No. 18-1170

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

v.

MAURA TRACY HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS, BARBARA D. UNDERWOOD, ACTING ATTORNEY GENERAL OF NEW YORK, IN HER OFFICIAL CAPACITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S MEMORANDUM OF LAW IN OPPOSITION TO NEW YORK ATTORNEY GENERAL'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Exxon Mobil Corporation ("ExxonMobil") filed this action nearly three years ago to challenge state misconduct that violates its constitutional rights. Until last week, the New York Attorney General ("NYAG") maintained this action was not yet ripe. Now, on the eve of appellate review, it argues the case is moot. The only constant in NYAG's position is its belief that no court should be permitted to consider the merits of ExxonMobil's claims. In NYAG's telling, its voluntary decision to close its investigation, while continuing to seek documents and testimony in a civil action on the same subject matter, deprives this Court of subject matter jurisdiction over ExxonMobil's appeal. If that were so, constitutional violations could be insulated from judicial review by the pretense of closing the challenged investigation and pursuing the same misconduct in a "new" investigation or, as here, in civil proceedings. The rule of law does not countenance such cynical devices, and judicial review is not so easily defeated.

NYAG's motion to dismiss conforms to its pattern of aggressively resisting judicial scrutiny of its official misconduct. Relying on its voluntary transition from civil investigation to civil litigation, NYAG recently attempted to disqualify the presiding judge in parallel state proceedings for a conflict it waived over two years earlier. That gambit was all the more breathtaking because NYAG had urged the District Court to decline jurisdiction over this action in deference to that same judge

who, according to NYAG, presided over "comprehensive" and "substantially advanced" state proceedings. (Decl. Ex. A.[1]) The state judge rejected NYAG's disqualification motion as "patent nonsense," "gamesmanship," and "judge shopping." (Decl. Exs. C & D.) NYAG's motion to dismiss before this Court should meet a similar fate.

The law requires as much. For at least four independent reasons, NYAG's purported voluntary cessation of its unlawful conduct does not provide valid grounds to dismiss ExxonMobil's appeal. First, NYAG has failed to satisfy the applicable standard for voluntary cessation because it has not, and cannot, show that it eradicated the effects of its misconduct or that there is no reasonable risk of recurrence. Second, this Court remains capable of providing meaningful relief notwithstanding NYAG's voluntary decision to close its investigation. Third, NYAG's unlawful conduct is capable of repetition while evading review. Fourth, even if NYAG's mootness argument is accepted, the proper remedy is vacatur of the District Court's ruling, not dismissal of this appeal. For all of these reasons, or any one of them, NYAG's motion should be denied.[2]

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[1] "Decl." refers to the declaration of Justin Anderson filed in support of this brief; "J.A." refers to the parties' joint appendix; "Br." refers to NYAG's brief in support of its motion to dismiss this appeal; "M.A." refers to the motion appendix attached to NYAG's motion; and "NY App. Br." refers to NYAG's principal appellate brief.

[2] NYAG's voluntary action and its motion to dismiss have no bearing on ExxonMobil's claims against the Massachusetts Attorney General.

BACKGROUND

This action challenges NYAG's abusive and discriminatory exercise of state power against ExxonMobil for its viewpoint on climate policy. In the First Amended Complaint, ExxonMobil sought declaratory and equitable relief, including an injunction barring enforcement of NYAG's first abusive subpoena. (J.A.-438.) In the proposed Second Amended Complaint, ExxonMobil expanded the requested injunctive relief to reach NYAG's entire investigation, which by then encompassed multiple subpoenas. (J.A.-1983–84.) As NYAG broadened the tools it used to violate ExxonMobil's rights, ExxonMobil sought corresponding relief.

Employing those tools, NYAG required ExxonMobil to produce over four million pages of documents and provide 18 witnesses for examinations collectively lasting nearly 200 hours. (Decl. ¶ 3.) The subject matter of the document productions and testimony ranged from the science of climate change to the resiliency of ExxonMobil's operations to its reporting of reserves and impairments. (J.A.-716–717, 1664–69.) For more than two years, Justice Barry Ostrager of the Commercial Division of the New York State Supreme Court presided over discovery disputes between ExxonMobil and NYAG. ExxonMobil urged Justice Ostrager to impose reasonable restrictions on NYAG's intrusive discovery demands. (J.A.-1802–05.) NYAG rejected Justice Ostrager's authority to do so, arguing that "this is not a civil discovery dispute where the court has the wide discretion" to manage

discovery. (J.A.-1811.) Justice Ostrager himself recognized that NYAG had used its investigative authority to obtain discovery that was "way beyond proportionality." (J.A.-1822.)

Using some of the information obtained in its investigation, NYAG filed a civil complaint against ExxonMobil on October 24, 2018. NYAG's complaint accuses ExxonMobil of fraud in connection with metrics ExxonMobil used to model the impact of future climate regulations and suggests ExxonMobil failed adequately to endorse sufficiently aggressive potential government regulations to address climate change. For instance, NYAG faults ExxonMobil for believing it is "highly unlikely" that governments will impose "additional regulations" to limit "increase[s] in global temperature to below two degrees Celsius above pre-industrial levels." (M.A.-84–86.) Such allegations—which purport to challenge ExxonMobil's allegedly faulty "assumptions" about climate policies—in reality merely attack ExxonMobil for failing to support NYAG's preferred climate policies. Notably, however, NYAG's complaint contains no allegations arising from the extensive document production pertaining to ExxonMobil's climate science research or the resiliency of its operations.

Immediately after filing its civil action, NYAG moved to disqualify Justice Ostrager. NYAG filed that motion even though it had previously waived any objection to Justice Ostrager's involvement in the case and notwithstanding its

representation to the District Court in this action that declining to exercise jurisdiction was appropriate because of Justice Ostrager's "comprehensive" and "substantially advanced" state proceedings. (Decl. Ex. A.) Justice Ostrager denied the motion as improper "judge shopping" in light of NYAG's previous waiver. (Decl. Exs. C & D.)

On November 21, 2018, NYAG and ExxonMobil entered a stipulation to dismiss with prejudice the subpoena-compliance proceedings. (M.A.-164.) According to the stipulation, NYAG "has completed its investigation of Exxon," NYAG's recently filed civil action was "based on its investigation" and "related" to the subpoena-compliance proceedings, and NYAG reserved the right to seek further discovery from ExxonMobil in the civil action. (M.A.-165.) Accordingly, NYAG reserved the right to continue seeking documents and testimony from ExxonMobil through the civil action that resulted from its investigation but not directly through the original investigation itself.

ARGUMENT

ExxonMobil's appeal should not be dismissed as moot. A case is "not moot" so long "as the parties have a concrete interest, however small, in the outcome of the litigation." *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012). It is the defendant's burden to show mootness, because "[t]o abandon the case" after it has been "litigated, often (as here) for years . . . may prove more

wasteful than frugal." *MHANY Mgmt.* v. *Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (citation omitted). NYAG has failed to carry that burden.

According to NYAG, its voluntary decision to close the investigation renders ExxonMobil's appeal moot and subject to dismissal, but NYAG is wrong on both counts. First, NYAG has failed to establish that its purported voluntary cessation of unlawful conduct has both eradicated the effects of its misconduct and will reasonably prevent the misconduct from recurring. Second, NYAG has failed to show that no meaningful, effective relief remains available in light of its voluntary cessation of the investigation. Third, NYAG's misconduct, even if temporarily halted, is capable of repetition while evading judicial review. Fourth, even if mootness could be established, the proper relief would be to vacate the District Court's ruling, not to dismiss the appeal.

I. NYAG's Purported Voluntary Cessation of Its Unlawful Conduct Does Not Make this Appeal Moot.

NYAG's argument is premised on the proposition that its voluntary decision to close its investigation can render ExxonMobil's claims moot. The law presumes exactly the opposite. It is a "'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 662 (1993) (citation omitted). To the contrary, "[t]he voluntary cessation of challenged conduct *does not*

ordinarily render a case moot" because a dismissal on this ground "would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox*, 567 U.S. at 307 (emphasis added).

To establish mootness based on its voluntary cessation of unlawful conduct, NYAG must establish that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *MHANY*, 819 F.3d at 603; *see also Irish Lesbian & Gay Org.* v. *Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998). This test "is a stringent one." *City of Mesquite* v. *Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982). NYAG has failed to satisfy either prong, much less both.

A. NYAG Has Failed to Show No Reasonable Expectation of Recurrence.

NYAG has not established that it is "*absolutely clear*" there is no reasonable expectation that the challenged conduct will recur. *MHANY*, 819 F.3d at 603. The conduct challenged here is NYAG's burdening ExxonMobil with document and deposition requests because of NYAG's disagreement with ExxonMobil about climate policy. Nothing in the record establishes that this conduct will not recur. NYAG relies almost exclusively on the stipulation terminating the subpoena-compliance proceedings, but in that stipulation, NYAG reserved its "right[] to seek . . . discovery" in its civil action (M.A.-165), and in its brief, NYAG has said it "will seek [discovery] in [its] civil-enforcement action" (Br. 6.). Indeed, on December

14, 2018, NYAG served on ExxonMobil fifty broad document requests in the civil action. (Decl. Ex. E.) NYAG also appears to believe the stipulation permits it to initiate new investigations of ExxonMobil's speech on climate change and perhaps even bring new claims or lawsuits on this subject matter. (Br. 1, 6 ("[T]he Attorney General has taken affirmative steps to close *this specific* investigation of Exxon." (emphasis added).)

In other words, NYAG has reserved the right to engage in precisely the same conduct challenged here. That is a far cry from the acts of voluntary cessation courts have ruled are sufficient to show that the challenged conduct will not recur. *See, e.g.*, *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 93, 98 (2013) (mootness established by "judicially enforceable," "unconditional," and "irrevocable" commitment "prohibit[ing] [the defendant] from filing suit," and "from making any claim *or* any demand" concerning "not just current or previous designs, but any colorable imitations").

NYAG has also denied the constitutional violations caused by its official misconduct. In its merits brief, NYAG maintained it is incapable of violating constitutional rights "by merely investigating," and that former Attorney General Eric Schneiderman's statements vilifying ExxonMobil's positions on climate policy merely "demonstrated a legitimate basis for th[e] investigations." (NY App. Br. 16, 28.) NYAG also defended its right to "follow[] leads proposed by people whose

motives may be questionable." (*Id.* 51.) Far from acknowledging its wrongdoing as unlawful conduct to be curtailed and not repeated, NYAG has defended it as appropriate.

Where, as here, a defendant "continues to defend the legality" of its conduct, an action is not moot because "it is not clear why [the defendant] would necessarily refrain" from engaging in the same conduct in the future. *Knox*, 567 U.S. at 307. "[G]iven its actions up to this point," NYAG's mere agreement to close the investigation, while reserving all rights to continue the challenged conduct, is insufficient to show "that it will not permit the challenged conduct to resume." *MHANY*, 819 F.3d at 605.

B. NYAG Has Failed to Show the Complete and Irrevocable Eradication of the Violation's Effects.

NYAG has also not established that its investigation's closure has irrevocably eradicated the effects of its prior misconduct. NYAG's prior misconduct had the effect of imposing costs and burdens on ExxonMobil for its viewpoint on climate policy. Nothing in the record suggests that those effects have been remedied. If anything, NYAG has broadened them through its civil action. By NYAG's own admission, the civil lawsuit draws on information ExxonMobil provided during the course of the investigation, and ExxonMobil has preserved the same constitutional challenges to that lawsuit as are presented here. (Br. 6, 11.) NYAG's civil lawsuit

is yet another form of abusive and discriminatory official action NYAG has taken against ExxonMobil because of its disagreement over policy.

