys:

s/ Douglas A. Cawley

Douglas A. Cawley
Lead Attorney
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Richard A. Kamprath
Texas State Bar No. 24078767
rkamprath@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
Fax (214) 978-4044

Richard Johnston (*pro hac vice*)
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer (*pro hac vice)*
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne (*pro hac vice*)
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg (*pro hac vice*)
andy.goldberg@state.ma.us
Peter C. Mulcahy (*pro hac vice*)
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: December 1, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 1, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:16-CV-469-K
	§	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	§	
	§	
Defendants.	§	
	§	

ORDER

Before the Court is Defendant Massachusetts Attorney General Maura Healey's Motion to Reconsider Jurisdictional Discovery Order (Doc. No. 78) and Attorney General Healey's Motion to Vacate and Reconsider November 17 Order, Stay Discovery, and Enter a Protective Order (Doc. No. 120). After careful consideration, the Court **DENIES** Defendant's Motions.

SO ORDERED.

Signed December 5th, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

EXXON MOBIL CORPORATION, Plaintiff,	)	4:16-CV-469-K
VS.	)	DALLAS, TEXAS
MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendant.	)	September 19, 2016

TRANSCRIPT OF PRELIMINARY INUNCTION HEARING

BEFORE THE HONORABLE ED KINKEADE

UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF:

MR. JUSTIN ANDERSON
Paul, Weiss, Ritkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, D.C. 20006
janderson@paulweiss.com
(202) 223-7300

MR. SAM RUDMAN
Paul, Weiss, Ritkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, New York 10019
srudman@paulweiss.com
(212) 373-3512

MR. TED WELLS
Paul, Weiss, Ritkind,
Wharton & Garrison LLP
1285 Avenue of the Americas
New York, New York 10019
twells@paulweiss.com
(212) 373-3317

MR. RALPH A. DUGGINS
Cantey Hanger LLP
Cantey Hanger Plaza
600 W. 6th Street
Suite 300
Fort Worth, Texas 76102
rduggins@canteyhanger.com
(817) 877-2800

FOR THE DEFENDANT:

MR. DOUGLAS A. CAWLEY
McKool Smith
300 Crescent Court
Suite 1500
Dallas, Texas 75201
dcawley@mckoolsmith.com
(214) 978-4972

MR. RICHARD KAMPRATH
McKool Smith
300 Crescent Court
Suite 1500
Dallas, Texas 75201
kramprath@mckoolsmith.com
(214) 978-4210

MR. RICHARD JOHNSTON
Massachusetts Attorney
General's Office
One Ashburton Place
20th Floor
Boston, Massachusetts 02108
Richard.Johnston@state.ma.us
(617) 963-2028

MS. MELISSA HOFFER
Massachusetts Attorney
General's Office
One Ashburton Place
19th Floor
Boston, Massachusetts 02108
melissa.hoffer@state.ma.us
(617) 963-2322

MR. PETER MULCAHY
Massachusetts Attorney
General's Office
One Ashburton Place
18th Floor
Boston, Massachusetts 02108
peter.mulcahy@state.ma.us
(617) 963-2068

COURT REPORTER: **MR. TODD ANDERSON, RMR, CRR**
United States Court Reporter
1100 Commerce St., Rm. 1625
Dallas, Texas 75242
(214) 753-2170

Proceedings reported by mechanical stenography and transcript produced by computer.

PRELIMINARY INJUNCTION HEARING - SEPTEMBER 19, 2016

P R O C E E D I N G S

THE COURT: Okay. Case of Exxon Mobil Corp. versus Maura Tracy Healey and a bunch of others, Cause Number 4:16-CV-00469-K, set today for hearing on this motion for preliminary injunction.

And before I begin, let me know. If y'all have already settled this, let me know and I'll stop right now. No? Y'all didn't settle this? I'm just shocked. I would have thought for sure. I'm kidding. I'm kidding. I'm just trying to keep y'all from being so serious.

I know it's an important case, but as far as I know there is no dead bodies in this case, correct? There's not -- it's not a murder case. There's no -- death penalty is not -- so y'all kind of calm it down a little bit.

All right. So here we go.

Mr. -- who's going to argue for ExxonMobil? Y'all have 300 lawyers on your side.

Ms. Cortell, are you going to do it?

MS. CORTELL: I am not, Your Honor. I'm sort of the introducer.

THE COURT: Introducer.

MS. CORTELL: Introducer, yes, sir.

THE COURT: Well, good.

MS. CORTELL: Your local introducer.

THE COURT: Well, good, good.

Okay. Well, tell me who these folks are.

MS. CORTELL: Presenting for ExxonMobil today will be Justin Anderson at the far end of the table.

MR. ANDERSON: Good morning, Judge.

THE COURT: Gosh, are you out of law school? You look so young.

MS. CORTELL: Your Honor, he's a little older than he looks.

THE COURT: Is he? You've got to admit he looks pretty young.

MS. CORTELL: He does.

THE COURT: I mean, really.

MS. CORTELL: And they're looking younger every day. In fact, younger next to him is Sam Rudman.

THE COURT: Okay.

MS. CORTELL: And then our senior lawyer from Paul Weiss is Ted Wells.

THE COURT: Hi, Mr. Wells. How are you?

MR. WELLS: Would somebody say I look younger?

THE COURT: I wasn't going to say that about you, Mr. Wells. Okay.

MS. CORTELL: And from Cantey Hanger, local counsel with me, is Ralph Duggins.

THE COURT: Okay. Hi, Mr. Duggins.

MR. DUGGINS: Good morning, Your Honor.

MS. CORTELL: And then on behalf of ExxonMobil we have vice president and general counsel, Jack Balagia.

MR. BALAGIA: Good morning, Your Honor.

THE COURT: The only person with any white hair on your side.

MS. CORTELL: Your Honor, I won't disclose my true --

THE COURT: Well, okay. I won't tell. Well, good.

Okay. And y'all are going to take 45 minutes; is that right? And you're going to offer whatever you've got to offer. And I understand that's what both side are going to do. We're not calling any witnesses. Is that right?

MR. ANDERSON: That's right, Judge. We had an agreement to just use the materials that are already in the record.

THE COURT: I want to tell you I appreciate y'all doing that and y'all working together on that.

MR. ANDERSON: Of course, Judge.

THE COURT: Okay. On the other side is there an introducer, or do I need to go through it?

MR. CAWLEY: Good morning, Your Honor. Douglas Cawley from McKool Smith, and I am the introducer. I am out of law school, but I do have white hair.

THE COURT: Yes, you do. And my hair was as long as yours until I got a haircut yesterday.

MR. CAWLEY: Ah-oh. All right.
THE COURT: All right.
MR. CAWLEY: Thank you, Your Honor.
THE COURT: Tell me about all these --
MR. CAWLEY: Also presenting for Attorney General Healey will be Rich Johnston.
MR. JOHNSTON: Good morning, Your Honor.
MR. CAWLEY: He is chief legal counsel to the Attorney General of Massachusetts.
THE COURT: Well, good. Good to have you.
MR. JOHNSTON: Thank you very much.
THE COURT: You have one of those really strong "park the car" and Boston kind of accents or --
MR. JOHNSTON: No, I wasn't born there, so I'm not as strong as my neighbors --
THE COURT: Okay. But --
MR. JOHNSTON: -- in terms of accent.
THE COURT: If I need an interpreter, I'll tell you as you get to talking, okay?
MR. JOHNSTON: Okay. Thanks.
THE COURT: All right. Good.
MR. CAWLEY: We also have with us Melissa Hoffer.
MS. HOFFER: Good morning, Your Honor.
MR. CAWLEY: She is chief of the Energy and Environmental Bureau of the Attorney General's Office.

THE COURT: Also in Massachusetts, correct?

MS. HOFFER: Yes, Your Honor.

THE COURT: Okay. Great.

MR. CAWLEY: And beside her, Mr. Peter Mulcahy.

MR. MULCAHY: Good morning.

THE COURT: Good morning.

MR. CAWLEY: Mr. Mulcahy is an Assistant Attorney General in the Environmental Protection Division of the Attorney General's Office.

THE COURT: Okay.

MR. CAWLEY: And then Richard Kamprath --

MR. KAMPRATH: Good morning, Judge.

MR. CAWLEY: -- who's with McKool Smith in Dallas.

THE COURT: Okay.

MR. CAWLEY: We're ready to proceed, Your Honor.

THE COURT: All right. Well, it's good to have y'all. And I appreciate it. And I've got all your documents and I've read everything, except there were some things filed late that I'm sorry I haven't, but I'll get to those as soon as I can.

And I've got the Defendant's PowerPoint of what you're going to present today.

And I'm glad to take y'all's, too, at some point if you've got some sort of PowerPoint of what you're doing later on. You can file it. You don't have to file it right now, but

you can, okay?

MR. ANDERSON: And, Judge, we're happy to hand up now a copy.

THE COURT: Okay. That would be great.

MR. ANDERSON: And, of course, to opposing counsel also.

THE COURT: Great.

MR. ANDERSON: We also prepared for the Court a binder that has all of the exhibits that we intend to use during today's hearing, and it's cited in this presentation. So it might be a little bit easier to flip through a binder than to go through the appendices that were filed.

THE COURT: Okay. That's great.

Okay. And I'm assuming we've got some really sharp computer people that are going to make all of this work correctly today. I see a gentleman back there in front of a computer, so I'm assuming you're the man? He's the man. Okay. All right.

Okay. Where did you go to law school?

MR. MULCAHY: Harvard.

THE COURT: Do they teach this computer stuff there?

MR. MULCAHY: Not well.

THE COURT: Okay. All right. We're going to find out.

All right. Who's doing it on y'all's side? Who's

doing the computer side?

MR. ANDERSON: I have a clicker here, Your Honor, but we have redundancy.

THE COURT: Okay. All right.

All right. So here we go. I'm ready.

MR. ANDERSON: Thank you, Judge. May I approach?

THE COURT: Sure.

MR. ANDERSON: And, Your Honor, we also prepared two poster boards. With the Court's permission I'd like to use them during the presentation.

THE COURT: Look, there's no jury here. Y'all can do -- you can even walk around.

Now, if this were normal, I would make you wear white wigs and stay at the podium and use English that was used a hundred years ago, but not today.

MR. ANDERSON: Thank you. Thank you in particular for the white wigs.

THE COURT: Yeah. That's right.

MR. ANDERSON: It would be hot in here.

THE COURT: It would be good.

(Pause)

THE COURT: And I know it kind of seems like we have low lights in here, but that's so we can really get good -- it's not so that we'll look like a lounge or something. It's just so we can really see this up here.

So if you need to turn it up a little bit, we can turn it up a little bit, Ronnie.

Go ahead.

MR. ANDERSON: Judge, are you able to see the poster boards from where you're sitting?

THE COURT: I can see this one. I can't see that one.

Okay. And y'all can get up and walk around if you can't see it. That's fine.

Okay. All right.

MR. ANDERSON: May I proceed?

THE COURT: Sure.

MR. ANDERSON: Judge, a preliminary injunction is an extraordinary remedy, and this is an extraordinary case. It's extraordinary because the Massachusetts Attorney General announced a plan to shape public opinion on climate change by holding her perceived political opponents to account for disagreeing with her.

She memorialized her plan with her collaborators in a common interest agreement that has its express purpose regulating speech. It listed among its objectives ensuring the accurate dissemination of information about climate change, accurate information according to the Attorney General.

And she issued a civil investigative demand that was focused on speech that she disagrees with and that targeted

entities who she perceives to be her political opponents.

So, Your Honor, this case is extraordinary because the evidence of viewpoint bias is so clear even before discovery is started.

And it's also extraordinary because of the widespread criticism that this investigation has drawn, including in the amicus brief that was filed by 11 state attorneys general before this Court last week. Those state AG's would be in a position to know the difference between a legitimate use of law enforcement power and a pretextual abusive one to regulate speech.

Your Honor, that's why we're here today. We're here today to ask this Court to prevent this pretextual use of law enforcement power to constrain and restrict the public debate on climate change.

THE COURT: Why did y'all get singled out? There's a lot of energy companies.

MR. ANDERSON: Well, Your Honor, as part of the evidence in the record --

THE COURT: I'm asking that because obviously I'm going to ask them that. And I just want you to tell me why you think you got singled out.

I mean, could they have gone against Shell, who is based in another part of the world, or gone against some wildcatters here in Texas, or people in California? Oh, no,

there's no drilling out there, so it wouldn't be in California. So why y'all?

MR. ANDERSON: Your Honor, it's a good question. And in the record we see that there has been a campaign to discredit ExxonMobil in particular that was spearheaded by climate change activists and trial attorneys who actually presented their theories at the conference that kicked off this investigation.

And so what you see is actually documented, and we have it in the presentation, Your Honor, where, you know, back in January of this year at the Rockefeller Family Fund there is explicitly an agenda about discrediting ExxonMobil, delegitimizing it as a political actor.

And so they've targeted ExxonMobil as, from their point of view, a perceived political opponent perhaps because it's one of the most prominent, if not the most prominent, traditional energy company. And it's well documented.

Now, there are reasons -- I think that's a good question for the other side about why they're targeting ExxonMobil.

THE COURT: I'm going to ask them. That's why I'm asking you. I get that. I mean, there's nothing else other than this that prompted this?

You know, I came up through the world of politics. That's how I got here. I mean, I wasn't just out here because

I went to Harvard and they just found me. I came through the world of running for election and that sort of thing, so I understand a little bit about politics.

Did y'all poke the bear, so to speak? Did you do something to the Attorney General in Massachusetts that brought this on? Or did y'all give -- did the president of Exxon give money trying to promote somebody else or -- no?

MR. ANDERSON: Your Honor, you know, that doesn't seem to be the story here.

THE COURT: Okay.

MR. ANDERSON: The issue is that -- what's extraordinary about this is that ExxonMobil doesn't really do anything in Massachusetts. I mean, we don't sell gas there. We don't -- we don't issue securities there.

THE COURT: There's no ExxonMobil stations there?

MR. ANDERSON: Oh, there are, but they're owned by franchisees, so they're not actually owned by the company there. They're owned by independent owners.

But what's more -- what's even more remarkable is that for the last ten years -- and, again, this is part of the presentation as well -- it's well documented ExxonMobil has acknowledged the risks of climate change, acknowledged that climate change could affect its business, and that regulations that might be enacted in response to climate change could affect its business as well.

In fact, it's been promoting for at least since, I think, 2009 the carbon tax as a way of responding to climate change.

So this idea that someone has poked the bear or has been antagonistic towards -- in particular towards the views of the Attorney General is just contradicted by the record.

But, you know, if it would help the Court, what perhaps I could do is just proceed through the facts that are --

THE COURT: Oh, I'm going to stop you when I want to. It doesn't work that way.

I don't know. They may -- where are you from? I forgot.

MR. ANDERSON: I'm from Washington, Judge.

THE COURT: Yeah, yeah. They may do that there. That's not how we do it here, okay? I tied my horse outside and ran in here to ask questions.

MR. ANDERSON: Well, Your Honor, what could be helpful, if it would be usable to the Court --

THE COURT: Oh, go through your deal and I'll stop you when I want to.

MR. ANDERSON: Okay. Why don't we begin with the way this investigation began. It began with a press conference in New York back in March where the Attorney General announced, you know, the investigation.

And there are really three critical takeaways from this conference. First, the explicitly political nature of the objective.

And as you can see in the picture there, you know, they're standing behind "AG's United for Clean Power," you know, a policy objective. It's this idea that in order to address climate change we -- the country has to move from traditional sources of energies into renewable sources of energy. And they're all very frustrated. Members of this coalition are frustrated with the Federal Government for not doing more.

And then what you see they identify as a big part of the problem here is that the public is not on their side, that there's confusion, there's public perception where the public hasn't yet agreed that these are the correct solutions to the climate change problem.

And to this coalition that debate is over, the solutions are clear, and so what they need to do is clear up the confusion that remains. And the way they're going to do that is by holding accountable those entities and voices that disagree.

THE COURT: Basically, what they're saying is Exxon hasn't been telling the truth and we want to show that so that the public perception will change; is that right?

MR. ANDERSON: Essentially -- essentially what

they're saying is even more than that, is that -- and you'll see this in documents -- is that what we want to do is get ExxonMobil to stop speaking or to speak in favor of the policies we support so that public perception will come over to our side so we can enact the policies that we prefer, you know, renewable energy and the other things that Al Gore invests in.

And the problem with that is that that's just an improper use of an investigative law enforcement authority. It might be appropriate to hold congressional hearings or rallies outside of -- you know, outside of Congress to support a transition from traditional energy to these renewable sources. But the idea that you use a subpoena to burden those on the other side of the debate, to chill them, to ask about their policy positions, is just a misuse of law enforcement power. That's not what that power is for.

And, Judge, maybe it would be helpful to hear some of the Attorney General's own words --

THE COURT: Okay.

MR. ANDERSON: -- as she describes this political objective.

THE COURT: Okay.

(Video played)

"But make no mistake about it, in my view, there's nothing we need to worry about more than climate change. It's incredibly serious when you think about the human and the

economic consequences and indeed the fact that this threatens the very existence of our planet. Nothing is more important. Not only must we act, we have a moral obligation to act. That is why we are here today.

"We know from the science and we know from experience the very real consequences of our failure to address this issue. Climate change is and has been for many years a matter of extreme urgency, but, unfortunately, it is only recently that this problem has begun to be met with equally urgent action. Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts.

"The states represented here today have long been working hard to sound the alarm, to put smart policies in place, to speed our transition to a clean energy future, and to stop power plants from emitting millions of tons of dangerous global warming pollution into our air."

MR. ANDERSON: So, Your Honor, as you see in these statements, it's all about politics. It's all about moving from traditional energy to renewables.

And in particular, part of the problem that the Defendant identifies is one of perception that there are certain industries, certain companies -- in the next slide

she'll name ExxonMobil as one of them -- that have been causing people not to agree with her about the catastrophic nature of the impact of climate change or the need to adopt these smart policies that she prefers that speed our transition to a clean energy future.

And then the next -- in the next breath she says, so this is how we're going to clear that up.

(Video played)

"Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."

THE COURT: So if you stop there --

(Video played)

"By quick, aggressive action --"

THE COURT: -- that seems to imply they're going to go after other companies, too. That's what she says. That's -- I don't know what other -- I guess there are other inferences, but that's what it seems.

MR. ANDERSON: Yeah. I mean, I think it's a fair -- fair argument, Judge.

THE COURT: And I guess my question is going to be,

so why aren't they here?

Why don't we just have up here everybody at once, get all this over with? Is it just one of many beginning, or what's going on?

MR. ANDERSON: Judge, it's unclear, and I think a lot will depend on what the Court does today about whether it allows this type of abusive, you know, use of law enforcement power to continue or whether it orders it to stop.

And I think it's exactly right, that, you know, based on that statement -- and by the way, based on the previous subpoena that was before this Court that was issued by the Virgin Islands, they actually targeted some of the nonprofit groups that speak out on this issue, and there's still litigation going on in DC over that effort.

So I think you're right to see that this is the beginning of a trend, a trend that 11 state AG's have raised the alarm about and others are raising the alarm about. But it's in its infancy, and so there's still time to put an end to it.

THE COURT: Okay.

(Video played)

"-- educating the public, holding accountable those who have needed to be held accountable for far too long, I know we will do what we need to do to address climate change and to work for a better future."

MR. ANDERSON: And these statements, Judge --

THE COURT: My question is, regardless of what we do here, if China and India and third world countries don't do something -- doesn't science say we've still got to get ahold of that? I mean, it seems to me.

I don't -- they are belching out stuff in China. I mean, you can barely go into their main cities without a mask on. It's terrible. I mean, I guess I don't get it. But, anyway, at that point, I don't get it. But I'll -- you can explain it to me.

MR. ANDERSON: Judge, that's a great point, because one of the very observations this subpoena, this civil investigative demand seeks to have ExxonMobil explain, is the former chairman's statement that in order to address climate change there needed to be a global effort that included reducing emissions from third world countries, so --

THE COURT: But I guess their answer is going to be, and I'll anticipate it, is that if you're lying, you're kind of the lead liar, and so you're leading everybody else down the primrose path. You are the pied piper.

MR. ANDERSON: But that's exactly the point. This is lying about public policy. For every debate there's someone on one side, someone on the other side.

THE COURT: No, no, no. I agree with that. But we kind of know back when those who were growing tobacco, it's

going to cause cancer. I mean, it isn't just public policy. There was -- there were things being hidden by the tobacco companies that weren't -- they weren't telling the truth about it, I mean, if that's what they're saying.

Is this -- is this that argument that, hey, there's really bad stuff behind all this that's causing terrible things?

MR. ANDERSON: Well, you know, Judge, if that were the argument, then you would expect the Defendants to be able to come forward and explain to you what the basis for the argument is, because we've shown that for the last ten years ExxonMobil has openly acknowledged the risks of climate change and again supports the carbon tax.

We have shown to you that this is a statute -- this is a statute that is a four-year limitations period. So all we're really talking about is what happened in Massachusetts over the last four years.

And we said in our briefs, identify the misleading statement, identify the falsehood, tell us what you think ExxonMobil did wrong. And what we got were basically two things in response: five documents from the 1980s where, if you look at them and -- you know, in the brief it makes it sound like in the 1980s ExxonMobil had it all figured out, it essentially determined that climate change was a serious threat, it knew how many degrees of temperature increase we

were looking at, and it knew the policies that had to be enacted in order to respond.

THE COURT: Okay.

MR. ANDERSON: And that's the characterization of the documents. And this has been in the press, too. But it's entirely misleading.

We put those documents in front of you. They're in the binder. They're in this presentation. You read them and they're riddled with caveats, hesitation, doubt. They say things like, you know, this is all subject to further analysis, we need better models, it would be premature to take any action based on this.

So, first of all, you've got that. The documents themselves are not these declarative, decisive statements that the Defendants would like them to be.

Then you also have the fact that what's in those documents is entirely consistent with the record that was being issued by the EPA, by MIT, by basically everyone speaking on this. So there's no big disconnect between what these internal documents say and what was generally available to the public at the time in the 1980s.

And three is, you know, these documents have been sitting at the University of Texas since 2003. They're not -- they're not these smoking guns that were being locked away and hidden that were somehow rested and came to light. They're

just corporate records that nobody was ashamed of, no one was embarrassed, because this is not at all different from what the public knew or indicative of any type of effort to conceal.

So that was one, and I think --

THE COURT: Why are they at U.T.? Remind me about that.

MR. ANDERSON: I'm sorry?

THE COURT: Why are they at the University of Texas?

MR. ANDERSON: They were deposited there, I think, around 2003.

THE COURT: That's where Exxon puts its old archives or something or --

MR. ANDERSON: It might have been Legacy Mobil. We could find out and provide the Court with more information, but I believe it was just the nature of providing corporate records to a university --

THE COURT: Okay.

MR. ANDERSON: -- as is often the case.

So that was one theory, Judge. And it doesn't withstand scrutiny. It's pretextual. This is not what this is about. This is about this. This is about changing public perception by putting a subpoena on ExxonMobil to discourage it from speaking out on the other side of this debate.

But they came up with this other theory which was about the idea, well, if climate change regulations come into

place, then ExxonMobil might not be able to take the oil out of the ground and might not be able to refine and sell it.

Now, you know, that's -- their argument is that our proved reserves might have to be impaired or written down or something, as the theory goes, because of these regulations that might come up in the future.

Now, that sounds -- it sounds sketchy anyway, but let's say you take it as a plausible argument. Big problem with that is that the SEC in its regulations makes it unambiguous, clear as day, that you can't anticipate future regulations. You have to calculate proved reserves based on regulations as they exist today.

So even if the Defendants were right, and I don't think they are, but even if they were right that regulations are coming in the next few years that would limit the ability to extract traditional fossil fuel, SEC says you don't take that into account in reporting proved reserves. So that theory of fraud easily is swept away.

And so I guess the question still is, so what is the theory that would justify 40 years of records about climate change? What is the theory that justifies asking all of these questions about policy statements that ExxonMobil has made in the past? And it's this --

THE COURT: Well, I mean, let's think about the other side of that. If y'all were doing some really terrible things,

which apparently they think you are, shouldn't they be aggressive, and isn't that what the courts are for, and they're being innovative, and that's what we do here?

I mean, that's -- that's why we have courts, to come in here and fight about that, and try to use the court system to punish evildoers. Isn't that what it's for?

MR. ANDERSON: The Court doesn't -- the Court is really -- actually, it's explicitly not for the purpose of punishing evildoers because they speak out on the wrong -- on the perceived wrong side of a policy debate.

THE COURT: No, no, no, no, not just about speech, but if you were withholding -- you know, like the tobacco companies just lied about stuff for years and years and years, oh, no, we don't have this, we don't have that, we don't know that it's cancer causing, or the same in the asbestos kinds of cases.

If companies were doing that, companies ought to be held accountable. That's what I'm assuming they're going to argue ultimately. I don't know -- they're not arguing that today, but ultimately that's what they're going to say is, see, we told you, they had these documents that showed all this terrible stuff.

MR. ANDERSON: Well, Judge, again, it would have to fit into some theory of fraud that could be litigated.

I mean, you might have noticed that the New York

Attorney General has entirely walked way from this theory that we knew in the past and that that was fraudulent because we didn't disclose it.

He's completely -- it's reported in the press. He's completely walked away from that, is now focused on the stranded asset theory that is equally flawed for the reasons I just described.

THE COURT: The what?

MR. ANDERSON: The idea that our reserves need to be impaired because of future government regulations. That seems to be what he's shifted his focus on.

THE COURT: That they should be impaired?

MR. ANDERSON: They should be, even though the SEC regulations prohibit that.

THE COURT: Okay.

MR. ANDERSON: But the -- Judge, I think that there would need to be some type of theory that actually made sense, some theory of fraud that you could present with a straight face and not turn red when you're explaining it, because what we have here is a statute that says don't defraud consumers, don't defraud investors in the state of Massachusetts, four-year limitations period.

And so we have said, what have we said? What have we done that could possibly give rise to this -- to an enforcement action against the company?

And, you know, we've gone through it about we don't sell gas there, we don't talk -- we don't sell gas to consumers, we don't sell our equity to investors. We've gone through. And what are the statements that could give rise to it?

And all they've been able to come back with are these two pretexts. They say, oh, these five documents show that you knew something. That's absurd. They don't show anything. They show that in the early '80s ExxonMobil knew about as much as anyone else on climate change and recognized that it was a fluid situation, the research needed to be developed, and we'll see where it goes.

And in the last ten years, as science has gotten a little more clear, as people's understanding has become a little more focused, ExxonMobil has been right there saying climate change is real, we recognize that, and it could have impacts on our business.

So when you talk about the comparisons to tobacco companies, it's just totally inept. There's no comparison here. The idea that ExxonMobil knew anything that others didn't, there's no basis for that. The idea that ExxonMobil concealed information to the public, you've got no basis for that, certainly not during the four-year limitations period.

THE COURT: Well, they want to -- they want to look and see. That's what they want. They want to look and see.

They don't trust you.

I mean, they just -- hey, he's a nice man, we like him, he's a good lawyer and all that, but we don't trust Exxon. We'll just look and we'll determine one way or the other what the real -- what the real truth is. Isn't that going to be their argument?

MR. ANDERSON: Well, that is, and that sounds like a fishing expedition to me. It sounds like they're going out there to see what they can find. And the Fourth Amendment doesn't authorize that. It doesn't authorize them to go out on a lark and see -- you know, let's see if we can stir up in the corporate -- 40 years of corporate records at ExxonMobil to see if maybe somewhere in there there's a document we can use.

And that would just -- that would be even without this press conference, even without the press. The problem is when you hear -- so when you hear what was --

THE COURT: Do you want me to hear some more?

MR. ANDERSON: Actually -- well, you know, Judge, we have a bit more, but not to hear, just to read.

THE COURT: All right.

MR. ANDERSON: Also present was the New York Attorney General. And he was sounding similar themes about the need to clear up this confusion, confusion about policy.

Again, this is called -- you know, the First Amendment calls this debate, disagreement, free exchange of

ideas. What he's talking about is cleaning up confusion, stepping into the breach of federal inaction, going after the morally and vacant forces -- I think they're talking about us -- that are trying to block Federal Government action, and talking about an unprecedented level of commitment and coordination.

THE COURT: I guess one of the things that really concerns me looking at all those attorney generals, I don't recognize them personally, but they're all from the Northeast, correct?

MR. ANDERSON: Your Honor, I think Maryland is in there. Does that -- does that count as the Northeast?

THE COURT: Yes. Yes, it does.

MR. ANDERSON: And, of course, the Virgin Islands.

THE COURT: Well, and the Virgin Islands are a different animal, but they are what they are.

I guess my concern is, is that you've got a group of very bright, well-meaning, thoughtful folks in the Northeast obviously disagreeing with, I think, bright, thoughtful, careful people in the Southeast and the Southwest.

You know, it's a -- it's an interesting -- it's an interesting precedent. I guess someday we'll end up with much smarter folks at the Supreme Court to try to decide that. But, you know, it's just one of those things that are really sad. I guess I would rather have geniuses and scientists deciding this

versus a generalist in Dallas, Texas. But it is what it is. And it's just -- it's just difficult. That's a very difficult thing to see.

There's not one southern attorney general on this, is there? Not one, correct?

MR. ANDERSON: Correct. And, in fact, the southern --

THE COURT: And no producing states attorney generals are on this, correct? None of those people are producing.

MR. ANDERSON: Judge, in the coalition there is Virginia as well, just to be clear.

THE COURT: Is Virginia there?

MR. ANDERSON: Virginia.

THE COURT: Yeah. How much drilling happens in Virginia?

MR. ANDERSON: Yeah. I just want to be clear, Judge.

THE COURT: Let me tell you, you can count those rigs on one hand.

Is Pennsylvania there?

MR. ANDERSON: Pennsylvania was not -- you know, Judge, I have this -- have this on a binder.

THE COURT: Pennsylvania is not going to be there. I don't have to look. Pennsylvania is not going to be there. They drill the heck out of Pennsylvania, because it goes right up to the border -- I mean not the border but the state line

with New York. They drill right on the state line.

It's very interesting when you look at the study of that. I mean, it just goes right up to it. So those Pennsylvania people are sucking the heck out of the oil underneath New York. I mean, they are. Just the way it is.

But, anyway, go ahead.

MR. ANDERSON: Well, it must be busy --

THE COURT: I'm just saying that is a very -- it's problematic or it's not problematic. And I guess I don't -- I mean, doesn't it concern y'all if we're kind of getting a us and them kind of a thing? I hate that.

MR. ANDERSON: Oh, Judge, absolutely. We'd prefer not to be here. We'd prefer not to be in the middle of this. But it is -- it is one of these regional disputes that is essentially political where one side is attempting to use law enforcement power to silence the other side.

And just to answer your question about Pennsylvania --

THE COURT: No, the real answer is -- and I'm going to ask them. If you had oil underneath your state like Texas has underneath its state, would you take the same position? Of course, I know the answer is going to be "yes." And I'm just saying, think about that.

Is that really -- I mean, mercy, we could drill under this courthouse probably and find gas or oil in Texas. It's

just -- that's just the way the Earth was made. The Barnett Shale actually comes even over here.

But, anyway, just a curious -- I'm just curious about that.

Go ahead.

MR. ANDERSON: It's a valid point, Judge. And, in fact, if you think about it, it would be something like -- you know, we have Al Gore up here. He's not an AG, but he was at this press conference. What he's known for is two things: climate change activism and investing in companies that are developing alternative sources of fuel.

THE COURT: And creating Al Jazeera, or selling his company to Al Jazeera.

But go ahead.

MR. ANDERSON: Right. Well, Judge, no one is criticizing -- if what you're saying -- I think you're onto something here when you say that.

If this became a regional type dispute -- he says a lot of things about the dire consequences of climate change and the need to adopt renewables and how renewables are the only solution. Now, of course, that affects his financial interests. And you could see if this were to escalate, you could see the attorneys general and producing states investigating him.

And so you could see how this type of thing -- if the

Defendant is right that it's appropriate to drop subpoenas on people and entities that disagree with you on politics, then you could just see how this snowballs, because for as many states that are on one side of the issue, you have an equal number on the other side of the issue. And they all have the same power to issue subpoenas that go outside of their states.

And that's why what we're doing today is just so important, Judge, because you are right that this is a troubling -- and you can see it in the way that this whole enterprise drew this swift criticism from the state attorney generals in producing states and elsewhere.

THE COURT: Why didn't you bring in the State of Texas and other states on your side?

MR. ANDERSON: Bring them in?

THE COURT: Yeah. Why didn't you bring them in?

MR. ANDERSON: You mean as parties?

THE COURT: Yeah.

MR. ANDERSON: Well, you know, Judge, it's a good question. They filed an amicus --

THE COURT: This is an innovative -- this is a very innovative, unique kind of sort of thing. I'm just saying if you thought outside the box, I kind of would have -- I mean, if I had a state on my team, I think I would like it. I mean, I just -- you're telling me this is all political. If it is, I think I would bring in some political animals. It's your

business, not mine.

MR. ANDERSON: Well, Judge, we do have 11 states on our side.

THE COURT: Yeah, I know. They filed amicus briefs. But I'm saying as -- you know, whatever.

Okay. Go ahead.

MR. ANDERSON: Well, Judge, the litigation is proceeding, and people are hearing --

THE COURT: Who knows what will happen after that? I know.

MR. ANDERSON: Right. I mean, look, this was an unprecedented filing. I mean, this is not just one. Eleven state attorneys general are saying we're law enforcement, these are our powers, we know the proper use, we know the improper use, and what Massachusetts is doing is wrong.

These are some of the statements in the brief:

That law enforcement power doesn't include the right to engage in unrestrained investigative excursions to promulgate a social ideology, or chill the expression of points of view.

Using law enforcement to resolve a public policy debate undermines the trust in the offices -- undermines the trust in offices of state AG's and threatens free speech.

Silencing Exxon not only harms ExxonMobil, it harms those who want to hear the views that are expressed by

ExxonMobil.

And probably most -- most hard-hitting, Judge, is the way they conclude, is that, you know, our history is embroiled with examples where legitimate exercise of law enforcement is soiled with political ends rather than legal ones, and Massachusetts seeks to repeat that unfortunate history.

They might not be parties -- I mean, they might not be parties yet, but this statement speaks -- it sends a loud message about where their views are and the threat that they perceive to not only their -- you know, their institution and the public confidence in their institutions but also to the free exchange of ideas on this matter.

THE COURT: You know, when you're looking at law enforcement, it's always troubling. I'll give you another law that's troubling that could be used. For example, when Al Gore was attacked for making political phone calls from the White House, was that an overreach? Is that similar to this? And eventually that was all thrown out.

Are those the sort of things that, you know -- or using RICO in political efforts that go after political -- whether it's by Republicans or Democrats or Whigs or whoever is doing it, is that too much?

I mean, are we using -- are we going too far? I don't know. I guess that's something -- all of these are questions, I guess, for you and the other side, so I wanted to

warn them.

You know, it's -- the power of Government, and I would say especially in criminal cases, is always -- needs to be checked. It can't be unfettered. I mean, it can't be unfettered. Is this one that has gone too far? And that's what they're saying. Is that what you're saying?

MR. ANDERSON: Yeah. Absolutely, Judge. Your instinct here is exactly right. This is -- this is on the wrong side of that line.

The law enforcement -- and no one up here is saying that law enforcement can't issue subpoenas to investigate crimes, that the proper use of law enforcement authority isn't important and appropriate. We recognize that. These 11 state attorneys general recognize that. Among all, they would recognize that. But what we're saying is that --

THE COURT: You're saying this ought to be done in legislatures and Congress and --

MR. ANDERSON: Exactly.

THE COURT: -- all those places?

MR. ANDERSON: Exactly. And that's what they're -- and they recognize that. And that's what they're complaining about. What they say is, oh, there is gridlock in Washington because some of the northeastern states don't agree with some of the southeastern states about how to resolve this conflict. And to them, that is not acceptable. To them, they're saying

what we need to do is change the focus of the debate and take it out of Congress where things aren't happening and put it in states -- the attorney generals' offices to start issuing subpoenas on those who disagree with us so that the policy we like gets enacted, because the people who are saying that it shouldn't be enacted are terrified of getting these subpoenas in the mail asking for 40 years of records so that the investigators can search through those records and find something, really anything that they can find in there, so they can start to piece together some type of case.

And, meanwhile, while you're responding, you've got that sword of Damocles dangling over you. You know, is it going to drop? It this -- you know, what can we say to appease the regulator? And that's exactly -- Judge, and that's exactly the plan here.

You know, let me back up just a second, because, you know, at this meeting back in March before they got out there and had their press conference -- and one of the things that -- you know, of the things that they tried to conceal is that they had a meeting --

THE COURT: Is this all in the booklet you gave me?

MR. ANDERSON: Yeah.

THE COURT: Okay.

MR. ANDERSON: Yes, Judge. I could direct you to the --

THE COURT: "Yeah"? "Yeah"? This is federal court. "Yeah" is not acceptable even in the South, okay?

MR. ANDERSON: Sorry, Judge. It's page 13 of the presentation.

THE COURT: Yes, sir. Yes, sir, I can see it.

MR. ANDERSON: And what we see here is that, you know, before they came out on the stage in the clips that we just saw --

THE COURT: Yes, sir.

MR. ANDERSON: -- they had this meeting with two people, Peter Frumhoff of the Union of Concerned Scientists, and Matthew Pawa, who's a climate change attorney. He sued ExxonMobil before over climate change, and a judge threw out the case and said this is what you should be taking to -- this is what you should be taking to Congress, not to the courts.

Anyway, they had a meeting where they met with these men. This was not in public. This wasn't recorded. We don't know what -- we don't know exactly what was said, but we know what these two men believe. We know that they pioneered this theory back in 2012 that if they could persuade a single sympathetic state attorney general to go issue a subpoena and get some documents, they could then use those documents --

THE COURT: Wait. You used the tobacco example.

MR. ANDERSON: That's right, Judge. They see that you can see the power of state prosecutors to get lots of

records and then see if you can pressure the companies once you get those records -- well, first of all, maybe into a settlement or something like that, but that's not even what he's talking about. What he's talking about is putting pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming.

THE COURT: What do they really want out of y'all, other than your documents? What do they want? What do you want? What do they want?

MR. ANDERSON: I think they want ExxonMobil to get on their train. They want ExxonMobil to support the policies that they favor, including a shift to renewables, or to be quiet. They might settle for that.

They either want us to be quiet or to agree with them, but to stop being on the side that they perceive as wrong, to stop being on the side that's slowing down the progress towards renewables that's sowing the confusion that bothers them so much.

According to one of the attorneys general, I think it was Schneiderman, the debate is settled, the debate is over.

And so what they would like ExxonMobil to do is to stop speaking, stop presenting another point of view, and either be quiet or support their position.

And this is laid out -- I mean, it's laid out in a

document about the goal here is not to protect consumers, it's not to protect investors. The goal is to get these documents so that you can put pressure on the industry to change its support for legislative and regulatory responses to global warming. I mean, it's well documented. It's in the public record.