Where, as here, the challenged conduct alters while an appeal is pending, it is irrelevant whether the "new" conduct "differs in certain respects from the old" conduct, or even harms plaintiff "to a lesser degree," so long as "[t]he gravamen" of complaint remains the same and "disadvantages [the plaintiff] in the same fundamental way." *Jacksonville*, 508 U.S. at 662. NYAG cannot "completely and irrevocably eradicate[] the effects of the alleged violation," simply by substituting one mechanism for inflicting harm with another. *See MHANY*, 819 F.3d at 603 (appeal not mooted even though "cause[]" of challenged conduct was "supersed[ed]" by intervening governmental action). It does not matter whether NYAG relies on subpoenas, investigations, or litigation to impose burdens and costs on ExxonMobil—if NYAG uses its state power to target ExxonMobil because of its viewpoint, NYAG violates the First Amendment.

II. NYAG's Purported Termination of Its Unlawful Conduct Does Not Preclude Meaningful Relief Here.

NYAG's purported closure of "this specific investigation" (Br. 6) does not render ExxonMobil's claims moot because the District Court can still grant effective relief. As the Supreme Court has held—and NYAG has acknowledged (Br. 10)—an action is not moot as long as "a court can fashion *some* form of meaningful relief." *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992); *Knox*, 567 U.S. at

307–08 ("A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party." (citation omitted)). Even the "availability of [a] *possible remedy* is sufficient to prevent [a] case from being moot." *Church of Scientology*, 506 U.S. at 13 (emphasis added).

ExxonMobil need not have specified particular relief in its complaint for it to be relevant here. When a party "could hardly be expected to request" relief based on events "that had not occurred when its complaint was filed," an "appeal is not moot simply because [the plaintiff] failed to ask for this type of relief" in its pleadings. *W. Dist. Council of Lumber Prod. & Indus. Workers* v. *La. Pac. Corp.*, 892 F.2d 1412, 1416 (9th Cir. 1989). Leave to amend should be freely granted under such circumstances. *See Am. Freedom Def. Initiative* v. *Metro. Transp. Auth.*, 815 F.3d 105, 111 (2d Cir. 2016). Amendment would be particularly appropriate here in light of the multiple forms of effective relief that are available.

A. An Injunction Barring the Use of Unlawfully Obtained Documents and Testimony Would Be Effective Relief.

As NYAG correctly recognizes, the conclusion of an investigation does not moot a challenge to a subpoena so long as the court can order the government to return or destroy copies of the documents improperly obtained. (Br. 10.) For example, in *Church of Scientology*, the Supreme Court held that a subpoena challenge was not mooted by compliance with the subpoena during the pendency of the appeal. 506 U.S. at 13. The Court explained that a court can "effectuate a partial

remedy" to end the ongoing violation to a party's Fourth Amendment privacy interests "by ordering the Government to destroy or return any and all copies [of records] it may have in its possession." *Id*. & n.6. A court may additionally prohibit the future use of subpoenaed documents or testimony. *See, e.g.*, *In re Grand Jury Investigation*, 445 F.3d 266, 272 (3d Cir. 2006).

Accordingly, a court could afford relief to ExxonMobil by barring NYAG from using the documents and testimony obtained through its unlawful investigation and requiring NYAG to destroy any such material in its possession.[3] NYAG responds that returning or destroying the fruits of its investigation "would not serve any purpose" because it could obtain the same documents again through civil discovery. (Br. 11.) Not so. Pursuant to its broad investigatory powers under the Martin Act, NYAG obtained documents and testimony that would be beyond the scope of civil discovery permitted in New York courts.

During its investigation, NYAG repeatedly touted its expansive investigative powers and contrasted them with the more narrow civil discovery rules. Before

[3] NYAG's out-of-circuit authorities are not to the contrary, as none involved a request for return or destruction of the documents. *See Office of Thrift Supervision* v. *Dobbs*, 931 F.2d 956, 958 (D.C. Cir. 1991) ("This case would present a different issue were Dobbs requesting the government to return documents he had provided, rather than merely to seal his testimony."); *Australia/Eastern U.S.A. Shipping Conference* v. *United States*, Nos. 82-1516, 82-1683, 1986 WL 1165605, at *1 (D.C. Cir. 1986) (dismissing appeal following "unanswered suggestion of mootness" in light of withdrawal of civil investigative demands); *Fed. Ins. Co.* v. *Maine Yankee Atomic Power Co.*, 311 F.3d 79, 82 (1st Cir. 2002) (dismissing appeal seeking "damages" for willful violation of stay prior to settlement).

Justice Ostrager, NYAG stated, "this is not a civil discovery dispute where the court has the wide discretion" to manage discovery; instead, during an investigation, "the choice of whether to ask this question or ask for these documents or examine this witness is entrusted to the good faith of our office." (J.A.-1811–12.) NYAG also asserted that to obtain documents in an investigation, it need meet only the "quite low" standard of showing that the documents are "merely . . . reasonably related to our investigation." (J.A.-1527–28.)

Such power does not extend to NYAG's pending civil action, where ordinary rules of civil discovery apply. *See* N.Y. G.B.L § 357. It is exceedingly unlikely that through civil discovery NYAG could again obtain the four million pages of documents ExxonMobil produced during the investigation. Under the New York Civil Practice Laws and Rules ("CPLR"), "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant." *Forman* v. *Henkin*, 30 N.Y.3d 656, 661 (2018) (citing CPLR 3101(a)).

Entire categories of the documents NYAG obtained from ExxonMobil during the investigation would not meet the standard of relevance. NYAG's complaint alleges principally that ExxonMobil's "proxy cost representations were materially false and misleading" to investors. (M.A.-8.) NYAG's allegations have nothing to do with ExxonMobil's historical research and communications on climate change

and its funding of alleged "climate denial organizations." Yet, NYAG demanded and received from ExxonMobil hundreds of thousands of documents on these matters. For example, ExxonMobil produced over 100,000 documents, totaling roughly one million pages, pertaining to the causes and impacts of climate change. (Decl. ¶ 4.) Those documents would not be subject to production under the CPLR in the civil action.

During its investigation, NYAG deposed 23 witnesses. (Decl. ¶ 2.) ExxonMobil provided 18 witness for testimony, 12 of whom testified over the course of two days and none of whom received the protections typically afforded deponents in civil actions. (Decl. ¶ 3.) In total, those 18 witnesses testified for nearly 200 hours. (Decl. ¶ 3.) NYAG could not obtain this same testimony in the civil action because New York Commercial Division Rules limit each party to 10 depositions and each deposition to seven hours. 22 NYCRR § 202.70, Rule 11-d(a). The rules also could preclude NYAG from deposing the same individuals it examined during the investigation. Under the CPLR, if NYAG notices a party for deposition, ExxonMobil may "substitute some other person if it wishes." CPLR 3106(d) (McKinney Commentaries); *see also Barnwell* v. *Emigrant Sav. Bank*, 916 N.Y.S.2d 506, 506–07 (App. Div. 2011) (reversing a trial court's motion to compel a deposition of defendants' chairman where defendants stated they would initially

produce someone else under CPLR 3106(d)). Finally, it is also not clear that NYAG could depose again retired ExxonMobil employees who reside outside New York.

NYAG also incorrectly argues that a court cannot order it to return or destroy documents and testimony because that "would be a retrospective remedy for a *past* purported violation of its rights" barred by the Eleventh Amendment. (Br. 14.) That argument fails on its face. An order directing NYAG to take action by returning or destroying materials and prohibiting NYAG from relying on such information is a prospective remedy for an ongoing harm, not an award of "retroactive monetary relief." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 102–03 (1984). As such, it is not barred by the Eleventh Amendment, which does not limit "a federal court's remedial power" to grant "prospective injunctive relief." *Edelman* v. *Jordan*, 415 U.S. 651, 667 (1974).

Indeed, courts have held that the Eleventh Amendment does not bar "a federal court from providing relief from governmental officials taking illegal possession of property in violation of federal law." *In re Deposit Ins. Agency*, 482 F.3d 612, 619 (2d Cir. 2007); *see also Fla. Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 698–70 (1982) (Eleventh Amendment does not bar a request for tangible property held by state officials). Because ExxonMobil seeks to end an ongoing injury, the Eleventh Amendment provides no bar to "a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of

federal law." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 73 (1996) (citation omitted).

NYAG's reliance on *Senate Permanent Subcommittee on Investigations* v. *Ferrer*, 856 F.3d 1080 (D.C. Cir. 2017), does not alter that conclusion. (Br. 14–15.) In *Ferrer*, the D.C. Circuit considered whether an action was mooted by the completion of a Senate subcommittee's investigation, despite a litigant's request for the return and destruction of documents produced to the subcommittee. *Id.* at 1085. That court concluded the action was moot and distinguished *Church of Scientology* by relying on the Speech and Debate Clause, which "affords Congress a privilege to use materials in its possession without judicial interference, even where unlawful acts facilitated their acquisition." *Id.* at 1086 (citation omitted). *Ferrer*'s holding, which expressly relied on the purpose underlying the Speech and Debate Clause, has no application to ExxonMobil's Section 1983 action. Unlike the Speech and Debate Clause, the "very purpose" of Section 1983, is to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *McDonald* v. *City of West Branch*, 466 U.S. 284, 290 (1984).

B. A Declaration that NYAG's Investigation Was Unlawful Would Be Effective Relief.

Declaratory relief would also provide an effective remedy. A declaratory judgment action "is not necessarily mooted" merely because "the defendant voluntarily ceases the conduct at issue." *Kidder, Peabody & Co.* v. *Maxus Energy*

Corp., 925 F.2d 556, 563 (2d Cir. 1991). Rather, a declaratory judgment action should be entertained (i) "when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue," or (ii) "when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* at 562 (citation omitted).

In *Kidder*, this Court considered whether a financial advisor's request for a declaration that it was not liable to a company under securities laws was moot when the company had made numerous representations to the court that it would not bring securities claims against its financial advisor. *Id.* at 560. This Court held that the request for declaratory relief was not moot because a "judicial declaration that [the company] is barred from asserting the [securities] claims would both settle the matter between these parties once and for all and dispel all uncertainty regarding the liability of [the financial advisor] for these claims." *Id.* at 563.

Here, just as in *Kidder*, a judicial declaration that NYAG's investigation of ExxonMobil violated its constitutional rights would settle "once and for all" whether NYAG has impermissibly used state power to violate ExxonMobil's First Amendment right to participate in public dialogue about climate change. In addition, because the fruits of NYAG's unlawful investigation are the basis of NYAG's civil action, NYAG is wrong to contend that no remaining "actual controversy" exists

between the parties. (Br. 16.) ExxonMobil continues to suffer an ongoing injury as a result of the civil action and has preserved constitutional challenges to that action.

NYAG again improperly invokes the Eleventh Amendment as a bar to such relief. (Br. 16–17.) It relies on *Green* v. *Mansour*, where the Supreme Court held a court could not issue a declaratory judgment regarding a past violation of federal law where there is no "continuing violation" and no "threat of state officials violating the [] law in the future." 474 U.S. 64, 73 (1985). But the Supreme Court further explained that a request for a declaratory judgment regarding past unlawful conduct would not be moot "if it might be offered in state-court proceedings as res judicata on the issue of liability." *Id.* Consistent with *Green*, a court could issue a declaratory judgment regarding NYAG's unlawful investigation for at least two reasons. First, ExxonMobil suffers a continuing violation of its federal rights and a threat of future violation of those rights because NYAG obtained documents and testimony from ExxonMobil through its improper investigation and NYAG seeks to use that information in its civil action.[4] Second, a declaration that NYAG's investigation was unlawful could have res judicata effect in the civil action, which is a mere

[4] ExxonMobil has also suffered collateral harm from NYAG's misconduct. For example, a securities class action against ExxonMobil relies heavily on the reckless and sensational claims NYAG has made against the company. *Ramirez* v. *Exxon Mobil Corp.*, No. 3:16-cv-30111-K (N.D. Tex. July 26, 2017), Dkt. No. 36.

outgrowth of the investigation, where ExxonMobil's constitutional claims have been preserved as defenses.

C. Other Equitable Remedies Would Be Effective Relief.

There are a variety of other remedies a court could impose to address NYAG's past and continuing violation of ExxonMobil's constitutional rights. For example, a court could impose a monitor to ensure that continued viewpoint bias does not influence NYAG's decision to use official power against ExxonMobil, including in its civil action against ExxonMobil. *See, e.g.*, *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1215–16 (2d Cir. 1987). Moreover, a court could order NYAG "to take steps to remedy [the conduct] for which it was found liable," including implementing procedures to ensure that political advocacy does not provide a basis for the discriminatory exercise of NYAG's official authority. *Id.* at 1184, 1237–39. To remedy NYAG's violation of ExxonMobil's due process rights, a court could disqualify from the civil action NYAG staff who were improperly influenced by viewpoint bias. *See, e.g.*, *United States* v. *Kahre*, 737 F.3d 554, 573–76 (9th Cir. 2013).

III. NYAG's Unlawful Conduct Is Capable of Repetition While Evading Review.

Even if the Court finds that NYAG has temporarily ceased engaging in the challenged conduct, this appeal should still be heard because the controversy is "capable of repetition, yet evading review." *Giuliani*, 143 F.3d at 647. This

exception to the mootness doctrine is satisfied where (1) the plaintiff has a "reasonable expectation" that it will be subject to the same challenged action again, and (2) the challenged conduct was "too short to be fully litigated" prior to its cessation. *Id*. at 647–48. Both elements of that exception are met here.

First, ExxonMobil has a "reasonable expectation" that the challenged conduct will recur in light of NYAG's continued defense of the legality of its conduct. Where, as here, a defendant continues to insist that it retains "authority" to engage in the challenged conduct, courts have "little difficulty concluding that there is a 'reasonable expectation'" of recurrence. *Honig* v. *Doe*, 484 U.S. 305, 318–20 (1988). Given NYAG's official position that "[n]o free-speech claim can arise from an objectively justified subpoena" (Decl. Ex. B), ExxonMobil has every reason to expect that NYAG will continue to manufacture pretextual rationalizations for its discriminatory abuse of law enforcement power.

Second, a challenged action is "too short" if it "could not be entirely litigated before again becoming moot, including prosecution of appeals as far as the Supreme Court." *Russman* v. *Bd. of Educ.*, 260 F.3d 114, 119 (2d Cir. 2001). Even where the challenged conduct persisted as long as three years, courts have deemed this element satisfied if the duration of the challenged action was insufficient to resolve the matter. *See, e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978) (18 months insufficient "to obtain complete judicial review"); *Johnson* v. *Rancho*

Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1019 (9th Cir. 2010) ("[T]hree years is too short for us or the Supreme Court to give the case full consideration.").

That is precisely what occurred here. Despite commencing this action in June 2016, and moving to join NYAG in October 2016, ExxonMobil was unable to fully litigate its claims before NYAG closed its investigation on the eve of appellate review. Even if ExxonMobil were to file a new complaint challenging NYAG's recently filed civil action, that complaint would not be fully adjudicated prior to the likely termination of the civil action, which is set for trial in October 2019. NYAG should not be permitted to avoid judicial review by merely oscillating between an improper investigation and an improper complaint.

IV. Dismissal of this Appeal Is Not Appropriate Even If NYAG Could Establish Mootness.

Even if NYAG were able to establish that this case is moot, the proper remedy is not to dismiss the appeal, but to vacate the District Court's decision insofar as it relates to NYAG and remand with instructions to dismiss the case without prejudice as moot.

It is well established that where "a civil case becomes moot on appeal," the Court must "vacate the district court judgment." *N.Y.C. Emps.' Ret. Sys.* v. *Dole Food Co.*, 969 F.2d 1430, 1435 (2d Cir. 1992). For instance, "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court" in order to "clear[] the path for future relitigation of the issues

between the parties." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 22-23 (1994); *see also Haley* v. *Pataki*, 60 F.3d 137, 141–42 (2d Cir. 1995) (vacating preliminary injunction following "Governor's voluntary compliance"). This disposition avoids "giving preclusive effect to a judgment never reviewed by an appellate court." *Dole Food*, 969 F.2d at 1435.

Vacatur would be particularly necessary here. ExxonMobil has preserved constitutional challenges to NYAG's civil action, and NYAG has stated ExxonMobil will have "a full opportunity" in state court to litigate those challenges. (Br. 6.) Absent vacatur of the District Court's decision, NYAG can be expected to argue that ExxonMobil's constitutional claims are precluded by that ruling. It should not be allowed to do so.

CONCLUSION

The motion to dismiss should be denied because the case is not moot and dismissal would be an improper remedy for mootness in any event.

Dated: December 17, 2018

Respectfully submitted by,

PAUL, WEISS, RIFKIND,
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). It contains 5,168 words, excluding the parts of this document exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f).

I further certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Date: December 17, 2018

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.

No. 18-1170

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

v.

MAURA TRACY HEALEY, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS, BARBARA D. UNDERWOOD, ACTING ATTORNEY GENERAL OF NEW YORK, IN HER OFFICIAL CAPACITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DECLARATION OF JUSTIN ANDERSON

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I, Justin Anderson, declare pursuant to 28 U.S.C. § 1746:

1. I am a lawyer with Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel for plaintiff Exxon Mobil Corporation ("ExxonMobil") in the above-captioned matter. I submit this Declaration in support of Plaintiff-Appellant's Opposition to New York Attorney General's Motion to Dismiss. I have personal knowledge of the facts stated herein, based on my experience or my consultation with others, or they are known to me in my capacity as counsel for ExxonMobil, and each of them is true and correct.

2. The Office of the New York Attorney General ("NYAG") deposed 23 witnesses over the course of its investigation.

3. During NYAG's investigation, ExxonMobil produced over four million pages of documents and provided 18 witnesses for testimony, 12 of whom testified over the course of two days. In total, the 18 witnesses testified for a total of nearly 200 hours.

4. During NYAG's investigation, ExxonMobil produced over 100,000 documents, totaling roughly one million pages, pertaining to the causes and impacts of climate change.

5. Attached as Exhibit A is a copy of a brief NYAG filed in the District Court on May 19, 2017, seeking dismissal of ExxonMobil's Section 1983 complaint in *Exxon Mobil Corp.* v. *Healey*, No. 1:17-cv-02301-VEC, Dkt. 220 (S.D.N.Y.).

6. Attached as Exhibit B is a copy of a brief NYAG filed in the District Court on December 21, 2017, seeking dismissal of ExxonMobil's Section 1983 complaint in *Exxon Mobil Corp.* v. *Healey*, No. 1:17-cv-02301-VEC, Dkt. 247 (S.D.N.Y.).

7. Attached as Exhibit C is a copy of the transcript of a hearing held on November 7, 2018, in *People of the State of New York* v. *Exxon Mobil Corp.*, No. 452044/2018, Dkt. 43 (Sup. Ct. N.Y. Cnty.).

8. Attached as Exhibit D is a copy of an order issued on December 4, 2018 by New York Supreme Court Justice Barry Ostrager in *People of the State of New York* v. *Exxon Mobil Corp.*, No. 452044/2018, Dkt. 48 (Sup. Ct. N.Y. Cnty.), denying NYAG's motion for disqualification

9. Attached as Exhibit E is a copy of NYAG's First Request For Production Of Documents To Defendant Exxon Mobil Corporation, dated December 14, 2018, in *People of the State of New York* v. *Exxon Mobil Corp.*, No. 452044/2018 (Sup. Ct. N.Y. Cnty.).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on December 17, 2018.

Justin Anderson

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
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.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE NEW YORK ATTORNEY GENERAL'S MOTION TO DISMISS THE ACTION BASED ON CERTAIN THRESHOLD DEFENSES

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PRELIMINARY STATEMENT

As this Court recognized, this action has broad implications for the ability of States to investigate potential violations of their own laws. If this action proceeds, even to discovery, federal judges regularly could be called upon to determine when a recipient of a document subpoena may learn details of, or even halt, the state investigation that generated the subpoena. The Court rightly noted that what plaintiff ExxonMobil Corp. (Exxon) is seeking here is "a heavy lift" because of the substantial "federalism concerns" at stake. Apr. 21, 2017 Hr'g Tr. at 10.

Exxon seeks to void a document subpoena issued a year and a half ago by the New York Office of the Attorney General (NYOAG) in pursuit of evidence of possible securities and consumer fraud by Exxon. Exxon requests this relief even though it purports to have *voluntarily* complied with its production obligations under the same subpoena. Moreover, as Exxon acknowledged to this Court, all of Exxon's objections to the NYOAG's investigative actions could have been fully raised in the parties' parallel New York state court subpoena enforcement proceeding, but never were. Indeed, rather than move to quash the NYOAG's subpoena in New York state court, Exxon filed this challenge over a thousand miles away in a Texas federal court, which transferred the case to the Southern District of New York.

Although many doctrines properly limit federal interference with sovereign state investigative actions and enforcement proceedings, this Court for now has requested briefing on two: ripeness and *Colorado River* abstention. Either warrants dismissal.

First, under settled law, Exxon cannot plausibly allege any ripe injury from the investigative subpoena on which this federal lawsuit is based. The NYOAG's subpoena is not self-executing, but rather requires a court order for penalties to attach to noncompliance. And Exxon purports to have willingly complied with its production obligations under the subpoena.

Second, in the alternative, this superfluous federal action should be dismissed under the abstention doctrine announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). That doctrine permits a federal court to dismiss a federal case in deference to a parallel state proceeding involving the same parties and based on the same underlying controversy. The circumstances here justify a *Colorado River* dismissal: Exxon has deliberately chosen to split its objections to subpoena compliance, asserting some in federal court and others in a New York state forum capable of entertaining them all. Further, while the New York proceeding has substantially progressed, this federal case has stalled at the threshold, not least because of Exxon's litigation choices—which include suing two State Attorneys General in an improper venue and trying to depose those Attorneys General about their ongoing investigations. This Court should not facilitate such disruption of a pending state investigation, especially where state procedures provide Exxon with a proper, complete, and efficient remedy for its objections.