And you see also, Judge, I think -- I think my clicker stopped. Oh, there it goes. You can see in the -- I was describing this meeting before back in January. It's all pursuant to this strategy that Matthew Pawa and others have been cooking up about targeting ExxonMobil, delegitimizing them as a political actor.

I mean, this is a movement that is being -- it's a playbook that's being created by Pawa and Frumhoff.

And so it shouldn't come as a surprise that when a Wall Street Journal reporter contacted Matthew Pawa and he was concerned that that reporter might ask about whether he attended that meeting in March with the Defendant and her collaborators and Al Gore, he reached out to the Environmental Bureau Chief at the New York Attorney General's Office saying, what should I do? And he wrote back, my ask is if you speak to the reporter, do not confirm that you attended or otherwise discuss the event.

So they know. They know this.

THE COURT: I don't get that either. I didn't

make -- I mean, let's just have this fight out in the public, it just seems to me. I mean, whatever. I mean, it's pretty clear how these fellows feel. They're scientists and feel strongly about it, and they have strong feelings about it. Okay. Nothing wrong with that, I don't think.

MR. ANDERSON: I agree.

THE COURT: I mean, they can say and do what they want. I mean, and they can file lawsuits if they want and pressure y'all if they want to.

Okay. All right. I don't know why they wouldn't confirm they were at the event.

MR. ANDERSON: Well --

THE COURT: I mean, that doesn't make any sense, but anyway.

MR. ANDERSON: Well, Judge, I agree with you that they are entitled under the First Amendment to have their views. I think the reason -- I think what the evidence shows here is the reason that they were trying to conceal the involvement of these men is because they don't want the public to know that this is political. They don't want the public to know that it's about pressuring ExxonMobil.

THE COURT: Yeah, I get it. I get all that. I just don't know why. They're not good politicians. They need to stick to science. No offense.

But go ahead.

MR. ANDERSON: Thank you, Judge. What I --

THE COURT: You're getting close to your time, so tell me what else you really want me to -- this is a swift review from the other AG's?

MR. ANDERSON: We did that.

THE COURT: Let me see all the states that they're from. Let me see them, all the states.

MR. ANDERSON: Texas --

THE COURT: Louisiana, Texas, South Carolina, Alabama, Michigan. Hmm. What's in Michigan? Where they make cars. Arizona, Wisconsin. Now, I don't know if they drill in Wisconsin. Nebraska, Oklahoma, Utah, Nevada. Interesting.

Kind of a -- are there any -- if we were going to have red and blue states, all red states on your side, all blue states on their side, that's kind of interesting, too, isn't it?

MR. ANDERSON: Well, I think under --

THE COURT: I just hate this us and them thing, but it is what it is.

MR. ANDERSON: And, Judge, we hate it, too. And I think --

THE COURT: Although Michigan might be a blue state. We don't know.

MR. ANDERSON: Yeah, Wisconsin also might be one that goes back and forth, I know.

THE COURT: You're right.

MR. ANDERSON: Paul Ryan, I think, is from there.

But, Judge, it does -- but it does highlight the points you're making, is that this isn't about consumer protection versus consumer fraud or securities protection, securities fraud. It's about politics. It's about --

THE COURT: I get that. You've made that point.

MR. ANDERSON: Okay.

THE COURT: What else?

MR. ANDERSON: Here's the other thing I think you really need to know, Judge, about this CID, is that it's -- in its own request it tells you that this is about viewpoint discrimination. It lists out all the groups -- in one of the many requests, it lists out all the groups that it wants ExxonMobil to produce its documents, its communications with.

And look at that group of 11. Every single one of them, if you Google, you're going to find out that people in the press deride these entities as climate deniers, like Heritage, American Enterprise Institute, API, ALEC. All of these are like the boogie man.

THE COURT: I get that point. I get that.

MR. ANDERSON: The next thing is, look at some of the statements that the CID wants to investigate. These are policy statements that we were talking about at the beginning about energy rationing.

You mentioned before that China and India would have to get onboard to limit CO2. Well, that was part of what the former chairman discussed at the World Petroleum Conference in China, that they would have to resort to energy rationing and in another statement by the current chairman about adaptation to change, about it's an engineering problem with engineering solutions and that issues such as global poverty might be more pressing than climate change. So policy tradeoff between development which requires energy and maintaining a certain level of CO2 that might require less, that's not fraud. That's a policy question. And they want to investigate this? They want to know why ExxonMobil was saying it.

And here's another great example. This is in their subpoena. They want to know why we said that the level of GDP growth requires more accessible, reliable, and affordable energy to fuel that growth, and it's vulnerable populations who would suffer most should that growth be artificially constrained. That's fraud? That's policy.

That's a question about tradeoff that everyone recognizes between limiting CO2 emissions and restricting energy production and the growth that comes with it. That's exactly what society is dealing with.

And so, Judge, we went through this before. And I encourage you, if you want to see it, the presentation has the detail.

THE COURT: So you're saying four years is really the max of what they should be able to get?

MR. ANDERSON: Well, yeah.

THE COURT: They shouldn't get anything is what you're arguing, I know, but four years is what it should be?

MR. ANDERSON: Yeah. It --

THE COURT: Because that's it. That's the statute of limitations.

MR. ANDERSON: The statute of limitations said we had to do something in the last four years in Massachusetts with consumers or investors that would give rise to the claims. And so we've asked repeatedly what have we done. Because everything we're seeing takes us back to 1976, '76, '97. I mean, these go back far into the past to find the documents that they don't like generally about public policy. And then you read what they're looking for: a policy, the design, communications about climate change, regulation of methane gas.

Again, for the last decade we've been saying climate change is a serious issue. We don't do anything in Massachusetts that would give rise to these claims in the last four years and even beyond. And yet what they want to know about has nothing to do with Massachusetts. They want to know about our statements in China, our statements at a Council on Foreign Relations meeting in New York, here in Dallas, our statements in England.

And then, Judge, you know, this one we obviously don't have time to do in the courtroom, but the idea that based on their review of these five documents from the '80s that ExxonMobil knew in 1982 that the mitigation of greenhouse effect would require major reductions in fossil fuel combustion, that's what they say? This is the document that they say supports it?

Look at this. Currently no unambiguous scientific evidence.

The relative contribution of each is uncertain.

Considerable uncertainty about whether these effects should occur.

Making significant changes in energy consumption patterns now would be premature.

These key points need better definition.

Uncertainties. Further study is necessary. Monitoring is necessary before any specific actions are taken.

This is called pretext. The fact that they are grasping at straws to justify their investigation tells you it didn't come from the right place. This investigation didn't come out of the right place. It came out of the place that was revealed in the press conference when they told you and then when they put it in their common interest agreement.

THE COURT: What do you mean it didn't come out of these documents? What are you saying?

MR. ANDERSON: This is the pretext for it.

THE COURT: I get it.

MR. ANDERSON: The real purpose is to silence -- I mean, it says it in the common interest agreement. It says we're doing two things here, this coalition of state attorney generals, we're limiting climate change and we're ensuring the dissemination of accurate information about climate change.

They memorialized it in their agreement.

THE COURT: Is that it?

MR. ANDERSON: Yes, Judge.

THE COURT: No, no. Give me your last shot.

MR. ANDERSON: All right. Judge, look, again, if this case were about a challenge to legitimate exercise of law enforcement power -- because we see that a lot in their briefs: It is routine, this is normal, they get to issue subpoenas.

No one is saying that's not true. No one is saying that the Massachusetts Attorney General can't issue subpoenas. No one is saying that she can't make appropriate comments about her priorities so if fighting drug dealers is a priority and she wants to hold a press conference saying, I'm putting 40 assistants on a drug enforcement task force and they're going to handle that today, no one is saying that's inappropriate. But that's not what this case is about, and if it were, we wouldn't have the support from the 11 state attorneys general.

What we are saying and what those state attorneys

general are saying and so many others are saying is that it's objectionable to use law enforcement tools to silence political opponents.

And when states engage in this conduct, when they misuse their power to violate the First Amendment rights of others, of citizens, that's when Federal courts come in. And so we're asking you to issue a preliminary injunction preventing this activity from continuing.

THE COURT: Okay.

MR. ANDERSON: Thanks, Judge.

THE COURT: Thank you.

All right. And so who's going to make the argument?

MR. JOHNSTON: Your Honor, my name is Richard Johnston.

THE COURT: Okay. Good to see you, Mr. Johnston.

MR. JOHNSTON: Thank you very much.

Your Honor, I know you're going to have a lot of questions for me because you've already telegraphed them, but I would appreciate it if I could just spend a couple of minutes explaining to you a couple of things about why I think it's inappropriate for the Court to be considering preliminary injunction at this time.

THE COURT: Sure.

MR. JOHNSTON: Mr. Anderson has been very passionate and eloquent about his position, but all of that eloquence and

passion doesn't really make up for the fact that he has a fatal defect in his case, that there's no irreparable harm sitting here today that should cause Your Honor to interfere with an ongoing legal proceeding in Massachusetts between the same parties on the same issues or to interfere with the efforts of an attorney general from another state to investigate what it considers potential wrongdoing.

As Exxon has indicated in its own papers, for it to get an injunction, it needs to show imminent harm. But there isn't any imminent harm because the Attorney General has no ability to enforce its CID on her own.

In order for the Attorney General to be able to enforce a CID, she needs the approval, once there is a challenge by a recipient, of the Superior Court in Massachusetts. And then the recipient has the ability to seek an appeal in the Massachusetts courts.

So as Your Honor knows from the papers, I believe, Exxon filed an almost identical proceeding in Massachusetts the day after it filed here, and that case is proceeding on the normal course of things. We have filed an initial brief. Exxon has filed a brief. We have another brief due in three weeks. Afterwards there will be a hearing in Massachusetts.

In the meantime, there's absolutely nothing that we as an attorney general can do to force Exxon to comply with the CID. For example, Exxon has not produced one document to us.

THE COURT: So regardless of how I rule here, one of your state superior judges may do something different? I mean, regardless of what I do, they'll do something different.

MR. JOHNSTON: Well, the Judge in Superior Court is going to do something.

THE COURT: Yeah, but it can't be exactly the same as what I do, unless he goes, oh, that Kinkeade is a smart judge, I'm going to do what he -- that never happens. We're too independent to do that as judges, so --

Who's going to win that fight?

MR. JOHNSTON: Well, my point is, Your Honor, that you should take a look at how the Massachusetts CID statute is set up.

THE COURT: Okay.

MR. JOHNSTON: Okay. Because the statute provides very precise rights and remedies for above Exxon and above the Attorney General, and we have been following that very prescribed procedure in Massachusetts state court.

We have some slides that I would like to refer Your Honor to.

THE COURT: Okay. Is your time up now when I can start blasting you with questions?

MR. JOHNSTON: No.

THE COURT: You're not ready yet?

MR. JOHNSTON: No.

THE COURT: Okay. Tell me when.

MR. JOHNSTON: I want to get into a few procedural things so you understand the context.

THE COURT: Okay.

MR. JOHNSTON: And also I want to talk a little bit about Your Honor's lack of jurisdiction over the Massachusetts Attorney General, and then I'm all yours.

THE COURT: Okay. I kind of felt that lack of jurisdiction might come up at some point.

MR. JOHNSTON: Well, you wouldn't --

THE COURT: Although, you know, in Texas we kind of think everything is in Texas. I don't know if y'all know that. I mean, you know, actually the Northern District of Texas is larger than all of New England. I didn't know if you know that. But, I mean, you could put all of New England in the Northern District of Texas. We have three other districts in here.

MR. JOHNSTON: Yeah, we had a debate this morning how many Massachusetts would fit in Texas on the way over to the courthouse. Some people said five. I thought it was probably closer to 20.

THE COURT: Yeah, probably -- I don't know. I would have to look -- I'll have to look at it and see.

But, anyway, a jurisdictional question is key and critical. And then I'm curious --

MR. JOHNSTON: And I'm going to get to that, but could I just explain the Massachusetts procedure?

THE COURT: Sure. Yes, sir.

MR. JOHNSTON: First we start with Chapter 93A, which is our consumer protection statute, which provides in one of its sections that the Attorney General can investigate also violations with the consumer protection statute, which applies to consumers and investors through the issuance of a civil investigative demand.

Section 7 of that statute says that the recipient must comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth.

Now, I know Texas is the Lone Star state. We're the commonwealth of Massachusetts. So that means us, Massachusetts.

Now, there's another provision, Section 6.7, which provides that at any time before the date specified in the notice, or 21 days, the Court can extend the reporting date or modify or set aside such demand or grant a protective order, in accordance with Rule 26(c) of the Massachusetts Rules of Civil Procedure.

And what the Attorney General did when it sent out the CID to Exxon was to tell Exxon, by the way, you have rights to challenge this. And it says, you can make a motion prior to the production date or within 21 days in the appropriate court

of law to modify or set aside this CID. And if it's burdensome, you can call us.

In any event, that's exactly what Exxon --

THE COURT: You didn't really expect that call to come in, did you?

MR. JOHNSTON: We didn't get the call.

THE COURT: Right, right. Okay. I mean, you kind of knew you were starting a firestorm, didn't you?

MR. JOHNSTON: Well, we certainly expected that when we sent out the CID.

THE COURT: I'm going to ask you this again. Yes. The answer is yes.

MR. JOHNSTON: Okay. We certainly knew --

THE COURT: I'm going to cross-examine you, and I'm going to do that until you say yes.

MR. JOHNSTON: Yes, we expected that there would be some resistance.

THE COURT: Some resistance?

MR. JOHNSTON: Well -- well, let me just say it this way, Your Honor.

THE COURT: You thought Exxon would kind of go, hey, it's okay?

MR. JOHNSTON: Well, in fact, Your Honor, you raised a good point, because about six months -- no -- four months before we sent out our CID, the State of New York Attorney

General, Mr. Schneiderman, sent a CID to Exxon. And as far as we know, Exxon never submitted any written objection to it, never submitted any legal challenge, and has produced 700,000 pages of documents or more to the New York AG.

THE COURT: So they're working with them and not with you?

MR. JOHNSTON: Yes, that's true, or what we understand to be true.

THE COURT: Why don't you just work with Schneiderman?

MR. JOHNSTON: Well, because under -- as I understand it, New York rules, Schneiderman can't release --

THE COURT: He can't share?

MR. JOHNSTON: -- those documents with us without the consent of Exxon. Just as in our CID law, we can't share what we get with other people unless Exxon were to agree.

THE COURT: Okay.

MR. JOHNSTON: So what they did was within the 21-day period they filed a lawsuit or a motion in Suffolk Superior Court which said they wanted to set aside or modify the CID.

And we will show you in a moment the table of contents from their brief that they filed with Massachusetts Superior Court which lists essentially all the issues that they have raised here. You know, it's a violation of their free speech rights, they're a victim by us --

THE COURT: Right.

MR. JOHNSTON: -- et cetera, bad faith. So they raised all those issues in Massachusetts.

Then what we did, which is what the statute prescribes for us, is that we can file a motion to confirm the CID and enforce it. We can file in the Superior Court a petition for an order of such court for the enforcement of this section and section six.

That's what we did. We filed a cross motion in Exxon's paper -- in Exxon's case seeking to have the Court enforce the CID. And that is where things stand.

As I said, each of the two parties have filed a brief. We have briefs that are due in three weeks, on October the 11th, at which point the whole case will be fully briefed in Massachusetts.

And as I said, until a court does something there, as a practical matter there isn't anything we can do. You know, we can't bang down the doors at Exxon and say, give us those documents. We can't send the sheriff out to collect a witness. We can't say that they can't sell Exxon gasoline in Massachusetts until a court in Massachusetts tells us that we can.

So for that matter alone, Your Honor --

THE COURT: Is that what you're seeking?

MR. JOHNSTON: No, we're not seeking any of that, in

terms of shutting Exxon down. What we will be seeking from --

THE COURT: Except in Massachusetts? You don't want them to sell gasoline there?

MR. JOHNSTON: No, I said we are not seeking that at all. I was just telling --

THE COURT: No, you just said that earlier. You said, we haven't done this, haven't done that, but --

MR. JOHNSTON: I said we couldn't. In the absence of a court order, we couldn't go out and do any of those things.

THE COURT: Until. Until. I'm just saying, some day down the road that's what you would like?

MR. JOHNSTON: No, that's not what we're looking for. What we want are documents and witnesses.

Now --

THE COURT: Okay.

MR. JOHNSTON: -- given the fact, Your Honor, that we can't do anything on our own, there's no need for you today to say we want to enjoin the Attorney General from doing anything, because we can't.

But beyond that, there's no irreparable harm, because as Your Honor knows, if there's an adequate remedy at law, there's no reason for a court to grant an injunction. Here there's no irreparable harm, because they have a full-blown statutory remedy in Massachusetts to deal with whatever their objections are. They've raised their objections fully. They

can argue all of them. So --

THE COURT: Have they argued jurisdiction?

MR. JOHNSTON: They certainly are arguing no jurisdiction over them in Massachusetts.

THE COURT: The same argument you're making here?

MR. JOHNSTON: Correct.

THE COURT: They don't have jurisdiction over you, and you don't have jurisdiction over them?

MR. JOHNSTON: They are arguing that. A difference is that in Massachusetts under their consumer protection statute, Chapter 93A, they're free to come in and argue without prejudice. And they have argued without prejudice. They've said, we're here to try to set aside the CID. Please be advised we don't think that Massachusetts has jurisdiction over us, and that's one of our key arguments as to why the CID shouldn't issue.

THE COURT: In fact, that's their first argument, right?

MR. JOHNSTON: It is their first argument.

THE COURT: Right. And then that it's too broad, I guess, is one of their other big arguments.

MR. JOHNSTON: Well, and they also say, it violates our First Amendment rights.

So everything that you've heard from Mr. Anderson this morning, he or one of his colleagues will be arguing in

Massachusetts in a few weeks in the place where the statute says it's supposed to be argued.

You also indicated --

THE COURT: We're glad still to have you down here. Even if I don't have jurisdiction, I just want you to know, I'm glad to have you here, and it's a very interesting case.

Y'all have done a great job as lawyers. It's very unique. I'm very interested in it. And I appreciate -- I don't want you to think that I don't appreciate the importance of this, and I'm looking at that hard. I really am. I think y'all -- it's a very unique effort, and I think that's what lawyers should do.

MR. JOHNSTON: Well, I appreciate the very open-minded way in which you're hearing all these issues this morning.

I would like to get to my next point, which is why I think that no matter how interested you may be in this and how much fun this case may be at an intellectual level, the fact is, Your Honor, with all due respect, we don't think you have the jurisdiction to hear a case against the Attorney General of Massachusetts. So let me get on to that.

Not only the U.S. Supreme Court, but the Fifth Circuit in several cases and Your Honor yourself in the 2010 case of *Saxton v. Faust* --

THE COURT: You're going to cite my own case?

MR. JOHNSTON: I'm going to cite your own case, among others.

THE COURT: Wow. Man. How cruel. Go ahead.

MR. JOHNSTON: Among others. But Your Honor relied on Fifth Circuit cases, which I'll talk about as well.

But what this series of cases has held quite conclusively is that a federal court in one state should not exercise jurisdiction over a state official in another state simply because the impact that the plaintiff may be feeling occurs in the forum state.

Exxon's really purported basis for being here and asserting jurisdiction is the claim that Attorney General Healey somehow committed a tort in Massachusetts by serving a CID in Massachusetts on Exxon where Exxon has a registered agent with the expectation that Exxon was going to have to produce all these documents from Texas where its headquarters is.

But as the cases I referred to in our brief, including the *Walden* case from the Supreme Court, the *Stroman* cases from the Fifth Circuit, which you relied on in your *Saxton* case, and your *Saxton* case, that simply is not an appropriate measure for gaining jurisdiction.

And I would like to cite some of the language in Your Honor's own decision back from *Saxton*. You said in dismissing that case, quote, the only contacts with Texas alleged by the

Saxtons are the effects felt of Judge Faust's rulings in Utah state court, because this case involved a judge who had issued a decision from Utah. And then you went on to say, the Fifth Circuit recently rejected the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling are felt in Texas. And then you cited *Stroman versus Wercinski.* And I will end the quote.

Now, what had happened in *Stroman* upon which Your Honor was relying is that the Fifth Circuit had said that an Arizona official who took regulatory action against a Texas company that happened to have facilities in Arizona, as well as a bunch of other states, couldn't be sued in Texas where the only thing that had happened in Texas was that this company was feeling the regulatory effects in Texas.

And the Supreme Court found the same thing in the *Walden* case, which we cite in our brief, where a DEA agent at an airport in Georgia fraudulently took some money off of somebody who was going through the security system and then filed a false affidavit, trying to seize the money.

And the person whose money was stolen tried to sue in Nevada, and the Supreme Court said you can't do that because the only effect upon -- the only thing that happened in Nevada was that the people who lost the money had less money in Nevada and felt the loss of that money there. But everything happened on the defendant's side in Georgia. And the defendant, not

having done anything in Nevada, couldn't be sued there.

So let's apply that to Attorney General Healey's situation. Now, she has no office or presence here in Texas. She hasn't conducted any official business here. She served the CID in Massachusetts, as I said, on the registered agent. She's not alleged to have called upon the Texas Attorney General or anyone else here in Texas to help her with the CID.

So this case really couldn't get too much closer to your decision in *Saxton*. We've got an official from an outside state, one Utah, one Massachusetts. We've got a state action, one a judge's decision, one the issuance of a CID. And in both cases we have an outside state official who had nothing to do with Texas.

Now, Exxon has cited to you not one case in which a federal judge asserted jurisdiction over an out-of-state attorney general where the attorney general had resisted jurisdiction.

And we did find several decisions from other federal district courts that found that a federal court could not exercise jurisdiction over another state's attorney general.

And I would invite Your Honor's attention in particular to a case that we cited in our reply brief, among several others that we cited, and that's the case of *Turner versus Abbott* in the DC -- in DC District Court where the court refused jurisdiction over the Texas Attorney General where he

had been sued by somebody who wanted to declare the Texas foreclosure statute unconstitutional. And the Court simply said that it was not appropriate to take jurisdiction over the Texas AG.

Now, if Your Honor elects not to dismiss this case, what's going to happen is that you will be opening up this courthouse potentially to every disgruntled Texas business and individual who feels slighted by some action whether it's a tax or a law or something else undertaken in some other state and they want to be able to sue here in their home state.

Similarly, you open up the prospect, as the Fifth Circuit referred to in the *Stroman* case, of every attorney general in every state, as well as every other state official in other states, are going to have to be subjected to the possibility that they're going to be dragged across the country every time they do something because one of their decisions impacts somebody who lives in Oregon or Nevada or Texas. And the Fifth Circuit in *Stroman* said it wasn't going to take jurisdiction in part to avoid that problem.

And I would also refer Your Honor to the amicus brief that was filed on our behalf in this case. And I would note that that amicus brief was filed by 20 attorneys general. And you asked about who's on --

THE COURT: Oh, you did get Alaska. I'm sorry.

MR. JOHNSTON: We did get Alaska. We got Virginia.

We got Mississippi, as well as 17 other attorneys general.

And one of the things that they said in their brief -- and I'll quote -- is the race to the federal courthouse would also undermine the States' compelling interest in protecting their citizens from fraudulent or deceptive practices, by forcing state Attorneys General to defend themselves against federal lawsuits filed all across the country. The federal courts should not facilitate such friction between the state and federal governments when recipients of state law CIDs have an adequate state court remedy available.

So I would suggest, Your Honor, that there just isn't jurisdiction here. And even if there were jurisdiction, Your Honor is familiar with the very prevalent concept of *Younger* abstention. *Younger* held that a federal court should abstain from hearing a case when there was a pending state criminal enforcement proceeding. And that principle was later extended to civil enforcement proceedings as well. And numerous federal courts have abstained from hearing cases involving parallel state enforcement proceedings precisely because they need to rely on the *Younger* abstention.

And I'm going to refer you to one particular decision, because it involves a CID. That's the case of *Lupin Pharmaceuticals versus Richards*. Richards was the Attorney General of Alaska, and Lupin was a Maryland drug company,

pharmaceutical company, that sued in federal court in Maryland to block the Alaska Attorney General from enforcing a CID that he'd issued in Alaska.

And the court in *Lupin* said, quote, the Lupin Plaintiffs have failed to demonstrate that they have no way of vindicating their rights through the Alaska proceeding and, thus, they have failed to show that the threatened harm constitutes an irreparable injury for purposes of *Younger*.

So I would suggest that based on the *Lupin* precedent, as well as the larger abstention doctrine in *Younger*, even if you had jurisdiction, given that there is an existing Massachusetts proceeding, you should defer to that proceeding and abstain.

I also would suggest, Your Honor, that the Plaintiffs have to show they have a decent chance of substantial likelihood of winning on the merits. And let me explain to you why I don't think that they're going to be able to do that. And, again, it goes back to the CID statute under which we're operating and the basis on which we brought this CID.

First off, I would like to refer you to the statute itself. The statute says that any person -- I'm sorry. I'll talk a little bit about the statute itself. The statute, 93A, says that anybody that commits an unfair business practice can be subject to liability. Then it says that in the regulation that we cited here that any person who fails to disclose to a

buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction.

So, you know, that's a pretty broad statute and broad set of regulations.

The Attorney General has power under the CID statute to issue a CID whenever he believes a person has engaged or is engaging in any method, act, or practice declared to be unlawful, including, of course, failing to make disclosures that may have influenced a buyer or -- a buyer of a consumer product or stock to make a different decision.

Now, it's important to recognize that the Attorney General doesn't need to have probable cause, you know, doesn't have to have substantial cause or substantial belief. He or she needs to have a reasonable belief.

And one of the purposes of the CID statute which allows the Attorney General to obtain information before bringing suit is so that an Attorney General who has a belief can conduct the investigation and then determine at the end of the investigation whether he or she has enough to proceed with a civil lawsuit or he or she doesn't, and --

THE COURT: So your contention in Massachusetts is that -- is that they lied and people wouldn't have bought their stock?

MR. JOHNSTON: In general, that they would not

have -- they would not have bought the stock or may have made other investment decisions if they knew the full extent of what Exxon's scientists knew or that consumers may have made different consumer choices.

Now, if there had been full disclosure of the full extent of the impact of gasoline products on climate change and on the environment, some consumers may have said, well, I think I'm going to switch to electric cars or I'm going to take the bus or I'm going to walk to work or I'm going to move so that I don't have to commute every day, which in fact many people these days are doing, so --

THE COURT: Not in Texas.

MR. JOHNSTON: Maybe not, but certainly in Massachusetts. I mean, we have a much smaller state. Many --

THE COURT: All compacted up.

MR. JOHNSTON: Yeah.

THE COURT: Right. Sure.

MR. JOHNSTON: I walk to work. Every day I have walked to my office for 30 years.

THE COURT: Yeah, move down here and see if that works out for you.

MR. JOHNSTON: It would be harder, I suspect.

THE COURT: It would be harder, I'm just telling you.

MR. JOHNSTON: But --

THE COURT: It's just a different world.

MR. JOHNSTON: But there are other methods of transportation, and also there are other things that could be done to try to --

THE COURT: How many times have y'all used this before, this very method of going against and using a CID to do this?

MR. JOHNSTON: We issued in the last three years about 300 CIDs.

THE COURT: I didn't say all your CIDs. Like this, though, using this same theory.

MR. JOHNSTON: We have used a number of CIDs for that theory. Let me give you an example --

THE COURT: Yeah, just give me an example.

MR. JOHNSTON: -- of one we just settled. And this is one that I think you probably read about in the papers, involving Volkswagen. Volkswagen made representations to the public, including consumers and regulators --

THE COURT: Involving diesel?

MR. JOHNSTON: -- about the diesel emissions.

THE COURT: And the switch?

MR. JOHNSTON: Right. And they knew based on what their own engineers and scientists knew that their emissions were different than what they were representing.

We issued a CID to Volkswagen, along with a bunch of other states, and the multi-state group recently announced a

rather substantial settlement with Volkswagen based in our case on our unfair and deceptive trade practices statute, Chapter 93A. I mean, it's not an uncommon thing at all.

We also, Your Honor, recently settled a case with a for-profit school where the for-profit school was making certain claims about the graduation rates of people who had taken out huge amounts of federal loans to go to school, and it turned out the graduation rates were really minimal. They represented that there were all sorts of employers who were taking their graduates in, when in fact those employers weren't taking their graduates in.

And we settled that case through a consent judgment in which they admitted to not disclosing things to their students that reflected what was really happening at the school.

So this is a very common thing. Our Consumer Protection Division is a very busy division.

THE COURT: Okay.

MR. JOHNSTON: Okay. So you asked the question --

THE COURT: Are you going to answer any of my questions?

MR. JOHNSTON: Well, I'm going to answer the first question.

THE COURT: No, no, no. I'm done with you.

MR. JOHNSTON: Oh.

THE COURT: You've gone as far as you're going to go for a while. You're going to answer all those questions I asked earlier.

MR. JOHNSTON: Well, the first one I think you asked Mr. Anderson was why Exxon, why did they pick on Exxon.

THE COURT: Yeah. Why?

MR. JOHNSTON: So can I answer that? There are obviously lots of oil companies. The reason why Exxon is featuring prominently now is because in November or so, late last fall, two different periodicals, one the Los Angeles Times, which, as you know, is a well-known metropolitan newspaper, and the other, Inside Climate News, which was nominated for a Pulitzer Prize for the articles that are published, they published a series of articles. I think there are something like eight articles. They're all in our papers which you can read to understand where we derived our belief from.

Those articles had gone and interviewed a whole bunch of people from Exxon, and they had looked at a whole bunch of Exxon documents, including at various repositories of Exxon documents, and they had concluded that it looked as though Exxon had not been forthcoming over the years with what its scientists knew and concluded back when.

And what we have gleaned from those articles are at least the following. And this is gleaned from the articles as

well as having read the documents that the articles made public.

So we read those articles and we read the documents, and it appears to us as though the following is at least evident from what we have read.

First, that Exxon knew that rising carbon dioxide emissions were causing global temperatures to increase.

Second, that Exxon knew that certain levels of warming would likely cause very significant adverse impacts on natural resources or human populations.

And third, that Exxon knew that using the products that it sells, like oil and gas, were playing a significant role in the CO2 emissions and warming and that sharp -- quote, sharply curtailing those uses would help mitigate the risk of climate change.

Now, the Attorney General said publicly before the CID was issued -- and you heard a part of what she said at the press conference -- that there was a disconnect between what Exxon knew and what Exxon told investors and customers. And that was based on the review of those articles as well as our own review of a bunch of documents.

In addition, Attorney General Healey knew at the time that she issued her CID that, as I mentioned earlier, Attorney General Schneiderman from New York had already issued a CID, and that Exxon -- for similar reasons, consumers and investors,

and that Exxon had produced a lot of documents in response. Attorney General Healey also knew that there had been calls in Congress for the DOJ to investigate Exxon.

Thus, you know, based on the statute in Massachusetts of having a belief that there may be problems with communications to investors and to consumers, she has a basis for being able to issue the CID.

THE COURT: How can she go back more than four years?

MR. JOHNSTON: Well, let me explain it to you as we see it. And Your Honor alluded to the tobacco cases. I think as you know then, the same thing pretty much happened in the tobacco cases. In fact, the DC circuit case which found that the tobacco companies had committed RICO violations basically starts out the opinion, as I recall it, with a discussion about a meeting that took place -- and the decision of the DC circuit was somewhere around 2009, I think.

Anyway, the DC circuit starts out the opinion by saying this all began back in 1952 when the vice presidents or executive vice presidents of each of the major tobacco companies got together in a room and talked about the fact that there were problems with the way tobacco might cause cancer, and none of those companies were supposed to use any kind of public pronouncements the fact that one of them was safer than another cigarette, and went on to talk all about what the tobacco companies' scientists knew, what they had seen in the

lab, and what they didn't tell consumers or regulators and, in fact, denied there was any sort of problem for a long time.

So, you know, the fact is that there are a number of means under Massachusetts law by which the Massachusetts courts can hold somebody liable for things that happened a pretty long time ago. And let me discuss a couple of them.

First, what somebody knew a while ago is relevant to whether they are saying something that's truthful now.

I mean, for example, if, you know, you knew from 20 years ago that your brother stole something and it was somehow relevant to a case today, the fact that you learned it 20 years ago doesn't stop you from having the knowledge that your brother stole something.

And the same thing here. If Exxon scientists were telling Exxon back when all of our products are going to cause a disaster for the environment, you know, the fact that Exxon knew that then bears upon what they're telling people now.

The other three specific ways in which old documents can be relevant and toll the statute -- or deal with the statute of limitations are that there is a concept in Massachusetts called continuing tort. So if something goes on for a long time, you know, you can reach back to the beginning of that time as opposed to just the last four years.

THE COURT: So basically the law in Massachusetts allows you to go way beyond --

MR. JOHNSTON: In some circumstances. I'm not saying in every circumstance. But in some circumstance it is. So if it's a continuous string where this was going on for 30 or 40 years, the courts may say it's the string that we get, not just the last piece of the string.

THE COURT: I get it.

MR. JOHNSTON: The second concept is the tolling of the statute of limitations for discovery purposes.

You know, if people don't know what Exxon was doing and don't find it out until the L.A. Times or Inside Climate News publishes all that stuff and then people start to look at it, the courts can say, well, your trigger started when you learned in those articles that Exxon may have been lying, not four years ago. How would you have known? Because you didn't know what Exxon scientists were doing.

And then the final theory is fraudulent concealment. You know, if a company takes steps to conceal what it knew, the courts will sometimes say, shame on you, we're not going to apply the statute of limitations where you were taking active steps to keep the plaintiffs from learning what you know that they would have known if you hadn't been hiding it from them.

So it's for all of those reasons that we believe --

THE COURT: I get it.

MR. JOHNSTON: -- at this stage that we have the right to at least get the documents.

And make no mistake, Your Honor, we aren't saying that today we're able to go into court and file a case against Exxon for misrepresentation or violations of the consumer protection law.

THE COURT: Or fraud or anything else.

MR. JOHNSTON: Or fraud or anything else. What we're saying is, we have this statute which allows us to get information before we have to make that decision. And we're saying to the courts -- we think it should be the Massachusetts court -- but we're telling you, too, because we're here.

THE COURT: You can do that based on nothing?

MR. JOHNSTON: Pardon me?

THE COURT: You can do that based on nothing just because you want to?

MR. JOHNSTON: No. We have to have a belief based on something.

THE COURT: Those five documents. Those five documents. That's it?

MR. JOHNSTON: Well, we cited those documents, but -- and, you know, if you would like to have a further analysis of those documents, you know, I would invite my colleague, Ms. Hoffer, who is chief of our Environmental Bureau, to deal with those documents.

THE COURT: I'm just saying those are your -- those are your bases?

MR. JOHNSTON: Those are our principal documents which we believe make out some of the points that we address. But keep in mind, Your Honor --

THE COURT: So what is the level? What's the level you've got to achieve to be able to do this?

MR. JOHNSTON: We would have to satisfy the Rule 11 criteria.

THE COURT: Okay.

MR. JOHNSTON: I mean, that's -- that's the burden on us. And so we, as an attorney general's office, have been --

THE COURT: I mean, you can't just go to any company and say, we want all your stuff because we think you might be doing some shenanigans.

MR. JOHNSTON: No. We have to have a reasonable belief.

THE COURT: Right.

MR. JOHNSTON: That's the limit on us.

And Exxon has raised the issue of the Fourth Amendment and how it's unreasonable and so forth. Well, I'll say a couple of things about that. One is the courts have long recognized since at least the *Morton Salt* case by the Supreme Court that governments, of course, have the right to obtain documents as part of investigations from companies. That's what investigations are. And to the extent that the requests are unreasonable, well, Exxon has every right in the world to

object in a Massachusetts court to say they are unreasonable.

As I mentioned, our CID statute says that it's governed by Rule 26(c), so, you know, we have to basically comply with the Rules of Civil Procedure with respect to what documents we're entitled to get. They have raised these objections. And, in fact, I suspect that when we're arguing in Massachusetts Superior Court, you know, we'll be hearing from Exxon as to why this category of documents is no good and that category of documents is no good.

But most of the documents that we have requested have dealt with either the scientific evidence that was referenced in the articles that we read or backup for that, for what people were doing with that research, and what Exxon was telling investors, what Exxon was telling consumers, and what sort of marketing strategies Exxon was developing in view of the fact that it knew that it had this perceived problem with respect to climate change. So --

THE COURT: Maybe I'm -- maybe I'm wrong, but I think he said, look, we agree there's climate change and that fossil fuels obviously add to that and -- isn't that different than Volkswagen hiding what they were doing so they could pass those tests in your state and all the other states, particularly California?

I mean, they're going to say, hey, that's a whole lot different. We're not hiding. We agree. We agree with you

that this is a problem. We just didn't see it as developed as you see it, the science.

MR. JOHNSTON: Well, from the documents that we have reviewed, Your Honor --

THE COURT: There are things that say --

MR. JOHNSTON: We think --

THE COURT: -- hey, we know it's all bad back in the '50s or '60s or whenever?

MR. JOHNSTON: '60s, '70s, yes.

And instead of telling the world, hey, we think gasoline products are going to be having a catastrophic impact on climate and one way to reduce that catastrophic effect would be to sell less and use less gasoline, instead, you know, they went on selling gasoline at the ordinary clip.

And, you know, if we're correct that we have the right to go back that distance because of various extensions of the statute of limitations, the fact that in 2010 they get around to saying, oh, in our financial disclosures in a little piece that says, oh, global warming is an issue that we have to think about, you know, that's not the same as saying 30 years ago we should be telling the world now what's happening.

THE COURT: I get it. Sure. I get it.

MR. JOHNSTON: Okay.

THE COURT: What else did I cut you off that you really want to tell me?

MR. JOHNSTON: Well, Your Honor --

THE COURT: You didn't answer my other questions, but it's okay. It's all right. That's all right. I'll just have to decide that on my own without your benefit. That's okay.

I always tell lawyers this is like stepping out into the street and you have a gun and it was like the beginning of Gunsmoke. You're probably too young to remember that. And somebody shoots somebody and they're dead. This is your only shot to make an argument in front of me.

I will not call y'all back, so you better take your shots, all I'm telling you. If you don't want to answer them, I'm okay with that.

MR. JOHNSTON: Well, I do know Gunsmoke, and James Arness went to my high school.

THE COURT: And he also didn't pull the gun as fast as the other guy, so every time he should have gotten shot in the beginning of that show.

But, anyway, go ahead.

MR. JOHNSTON: Well, I remember that one of the questions you posed to Mr. Anderson was, you know, why you? Did you poke the bear? And I've explained why Exxon.

In terms of poking the bear --

THE COURT: They're the biggest. Of course that's why you went after them.

MR. JOHNSTON: Well, we also have access to Exxon

documents.

THE COURT: And they're pretty -- they make a lot of money. They're pretty effective at what they do, wouldn't you agree?

MR. JOHNSTON: They are, according to their own records, the largest publicly held oil and gas company in the world.