BACKGROUND

A. The NYOAG Ongoing Investigation into the Truth of Exxon's Public Disclosures

1. The NYOAG's duty and ability to enforce state antifraud laws

The New York Attorney General is "the State's chief law enforcement officer." *People v. Grasso*, 54 A.D.3d 180, 204 (1st Dep't 2008) (quotation marks omitted). As head of the NYOAG, the Attorney General safeguards the public interest through investigations and enforcement actions to combat securities fraud, N.Y. Gen. Bus. Law (GBL) art. 23-A, fraud against consumers, N.Y. GBL § 349; and fraud or illegality in the conduct of business, N.Y. Exec. Law § 63(12).

In particular, New York's longstanding securities fraud law—the Martin Act—vests the NYOAG with broad authority to investigate suspected fraud in the offer, sale, or purchase of securities. *See* N.Y. GBL art. 23-A. The Martin Act empowers the NYOAG "to prevent fraudulent

securities practices by investigating and intervening at the first indication of possible securities fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011) (quotation marks omitted). State law likewise authorizes the NYOAG to investigate possible fraud perpetrated against consumers, *see, e.g.*, N.Y. GBL § 349, and suspected fraud in the conduct of business, *see* N.Y. Exec. Law § 63(12).

The NYOAG may subpoena documents and witnesses as part of any such investigation. *See* N.Y. GBL §§ 349(f), 352(2)–(3); N.Y. Exec. Law § 63(12). Yet these and other "statutes do not bestow judicial powers upon the Attorney-General." *Matter of Sigety v. Hynes*, 38 N.Y.2d 260, 267 (1975) (quotation marks omitted). Rather, state antifraud laws enable the NYOAG to seek judicial relief for substantive violations; and the Civil Practice Law and Rules (C.P.L.R.) authorize the NYOAG to "move in the supreme court to compel compliance" with an investigative subpoena, upon a showing "that the subpoena was authorized." C.P.L.R. 2308(b)(1). The subpoena's recipient may raise all available legal objections. *Id.* 404(a). Alternatively, the recipient can move to quash the subpoena in whole or part. *Id.* 2304. In any such proceeding, the NYOAG need not "disclose the details of [its] investigation" beyond those necessary to establish the NYOAG's "authority, the relevance of the items sought, and some factual basis for [the] investigation." *Am. Dental Coop., Inc. v. Att'y-Gen.*, 127 A.D.2d 274, 280 (1st Dep't 1987).

The NYOAG has a robust history of taking action against fraud that threatens the health, safety, and economic security of the people, businesses, and institutions of this State. In enforcing New York's securities and consumer fraud laws, the NYOAG has sought to ensure that companies are truthful in their disclosures to investors and consumers about a range of issues, including the impact of climate change on the companies' businesses. This does not mean that a company must

hew to any orthodoxy or "political" position regarding climate change. It does mean, however, that when a company—here a global energy company with shares traded on the New York Stock Exchange—elects to inform investors or consumers about the anticipated effect of climate change and related government policies on that company's business and operations, those statements must be accurate and not materially at odds with the company's internal information or conclusions.

In a recent example of such an enforcement action, after a thorough investigation, in November 2015 the NYOAG announced a successful settlement with Peabody Energy (formerly Peabody Coal). *See* Assurance of Discontinuance, No. 15-242, *available at* https://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf. Among other relief, the settlement barred Peabody from publicly stating that that the company could not predict the potential impact of climate regulations on its business when, in fact, Peabody *had* internally projected that such regulations would have a severe negative impact on coal demand. *Id.* at 2–3, 9. The NYOAG's investigation also found that Peabody had falsely portrayed an International Energy Agency report's findings about the likely effect of governmental action on future coal demand. *Id.* at 3–8.

Investors and consumers are entitled to rely on the assumption that a company's public positions align with its actual conclusions. Misrepresentation of such information is not a legitimate business strategy, nor is it commercial speech protected by the First Amendment. *See Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) (reiterating that "First Amendment does not shield fraud").

2. The NYOAG's investigative subpoenas for Exxon documents

On November 4, 2015, the NYOAG issued a subpoena to Exxon as part of an investigation into possible violations of New York's laws prohibiting securities, consumer, and business fraud (2015 Subpoena). *See* First Am. Compl. (Compl.) ¶ 20, ECF No. 100. The 2015 Subpoena

requested documents that would enable the NYOAG to assess whether Exxon had made false or misleading statements to investors and consumers about the impact of climate change and related policies on Exxon's business, including on Exxon's operations and financial reporting. App. 1–18 (copy of subpoena).[1]

The details of the NYOAG's ongoing investigation appropriately remain confidential at the pre-enforcement stage.[2] Nonetheless, a discussion of limited information already in the public record provides context. In the years preceding the NYOAG's subpoena, Exxon made numerous public statements regarding the company's understanding of the causes, course, and expected business and financial impact of climate change. For example, a 2014 report entitled *Energy and Carbon—Managing the Risks* assured investors that Exxon was "confident that none of [its] hydrocarbon reserves are now or will become 'stranded,'" i.e., not economically recoverable; the report also stated that Exxon calculates the likely costs of future global carbon regulations and "incorporate[s] them as a factor in [Exxon's] specific investment decisions."[3] Apparent contradictions between some of Exxon's public statements and internal company documents released in early 2015, along with apparent inconsistencies in Exxon's own public reporting, suggest that Exxon may not have accurately disclosed the company's own conclusions or practices on these important topics. In addition, some statements in the *Managing the Risks* report appear to be premised on unsupported assumptions, possibly making them misleading. The NYOAG issued

[1] "App." refers to the accompanying appendix of exhibits to the Declaration of Leslie B. Dubeck.

[2] In this ongoing investigation, the NYOAG has served additional subpoenas upon Exxon. For example, because of concern about spoliation of documents, and in conformance with proceedings before the New York court on that issue, the NYOAG has taken, pursuant to subpoena, testimony of witnesses who may possess information relevant to spoliation.

[3] *Energy and Carbon—Managing the Risks* at 1, 18, http://cdn.exxonmobil.com/~/media/global/files/energy-and-environment/report---energy-and-carbon---managing-the-risks.pdf.

the 2015 Subpoena to further investigate, among other things, these public revelations and the accuracy of Exxon's representations.

On August 19, 2016, the NYOAG issued a separate subpoena to PricewaterhouseCoopers LLP (PwC), Exxon's outside auditor (PwC Subpoena). For many years, PwC has audited the accuracy of Exxon's publicly disseminated financial statements. The PwC Subpoena sought documents relating to PwC's recent audits of Exxon, including material that might shed light on the accuracy of Exxon's public statements about the impact of climate change and related policies on Exxon's reserves, impairments, and capital expenditures. *See* App. 19–37 (copy of subpoena).

Exxon did not serve objections to the 2015 Subpoena or the PwC Subpoena and has never moved to quash either subpoena in a New York court. Rather, Exxon has produced—and has allowed PwC to produce—responsive documents. *See* Compl. ¶ 74. The responses have been protracted and deficient, forcing the NYOAG to seek judicial intervention to compel Exxon's and PwC's full compliance with their duties to assist the NYOAG's authorized investigation. *See infra* Part C. Exxon also has withheld a limited number of documents under a claim that disclosure would impinge on freedoms protected by the First Amendment. Compl. ¶¶ 11, 67.

Exxon's complaint ignores the fact that the NYOAG has broad discretion over whether to disclose information relating to a confidential Martin Act investigation, *see Matter of First Energy Leasing Corp. v. Att'y-Gen.*, 68 N.Y.2d 59, 64 (1986) (citing N.Y. GBL § 352(5)), and focuses on a March 29, 2016 press event among Attorneys General who had filed a brief that day in the U.S. Court of Appeals for the D.C. Circuit in support of EPA's Clean Power Plan. At this press event, Attorney General (AG) Eric T. Schneiderman publicly confirmed the ongoing investigation, while providing appropriate caveats reflecting a lack of any prejudgment about the investigation's yet-to-be-reached conclusions. For example, AG Schneiderman declined to predict the investigation's

outcome, explaining that the NYOAG would proceed "as carefully as possible" and was "not prejudging anything." ECF No. 168-1, at 18–19. AG Schneiderman also stated that Exxon "should welcome our investigation because, unlike journalists, we will get every document and we will be able to put them in context." *Id.* at 18. And he later stressed again that the NYOAG would not be "prejudging the evidence" obtained in the exercise of its "obligation to take a look at the underlying documentation." *Id.* at 20.

B. Exxon's Federal Lawsuit Against the Massachusetts Attorney General and Ensuing Discovery Demands of the NYOAG

The NYOAG is not alone in investigating the accuracy of Exxon's financial disclosures touching on climate-change issues. So too is the Securities and Exchange Commission, according to published reports.[4] And the Massachusetts Attorney General's Office in April 2016 issued a civil investigative demand (CID) to Exxon for company documents on this subject.

Although Exxon purports to have complied with the NYOAG's document subpoena, Exxon took a different approach toward Massachusetts. In July 2016, after receipt of the CID, Exxon filed a federal complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 and state law against Massachusetts AG Maura Healey, in her official capacity, in the Northern District of Texas. *See* ECF No. 1. Exxon also sought a preliminary injunction against the CID's enforcement. *See* ECF Nos. 8–9. That complaint has evolved into the federal action against the Attorneys General of Massachusetts and New York now before this Court.[5]

In sum and substance, Exxon claimed that Massachusetts' CID was impermissibly motivated, constituted an abuse of process under state law, and violated Exxon's rights under the

[4] *See, e.g.*, Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, Wall St. J., Sept. 20, 2016.

[5] The parties' status letter filed on April 12, 2017, summarizes the case's procedural history, only some of which will be repeated here. *See* ECF No. 190.

U.S. Constitution's First, Fourth, and Fourteenth Amendments and Commerce Clause. AG Healey moved to dismiss the case on grounds including lack of personal jurisdiction, lack of ripeness, improper venue, and *Younger* abstention—the last in deference to a parallel proceeding in Massachusetts Superior Court in which Exxon had also challenged the CID.

In September 2016, the district court (the Honorable James E. Kinkeade) held a hearing on Exxon's motion for a preliminary injunction. The court asked Exxon: "How the heck do I have jurisdiction?" ECF No. 68, at 87. The court also asked Exxon: "If you are agreeing to cooperate [with New York], why aren't you cooperating with [Massachusetts]?" *Id.* at 88. To the latter question, Exxon replied that it was "considering [its] options with respect to further compliance" with the 2015 Subpoena and that the "situation" was "very fluid." *Id.* at 88–89. Despite these cryptic representations, Exxon thereafter continued producing documents to the NYOAG and now purports to have completed production pursuant to the 2015 Subpoena, save any future efforts to recover any unpreserved material.

Rather than decide Massachusetts' motion on any of the other *three* dispositive threshold grounds, on October 13, 2016, the court ordered "jurisdictional discovery" to determine whether to dismiss the complaint "for lack of subject matter jurisdiction" due to *Younger* abstention, or whether the narrow bad-faith exception to that doctrine applied. ECF No. 73, at 3. The court apparently—and erroneously—assumed that it needed "to examine its subject matter jurisdiction" in this fashion, even "*sua sponte*," with discovery, before addressing any other defenses.[6] *Id.* at 2.

On the heels of this order, Exxon served on the NYOAG—not yet a party to the case—

[6] "*Younger* is not a jurisdictional bar based on Article III requirements, but instead a prudential limitation on the court's exercise of jurisdiction." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003); *see also Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 967 & n.6 (5th Cir. 1993) (declining to address *Younger* abstention where defense was forfeited).

nearly a hundred total interrogatories, requests for admissions, and document demands. *See* App. 38–84. Exxon also noticed the personal deposition of AG Schneiderman, plus those of the Chief and Deputy Chief of the NYOAG's Environmental Protection Bureau. App. 85–90. In November 2016, the district court ordered AG Healey to travel to Texas in December for a deposition and advised AG Schneiderman also to be available then for a deposition in Dallas. ECF No. 117. The court withdrew this order and stayed all discovery after Massachusetts petitioned the Fifth Circuit for a writ of mandamus. *See* ECF No. 151, 163.

C. The New York Supreme Court Proceeding to Compel Exxon's Fulfillment of its Production Obligations

Various deficiencies in Exxon's responses to the 2015 Subpoena and PwC Subpoena have forced the NYOAG to seek judicial relief to hasten full compliance. Issues have included a lengthy delay in searching and producing the files of Exxon's most senior management, up to and including its former Chairman and CEO, Rex W. Tillerson (some of which material Exxon, in the meantime, has failed to preserve), as well as the assertion of an alleged accountant-client "evidentiary privilege" under Texas law.

On October 14, 2016, the NYOAG moved by order to show cause in New York Supreme Court to enforce the PwC Subpoena in full and to dispute Exxon's privilege assertion. *See* App. 91–93. The proceeding was assigned to the Honorable Barry R. Ostrager. Exxon did not cross-move to quash the PwC Subpoena or in any way challenge the NYOAG's investigative authority in the New York forum. Rather, the next business day after the subpoena enforcement proceeding began, Exxon moved for leave to amend its federal complaint in Texas to add AG Schneiderman to the roster of defendants there. *See* ECF No. 74; *see also infra* Part D.

The New York court rejected Exxon's claim of accountant-client privilege, App. 163–167, Justice Ostrager observed that the Texas statute cited by Exxon, by its "plain meaning," expressly

permitted an accountant (here, PwC) to reveal client information when directed by a court order—including the New York court's own order enforcing the PwC Subpoena, App. 165. Justice Ostrager also held that, under "controlling authority," New York law applied and does not recognize any accountant-client privilege. App. 166. Exxon appealed to the Appellate Division, First Department, which heard oral argument on March 21, 2017. The appeal remains pending.

In November 2016, the NYOAG moved in New York state court to compel full compliance with the 2015 Subpoena. Specifically, the NYOAG sought an order (i) requiring Exxon to produce general accounting-related material; (ii) requiring Exxon to produce documents specifically concerning "the impact of climate change and related government action" on Exxon's financial reporting, including documents from "additional custodians" and those found with "targeted search terms"; and (iii) "implementing a schedule for the prompt production of all other responsive documents called for by the subpoena." App. 169. In opposition, Exxon conceded that "New York law protects subpoena recipients, like ExxonMobil, against the 'abuse of subpoena power' by providing for judicial review." App. 192. Exxon availed itself of that review by arguing that general accounting documents were beyond the 2015 Subpoena's scope (App. 190–193), an objection that the New York court accepted (App. 218). Regarding the climate-change-related documents, Exxon argued that its "constitutional claims" against producing such documents were "beside the point," thus carving up its objections and attempting to avoid the available state court review of its constitutional claims. App. 176–177. Upon the NYOAG's request for a schedule for production of all remaining documents, the New York court directed the parties to reach "agreement by December 1st" or else the court would "enter an order." App. 219–221.

The parties have appeared five times before the New York court and four of these hearings have addressed parameters for Exxon's production under the 2015 Subpoena. In early December

2016, Exxon represented that it was "fully complying with its obligations" and had "agreed to complete a reasonable production of documents responsive to" the 2015 Subpoena by January 31, 2017. App. 222–223. A few days later, the New York court so-ordered that agreement at a hearing. App. 254. In the ensuing month, Exxon and the NYOAG disagreed about the scope of the agreed upon searches, and the New York court ordered that Exxon perform the searches the NYOAG had requested absent other agreement of the parties. App. 275.

Exxon failed to meet the agreed-upon January 31 deadline, spawning further proceedings in state court. In the interim, the NYOAG's review uncovered that former Exxon CEO Rex W. Tillerson used a secondary email account (under the alias "Wayne Tracker"), from which Exxon had produced few, if any, documents. Only then did Exxon first confirm this account's existence—and divulge "that despite the company's intent to preserve the relevant emails in both of Mr. Tillerson's accounts," unspecified "technological processes did not automatically extend to the secondary email account."[7] App. 278.

At the next hearing, the New York court commented that the NYOAG "is entitled to documents relevant to its outstanding subpoena" and asked whether a March 31 production deadline would be "acceptable" to Exxon. App. 287, 308. Exxon said yes—and that it "stand[s] by that representation." App. 308, 310. The New York court thus ordered Exxon by April 10 to certify subpoena compliance, save any future efforts to recover any unpreserved material. App. 311, 315. Exxon then unilaterally extended the production deadline to April 30; when this Court

[7] In other words, no preservation hold was placed on "Wayne Tracker." Months earlier, Exxon had told the New York court that "ExxonMobil has engaged in no conduct, and the Attorney General has identified none, suggesting that any evidence is at risk of being destroyed or concealed." App. 188.

asked whether Exxon was "planning to make that deadline," Exxon's counsel responded, "Yes." Apr. 21, 2017 Hr'g Tr. at 3.

D. Exxon's First Amended Complaint, Adding the New York Attorney General as a Defendant

In comparison to the substantially advanced proceedings in New York Supreme Court to enforce the 2015 Subpoena and the PwC Subpoena, Exxon's federal lawsuit against the NYOAG has not progressed beyond the threshold stage.

Exxon sought leave to add AG Schneiderman as a defendant in this case on October 17, 2016 (the next business day after the NYOAG began proceedings against Exxon to enforce the PwC Subpoena), and filed its amended complaint on November 10, 2016. *See* ECF Nos. 74, 100. The claims in Exxon's amended complaint resemble those in the initial complaint (*see supra* at 7-8), except that Exxon now (1) extends these claims also to the 2015 Subpoena issued by the NYOAG (*e.g.*, Compl. ¶ 14); (2) alleges a vast conspiracy wherein AGs "Schneiderman and Healey have agreed with each other, and with others known and unknown, to deprive ExxonMobil of rights" (*id.* ¶ 106); and (3) claims that federal accounting standards for oil and gas reserves preempt the ongoing state fraud investigations in their entirety (*id.* ¶ 126).

As the First Amended Complaint alleges, Exxon had produced "over one million pages" in response to the NYOAG's subpoena from November 2015 through October 2016. *Id.* ¶ 74. And Exxon has continued to produce documents since filing that complaint. Yet Exxon alleges that "[t]he playing field changed on March 29, 2016, when Attorney General Schneiderman hosted a press conference in New York City." *Id.* ¶ 27. According to Exxon, that conference and the entry of a legal common-interest agreement among Attorneys General working together to conduct securities and consumer fraud investigations exposed these state investigations' "improper purpose," i.e., "to silence ExxonMobil's voice in the public debate regarding climate change."

Id. ¶ 92. Exxon seeks declaratory and injunctive relief solely and specifically as against the NYOAG's 2015 Subpoena and Massachusetts's CID. *See id.* ¶ 14.

By order issued on March 29, 2017, Judge Kinkeade transferred venue to this Court under 28 U.S.C. § 1406(a). At a status conference, this Court ordered that the litigation be staged "in a way that is respectful of federalism concerns." Apr. 21, 2017 Hr'g Tr. at 9–10. The Court has requested initial briefing, as applicable, on personal jurisdiction, ripeness, *Colorado River* abstention, and preclusion, with briefing on other defenses to follow, if necessary. *Id.* at 10–11.

ARGUMENT

I. Exxon Fails to Allege a Ripe Injury.

Exxon's complaint must be dismissed because the NYOAG's investigative subpoena creates no ripe Article III injury qualifying for federal court intervention, in light of the full and fair state judicial process for challenging the subpoena.

To satisfy standing requirements, a federal complaint must present a ripe case or controversy. *See, e.g.*, *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003). The plaintiff's alleged injury "may not be speculative or abstract, but must be distinct and definite." *Schulz v. IRS*, 395 F.3d 463, 464 (2d Cir.) (per curiam), *clarified on reh'g*, 413 F.3d 297 (2d Cir. 2005). The ripeness prerequisite serves the key goal of preventing federal courts from "becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues." *N.Y. Civ. Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (quotation marks omitted).

Under settled law, an affirmative federal lawsuit seeking to invalidate a non-self-executing administrative subpoena does not present a ripe Article III controversy. *See, e.g.*, *Schulz*, 395 F.3d at 464–65. Because no consequence may befall the recipient until the agency seeks to enforce the

demand in court, the parties are properly remitted to the orderly procedures available at law for enforcing and contesting such administrative action. *See id.* at 464; *see also, e.g.*, *Reisman v. Caplan*, 375 U.S. 440, 449–50 (1964). And there is "no reason why a state's non-self-executing subpoena should be ripe for federal review when a federal equivalent would not be." *Google v. Hood*, 822 F.3d 212, 226 (5th Cir. 2016). Respect for coequal state sovereigns should, "[i]f anything," make a federal court even "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." *Id.*

These principles bar a federal lawsuit by Exxon contesting the legality of the 2015 Subpoena—or any other investigative process issued by the NYOAG in pursuit of evidence of possible violations of state antifraud laws. The NYOAG's investigative subpoenas are not self-executing. *See Google*, 822 F.3d at 224 (defining "non-self-executing" subpoena as one for which "the issuing agency could not itself sanction non-compliance"). In conducting fraud investigations, the New York "Attorney General acts as an executive official performing an administrative duty." *Carlisle v. Bennett*, 268 N.Y. 212, 217 (1935). The GBL and Executive Law "do not bestow judicial powers upon the Attorney-General," who "'passes upon no question of civil violation or of criminal guilt.'" *Matter of Sigety*, 38 N.Y.2d at 267 (quoting *Dunham v. Ottinger*, 243 N.Y. 423, 433 (1926)); *see id.* ('"[W]hatever judicial decision follows is made by the courts.'" (quoting *Dunham*, 243 N.Y. at 433)).[8] Rather, to enforce an investigative subpoena,

[8] Nor is the 2015 Subpoena self-executing because the Martin Act makes failure to comply "without reasonable cause" a misdemeanor. N.Y. GBL § 352(4). A subpoena recipient may defend against such a charge by asserting "any ground generally regarded in law as a valid excuse for" noncompliance. *People v. D'Amato*, 12 A.D.2d 439, 443 (1st Dep't 1961). And "since disobedience to a subpoena under those statutes has no penal consequences until a judge has ordered its enforcement, there is no occasion for any preliminary resort to the courts." *Application of Colton*, 291 F.2d 487, 490 (2d Cir. 1961) (Friendly, J.); *accord Schulz*, 413 F.3d at 301. In any event, Exxon avers that it is complying with its production obligations in good faith. *E.g.*, Compl. ¶ 74.

the NYOAG must "move in the supreme court to compel compliance" and demonstrate "that the subpoena was authorized." C.P.L.R. 2308(b); *see also Dias v. Consol. Edison Co. of N.Y.*, 116 A.D.2d 453, 454 (1st Dep't 1986) ("[I]n regard to a nonjudicial subpoena it seems clear enough that no contempt punishment can be sought until compliance has been judicially ordered but not forthcoming." (quotation marks and alteration omitted)).