THE COURT: And arguably the largest company in the world if we -- I don't know how we consider Apple and all those other companies, whether they're real or not.

MR. JOHNSTON: You will never get an argument out of me that they are a big, big company. They are a big, big company. They do business everywhere.

But in terms of poking the bear, I mean, I'm not aware that Exxon went out of its way to do anything to the Attorney General. I wasn't even aware until I read their papers that Exxon is or was back in March of 2016 a political opponent of the Attorney General. I didn't think they made -- had any particular presence in political elections or so on.

You know, our CID was based on --

THE COURT: You're saying that very wryly like that doesn't happen.

MR. JOHNSTON: Well --

THE COURT: Like Al Gore wasn't freaking involved in all the politics that there could be of this. Mercy, he's

front and center of this thing. He's the politician, wouldn't you say?

MR. JOHNSTON: I didn't say that he wasn't. What I said was, I wasn't aware that Exxon had done anything in particular against Attorney General Healey.

THE COURT: Yeah, I understand that. But, you know, you can't deny that these are politicians involved in this.

MR. JOHNSTON: Well --

THE COURT: Doesn't -- your Attorney General is not appointed by the governor in Massachusetts.

MR. JOHNSTON: No, no. The attorney general --

THE COURT: She runs.

MR. JOHNSTON: -- runs for office.

THE COURT: Right. And she has run for other offices prior to this, correct?

MR. JOHNSTON: No, she hasn't.

THE COURT: This is her first time?

MR. JOHNSTON: Yeah. She's 44. In fact, there's alleged in their papers some sort of conspiracy going back to 2012. I mean, she took office in 2015, was her first office. She had been a line attorney general until about a year before the election, and then she stepped down and ran for Attorney General.

THE COURT: And I'm assuming well thought of or she wouldn't have got elected?

MR. JOHNSTON: I think that many people think well of her in Massachusetts.

THE COURT: Good. And I'm sure other states do, too. Okay. Are you going to answer my other ones?

MR. JOHNSTON: I've probably forgotten what some of them are.

THE COURT: That's okay. That's all right.

MR. JOHNSTON: But, no, if they're burning issues to Your Honor, by all means, please ask me, because that's what I'm up here for.

THE COURT: Sorry, I only ask them once. I don't go back.

MR. JOHNSTON: Yeah. Well, I have my notes that you -- you asked about why just Exxon. You asked is this case like tobacco.

THE COURT: And it is going to go beyond Exxon, right, if this is successful?

MR. JOHNSTON: Well --

THE COURT: I mean, you don't think other companies were doing anything differently than they were, or do you?

MR. JOHNSTON: Look, depending on what we find in Exxon, we may look other places. But, you know, Exxon is the place that we've started, because there appeared to be a basis from published documents about Exxon.

THE COURT: Oh, I get it. I understand it. I

think -- I get why you did it. But you're likely to go after other oil producers?

MR. JOHNSTON: Depends where this investigation leads us.

Let me respond to some other things that came up a little bit earlier about the First Amendment and Exxon's speech. This is not --

THE COURT: The bottom line is, you want to have the fight in Massachusetts, and you think that's the appropriate place, right?

MR. JOHNSTON: We certainly do think it's appropriate --

THE COURT: Right.

MR. JOHNSTON: -- because of the statutes and because of jurisdiction.

THE COURT: And that's your strongest argument, way stronger than your argument about, hey, the statute of limitations can be extended. Anytime lawyers get into that, you'd agree that's not your number one argument, correct? That's not the strongest argument?

MR. JOHNSTON: No. It's toward the end of our brief.

THE COURT: Right. Exactly. I mean, that's the one where you're -- you're being a pioneer. Nothing wrong with that.

MR. JOHNSTON: Well, no, I'm not being a pioneer.

I'm not arguing for an extension of the law. Those principles exist in Massachusetts. We're saying that this case would fit one of those exceptions.

THE COURT: Okay. That's a better -- you're right. You're -- that's a better way of saying it.

MR. JOHNSTON: But with respect to the arguments about political speech, you know, Mr. Anderson said we're trying to basically squelch Exxon from saying stuff. You know, what we're trying to do by our CID is not deal with what Exxon necessarily wants to say five years from now, but, you know, what has Exxon said already.

THE COURT: I get it.

MR. JOHNSTON: Did it make statements that were at variance with what it knew? If it did, there could be liability under the consumer protection statute.

THE COURT: If they had had information about how bad global warming was and they said something other than that or withheld it, then you want to know?

MR. JOHNSTON: That's correct.

THE COURT: Right?

MR. JOHNSTON: That's correct, so we can determine whether the totality of the circumstances warrant bringing a civil enforcement action. The circumstances may; they may not. Attorney General Healey hasn't made any predetermination.

I mean, if she had, which is what Exxon suggests, I

mean, we would have filed the lawsuit. But, you know --

THE COURT: You made a predetermination there's some reasonable belief that there's some shenanigans going on.

MR. JOHNSTON: That's right. We had to have that belief --

THE COURT: Right.

MR. JOHNSTON: -- in order to get the CID in the first place.

THE COURT: Right.

MR. JOHNSTON: But we have to wait till we have the evidence before we could stand up, sign our names on a pleading under Rule 11, and say we have a right to collect something or get an injunction against Exxon going forward.

THE COURT: I get it. I get it.

Whatever else you want to tell me that I cut you off, tell me.

MR. JOHNSTON: I think that I probably dealt with most of the things that I wanted to deal with, but may I just confer with my associates?

THE COURT: Oh, sure, sure.

MR. JOHNSTON: Thank you very much.

(Pause)

THE COURT: Yes, sir?

MR. JOHNSTON: The consensus is sit down.

THE COURT: Okay. I would love to hear from all your

other lawyers, especially Ms. Hoffer.

Is it "Hoffer" or "Hoffer"?

MR. JOHNSTON: Ms. Hoffer.

MS. HOFFER: Hoffer, Your Honor.

THE COURT: Hoffer. Because I know she's the one that did all the special research, but I know her time is limited. So I'll know that she would have liked to have told me all about it, but that's okay. Okay?

Thank you.

MR. JOHNSTON: Yes.

THE COURT: Good presentation. I thought you did a good job. You know, you're one of my -- I guess you're about my thirteenth favorite Yankee, okay?

MR. JOHNSTON: Well, may I say, Your Honor, that I hope you won't be upset at me if I say that I hope this is the last time we see each other.

THE COURT: It's okay. It's okay. I have actually been to some football games in Boston, and I might go back one of these days again.

MR. JOHNSTON: I didn't think that people in Texas thought that we played football in Massachusetts.

THE COURT: Oh, no. You beat my team when I went up there.

MR. JOHNSTON: Oh, pro football. Okay.

THE COURT: It was good.

MR. JOHNSTON: All right.
THE COURT: No, it was college. It was college.
MR. JOHNSTON: College?
THE COURT: So I love it, and I love your state. It's a wonderful place for people to be, and I don't blame y'all for living there.
MR. JOHNSTON: You are welcome in a friendly capacity anytime.
THE COURT: Thank you.
MR. JOHNSTON: I'll put you up.
THE COURT: Thank you. I appreciate it. Thank you very much.
MR. JOHNSTON: Okay. Thank you.
THE COURT: Do you have any response to any of theirs? And then I'll give him a response, too.
MR. ANDERSON: Sure.
THE COURT: Particularly about jurisdiction. How the heck do I have jurisdiction?
MR. ANDERSON: You have personal jurisdiction, Judge, because the Defendant directed her intentional tort at Texas.
The face of the CID itself indicates that what she's investigating is speech that occurred in Texas. She wants the records of that speech that are in Texas, and she wants to suppress speech that's coming out of Texas.
THE COURT: Okay. Stop. I get that.

Here's my other question. Is it true what he said about y'all cooperating in New York and not cooperating with them?

MR. ANDERSON: Your Honor, we were served with a subpoena before the press conference, and we are cooperating with it.

THE COURT: Yes? No? Or whatever?

MR. ANDERSON: Yes.

THE COURT: So why the heck are we having this big fight? I'm about to start a case involving 10,000, the largest case in federal court. Why are y'all poking this bear? If you are agreeing to cooperate there, why aren't you cooperating with them?

MR. ANDERSON: Well, Your Honor, when we started complying with New York, that was before the press conference, and so circumstances have changed. And with respect to New York, all options are on the table, and so --

THE COURT: What does that mean?

MR. ANDERSON: That means that we are considering our options with respect to further compliance.

THE COURT: You're maybe going to comply or maybe going to fight?

MR. ANDERSON: (Indicating in the affirmative)

THE COURT: Yes?

MR. ANDERSON: That's right, Judge. When we started

complying with New York, it's a different landscape.

THE COURT: So if they had not had that press conference, some poor judge somewhere else would be fiddling with this, not me, right?

MR. ANDERSON: Your Honor, it's so rare that you have evidence like this in the public record about an impermissible motive behind a government action. Normally, that's the type of thing that's concealed.

THE COURT: Yeah, but doesn't New York have the same motive they've got?

MR. ANDERSON: Oh, New York -- like I said, judge, it could very well be that -- that, you know, all options are available, and they're being considered now, and it's possible.

THE COURT: All options are available. Mercy, you sound like the Secretary of State or Defense or the guy that's driving our nuclear submarines or something. It doesn't tell me what that even means.

MR. ANDERSON: Judge, it just reflects the fact that this has been a very fluid situation. And ExxonMobil's initial reaction whenever it receives an inquiry from Government is to respond and comply and to do what it's supposed to do like everybody else. It's this press conference and these documents that have come to light that have upended that normal presumption.

And that's why everything that the defense says

about, you know, we issue CIDs to investigate fraud, we issued 400 of them, including to Volkswagen -- you know, we're not contesting any of that. That's all well and good and appropriate.

THE COURT: So you're saying if they hadn't had this press conference and it hadn't been pointed out that y'all are doing something -- something that's a shenanigan, it might have had a different outcome?

MR. ANDERSON: Right. If there had not been these express public statements that the problem we have with ExxonMobil is that it's confusing the public about the need for the policies we support in the press conference, in the common interest agreement, and in the CID itself --

THE COURT: How many documents have you produced to New York? 700,000 or more? A bunch?

MR. ANDERSON: A bunch, Judge. Yeah, that production has been ongoing for a while and --

THE COURT: Are you still producing?

MR. ANDERSON: We are still producing to New York, yes.

THE COURT: Okay.

MR. ANDERSON: And, Judge, even --

THE COURT: But Schneiderman, is he part of this still? Is he still part of this one?

MR. ANDERSON: Oh, yes. He's pictured on the right

of -- in the press conference looking on, or on my right, the Attorney General's left. He's there.

THE COURT: So I'm assuming after this press conference and you had already been cooperating there was a frank conversation with somebody from the Attorney General's Office and a lawyer for Exxon, correct?

MR. ANDERSON: That would -- that -- without going into those details, that would be a fair assumption, Judge.

THE COURT: Without going into those details, there was a -- I don't know how frank -- very frank, kind of like what happens at halftime at some football game between the coach and the kid that let the guy score the touchdown. Those really hard conversations, or that I had with my children growing up when they messed up, you know.

MR. ANDERSON: Right.

THE COURT: A very hard conversation, correct?

MR. ANDERSON: Correct, Judge. Because this is the type of thing that you don't expect to see in a normal investigation --

THE COURT: Okay.

MR. ANDERSON: -- where the political objectives are totally laid bare.

THE COURT: All right. Any other response?

MR. ANDERSON: Judge, I just think it's important to address personal jurisdiction, Judge, because we are confident

that you have personal jurisdiction. And the reason is --

THE COURT: He said no other federal judge has ever done this. He even pulled my own cases out. I mean, how -- how appropriate.

MR. ANDERSON: *Saxon*, Judge, is a case that I'm sure you remember.

THE COURT: I do remember.

MR. ANDERSON: You told, Judge, with the parties in front of them, complaining about the fact that the orders that were issued in Utah might have some effect here.

Walden is another case where the seizure of the money took place in Georgia where the plaintiffs had been traveling. The DEA agent was in Georgia. He seized the money there. They go home to Arizona, and that's where they would like to have their money. And then they file their lawsuit there. And the Supreme Court says that's not enough. The fact that you feel some of the effects in Arizona is not enough.

But then you have *Calder* which is where in California there's a celebrity named Shirley Jones who resided there, and the National Inquirer published a story in Florida which is where all the defendants were, in Florida, criticizing her, something about her personal life. She sues them for libel in California. And the Supreme Court says that was appropriate, there's personal jurisdiction over the National Inquirer and those defendants in California because the brunt of the injury

and the cause of action occurs in California.

Here, the cause of action occurs in Texas. This is where ExxonMobil speaks. This is where the speech that the Attorney General disapproves of is coming from. When she issued her CID, she directed that intentional tort at this state. And that is why the tort is here. She intentionally --

Let's think about the principle of personal jurisdiction.

THE COURT: I get the principle, but you're comparing Ms. Healey to the National Inquirer. So you're saying what she did was akin to that?

MR. ANDERSON: It was akin to it in the sense that she intentionally committed a tort and directed it at the State of Texas. What she did was, she knows that Massachusetts is not the state where ExxonMobil operates. We have a registered agent there who receives service of process and sends it on down to Texas.

What she did not like -- and it's in the CID -- is she didn't like that there were certain statements that were being made in Texas. She didn't like that speech. And she wants the records that are here in Texas. And so she sent the CID to the registered agent knowing that it would come to Texas.

And there's -- you know, in addition to *Calder*, there's plenty of Fifth Circuit authority on the proposition

that where the communication creates a tort in Texas, like *Wien Air* or *Lewis,* where you intentionally direct your conduct at the State of Texas knowing that an intentional tort will occur there, there's personal jurisdiction.

THE COURT: I get all that. I know those cases. I'm not -- that's not it. I mean, has there ever been a judge do this and shut down an attorney general?

MR. ANDERSON: Well, Judge, this is -- I mean, this is honestly unprecedented. Has there ever been an amicus brief filed by 11 state attorneys general saying one of our peers is doing something wrong, she's violating the Constitution by issuing it?

If there is such a case where we had that record and a federal judge turned down jurisdiction, then I say that's a good point. But the reason there's no precedent here is because these actions are unprecedented. They're outrageous. This is a misuse of law enforcement authority, because the Attorney General and those she's working with, including Al Gore --

THE COURT: All right. Let me stop you. What about his argument that you have adequate remedy there in Massachusetts?

MR. ANDERSON: Well, that presupposes that there is some type of exhaustion requirement for a 1983 action that first you have to go to state court, and if you can go to state

court then you can't come to federal court. But if that were true, then all 1983 actions would be heard in state courts because you could always go. The court is a general jurisdiction. You can bring your claims there. There's no exhaustion requirement.

And so the idea that we could be in Massachusetts is just -- it's just a false premise; that if we could be there, then we can't be here. That's just not true.

THE COURT: You could be both?

MR. ANDERSON: We could be both, but the problem is that the Massachusetts state court doesn't have personal jurisdiction over ExxonMobil.

We filed there because we had to. We were conservative. We didn't want to forfeit any rights we might have, so we filed a petition there.

THE COURT: I'm assuming -- I have not looked at your petition there, but I'm assuming that whatever you filed said we're not giving up on our jurisdictional point. And there's a procedure to do that, like we do with special appearance in Texas, something like that?

MR. ANDERSON: Exactly right, Judge.

THE COURT: Something like that?

MR. ANDERSON: Precisely that. We made a special appearance.

THE COURT: Appearance. Okay. Is that what it's

called up there?

MR. ANDERSON: I believe it's called a special appearance.

THE COURT: Is it? Okay.

MR. ANDERSON: Or it may have a different name, but has that effect.

THE COURT: Okay. Okay.

MR. ANDERSON: We appeared to contest jurisdiction. That was the first point in the brief, is that the Court does not have personal jurisdiction over ExxonMobil. We asked that the Court not do anything. We said just stay this action pending the lawsuit that we filed here.

THE COURT: And they didn't do that.

MR. ANDERSON: So far the state hasn't done anything. We're still in the middle of briefing. So we'll see if the state -- when we go up there, we'll see if the Judge who's assigned the case --

THE COURT: Stays it?

MR. ANDERSON: -- decides to stay it --

THE COURT: Okay.

MR. ANDERSON: -- in deference to these actions.

THE COURT: Okay.

MR. ANDERSON: So for those two reasons -- and, you know, the third one, Judge, even if a *Younger* abstention was relevant, you know, there's an exception for bad faith. And

that's the idea that, you know, if there is a forum in state court, if you're there because of the bad faith of the defendant, well, that's not an argument for putting you in that forum.

And so here there is a bad faith that permeates the entire case. What we're arguing here is bad faith, that the Attorney General brought this investigation in bad faith. She brought it to deter the exercise of constitutional rights. That is the definition of bad faith. And that means that *Younger* abstention doesn't apply and the normal presumption applies, which is that when a federal court has subject matter jurisdiction over the cause and personal jurisdiction over the parties, it hears the case.

THE COURT: And so you're saying -- he said, hey, we've got a reasonable belief from these documents. You're saying they can't have a reasonable belief. That's your argument?

MR. ANDERSON: What I'm saying, Judge, is that that's exactly right. They say they have a reasonable belief, but everything they've told you about this case is pretext, and now we hear for the first time that there are documents from the '50s and '60s that might support their investigation? Well, why didn't they put it in their briefs.

They've had -- they filed three -- at least three briefs in this case, and all that they've cited as the basis

for their investigation were those handful of documents from the '80s, which we looked at and we told -- and we encourage you to look at them, too, Judge. All they show is uncertainty and doubt and the need for further research, the same as everybody else in the '80s.

And then this theory about -- which the Defendants haven't even tried to defend, this idea that the assets, the proved reserves, might become stranded because of future regulations that might be enacted -- who knows -- in response to climate change.

THE COURT: Anything else?

MR. ANDERSON: Yes, Judge. May I have just one moment?

THE COURT: Sure, sure, sure.

(Pause)

MR. ANDERSON: Could I make two final points, Judge?

THE COURT: Sure.

MR. ANDERSON: The first is the nature of the First Amendment harms that we are asking for relief. Here those -- those are irreparable injuries. The injury is irreparable for the reason that we were discussing before, is that you have that constant risk that your regulator is going to take an adverse action because she doesn't like what you're saying.

That's why it's settled precedent, and the defense hasn't contended otherwise, that if you accept that there is a

substantial likelihood that we will prove a First Amendment violation here, then you've also found irreparable injury. It's just a legal truism. If you find one, then you've got the other.

So all of this back-and-forth about irreparable harm is settled if you find that there is a First Amendment violation, which we believe we have established.

THE COURT: I get that, but go back to -- what's the -- what's the tort?

What do you think is the tort?

MR. ANDERSON: The tort is a constitutional tort. It's, number one, the viewpoint discrimination that --

THE COURT: I get it. Okay.

MR. ANDERSON: -- motivates, and then the political speech that's being burdened, the fishing expedition in violation of the Fourth Amendment, and the biased investigation in violation of due process.

THE COURT: Okay. I get that.

Okay. Go back to your other point.

MR. ANDERSON: Judge, I think the other point that is very important here is that with respect to Volkswagen, which was the example of an investigation that is on -- that is similar to this one, Volkswagen. Perhaps I missed it, but was there a press conference where the Attorney General and others announced they were against diesel fuel, and so, therefore,

would be investigating Volkswagen because they had a policy disagreement about whether diesel fuel was an appropriate fuel for Americans to use? I doubt it.

Did the subpoena to Volkswagen ask for 40 years of records, or did it pertain only to a violation that occurred within the limitations period?

Everyone knows the Volkswagen issue is a recent one. It's within the four-year period. It's not from the '80s.

And, Judge, I think that comparison actually undermines their argument quite a bit, because it shows the difference between a real investigation and one that is -- one that is pretext, one that's about changing the political debate by putting pressure on a company to produce 40 years of records so that someone can sift through all of them and find something that can be used as leverage so the company will change its position.

You know, that's the playbook that Matthew Pawa and Peter Frumhoff wrote up a few years ago. It's the one that they likely presented just before that press conference with the Defendant and Al Gore. And it's the reason that this Government action is impermissible.

THE COURT: Is that it?

MR. ANDERSON: That's all, Judge.

THE COURT: Thanks.

MR. ANDERSON: Thank you.

THE COURT: Mr. Johnston, anything else?

MR. JOHNSTON: Just a few quick points, Your Honor --

THE COURT: You bet.

MR. JOHNSTON: -- in response to what Mr. Anderson just said.

First off, it's my understanding in response to your question that even though Attorney General Schneiderman was at the press conference, even though there may have been frank conversations, that Exxon continues to produce documents to New York.

Second of all, Exxon has suggested that there is no comparison between the Volkswagen case and this one. In fact, there are plenty of similar comparisons. There were press articles about what had happened at Volkswagen. We sent out a CID. We worked collaboratively with other attorneys general to find out whether, in fact, there had been deceptive conduct. We ended up settling the case on the basis of what we learned through the CID.

I want to also make one last point about something that is unclear in what Exxon is seeking here. Exxon has asked you to grant an injunction preventing us from enforcing the CID or seeking to enforce the CID. And that may mean simply that they don't want the Attorney General to do something unilateral about the CID, which, as I have explained to you, we can't, because we need court authority to do so.

But it may also mean, although they don't say it so explicitly, that if you were to grant an injunction against us enforcing the CID, it means that we can't even file our brief in three weeks in Massachusetts Superior Court.

And we certainly would urge you, regardless of what you are thinking about the case, not to tell us we can't file our briefs in Massachusetts court.

And the last corollary to that is that Mr. Anderson has suggested that they have irreparable harm because of the First Amendment. They don't have any irreparable harm if they're not producing any documents. And at least until the Massachusetts court rules under our state procedure that we're entitled to documents, there's no First Amendment issue because there's no document being produced.

So for all of these reasons, including the ones that I raised earlier, Your Honor --

THE COURT: What about his argument *Younger* doesn't apply where you've got 1983?

MR. JOHNSTON: Well, I think that in a number of cases that *Younger* -- that addressed *Younger*, I think some were 1983, but I won't --

THE COURT: I'll look. You know, I don't know. I'm not trying to set you up. I don't know the answer.

MR. JOHNSTON: And, frankly, I can't remember whether any of the cases we cited did or not.

THE COURT: Okay. I'll look at it. I promise you.

MR. JOHNSTON: And I don't want to make a statement that I can't back up --

THE COURT: Okay. Thank you.

MR. JOHNSTON: -- since, after all, that's what this case is about.

THE COURT: Yes, sir. Yes, sir. Thank you.

MR. JOHNSTON: Thank you.

THE COURT: Anything else?

MR. ANDERSON: Judge, could I just clarify that the *Younger* point wasn't that it was because it's a 1983 action.

THE COURT: Oh, I'm sorry.

MR. ANDERSON: But it was because it's bad faith. *Younger* abstention could easily apply in a 1983 action --

THE COURT: It could. Okay.

MR. ANDERSON: -- when there is no bad faith. It's the bad faith.

The other point was just that as a general proposition the mere existence of a state forum doesn't preclude a 1983 action from proceeding in federal court.

THE COURT: Oh, okay. Okay.

MR. ANDERSON: It's two different --

THE COURT: I got it backwards.

MR. JOHNSTON: But, Your Honor, just with respect to *Younger,* the case law does say that that bad-faith exception to

Younger --

THE COURT: Yes, sir.

MR. JOHNSTON: -- is to be applied. And the term they use is parsimonious things. So we would urge you to be very parsimonious --

THE COURT: Whoa. I better write that word down. That's a big word.

MR. JOHNSTON: It means --

THE COURT: Could that be rarely?

MR. JOHNSTON: Very, very rarely.

THE COURT: Mercy. We use that in Waco occasionally. Okay. Off the record.

(Discussion off the record)

(Hearing adjourned)

INDEX

I, TODD ANDERSON, United States Court Reporter for the United States District Court in and for the Northern District of Texas, Dallas Division, hereby certify that the above and foregoing contains a true and correct transcription of the proceedings in the above entitled and numbered cause.

WITNESS MY HAND on this 19th day of September, 2016.

/s/Todd Anderson
TODD ANDERSON, RMR, CRR
United States Court Reporter
1100 Commerce St., Rm. 1625
Dallas, Texas 75242
(214) 753-2170

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff,	)	4:16-CV-469-K
VS.	)	DALLAS, TEXAS
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	)	November 16, 2016

TRANSCRIPT OF TELEPHONE CONFERENCE

BEFORE THE HONORABLE ED KINKEADE

UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF:

MR. JUSTIN ANDERSON
Paul, Weiss, Ritkind, Wharton & Garrison LLP
2001 K Street, NW
Washington, D.C. 20006
janderson@paulweiss.com
(202) 223-7300

MR. TED WELLS
Paul, Weiss, Ritkind,
Wharton & Garrison LLP
1285 Avenue of the Americas
New York, New York 10019
twells@paulweiss.com
(212) 373-3317

MS. MICHELE HIRSHMAN
Paul, Weiss, Rifkind,
Wharton & Garrison, LLP
1285 Avenue of the Americas
New York, New York 10019
MHirschman@paulweiss.com
(212) 373-3000

MR. DANIEL E. BOLIA
Exxon Mobil Corporation
1301 Fannin Street
Room 1546
Houston, Texas 77002
daniel.e.bolia@exxonmobil.com
(832) 648-5500

MR. PATRICK JOSEPH CONLON
Exxon Mobil Corporation
1301 Fannin Street
Room 1539
Houston, Texas 77002
patrick.j.conlon@exxonmobil.com
(832) 624-6336

MS. NINA CORTELL
Haynes & Boone LLP
2323 Victory Avenue
Suite 700
Dallas, Texas 75219
nina.cortell@haynesboone.com
(214) 651-5579

FOR THE DEFENDANT, ERIC TRADD SCHNEIDERMAN:

MR. RODERICK ARZ
Office of the Attorney General
State of New York
120 Broadway, Fl 24th
New York, New York 10271
(212) 416-8633

MR. JEFFREY M. TILLOTSON, P.C.
Tillotson Law
750 N. Saint Paul Street
Suite 610
Dallas, Texas 75201
Jtillotson@TillotsonLaw.como
(214) 382-3041

MR. PETE MARKETOS
Reese Gordon Marketos LLP
750 N. Saint Paul Street
Suite 610
Dallas, Texas 75201
petemarketos@rgmfirm.com
(214) 382-9810

FOR THE DEFENDANT, MAURA TRACY HEALY:

MR. DOUGLAS A. CAWLEY
McKool Smith
300 Crescent Court
Suite 1500
Dallas, Texas 75201
dcawley@mckoolsmith.com
(214) 978-4972

MR. RICHARD JOHNSTON
Massachusetts Attorney
General's Office
One Ashburton Place
20th Floor
Boston, Massachusetts 02108
Richard.Johnston@state.ma.us
(617) 963-2028

MS. MELISSA HOFFER
Massachusetts Attorney
General's Office
One Ashburton Place
19th Floor
Boston, Massachusetts 02108
melissa.hoffer@state.ma.us
(617) 963-2322

ALSO PRESENT: **MR. JASON BROWN**

COURT REPORTER: **MR. TODD ANDERSON, RMR, CRR**
United States Court Reporter
1100 Commerce St., Rm. 1625
Dallas, Texas 75242
(214) 753-2170

Proceedings reported by mechanical stenography and transcript produced by computer.

TELEPHONE CONFERENCE - NOVEMBER 16, 2016

P R O C E E D I N G S

THE COURT: Good morning. Let me make sure who I have got.

Mr. Anderson?

Hello?

Mr. Anderson?

MR. ANDERSON: Good morning, Judge.

THE COURT: Ms. Cortell?

MS. CORTELL: Yes, Your Honor. I've got a full list if that would help.

THE COURT: Is it Richard Johnston?

MR. JOHNSTON: Yes, Your Honor.

THE COURT: And then Mr. Arz?

MR. ARZ: Yes, Your Honor. Good morning.

THE COURT: Good morning.

How is the weather in New York?

MR. ARZ: Good.

MR. BROWN: And, Your Honor, this is Jason Brown. I'm the chief deputy for the New York Attorney General's Office. I'm on the line as well.

And the weather up here is actually not so bad.

THE COURT: What does that mean?

Is it raining -- raining and cold?

MR. BROWN: Yesterday it was raining and cold.

Today, it's funny, it's a little bit warmer, so --

THE COURT: Oh, well, good. Good.

MR. BROWN: (Inaudible)

THE COURT: Well, good. So -- all right. Anybody else on the line?

MS. CORTELL: Your Honor, it's Nina Cortell. Let me give you a full list, if that's okay.

THE COURT: Sure.

MS. CORTELL: I think that might expedite it.

THE COURT: Okay.

MS. CORTELL: So for ExxonMobil, in addition to Justin Anderson, you have myself, Nina Cortell, Ted Wells, Pat Conlon, Dan Bolia, and Michele Hirshman.

For the Massachusetts Attorney General, in addition to Richard Johnston, you have Melissa Hoffer and Doug Cawley.

And for the New York Attorney General you have -- in additional to Mr. Arz and Jason Brown, you have Pete Marketos and Jeff Tillotson.

THE COURT: Mr. Tillotson. You haven't been in here since you became an independent lawyer. How are you doing?

MR. TILLOTSON: I'm doing fine, Your Honor. Thanks for asking. I'm -- I'm my own boss, and so I routinely both hire and fire myself every afternoon.

THE COURT: Well, there you go. I wasn't worried that you were going broke. I just wondered what was going on

with you. That's good. Good to have you back.

Okay.

MR. TILLOTSON: Thank you.

THE COURT: You know, I've got Ms. Cortell's letter, and I guess her concern and my concern, too, at this point is whether or not Attorney General Schneiderman -- isn't that the right way to say it, general? Just call him General Schneiderman and General Healey, whether they're going to comply with the order on the discovery or not and/or what's going to happen there. And I just wanted to kind of hear y'all's response from that.

MR. JOHNSTON: Your Honor, this is Richard Johnston. You heard from me in September when we were down there arguing. I will talk for the Attorney General's Office in Massachusetts.

As Your Honor will probably recall when we were before you the last time, we argued quite strenuously that the Court didn't have personal jurisdiction over Attorney General Healey. We argued secondarily that the Court should abstain from taking the case because there was almost equivalent proceeding in a Massachusetts state court.

We also argued there was no real irreparable harm because Exxon had already produced many of the same documents to New York.

And when we left court, or as we were leaving court, you told us -- you told the parties that it seemed strange that

Exxon had produced a lot of documents to New York but wouldn't give them to Massachusetts, and directed the parties to have a discussion, and failing a discussion between us that we would mediate before Judge Stanton.

We had discussions about the subject, and then we had a mediation with Judge Stanton, and we left the process with no documents from Exxon.

To our somewhat surprise we then got almost immediately the discovery order, which seemed to relate primarily the issue of abstention, at which point we filed a motion for reconsideration with Your Honor on the discovery order because we pointed out that the law on personal jurisdiction seemed very clear under the Fifth Circuit, that there was no ability on the part of the Court to exercise jurisdiction over an attorney general from another state, no federal court anywhere in the country had done that over the opposition of an attorney general and Exxon didn't provide any such cases. So that motion for reconsideration is still pending.

In the meantime, we received from Exxon approximately a hundred and so written discovery requests, including interrogatories, document requests, and requests for admission. We also got notices of the deposition for Attorney General Healey herself and -- to assist the attorneys general.

Now, each one of those discovery requests had a

particular time period for responding under the rules, and we do intend to respond to all of them under the rules. And as we have said in at least one other paper, we do intend to object to the discovery, including depositions of Attorney General Healey and her associates and to the other forms of discovery.

But we will be filing those in a timely fashion. I think in direct response to Ms. Cortell's concern, we do not expect that Attorney General Healey or the other assistant attorneys general will show up for depositions. We will be filing motions with respect to those prior to the depositions.

I should note that when we got the notices -- we got the letter from Exxon's counsel, I think on Friday during the holiday about whether we would show up or not, and when by Monday afternoon we had not yet responded, they sent a letter to Your Honor saying there was concern about whether people were going to show up.

So it's not as though there was any long delay in letting people know. I think less than -- there hadn't even been a working day on Friday and we were a few hours into the working day on Monday and we still had several days before our formal responses were due.

So we will be filing those responses, and the responses will, among other things, talk about the fact that it is heavily, heavily disfavored to have top executive officials, including attorneys general, deposed about their thought

processes in bringing particular matters.

And what we seem to have here, as we argue in our motion for reconsideration, is a situation where the normal investigatory process has been turned on its head.

We still in response to our civil investigation demand have not received one document from Exxon, and yet Exxon is going after the Attorney General's entire thought process through a hundred written discovery requests and more and then three depositions of key people who are involved in the decision-making process.

So our motion for reconsideration focuses on that as will our objections to the specific discovery requests which they have made.

THE COURT: Is that no?

MR. JOHNSTON: That is a no.

THE COURT: That's the longest no I have had in two or three weeks, but it's okay. I'm used to that. You're a lawyer.

All right.

MR. JOHNSTON: Also it's been a few -- it's been a couple of months now since we were before you, and I know you have been in a busy trial. And, you know, sometimes it's important to just remind everybody where we -- where we think we are on this.

THE COURT: I appreciate that, and that -- you know,

I was a history minor, and so I always like history, and so not that I always need it, and I kind of like to choose which history I'm -- you know, whatever.

But I kind of do keep up with my docket, what's going on. But I'm glad for you to keep up with it, too. That's always fascinating, and that's -- you know, you talk about things are unusual. I would say that's a little unusual to think that, you know, your comments about we got this unusual thing from the Court. You know, whatever.

You can make whatever comments you want to make. I'm going to make whatever rulings I think are appropriate, and I'll rule on your motion when I -- in due time.

So I'll take that as an answer of no.

All right. Mr. Schneiderman's representative -- excuse me. General Schneiderman's representative, who is going to be -- tell me who's speaking for him.

Mr. Arz?

MR. BROWN: So, Your Honor, again, Chief Deputy Jason Brown speaking.

THE COURT: Oh, I'm sorry. Okay.

MR. BROWN: I'm going to take Your Honor's cue, the answer is no. I'm happy to expand at greater length.

The only thing I would note at this point is we were served as nonparty. We got nonparty discovery requests, you know, basically hours or a day or so before we became a party,

so that's also an issue that needs to be fleshed out.

But -- but for the reasons that Mr. Johnston said and others that are unique to me, you are the -- we'll need to exercise our right to make appropriate objections to that discovery request.

THE COURT: Are you a party now?

MR. BROWN: Now? Yes. I think we were served earlier. We're new to the dance, as the Court knows. Today is Wednesday. I think we became a party either on Monday or yesterday. So this is all very new to us.

MS. CORTELL: Your Honor, it's Nina. It may be new to New York, but the order amending was November 10th, and then they immediately went into court in New York and sought to pursue a subpoena there which they had now set for hearing on this coming Monday. And that's really what prompted our letter, because in their papers they're saying that New York is the appropriate place to litigate this, whereas we're already set here on discovery that was then pending.

And so what we're hoping to do is set up a protocol here to handle our discovery which was issued properly pursuant to this Court 's October 13 order permitting discovery.

We acted promptly, which I think the Court would have expected us to do. The discovery is returnable as early as some of it tomorrow and early next week.

We had asked them for confirmation if they were going

to comply. We had not heard back. And in the meantime they go into court in New York and assert jurisdiction there, and that's what prompted the letter.

So what we're here for today is to ask for a protocol, if you will, for how to handle discovery, discovery disputes, so that we, you know, get the discovery we're entitled to under this Court's order.

THE COURT: Y'all want to respond?

MR. BROWN: Yes, Your Honor. Jason Brown again. I mean, Ms. Cortel has slightly butchered the procedural history here. We had, as I think the Court knows, a prior case pending in New York where actually Justice Ostrager had issued an opinion rejecting one of their arguments, as Mr. Wells knows. He appeared in court on that.

So this is not some new litigation intended to do an end-run around anybody. It was simply pursuing the motion to compel that we had previously begun litigation on for a subpoena that long predated any issues that Exxon raises in the Texon case -- in Exxon case that has been pending now for over a year on the subpoena.

So what we did is when we got the -- when we were added as a party, we -- we wrote to Paul, Weiss and asked whether they would withdraw those subpoenas since we were now a party.

On Saturday we received the response no, and then the

next thing we knew we were being scheduled for a status conference here.

So I'm still a little unclear as to what is being requested, but obviously we haven't missed any deadlines yet. We are planning to participate in a way that makes the Court aware of our -- our issues.

Right now, because they are styled as Rule 45 nonparty discovery requests, the only court that would have jurisdiction over that dispute, because the depositions have been noticed here in Manhattan, would be the Southern District of New York.

So right now, without withdrawing their prior subpoenas to us, we have no choice but to go to the Southern District of New York. Again, these are issues that perhaps, know, we would have been better off discussing with Paul, Weiss directly, but they requested a status conference, so here we are.

MR. ANDERSON: Judge, this is Justin Anderson. May I respond to a few of those points?

THE COURT: Yes.

MR. ANDERSON: Well, first, I would just like to say Ms. Cortell did not butcher any -- any history, procedural or otherwise. The matter that was pending before the New York Supreme Court had to do with a subpoena that the New York Attorney General issued to PricewaterhouseCoopers. That was

the subject matter of that litigation, and that is the only litigation that was pending before they rushed into court on Monday morning to raise the subpoena that was at issue before this Court.

So in terms of the procedural history, it is not correct to suggest that this matter was before the Court in New York. It was a separate subpoena issued to ExxonMobil's auditors.

Second, the request on Friday to adjourn the subpoena that had been issued to ExxonMobil to the New York Attorney General, that request had nothing to do with the addition of the New York Attorney General as a party to this action.

You know, the basis in the letter was that there is a motion for reconsideration and a motion to dismiss pending, and the New York Attorney General requested that we adjourn the return date pending this Court's resolution of those motions.

We responded in the letter promptly that that would make no sense because you ordered discovery to determine whether there is jurisdiction. So putting off discovery until jurisdiction has been resolved was nonsensical.

Aside from -- aside from that letter, we had heard nothing from either the Massachusetts Attorney General or the New York Attorney General in response to the discovery request that we made.

And we made our first set of discovery requests at

the end of October.

On October 24th we served Massachusetts.

We then served New York on the 3rd of November.

So this idea that we came rushing to you without giving them any time to respond, that is truly a butchering of the record.

And, finally, Judge, you know, with respect to the subpoenas, if -- if -- it is correct that right now all that is pending is the third-party subpoenas, and they naturally would be -- if there is a motion to quash or a motion to compel, it naturally would -- would begin in the Southern District of New York. But there is a procedure for transferring jurisdiction of -- of any motion to quash in connection with those subpoenas to this Court.

And in light of the fact that those subpoenas now pertain to parties to the litigation before this Court, they would be -- it would be quite likely that if a motion to transfer is made that those objections find their way to you.