In addition, New York's "comprehensive procedure" for raising objections to NYOAG subpoenas affords Exxon a "full opportunity for judicial review" before facing any penalties for noncompliance. *See Reisman*, 375 U.S. at 443, 450. The respondent in a New York subpoena enforcement proceeding is free to raise "objection[s] in point of law." C.P.L.R. 404(a). As relevant here, the objections may be constitutional, *e.g.*, *State v. Mobil Oil Corp.*, 40 A.D.2d 369, 370 (1st Dep't), *aff'd*, 33 N.Y. 2d 627 (1973), or contend the subpoena is "an instrument of harassment," *Hynes v. Moskowitz*, 44 N.Y.2d 383, 393 (1978). New York law also permits a recipient to move (or cross-move) to quash an investigative subpoena or impose "[r]easonable conditions" on compliance. C.P.L.R. 2304. And "a motion to quash provides adequate protection to those who feel themselves aggrieved by the conduct of a public prosecutor." *Matter of McGinley v. Hynes*, 51 N.Y.2d 116, 126 n.3 (1980); *see Matter of Brunswick Hosp. Ctr. Inc. v. Hynes*, 52 N.Y.2d 333, 339 (1981) (describing motion to quash as "proper and exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority"); *Carlisle*, 268 N.Y. at 218; *Anonymous v. Axelrod*, 92 A.D.2d 789, 789 (1st Dep't 1983).

In short, Exxon "can adequately raise [any] constitutional challenges to the Attorney General's conduct in" a New York court: even a claim that "the Attorney General was engaged in a conspiracy to deprive" Exxon of rights "guaranteed by the First Amendment." *See Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991) (quotation marks omitted).

Exxon's refusal to invoke New York's comprehensive and available system for lodging constitutional objections to the NYOAG's subpoenas does not manufacture an injury permitting federal court intervention. The critical question is whether the "same challenges raised in the federal suit *could* be litigated in state court." *Google*, 822 F.3d at 226 (emphasis added); *see also Schulz*, 395 F.3d at 465 (asking whether recipient had a "reasonable opportunity to contest the government's request"). If so, litigants cannot bypass adequate state procedures and burden the federal courts with challenges to state subpoenas that are being enforced elsewhere or have not yet been enforced.[9] Nor does remitting a state subpoena recipient to state court impose an exhaustion requirement on seeking § 1983 relief, as Exxon has argued. *See* ECF No. 167, at 13. The issue is whether Exxon has suffered any ripe injury at all, and inability to access a federal forum does not suffice. "[P]rotection from unconstitutional action by state prosecutors does not require a *federal* civil rights action." *Barr v. Abrams*, 641 F. Supp. 547, 555 (S.D.N.Y. 1986) (Leval, J.) (emphasis added). A contrary conclusion would impugn "the competence of the state courts" and undermine "the dignity of states as co-equal sovereigns in our federal system." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003) (quotation marks omitted). In the words of the Fifth Circuit—where Exxon filed its unripe action—a federal court must "not presume" that a state court just down the street "would be insensitive to the First Amendment values that can be implicated by investigatory subpoenas." *Google*, 822 F.3d at 226 n.10.

Developments make plain that no ripe injury will *ever* arise from the 2015 Subpoena, which forms the basis of Exxon's federal case against the NYOAG. By its own account, Exxon has readily "agreed to complete a reasonable production of documents responsive to" the 2015

[9] As with *Younger* abstention, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority" otherwise. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987).

Subpoena. App. 223. As it told the New York court, Exxon "stand[s] by that representation" (App. 310), leading Justice Ostrager to memorialize the parties' "consensual" resolution "of everything that is presently in dispute" (App. 315). And Exxon has stood by that representation in response to this Court's questioning. Apr. 21, 2017 Hr'g Tr. at 3. Further, the New York court has consistently been available to the parties to resolve disputes as they have arisen. *See, e.g.*, App. 276 ("If you have any further disagreements, we will employ the same procedure: You will contact the court, you will exchange correspondence, and, if necessary, we will reconvene.").

Finally, insofar as Exxon contends that the NYOAG's investigation cannot produce a valid enforcement complaint, any such claim also is unripe. The amended complaint conjectures that the NYOAG's "theory of fraud" is "unsound" (Compl. ¶ 80) and declares that Exxon has engaged in no conduct "that could give rise to a statutory violation" (*id.* ¶ 65). "[A]t the subpoena enforcement stage," however, "courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers." *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996); *accord Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 212–13 (1946); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052–53 (2d Cir. 1973). In particular, Exxon's assertion that its "reporting of proved reserves" is not actionable (Compl. ¶ 94) creates no ripe controversy when "the precise character of possible violations cannot be known in advance," *In re McVane*, 44 F.3d 1127, 1136 (2d Cir. 1995) (quotation marks omitted); *see FTC v. Texaco, Inc.*, 555 F.2d 862, 873–74 (D.C. Cir. 1977) (en banc) (refusing to conclude "in the pre-complaint stage" that "only proved reserves" could be relevant to agency's inquiry); *Cuomo v. Dreamland Amusements, Inc.*, No. 08-cv-7100 & 08-cv-6321, 2008 WL 4369270, at *8 (S.D.N.Y. Sept. 22, 2008) (holding analogous preemption claim against NYOAG unripe where investigation potentially had "several bases"). In the words of Exxon's counsel: "There is no reality

at the moment that there's going to be a trial of anything. This at the moment is a mere investigation. They have the right to conduct the investigation, but that is what it is." App. 128.

II. The Court Should Abstain Under *Colorado River* from Entertaining This Duplicative and Vexatious Federal Suit.

In the alternative, this federal case should be dismissed in favor of the parallel New York proceeding under the abstention doctrine announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). "In 'exceptional circumstances,' and in deference to parallel state court proceedings, the court may decline to exercise jurisdiction over a properly presented federal claim in order to further the interests of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Am. Disposal Servs., Inc. v. O'Brien*, 839 F.2d 84, 87 (2d Cir. 1988) (quoting *Colorado River*, 424 U.S. at 817) (brackets omitted). Relevant criteria are set forth below. *See infra* Parts II.A–B.

The ongoing federal and state proceedings between the NYOAG and Exxon are parallel, meeting that condition of *Colorado River* abstention. "Suits are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 100 (2d Cir. 2012) (quotation marks omitted). Where that is so, the required parallelism exists even if the federal plaintiff raises "an alternative theory of recovery" that could have been "raised in state court." *Telesco v. Telesco Fuel & Masons' Materials, Inc.*, 765 F.2d 356, 362 (2d Cir. 1985).

Exxon admits that, "[i]n theory," it could have raised all of its objections to the NYOAG's subpoenas in the state proceeding. Apr. 21, 2017 Hr'g Tr. at 15. Instead, Exxon lodged privilege, scope, and burden objections in New York state court, while foisting constitutional and state law objections on a Texas federal court. *See supra* at 10–11. Where a federal plaintiff engages in "claim splitting" between federal and state court, as Exxon has done here, "*Colorado River* sets out the

appropriate standard" for deciding whether to dismiss the "duplicative federal claims." *Kanciper v. Suffolk County Soc'y for Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013). For the reasons that follow, Exxon's overlapping federal lawsuit should be dismissed.

A. The *Colorado River* factors warrant abstention.

A court looks to the following criteria when deciding whether to abstain under *Colorado River*: (1) avoidance of piecemeal litigation; (2) whether the cases involve property under one court's control; (3) the actions' order of filing and relative progress; (4) the forums' convenience; (5) whether federal or state law governs; and (6) whether the state proceeding is adequate to protect the federal plaintiff's rights. *See Niagara Mohawk*, 673 F.3d at 100–01; *De Cisneros v. Younger*, 871 F.2d 305, 307–08 (2d Cir. 1989). A party's vexatious behavior also factors into the decision. *See infra* Part II.B. These criteria are not a "mechanical checklist," but rather require "careful balancing" in a case's specific circumstances. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 210 (2d Cir. 1985). Careful examination of these factors warrants abstention here.

First, these parallel cases present a "danger of piecemeal litigation," a "paramount" consideration in any *Colorado River* analysis. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 19; *Arkwright-Boston Mfrs.*, 762 F.2d at 211. The New York court has directed Exxon to fulfill its production obligations on specified terms, and stated that "what I've ordered is what Exxon is doing." App. 275. From this Court, Exxon seeks a ruling that it need *not* have done those things, based on objections *not* raised in state court.[10] "The central problem with piecemeal adjudication

[10] Either Exxon has complied with the NYOAG's subpoena involuntarily, in response to a court order with preclusive effect, or Exxon has complied voluntarily, negating any claim of a ripe federal injury and fortifying the case for *Colorado River* abstention. Allowing Exxon to have it all ways—no preclusion, federal review, and no abstention—"would open the door to never-ending challenges to the validity of subpoenas, perhaps even years after initial issuance and compliance." *Matter of Brunswick Hosp.*, 52 N.Y.2d at 339.

in this case . . . is that a potential exists for inconsistent and mutually contradictory determinations." *De Cisneros*, 871 F.2d at 308 (quotation marks omitted). Such a "risk of inconsistent outcomes" may not be "preventable by principles of res judicata," *see Niagara Mohawk*, 673 F.3d at 101–02 (quotation marks omitted), given Exxon's assiduous efforts not "to place the conspiracy allegations, which [are] central to [its] section 1983 claims, directly in issue in the state court proceeding," *see Temple of Lost Sheep*, 930 F.2d at 184; *see also* Apr. 21, 2017 Hr'g Tr. at 12 (discussing "big charts" with which Exxon informed New York court of "what was going on in Texas," while assuring New York court that those proceedings were irrelevant). Also absent from this case is any mention of the PwC Subpoena, in response to which PwC's production will soon be complete—with or without allegedly privileged documents. Nor has Exxon joined PwC as a relief defendant in this lawsuit. The "potential for fragmented adjudication" of a single controversy when "parties are joined in the state-court action but not the federal action" supports *Colorado River* abstention. *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18, 30 (1st Cir. 2010); *see also De Cisneros*, 871 F.2d at 309 (stating that party resisting abstention could "hardly complain" about consequences of own failure to join additional defendant in parallel suit).

Second, although this case does not involve a res, the principle that favors abstention when a court has assumed jurisdiction over a res is present here. The New York court has assumed control over Exxon's production of documents. Hence, "concurrent federal proceedings are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property.'" *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 567 (1983) (quoting *Colorado River*, 424 U.S. at 819). Whereas Exxon has told the New York court that the NYOAG "ha[s] the right to conduct the investigation" (App. 128), and the New York court has stated that the NYOAG "is entitled to documents relevant to its outstanding subpoena" (App. 287),

Exxon would have this Court declare that the NYOAG is *not* "entitled" to these same documents—a great many of which the NYOAG already possesses because Exxon has produced them.