THE COURT: Well, here's -- let me -- let me begin by saying, Mr. Brown, you scored some points by being -- with the Court by being frank and to the point. So I'm making you an honorary, as you said, Texon. I don't know what that is. But I'm going to make you -- I look forward to having you here sometimes and I will tease you about that. That's a good name for some future company, I guess.

But, anyway, here's what I would like to do, especially since I'm in this trial that may take the rest of my adult days to finish, and then I have another one starting in January with Facebook and a local company here, another big case.

So what I would like to do is convert Judge Stanton to a special master to deal with y'all on this so you can be talking to somebody regularly. He's my special master on this case. I have complete confidence in him. Obviously, I need y'all's permission to do that. And you're going to -- you're going to have to pay for that among yourselves.

But then we can get something, and you'll have somebody to have my ear when my other part of me is sitting out there and we can get this moving and can consider all of your -- you know, your various concerns.

I get it. And it's -- you know, we're getting pretty close to the point of loggerheads. And okay, that's fine. And try to figure that answer out.

Is that okay with the parties at this point?

I will make sure that he does not overcharge or undercharge you, if that's okay. I think he charges about $725.00 an hour. And, you know, that's what Johnson & Johnson -- I think that's what they're paying him in here.

But, anyway, so that's what I would like to be able to do so we can get something going on it and try to get

something besides us talking on the phone and get some resolution for y'all as quickly as possible.

So what about New York, Mr. Brown?

MR. BROWN: Thank you, Your Honor. And -- and I think we all very much appreciate the spirit of that suggestion.

My only concern -- and I -- you know, I know lawyers always come up with concerns. But we -- we obviously do have a personal jurisdiction defense that we wanted to be careful not to waive.

THE COURT: I'm not trying to get you to waive -- I don't want you to waive anything. I'm not -- you know, yes, you don't know me, but I'm not -- I'm not trying to sneak up on you or anybody else. That's not my style. We're going to fight this thing out, y'all are, one way or the other, and it's not going to be based upon, you know, that sort of thing, okay?

I'm not -- I'm not trying to get you to do that, okay?

This is on the record. This is on the record. I don't know how much clearer I can be than that, okay?

MR. BROWN: Okay. Thank you, Your Honor.

THE COURT: Is that okay?

So it's okay with you?

MR. BROWN: Yeah, I mean, we haven't -- unfortunately we have taxpayer money that we have to account for, but

conceptually I think that's fine.

THE COURT: Okay.

MR. BROWN: I just have to work out the mechanics of how that would -- how we would be able to find funding for our payment. That's all.

THE COURT: Yeah, but don't you do that now in various cases?

MR. BROWN: No. Actually, no.

THE COURT: You don't?

MR. BROWN: I'm not looking to throw -- Your Honor, I'm not looking to throw a roadblock, so let's do this issue and then let the Court know.

THE COURT: Well, who's -- who's paying for Marketos?

MR. BROWN: Marketos, Your Honor.

THE COURT: Yeah, but, I mean, he's -- you're paying for him, right?

MR. BROWN: Yeah. No. And -- we have to get to several levels of authorization to do it. So, again, Your Honor, I don't mean to put a --

THE COURT: And Tillotson doesn't work for free. Tillotson doesn't work for free at all, because I've had him in here. He's the most expensive lawyer in Dallas.

MR. TILLOTSON: I'm going to take that as a compliment.

THE COURT: It is a compliment.

MR. TILLOTSON: Have to go through a big process and approval process that we went through, so I think there's just -- they want to make sure they can -- they can fund this in a way --

THE COURT: Yeah. Okay. Mr. Tillotson, will you just -- just commit to me -- yeah, Mr. Tillotson, will you just commit to me you will do your best to get this done?

MR. TILLOTSON: Of course, Your Honor. Absolutely.

THE COURT: Yeah. Okay. And you know -- you know Judge Stanton well, correct?

MR. TILLOTSON: I do, Your Honor. I just want to make sure -- he needs to clear conflicts, because obviously I have had relationships with him and against him in the past, so he will need to inform everyone obviously of any conflicts he may have with the parties.

THE COURT: Okay.

MR. TILLOTSON: I have no problem with him being special master.

THE COURT: Yeah. Yeah. Okay. Well, yeah. Obviously, everybody has got to do that.

All right. All right. And then I haven't meant to ignore you, Mr. Johnston.

MR. JOHNSTON: I will be short, Your Honor. I echo Mr. Brown's comments. Because it is taxpayer money I don't have the authority to commit to that, so I will have to have

discussions internally here.

THE COURT: Well, you did hire Mr. Cawley, correct? Is that correct?

MR. JOHNSTON: That's correct.

THE COURT: And McKool Smith is known on what I see locally as the most expensive law firm and the most successful -- one of the successful firms, I'm sure that you would agree, wouldn't you, Mr. Cawley?

MR. CAWLEY: Well, I'd agree -- I'd love to agree with the second half, Your Honor. On the first one I'd say maybe we're not the most expensive after getting through negotiating with the State of Massachusetts.

THE COURT: Oh, I'm sorry. But you are a very successful firm and do extremely well, partner by partner, correct?

MR. CAWLEY: Yes, Your Honor.

THE COURT: I know.

Okay. So y'all work on getting that done. Assuming that you can work through whatever layers there are -- there are, you'll work on that?

Yes?

MR. CAWLEY: Absolutely.

THE COURT: Who said that?

UNIDENTIFIED SPEAKER: Absolutely, Your Honor.

THE COURT: Who said that, for the record?

MR. CAWLEY: This is Doug Cawley. I'm one person who said we'll work on it.

THE COURT: And also, Mr. Johnston, do you, too?

MR. JOHNSTON: I do. I do, too.

THE COURT: Hey, is the T silent or not in your -- Johnston?

MR. JOHNSTON: Not the way I pronounce it, Your Honor.

THE COURT: Okay. I'm working on trying to get you to be a -- what did we make -- what did I make Mr. Brown? A Texon.

MR. BROWN: Not a very strong --

THE COURT: Texon. A Texon. You're next. We're going to --

MR. BROWN: A Texon.

THE COURT: Okay.

MR. JOHNSTON: Last time you told me I was your thirteenth favorite Yankee.

THE COURT: That's correct. Okay. Well --

MS. CORTELL: And, Your Honor, for the record, ExxonMobil of course is agreeable, and we'll work with the parties to that end.

THE COURT: Oh, you were next.

Okay. So y'all work on that. And get that done in the next day or two so we can get that resolved before

Thanksgiving, and we can kind of get things moving, okay?

And then try to set up --

MR. BROWN: Your Honor?

THE COURT: Yes, sir.

MR. BROWN: Your Honor, this is Mr. Brown here. Implicit in what you're saying, I hope, is because I think our objections -- our court filing might be due as early as tomorrow -- is that the current discovery requests are stayed pending our discussions to work with the special master?

THE COURT: Well, you agree on the special master and then we'll see, okay?

So -- all right. That does kind of put the pressure on y'all to get on it, so let me know.

You know what? I have always found that what we want to do or can -- we can get things done through the process of whatever. I realize there's a lot of lawyers in the attorney generals' offices, but there's one at the top and can make these decisions, and so y'all get that done, okay?

Anything else y'all want to talk to me about?

MS. CORTELL: I'm assuming that there's no implied stay as a result of this conference.

THE COURT: I'm not staying anything. I'm not staying anything. No. If you want to stay, file something and ask me for it, okay?

MS. CORTELL: Okay.

THE COURT: All right.

MS. CORTELL: Thank you, Your Honor.

THE COURT: All right. Y'all --

MR. BROWN: Thank you, Your Honor.

THE COURT: Thank y'all. And we'll look forward to seeing y'all again soon, and have a wonderful Thanksgiving.

MS. CORTELL: You, too, Your Honor. Thank you.

MR. BROWN: Thank you, Your Honor.

THE COURT: Thank y'all. Bye-bye.

(Hearing adjourned)

INDEX

I, TODD ANDERSON, United States Court Reporter for the United States District Court in and for the Northern District of Texas, Dallas Division, hereby certify that the above and foregoing contains a true and correct transcription of the proceedings in the above entitled and numbered cause.

WITNESS MY HAND on this 17th day of November, 2016.

/s/Todd Anderson
TODD ANDERSON, RMR, CRR
United States Court Reporter
1100 Commerce St., Rm. 1625
Dallas, Texas 75242
(214) 753-2170

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

CIVIL INVESTIGATIVE DEMAND

BY HAND DELIVERY

Demand No.: 2016-EPD-36

Date Issued: April 19, 2016

Issued To: Exxon Mobil Corporation
c/o Corporation Service Company, its Registered Agent
84 State Street
Boston, Massachusetts 02109

This Civil Investigative Demand ("CID") is issued to Exxon Mobil Corporation ("Exxon" or "You") pursuant to Massachusetts General Laws c. 93A, § 6, as part of a pending investigation concerning potential violations of M.G.L. c. 93A, § 2, and the regulations promulgated thereunder arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth of Massachusetts (the "Commonwealth"); and (2) the marketing and/or sale of securities, as defined in M.G.L. c. 110A, § 401(k), to investors in the Commonwealth, including, without limitation, fixed- and floating rate-notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

This CID requires You to produce the documents identified in Schedule A below, pursuant to M.G.L. c. 93A, § 6(1). The Documents identified in Schedule A must be produced by May 19, 2016, by delivering them to:

I. Andrew Goldberg
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

The documents shall be accompanied by an affidavit in the form attached hereto. AAG Goldberg and such other employees, agents, consultants, and experts of the Office of the Attorney General as needed in its discretion, shall review Your affidavit and the documents produced in conjunction with our investigation.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

This CID also requires You to appear and give testimony under oath through Your authorized custodian of records that the documents You produce in response to this CID represent all of the documents called for in this CID; that You have not withheld any documents responsive to this CID; and that all of the documents You produce were records made in good faith and kept in the regular course of Your business, and it was the regular course of Your business to make and keep such records. This testimony will be taken on June 10, 2016, beginning at 9:30 a.m. at the Boston Office of the Attorney General, 100 Cambridge Street, 10th Floor, Boston, Massachusetts. The testimony will be taken by AAG Goldberg or an appropriate designee, before an officer duly authorized to administer oaths by the law of the Commonwealth, and shall proceed, day to day, until the taking of testimony is completed. The witness has the right to be accompanied by an attorney. Rule 30(c) of the Massachusetts Rules of Civil Procedure shall apply. Your attendance and testimony are necessary to conduct this investigation.

This CID also requires You to appear and give testimony under oath through one or more of Your officers, directors or managing agents, or other persons most knowledgeable concerning the subject matter areas enumerated in Schedule B, below. This testimony will be taken on June 24, 2016, beginning at 9:30 a.m. at the Boston Office of the Attorney General, 100 Cambridge Street, 10th Floor, Boston, Massachusetts. The testimony will be taken by AAG Goldberg or an appropriate designee, before an officer duly authorized to administer oaths by the law of the Commonwealth, and shall proceed, day to day, until the taking of testimony is completed. The witness has the right to be accompanied by an attorney. Rule 30(c) of the Massachusetts Rules of Civil Procedure shall apply. Your attendance and testimony are necessary to conduct this investigation.

Under G.L. c. 93A, § 6(7), You may make a motion prior to the production date specified in this notice, or within twenty-one days after this notice has been served, whichever period is shorter, in the appropriate court of law to modify or set aside this CID for good cause shown.

If the production of the documents required by this CID would be, in whole or in part, unduly burdensome, or if You require clarification of any request, please contact AAG Goldberg promptly at the phone number below.

Finally, please note that under G.L. c. 93A, §7, obstruction of this investigation, including the alteration or destruction of any responsive document after receipt of

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

this CID, is subject to a fine of up to five thousand dollars ($5,000.00). A copy of that provision is reprinted at Schedule C.

Issued at Boston, Massachusetts, this 19th day of April, 2016.

COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

By: _____

I. Andrew Goldberg
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Tel. (617) 727-2200

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE A

A. General Definitions and Rules of Construction

1. "Advertisement" means a commercial message made orally or in any newspaper, magazine, leaflet, flyer, or catalog; on radio, television, or public address system; electronically, including by email, social media, and blog post; or made in person, in direct mail literature or other printed material, or on any interior or exterior sign or display, in any window display, in any point of transaction literature, but not including on any product label, which is delivered or made available to a customer or prospective customer in any manner whatsoever.

2. "All" means each and every.

3. "Any" means any and all.

4. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the CID all information or Documents that might otherwise be construed to be outside of its scope.

5. "Communication" means any conversation, discussion, letter, email, memorandum, meeting, note or other transmittal of information or message, whether transmitted in writing, orally, electronically or by any other means, and shall include any Document that abstracts, digests, transcribes, records or reflects any of the foregoing. Except where otherwise stated, a request for "Communications" means a request for all such Communications.

6. "Concerning" means, directly or indirectly, in whole or in part, relating to, referring to, describing, evidencing or constituting.

7. "Custodian" means any Person or Entity that, as of the date of this CID, maintained, possessed, or otherwise kept or controlled such Document.

8. "Document" is used herein in the broadest sense of the term and means all records and other tangible media of expression of whatever nature however and wherever created, produced or stored (manually, mechanically, electronically or otherwise), including without limitation all versions whether draft or final, all annotated or nonconforming or other copies, electronic mail ("e-mail"), instant messages, text messages, personal digital assistant or other wireless device messages, voicemail, calendars, date books, appointment books, diaries, books, papers, files, notes, confirmations, accounts statements, correspondence, memoranda, reports, records, journals, registers, analyses, plans, manuals, policies, telegrams, faxes, telexes, wires, telephone logs, telephone messages, message slips, minutes, notes or records or transcriptions of conversations or

Communications or meetings, tape recordings, videotapes, disks, and other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, notices and summaries. Any non-identical version of a Document constitutes a separate Document within this definition, including without limitation drafts or copies bearing any notation, edit, comment, marginalia, underscoring, highlighting, marking, or any other alteration of any kind resulting in any difference between two or more otherwise identical Documents. In the case of Documents bearing any notation or other marking made by highlighting ink, the term Document means the original version bearing the highlighting ink, which original must be produced as opposed to any copy thereof. Except where otherwise stated, a request for "Documents" means a request for all such Documents.

9. "Entity" means without limitation any corporation, company, limited liability company or corporation, partnership, limited partnership, association, or other firm or similar body, or any unit, division, agency, department, or similar subdivision thereof.

10. "Identify" or "Identity," as applied to any Document means the provision in writing of information sufficiently particular to enable the Attorney General to request the Document's production through CID or otherwise, including but not limited to: (a) Document type (letter, memo, etc.); (b) Document subject matter; (c) Document date; and (d) Document author(s), addressee(s) and recipient(s). In lieu of identifying a Document, the Attorney General will accept production of the Document, together with designation of the Document's Custodian, and identification of each Person You believe to have received a copy of the Document.

11. "Identify" or "Identity," as applied to any Entity, means the provision in writing of such Entity's legal name, any d/b/a, former, or other names, any parent, subsidiary, officers, employees, or agents thereof, and any address(es) and any telephone number(s) thereof.
12. "Identify" or "Identity," as applied to any natural person, means and includes the provision in writing of the natural person's name, title(s), any aliases, place(s) of employment, telephone number(s), e-mail address(es), mailing addresses and physical address(es).

13. "Person" means any natural person, or any Entity.

14. "Refer" means embody, refer or relate, in any manner, to the subject of the document demand.

15. "Refer or Relate to" means to make a statement about, embody, discuss, describe, reflect, identify, deal with, consist of, establish, comprise, list, or in any way pertain, in whole or in part, to the subject of the document demand.

16. "Sent" or "received" as used herein means, in addition to their usual meanings, the transmittal or reception of a Document by physical, electronic or other delivery, whether by direct or indirect means.

17. "CID" means this subpoena and any schedules, appendices, or attachments thereto.

18. The use of the singular form of any word used herein shall include the plural and vice versa. The use of any tense of any verb includes all other tenses of the verb.

19. The references to Communications, Custodians, Documents, Persons, and Entities in this CID encompass all such relevant ones worldwide.

B. Particular Definitions

1. "Exxon," "You," or "Your," means Exxon Mobil Corporation, and any present or former parents, subsidiaries, affiliates, directors, officers, partners, employees, agents, representatives, attorneys or other Persons acting on its behalf, and including predecessors or successors or any affiliates of the foregoing.

2. "Exxon Products and Services" means products and services, including without limitation petroleum and natural gas energy products and related services, offered to and/or sold by Exxon to consumers in Massachusetts.
3. "Carbon Dioxide" or "CO_2" means the naturally occurring chemical compound composed of a carbon atom covalently double bonded to two oxygen atoms that is fixed by photosynthesis into organic matter.

4. "Climate" means the statistical description in terms of the mean and variability of relevant quantities, such as surface variables, including, without limitation, temperature, precipitation, and wind, on Earth over a period of time ranging from months to thousands or millions of years. Climate is the state, including a statistical description, of the Climate System. *See* Intergovernmental Panel on Climate Change (IPCC), 2012: Glossary of terms. In: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. A Special Report of Working Groups I and II of the IPCC. Cambridge University Press, Cambridge, UK, and New York, NY, USA (the "IPCC Glossary"), p. 557.

5. "Climate Change" means a change in the state of Earth's Climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. *See* IPCC Glossary, p. 557.

6. "Climate Model" means a numerical representation of the Climate System based on the physical, chemical, and biological properties of its components, their interactions, and feedback processes, and that accounts for all or some of its known properties. Climate models are applied as a research tool to study and simulate the climate, and for operational purposes, including monthly, seasonal, interannual, and longer-term climate predictions. *See* IPCC Glossary, p. 557.

7. "Climate Risk" means the risk that variables in the Climate System reach values that adversely affect natural and human systems and regions, including those that relate to extreme values of the climate variables such as high wind speed, high river water and sea level stages (flood), and low water stages (drought). These include, without limitation, such risks to ecosystems, human health, geopolitical stability, infrastructure, facilities, businesses, asset value, revenues, and profits, as well as the business risks associated with public policies and market changes that arise from efforts to mitigate or adapt to Climate Change.

8. "Climate Science" means the study of the Climate on Earth.
9. "Climate System" means the dynamics and interactions on Earth of five major components: atmosphere, hydrosphere, cryosphere, land surface, and biosphere. *See* IPCC Glossary, p. 557.

10. "Global Warming" means the gradual increase, observed or projected, in Earth's global surface temperature, as one of the consequences of radiative forcing caused by anthropogenic emissions.

11. "Greenhouse Gas" means a gaseous constituent of Earth's atmosphere, both natural and anthropogenic, that absorbs and emits radiation at specific wavelengths within the spectrum of infrared radiation emitted by the Earth's surface, the atmosphere, and clouds. Water vapor (H_2O), carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4), chlorofluorocarbons (CFCs), and ozone (O_3) are the primary Greenhouse Gases in the Earth's atmosphere. *See* IPCC Glossary, p. 560.

12. "Greenhouse Gas Emissions" means the exiting to the atmosphere of Greenhouse Gas.

13. "Methane" or "CH_4" means the chemical compound composed of one atom of carbon and four atoms of hydrogen. Methane is the main component of natural gas.

14. "Radiative Forcing Effect" means the influence a factor has in altering the balance of incoming and outgoing energy in the Earth-atmosphere system and is an index of the importance of the factor as a potential climate change mechanism.

15. "Security" has the same meaning as defined in M.G.L. c. 110A, § 401(k), and includes, without limitation, any fixed- and floating rate-notes, bonds, and common stock, available to investors for purchase by Massachusetts residents.

16. "Sustainable Development" means development that meets the needs of the present without compromising the ability of future generations to meet their own needs. *See* IPCC Glossary, p. 564.

17. "Sustainability Reporting" means the practice of measuring, disclosing and being accountable to internal and external stakeholders for organizational performance towards the goals of Sustainable Development.

18. "Acton Institute for the Study of Religion and Liberty" or "Acton Institute" means the nonprofit organization by that name. Acton Institute is located in Grand Rapids, Michigan.

19. "American Enterprise Institute for Public Policy Research" or "AEI" means the nonprofit public policy organization by that name. AEI is based in Washington, D.C.

20. "Americans for Prosperity" means the nonprofit advocacy group by that name. Americans for Prosperity is based in Arlington, Virginia.

21. "American Legislative Exchange Council" or "ALEC" means the nonprofit organization by that name consisting of state legislator and private sector members. ALEC is based in in Arlington, Virginia.

22. "American Petroleum Institute" or "API" means the oil and gas industry trade association by that name. API is based in Washington, D.C.

23. "Beacon Hill Institute at Suffolk University" means the research arm of the Department of Economics at Suffolk University in Boston, Massachusetts, by that name.

24. "Center for Industrial Progress" or "CIP" means the for profit organization by that name. CIP is located in Laguna Hills, California.

25. "Competitive Enterprise Institute" or "CEI" means the nonprofit public policy organization by that name. CEI is based in Washington, D.C.

26. "George C. Marshall Institute" means the nonprofit public policy organization by that name. George C. Marshall Institute is based in Arlington, Virginia.

27. "The Heartland Institute" means the nonprofit public policy organization by that name. The Heartland Institute is based in Arlington Heights, Illinois.

28. "The Heritage Foundation" means the nonprofit public policy organization by that name. The Heritage Foundation is based in Washington, D.C.

29. "Mercatus Center at George Mason University" means the university-based nonprofit public policy organization by that name. Mercatus Center at George Mason University is based in Arlington, Virginia.

C. Instructions

1. Preservation of Relevant Documents and Information; Spoliation. You are reminded of your obligations under law to preserve Documents and information relevant or potentially relevant to this CID from destruction or loss, and of the consequences of, and penalties available for, spoliation of evidence. No agreement, written or otherwise, purporting to modify, limit or otherwise vary the terms of this CID, shall be construed in any way to narrow, qualify, eliminate or otherwise diminish your aforementioned preservation obligations. Nor shall you act, in reliance upon any such agreement or otherwise, in any manner inconsistent with your preservation obligations under law. No agreement purporting to modify, limit or otherwise vary your preservation obligations under law shall be construed as in any way narrowing, qualifying, eliminating or otherwise diminishing such aforementioned preservation obligations, nor shall you act in reliance upon any such agreement, unless an Assistant Attorney General confirms or acknowledges such agreement in writing, or makes such agreement a matter of record in open court.

2. Possession, Custody, and Control. The CID calls for all responsive Documents or information in your possession, custody or control. This includes, without limitation, Documents or information possessed or held by any of your officers, directors, employees, agents, representatives, divisions, affiliates, subsidiaries or Persons from whom you could request Documents or information. If Documents or information responsive to a request in this CID are in your control, but not in your possession or custody, you shall promptly Identify the Person with possession or custody.

3. Documents No Longer in Your Possession. If any Document requested herein was formerly in your possession, custody or control but is no longer available, or no longer exists, you shall submit a statement in writing under oath that: (a) describes

in detail the nature of such Document and its contents; (b) Identifies the Person(s) who prepared such Document and its contents; (c) Identifies all Persons who have seen or had possession of such Document; (d) specifies the date(s) on which such Document was prepared, transmitted or received; (e) specifies the date(s) on which such Document became unavailable; (f) specifies the reason why such Document is unavailable, including without limitation whether it was misplaced, lost, destroyed or transferred; and if such Document has been destroyed or transferred, the conditions of and reasons for such destruction or transfer and the Identity of the Person(s) requesting and performing such destruction or transfer; and (g) Identifies all Persons with knowledge of any portion of the contents of the Document.

4. No Documents Responsive to CID Requests. If there are no Documents responsive to any particular CID request, you shall so state in writing under oath in the Affidavit of Compliance attached hereto, identifying the paragraph number(s) of the CID request concerned.

5. Format of Production. You shall produce Documents, Communications, and information responsive to this CID in electronic format that meets the specifications set out in Schedule D.

6. Existing Organization of Documents to be Preserved. Regardless of whether a production is in electronic or paper format, each Document shall be produced in the same form, sequence, organization or other order or layout in which it was maintained before production, including but not limited to production of any Document or other material indicating filing or other organization. Such production shall include without limitation any file folder, file jacket, cover or similar organizational material, as well as any folder bearing any title or legend that contains no Document. Documents that are physically attached to each other in your files shall be accompanied by a notation or information sufficient to indicate clearly such physical attachment.

7. Document Numbering. All Documents responsive to this CID, regardless of whether produced or withheld on ground of privilege or other legal doctrine, and regardless of whether production is in electronic or paper format, shall be numbered in the lower right corner of each page of such Document, without disrupting or altering the form, sequence, organization or other order or layout in which such Documents were maintained before production. Such number shall comprise a prefix containing the producing Person's name or an abbreviation thereof, followed by a unique, sequential, identifying document control number.

8. Privilege Placeholders. For each Document withheld from production on ground of privilege or other legal doctrine, regardless of whether a production is electronic or in hard copy, you shall insert one or more placeholder page(s) in the

production bearing the same document control number(s) borne by the Document withheld, in the sequential place(s) originally occupied by the Document before it was removed from the production.

9. Privilege. If You withhold or redact any Document responsive to this CID of privilege or other legal doctrine, you shall submit with the Documents produced a statement in writing under oath, stating: (a) the document control number(s) of the Document withheld or redacted; (b) the type of Document; (c) the date of the Document; (d) the author(s) and recipient(s) of the Document; (e) the general subject matter of the Document; and (f) the legal ground for withholding or redacting the Document. If the legal ground for withholding or redacting the Document is attorney-client privilege, you shall indicate the name of the attorney(s) whose legal advice is sought or provided in the Document.

10. Your Production Instructions to be Produced. You shall produce a copy of all written or otherwise recorded instructions prepared by you concerning the steps taken to respond to this CID. For any unrecorded instructions given, you shall provide a written statement under oath from the Person(s) who gave such instructions that details the specific content of the instructions and any Person(s) to whom the instructions were given.

11. Cover Letter. Accompanying any production(s) made pursuant to this CID, You shall include a cover letter that shall at a minimum provide an index containing the following: (a) a description of the type and content of each Document produced therewith; (b) the paragraph number(s) of the CID request to which each such Document is responsive; (c) the Identity of the Custodian(s) of each such Document; and (d) the document control number(s) of each such Document.

12. Affidavit of Compliance. A copy of the Affidavit of Compliance provided herewith shall be completed and executed by all natural persons supervising or participating in compliance with this CID, and you shall submit such executed Affidavit(s) of Compliance with Your response to this CID.

13. Identification of Persons Preparing Production. In a schedule attached to the Affidavit of Compliance provided herewith, you shall Identify the natural person(s) who prepared or assembled any productions or responses to this CID. You shall further Identify the natural person(s) under whose personal supervision the preparation and assembly of productions and responses to this CID occurred. You shall further Identify all other natural person(s) able competently to testify: (a) that such productions and responses are complete and correct to the best of such person's knowledge and belief; and (b) that any Documents produced are authentic, genuine and what they purport to be.

14. Continuing Obligation to Produce. This CID imposes a continuing obligation to produce the Documents and information requested. Documents located, and information learned or acquired, at any time after your response is due shall be promptly produced at the place specified in this CID.

15. No Oral Modifications. No agreement purporting to modify, limit or otherwise vary this CID shall be valid or binding, and you shall not act in reliance upon any such agreement, unless an Assistant Attorney General confirms or acknowledges such agreement in writing, or makes such agreement a matter of record in open court.

16. Time Period. Except where otherwise stated, the time period covered by this CID shall be from April 1, 2010, through the date of the production.

D. **Documents to be Produced**

1. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions (including, without limitation, from fossil fuel extraction, production, and use), and the effects of these emissions on the Climate, including, without limitation, efforts by Exxon to:

   (a) analyze the absorption rate of atmospheric CO_2 in the oceans by developing and using Climate Models;

   (b) measure atmospheric and oceanic CO_2 levels (including, without limitation, through work conducted on Exxon's *Esso Atlantic* tanker);

   (c) determine the source of the annual CO_2 increment that has been increasing over time since the Industrial Revolution by measuring changes in the isotopic ratios of carbon and the distribution of radon in the ocean; and/or

   (d) assess the financial costs and environmental consequences associated with the disposal of CO_2 and hydrogen sulfide gas from the development of offshore gas from the seabed of the South China Sea off Natuna Island, Indonesia.

2. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning papers prepared, and presentations given, by James F. Black, at times Scientific Advisor in the Products Research Division of Exxon Research and Engineering, author of, among others, the paper *The Greenhouse Effect*, produced in or around 1978.

3. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning the paper *CO_2 Greenhouse Effect A Technical Review*, dated April 1, 1982, prepared by the Coordination and Planning Division of Exxon Research and Engineering Company.

4. For the time period from January 1, 1976, through the date of this production, Documents and Communications concerning the paper *CO_2 Greenhouse and Climate Issues*, dated March 28, 1984, prepared by Henry Shaw, including all Documents:

   (a) forming the basis for Exxon's projection of a 1.3 to 3.1 degree Celsius average temperature rise by 2090 due to increasing CO_2 emissions and all Documents describing the basis for Exxon's conclusions that a 2 to 3 degree Celsius increase in global average temperature could:

   - Be "amplified to about 10 degrees C at the poles," which could cause "polar ice melting and a possible sea-level rise of 0.7 meter[sic] by 2080"
   - Cause redistribution of rainfall
   - Cause detrimental health effects
   - Cause population migration

   (b) forming the basis for Exxon's conclusion that society could "avoid the problem by sharply curtailing the use of fossil fuels."

5. Documents and Communications with any of Acton Institute, AEI, Americans for Prosperity, ALEC, API, Beacon Hill Institute at Suffolk University, CEI, CIP, George C. Marshall Institute, The Heartland Institute, The Heritage Foundation, and/or Mercatus Center at George Mason University, concerning Climate Change and/or Global Warming, Climate Risk, Climate Science, and/or communications regarding Climate Science by fossil fuel companies to the media and/or to investors or consumers, including Documents and Communications relating to the funding by Exxon of any of those organizations.

6. For the time period from September 1, 1997, through the date of this production, Documents and Communications concerning the API's draft *Global Climate Science Communications Plan* dated in or around 1998.

7. For the time period from January 1, 2007, through the date of this production, Documents and Communications concerning Exxon's awareness of, and/or response to, the Union of Concerned Scientists report *Smoke, Mirrors & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science*, dated January 2007.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

8. For the time period from April 1, 1997, through the date of this production, Documents and Communications concerning the decision making by Exxon in preparing, and substantiation of, the following statements in the remarks *Energy – key to growth and a better environment for Asia-Pacific nations*, by then Chairman Lee R. Raymond to the World Petroleum Congress, Beijing, People's Republic of China, 10/13/97 (the "Raymond WPC Statements"):

    - It is highly unlikely that the temperature in the middle of the next century will be significantly affected whether policies are enacted now or 20 years from now. (Raymond WPC Statements, p. 11)

    - Forecasts of future warming come from computer models that try to replicate Earth's past climate and predict the future. They are notoriously inaccurate. None can do it without significant overriding adjustments. (Raymond WPC Statements, p. 10)

    - Proponents of the agreements [that could result from the Kyoto Climate Change Conference in December 1997] say they are necessary because burning fossil fuels causes global warming. Many people – politicians and the public alike – believe that global warming is a rock-solid certainty. But it's not. (Raymond WPC Statements, p. 8)

    - To achieve this kind of reduction in carbon dioxide emissions most advocates are talking about, governments would have to resort to energy rationing administered by a vast international bureaucracy responsible to no one. (Raymond WPC Statements, p. 10)

    - We also have to keep in mind that most of the greenhouse effect comes from natural sources, especially water vapor. Less than a quarter is from carbon dioxide, and, of this, only four percent of the carbon dioxide entering the atmosphere is due to human activities – 96 percent comes from nature. (Raymond WPC Statements, p. 9)

9. Documents and Communications concerning Chairman Rex W. Tillerson's June 27, 2012, address to the Council on Foreign Relations, including those sufficient to document the factual basis for the following statements:

    - Efforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels.

    - Humans have long adapted to change, and governments should create policies to cope with the Earth's rising temperatures.

- Changes to weather patterns that move crop production areas around – we'll adapt to that. It's an engineering problem and it has engineering solutions.

- Issues such as global poverty [are] more pressing than climate change, and billions of people without access to energy would benefit from oil and gas supplies.

10. Documents and Communications concerning Chairman Tillerson's statements regarding Climate Change and Global Warming, on or about May 30, 2013, to shareholders at an Exxon shareholder meeting in Dallas, Texas, including Chairman Tillerson's statement "What good is it to save the planet if humanity suffers?"

11. Documents and Communications concerning Chairman Tillerson's speech *Unleashing Innovation to Meet Our Energy and Environmental Needs*, presented to the 36th Annual Oil and Money Conference in London, England, 10/7/15 (the "2015 Oil and Money Conference Speech"), including Documents sufficient to demonstrate the factual basis for Chairman Tillerson's representation that Exxon's scientific research on Climate Change, begun in the 1970s, "led to work with the U.N.'s Intergovernmental Panel on Climate Change and collaboration with academic institutions and to reaching out to policymakers and others, who sought to advance scientific understanding and policy dialogue."

12. Documents and Communications concerning any public statement Chairman Tillerson has made about Climate Change or Global Warming from 2012 to present.

13. Documents and Communications concerning changes in the design, construction, or operation of any Exxon facility to address possible variations in sea level and/or other variables, such as temperature, precipitation, timing of sea ice formation, wind speed, and increased storm intensity, associated with Climate Change, including but not limited to:

    (a) adjustments to the height of Exxon's coastal and/or offshore drilling platforms; and

    (b) adjustments to any seasonal activity, including shipping and the movement of vehicles.

14. Documents and Communications concerning any research, analysis, assessment, evaluation, Climate Modeling or other consideration performed by Exxon, or with funding provided by Exxon, concerning the costs for CO_2 mitigation, including,

without limitation, concerning the 2014 Exxon report to shareholders *Energy and Carbon – Managing the Risks* (the "2014 Managing the Risks Report").

15. Documents and Communications substantiating or refuting the following claims in the 2014 Managing the Risks Report:

    - [B]y 2030 for the 450ppm CO2 stabilization pathway, the average American household would face an added CO2 cost of almost $2,350 per year for energy, amounting to about 5 percent of total before-tax median income. (p. 9)
    - These costs would need to escalate steeply over time, and be more than double the 2030 level by mid-century. (p. 9)

    - Further, in order to stabilize atmospheric GHG concentrations, these CO2 costs would have to be applied across both developed and undeveloped countries. (p. 9)

    - [W]e see world GDP growing at a rate that exceeds population growth through [the year 2040], almost tripling in size from what it was globally in 2000 [fn. omitted]. It is largely the poorest and least developed of the world's countries that benefit most from this anticipated growth. However, this level of GDP growth requires more accessible, reliable and affordable energy to fuel growth, and it is vulnerable populations who would suffer most should that growth be artificially constrained. (pp. 3 – 4)

    - [W]e anticipate renewables growing at the fastest pace among all sources through [the year 2040]. However, because they make a relatively small contribution compared to other energy sources, renewables will continue to comprise about 5 percent of the total energy mix by 2040. Factors limiting further penetration of renewables include scalability, geographic dispersion, intermittency (in the case of solar and wind), and cost relative to other sources. (p. 6)

    - In assessing the economic viability of proved reserves, we do not believe a scenario consistent with reducing GHG emissions by 80 percent by 2050, as suggested by the "low carbon scenario," lies within the "reasonably likely to occur" range of planning assumptions, since we consider the scenario highly unlikely. (p. 16)

16. Documents and Communications that formed the basis for the following statements in Exxon's January 26, 2016, press release on Exxon's 2016 Energy Outlook:

- In 2040, oil and natural gas are expected to make up nearly 60 percent of global supplies, while nuclear and renewables will be approaching 25 percent. Oil will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place.

- ExxonMobil's analysis and those of independent agencies confirms our long-standing view that all viable energy sources will be needed to meet increasing demand.

- The Outlook projects that global energy-related carbon dioxide emissions will peak around 2030 and then start to decline. Emissions in OECD nations are projected to fall by about 20 percent from 2014 to 2040.

17. Documents and Communications concerning any research, study, and/or evaluation by Exxon and/or any other fossil fuel company regarding the Climate Change Radiative Forcing Effect of natural gas (Methane), and potential regulation of Methane as a Greenhouse Gas.

18. Documents and Communications concerning Exxon's internal consideration of public relations and marketing decisions for addressing consumer perceptions regarding Climate Change and Climate Risks in connection with Exxon's offering and selling Exxon Products and Services to consumers in Massachusetts.

19. Documents and Communications concerning the drafting and finalizing of text, including all existing drafts of such text, concerning Greenhouse Gas Emissions and the issue of Climate Change or Global Warming filed with the U.S. Securities and Exchange Commission (the "SEC") by Exxon, including, without limitation, Exxon's Notices of Meeting; Form 10-Ks; Form 10-Qs; Form 8-Ks; Prospectuses; Prospectus Supplements; and Free Will Prospectuses; and/or contained in any offering memoranda and offering circulars from filings with the SEC under Regulation D (17 CFR § 230.501, et seq.).

20. Documents and Communications concerning Exxon's consideration of public relations and marketing decisions for addressing investor perceptions regarding Climate Change, Climate Risk, and Exxon's future profitability in connection with Exxon's offering and selling Securities in Massachusetts.

21. Documents and Communications related to Exxon's efforts in 2015 and 2016 to address any shareholder resolutions related to Climate Change, Global Warming, and how efforts to reduce Greenhouse Gas Emissions will affect Exxon's ability to operate profitably.
22. For the time period from January 1, 2006, through the date of this production, Documents and Communications concerning Exxon's development of its program

for Sustainability Reporting addressing Climate Change and Climate Risk, including, without limitation, regarding Exxon's annual "Corporate Citizenship Report" and Exxon's "Environmental Aspects Guide."

23. Documents and Communications concerning information exchange among Exxon and other companies and/or industry groups representing energy companies, regarding marketing of energy and/or fossil fuel products to consumers in light of public perceptions regarding Climate Change and Climate Risk.

24. Exemplars of all advertisements, flyers, promotional materials, and informational materials of any type, including but not limited to web-postings, blog-posts, social media-postings, print ads (including ads on op-ed pages of newspapers), radio and television advertisements, brochures, posters, billboards, flyers and disclosures used by or for You, Your employees, agents, franchisees or independent contractors to solicit or market Exxon Products and Services in Massachusetts, including but not limited to:

    - A copy of each print advertisement placed in the Commonwealth;
    - A DVD format copy of each television advertisement that ran in the Commonwealth;
    - An audio recording of each radio advertisement and audio portion of each internet advertisement;
    - A copy of each direct mail advertisement, brochure, or other written promotional materials;
    - A printout, screenshot or copy of each advertisement, information, or communication provided via the internet, email, Facebook, Twitter, You Tube, or other electronic communications system; and/or
    - A copy of each point-of-sale promotional material used by You or on Your behalf.

25. Documents and Communications sufficient to show where each of the exemplars in Demand No. 24 was placed and the intended or estimated consumers thereof, including, where appropriate, the number of hits on each internet page and all Commonwealth Internet Service Providers viewing same.