Third, the relative progress of the two cases favors abstention. *See, e.g.*, *De Cisneros*, 871 F.2d at 308 (advising that progress of parallel actions "must be carefully examined"). As described above (*see supra* at 9–12), the New York proceeding was filed first and since has progressed through five court appearances, multiple rounds of briefing and letter writing, the production of millions of pages of documents, and an appeal to the Appellate Division. *See Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1289 (7th Cir. 1988) (identifying state appeal as development supporting abstention). During that time, the state court has grown familiar with the parties' dispute and the NYOAG's investigation. By contrast, the federal case thus far has "concentrated on the propriety of bringing suit in federal court at all." *Am. Disposal Servs.*, 839 F.2d at 88; *see also Telesco*, 765 F.2d at 363 (upholding abstention where state proceedings were "extensive" and federal suit had "not moved beyond the initial pleadings").

Fourth, although the state court and *this* federal court are equally convenient geographically because their courthouses are adjacent, *see Niagara Mohawk*, 673 F.3d at 101, that is a recent development. Exxon sued in the Northern District of Texas—"the wrong division or district," 28 U.S.C. § 1406(a), and a dramatically inconvenient forum for the Attorneys General of New York and Massachusetts to defend their official conduct. The lack of a valid justification for Exxon's doing so, and the resources wasted there, strongly favor abstention. *See infra* Part II.B.

Fifth, although Exxon's § 1983 claims are federal, the claims necessarily turn in large part on state law. For example, Exxon's Fourth Amendment claim asks whether the NYOAG's subpoena "is within the authority of the agency" and "the information sought is reasonably relevant" to an authorized investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652

(1950). And Exxon's First Amendment claim includes the allegation that the NYOAG lacks "a good faith basis for conducting any investigation." Compl. ¶ 107; *see id.* ¶ 61 (alleging that New York state court standards for subpoena enforcement are not met). Such an allegation is essential because, in general, objectively justified law enforcement action will be upheld against a First Amendment challenge without "inquiry into the underlying motive." *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *see also Hartman v. Moore*, 547 U.S. 250, 256–63 (2006).

Sixth, subpoena enforcement procedures under state law offer full protection to Exxon, despite Exxon's election to divide its defenses between two different courts. *See supra* at 10–11. Proceeding "in this 'one from column A, one from column B' manner" invites *Colorado River* abstention. *Garcia v. Tamir*, No. 99-cv-0298, 1999 WL 587902, at *8 (S.D.N.Y. Aug. 4, 1999).

B. This lawsuit's vexatious nature compels abstention.

The U.S. Supreme Court and Second Circuit have "found 'considerable merit' in the idea 'that the vexatious or reactive nature of either the federal or the state litigation may influence'" the *Colorado River* calculus. *Telesco*, 765 F.2d at 363 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 17 n.20). So too have "numerous courts in this circuit." *Abe v. N.Y. Univ.*, No. 14-cv-9323, 2016 WL 1275661, at *9 (S.D.N.Y. Mar. 30, 2016). Given that the preceding factors already favor abstention, the vexatious nature of this action compels a *Colorado River* dismissal.

This lawsuit against AG Schneiderman followed directly on the heels of two events. The first was the district court's October 13, 2016 "jurisdictional discovery" order against AG Healey. *See* ECF No. 73. The second was the NYOAG's October 14, 2016 filing of a subpoena enforcement proceeding in New York Supreme Court against Exxon and PwC. Exxon claims that "Justice Ostrager had never been assigned to the case" and "no one had been in state court" when Exxon sought leave to amend its federal complaint. Apr. 21, 2017 Hr'g Tr. at 13. In fact, Exxon

filed its federal motion mere hours after specifically asking Justice Ostrager by letter to delay acting on the NYOAG's proposed order to show cause until Exxon had "an opportunity to be heard."[11] App. 94. Since then, Exxon has continued producing documents to the NYOAG as if the federal claims did not exist. Exxon's allegation that a March 2016 press conference "changed" the "playing field" (Compl. ¶ 27) and its assurance to Judge Kinkeade that the "situation" regarding compliance was "very fluid" (ECF No. 68, at 89) ring hollow in retrospect.

So far, this federal action's primary purpose has been to investigate the NYOAG's investigation—via attempted discovery that Exxon described to this Court as "very narrow" (Apr. 21, 2017 Hr'g Tr. at 31), but that Exxon promised to Justice Ostrager would be "fairly heated" because Exxon would "try to take depositions of the state AG's" (App. 150). If Exxon does not "want" the NYOAG's "investigative evidence," as this Court recently heard (Apr. 21, 2017 Hr'g Tr. at 32), then surely Exxon would not have noticed the deposition of the NYOAG Bureau Chief who signed and served the 2015 Subpoena (*see* App. 2, 87). Nor would Exxon have requested that the NYOAG substantiate potential enforcement theories and admit to having "abandoned" certain other theories. App. 71, 79. And Exxon certainly would not have sought a copy of all communications between the NYOAG and other State Attorney General offices "concerning any investigation of ExxonMobil related to climate change." App. 49.

"This suit could be described as a counterattack," designed "to put the prosecutor on the defensive and to obtain discovery of the prosecutor's investigation." *Barr*, 641 F. Supp. at 554, 555. Exxon attempted to assure Justice Ostrager that it sued in its "home state of Texas" because

[11] An order to show cause sets a briefing schedule and return date for the motion (which often involves an in-person hearing), affording the respondent ample opportunity to be heard before any relief is ordered. *See* C.P.L.R. 403(d); David D. Siegel, *N.Y. Prac.* § 248 (5th ed. Jan. 2017 update) ("An order to show cause is basically only a substitute for a notice of motion . . . [that] can shorten the notice time.").

that was "the one place" where it could "get multiple attorney generals." App. 147, 151. Judge Kinkeade correctly concluded otherwise. *See* 28 U.S.C. § 1406(a); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183 (1979) (holding that "convenience" of suing several out-of-state state officials in "one place" provides no basis for venue); *Cong. Talcott Corp. v. Roslin*, No. 95-cv-7698, 1996 WL 499337, at *6 (S.D.N.Y. Sept. 4, 1996) (abstaining under *Colorado River* where "sole reason offered" for instituting "doppelganger federal action" was "self-contradictory").

Moreover, the First Amendment claim at the heart of Exxon's complaint suffers from conspicuous pleading deficiencies. For one thing, the complaint does not specify the particular viewpoint or statements of Exxon (apart from possibly false or misleading statements) allegedly being targeted for suppression. *Cf.* Compl. ¶¶ 9, 63 (reciting Exxon's own public recognition of "significant" business risks posed by climate change). For another, the complaint nowhere alleges that these subpoenas have in any way curtailed Exxon's corporate speech about climate change.[12] *See Curley*, 268 F.3d at 73 ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech."). As this Court has observed, the mere prospect that an investigating authority's political views might diverge from those of an investigative subject "doesn't add up to a First Amendment problem." Apr. 21, 2017 Hr'g Tr. at 19; *see also Telemarketing Assocs.*, 538 U.S. at 612 (observing that "the First Amendment does not shield fraud"); *Hartman*, 547 U.S. at 252 (holding that claim of retaliatory prosecution under First Amendment requires proof that prosecution was objectively unjustified).

Colorado River abstention is especially appropriate where, as here, "the federal suit could be considered both vexatious and contrived," *Interstate Material Corp.*, 847 F.2d at 1289, and a

[12] Exxon has previously taken the position that its First Amendment claim "does not require proof that any speech has been curtailed." ECF No. 57, at 10.

"blatant attempt to manipulate the concurrent system of jurisdiction," *Garcia*, 1999 WL 587902, at *8; *accord Abe*, 2016 WL 1275661, at *9. Entertaining this lawsuit would encourage every future state or local subpoena recipient participating in state court enforcement proceedings to undermine those proceedings by countersuing in federal court and decrying the subpoena as the product of an unconstitutional conspiracy. Federal courts should "have no interest in encouraging this practice." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). Particularly given "the hostile history of the case," *Telesco*, 765 F.2d at 363, this Court should remit Exxon to a single, proper, and available state forum from this point onward.

CONCLUSION

The Court should dismiss Exxon's First Amended Complaint for the failure to allege a ripe injury or because it is a duplicative federal action that calls for abstention under *Colorado River*.

Dated: New York, New York
May 19, 2017

Respectfully submitted,

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Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
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.	:	

MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE NEW YORK ATTORNEY GENERAL'S MOTION TO DISMISS THE ACTION

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PRELIMINARY STATEMENT

In November 2015, the New York Office of the Attorney General (NYOAG) issued a document subpoena to Exxon Mobil Corp. (Exxon) requesting information to aid the NYOAG's investigation into whether certain of Exxon's public disclosures violated New York State's antifraud laws. This federal lawsuit by Exxon seeks to excuse further compliance with that now two-year-old subpoena. Exxon claims that the NYOAG's stated purpose of investigating fraud is pretext and that, *in reality*, the 2015 subpoena is the outgrowth of an illicit conspiracy among statewide elected officials and assorted private persons to suppress Exxon's corporate viewpoint on climate change, in violation of the First Amendment. That unsupported theory fails to meet Rule 12(b)(6)'s plausibility standard, and Exxon's other legal claims are similarly deficient.

In particular, neither Exxon's amended complaint nor its lengthy oral presentations to the Court have specified what protected corporate speech or viewpoint the NYOAG purportedly has targeted for suppression—let alone actually restricted—through the issuance of document requests. The answer is none. The NYOAG seeks to remedy only unprotected fraudulent misstatements, if any, made by Exxon to investors and consumers. To avoid scrutiny on that topic, Exxon attempts to manufacture a First Amendment objection exclusively from the New York Attorney General's alleged "political" motivation in issuing the subpoena. However, impugning an elected official's motives as "political" cannot immunize Exxon from a legitimate state law inquiry into the truth of the company's public disclosures.

Accordingly, this baseless federal counterattack on the NYOAG's subpoena should be dismissed with prejudice. As the Court summarized at the most recent hearing: If the State Attorneys General uncover no actionable misconduct, "then they don't have a case. If they are right, then Exxon should be held to account." Nov. 30, 2017 Hr'g Tr. at 34.

ARGUMENT

As the NYOAG's prior submissions demonstrate, Exxon's amended complaint does not allege a ripe injury and should otherwise be dismissed due to *Colorado River* abstention. Those defenses remain dispositive.[1] In addition, the amended complaint fails to state a viable claim for relief on the merits.

"To survive a motion to dismiss under [Rule] 12(b)(6), a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013). This standard vests the Court with "'the power to insist upon some specificity in pleading.'" *Kaufman v. Time Warner*, 836 F.3d 137, 141 (2d Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). And it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

As detailed below, the incurable deficiencies in Exxon's pleading independently warrant dismissal of this action. Those flaws also highlight the propriety of *Colorado River* abstention, by exposing Exxon's federal suit as no more than "a 'defensive tactical maneuver,' predicated on a contrived federal claim." *Carvel Corp. v. H.P. Hood, Inc.*, 1985 WL 3829, at *1 (S.D.N.Y. 1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 n.20 (1983)).

[1] The prior briefing describes the NYOAG's fraud investigation, along with the procedural histories of this action and the parallel subpoena enforcement proceeding in New York State court. ECF No. 220, at 2–13. As Exxon recently confirmed, the state court is "presiding over [Exxon's] compliance with the subpoena" that forms the subject of this federal case. Nov. 30, 2017 Hr'g Tr. at 40. The state proceeding is both ongoing and comprehensive, as reflected in the state court's express instruction to the parties to bring "any further disagreements" to that court for resolution. Appendix to the Declaration(s) of Leslie B. Dubeck (App.) 276, *see* ECF Nos. 221, 235. And Exxon has done just that, by moving in state court in May 2017 to quash a subsequent series of document and testimonial subpoenas issued by the NYOAG. App. 317–347.