26. Documents and Communications substantiating the claims made in the advertisements, flyers, promotional materials, and informational materials identified in response to Demand Nos. 22 through 24.

27. Documents and Communications concerning Your evaluation or review of the impact, success or effectiveness of each Document referenced in Demand Nos. 22 through 24, including but not limited to Documents discussing or referring in any way to: (a) the effects of advertising campaigns or communications; (b) focus groups; (c) copy tests; (d) consumer perception; (e) market research; (f) consumer

research; and/or (g) other study or survey or the reactions, perceptions, beliefs, attitudes, wishes, needs, or understandings of potential consumers of Exxon Products and Services in light of public perceptions of Climate Change, Greenhouse Gas Emissions, and Climate Risk.

28. Documents sufficient to show Exxon's organizational structure and leadership over time, including but not limited to organizational charts, reflecting all Exxon Entities in any way involved in:

    (a) the marketing, advertisement, solicitation, promotion, and/or sale of Exxon Products and Services to consumers in the Commonwealth; and/or

    (b) the marketing, advertisement, solicitation, promotion, and/or sale to investors of Exxon Securities in the Commonwealth.

29. Documents and Communications sufficient to identify each agreement entered into on or after April 1, 2010, through the present, between and among Exxon and the Commonwealth of Massachusetts, its agencies, and/or its political subdivisions, for Exxon to provide Exxon Products and Services in Massachusetts.

30. Documents sufficient to identify all claims, lawsuits, court proceedings and/or administrative or other proceedings against You in any jurisdiction within the United States concerning Climate Change and relating to Your solicitation of consumers of Exxon Products and Services and/or relating to Your solicitation of consumers of Exxon Securities, including all pleadings and evidence in such proceedings and, if applicable, the resolution, disposition or settlement of any such matters.

31. Documents sufficient to identify and describe any discussion or consideration of disclosing in any materials filed with the SEC or provided to potential or existing investors (e.g., in prospectuses for debt offerings) information or opinions concerning the environmental impacts of Greenhouse Gas Emissions, including, without limitation, the risks associated with Climate Change, and Documents sufficient to identify all Persons involved in such consideration.

32. Transcripts of investor calls, conferences or presentations given by You at which any officer or director spoke concerning the environmental impacts of Greenhouse Gas Emissions, including, without limitation, the risks associated with Climate Change.

33. Documents and Communications concerning any subpoena or other demand for production of documents or for witness testimony issued to Exxon by the New

York State Attorney General's Office concerning Climate Change and Your marketing of Exxon Products and Services and/or Exxon Securities, including, through the date of Your production in response to this CID, all Documents produced to the New York State Attorney General's Office pursuant to any such subpoena or demand.

34. Documents sufficient to Identify all other federal or state law enforcement or regulatory agencies that have issued subpoenas or are otherwise currently investigating You concerning Your marketing of Exxon Products and Services to consumers and/or of Exxon Securities to investors.

35. Documents sufficient to Identify any Massachusetts consumer who has complained to You, or to any Massachusetts state or local consumer protection agency, concerning Your actions with respect to Climate Change, and for each such consumer identified, documents sufficient to identify each such complaint; each correspondence between You and such consumer or such consumer's representative; any internal notes or recordings regarding such complaint; and the resolution, if any, of each such complaint.

36. Documents and communications that disclose Your document retention policies in effect between January 1, 1976 and the date of this production.

37. Documents sufficient to Identify Your officers, directors and/or managing agents, or other persons most knowledgeable concerning the subject matter areas enumerated in Schedule B, below.

38. Documents sufficient to identify all natural persons involved in the preparation of Your response to this CID.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE B

Pursuant to the terms of this CID, you are commanded to produce one or more witnesses at the above-designated place and time, or any agreed-upon adjourned place and time, who is or are competent to testify as to the following subject matter areas:

1. Your compliance with Massachusetts General Law Chapter 93A, § 2, and the regulations promulgated thereunder concerning, the marketing, advertising, soliciting, promoting, and communicating or sale of: (1) Exxon Products and Services in the Commonwealth and/or to Massachusetts residents; and (2) Securities in the Commonwealth and/or to Massachusetts residents.

2. The marketing, advertising, soliciting, promoting, and communicating or sale of Exxon Products and Services in the Commonwealth and/or to Massachusetts residents, including their environmental impacts with respect to Greenhouse Gas Emission, Climate Change and/or Climate Risk.

3. The marketing, advertising, soliciting, promoting, and communicating or sale of Securities in the Commonwealth and/or to Massachusetts residents, including as to Exxon's disclosures of risks to its business related to Climate Change.

4. All topics covered in the demands above.

5. Your recordkeeping methods for the demands above, including what information is kept and how it is maintained.

6. Your compliance with this CID.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE C

CHAPTER 93A. REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

Chapter 93A: Section 7. Failure to appear or to comply with notice

Section 7. A person upon whom a notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth. Any person who fails to appear, or with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this chapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject to any such notice, or knowingly conceals any relevant information, shall be assessed a civil penalty of not more than five thousand dollars.

The attorney general may file in the superior court of the county in which such person resides or has his principal place of business, or of Suffolk county if such person is a nonresident or has no principal place of business in the commonwealth, and serve upon such person, in the same manner as provided in section six, a petition for an order of such court for the enforcement of this section and section six. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

SCHEDULE D

See attached "Office of the Attorney General - Data Delivery Specification."

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

AFFIDAVIT OF COMPLIANCE WITH CIVIL INVESTIGATIVE DEMAND

State of

County of

I, _____ , being duly sworn, state as follows:

1. I am employed by _____ in the position of _____;

2. The enclosed production of documents and responses to Civil Investigative Demand 2016-EPD-36 of the Attorney General of the Commonwealth of Massachusetts, dated April 19, 2016 (the "CID") were prepared and assembled under my personal supervision;

3. I made or caused to be made a diligent, complete and comprehensive search for all Documents and information requested by the CID, in full accordance with the instructions and definitions set forth in the CID;

4. The enclosed production of documents and responses to the CID are complete and correct to the best of my knowledge and belief;

5. No Documents or information responsive to the CID have been withheld from this production and response, other than responsive Documents or information withheld on the basis of a legal privilege or doctrine;

6. All responsive Documents or information withheld on the basis of a legal privilege or doctrine have been identified on a privilege log composed and produced in accordance with the instructions in the CID;

7. The Documents contained in these productions and responses to the CID are authentic, genuine and what they purport to be;

8. Attached is a true and accurate record of all persons who prepared and assembled any productions and responses to the CID, all persons under whose personal supervision the preparation and assembly of productions and responses to the CID occurred, and all persons able competently to testify: (a) that such productions and responses are complete and correct to the best of such person's knowledge and belief; and (b) that any Documents produced are authentic, genuine and what they purport to be; and

9. Attached is a true and accurate statement of those requests under the CID as to

Demand No.: 2016-EPD-36
Date Issued: April 19, 2016
Issued To: Exxon Mobil Corporation

which no responsive Documents were located in the course of the aforementioned search.

_____ _____
Signature of Affiant Date

_____
Printed Name of Affiant

Subscribed and sworn to before me

this __ day of _____ 2016.

_____
Notary Public
My commission expires:

_____

Office of the Attorney General - Data Delivery Specification
ONE – Production Load File

I. General

1. Images produced to the Office of the Attorney General should be single page series IV TIFF images, 300 dpi or better quality. TIFFs may be Black & White or color.
2. Bates Numbers should be placed in the lower right hand corner unless to do so would obscure the underlying image. In such cases, the Bates number should be placed as near to that position as possible while preserving the underlying image. Bates numbers should contain no spaces, hyphens or underscores. Example: AG0000000001.
3. Spreadsheets and Powerpoint ESI should be produced as native ESI and name for the bates number associated with the first page of the item. If the item has a confidentiality designation, please *DO NOT* append it to the bates numbered file name. The designation should be stored in a field in the DAT.
4. For any ESI that exists in encrypted format or is password-protected, instructions on means for access should be provided with the production to the AGO. (For example, by supplying passwords.)
5. All records should include at least the following fields of created data:
   a. Beginning Bates Number (where TIFF Images are produced)
   b. Ending Bates Number
   c. Beginning Attachment Range
   d. Ending Attachment Range
   e. RemovedFrom: If records were globally deduplicated, this field should contain a concatenated list of all custodians or sources which originally held the item.
   f. MD5 Hash or other hash value
   g. Custodian / Source
   h. Original file path or folder structure
   i. FamilyID
   j. Path/Link to natives
   k. Path/Link to text files (***do not produce inline text in the dat file***)
   l. Redacted – Bit Character field (1 or 0 where 1=Yes and 0=No)
   m. Production date
   n. Volume name
   o. Confidentiality or other treatment stamps
6. Email should be produced with at least the following fields of metadata:
   a. TO
   b. FROM
   c. CC
   d. BCC
   e. Subject
   f. Path to text file (***do not produce inline text in the dat file***)

g. Sent Date (dates and times must be stored in separate fields)
h. Sent Time (dates and times must be stored in separate fields and without time zones)
i. File extension (.txt, .msg, etc.)
j. Attachment count.

7. eFiles should be produced with at least the following individual fields of metadata:
   a. Author
   b. CreateDate (dates and times must be stored in separate fields)
   c. CreateTime (dates and times must be stored in separate fields with no time zones or am/pm)
   d. LastModifiedDate (dates and times must be stored in separate fields)
   e. LastModifiedTime (dates and times must be stored in separate fields with no time zones or am/pm).
8. Deduplication (Removed From data field)
   a. If the producing entity wishes to deduplicate, exact hash value duplicates may be removed on a global basis if the producing entity provides a field of created data for each deduplicated item that provides a concatenated list of all custodians or other sources where the item was original located. This list should be provided in the RemovedFrom data field.
   b. Any other form of deduplication must be approved in advance by the Office of the Attorney General.

II. File Types and Load File Requirements

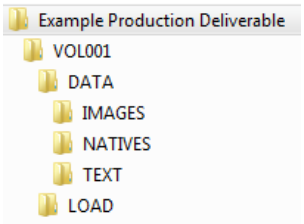
a. File Types

Data: Text, images and native files should each be delivered as subfolders in a folder named "DATA". See screen shot "Example Production Deliverable."

- Images: Single page TIFF images delivered in a folder named "IMAGES."
- Text: Multipage text files (one text file per document), delivered in a folder named "TEXT."
- Natives: Delivered in a folder named 'NATIVES".

Load Files: Concordance format data load file and Opticon format image load file should be delivered in a folder named LOAD (at the same level as the folder DATA in the structure). See screen shot "Example Production Deliverable."

Office of the Attorney General - Data Delivery Specification
ONE – Production Load File



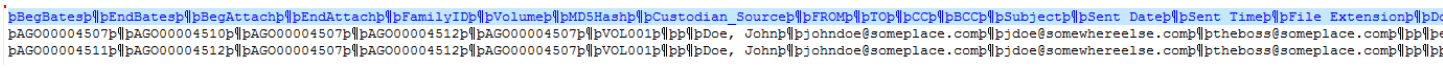
b. **Fields to be Produced in ONE Data Load File – Concordance Format**

Field Name	Description/Notes
BegBates	Starting Bates Number for document
EndBates	Ending Bates Number for document
BegAttach	Starting Bates Number of Parent document
EndAttach	Ending Bates Number of last attachment in family
FamilyID	Parent BegBates
Volume	Name of Volume or Load File
MD5Hash	
Custodian_Source	If the source is a human custodian, please provide the name: Last name, first name. If this results in duplicates, add numbers or middle initials Last name, first name, middle initial or # If the source is not a human custodian, please provide a unique name for the source. Ex: AcctgServer
FROM	Email
TO	Email
CC	Email
BCC	Email
Subject	Email
Sent Date	Email
Sent Time	Email
File Extension	
Attch Count	Email
Doc Type	Email, attachment
Original FilePath	Original location of the item at time of Preservation.
FileName	
CreateDate	Loose files or attachments. Date and Time must be in separate fields.
CreateTime	Loose files or attachments. Date and Time must be in separate fields and the Time field should not include Time Zone (EDT, EST etc)
LastModDate	Loose files or attachments (Date and Time must be in separate fields)
LastModTime	Loose files or attachments. Date and Time must be in separate fields and the Time field should not include Time Zone (EDT, EST, AM, PM etc)
Redacted	This is a Boolean/bit character field. Data value should be “0" or "1" where 0 = No and 1=Yes.
Confidentiality Designation	NOTE: *Do not append the Confidentiality Designation to the native file name*
RemovedFrom	Last name, first name with semi colon as separator Lastname, firstname; nextlastname, nextfirstname etc.

Office of the Attorney General - Data Delivery Specification
ONE – Production Load File

Encrypted_pwp	This is a single character field. Data value should be “N" or "Y". (File is or is not encrypted/password protected)
EncryptKey_password	For those files where Encrypted_pwp is Y, provide password or encryption key information in this field.
ProdDate	MM\DD\YYYY
TextLink	path to the text files should begin with TEXT\
NativeLink	path to the native files should begin with NATIVES\

The Data load file for ONE is the same as a Concordance load file, with the same field delimiters () and text qualifiers (þ). Here is a screen shot of part of a ONE load file with the fields identified above:

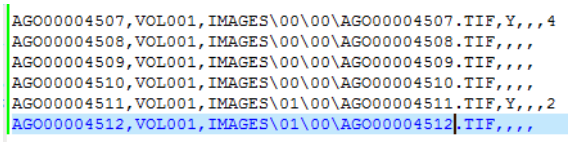


c. <u>Fields required for an Images Load File – Opticon Format</u>

The Images load file for ONE is the same as an OPTICON load file. It contains these fields, although Folder Break and Box Break are often not used.

Field Name	Description/Notes
Alias	Imagekey/Image link - Beginning bates or ctrl number for the document
Volume	Volume name or Load file name
Path	relative path to Images should begin with IMAGES\ and include the full file name and file extension (tif, jpg)
Document Break	Y denotes image marks the beginning of a document
Folder Break	N/A - leave blank
Box Break	N/A - leave blank
Pages	Number of Pages in document

Here is a screen shot of an opticon load file format in a text editor with each field separated by a comma. Alias, Volume, Path, Document Break, Folder Break (blank), Box Break (blank), Pages.



THE WALL STREET JOURNAL.

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit http://www.djreprints.com.

http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593

BUSINESS

SEC Probes Exxon Over Accounting for Climate Change

Probe also examines company's practice of not writing down the value of oil and gas reserves

The Securities and Exchange Commission is investigating Exxon Mobil Corp.'s valuing of its assets and how it calculates the impact of climate change on its business. PHOTO: BLOOMBERG NEWS

By **BRADLEY OLSON** and **ARUNA VISWANATHA**
Updated Sept. 20, 2016 7:55 p.m. ET

The U.S. Securities and Exchange Commission is investigating how Exxon Mobil Corp. values its assets in a world of increasing climate-change regulations, a probe that could have far-reaching consequences for the oil and gas industry.

The SEC sought information and documents in August from Exxon and the company's auditor, PricewaterhouseCoopers LLP, according to people familiar with the matter. The federal agency has been receiving documents the company submitted as part of a continuing probe into similar issues begun last year by New York Attorney General Eric Schneiderman, the people said.

The SEC's probe is homing in on how Exxon calculates the impact to its business from the world's mounting response to climate change, including what figures the company uses to account for the future costs of complying with regulations to curb greenhouse gases as it evaluates the economic viability of its projects.

The decision to step into an Exxon investigation and seek climate-related information represents a moment in the effort to take climate change more seriously in the financial community, said Andrew Logan, director of the oil and gas program at Ceres, a Boston-based advocacy organization that has pushed for more carbon-related disclosure from companies.

RELATED COVERAGE

- For U.S. firms, Figuring Out GAAP Is Not the Only Challenge (Sept. 19)
- When Should a Company Write Down Assets (Sept. 16)
- New York AG Employs Powerful Law in Exxon Probe (Sept. 16)
- Companies Might Have to Disclose Their Carbon-Related Risks (Sept. 13)
- Exxon Seeking Injunction Against Climate-Change Investigation (June 15)

"It's a potential tipping point not just for Exxon, but for the industry as a whole," he said.

As part of its probe, the SEC is also examining Exxon's longstanding practice of not writing down the value of its oil and gas reserves when prices fall, people familiar with the matter said. Exxon is the only major U.S. producer that hasn't taken a write down or impairment since oil prices plunged two years ago. Peers including Chevron Corp. have lowered valuations by a collective $50 billion.

"The SEC is the appropriate entity to examine issues related to impairment, reserves and other communications important to investors," said Exxon spokesman Alan Jeffers. "We are fully complying with the SEC request for information and are confident our financial reporting meets all legal and accounting requirements."

A spokeswoman for PwC declined to comment. An SEC spokeswoman declined to comment. A spokesman for Mr. Schneiderman said the attorney general wouldn't comment on the matter.

The SEC probe isn't believed to involve other energy companies, according to a person familiar with the matter.

Activists, members of Congress and former government officials have ratcheted up pressure on the SEC in the past year to do more to assess climate risks. Four congressional Democrats including U.S. Rep. Ted Lieu last year asked the SEC to investigate Exxon over its climate-related science and advocacy. Three former U.S. treasury secretaries wrote the SEC in July urging the agency to adopt industry-specific standards for disclosure in company filings.

A potential sticking point in the probe is what price Exxon uses to assess the "price of carbon"—the cost of regulations such as a carbon tax or a cap-and-trade system to push down emissions—when evaluating certain future oil and gas prospects, people familiar with the matter said. The SEC is asking how Exxon's carbon price affects its balance sheet and the outlook for its future, the people said.

When such a theoretical price for carbon is low, more oil and gas wells would be commercially viable. Conversely, a high carbon price would make more of Exxon's assets look uneconomic to pull out of the ground in future years.

In 2014, Exxon determined that none of its assets were at risk of being rendered less valuable by impacts from the global response to climate change.

Exxon doesn't disclose the exact price it uses to determine the commercial viability of its projects—outside of a general range of $20 to $80 a metric ton for the future—but many of its rivals, including Royal Dutch Shell PLC and BP PLC, do. Both Shell and BP said they use an internal price of roughly $40 a metric ton to decide whether to proceed with a project.

By contrast, Houston-based ConocoPhillips said it uses an internal carbon price range of between $6 and $51 a metric ton, depending on a project's location and annual projected emissions.

Exxon has ardently defended its record of climate research against critics, as well as its view that the use of fossil fuels will grow in coming decades, which corresponds to the predictions of major global energy forecasters.

Still, some investors such as the California Public Employees' Retirement System say Exxon and other energy companies should acknowledge the growing global response to climate change may mean that it will never be able to tap future wells that make up a great deal of its multibillion-dollar value.

Exxon also has defended its practice of not writing down the value of assets, saying that it is extremely conservative in booking the value of new fields and wells, which lowers its need to reduce the value of those assets if falling prices later affect the reserves' value.

In response to a report in The Wall Street Journal about the New York attorney general's probe into write-downs last week, an Exxon spokesman said the company follows all rules and regulations.

Write to Bradley Olson at Bradley.Olson@wsj.com and Aruna Viswanatha at Aruna.Viswanatha@wsj.com

Copyright 2014 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

The New York Times | http://nyti.ms/2dU7Ztx

ENERGY & ENVIRONMENT

Exxon Concedes It May Need to Declare Lower Value for Oil in Ground

By CLIFFORD KRAUSS OCT. 28, 2016

HOUSTON — Exxon Mobil, in a concession to market and regulatory pressures, said Friday that it might be forced to write down the value of some of its oil and gas assets in Canada and elsewhere if energy prices remain low through the end of the year.

The announcement, which accompanied the company's release of another quarter of lackluster earnings, was an apparent reversal of Exxon Mobil's stance in recent years.

The company has long insisted that it has been adequately accounting for the value of its oil and gas reserves — even as many other petroleum companies have taken big write-offs to reflect a two-year price slump.

On Friday, though, the company acknowledged that it faced what could be the biggest accounting revision of reserves in its history. Exxon Mobil might have to concede that 3.6 billion barrels of oil-sand reserves and one billion barrels of other North American reserves are currently not profitable to produce.

The way Exxon Mobil accounts for the value of assets still in the ground has made the company a target of inquiries by the Securities and Exchange Commission,

as well as the New York attorney general, Eric T. Schneiderman.

Mr. Schneiderman, along with many energy experts, has criticized Exxon Mobil for being slow to take into account the impact of anticipated future government actions to curb climate change, which may force energy companies to leave at least some fossil fuels untapped in the ground.

On Friday, Exxon Mobil seemed ready to acknowledge that the value of its assets might change.

"We anticipate that certain quantities of currently booked reserves such as those associated with our Canadian oil sands will not qualify as proven reserves at year-end 2016," Jeff Woodbury, Exxon Mobil's vice president for investor relations, said during a conference call.

Mr. Woodbury added that if current price levels persist, other oil and gas operations in North America may have to be written down, although he indicated that they could also be put back on the books if prices recovered sufficiently.

In August, the S.E.C. requested company documents and explanations about the value of Exxon Mobil's reserves, but it has not publicly commented on its inquiry. Exxon Mobil has promised to comply fully with the agency's requests and has expressed confidence that it has met its legal and accounting requirements.

The company has resisted Mr. Schneiderman's broader investigation into its accounting and its past public positions on climate change. The New York attorney general contends that Exxon Mobil has misled the public, even as the company's own scientists were warning about the climate impacts of greenhouse-gas emissions from fossil fuels.

Other oil and gas companies, including Exxon Mobil's rivals Chevron and Royal Dutch Shell, have lowered valuations by more than $50 billion since oil prices plunged from over $100 a barrel in 2014 to the current price of around $50 a barrel.

In contrast, Exxon Mobil resisted write-downs, saying that it conservatively valued its assets on a long-term basis and that price volatility was normal in commodity markets.

Exxon Mobil's oil sand reserves in Canada's Alberta province are a prime target for a write-down because they are particularly expensive to mine. Investments in oil sands have been slowing, and several oil companies have given up on the resource. Turning oil sands into a usable form of petroleum requires heavy processing and refining.

Because Exxon Mobil's earnings on oil and gas exploration and production have been in decline, said Brian Youngberg, a senior energy analyst at Edward Jones, "it is increasingly hard for it to demonstrate its reserves as economical in today's world of more moderate oil prices."

"Scrutiny will continue to rise on this issue," Mr. Youngberg said, "especially when it updates its reserves in early 2017."

With the world's oil industry producing over a million barrels a day more than global demand, few analysts expect oil prices to rise much through the end of the year — even though the expectation that the OPEC cartel may freeze or cut production in the coming months has moderately stabilized prices in recent months.

Oil prices were as low as $30 a barrel in February. On Friday, West Texas Intermediate oil, a benchmark, was trading just above $49.

The Exxon Mobil announcement came as the company reported third-quarter earnings of $2.7 billion, a 38 percent drop from the comparable period last year. Exxon Mobil has now reported two full years of quarterly declines as a result of low energy prices and recent drops in production and in profit margins on petroleum refining.

Shares of Exxon Mobil stock were down more than 2 percent in early afternoon trading on Friday.

Exxon Mobil's dividend payments continue to exceed profits, which means the company is borrowing and selling assets to finance its payments to shareholders. At the same time, cuts in capital spending are hurting the company's ability to maintain production.

"Although earnings may have bottomed," said Fadel Gheit, a senior Oppenheimer & Company analyst, "Exxon Mobil is not out of the woods yet and needs a much higher oil price to regain its balance."

Exxon Mobil is far from the only oil company that is suffering from low oil and natural gas prices. ConocoPhillips this week reported a third-quarter loss of $1 billion, as income fell 13 percent.

A version of this article appears in print on October 29, 2016, on page B5 of the New York edition with the headline: Exxon Concedes Drop in Value of Its Reserves.

© 2016 The New York Times Company

THE WALL STREET JOURNAL.

This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers visit http://www.djreprints.com.

http://www.wsj.com/articles/exxon-mobil-profit-revenue-slide-again-1477657202

BUSINESS | EARNINGS

Exxon Warns on Reserves as It Posts Lower Profit

Oil producer to examine whether assets in an area devastated by low prices and environmental concerns should be written down

An Exxon Mobil sign in front of a refinery in Torrance, Calif. PHOTO: ASSOCIATED PRESS

By **BRADLEY OLSON** and **LYNN COOK**
Updated Oct. 28, 2016 4:43 p.m. ET

Exxon Mobil Corp. warned that it may be forced to eliminate almost 20% of its future oil and gas prospects, yielding to the sharp decline in global energy prices.

Under investigation by the U.S. Securities and Exchange Commission and New York state over its accounting practices—and the impact of future climate change regulations on its business—Exxon on Friday disclosed that some 4.6 billion barrels of oil in its reserves, primarily in Canada, may be too expensive to tap.

Exxon is facing near- and long-term threats as it seeks to exploit the full value of a vast oil and gas portfolio that stretches from Texas to the Caspian Sea, and deliver the handsome dividends that its shareholders have come to expect since it was part of John D. Rockefeller's Standard Oil.

Today, the company is suffering amid a two-year plunge in oil prices that has a barrel trading for around $50, a level Chief Executive Rex Tillerson believes may linger as U.S. shale producers ramp up at the first uptick in prices, prolonging the current glut and putting a ceiling on any price upswing.

EARNINGS FROM THE OIL PATCH

- Chevron Returns to Profit, but Revenue Slides
- Phillips 66 Posts Revenue and Profit Decline
- Total's Profit Jumps as Cost-Cutting Bears Fruit
- ConocoPhillips Revenue Slides
- Statoil Posts Wider Loss, Cuts Capital Spending Further

Earlier this year, Exxon lost the triple-A bond rating it had held from Standard & Poor's Rating Services since 1930, a standing of creditworthiness shared with just two other companies, Microsoft Corp. and Johnson & Johnson. Last year, it failed to find enough new oil and gas to replace what it produced for the first time in 20 years. Its profits in the last 12 months are the lowest since 1999, before it merged with Mobil Corp.

Exxon is alone among major oil companies in not having written down the value of its future wells as prices fell. It has said it follows conservative practices in booking reserves. It now plans to examine its assets to test, under rules governed by accounting standards, whether they are worth less than carried on its books.

The company said the 20% reserves reductions, which are governed separately by SEC rules, may be necessary based on the average 2016 price by the end of the year, though higher prices in November and December could mitigate the extent of the decline. It added that any reserve reductions could be added back if prices recover.

In an investor call on Friday, Exxon declined to discuss potential reserve write-offs or accounting write-downs in detail beyond its statement. The SEC declined to comment on Exxon's disclosure.

"Exxon has long been the best at what they do, but these external constraints are putting them more in line with everyone else, forcing them to the level of their competitors," said Sean Heinroth, a principal in the energy practice at management consultancy A.T. Kearney.

Though Exxon didn't mention climate change or regulators in its disclosure, most of the assets it said may not be economic are among the most scrutinized by climate change activists: Canada's oil sands.

Since 1999, energy companies have invested more than $200 billion in Alberta's oil sands, which has the third largest oil reserves behind Venezuela and Saudi Arabia, says the Canadian Association of Petroleum Producers.

FURTHER READING

- China's Oil Giants Shrink Their Spending (Oct. 28)
- Oil Companies Shift Exploration Tactics, Curb Spending (Oct. 26)
- Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests (May 25)

Nine of the world's top oil companies, including Exxon, Chevron and Royal Dutch Shell PLC, have been counting on wringing more Canadian crude from the ground in the coming decades. Combined, Canadian crude accounts for 23% of the firms' proven reserves, according to data from investment bank Peters & Co.—up from only 5% in 2006.

New investments in the oil sands may be much harder to come by after Exxon's announcement, said Andrew Logan, director of the oil and gas program at Ceres, a Boston-based nonprofit that has pushed Exxon and other companies for better disclosure on the potential impact of climate change on the energy business.

"Why would any company invest billions of dollars in a new oil sands project now, given the near certainty that the world will be transitioning away from fossil fuels during the decades it will take for that project to pay back?" Mr. Logan said.

The potential loss of reserves has broad ramifications for Canada, which depends on the development of its crude stores to support its economy, but like other western countries has been moving to strengthen regulations to address climate change. Canadian Prime Minister Justin Trudeau earlier this month unveiled a national carbon-pricing proposal,

sparking an immediate clash between the national government and the province of Alberta.

The Liberal government's proposal to charge a price for carbon emissions compounds the headwinds energy companies already face if they want to mine Canada's oil sands for decades to come.

Amy Myers Jaffe, executive director for Energy and Sustainability at University of California, Davis, said Exxon's warning signals that it doesn't believe oil prices will rise significantly in the near future.

"This company had positioned itself for growth and oil sands were a key part of its strategy," she said, adding: "If lots of companies have to do write downs on their Canadian reserves, it sends a gloomy message about the oil sands," she said.

Longer term, Exxon faces headwinds from regulations aimed at reducing carbon dioxide and other greenhouse gas emissions, measures that are widely expected to fall most heavily on its industry.

Exxon's other major obstacle: U.S. competition. Advanced shale drilling techniques have unleashed a new wave of American oil into world markets. Those drilling and fracking techniques have made smaller American companies the industry's new "swing producers," or those most able to ramp up output quickly.

Exxon's Mr. Tillerson acknowledged that prospect in a recent speech at a conference in London where other energy executives were forecasting a sharp supply shortfall in coming years.

"I don't necessarily agree with the premise," he said.

Exxon shares fell 2.5% to $84.78 at 4 p.m. in Friday trading after reporting a quarterly profit that declined 38% compared with a year ago.

Write to Bradley Olson at Bradley.Olson@wsj.com and Lynn Cook at lynn.cook@wsj.com

Copyright 2014 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

1684CV01888 Exxon Mobil Corporation vs. Office of Attorney General

Case Type	Actions Involving the State/Municipality	**Initiating Action:**	Equity Action involving the Commonwealth, Municipality, MBTA, etc.
Case Status	Open	**Status Date:**	06/16/2016
File Date	06/16/2016	**Case Judge:**	
DCM Track:	A - Average	**Next Event:**	12/07/2016

All Information | Party | Event | Tickler | Docket | Disposition

Party Information

Exxon Mobil Corporation - Plaintiff

Alias

Party Attorney

Attorney	Anderson, Justin
Bar Code	PHV1030572DC
Address	**Phone Number**
Attorney	Bolia, Daniel E
Bar Code	PHV24064919TX
Address	**Phone Number**
Attorney	Conlon, Patrick J
Bar Code	PHV1913649NY
Address	**Phone Number**
Attorney	Frongillo, Esq., Thomas Carl
Bar Code	180690
Address	Fish & Richardson P.C. One Marina Park Drive Boston, MA 02210
Phone Number	(617)521-7050
Attorney	Hirshman, Michele
Bar Code	PHV1941871NY
Address	**Phone Number**
Attorney	Simons, Esq., Caroline Koo
Bar Code	680827
Address	Fish & Richardson P.C. One Marina Park Drive Boston, MA 02210
Phone Number	(617)956-5907
Attorney	Toal, Daniel J
Bar Code	PHV2811578NY
Address	**Phone Number**
Attorney	Wells, Jr., Theodore V.
Bar Code	PHV3936770NY
Address	**Phone Number**

More Party Information

Office of Attorney General - Defendant

Alias

Party Attorney

Attorney	Courchesne, Esq., Christophe Gagnon
Bar Code	660507
Address	Office of the Attorney General One Ashburton Place Boston, MA 02108
Phone Number	(617)963-2423
Attorney	Goldberg, Esq., I. Andrew
Bar Code	560843

ADDENDUM 605

Address	Massachusetts Attorney General's Office Environmental Protection Div. One Ashburton Place Boston, MA 02108
Phone Number	(617)727-2200
Attorney	Hoffer, Esq., Melissa Ann
Bar Code	641667
Address	Massachusetts Attorney General's Office One Ashburton Place 18th Floor Boston, MA 02108
Phone Number	(617)963-2322
Attorney	Johnston, Esq., Richard
Bar Code	253420
Address	Mass Attorney General's Office 1 Ashburton Place Boston, MA 02108
Phone Number	(617)963-2028
Attorney	Mulcahy, Esq., Peter C.
Bar Code	682958
Address	Office of the Attorney General One Ashburton Place Boston, MA 02108
Phone Number	(617)963-2068

More Party Information

Events

Date	Session	Location	Type	Event Judge	Result
12/07/2016 02:00 PM	Civil F	BOS-10th FL, CR 1006 (SC)	Motion Hearing		

Ticklers

Tickler	Start Date	Days Due	Due Date	Completed Date
Service	06/16/2016	90	09/14/2016	
Answer	06/16/2016	120	10/14/2016	
Rule 12/19/20 Served By	06/16/2016	120	10/14/2016	
Rule 12/19/20 Filed By	06/16/2016	151	11/14/2016	
Rule 12/19/20 Heard By	06/16/2016	180	12/13/2016	
Rule 15 Served By	06/16/2016	420	08/10/2017	
Rule 15 Filed By	06/16/2016	452	09/11/2017	
Rule 15 Heard By	06/16/2016	452	09/11/2017	
Discovery	06/16/2016	720	06/06/2018	
Rule 56 Served By	06/16/2016	750	07/06/2018	
Rule 56 Filed By	06/16/2016	781	08/06/2018	
Final Pre-Trial Conference	06/16/2016	900	12/03/2018	
Judgment	06/16/2016	1096	06/17/2019	

Docket Information

Docket	Docket Text	File Ref

ADDENDUM 606

Date		Nbr.
06/16/2016	Attorney appearance On this date Thomas Carl Frongillo, Esq. added for Plaintiff Exxon Mobile Corporation	
06/16/2016	Case assigned to: DCM Track A - Average was added on 06/16/2016	
06/16/2016	Original civil complaint filed.	1
06/16/2016	Civil action cover sheet filed.	2
06/16/2016	Plaintiff Exxon Mobil Corporation's EMERGENCY Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order	3
06/16/2016	Attorney appearance On this date Caroline Koo Simons, Esq. added for Plaintiff Exxon Mobil Corporation	
06/16/2016	Plaintiff Exxon Mobil Corporation's Motion for Leave for Theodore V. Wells Jr. to Appear Pro Hac Vice	4
06/16/2016	Plaintiff Exxon Mobil Corporation's Motion for Leave for Michele Hirshman to Appear Pro Hac Vice	5
06/16/2016	Plaintiff Exxon Mobil Corporation's Motion for Leave for Daniel J. Toal to Appear Pro Hac Vice	6
06/16/2016	Plaintiff Exxon Mobil Corporation's Motion for Leave for Justin Anderson to Appear Pro Hac Vice	7
06/16/2016	Plaintiff Exxon Mobil Corporation's Motion for Leave for Patrick J. Conlon to Appear Pro Hac Vice	8
06/16/2016	Plaintiff Exxon Mobil Corporation's Motion for Leave for Daniel E. Bolia to Appear Pro Hac Vice	9
06/22/2016	Plaintiff Exxon Mobil Corporation's Joint Motion for enlargement of time to respond to Emergency Motion and petition with proposed briefing schedule and rquest for leave to file replies	10
06/23/2016	Endorsement on Motion for (#10.0): ALLOWED enlargement of time Notice sent 6/24/16	
07/29/2016	Attorney appearance On this date I. Andrew Goldberg, Esq. added for Defendant Office of Attorney General	
07/29/2016	Attorney appearance On this date Christophe Gagnon Courchesne, Esq. added for Defendant Office of Attorney General	
07/29/2016	Attorney appearance On this date Melissa Ann Hoffer, Esq. added for Defendant Office of Attorney General	
08/01/2016	General correspondence regarding a letter to the Honorable Heidi E. Brieger from thed Attoeney General for the Commonwealth of Mass requesting leave to serve a single concolidated memorandum of law not to exceed 40 pages filed on 7/28/16 & ALLOWED on 7/29/16, for the good and suffecient reasons herein. Notices mailed 7/29/16	11
08/08/2016	Received from Defendant Office of Attorney General: Answer to original complaint;	12
08/08/2016	Attorney appearance On this date Richard Johnston, Esq. added for Defendant Office of Attorney General	
08/09/2016	Attorney appearance On this date Peter C. Mulcahy, Esq. added for Defendant Office of Attorney General	
08/23/2016	General correspondence regarding Letter to Judge Brieger Request of plff for leave to file a memorandum not to exceed 25 pages Allowed without opposition Notice Sent 8/23/16	13
08/30/2016	Attorney appearance On this date Theodore V. Wells, Jr. added for Plaintiff Exxon Mobil Corporation	
08/30/2016	Attorney appearance On this date Michele Hirshman added for Plaintiff Exxon Mobil Corporation	
08/30/2016	Attorney appearance On this date Daniel J Toal added for Plaintiff Exxon Mobil Corporation	

ADDENDUM 607

08/30/2016	Attorney appearance On this date Justin Anderson added for Plaintiff Exxon Mobil Corporation	
08/30/2016	Attorney appearance On this date Patrick J Conlon added for Plaintiff Exxon Mobil Corporation	
08/30/2016	Attorney appearance On this date Daniel E Bolia added for Plaintiff Exxon Mobil Corporation	
08/31/2016	Endorsement on Motion for Leave for Theodore V. Wells Jr to Appear Pro Hac Vice (#4.0): ALLOWED (dated 8/30/16) notice sent 8/31/16	
08/31/2016	Endorsement on Motion for Leave for Michele Hirshman to Appear Pro Hac Vice (#5.0): ALLOWED (dated 8/30/16) notice sent 8/31/16	
08/31/2016	Endorsement on Motion for Leave for Daniel J. Toal to Appear Pro Hac Vice (#6.0): ALLOWED (dated 8/30/16) notice sent 8/31/16	
08/31/2016	Endorsement on Motion for Leave for Justin Anderson to Appear Pro Hac Vice (#7.0): ALLOWED (dated 8/30/16) notice sent 8/31/16	
08/31/2016	Endorsement on Motion for Patrick J Conlon to Appear Pro Hac Vice (#8.0): ALLOWED (dated 8/30/16) notice sent 8/31/16	
08/31/2016	Endorsement on Motion for Leave for Daniel E Bolia to Appear Pro Hac Vice (#9.0): ALLOWED (dated 8/30/16) notice sent 8/31/16	
08/31/2016	Plaintiff Exxon Mobil Corporation's Notice of Special Appearance on Behalf of Petitioner Exxon Mobil Company: ALLOWED (dated 8/30/16) notice sent 8/31/16	14
10/14/2016	Defendant Office of Attorney General's Cross Motion to Compel Exxon Mobil Corporation to comply with Civil Investigative Demand No. 2016-EPD-36 (filed 9/9/16)	15
10/14/2016	Office of Attorney General's Memorandum in opposition to Exxon's motion to set aside or modify the Civil Investigative Demand or for a Protective Order and supporting The Commonwealth's Cross-Motion to Compel Exxon to Comply with the Civil Investigative Demand (filed 9/9/16)	16
10/14/2016	Office of Attorney General's Reply Memorandum in support of The Commonwealth's Cross-Motion to Compel Exxon Mobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36 (filed 10/11/16)	17
10/21/2016	The following form was generated: Notice to Appear Sent On: 10/21/2016 15:39:40	

Case Disposition

Disposition	Date	Case Judge
Pending		

ADDENDUM 608

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL	)

RECEIVED
JUN 16 2016
SUPERIOR COURT-CIVIL
MICHAEL JOSEPH DONOVAN
CLERK-MAGISTRATE

EMERGENCY MOTION OF EXXON MOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER

Pursuant to G.L. c. 93A, § 6(7), Superior Court Rule 9A(e), and the standards set forth in Mass. R. Civ. P. 26(c), Petitioner Exxon Mobil Corporation ("ExxonMobil"), through this special appearance and without consenting to jurisdiction, respectfully requests that this Court set aside a civil investigative demand (the "CID") served on ExxonMobil by the Attorney General. As grounds for this motion, ExxonMobil states:

1. On April 19, 2016, the Attorney General served the CID on ExxonMobil, which states that the Attorney General is investigating possible violations of G.L. c. 93A, § 2. According to the CID, the Attorney General's investigation centers on two types of transactions: (1) ExxonMobil's marketing and sale of energy and other fossil fuel derived products to consumers in Massachusetts, and (2) ExxonMobil's marketing and sale of securities to Massachusetts investors.

2. The Court should set aside the CID because the Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation. During the 4-year limitations period of G.L. c. 93A, § 2, ExxonMobil has not (1) sold fossil fuel derived products to consumers in Massachusetts, (2) owned or operated a

single retail store or gas station in the Commonwealth, or (3) sold any form of equity to the general public in Massachusetts. Furthermore, ExxonMobil's only sale of debt in the past decade has been to underwriters outside the Commonwealth, and ExxonMobil did not market those sales to Massachusetts consumers.

3. However, if this Court determines that it can exercise personal jurisdiction over ExxonMobil, alternatively, and solely to protect its rights and preserve its objections, ExxonMobil respectfully requests that this Court order the following relief.

4. The Court should exercise its inherent authority to disqualify the Attorney General and her office from pursuing this investigation and appoint an independent counsel, who is not compensated on a contingency-fee basis, to determine whether an investigation is warranted and, if so, to conduct that investigation. The Attorney General's public extrajudicial statements disparaging ExxonMobil and prejudging the outcome of any investigation preclude her and her office from serving as a disinterested prosecutor in any investigation of ExxonMobil.

5. The Court also should set aside, modify, or issue a protective order concerning the CID because it violates ExxonMobil's constitutional, statutory, and common law rights. The CID impermissibly infringes on ExxonMobil's constitutional rights to free speech, freedom from unreasonable searches and seizures, and guarantee of due process of law as guaranteed by Articles XII, XIV, and XVI of the Massachusetts Declaration of Rights. The CID also runs afoul of the standards set forth in Mass. R. Civ. P. 26(c) because it imposes undue burden and expense on ExxonMobil. For instance, the CID requests production of over 40 years of documents, despite the 4-year statute of limitations. Furthermore, the CID is impermissibly unspecific and does not affirmatively state that ExxonMobil may withhold documents on the basis of privilege.

6. Finally, the Court should exercise its discretion to stay adjudication of this

Petition pending the resolution of an earlier filed federal action in the United States District Court for the Northern District of Texas, *Exxon Mobil Corp.* v. *Healey*, Case No. 4:16-CV-469 (N.D. Tex. June 15, 2016), which seeks to enjoin the Attorney General's investigation.

7. This emergency motion is filed pursuant to Superior Court Rule 9A(e) because ExxonMobil has been unable to reach an agreement with the Attorney General that satisfactorily addresses ExxonMobil's concerns relating to the CID prior to June 16, 2016, the agreed-upon time for ExxonMobil to initiate any legal proceeding to set aside or modify the CID without waiving its right to object to the CID.

8. ExxonMobil also relies on the grounds set forth in its Memorandum in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order filed with this motion.

Respectfully Submitted,

EXXON MOBIL CORPORATION

By its attorneys,

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(patrick.j.conlon@exxonmobil.com)
(*pro hac vice* pending)
Daniel E. Bolia
(daniel.e.bolia@exxonmobil.com)
(*pro hac vice* pending)
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

By: /s/ Justin Anderson
Theodore V. Wells, Jr.
(*pro hac vice* pending)
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
(*pro hac vice* pending)
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo (BBO# 180690)
(frongillo@fr.com)
Caroline K. Simons (BBO# 680827)
(simons@fr.com)
One Marina Park Drive
Boston, MA 02210
(617) 542-5070

Dated: June 16, 2016

CERTIFICATE OF COMPLIANCE WITH SUPERIOR COURT RULE 9C

I, Thomas C. Frongillo, hereby certify that before serving the Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify Civil Investigative Demand or Issue a Protective Order, counsel for ExxonMobil, including Theodore V. Wells Jr., Michele Hirshman, Daniel J. Toal, Patrick J. Conlon, Daniel E. Bolia, and others, conducted several Superior Court Rule 9C telephone conferences with Assistant Attorney General Andrew Goldberg and Assistant Attorney General Christophe Courchesne from the Attorney General's Office since the service of the CID on April 19, 2016. The most recent conference was conducted on June 15, 2016 at approximately 12:35 p.m. Although counsel made a good faith effort to narrow the areas of disagreement with the Attorney General's Office, the parties were unable to reach a satisfactory resolution.

/s/ Caroline K. Simons
Caroline K. Simons

Dated: June 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served upon the Attorney General's Office for the Commonwealth of Massachusetts by hand delivery on June 16, 2016.

/s/ Caroline K. Simons
Caroline K. Simons

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL

RECEIVED
JUN 16 2016
SUPERIOR COURT-CIVIL
MICHAEL JOSEPH DONOVAN
CLERK-MAGISTRATE

PETITION OF EXXON MOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER

Pursuant to G.L. c. 93A, § 6(7) and the standards set forth in Mass. R. Civ. P. 26(c), Petitioner Exxon Mobil Corporation ("ExxonMobil"), through this special appearance and without consenting to personal jurisdiction, respectfully requests that this Court set aside a civil investigative demand (the "CID") served on ExxonMobil by the Office of the Attorney General of the Commonwealth of Massachusetts (the "Attorney General"). The Court should set aside the CID because this Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation. Alternatively, should the Court determine that it can exercise personal jurisdiction, it should (1) exercise its inherent power to recuse the Massachusetts Attorney General's Office from pursuing this investigation because it is impermissibly biased against ExxonMobil; and (2) set aside the CID because it violates ExxonMobil's constitutional, statutory, and common law rights, as well as the standards of Mass. R. Civ. P. 26(c), which protect ExxonMobil from "annoyance, embarrassment, oppression, or undue burden or expense." ExxonMobil also respectfully requests that the Court exercise its discretion to stay adjudication of this Petition pending the resolution of an earlier filed federal action in the Northern District of Texas, which seeks to enjoin the Attorney General's investigation.

INTRODUCTION

1. Frustrated by the federal government's perceived inaction, a coalition of state attorneys general with an agenda to end the world's reliance on fossil fuel announced its "collective efforts to deal with the problem of climate change" at a press conference, held on March 29, 2016, with private citizen and former Vice President Al Gore as the featured speaker.[1] The attorneys general declared that they planned to "creatively" and "aggressively" use the powers of their respective offices on behalf of the coalition to force ExxonMobil[2] and other energy companies to comply with the coalition's preferred policy responses to climate change.[3] As their statements made unmistakably clear, the attorneys general press conference was a politically motivated event, urged on by activists.

2. The press conference represented a major achievement for a small group of climate activists. Since at least 2012, these activists sought to influence the debate surrounding climate change by gaining access to ExxonMobil's internal documents with the hope of using those documents to discredit the company and other political opponents. They recognized that appropriating law enforcement tools provided the most viable means to accomplish that goal because "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[4] To them, law enforcement was simply another means of advancing their political agenda, by "wresting potentially useful internal documents from the

---

1 ExxonMobil has submitted an Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order. The Appendix contains affidavits and exhibits that are referenced in this Petition and in the Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order. A transcript of the AGs United For Clean Power Press Conference, held on March 29, 2016, was prepared by counsel based on a video recording of the event, which is available at http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across. The transcript is included in the Appendix as Exhibit A at App. 2-21.

2 ExxonMobil was formed as a result of a merger between Exxon and Mobil on November 30, 1999. For ease of discussion, we refer to the predecessor entities as ExxonMobil throughout this Petition.

3 Ex. A at App. 3.

4 Ex. C at App. 63.

fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[5]

3. Two climate activists, who have led the effort to access ExxonMobil's records, gave private presentations to the attorneys general before the press conference commenced.[6] Those presentations were closed to the press, and the contents of the presentations have been kept secret from the public. The attorneys general recognized that the involvement of the climate activists—one of whom is a plaintiffs' attorney likely to profit from any private litigation made possible by a government investigation of ExxonMobil—could expose the coordination between the attorneys general and the private, special interests that were advancing the investigation and the press conference announcing these investigative efforts. So, when that plaintiffs' attorney asked the New York Attorney General's Office what he should tell a reporter if asked about his involvement, a senior official with the office specifically requested that the plaintiffs' attorney refrain from disclosing his presence at the meeting, thus concealing it from the press and public.[7]

4. The Attorney General's statements at the press conference embraced the activists' agenda. After announcing that "there's nothing we need to worry about more than climate change," the Attorney General pledged to undertake "quick, aggressive action" in furtherance of her "moral obligation" to alleviate the threat to "the very existence of our planet" by moving the country toward a "clean energy future."[8]

5. The Attorney General pointed to her office's investigation of ExxonMobil as a means of addressing climate change. Signaling that her investigation would work backward from a preordained conclusion, the Attorney General announced the findings in advance: the

---

5 *Id.* at App. 78.
6 *See* Ex. M at App. 132-33.
7 *See* Ex. D at App. 89.
8 Ex. A at App. 13-14.

investigation would reveal "the troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public."[9]

6. Three weeks later, the Attorney General's Office commenced this investigation by serving a CID on ExxonMobil. The CID purports to investigate whether ExxonMobil's statements about climate change violate G.L. c. 93A, § 2,[10] which prohibits "unfair or deceptive acts or practices" in "trade or commerce."[11] According to the CID, the Attorney General's Office is investigating ExxonMobil's (1) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (2) "marketing and/or sale of securities . . . to investors in the Commonwealth, including . . . common stock, sold or offered to be sold in the Commonwealth."[12]

7. The investigation is unwarranted, however, and constitutes an abuse of government power. Although the statute of limitations for a claim under G.L. c. 93A, § 2 is four years, *see* G.L. c. 260, § 5A, for more than a decade, ExxonMobil has widely and publicly confirmed that it "recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant."[13] The Attorney General has identified no contrary statement about climate change—nor is any identifiable—that could support ExxonMobil's c. 93A liability during the relevant limitations period.

8. Moreover, ExxonMobil has engaged in no conduct in Massachusetts which could subject it to liability for the violations of law alleged in the CID. During the limitations period,

---

9 *Id.* at App. 13.
10 Ex. B at App. 23.
11 G.L. c. 93A, § 2(a).
12 Ex. B at App. 23.
13 Ex. E at App. 94; *see also* Ex. F at App. 104 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").

ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts.[14] Nor has it marketed or sold any security for sale to the general public in Massachusetts in the last five years.[15]

9. In the absence of any misleading statements *or* any relevant commercial transactions, there is no *bona fide* basis for the CID, much less a reason to believe that ExxonMobil violated G.L. c. 93A, § 2, as required to authorize the issuance of a CID under the statute.[16]

10. This Court also lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation because ExxonMobil, a New Jersey corporation, headquartered in Texas, has not engaged in suit-related conduct in Massachusetts.

11. The CID nevertheless demands that ExxonMobil produce virtually every document it has generated about climate change during the last 40 years, thereby imposing a breathtaking burden on ExxonMobil. Complying with the CID's demands would require ExxonMobil to collect, review, and produce several millions of pages of documents, and would cost millions of dollars.[17]

12. Worse still, the CID targets ExxonMobil's communications with the Attorney General's political opponents in the climate change debate—i.e., organizations that hold views

---

14 Service stations in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner are owned and operated independently. *See* Affidavit of Geoffrey Grant Doescher, dated June 10, 2016 ("Doescher Aff.") ¶ 4. In addition, distribution facilities in Massachusetts, including Everett Terminal, have not sold products to consumers during the limitations period.

15 During the limitations period, ExxonMobil has sold short-term, fixed-rate notes in Massachusetts in specially exempted commercial paper transactions. *See* G.L. c. 110A, § 402(a)(10); *see also* 15 U.S.C. § 77c(a)(3). These notes, which mature in 270 days or less, were sold to institutional investors, not individual consumers. *See* Affidavit of Robert Luettgen, dated June 14, 2016 ("Luettgen Aff.") ¶¶ 7-10.

16 G.L. c. 93A, § 6(1) (noting that the Attorney General can conduct an investigation whenever she "believes a person has engaged in or is engaging in" an act in violation of G.L. c. 93A).

17 Affidavit of Justin Anderson, dated June 14, 2016 ("Anderson Aff.") ¶¶ 4-5 .

about climate change and the proper policy responses to it with which the Attorney General disagrees.[18] The organizations identified by the CID are exclusively ones that have been derided by climate activists as so-called "climate deniers," meaning that they or some of their employees have expressed skepticism about the science of climate change or the Attorney General's preferred responses to the problem.[19]

13. The Attorney General's statements at the press conference and the remarkably broad scope of the CID unmask this investigation for what it is: a pretextual use of law enforcement power to deter ExxonMobil from participating in ongoing public deliberations about climate change and by fishing through decades of ExxonMobil's documents in the hope of finding some ammunition to enhance the Attorney General's position in the policy debate concerning how to respond to climate change. This effort to deter ExxonMobil from engaging in public discussions of policy issues related to climate change amounts to an abuse of government power.

14. The Attorney General's investigation violates ExxonMobil's rights. That is why ExxonMobil has filed a federal action in the United States District Court for the Northern District of Texas, seeking to enjoin the enforcement of the CID because it violates ExxonMobil's constitutional right to free speech, freedom from unreasonable searches and seizures, and guarantee of due process of law.[20] ExxonMobil respectfully requests that this Court permit the federal action to proceed before adjudicating this Petition.

15. ExxonMobil asks this Court to conclude that it lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation. In addition, and solely to preserve its rights, ExxonMobil also requests that (i) the

---

18 Ex. B at App. 35 (Request No. 5).
19 Anderson Aff. ¶ 3.
20 Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

Attorney General and her office be recused; and (ii) the CID be set aside in its entirety or, in the alternative, modified or made subject to a protective order pursuant to G.L. c. 93A, § 6(7) and Mass. R. Civ. P. 26(c) in the event the Court determines that it can exercise personal jurisdiction over ExxonMobil.

FACTS

A. The Attorney General's Misuse of Law Enforcement Tools

16. The CID issued by the Attorney General's Office is the product of a coordinated campaign of partisan state officials urged on by climate change activists and privately interested attorneys. This campaign first exposed itself to the public on March 29, 2016, when the New York Attorney General hosted a press conference in New York City with certain other attorneys general as the self-proclaimed "AGs United For Clean Power." Private citizen and former Vice President Al Gore was the event's featured speaker. The Attorney General, along with attorneys general or staff members from over a dozen other states, attended and participated in the conference.

17. The attorneys general, calling themselves "the Green 20" (a reference to the number of participating attorneys general), explained that their mission was to "com[e] up with creative ways to enforce laws" that they claim were "being flouted by the fossil fuel industry."[21] Expressing dissatisfaction with the perceived "gridlock in Washington" regarding climate-change legislation, the New York Attorney General said that the coalition had to work "creatively" and "aggressively" to advance that agenda."[22]

---

21 Ex. A at App. 3.
22 *Id.* at App. 3-4.

18. The New York Attorney General announced that the assembled "group of state actors [intended] to send the message that [it was] prepared to step into this [legislative] breach."[23] He continued:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[24]

19. In an effort to legitimize the Green 20's investigations, private citizen and Vice President Gore cited perceived inaction by the federal government, observing that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[25]

20. Gore went on to condemn those who question the sufficiency of renewable energy sources to power modern economies, faulting them for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[26] He then accused the fossil fuel industry of "using [its] combined political and lobbying efforts to put taxes on solar panels and jigger with the laws" and said "[w]e do not have 40 years to continue suffering the consequences of the fraud."[27]

21. During her turn at the podium, the Attorney General began by thanking Gore "who, today, I think, put most eloquently just how important this is, this commitment that we make."[28] The Attorney General then articulated her view that "there's nothing we need to worry

---

23 *Id.* at App. 4.
24 *Id.* at App. 5.
25 *Id.* at App. 10.
26 *Id.*
27 *Id.* at App. 8, 10.
28 *Id.* at App. 13.

about more than climate change," and that the attorneys general "have a moral obligation to act" to alleviate the threat to "the very existence of our planet."[29]

22. To advance this shared agenda on climate change policy, the Attorney General pledged to take "quick, aggressive action" to "address climate change and to work for a better future"[30]—namely, by investigating ExxonMobil. She also announced, in advance, the findings of her recently launched investigation:

> Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.[31]

The Attorney General's comments unambiguously reflected her prejudicial determination that ExxonMobil had engaged in deception in connection with the debate over climate change policy.

B. The Green 20 Press Conference Is Criticized by Other Attorneys General and Legal Commentators

23. The results-oriented approach to investigating fossil fuel companies and ExxonMobil articulated by the Attorney General and her colleagues struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. The disconnect between the coalition's stated desire to fill a perceived void in federal climate change policy, and its proposed solution—to investigate a single energy company for alleged fraud—was so clear that one reporter asked whether the press conference and the

---

29 *Id.*
30 *Id.* at App. 14.
31 *Id.* at App. 13.

investigations launched by the Attorney General and other members of the coalition were nothing more than "publicity stunt[s]."[32]

24. The press conference also drew a swift and sharp rebuke from other state attorneys general who criticized the Attorney General and those joining her in using the power of law enforcement as a tool to limit free speech and the free exchange of viewpoints and ideas about climate change. The attorneys general of Alabama and Oklahoma stated that "scientific and political debate" "should not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."[33] They emphasized that "[i]t is inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time."[34]

25. The Louisiana Attorney General similarly observed that "[i]t 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."[35] Likewise, the Kansas Attorney General questioned the "unprecedented" and "strictly partisan nature of announcing state 'law enforcement' operations in the presence of a former vice president of the United State[s] who, presumably [as a private citizen], has no role in the enforcement of the 17 states' securities or consumer protection laws."[36] The West Virginia Attorney General criticized the attorneys general for "abusing the powers of their office" and

---

32 *Id.* at App. 18.
33 Ex. G at App. 109.
34 *Id.*
35 Ex. H at App. 111.
36 Ex. I at App. 113 (internal quotation marks omitted).

stated that the desire to "eliminate fossil fuels . . . should not be driving any legal activity" and that it was improper to "use the power of the office of attorney general to silence . . . critics."[37]

26. Two state attorneys general went a step further and filed a motion to intervene in an action pending in Texas in which ExxonMobil challenged a subpoena issued by the Virgin Islands Attorney General that, like the Massachusetts CID, seeks almost four-decades' worth of ExxonMobil's documents and communications related to climate change. The Attorneys General of Texas and Alabama criticized the investigation for being "driven by ideology, and not law."[38] The Texas Attorney General called the investigation "a fishing expedition of the worst kind" and recognized it as "an effort to punish Exxon for daring to hold an opinion on climate change that differs from that of radical environmentalists."[39] The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas "is more than a free speech case. It is a battle over whether a government official has a right to launch a criminal investigation against anyone who doesn't share his radical views."[40] He further stated that the investigation was an "abus[e] of power" used to "intimidate a company for its climate change views which run counter to that of his own."[41]

C. In Closed-Door Meetings, the Green 20 Plots with Climate Activists and Plaintiffs' Lawyers

27. The impropriety of the statements made by the Attorney General and the other attorneys general at the press conference are surpassed only by what they said behind closed doors. In advance of the conference, the chief of the Energy & Environment Bureau in the Massachusetts Attorney General's Office indicated, in response to a questionnaire from the New

---

37 Ex. J at App. 116, 118.
38 Plea in Intervention of the States of Texas and Alabama, *Exxon Mobil Corp.* v. *Walker et al.*, No. 017-284890-16 (Tex. Dist. Ct. Tarrant Cty., May 16, 2016).
39 Ex. K at App. 120.
40 Ex. L at App. 123.
41 *Id.*

York Attorney General's Office, that the Massachusetts Attorney General's Office was hoping to "learn the status of states' investigations/plans" and explore avenues for "coordination."[42] She also noted that the office was taking actions to "advance[e] clean energy."[43]

28. In addition, during the morning of the press conference, the attorneys general attended two presentations.[44] Those presentations were not announced publicly, and they were not open to the press or general public. The identity of the presenters and the titles of the presentations, however, were later released by the State of Vermont in response to a request under that state's Freedom of Information Act.[45]

29. The first presenter was Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists.[46] His subject was the "imperative of taking action now on climate change."[47]

30. According to the Union of Concerned Scientists, those who do not share its views about climate change and responsive policy make it "difficult to achieve meaningful solutions to global warming."[48] It accuses "[m]edia pundits, partisan think tanks, and special interest groups" of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[49]

31. Matthew Pawa of Pawa Law Group, P.C.[50] hosted the second presentation on the topic of "climate change litigation."[51] The Pawa Law Group, which boasts of its "role in

---

42 Ex. Z at App. 201.
43 *Id.* at App. 202.
44 *See* Ex. M at App. 132-33.
45 *See* Ex. N at App. 145-46.
46 Ex. O at App. 150.
47 Ex. M at App. 132-33.
48 Ex. P at App. 154.
49 *Id.* at App. 154-55.
50 Ex. Q at App. 164.

launching global warming litigation," previously sued ExxonMobil and sought to hold it liable for negatively impacting climate change.[52] That suit was dismissed because, as the court properly held, "regulating global warming emissions is a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[53]

32. Frumhoff and Pawa have sought for years to initiate legal actions against fossil fuel companies in the service of their political agenda and for private profit. As early as 2007, Frumhoff contributed to a report issued by the Union of Concerned Scientists, titled "Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science," which brainstormed strategies for "putting the brakes" on ExxonMobil's alleged "disinformation campaign."[54] And, in 2012, Frumhoff hosted and Pawa presented at a conference entitled "Climate Accountability, Public Opinion, and Legal Strategies."[55] The conference's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[56] The 2012 conference's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[57] Even then, Frumhoff and Pawa suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[58] Indeed, that conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on

---

51 Ex. M at App. 132-33.
52 Ex. R at App. 166.
53 Ex. F at App. 64; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012).
54 Ex. S at App. 169-75.
55 Ex. C at App. 56, 83-86.
56 *Id.* at App. 82.
57 *Id.* at App. 63.
58 *Id.*

the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[59]

33. As recently as January 2016, Pawa and a group of climate activists met to discuss the "Goals of an Exxon campaign."[60] The goals included:

> To establish in public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm. To delegitimize them 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 & climate into center of 2016 election cycle.[61]

34. The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the investigations. In an apparent attempt to improperly shield their communications from public scrutiny, the attorneys general drafted—and may have executed—a common interest agreement in connection with the Green 20 conference.[62] In addition, the day after the conference, a reporter from *The Wall Street Journal* called Pawa.[63] In response, Pawa asked the New York Attorney General's Office "[w]hat should I say if she asks if I attended?"[64] The environmental bureau chief at the office responded, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[65]

35. The CID represents the culmination of Frumhoff's and Pawa's collective efforts to enlist state law enforcement officers in their quest to enact their preferred policy responses to climate change and obtain documents for private lawsuits.

---

59 *Id.* at App. 78.
60 Ex. T at App. 177.
61 *Id.*; *see also* Ex. U at App. 179-80.
62 Ex. AA at App. 208.
63 Ex. D at App. 89.
64 *Id.*
65 *Id.*

36. The press conference, the earlier closed-door meetings with those on one side of the debate, and those private activists' long-standing desire to expose ExxonMobil's "internal documents" as part of a campaign to put "pressure on the industry," inducing it to support "legislative and regulatory responses to global warming"[66] form the partisan backdrop against which the CID must be read. The thoroughly partisan goals of these individuals—which the Attorney General and her attorneys general coalition partners adopted as their own at the press conference—are reflected in the CID itself.

D. The CID's Baseless Investigation, Burdensome Demands, and Viewpoint Bias

37. Three weeks after the press conference, on April 19, 2016, the Attorney General served the CID on ExxonMobil's registered agent in Suffolk County, Massachusetts.

38. According to the CID, there is "a pending investigation concerning [ExxonMobil's] potential violations of G.L. c. 93A, § 2."[67] That statute prohibits "unfair or deceptive acts or practices" in "trade or commerce"[68] and has a four-year statute of limitations.[69] The CID specifies two types of transactions under investigation: ExxonMobil's (1) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (2) "marketing and/or sale of securities" to Massachusetts investors.[70] The requested documents pertain largely to information related to climate change in the possession of ExxonMobil and located at its principal place of business in Texas.

39. ExxonMobil could not have committed the possible offenses that the CID purports to investigate for two reasons.

---

66 Ex. C at App. 78.
67 Ex. B at App. 23.
68 G.L. c. 93A, § 2(a).
69 G.L. c. 260, § 5A.
70 Ex. B at App. 23.

40. First, at no point during the past five years—more than one year before the limitations period began—has ExxonMobil (1) sold fossil fuel derived products to consumers in Massachusetts, or (2) owned or operated a single retail store or station in the Commonwealth.[71]

41. Second, ExxonMobil has not sold any form of equity for sale to the general public in Massachusetts in the last five years, which is also well beyond the limitations period.[72] Furthermore, ExxonMobil's only sale of debt in the past decade has been to underwriters *outside* the Commonwealth, and ExxonMobil did not market that debt to Massachusetts consumers.[73]

42. The CID's focus on events, activities, and records outside of Massachusetts is demonstrated by the items it seeks. For example, the CID demands documents that relate to or support 11 specific statements.[74] None of those statements were made in Massachusetts.[75] The CID also seeks ExxonMobil's communications with 12 named organizations,[76] but only one of these organizations has an office in Massachusetts and ExxonMobil's communications with the other 11 organizations likely occurred outside of Massachusetts. Finally, the CID requests all documents and communications related to ExxonMobil's publicly issued reports, press releases, and Securities and Exchange Commission ("SEC") filings, which were likely issued in Texas, ExxonMobil's headquarters,[77] and all documents and communications related to ExxonMobil's climate change research, which also occurred outside of Massachusetts.[78]

43. Even if ExxonMobil had engaged in relevant conduct in Massachusetts, ExxonMobil has made no statements in the past four years that could give rise to fraud as alleged

---

71 Doescher Aff. ¶ 3.
72 Luettgen Aff. ¶ 8.
73 *Id.* ¶¶ 5-6. This is subject to the one exception discussed above—*i.e.*, short-term fixed-rate notes, which ExxonMobil has sold to a handful of sophisticated institutions in the Commonwealth. *See supra* n.14.
74 Ex. B at App. 36-37 (Request Nos. 8-11).
75 *Id.*
76 *Id.* at App. 35 (Request No. 5).
77 *Id.* at App. 38-40 (Request Nos. 15-16, 19, 22).
78 *Id.* at App. 34-35, 37-40 (Request Nos. 1-4, 14, 17, 22).

in the CID. For more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's 2006 Corporate Citizenship Report recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and reasoned that "strategies that address the risk need to be developed and implemented."[79] In addition, in 2002, ExxonMobil, along with three other companies, helped launch the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."[80]

44. ExxonMobil has also discussed these risks in its public SEC filings. For example, in its 2006 10-K, ExxonMobil stated that the "risks of global climate change" "have been, and may in the future" continue to impact its operations.[81] Similarly, in its 2015 10-K, ExxonMobil noted that the "risk of climate change" and "pending greenhouse gas regulations" may increase its "compliance costs."[82]

45. Long before the limitations period governing G.L. c. 93A, § 2, ExxonMobil disclosed and acknowledged the risks that supposedly give rise to the Attorney General's investigation.

46. In stark contrast to the absence of any factual basis for investigating ExxonMobil's alleged fraud is the heavy burden imposed by the CID. Spanning 25 pages and containing 38 broadly worded document requests, the CID unreasonably demands production of essentially any and all communications and documents relating to climate change that

---

79 Ex. F at App. 104.
80 Ex. V at App. 182.
81 Ex. W at App. 188-89.
82 Ex. X at App. 195.

ExxonMobil has produced or received over the last 40 years. For example, the CID requests all documents and communications "concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions . . . and the effects of these emissions on the Climate" since 1976 and all documents and communications concerning "any research, study, and/or evaluation by ExxonMobil and/or any other fossil fuel company regarding" methane since 2010.[83] It also requests all documents and communications concerning papers and presentations given by ExxonMobil scientists since 1976[84] and demands production of ExxonMobil's climate change related speeches, public reports, press releases, and SEC filings over the last 6 to 20 years.[85] Moreover, it fails to reasonably describe several categories of documents by, for example, requesting documents related to ExxonMobil's "awareness," "internal consideration[s]," and "decision making" with respect to certain climate change matters.[86]

47. The CID's narrower requests, however, are in some instances more troubling than its overly broad ones, because they appear to target groups that hold views with which the Attorney General disagrees. All 12 of the organizations that ExxonMobil is directed to produce its communications with have been accused by advocacy groups of holding views with respect to climate change science or climate change policy with which those advocacy groups disagree.[87] Curiously, the CID does not request the production of ExxonMobil's communications with organizations that have expressed views on climate change with which the Attorney General agrees.

---

83 Ex. B at App. 34, 39 (Request Nos. 1, 17).

84 *Id.* at App. 34-35 (Request Nos. 2-4).

85 *Id.* at App. 36 (Request No. 8 (all documents since 1997)); *id.* at App. 39-40 (Request No. 22 (all documents since 2006)); *id.* at App. 36-39 (Request Nos. 9-12, 14-16, 19 (all documents since 2010)). The CID also demands the testimony of ExxonMobil officers, directors, or managing agents who can testify about a variety of subjects, including "[a]ll the topics covered" in the CID. *Id.* at App. 43 (Schedule B).

86 *See id.* at App. 35-36, 39 (Request Nos. 7-8, 18).

87 Anderson Aff. ¶ 3.

48. The return date for the CID was initially set at May 19, 2016. To facilitate discussions between the parties regarding the legality of the CID, the parties agreed to extend the CID's return date to June 29, 2016 and the date for filing objections to the CID to June 16, 2016. While the parties have been actively engaged in these discussions without court intervention, we have not reached a resolution. Through this special appearance, ExxonMobil therefore files this Petition of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, pursuant to Superior Court Rule 9A(e), to contest the Court's jurisdiction and avoid the waiver of its right to object to the CID.

E. ExxonMobil's Motion for Preliminary Injunction in Texas to Enjoin Enforcement of the CID

49. Because the Attorney General's investigation and the CID has infringed, is infringing, and will continue to infringe upon ExxonMobil's federal constitutional rights, ExxonMobil recently filed an action in the United States District Court for the Northern District of Texas and a motion to enjoin the enforcement of the CID.[88]

50. That court has jurisdiction over the constitutional claims raised in the federal action because a substantial part of the events giving rise to ExxonMobil's federal constitutional claims occurred in the Northern District of Texas. Massachusetts courts, by contrast, lack general jurisdiction over ExxonMobil and, in the absence of suit-related conduct, also lack specific jurisdiction.

51. In view of these many infirmities of the CID and the investigation, ExxonMobil hereby seeks relief based on the following grounds:

---

[88] Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

GROUND ONE

THERE IS NO PERSONAL JURISDICTION OVER EXXONMOBIL

52. ExxonMobil, through this special appearance and without consenting to jurisdiction, requests that this Court set aside the CID because this Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation.

53. ExxonMobil is not subject to general jurisdiction in Massachusetts. Because ExxonMobil is incorporated in New Jersey and headquartered in Texas, it cannot be regarded as "at home" in Massachusetts for purposes of general jurisdiction.

54. ExxonMobil is not subject to specific jurisdiction in Massachusetts because it has engaged in no suit-related conduct in Massachusetts within the limitations period. The CID seeks documents that do not reflect, relate to, or concern, in any way, ExxonMobil's trade or commerce in Massachusetts. During the last five years, ExxonMobil has not sold fossil fuel derived products to Massachusetts consumers, nor has it sold or marketed any securities to the general public in Massachusetts.[89]

GROUND TWO

DISQUALIFICATION OF THE ATTORNEY GENERAL FOR BIAS AND APPOINTMENT OF AN INDEPENDENT COUNSEL

55. If the Court determines that it can exercise personal jurisdiction over ExxonMobil, then, in order to protect its rights and preserve its objections against claims of waiver, ExxonMobil seeks the following relief.

56. ExxonMobil requests that the Court exercise its inherent authority to disqualify the Attorney General and the Office of the Attorney General of the Commonwealth of

---

[89] *See supra* n.14.

Massachusetts, and appoint an independent investigator not compensated on a contingency-fee basis.

57. ExxonMobil is entitled to an inquiry conducted by an impartial and even-handed investigator, but the Attorney General cannot conduct an inquiry in that manner. Her public extrajudicial statements disparaging ExxonMobil and prejudging the outcome of any investigation preclude her from serving as a disinterested prosecutor in any investigation of ExxonMobil. The Attorney General's partisan statements also undermine the public's confidence in any investigation of ExxonMobil conducted by her office.

58. In light of the Attorney General's comments about ExxonMobil and her investigation, there is little chance that the effects of this bias could be isolated. Any subordinate working in the Attorney General's Office would be hard-pressed to ignore the stated objectives of the Attorney General and her senior advisors. The bias, therefore, affects the integrity of the investigation by the entire Attorney General's Office.

59. The Court should disqualify the Attorney General and her office, and appoint an independent counsel, who is not compensated on a contingency-fee basis, to determine whether an investigation is warranted and, if so, to conduct that investigation.

GROUND THREE

THE CID VIOLATES EXXONMOBIL'S CONSTITUTIONAL, STATUTORY, AND COMMON LAW RIGHTS

60. If the Court determines that it can exercise personal jurisdiction over ExxonMobil, to protect its rights, and preserve its objections against claims of waiver, then ExxonMobil seeks the following additional relief.

61. Pursuant to G.L. c. 93A, § 6(7), the CID should be set aside because it significantly infringes on several of ExxonMobil's rights under the Massachusetts Constitution,

Massachusetts statutes, and Massachusetts common law. If the CID is not set aside in its entirety, it should, at a minimum, be modified to at least the relevant statute of limitations period or made subject to a protective order.

62. First, the CID should be set aside in light of the previously described bias harbored by the Massachusetts Attorney General's Office against ExxonMobil, in violation of ExxonMobil's due process right under Article XII of the Massachusetts Constitution to a disinterested prosecutor.

63. Second, in violation of Article XVI of the Massachusetts Constitution, the CID constitutes impermissible viewpoint discrimination by targeting ExxonMobil's climate change speech with those perceived to be on the wrong side of the climate change debate. It also impermissibly burdens ExxonMobil's right to engage in the public debate on climate change by requesting essentially all of its documents related to climate change over the past 40 years. Article XVI prohibits the Attorney General from issuing a CID to prescribe what shall be orthodox in matters of public concern.

64. Third, in violation of ExxonMobil's rights under Article XIV of the Massachusetts Constitution, the CID launches an unreasonable fishing expedition into 40-years' worth of ExxonMobil's records related to climate change. The CID purports to investigate ExxonMobil's deception of Massachusetts consumers and investors in trade or commerce. But, during the limitations period, ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts, nor has it marketed or sold any security to the general public in Massachusetts[90]—much less deceived these consumers and investors. Because ExxonMobil cannot be liable for the violations of law alleged in the CID, the CID should be aside for two additional reasons: (i) its issuance constitutes arbitrary and capricious conduct under

[90] *See supra* n.14.

Massachusetts law, and (ii) it seeks documents that are irrelevant to ExxonMobil's alleged violation of Massachusetts law.

65. Fourth, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the CID is unduly burdensome and impermissibly unspecific. The CID demands virtually all of ExxonMobil's documents and communications related to climate change over the past 40 years.

66. Fifth, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the issuance of the CID constitutes an abuse of process and harassment under Massachusetts common law because it was issued for the improper purposes described above, namely to burden ExxonMobil's right to engage in protected speech.

67. Finally, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the CID does not affirmatively state that ExxonMobil may withhold documents on the basis of privilege. ExxonMobil therefore requests that, if the CID is not set aside, it should be modified or a protective order should be issued to prevent the disclosure of privileged information.

GROUND FOUR

ADJUDICATION OF THIS PETITION SHOULD BE STAYED PENDING THE FEDERAL COURT'S RULING ON EXXONMOBIL'S APPLICATION FOR A PRELIMINARY INJUNCTION

68. ExxonMobil requests that this Court defer taking action on this matter until ExxonMobil's pending application in federal court for a preliminary injunction has been resolved.

69. On June 15, 2016, ExxonMobil filed a motion for a preliminary injunction seeking to enjoin the CID because it violates ExxonMobil's federal constitutional rights.

70. The United States District Court for the Northern District of Texas has jurisdiction over that matter and is capable of furnishing complete relief to the parties.

71. Staying the adjudication of this Petition would avoid the possibility of duplicative or inconsistent rulings on ExxonMobil's constitutional challenges to the CID, and will serve the interests of judicial economy and efficiency and the principles of comity.

WHEREFORE, Petitioner respectfully prays that this Court:

1. Determine that it lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation and therefore set aside the CID;

2. If the Court determines that it can exercise personal jurisdiction, provide the following relief:

   a. Recuse the Massachusetts Attorney General's Office from investigating this matter, and appoint an independent counsel to determine if an investigation is warranted and, if so, conduct the investigation;

   b. Pursuant to G.L. c. 93A, § 6(7) and Mass. R. Civ. P. 26(c), set aside or modify the CID, or issue a protective order; and

   c. Stay adjudication of this Petition pending the resolution of the federal court litigation; and

3. Order such other or further relief to Petitioner as it may deem just and proper.

Respectfully Submitted,

EXXON MOBIL CORPORATION

By its attorneys,

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(patrick.j.conlon@exxonmobil.com)
(*pro hac vice* pending)
Daniel E. Bolia
(daniel.e.bolia@exxonmobil.com)
(*pro hac vice* pending)
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP

By: /s/ Justin Anderson
Theodore V. Wells, Jr.
(*pro hac vice* pending)
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
(*pro hac vice* pending)
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300
Fax: (202) 223-7420

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo
(frongillo@fr.com)
Caroline K. Simons
(simons@fr.com)
One Marina Park Drive
Boston, MA 02210
(617) 542-5070

Dated: June 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served upon the Attorney General's Office for the Commonwealth of Massachusetts by hand delivery on June 16, 2016.

/s/ Caroline K. Simons
Caroline K. Simons

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO.: 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL

THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXON MOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36

The Commonwealth of Massachusetts (the "Commonwealth"), acting by and through the Office of Attorney General Maura Healey (the "Attorney General"), hereby cross-moves pursuant to the Consumer Protection Act ("Chapter 93A"), G.L. c. 93A, § 7, for an order compelling the petitioner Exxon Mobil Corporation ("Exxon") to comply with Civil Investigative Demand No. 2016-EPD-36 (the "CID"), issued by the Attorney General on April 19, 2016, pursuant to her authority under G.L. c. 93A, § 6. As grounds therefor, the Attorney General states the following.

1. On June 16, 2016, Exxon filed its Petition and so-called Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order in this case.

2. In response to Exxon's motion, and in support of this cross-motion,[1] the Attorney General is submitting the accompanying: (i) Consolidated Memorandum Opposing Exxon's Motion to Set Aside or Modify the CID or For a Protective Order and Supporting the Commonwealth's Cross-Motion to Compel Exxon to Comply with the CID (the "Consolidated

[1] This cross-motion is being served in accordance with the agreed upon schedule set forth in this Court's order of June 23, 2016 (Ames, J.), and is being served without a certificate pursuant to Suffolk Superior Court Rule 9C because under the circumstances no Rule 9C certificate is required.

Memorandum");[2] and (ii) an Appendix in the Consolidated Memorandum.

3. The Attorney General issued the CID to Exxon pursuant to G.L. c. 93A, § 6, as part of the Attorney General's pending investigation of Exxon's potential violations of G.L. c. 93A, § 2, and the regulations promulgated thereunder, for unfair and deceptive acts or practices in its marketing and/or sale of energy and other fossil fuel derived products to consumers in Massachusetts, and its marketing and/or sale of securities, as defined by G.L. c. 110A, § 401(k), to Massachusetts investors.

4. The CID seeks information related to *what Exxon knew* about the impacts of burning fossils fuels (its primary product) on climate change and climate-driven risk to Exxon's own business and assets; *when Exxon knew those facts*; and *what Exxon told the world, including investors and consumers in Massachusetts*, about climate change over time. The Attorney General is seeking this information because it appears that Exxon had extensive knowledge of what one of Exxon's own scientists described as the potentially "catastrophic" impacts of climate change, and nevertheless took and continues to take public positions directed to investors, consumers, and the public that misleadingly minimize and fail to fully disclose the risks associated with climate change, to induce investors to invest in Exxon's securities or to induce consumers to purchase its products, in violation of G.L. c. 93A, § 2, and its implementing regulations.

5. Chapter 93A, G.L. c. 93A, § 6(1), grants the Attorney General broad authority to investigate entities she believes have engaged or are engaging in any method, act or practice declared to be unlawful. *Attorney General v. Bodimetric Profiles*, 404 Mass. 152, 157-158 (1987). And pursuant to her investigatory powers, the Attorney General may examine or cause to

[2] The Attorney General was granted leave to file such a consolidated memorandum by order of this Court (Brieger, J.) on July 29, 2016.

be examined, through a CID, any material that is relevant to any alleged unlawful method, act or practice. Chapter 93A, G.L. c. 93A, § 6(1)(b).

6. As explained more fully in the accompanying Consolidated Memorandum, Exxon is unable to establish good cause or otherwise meet its burden to set aside or modify the CID or be granted a protective order. Instead, Chapter 93A provides lawful authority for the Attorney General's investigation, and the CID is both reasonable and imposes no undue burden on Exxon. Accordingly, this Court should compel Exxon to comply with it.

WHEREFORE, the Commonwealth requests that the Court issue an order: (i) denying in its entirety Exxon's motion to set aside or modify the CID or for a protective order; (ii) compelling Exxon to comply in all respects with the CID, including by forthwith producing to the Attorney General's Office the documents identified in the CID; and (iii) granting the Commonwealth such other and further relief as is just and proper in the circumstances.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS

By its attorney:

MAURA HEALEY
ATTORNEY GENERAL

Richard J. Johnston, BBO# 253420
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer, BBO# 641667
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe Courchesne, BBO# 660507
Chief, Environmental Protection Division
christope.courchesne@state.ma.us
I. Andrew Goldberg, BBO# 560843
andy.goldberg@state.ma.us

Peter C. Mulcahy, BBO # 682958
peter.mulcahy@state.ma.us
Assistant Attorneys General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Dated: August 8, 2016

CERTIFICATE OF SERVICE

I, I. Andrew Goldberg, hereby certify that on this 8th day of August, 2016, I caused a copy of the foregoing document to be served upon counsel of record by regular mail.

I. Andrew Goldberg

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.: 16-1888F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL

THE COMMONWEALTH'S CONSOLIDATED MEMORANDUM OPPOSING EXXON'S MOTION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR FOR A PROTECTIVE ORDER AND SUPPORTING THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXON TO COMPLY WITH THE CIVIL INVESTIGATIVE DEMAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I. INTRODUCTION

The Commonwealth of Massachusetts (the "Commonwealth"), by and through Attorney General Maura Healey, hereby opposes the so-called emergency motion of Exxon Mobil Corporation ("Exxon" or the "Company") to set aside or modify the Attorney General's Civil Investigative Demand No. 2016-EPD-36 (the "CID") or for a protective order.

The Attorney General's Office ("AGO" or the "Office") issued the CID to Exxon pursuant to the Massachusetts Consumer Protection Act ("Chapter 93A"), G.L. c. 93A, § 6, as part of the Attorney General's pending investigation of Exxon's potential violations of G.L. c. 93A, § 2, and the regulations promulgated thereunder, for unfair and deceptive acts or practices in its marketing and/or sale of energy and other fossil fuel derived products to consumers in Massachusetts, and its marketing and/or sale of securities, as defined by G.L. c. 110A, § 401(k), to Massachusetts investors.

The CID seeks information related to *what Exxon knew* about the impacts of burning fossils fuels (its primary product) on climate change and climate-driven risk to Exxon's own businesses and assets; *when Exxon knew those facts*; and *what Exxon told the world, including investors and consumers in Massachusetts*, about climate change over time. The Attorney General is seeking this information because it appears that, based on Exxon and other documents made public in 2015 by investigative journalists, Exxon had extensive knowledge of what one of Exxon's scientists described as the potentially "catastrophic" impacts of climate change. Based on Exxon's own state-of-the-art scientific climate change research program launched in the 1970s, Exxon knew those impacts could significantly affect its assets and businesses, and knew that there was a short window of opportunity to put in place efforts to reduce reliance on fossil fuels to help avert future climate disruption. Specifically, based on the Office's review of the recently disclosed Exxon documents and Exxon's public statements, the Attorney General

believes that Exxon appears to have engaged in conduct that included statements to investors and consumers that falsely downplayed, obfuscated, and otherwise did not fully disclose Exxon's knowledge of the extent of climate-driven risk to its assets—including the valuation of its fossil fuel reserves, the viability of new Exxon fossil fuel development projects, and risks to its operations.

For example, in the early 1980s, Exxon's scientists were predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a two to three degree Celsius increase could lead to melting of polar ice, rising sea levels, "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[1] Exxon understood then that warming in excess of two degrees Celsius (about 3.6 degrees Fahrenheit) would pose a significant threat, and it is widely recognized today that, to avoid the most severe impacts of climate change, carbon dioxide emissions must be reduced to ensure global average temperature increase does not exceed two degrees Celsius above preindustrial levels; that objective formed the basis for the recent Paris Agreement of the parties, including the United States, to the United Nations Framework Convention on Climate Change.[2] In its 2012 World Energy Outlook, the International Energy Agency reported that "[n]o more than one-third of proven reserves of fossil fuels can be consumed prior to 2050 if the world is to achieve the 2 degree Celsius goal."[3] If substantial portions of Exxon's vast fossil fuel reserves are unable to be burned due to carbon dioxide emissions limits put in place to stabilize global average temperature, those assets—valued in the billions—will be stranded, placing shareholder

[1] *See* Appendix ("App.") Exhibit ("Ex.") 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[2] *See* Ex. 2, App. 301, at art. 2 § 1(a) (Paris Agreement). As of August 3, 2016, 180 countries have signed the agreement, and 22 of those countries have formally ratified it.

[3] *See* Ex. 3, App. 328 (executive summary).

value at risk.[4] Over three decades ago, Exxon understood that climate-driven risk to its businesses, recognizing in 1982, in a memorandum widely distributed to Exxon management, that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion,"[5] and, in 1984, that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[6] Despite those facts, Exxon continues to maintain that the future is bright for its investors, representing in a 2014 report Exxon prepared for shareholders that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded"[7] and projecting in 2016 that "[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[8] And, notwithstanding Exxon's sophisticated understanding in the early 1980s of

[4] Indeed, one financial services provider in New England bluntly concluded that "there are fundamental questions about whether fossil fuel companies like ExxonMobil have a long-term future in the marketplace." *See* Ex. 4, App. 341 (IW Financial, *Managing the Risks of Exposure to Fossil Fuel Companies*) ("Fossil fuel companies' proven reserves of coal, oil and gas are valued at approximately $20 trillion. However, multiple scientific studies have looked at the current climate situation and concluded that the vast majority of these resources must not be burned for the international community to retain even a reasonable chance of limiting climate change to 2 degrees Celsius — a goal recognized by virtually every national government and many prominent international organizations. According to the Carbon Tracker Initiative, the industry's current reserves contain almost 2,800 gigatons of carbon dioxide — roughly five times the amount that can be added to the atmosphere without completely discarding the 2-degree target. If 80 percent of these reserves — approximately $16 trillion in assets — become 'stranded,' what impact will it have on fossil fuel companies' share price? This question is driving a wide range of stakeholders to reconsider their investments in the fossil fuel industry.").

[5] Ex. 5, App. 347 (memorandum from M.B. Glaser to a broad distribution list of Exxon management, attaching document, "CO_2 'Greenhouse Effect' Summary").

[6] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[7] Ex. 6, App. 352 (Exxon, *Energy and Carbon—Managing the Risks* (2014)). The 2014 report was prepared, according to Exxon, "in connection with the withdrawal of a prior shareholder proposal" seeking "an analysis of the potential for the Company's oil and gas assets to become stranded as a result of global public policy regarding climate change." Ex. 7, App. 383 (Feb. 29, 2016, letter from Exxon counsel Louis L. Goldberg, Esq., to Office of Chief Counsel, U.S. Securities and Exchange Commission).

[8] Ex. 8, App. 391 (Exxon press release, "ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity," dated Jan. 25, 2016).

the relatively near-term timeframe for significant climate change impacts if carbon dioxide emissions were unabated and atmospheric carbon dioxide doubled, significantly increasing global average temperature,[9] Exxon in 2016 continues to tell investors and consumers that "current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these events."[10]

In addition to Exxon's failure to fully disclose the risks posed by climate change to investors, consumers, and the public, it appears that Exxon also played a key role in concerted efforts with other fossil fuel interests and non-governmental entities, to create doubt about the credibility of scientific findings demonstrating the risk of climate change in order to thwart proposed policies that would reduce greenhouse gas emissions, thereby distorting investor, consumer, and public perception of the risk, and likely affecting the choices that both investors and consumers have made in the marketplace.

Exxon's apparent course of conduct, over more than 40 years, in connection with climate change does not appear substantially different from the now-exposed efforts of the tobacco industry to deceive the public for decades about the cancer risks posed by cigarettes, and this link between the deceptive marketing efforts of big tobacco and of big oil is now beginning to come into sharp focus.[11] Over the course of twenty years of litigation, courts around the country and here in Massachusetts have repeatedly found that the tobacco industry's conduct violated laws against unfair and deceptive trade practices and have ordered a variety of relief to redress the harms that the industry caused the public. As in the tobacco and countless other investigations

[9] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[10] Ex. 9, App. 398 (Exxon webpage, *Meeting global needs—managing climate change business risks*).

[11] *See* Ex. 10, App. 405 (*Document trove details links between tobacco, oil industries*, ClimateWire, July 20, 2016) ("Both [the tobacco and oil] industries hired public relations company Hill & Knowlton Inc., an influential New York firm, for outreach as early as 1956.").

into consumer and investor practices of national companies, the Attorney General has communicated with similarly situated state attorneys general and received information from interested members of the public. Contrary to Exxon's suggestion that this multi-state coordination is a nefarious conspiracy against its political speech, it is no more than the customary work of the involved attorneys general's offices.

Exxon now seeks to avoid scrutiny of its conduct, and has filed the pending petition and emergency motion to set aside or modify the CID, accompanied by its "hurry up and wait" request for stay. However, Exxon has failed to meet its heavy burden to establish that the Attorney General has acted arbitrarily and capriciously in issuing the CID or that the documents sought by the CID are irrelevant to Exxon's potential violations of Chapter 93A.

Moreover, in a thinly veiled effort to forum shop, Exxon—the day before filing its petition with this Court—filed a parallel action against the Attorney General in a Texas federal district court under 42 U.S.C. § 1983,[12] claiming violations of its constitutional rights and seeking to enjoin the Attorney General's investigation. The Attorney General today has moved to dismiss that action[13] and opposed Exxon's motion for a preliminary injunction in the case.

This Court should deny Exxon's request that this action in Massachusetts be stayed, deny Exxon's petition, and grant the Attorney General's cross-motion to compel production of the documents sought by the CID.

[12] *Exxon Mobil Corporation v. Maura Tracy Healey*, U.S. District Court for the Northern District of Texas, Case No. 4:16-cv-469 (Kinkeade, J.).

[13] The grounds for the dismissal motion in the Texas case include the Texas court's lack of personal jurisdiction over the Attorney General, its lack of subject matter jurisdiction, and improper venue.

II. FACTS

A. Massachusetts AGO Civil Investigative Demands

CIDs are a crucial tool for gaining information regarding whether an entity under investigation has violated the law.[14] Since 2013, the AGO has issued several hundred CIDs to or regarding companies or individuals suspected of committing unfair and deceptive business practices or other conduct in violation of Massachusetts law. Appendix ("App."), Affidavit of Melissa A. Hoffer ("Hoffer Aff."), ¶ 13. Those CIDs included a number issued in connection with joint investigations with other states and the federal government: about twenty-five with other states; about thirty involving the federal government; and some involving joint investigations with other states and the federal government. *Id*. at ¶ 14.[15] CIDs issued pursuant to the AGO's Chapter 93A authority have addressed, among other things, foreclosure practices of banks, business practices in the pharmaceuticals industry, the marketing and sale of securities,

[14] Nearly every other state attorney general has CID or similar authority. *See, e.g.*, Ala. Code § 8-19-9; Alaska Stat. Ann. § 45.50.495; Ariz. Rev. Stat. Ann. § 44-1524; Ark. Code Ann. § 4-88-111; Colo. Rev. Stat. Ann. § 6-1-107; Del. Code Ann. tit. 6, § 2514; Fla. Stat. Ann. § 501.206; Ga. Code Ann., § 10-1-403; Idaho Code Ann. § 48-611; 815 Ill. Comp. Stat. Ann. 505/3; Kan. Stat. Ann. § 50-631; Ky. Rev. Stat. Ann. § 367.240; La. Stat. Ann. § 51:1412; Md. Code Ann., Com. Law § 13-405; Minn. Stat. Ann. § 8.31; Miss. Code. Ann. § 75-24-27; Mo. Ann. Stat. § 407.040; Mont. Code Ann. § 30-14-113; Neb. Rev. Stat. Ann. § 59-1611; N.H. Rev. Stat. Ann. § 358-A:8; N.J. Stat. Ann. § 56:8-3; N.M. Stat. Ann. § 57-12-12; N.Y. Exec. Law § 63; N.C. Gen. Stat. Ann. § 75-10; Ohio Rev. Code Ann § 1345.06; Okla. Stat. Ann. tit. 15, § 758; Or. Rev. Stat. Ann. § 646.618; 71 Pa. Stat. and Cons. Stat. Ann. § 307-3; 9 R.I. Gen. Laws Ann. § 9-1.1-6; S.C. Code Ann. § 39-5-70; S.D. Codified Laws § 37-24-12; Tenn. Code Ann. § 47-18-106; Tex. Bus. & Com. Code Ann. § 17.61; Vt. Stat. Ann. tit. 9, § 2460; Va. Code Ann. § 59.1-201; Wash. Rev. Code Ann. § 19.86.110; Wyo. Stat. Ann. § 40-12-112.

[15] Examples since 2013, which have become public through settlement with the target companies, include: investigations involving large multistate groups and the federal government (Chase Bank, Ocwen, and HSBC); investigations with small groups of states and the federal government (Citigroup, JP Morgan); a joint investigation with federal authorities (Oppenheimer); a joint investigation with another state (LPL Financial); and a joint investigation with a large multistate group (MoneyGram). Hoffer Aff., ¶ 15; Exs. 11-18, App. 409-428 (Office press releases).

and solicitations and transactions involving other products and services sold in the Commonwealth. *Id*. at ¶ 14.

A very recent, visible example is the Office's 2016 leadership and participation in a multistate investigation into Volkswagen's "clean diesel" deception, which has so far resulted in a partial settlement providing Massachusetts with nearly $100 million in Chapter 93A civil penalties and environmental mitigation.[16]

B. Massachusetts AGO's Longstanding Efforts on Climate Change

For years, the AGO has been a leader in addressing the threat of climate change, often in collaboration with other state attorneys general. The Office led the federal litigation that resulted in the United States Supreme Court's determination in *Massachusetts v. EPA* that greenhouse gases are pollutants warranting regulation under the federal Clean Air Act. *See* 549 U.S. 497 (2007). In the intervening decade, Massachusetts's injuries from climate change—and the scientific predictions of future injuries—have only grown more devastating.[17] In subsequent litigation, the Office has worked closely with other states to advocate for and defend federal findings and regulations addressing climate change under the Clean Air Act, including the EPA's Clean Power Plan regulations to reduce power plant greenhouse gas emissions and the EPA's recent regulations regarding methane emissions from oil and gas facilities. Massachusetts has enacted laws that require reductions in greenhouse gas emissions and encourage strategies to reduce reliance on fossil fuels, including the Global Warming Solutions Act, 2008 Mass. Acts. ch. 298, and the Green Communities Act, 2008 Mass. Acts ch. 169. As state and federal law

[16] Ex. 19, App. 430 (Office press release). On July 19, 2016, Massachusetts, New York, and Maryland announced the filing of separate state suits against Volkswagen alleging state environmental law violations that were not covered under the partial settlement and that arose from the corporate misconduct identified through the multi-state investigation, including depositions and document productions in response to the states' CIDs. Ex. 20, App. 433 (press release announcing lawsuits).

[17] *See, e.g.*, Ex. 21, App. 439 (recent reports on Massachusetts impacts of sea level rise).

recognize, the overwhelming scientific evidence indicates that human activity, and the burning of fossil fuels in particular, are key drivers of climate change.[18]

C. 2015 Investigative Reporting and Release of Exxon Documents

In 2015, the Los Angeles Times, in cooperation with the Columbia University School of Journalism,[19] and the news organization InsideClimate News,[20] published a series of investigative reports and internal Exxon and other documents establishing that Exxon had a robust climate change scientific research program in the late 1970s into the 1980s that documented the serious potential for climate change, the likely contribution of fossil fuels (the Company's chief product) to climate change, and the risks of climate change including to Exxon's assets and businesses.[21] As set forth above, Exxon was, in the early 1980s, predicting

---

[18] *See, e.g.*, Ex. 22, App. 450-453 (Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report*, Summary for Policymakers, at 2-5) ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on humans and natural systems. . . . Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and oceans have warmed, the amounts of snow and ice have diminished, and sea level has risen. . . . Emissions of CO_2 from fossil fuel combustion and industrial processes contributed about 78% of the total [greenhouse gas] emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010. Globally, economic and population growth continued to be the most important drivers of increases in CO_2 emissions from fossil fuel combustion." (internal citations omitted)).

[19] Ex. 23, App. 481 (Sara Jerving, et al., *What Exxon knew about the Earth's melting Arctic*, L.A. Times, Oct. 9, 2015).

[20] Ex. 24, App. 497 (InsideClimate News articles in Exxon: The Road Not Taken series). InsideClimate News was named a finalist for a Pulitzer Prize for its work on the series. Ex. 25, App. 602.

[21] According to InsideClimate News, its "reporters interviewed former Exxon employees, scientists, and federal officials, and consulted hundreds of pages of internal Exxon documents, many of them written between 1977 and 1986." Neela Banerjee, *et al.*, Exxon: The Road Not Taken 2, (InsideClimate News 2015), *available at* https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken (last accessed Aug. 5, 2016). InsideClimate News also reviewed "thousands of documents from archives including those held at the University of Texas-Austin, the Massachusetts Institute of Technology and the American Association for the Advancement of Science." *Id.* Following the disclosure, Exxon does not dispute the authenticity of the documents. Ex. 26, App. 605 (Exxon webpage posting documents).

significant increases in global temperature as a result of climate change and understood that a two to three degree Celsius increase could pose a significant threat to ecosystems and human populations.[22] One Exxon scientist warned that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)."[23]

Exxon understood that doubling of atmospheric carbon dioxide would occur "sometime in the latter half of the 21st century," and that "CO_2-induced climate changes should be observable well before doubling."[24] Exxon's scientists agreed with the scientific consensus that "a doubling of atmospheric CO_2 from its pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5) [degrees Celsius]."[25] Exxon knew what that would mean for humanity and ecological systems: "There is unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alterations in the biosphere."[26] Nevertheless, in 2016, Exxon maintains that "[w]hile most scientists agree climate change poses risks related to extreme weather, sea-level rise, temperature extremes, and precipitation changes, current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these events."[27]

---

[22] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[23] Ex. 27, App. 608 (interoffice memorandum from Roger W. Cohen to W. Glass (Aug, 18, 1981)).

[24] Ex. 28, App. 614 (letter from Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982)).

[25] *Id.*, App. 613. A temperature increase of 1.5 to 4.5 degrees Celsius equals a temperature increase of 2.7 to 8.1 degrees Fahrenheit.

[26] *Id.*

[27] Ex. 9, App. 398 (Exxon webpage, *Meeting global needs—managing climate change business risks*).

As well, it appears Exxon may have failed to disclose fully its knowledge of climate change threats to investors and consumers to whom it continued to market and sell securities and products. For example, by 1982, Exxon knew about the climate-driven risk to its businesses, and its management recognized that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel combustion,"[28] and by 1984, Exxon scientists were advising Exxon management that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[29] Exxon knew that "should it be deemed necessary to maintain atmospheric CO_2 levels to prevent significant climatic changes, dramatic changes in patterns of energy use would be required."[30]

Yet, as of 2016, when it has become even clearer, as set forth above, that to avoid severe climate disruption, carbon dioxide emissions must be reduced to ensure global average temperature increase does not exceed two degrees Celsius above preindustrial levels—which means that well over half of the world's fossil fuels reserves must remain unburned—Exxon continues to tell its investors that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded."[31] Attorney General Healey's concern that Exxon has not adequately disclosed climate risk to Massachusetts investors in its securities is reflected in recent actions by Exxon shareholders (including Massachusetts-based shareholders) to compel the Company to more fully assess and respond to climate risks.[32]

---

[28] Ex. 5, App. 347 (memorandum from M.B. Glaser to a broad distribution list of Exxon management, attaching document, "CO_2 'Greenhouse Effect' Summary").

[29] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

[30] Ex. 29, App. 618 (letter from W.L. Ferrall to Dr. H.L. Hirsch regarding "Controlling Atmospheric CO_2," with attached memorandum (Oct. 16, 1979)).

[31] Ex. 6, App. 352 (Exxon, *Energy and Carbon—Managing the Risks* (2014)).

[32] In the past year, Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's businesses. The proposals "drew more support than any contested climate-related

Despite its knowledge of the potentially "catastrophic" impacts of climate change, Exxon appears to have engaged with other fossil fuel interests in a campaign from at least the 1990s onward to prevent government action to reduce greenhouse gas emissions.[33] In 1998, Exxon participated as a member of the "Global Climate Science Communications Team," which engaged in a concerted effort to challenge the "scientific underpinning of the global climate change theory" in the media, and which took the position, directly contrary to Exxon's internal knowledge at the time, that "[i]n fact, it [sic] not known for sure whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it."[34] A draft plan prepared by that team noted that "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts."[35]

D. Exxon Investigations and Litigation

1. New York Subpoena, Requests for Federal Investigation, and Massachusetts CID

Following the 2015 release of Exxon's documents, on or about November 5, 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon under New York's Martin Act, seeking documents regarding Exxon's climate research and its communications to investors and consumers about the risks of climate change and the effect of those risks on

---

votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels." Ex. 30, App. 645 (Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016); *see also* Ex. 31, App. 650 (Natasha Lamb & Bob Litterman, *Really? Exxon left the risk out of its climate risk report*, May 28, 2014) (discussing Exxon's *Energy and Carbon—Managing the Risks* report (Ex. 6)).

[33] Ex. 32, App. 654 (email from Joe Walker to Global Climate Science Team, with "draft Global Climate Science Communications Plan").

[34] *Id.*, App. 657.

[35] *Id.*, App. 655. Adopted in 1997 to limit carbon emissions in industrialized countries, the Kyoto climate change treaty (the "Kyoto Protocol") was ratified by 191 countries but never ratified by the United States. Ex. 33, App. 664 (Kyoto Protocol ratification status).

Exxon's business.[36] Exxon is cooperating with the New York subpoena and has produced more than 700,000 pages of documents to New York.[37]

In January 2016, at the request of members of Congress, the Department of Justice asked the Federal Bureau of Investigation to investigate whether Exxon should be prosecuted under the federal Racketeer Influenced and Corrupt Organizations Act, based on the documents released by journalists.[38] United States Attorney General Lynch recently confirmed that the investigation is ongoing.[39]

Following the disclosure of the Exxon documents, the AGO also reviewed them and other Exxon public statements and representations and determined that an investigation pursuant to Chapter 93A was warranted. Attorneys General Schneiderman and Healey and several other attorneys general met in New York in March 2016 and discussed at a press conference their cooperation on a number of national environmental issues.[40] Attorney General Healey announced that her office also would be investigating Exxon.[41]

On April 19, 2016, the AGO served Exxon's Massachusetts registered agent with its CID.[42] The CID seeks documents from Exxon on such topics as "Exxon's development,

---

[36] Ex. 34, App. 673 (*Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times, Nov. 5, 2015).

[37] Ex. 35, App. 679 (comment to InsideClimate News published on July 7, 2016).

[38] Ex. 36, App. 688 (Jan. 12, 2016, letter from Department of Justice to Hon. Ted W. Lieu and Hon. Mark DeSaulnier).

[39] Ex. 37, App. 690 (comment reported in press).

[40] Ex 38, App. 695 (press release regarding press conference, including video recording).

[41] *Id.* (video recording).

[42] Issuance of the CID triggered an investigation by the House Science, Space, and Technology Committee into state attorneys general investigations of Exxon, and on July 13, 2016, Attorneys General Healey and Schneiderman were served with subpoenas by the Committee. The subpoenas appear to be the first ever served by Congress on a sitting state attorney general. Attorney General Healey, as well as Attorney General Schneiderman, has objected to the subpoena as an unconstitutional abuse of Congressional authority. The subpoena correspondence is available at http://www.mass.gov/ago/bureaus/eeb/the-environmental-

planning, implementation, review, and analysis of research efforts to study CO_2 emissions"; research on how the effects of climate change will affect Exxon's costs, marketability, and future profits; and how this information was communicated to consumers and investors.[43]

As well, in early July 2016, nineteen members of the United States Senate called for an end to fossil fuel companies', including Exxon's, climate change "misinformation campaign to mislead the public and cast doubt in order to protect their financial interest,"[44] and offered support for a resolution urging fossil fuel companies to cooperate with "active or future investigation into (A) their climate-change related activities; (B) what they knew about climate change and when they knew that information; (C) what they knew about the harmful effects of fossil fuels on the climate; and (D) any activities to mislead the public about climate change."[45]

2. Texas and Massachusetts Cases

On June 15, 2016, Exxon filed a civil complaint against Attorney General Healey, in her official capacity, in United States District Court for the Northern District of Texas under 42 U.S.C. § 1983, alleging that Attorney General Healey's investigation violated its constitutional rights, along with a motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID. The following day, June 16, 2016, Exxon filed the instant petition to set aside or modify the CID or for a protective order, along with an emergency motion seeking the same relief and a stay of the Massachusetts proceedings pending the outcome of the Texas proceeding.

---

protection-division/exxon-investigation.html. On August 3, 2016, all eleven members of the Massachusetts Congressional delegation sent a joint letter to the Committee's chair, objecting to the issuance of the subpoenas. Ex. 39, App. 700.

[43] Civil Investigative Demand No. 2016-EPD-36, at 12-20 (Exxon Petition, Exhibit B).

[44] Ex. 40, App. 704 (*19 Senate Democrats call out Exxon, fossil fuel industry on climate change denial,* FuelFix, Jul. 11, 2016).

[45] Ex. 41, App. 707 (S. Con. Res. 45, 114th Cong. (2016)).

III. SUMMARY OF ARGUMENT

Notwithstanding Exxon's disingenuous assertions to the contrary, this Court has personal jurisdiction over Exxon both to compel Exxon to comply with the CID and to adjudicate any claims that may result from the Attorney General's investigation. On the merits, Exxon's motion should be denied in its entirety because Exxon has not: (1) met its heavy burden of demonstrating the Attorney General issued her CID arbitrarily or capriciously; (2) demonstrated that the documents the Attorney General seeks are irrelevant to her investigation; or (3) established good cause for the relief it seeks pursuant to G.L. c. 93A, § 6(7), such as the burdens of production being a substantial interference with its business. Exxon has not shown, because it cannot show, that any of its constitutional rights are threatened by the Attorney General's investigation. Accordingly, the Court should deny Exxon's motion and grant the Commonwealth's cross-motion pursuant to G.L. c. 93A, § 7, to compel Exxon to comply in all respects with the CID, including by producing the documents identified in the CID to the Attorney General's Office.

IV. ARGUMENT

A. This Court Has Personal Jurisdiction over Exxon.

Incredibly, Exxon's papers deny its pervasive business contacts with the Commonwealth, which fully support this Court's personal jurisdiction over Exxon in this matter. For the Court to exercise personal jurisdiction, jurisdiction must comport with the state long-arm statute, G.L. c. 223A, § 3, and also the due process requirements of the Fourteenth Amendment to the United States Constitution. *See Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979). Both the long-arm statute and due process are clearly satisfied here.

1. This Court Properly May Exercise Personal Jurisdiction over Exxon Under the Massachusetts Long-Arm Statute.

The state's long-arm statute, G.L. c. 223A, § 3, authorizes personal jurisdiction over defendants in actions arising from a person's "(a) transacting any business in the commonwealth; (b) contracting to supply services or things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; [or] (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth . . . ."

The Commonwealth issued the CID in connection with Exxon's "transaction of business" in Massachusetts, namely its marketing and sale of fossil fuel derived products to consumers in Massachusetts and of securities to investors here. These activities plainly subject Exxon to personal jurisdiction under G.L. c. 223A, § 3(a). Courts construe "transacting any business in the commonwealth" in a "generous manner," and in applying the clause to the facts, focus on whether the party "attempted to participate in the commonwealth's economic life." *Cossart v. United Excel Corp.*, 804 F.3d 13, 18 (1st Cir. 2015).[46]

The Court should reject Exxon's preposterous effort to deny its wide-ranging and ongoing Massachusetts business activities. The facts contradict Exxon's representation that it has not marketed and sold fossil fuel products and services or its securities in Massachusetts.[47]

[46] *See also Lyle Richards, Int'l v. Ashworth*, *Ltd.,* 132 F.3d 111 (1st Cir. 1997) ("transacting business" test is designed to identify deliberate, as distinguished from fortuitous, contacts with forum by nonresident party); *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) (law school "transact[ed] business" in Massachusetts despite never maintaining any Massachusetts campus, office, bank account, mailing address, or telephone listing, where plaintiff initiated contact with the law school without prior solicitation).

[47] *See* Exxon Appendix, Affidavit of Geoffrey Grant Doescher ("Doescher Aff."), ¶ 3 ("At no point during the last five years has Exxon Mobil Corporation (1) sold fossil fuel derived products to consumers in Massachusetts, or (2) owned or operated a single retail store or gas

Exxon conducts extensive business in Massachusetts, including sales of its fossil fuel products to the State and to wholesalers and retailers located in Massachusetts, and sales of its securities to large Massachusetts-based financial services companies. Indeed, Exxon is one of the leading suppliers of fossil-fuel products in Massachusetts, routinely conducting transactions with at least hundreds of Massachusetts retailers of Exxon products, including Pep Boys, Advance Auto Parts, Auto Zone, NAPA Auto Parts, Costco, and Target.[48] Most prominently, Exxon distributes fossil fuel products to consumers through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products[49] and through the operation of its own interstate oil pipeline system and major fuel distribution terminals in the Massachusetts cities of Springfield and Everett.[50] Exxon's terminals store large quantities of gasoline and other fuels, which are transported by truck to commercial gasoline stations and other facilities throughout Massachusetts and New England. Exxon provides advertising and marketing support directly to wholesalers of its products, including those located in Massachusetts.[51] To promote its sales of fossil fuel products, Exxon advertises them in Massachusetts through all types of media, including radio, television, and the Internet. Hoffer Aff., ¶ 46. Exxon also sold its products at

---

station in the Commonwealth"); *id.* at ¶ 4 ("Any service station that sells fossil fuel derived products under an 'Exxon' or 'Mobil' banner is owned and operated independently").

[48] Ex. 42, App. 712 (portion of an Exxon website with the "Where to buy Mobil™ motor oil" store locator results for the Boston zip code 02108).

[49] Ex. 43, App. 730 (Exxon webpage directing customers to find its branded stations in Massachusetts); Ex. 44, App. 737 (portion of an Exxon website for a representative Mobil-branded station in Boston, Massachusetts).

[50] Ex. 45, App. 740 (Exxon webpage describing its interstate oil pipeline system and fuel distribution terminals in the Massachusetts cities of Springfield and Everett).

[51] Ex. 46, App. 742 (portion of Exxon website describing its relationship with its branded wholesalers, including that wholesalers of Exxon products "have access to premier fuel products and innovative consumer pull programs [and] best-in-class marketing and advertising support and dedicated sales expertise"). *See also* Ex. 47, App. 745 (*ExxonMobil Launches New U.S. Retail Fuels Platform*, CSP Daily News, Jan. 14, 2014) (describing Exxon's "retail fuels technology platform" for Exxon-branded stations and quoting Exxon wholesale manager Grant Doescher describing platform's benefits for "[o]ur stations").

relevant times *to the Commonwealth*. An Exxon division entered into a contract to supply the Massachusetts State Police with motor oil for its cruisers from 2011 through 2014. The deal was touted to provide environmental benefits to Massachusetts.[52] Exxon's fossil-fuel product sales and marketing activities are plainly the "transaction of business" under the Commonwealth's long-arm statute.

Exxon's business transactions in the Commonwealth also include its dealings with Massachusetts securities investors, and the Company admits it has sold securities (short term fixed rate notes) in Massachusetts during the limitations period.[53] Without more, these admitted sales of short term fixed rate notes, the marketing of which is one subject of the Attorney General's investigation, suffice to bring Exxon within the ambit of the state's long-arm statute.[54] Beyond Exxon's admitted sales of securities to Massachusetts investors, Exxon common stock is held by, among many other Massachusetts shareholders, the following institutional investors:

- Boston-based State Street Corporation, the second largest institutional investor in Exxon common stock, with holdings valued at approximately $16.7 billion as of March 31, 2016;
- Boston-based Wellington Management, the seventh largest institutional investor in Exxon stock, with holdings valued at approximately $4.6 billion as of March 31, 2016; and

[52] Ex. 48, App. 747 (press release announcing Exxon partnership with Massachusetts State Police, dated Jun. 14, 2012); Ex. 49, App. 750 (standard contract between ExxonMobil Oil Corp. and the Commonwealth).

[53] Exxon Petition at 5 & n.15. Such notes are not exempt from the definition of "security" under Massachusetts law, subjecting such transactions to scrutiny pursuant to Chapter 93A. *Compare* 15 U.S.C. § 77c(a)(3) *with* G.L. c. 110A, § 401(k).

[54] Exxon's attempt to point to G.L. c. 110A, § 402(a)(10) to shield it from liability here is unavailing because the exemption provided by that provision relates only to filing requirements, not to Chapter 93A's proscription of misleading marketing or fraud, and it is irrelevant whether the securities Exxon admits to selling are exempt from filing requirements as long as they fit within the definition of securities in G.L. c. 110A, which these do.

- Boston-based Fidelity Investments, which holds Exxon stock as part of its extensive mutual fund offerings, including, *e.g.*, in the Fidelity Independence Fund.[55]

In addition, the Massachusetts Pension Reserves Investment Trust (the Massachusetts State Pension Fund) has made a significant investment in Exxon securities, purchased through its Massachusetts-based investment manager. Hoffer Aff., ¶ 42.

Exxon's activities also trigger the long-arm statute's other grounds for jurisdiction. Exxon's arrangements to supply fossil fuel products to retailers, other wholesalers, and consumers such as the Commonwealth constitute "contracting to supply services or things" in Massachusetts under G.L. c. 223A, § 3(b). Exxon's marketing and other statements to Massachusetts consumers and investors in violation of Chapter 93A also may constitute tortious acts and omissions in the state, which are independently sufficient for long-arm jurisdiction under G.L. c. 223A, § 3(c). *See, e.g., North American Video Corp. v. Leon*, 480 F. Supp. 213, 218 (D. Mass. 1979) (intentional misrepresentation in Massachusetts triggers jurisdiction under M.G.L. c. 223A, § 3(c), by causing tortious injury by an act or omission in Massachusetts). Finally, Exxon's extensive contacts in Massachusetts also satisfy the long arm statute's "general jurisdiction" prong, G.L. c. 223A, § 3(d), with Exxon regularly engaged in or soliciting business here, engaging in other persistent courses of conduct in Massachusetts, and deriving substantial revenue from its goods sold and used here. *See Heins v. Wilhelm Loh Wetzlar Optical Mach. GmbH & Co. KG*., 26 Mass. App. Ct. 14, 20 (1988) (ruling requirements of "general

[55] *See* Ex. 50, App.753 (list of largest institutional shareholders); Ex. 51, App. 756 (holdings of the Fidelity Independence Fund). Exxon's communications with its Massachusetts investors are constant. That communication occurs both through traditional communications required by law and through more personal means: Exxon's chief executive officer discussed the Company's environmental performance with a Massachusetts-based investor at the Company's 2014 annual shareholder meeting. *See* Ex. 52, App. 780, 21 (shareholder meeting unofficial transcript).

jurisdiction" provision apply disjunctively, and "substantial revenues" requirement was satisfied where plaintiff asserted that dozens of defendant's machines, valued around $50,000 each, had been sold to Massachusetts companies).[56]

2. Exxon's Extensive Contacts with Massachusetts Support Jurisdiction Under the Due Process Requirements of the Fourteenth Amendment.

Exxon's Massachusetts business contacts also amply meet the constitutional requisites for personal jurisdiction here. For personal jurisdiction to comport with the due process requirements of the Constitution, the defendant must have "established 'minimum contacts' in the forum state," *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 772 (1994) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). First, minimum contacts must arise from some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"; second, plaintiff's claim must arise out of or relate to those contacts; and third, "the assertion of jurisdiction over the defendant must not offend 'traditional notions of fair play and substantial justice.'" *Bulldog Inv'rs Gen. P'ship v. Sec'y of Com.*, 457 Mass. 210, 217 (2010) (quoting, *inter alia*, *Tatro*, 416 Mass. at 773). Exxon's extensive business transactions in Massachusetts undoubtedly constitute the necessary "minimum contacts" for jurisdiction, including its "purposeful availment" of the privileges of doing business in the Massachusetts market. *See Tatro*, 416 Mass. at 772; *Bulldog Inv'rs*, 457 Mass. at 217 ("Because the plaintiffs operated a Web site accessible in Massachusetts

[56] Exxon's Massachusetts fossil fuel facilities have also been the subject of litigation by the Attorney General's Office. In 2010, Exxon and several subsidiaries agreed to pay the Commonwealth $2.9 million in civil penalties for air pollution related violations of state law, including emissions of gasoline vapors, volatile organic compounds, and other toxic air pollutants from its Massachusetts bulk gasoline terminals in Everett and Springfield. The settlement was memorialized in a consent judgment entered by this Court. Ex. 53, App. 785 (Office press release and Boston Globe story reporting settlement and noting Exxon statement that "we have entered into an agreement in an effort to resolve this matter and continue focusing on safe and environmentally responsible operations").

and sent a solicitation that is prohibited by Massachusetts law to a Massachusetts resident, it was reasonable for the plaintiffs to anticipate being held responsible in Massachusetts.").[57]

The second requirement of due process is also satisfied here. It was Exxon's "suit-related" sales and marketing of securities to investors and fossil fuel products to consumers *in Massachusetts*, as identified on the face of the CID, that may constitute Chapter 93A violations and thus subject Exxon to this Court's jurisdiction.

Asserting personal jurisdiction over Exxon also comports with the "fair play and substantial justice" requirements of due process. This analysis requires the Court to "weigh the Commonwealth's interest in adjudicating the dispute, the burden on the out-of-State party of litigating in Massachusetts, and the Commonwealth's interest in obtaining convenient and effective relief." *See Bulldog Inv'rs*, 457 Mass. at 218. The Commonwealth's interest in protecting its consumers and investors through enforcement of Chapter 93A in Massachusetts state courts is well-established and far outweighs any inconvenience that a large, publicly-traded corporation with a substantial Massachusetts presence and billions of dollars in quarterly profits may face in defending its conduct here. *See id.* (plaintiff's inconvenience "does not outweigh the Commonwealth's interest in enforcing its laws in a Massachusetts forum"); *Hongyu Luo v. Tao Ceramics Corp.*, No. 13-CV-5280-F, 2014 WL 3048679, at *4 (Mass. Super. Apr. 10, 2014) ("Massachusetts [consumer protection laws] would not provide Massachusetts residents with effective protection if they could not be enforced against non-resident defendants.").

For the reasons discussed above, both the Commonwealth's long-arm statute and due process support the Court's personal jurisdiction over Exxon to adjudicate the validity of the CID

[57] Exxon's reliance on *Walden v. Fiore*, 134 S.Ct. 1115 (2014) is misplaced. Plaintiff Exxon's Memorandum in Support of Motion to Set Aside or Modify Civil Investigative Demand or Issue a Protective Order (June 16, 2016) ("Memo."), 8. In *Walden*, none of the petitioner-defendant's conduct occurred in the forum state.

and in any eventual enforcement action that the Commonwealth files against Exxon in this matter.

B. The Attorney General Is Exercising Her Authority Lawfully and Without Improper Bias or Prejudgment.

The Attorney General's investigation of Exxon in no way constitutes an abuse of government power. *See, e.g.*, *SEC v. McGoff*, 647 F.2d 185, 192-93 (D.C. Cir. 1981) (finding SEC investigation into company's funding from apartheid South Africa involved no abuse of government authority because "investors and potential investors … have a clear stake in knowing, and a congressionally mandated right to disclosure, if South African funds have been used" by the company). The Court should summarily reject Exxon's claims that the Attorney General is violating its due process rights and should be recused from this investigation because she is biased. *See* Plaintiff Exxon's Memorandum in Support of Motion to Set Aside or Modify Civil Investigative Demand or Issue a Protective Order (June 16, 2016) ("Memo."), 8-10.

Exxon's arguments on this issue boil down to a contention that the Attorney General's brief statement at a New York press conference in March 2016 evinced an improper bias that would prevent her from serving as a "disinterested" prosecutor in the case.[58] The claim is utterly without merit. If credited, it would allow law enforcement targets to disrupt necessary investigations whenever a prosecutor speaks publicly on a matter.

The Attorney General's comments recognized climate change as an environmental matter of grave public concern—consistent with both her duty to protect the environmental resources of Massachusetts, G.L. c. 12, § 11D, and with the edicts of federal and state law[59]—and also

[58] Exxon offensively equates the Attorney General to prosecutors found guilty of gross misconduct, bad faith, or a pecuniary conflict of interest, none of which is at issue here.

[59] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (federal law); Global Warming Solutions Act, 2008 Mass. Acts ch. 298, and Green Communities Act, 2008 Mass. Acts ch. 169 (state laws addressing climate change).

announced the initiation of the investigation at issue in this case. The statement also explained the reasons for the investigation and her reasonable belief that Exxon's statements—as reflected in Exxon's own documents in the public domain as discussed above—may have misled investors, consumers, and the public about the harms caused by climate change, both to Exxon's business and assets and to the environment and human populations. Indeed, *such a belief that Exxon violated state law is the very basis for an investigation*. *See Harmon Law Offices, P.C. v. Attorney General*, 83 Mass. App. Ct. 830, 834 (2013). Exxon has cited no case holding that such a public statement by a prosecutor demonstrates improper motive or bias, inappropriate prejudgment of the investigation, or personal animus.

Exxon's assertions that the Attorney General's statement demonstrates her bias or prejudgment of the investigation's merits disregard the Attorney General's unremarkable authority, as an elected official and a prosecutor, to explain to the public and the press that she is conducting an investigation. "Statements to the press may be an integral part of a prosecutor's job . . . and they may serve a vital public function." *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). *See also Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out on matters of public concern."); Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 Fordham L. Rev. 865, 888 (1990) ("Prosecutors are publicly accountable; their accountability is measured in part through public information about the prosecutor's office, and about particular cases. Indeed, it is generally accepted that elected prosecutors have an obligation to inform the community about the functioning of their offices."). The Attorney General's statement merely reflects her belief, in light of her Office's review of the public record, that Exxon violated

Chapter 93A with respect to its marketing and sale of fossil fuel derived products to consumers and of securities to investors.

That the Attorney General has coordinated with other state attorneys general in conducting this investigation into potential violations by Exxon of Chapter 93A, and engaged with interested third parties on matters of public concern, is of no moment. What Exxon attempts to paint as nefarious is customary and routine practice for the Attorney General's Office and for attorneys general's offices around the country.[60] Attorneys general are advocates for the public interest, charged by statute with enforcing state law against unfair and deceptive business practices through investigations and legal action, and that is what Attorney General Healey is doing in this case. Neither the Attorney General's statement nor her participation in discussions with other attorneys general provides a basis for this Court to order her recusal from this matter on constitutional grounds or otherwise.

C. Chapter 93A Provides Lawful Authority for the Attorney General's Investigation, and There Are Sufficient Grounds to Investigate Exxon for Its Potential Violations of the Statute.

Amid pages of irrelevant descriptions of meetings and communications in which the Attorney General took no part, Exxon's papers offer a series of conclusory arguments that the Court should set aside the CID. Memo., 11-18. None of Exxon's arguments satisfies its heavy burden to establish that the CID is arbitrary or capricious. *Att'y Gen. v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989).

[60] The investigatory practices here with respect to this inquiry into Exxon's potential fraudulent misrepresentations regarding the risks of climate change closely parallel the largely successful collaborations of state attorneys general in tobacco litigation and in other multistate investigations discussed above. *See, e.g.*, Ex. 54, App. 788 (background from National Association of Attorneys General regarding tobacco Master Settlement Agreement); Section II.A, *supra*.

1. Statutory Background and Standard of Review

The purpose of Chapter 93A is "to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace," *Poznik v. Mass. Med. Prof'l Ins. Ass'n*, 417 Mass. 48, 53 (1994) (abrogated by statute on other grounds), as well as to provide "proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities," *Commonwealth v. DeCotis*, 366 Mass. 234, 238 (1974). To that end, G.L. c. 93A, § 2, prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."

"*[W]henever [s]he believes* a person has engaged in any method, act or practice declared to be unlawful" by Chapter 93A, the Attorney General enjoys broad powers to investigate the unlawful conduct, including the issuance of civil investigative demands. *Bodimetric*, 404 Mass. at 157 (quoting and interpreting Attorney General's authority under G.L. c. 93A, § 6(1) (emphasis in original)).

In challenging the Attorney General's CID, it is Exxon's burden to show that the Attorney General has acted arbitrarily or capriciously. *Bodimetric*, 404 Mass. at 157. The Attorney General has no affirmative burden in a case challenging a CID, and an "assertion that the Attorney General has not affirmatively demonstrated the validity of [her] belief is insufficient to establish that the Attorney General has acted arbitrarily and capriciously." *Id.* at 157-58; *Harmon Law Offices*, 83 Mass App. Ct. at 835 (affirming superior court's decision dismissing complaint to set aside CIDs to law firm suspected of Chapter 93A violations in its foreclosure and eviction practices and finding CID recipient has "heavy burden" to show good cause why it should not be compelled to respond). In assessing the reasonableness of the Attorney General's demands, the Court applies a "plainly irrelevant" standard. *Matter of Bob Brest Buick, Inc.*, 5 Mass. App. Ct. 717, 719-20 (1977) ("[i]t cannot now be said that the C.I.D., as modified, was too

indefinite, exceeded reasonable limits, or was 'plainly irrelevant' . . . to the public interest sought to be protected").

2. The AGO's CID Is Reasonable Because It Is Premised on the Public Record of Exxon's Evidently Fraudulent Conduct.

As set forth in Section II.C, the internal Exxon documents recently made public establish that Exxon's climate change scientific research program in the late 1970s into the 1980s documented the serious potential for climate change, the likely contribution of fossil fuels (the Company's chief product) to climate change, and the risks of climate change to the world's natural and economic systems, including Exxon's own assets and businesses. *See* Section II.C, *supra* (discussing evidence of Exxon's knowledge of risks posed by climate change to its businesses). Indeed, a key rationale for Exxon's decision to launch its cutting-edge climate change research program was to "[d]evelop expertise to assess the possible impact of the greenhouse effect on Exxon business" and "[f]orm [a] responsible team that can credibly carry bad news, if any, to the corporation."[61] At that time, Exxon also understood "the potential for [its] research to attract the attention of the popular news media because of the connection between Exxon's major business and the role of fossil fuel combustion in contributing to the increase of atmospheric CO_2."[62] And, by 1984, Exxon's scientists recognized that "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[63]

In recent years, when it has become even clearer, as reflected in the Paris Agreement, that to achieve the goal of stabilizing average global temperatures at a safer level well over half of the

[61] Ex. 55, App. 792 (Exxon presentation to National Oceanic and Atmospheric Administration (March 26, 1979)).

[62] Ex. 28, App. 613 (letter from Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982)).

[63] Ex. 1, App. 286 (Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984)).

world's fossil fuel reserves must remain unburned, and despite Exxon's knowledge over three decades ago that to avoid the worst impacts of climate change, fossil fuel use would need to be "sharply curtail[ed],"[64] Exxon continues to make apparently misleading and deceptive statements to investors. In a 2014 report Exxon prepared for shareholders that is still being disseminated to Massachusetts investors on Exxon's website, Exxon represented that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded."[65] Exxon has made that same representation to the U.S. Securities and Exchange Commission in 2016 correspondence,[66] and likewise represented in 2016 that "[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[67] Even though Exxon understood long ago that responses to climate change could likely involve drastic reductions in reliance on fossil fuels, in a 2015 speech to the Annual Oil and Money Conference, Exxon's Chief Executive Officer and Chairman did not include climate change among the three key factors determining future global energy demand ("at ExxonMobil, we foresee future energy demand being shaped by three major forces: population growth, trade and economic development, and energy efficiency").[68] Exxon's recent statements fail to disclose Exxon's extensive knowledge of the likely impacts of climate change and the risks to its businesses. Instead they portray falsely, to a public unaware of Exxon's research and internal knowledge, a bright future for Exxon and the oil industry.

---

[64] *Id.*

[65] Ex. 6, App. 352 (Exxon, *Energy and Carbon—Managing the Risks* (2014)).

[66] Ex. 7, App. 383 (Feb. 29, 2016, letter from Exxon counsel Louis L. Goldberg, Esq., to Office of Chief Counsel, U.S. Securities and Exchange Commission).

[67] Ex. 8, App. 391 (press release, "ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity," dated Jan. 25, 2016).

[68] Ex. 56, App. 822 (address of Exxon Chairman and Chief Executive Officer Rex Tillerson, "Unleashing Innovation to Meet Our Energy and Environmental Needs," 36th Annual Oil and Money Conference, dated Oct. 7, 2015).

Based on the publicly available Exxon documents and statements the Office has reviewed, the Attorney General believes that Exxon has engaged in conduct that included, at least, misleading statements to investors and consumers that minimized, obfuscated, and otherwise did not fully disclose—and therefore were deceptive and misrepresented—Exxon's knowledge of the extent of climate-driven risks to its assets. These risks implicate, among other things: Exxon's operations; valuations of Exxon's fossil fuel reserves, including the risks that those assets will be "stranded"; the financial viability of new Exxon fossil fuel development projects; and the anticipated impacts on Exxon's business of the Paris Agreement or similar climate change public policies to cap global average temperature increase at two degrees Celsius (in other words, the resilience of Exxon's portfolio in a low carbon scenario).

The Attorney General further believes that Exxon made statements that misled investors, consumers, and the public about Exxon's knowledge, based in part on previous research by Exxon's own scientists, regarding the role of Exxon products in contributing to climate change; the severity of the actual and threatened impacts of climate change on ecological systems that support human health and sustain life; Exxon's scientists' recognition that transitioning away from reliance on fossil fuels could avert severe climate change; and the likely climate impacts of continued, long term primary reliance on fossil fuels.[69]

[69] According to public documents, Exxon, with the assistance of other fossil fuel interests and non-governmental entities, also appears to have disseminated misleading statements in order to raise doubts about the credibility of scientific findings demonstrating the risks of climate change, thereby distorting consumer, investor, and public perception of the risks. This conduct is plainly relevant to Exxon's potential violations of Chapter 93A; CID Demand No. 5 (Exxon Petition, Exhibit B, App. 35) therefore requests Exxon's communications with these third parties. Such communications may also provide further information regarding Exxon's internal knowledge of climate risks relative to its contemporaneous and later statements to consumers and investors.

With this predicate, the CID seeks information about Exxon's continuing efforts to present to consumers, investors, and the public potentially misleading information about the risks of climate change, the viability of alternative energy sources, and the environmental attributes of its products and services. *See* CID Demand Nos. 9, 10, and 11 (Exxon Petition, Exhibit B, App. 36-37).[70] The CID also seeks information regarding Exxon's deceptive statements contained in advertising and public relations campaigns over many years about climate change and the environmental bona fides of the Company and its products, as those may be shown to have driven customer investment in its products to the detriment of cleaner alternative energy (such as purchasing biofuels).[71] Further, the CID seeks information regarding Exxon's statements in securities offerings and other contexts, which may also include similar misrepresentations to investors about the risks of climate change to its businesses and assets, and the risks of regulatory costs and requirements associated with policy responses to climate change. *See* CID Demand Nos. 19, 20, 21, 31, and 32 (Exxon Petition, Exhibit B, App. 39-41).

[70] Under Massachusetts law, the purchase of an intentionally falsely represented product, without more, is an "ascertainable injury" under Chapter 93A, and an action based on deceptive acts or practices does not require proof that a consumer relied on the deception. *See Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004) (sales of cigarettes labeled "light" "in order to establish in the individual and collective consciousness the concept that [light cigarettes] are more healthful" where defendant cigarette manufacturer knew that smokers of such cigarettes would not "in fact receive the promised benefits" are deceptive under Chapter 93A). As well, marketing "need not be totally false in order to be deemed deceptive in the context" of Chapter 93A. *Id.* at 394-95. Deceptive marketing "may consist of a half-truth, or even may be true in a literal manner, but still create an overall misleading impression through failure to disclose material information." *Id.*

[71] Public relations efforts, as it appears Exxon was engaged in, to deceptively downplay climate risks, when targeted at consumers, may tend to depress appreciation of the urgent need for, and investment in, cleaner alternative energy sources that are competing with Exxon products and services. *See* Ex. 10, App. 405 ("Both [the tobacco and oil] industries hired public relations company Hill & Knowlton Inc., an influential New York firm, for outreach as early as 1956."). For this reason, the CID seeks to elicit information regarding the engagement of public relations firms. *See* CID Demand Nos. 18 and 20, Exxon Petition, Exhibit B, App. 39.

In all its papers, Exxon has made no specific arguments that the requested information is "plainly irrelevant" to potential Chapter 93A violations by the Company. It therefore has not met its "heavy burden" to show good cause for setting aside or modifying the CID. To the contrary, the documents that the AGO seeks through the CID are needed for the Attorney General to continue to exercise her reasoned judgment in assessing whether an enforcement action under Chapter 93A is justified.

3. Documents Dated and Related to Exxon's Actions Outside the Limitations Period Are Highly Relevant to the Investigation.

In its Petition and Memorandum in support of its motion, Exxon argues that the CID constitutes an "abuse of government power" and is otherwise unwarranted because Exxon claims it has, "for more than a decade" recognized that the risk of climate change and its potential impacts "may" be significant, and baldly asserts that the Attorney General has failed to identify any Exxon statement about climate change that could establish liability under Chapter 93A "during the relevant limitations period." Petition, 4, 16-17; Memo, 7.

On the contrary, the Attorney General believes Exxon has violated Chapter 93A during the four-year limitations period applicable to actions under the statute. As set forth above, the Attorney General believes that Exxon has engaged in conduct during the limitations period that included, at least, statements to shareholders and consumers that did not fully disclose and otherwise misrepresented Exxon's knowledge of the extent of climate-driven risk to its assets, its operations, and new Exxon fossil fuel development projects; and the effects on Exxon's business of regulations, treaties, agreements, and other measures to reduce greenhouse gas emissions. Exxon statements during the limitations period, reflected in the CID,[72] confirm the sound basis for that belief.

[72] *See* CID Demand Nos. 9, 10, and 11 (Exxon Petition, Exhibit B, App. 36-37).

Understanding what Exxon knew—and for how long it has known it—about the impacts of climate change on its business and consumers is highly relevant to a determination whether Exxon has violated Chapter 93A during the limitations period. Such information can demonstrate that Exxon knew that statements it made during the limitations period were false, misleading, or fraudulent *in light of* Exxon's *prior* knowledge and conduct. Events occurring prior to the limitations period, therefore, may provide critical evidence regarding whether a violation of law occurred during the limitations period. *See, e.g.*, *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination*, 441 Mass. 632, 647 (2004) (plaintiff who had seasonable claim may use events occurring prior to limitations period as "background evidence" and entity's prior conduct "is relevant as background evidence" to a determination whether subsequent actions by entity constitute violations of applicable law).

Further, the investigation may reveal facts that would demonstrate that Exxon's conduct prior to the limitations period is actionable. For example, Exxon's conduct may constitute a continuing violation. *See, e.g.*, *Taygeta Corp. v. Varian Assocs. Inc.*, 436 Mass. 217, 232 (2002) (recurring tortious conduct in the form of continuing flow of contaminated groundwater to abutting property constituted continuing nuisance not barred by three-year statute of limitations even though dumping that caused contamination occurred decades before suit). If Exxon engaged in conduct prior to the limitations period that is determined to be misleading, based on its pre-limitations period knowledge, and continued to make fresh misleading representations during the limitation period that spring from that initial fraud, its conduct could constitute a continuing violation. *Cf. Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part) (pattern or practice that would have constituted violation of statute, but for the fact that statute had not yet become effective, became violation upon statute's passage and liability may

be imposed if present day salary structure is mere continuation of illegal pre-statute pay structure).

As well, facts revealed during the investigation may also demonstrate that equitable tolling of the Chapter 93A statute of limitations would be proper. *See Lambert v. Fleet Nat'l Bank*, 449 Mass. 119, 126 (2007) (holding that discovery rule applies to Chapter 93A claims); *Szymanski v. Boston Mut. Life Ins. Co.*, 56 Mass. App. Ct. 367, 370 (2002) (same; reversing grant of summary judgment for defendant insurer where question of fact existed whether plaintiff should have understood vanishing premium policy's diminishing value prior to date of commencement of suit and therefore whether discovery rule should apply to toll the statute of limitations); *Cambridge Plating Co., Inc. v. Napco, Inc.*, 991 F.2d 21, 28 (1st Cir. 1993) (statute of limitations tolled until "an event or events have occurred that were reasonably likely to put plaintiff on notice that someone may have caused her injury"); *see also Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 519 (1997) (breach of fiduciary duty of disclosure tolls limitations period under G.L. c. 260, § 12).[73]

[73] There are three circumstances that trigger application of the discovery rule in Massachusetts: "where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party, where a wrongdoer breached some duty of disclosure, or where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive." *Szymanski*, 56 Mass. App. Ct. at 370 (citing *Patsos v. First Albany Corp.*, 433 Mass. 323 (2001)). The factual basis for a cause of action is "inherently unknowable" if it is "incapable of detection by the wronged party through the exercise of reasonable diligence." *Geo. Knight & Co., Inc. v. Watson Wyatt & Co.*, 170 F. 3d 210, 213 (1st. Cir. 1999). Fraudulent concealment requires evidence that a defendant committed an affirmative act to "conceal or cover up wrongful conduct which underlies the action." *Tomaselli v. Beaulieu*, 967 F. Supp. 2d 423, 442 (D. Mass. 2013); G.L. c. 260, § 12. A "mere failure to reveal information," can be "fraudulent concealment by a person, such as a fiduciary, who has a duty to disclose," and such a duty may exist when "one party reposes, to the other's knowledge, trust and confidence under circumstances in which the other's failure to make disclosure would be inequitable." *Watson Wyatt & Co.*, 170 F.3d at 215-16.

In light of the long history of Exxon's internal deliberations on climate change evident in the recently disclosed Exxon documents, certain of the demands in the CID necessarily seek documents that predate the limitations period. Given the several ways in which they may help prove actionable violations of Chapter 93A, these documents are highly relevant to the Commonwealth's potential Chapter 93A claims, and the CID's requests for documents outside the limitations period are therefore reasonable.

4. Exxon's Free Speech Objections to the CID Are Baseless.

Exxon cites several provisions of the Massachusetts Declaration of Rights that it says the Attorney General's CID and her comments at a New York press conference violate. Memo., 8-14. Exxon's conclusory arguments in this regard are mistaken.[74]

As a threshold matter, the CID does not regulate or burden any speech and therefore does not violate Exxon's rights under Article XVI of the Massachusetts Constitution. *See* Memo., 11-14.[75] Exxon says that the CID is a "direct and deliberate assault" on its First Amendment rights that "regulates" and "intrudes on" its political speech. *See* Memo., 11. The CID does no such thing.

Subpoenas and CIDs like the Attorney General's CID to Exxon "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political

[74] In earlier sections, the Commonwealth addresses Exxon's repeated claims of unconstitutional harassment (Memo., 14), *see* Section IV.B, *supra*, and its claims that the scope of the CID exceeds constitutional or other bounds (Memo., 15-16), *see* Sections IV.C.2 and IV.C.3, *supra*.

[75] As relevant here, Massachusetts courts generally interpret the free speech guarantees of the Massachusetts Constitution consistently with the First Amendment, with resort to federal case law. *See, e.g.*, *Opinions of the Justices*, 387 Mass. 1201, 1202 (1982) ("criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution" (citation omitted)). As an apparent tactic to avoid obviously duplicative actions, Exxon asserted federal constitutional claims against the Attorney General in the Texas lawsuit, but not in its Massachusetts petition.

association." *SEC v. McGoff*, 647 F.2d 185, 187-88 (D.C. Cir. 1981) (upholding SEC subpoena for corporate records relating to transactions with South Africa). Article XVI does not ordinarily protect routine corporate business records, which are all that the CID requests. A subpoena for corporate records like the CID is a "generally applicable" order "*unconcerned with regulating speech*" and does not even have the incidental (but permissible) "effect of interfering with speech." *See Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (emphasis added).

In *In re Enforcement of Subpoena*, 436 Mass. 784 (2002), a case nowhere cited in Exxon's papers that involved a challenge to the Judicial Conduct Commission's subpoena of a journalist who was the spouse of a judge under investigation, the Supreme Judicial Court held that subpoenas concerning matters of public controversy do not inherently implicate free speech protections:

> The mere fact that the subpoena calls for production of documents reflecting, inter alia, communications that the witness had with others does not burden speech. Indeed, witnesses in a vast array of proceedings are commonly called on to give evidence concerning what they said or wrote to others and what others said or wrote to them. A discovery request or subpoena seeking information about a witness's communications does not automatically raise free speech concerns. *Similarly, the fact that the subject matter of the witness's communications may include items that are of current public interest or controversy . . . do[es] not transform the . . . subpoena into a violation of free speech rights*.

436 Mass. at 790 (emphasis added).

Accordingly, the recipient of such a demand is not entitled to heightened scrutiny of the demand under Article XVI and the cases Exxon cites. This principle follows from the black letter law that the First Amendment, and thus Article XVI, does not prevent government inquiries that seek information from the press, a context with much weightier constitutional dimensions than a

routine inquiry from the Attorney General to a publicly traded company concerning its potentially misleading and deceptive practices in violation of the Commonwealth's consumer and investor protection laws. *See, e.g.*, *Commonwealth v. Corsetti*, 387 Mass. 1, 4 (1982) (citing *In the Matter of Roche*, 381 Mass. 624, 633 (1980) and *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).[76]

The threadbare nature of Exxon's alleged Article XVI harms further undermines Exxon's free speech claims. *In re Enforcement of Subpoena*, 436 Mass. at 791, 794 (finding challenger "failed to show how requiring him to comply with this subpoena will chill his rights of expression or association" despite "all the constitutional rhetoric in [his] arguments").[77] Indeed, there is absolutely no evidence that the CID itself has chilled or silenced Exxon's speech or will do so in the future: in fact, before and after the CID was issued, Exxon has continued to speak

[76] The Attorney General thus need not demonstrate a "compelling interest" in the materials sought nor that her requests are "narrowly tailored," as Exxon contends. Memo., 11, 13. The CID would, in fact, meet even this exacting standard of scrutiny, given the CID's lack of effects on Exxon's speech, the compelling importance of enforcing Chapter 93A, and Exxon's sole possession of its own internal documents. *See In re Enforcement of Subpoena,* 436 Mass. at 791-92.

[77] *See Univ. of Penn. v. EEOC,* 493 U.S. 182, 195-202 (1990) (affirming denial of relief from administrative subpoena because alleged First Amendment harm to academic freedom too attenuated and speculative to preclude disclosure of peer review materials, citing *Branzburg*); *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972) (affirming trial court denial of injunctive relief in First Amendment challenge to Army regulatory action and holding that unspecified "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *In the Matter of Roche*, 381 Mass. 624, 633, 635 (1980) (citing *Branzburg* and finding harm to "free flow of information" too "speculative" to warrant First Amendment exception to the "longstanding principle that 'the public . . . has a right to every man's evidence'"); *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989) (affirming denial of protective order against administrative subpoena because "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation" (citation omitted)).

about its views on climate change, including with regard to pending investigations and this very litigation.[78] Exxon makes no serious claim that the CID will impede its ability to speak freely.

Exxon also cannot claim that its responses to the CID will necessarily be made public in some way that threatens its internal political deliberations. G.L. c. 93A, § 6(6) provides that "[a]ny documentary material or other information produced . . . shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general . . . ." While the material and information elicited in response to the CID may be disclosed in court pleadings or other papers filed with the court, *id.*, the statute expressly authorizes the Court to grant protective orders in accordance with the standards in Massachusetts Rule of Civil Procedure 26(c), when appropriate, including to require that material to be filed in court be submitted under seal as set forth in Rule 26(c)(8). *See* G.L. c. 93A, § 6(7). The Attorney General fully recognizes and honors the protections afforded persons providing documents and information pursuant to her CID authority, and will satisfy those obligations here.[79]

Moreover, Article XVI in no way bars the Attorney General's investigation into whether Exxon's commercial communications with consumers and investors have been false, deceptive, misleading, or fraudulent in violation of Chapter 93A. *See* Section II.C., *supra*. The purpose of her investigation is wholly consistent with Article XVI and the First Amendment, which do not

[78] *See, e.g.*, Ex. 57, App. 835 (Exxon webpage, *ExxonMobil's perspectives on climate change, Our climate science history*); Ex. 58, App. 839 (Exxon blog post, *The truth about ExxonMobil and climate change*, May 23, 2016); Ex. 59, App. 843 (Exxon blog post, *The coordinated attack on ExxonMobil*, Apr. 20, 2016); Ex. 60, App. 846 (Exxon blog post, *ExxonMobil responds to state AGs,* Mar. 29, 2016; and Ex. 61, App. 849 (Exxon press release, "ExxonMobil to Hold Media Call on New York Attorney General Subpoena," dated Nov. 5, 2015).

[79] The CID itself was only made public when Exxon filed its papers in the Texas court on June 15, 2016.

protect false, deceptive, or misleading statements in the marketplace. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (government "may, and does, punish fraud directly"); *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (First Amendment does not limit "restrictions on false, deceptive, and misleading commercial speech"); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) ("it is well settled that the First Amendment does not protect fraud"); *Opinion of the Justices*, 373 Mass. 888, 891 (1977) (no constitutional protection for "deceptive, misleading, or false statements, and statements proposing illegal transactions"). If the Attorney General concludes as a result of her investigation that the statements are indeed fraudulent and chooses to pursue enforcement action, she may certainly do so consistently with Article XVI. Accordingly, the Court should disregard Exxon's conclusory and premature free speech objections to the CID.

5. The CID Is Not Overly Burdensome.

"Documentary demands exceed reasonable limits *only* when they '*seriously interfere with the functioning of the investigated party* by placing burdens on manpower or requiring removal of critical records.' [B]ecause the requested information is often peculiarly within the province of the person to whom the C.I.D. is addressed, broad discovery demands may be permitted even when such a demand 'imposes considerable expense and burden on the investigated party.'" *Bodimetric*, 404 Mass. at 159 (emphasis added) (quoting *Matter of Yankee Milk, Inc.*, 372 Mass. 353, 365 (1977)). *See also Matter of Yankee Milk, Inc.*, 372 Mass. at 364-65 ("[E]ffective investigation requires broad access to sources of information . . . because evidence of the alleged violations is within the control of the investigated party.").[80] Exxon cannot claim that producing

[80] *Cf. Cuomo v. Dreamland Amusements, Inc.*, No. 08 CIV.6321 JGK, 2008 WL 4369270, at *12 (S.D.N.Y. Sept. 22, 2008) (in considering claim of irreparable harm from compliance with state administrative subpoena, "no irreparable injury has been shown because

the documents requested by the CID will "seriously interfere" with the functioning of a company of Exxon's scale and resources.

Here, the documents the Attorney General seeks are within Exxon's exclusive control, are relevant to the Attorney General's investigation, and can be produced to the AGO without interfering with Exxon's business. Exxon's suggestion that it would be overly burdened by responding to the CID lacks credibility, because Exxon currently is in the process of producing documents responsive to the New York Attorney General's similar subpoena, more than 700,000 pages to date, and Exxon could readily duplicate at least those documents for production to the Commonwealth in the first instance at a *de minimis* cost, with a subsequent production of documents responsive only to the Massachusetts CID. In this context, Exxon's claimed burdens are no grounds for setting aside or modifying the CID.

D. The Court Should Not Stay This Proceeding Pending the Outcome of Exxon's Texas Lawsuit.

Exxon includes in its motion and supporting memorandum the untenable request that this Court stay its hand while a Texas federal district court adjudicates the merits of Exxon's lawsuit against the Attorney General, because it filed the federal case first. The Court should reject this transparent attempt to forum shop. The cited rule does not apply to two lawsuits filed by the same plaintiff, *see Ethicon Endo-Surgery, Inc. v. Pemberton*, No. 10-3973-B, 2010 WL 5071848, at *3 (Mass. Super. Oct. 27, 2010) (applying rule to consider "mirror image" actions where plaintiff and defendant filed separate actions in different courts); *Quality One Wireless, LLC v. Goldie Grp., LLC*, 37 F. Supp. 3d 536, 540 (D. Mass. 2014) (same). Besides, here the two cases were essentially simultaneous. Exxon filed in Texas a mere twenty-four hours earlier in order to make the nominal, and disingenuous, argument that its Texas lawsuit predated its Massachusetts

---

the present detriment to Dreamland from the investigation is that it must participate in an investigation. The costs of such compliance do not constitute irreparable injury.").

petition. Moreover, the factors courts use in applying the "first-filed" presumption all cut against deferring to the other action, including:

(i) severe inconvenience to the Commonwealth of litigating challenges to its CID in Texas;

(ii) the Texas court's lack of personal jurisdiction over the Attorney General;

(iii) the distinction between the cases created by the Commonwealth's cross-motion to compel here, which it is not bringing in Texas court; and

(iv) the principles of federal-state comity favoring this Court's application of the Massachusetts law, Chapter 93A, that authorizes the CID.

Cf. Mass. R. Civ. P. 12(b)(9) (concerning dismissal of action based on prior actions pending in courts of the Commonwealth); Reporter's Notes, Mass. R. Civ. P. 12(b)(9) ("the court . . . should determine the location of the ultimate litigation").

Moreover, staying this case would powerfully constrain the Attorney General's use of CIDs to investigate foreign corporations' conduct in Massachusetts by encouraging foreign corporations that are targets of CIDs to engage in the very same gamesmanship Exxon has employed here. Any such company could bring objections in a federal court far from Massachusetts, despite a near-ubiquitous business presence in Massachusetts, and file a near-identical action in Massachusetts while simultaneously seeking to stay it, thereby vastly increasing the Commonwealth's inconvenience and costs.

E. In Light of the Sound Basis for the Attorney General's Investigation, the Court Should Grant the Commonwealth's Cross-Motion to Compel.

As demonstrated above in Sections IV.B and IV.C, the CID fully comports with the Attorney General's statutory authority, is reasonable based on the Office's review of publicly available Exxon documents and statements, does not offend Exxon's constitutional rights, and

does not impose impermissible burdens on Exxon. For these same reasons, the Court should grant the Attorney General's cross-motion to compel Exxon to comply with the CID in its entirety. In this context, the Court may treat its findings in support of its determination to deny Exxon's emergency motion to set aside or modify the CID as an affirmation of Exxon's legal obligation to comply with the CID. *Cf. Harmon Law Offices,* 83 Mass. App. Ct. at 832 (accepting parties' treatment of the judge's decision on CID recipient's motion to set aside as requiring compliance with CID).

Despite its references to some specific CID requests, Exxon does not present serious and particularized arguments that individual demands should be modified or set aside.[81] Nor has Exxon in any way met its burden with regard to the CID as a whole or with regard to any particular request. *Bodimetric*, 404 Mass. at 157. Should the Court wish to scrutinize the relevance of individual demands, the Commonwealth respectfully requests the opportunity to present briefing supporting the reasonableness of and rationale for those demands. For the reasons discussed above, the Attorney General's CID seeks documents from Exxon that are relevant to her potential claims of violations of Chapter 93A, and the Court should order Exxon to comply with the CID.

V. CONCLUSION

The Attorney General commenced an investigation into Exxon's business practices and issued the CID because the Attorney General has a reasonable belief that Exxon violated Chapter

[81] For example, in a single paragraph, Exxon references Requests 1, 2-4, 5, 8-35, and 37-38 (nearly every request in the CID), asserting they are overly burdensome because of their temporal scope. *See* Memo., 17 & nn. 54-56. Yet Exxon does not describe the claimed burden of responding to this request in any detail, instead simply relying on broad and general assertions that the CID cannot legitimately extend to documents predating the limitations period. *Id.* Setting aside the specific reasons for their relevance, *see* Section IV.C.3, *supra*, this conclusory approach can in no way satisfy Exxon's burden to show good cause to set aside or modify the CID. *See also* Memo., 18 & n.57 (similar).

93A and that Exxon is in possession of records and documents relevant to a determination whether such violations actually occurred. Exxon bears the heavy burden of showing that the Attorney General acted arbitrarily or capriciously in issuing the CID, and it has failed to do so. Exxon has provided the Court with nothing that could establish good cause for setting the CID aside, or otherwise requiring modification of the CID, or issuance of a protective order. Accordingly, the Court should decline Exxon's invitation to stay this litigation pending its parallel litigation against the Attorney General in Texas, deny Exxon's motion to set aside the CID, and order Exxon to comply in all respects with the CID, including by producing to the Attorney General's Office the documents identified in the CID.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

Richard Johnston, BBO # 253420
Chief Legal Counsel
richard.johnston@state.ma.us
Melissa A. Hoffer, BBO# 641667
Chief, Energy and Environment Bureau
melissa.hoffer@state.ma.us
Christophe G. Courchesne, BBO# 660507
Chief, Environmental Protection Division
christophe.courchesne@state.ma.us
I. Andrew Goldberg, BBO# 560843
andy.goldberg@state.ma.us
Peter C. Mulcahy, BBO# 682958
peter.mulcahy@state.ma.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
Fax (617) 727-9665

Dated: August 8, 2016

CERTIFICATE OF SERVICE

I, I. Andrew Goldberg, hereby certify that on this 8th day of August, 2016, I caused a copy of the foregoing document to be served upon counsel of record by regular mail.

I. Andrew Goldberg

NOTICE TO APPEAR FOR Motion Hearing	DOCKET NUMBER 1684CV01888	**Trial Court of Massachusetts** **The Superior Court**
CASE NAME: **Exxon Mobil Corporation vs. Office of Attorney General**		Michael Joseph Donovan, Clerk of Court
TO: Melissa Ann Hoffer, Esq. Massachusetts Attorney General's Office One Ashburton Place 18th Floor Boston, MA 02108		COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

The Court will hear the following event:

Motion Hearing

Counsel should appear as follows:

Date: 12/07/2016

Time: 02:00 PM

Session/ Courtroom Location: Civil F / BOS-10th FL, CR 1006 (SC)

FURTHER ORDER OF THE COURT:

DATE ISSUED	ASSOCIATE JUSTICE	
10/21/2016		**Michael Joseph Donovan, Clerk of Court**

Date/Time Printed: 10-21-2016 15:39:42

SCV012a\ 06/2014