A. Exxon's Allegations of a Politically Motivated Document Subpoena Do Not State a Plausible First Amendment Claim.

For the variety of independent reasons set forth below, Exxon's sparsely pleaded theory of a "politically motivated" document subpoena does not state a plausible § 1983 claim for violation of the First Amendment. *See* Am. Compl. (Compl.) at 1 & ¶ 99; *see also id.* ¶¶ 109–111.

1. Exxon's free-speech claim lacks the requisite specificity on multiple levels.

First and foremost, Exxon entirely fails to allege any legal or actual restriction on its *protected* speech resulting from the NYOAG's two-year-old subpoena. The First Amendment poses no obstacle to "fraud actions trained on representations made in individual cases." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003). Thus, liability for fraudulent misstatements "cannot be avoided by evoking the First Amendment." *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990). And fraud liability may arise where a company misstates internal conclusions or skews data, with the consequence of misleading investors or consumers about the "viability" of a "leading product." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46–47 (2011).

Waving away these settled principles, Exxon asserts that the NYOAG's investigation of potential fraud is "pretextual" (Compl. ¶ 89) and that the subpoena instead is meant to "intimidate one side of [the] public policy debate" regarding climate change (*id.* ¶ 12). Exxon's conclusory allegations in this regard do not plausibly state a free-speech claim.

As this Court correctly observed, a mere subpoena for corporate records "clearly" does not regulate speech. Nov. 30, 2017 Hr'g Tr. at 71. Document requests in a fraud investigation "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political associations." *SEC v. McGoff*, 647 F.2d 185, 187–88 (D.C. Cir. 1981). That fact readily distinguishes this subpoena dispute from Exxon's previously cited decisions concerning the

legality of direct regulations or restrictions on speech.[2] To be sure, *specific* information sought by an administrative subpoena may implicate protected rights, in which case "the agency must make some showing of need for the material sought." *FEC v. Larouche Campaign*, 817 F.2d 233, 234–35 (2d Cir. 1987); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454 (1958) (upholding organization's decision to produce "substantially all the data" requested, "except its membership lists"). Exxon has remained free to object to the disclosure of any such allegedly protected material; and Exxon admits that it has pursued this course, by withholding particular documents on putative First Amendment grounds. *See* Compl. ¶ 67.

Nor does the amended complaint allege that the NYOAG's document requests have hindered Exxon's corporate messaging in any way. To proceed under the First Amendment, a "plaintiff must allege something more than an abstract, subjective fear that his rights are chilled." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). Yet the complaint nowhere suggests that receipt of the subpoena has caused Exxon to self-censor its own protected speech out of an objective fear of imminent adverse consequences for "informing and educating the public, offering criticism, [or] providing a forum for discussion and debate." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (describing nature of corporate speech rights).

Instead, Exxon wrongly insists that chilling of speech is "not an element" of a First Amendment claim in this Circuit. Nov. 30, 2017 Hr'g Tr. at 19–20. That conclusion may be so where a plaintiff alleges "some other concrete harm"—*e.g.*, job loss, prison discipline, or denial of a government benefit—resulting from engaging in protected speech. *Dorsett v. County of*

[2] *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (denial of funding for student newsletter); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (ban on hate speech); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688–91 (2d Cir. 2013) (financial reporting requirements for nonprofit organizations); *see also Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003) (removal of billboard advertisements at public official's direction).

Nassau, 732 F.3d 157, 160 (2d Cir. 2013); *see Zherka v. Amicone*, 634 F.3d 642, 644 (2d Cir. 2011). Otherwise, a plaintiff asserting a free-speech violation must plead and prove "that his speech has been adversely affected by the government," *Dorsett*, 732 F.3d at 160—in other words, "that his right to free speech was actually violated," *Williams v. Town of Greenburgh*, 535 F.3d 71, 78 (2d Cir. 2008). In disavowing that duty, Exxon misreads Second Circuit law. *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) (affirming dismissal of First Amendment claim where plaintiff offered only "suggestion" that prosecutorial action chilled "his participation in the political process").

Besides failing to allege any legal or actual restriction on Exxon's speech, the amended complaint does not specify what *protected* speech the NYOAG supposedly is "targeting" for suppression with a document subpoena. Compl. ¶ 88. Indeed, the complaint touts Exxon's own "longstanding public recognition of the risks associated with climate change" (*id.* ¶ 9), explaining that, "[f]or more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business" (*id.* ¶ 63). Exxon's website tells a similar story: "The risk of climate change is clear and the risk warrants action. Increasing carbon emissions in the atmosphere are having a warming effect."[3] As Judge Kinkeade thus summarized when transferring the case: "Exxon has publicly acknowledged since 2006 the possible significant risks to society and ecosystems from rising greenhouse gas emissions." ECF No. 180, at 5. These public statements demonstrate that, far from being muzzled, Exxon regularly engages in corporate advocacy concerning climate change.

At the most recent hearing, Exxon's counsel tried to fill this pleading void by portraying disagreements over climate change as "subtle." Nov. 30, 2017 Hr'g Tr. at 29. Even a liberal reading

[3] ExxonMobil, Climate: ExxonMobil's perspectives on climate change, http://corporate. exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/our-position (visited Dec. 21, 2017).

of the complaint, however, does not reveal what protected speech the NYOAG allegedly had "the ulterior motive" of squelching with a document subpoena aimed at investigating potential fraud. Compl. ¶ 107. Rather, Exxon imputes to the NYOAG the "improper" purpose of seeking "to change the political calculus surrounding the debate about policy responses to climate change." *Id.* ¶ 88. Such a conclusory contention of wrongdoing cannot withstand Rule 12(b)(6) review. *See, e.g., Interpharm, Inc. v. Wells Fargo Bank, N.A.*, 655 F.3d 136, 143–44 (2d Cir. 2011) (affirming dismissal of claim that defendant improperly exercised legal rights to cause plaintiff duress). The complaint's lack of specificity is especially inappropriate given Exxon's accusation that statewide elected officials together have misused their "law enforcement resources" for unlawful ends. Compl. ¶ 7. A plaintiff asserting this type of claim must "specify in detail the factual basis necessary to enable [the defendants] intelligently to prepare their defense." *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977). Exxon's submission falls short.

Given these pleading failures, Exxon's contentions that the subpoena furthers a "political agenda" (Compl. ¶¶ 1, 34) and has a "political character" (*id.* ¶ 91) cannot sustain a First Amendment claim.[4] As this Court observed, characterizing the conduct of a statewide elected official as "political" says little of significance. Nov. 30, 2017 Hr'g Tr. at 31–32. Attorney General (AG) Schneiderman is the elected official entrusted with enforcing New York State's laws prohibiting securities, business, and consumer fraud. This duty entails the power, among others, of "investigating and intervening at the first indication of possible securities fraud on the public." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011) (quotation marks omitted). As the Court pointed out, an (unsupported) allegation of "political" purpose in

[4] This claim would fare no better in the Fifth Circuit, where a plaintiff must specifically point to some "outward sign" of protected expression to establish a First Amendment violation, which cannot turn on the defendant's "bad motive alone." *Steadman v. Texas Rangers*, 179 F.3d 360, 368 (5th Cir. 1999).

exercising that authority cannot "make an investigation into what Exxon did or said historically illegal." Nov. 30, 2017 Hr'g Tr. at 23. Nor may it override the default principle that a State "violates no constitutional rights by merely investigating." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986) (rejecting entity's assertion "that the mere exercise of jurisdiction over it by [a] state administrative body violate[d] its First Amendment rights"). In sum, a speculative claim of illicit purpose—which is all that Exxon presents here—cannot void facially neutral law enforcement action under the First Amendment. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 652 (1994).

2. No free-speech claim can arise from an objectively justified subpoena.

Exxon elsewhere has admitted that the NYOAG "ha[s] the right to conduct the investigation" called into question here. App. 128. That admission further undermines any First Amendment claim, as does Exxon's failure plausibly to allege to this Court that the NYOAG's fraud investigation lacks a sufficient factual basis.

To succeed on the claim that a prosecution was meant to deter protected speech, a § 1983 plaintiff must plead and prove that the prosecution was objectively unjustifiable. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012). This requirement honors the "presumption that a prosecutor has legitimate grounds for the action he takes," while avoiding the "difficulty of divining" the effect, if any, of other persons' motives "upon the prosecutor's mind." *Hartman*, 547 U.S. at 263. Exxon's claim of an impermissibly motivated investigative subpoena implicates these same concerns. *See infra* at 9–10 (addressing Exxon's allegations concerning third parties' motives); *see also McBeth v. Himes*, 598 F.3d 708, 720 (10th Cir. 2010) (applying *Hartman*'s "objective basis" rule in rejecting First Amendment challenge to administrative sanction following state investigation). And Exxon's

sweeping assertion that it has "made no statements" that even *potentially* "could give rise to fraud" liability (Compl. ¶ 63) is simply a legal conclusion that carries no weight on a motion to dismiss, *see Iqbal*, 556 U.S. at 679.

3. The amended complaint's factual allegations do not support a plausible claim of unlawful conspiracy.

Exxon's threadbare factual allegations do not plausibly show any free-speech violation whatsoever. Much less do they support a conclusion that the NYOAG's document subpoena is the "proximate result of [an] unlawful conspiracy" among public and private actors to violate Exxon's First Amendment rights. Compl. ¶¶ 42; *see id.* ¶¶ 105–108. Allegations on this subject take two forms, but neither supports the inference of conspiracy that Exxon wishes to draw.

First, as proof of a conspiracy, Exxon points to a "Climate Change Coalition Common Interest Agreement" signed between April and May 2016 by members of the respective offices of seventeen State Attorneys General. *Id.* ¶ 52. This agreement—executed half a year *after* the NYOAG subpoenaed Exxon—does not plausibly reflect anyone's "willingness to violate First Amendment rights." *See id.* Rather, it memorializes "the decision of a party, here the government, to partner with others in the conduct of litigation" and related matters, while preserving "its most basic civil discovery privileges." *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 277–78 (4th Cir. 2010). The agreement's first substantive paragraph recites the participating States' "common legal interests" pertaining to climate change, including "potentially taking legal actions to compel or defend federal measures to limit greenhouse gas emissions," and "potentially conducting investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change."[5] Compl. Ex. V at 1. The

[5] This Court on a Rule 12(b)(6) motion may consider the entire common-interest agreement, a document that is both "attached to the complaint" and "incorporated in the complaint by reference." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

written agreement also confirms that the parties' sharing of information "does not diminish in any way the privileged and confidential nature of such information." *Id.* Read as a whole, the document thus embodies "an agreement to pursue" one or more "common legal strateg[ies]." *See HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 72 n.12 (S.D.N.Y. 2009). Such an agreement is unremarkable, as state law enforcement officers regularly join forces when investigating and combatting unlawful activity affecting many States.[6] Exxon's labeling such an agreement "illicit" (Compl. ¶ 52) does not plausibly make it so.

Second, according to Exxon, any unlawful conspiracy extends also to nongovernmental "climate change activists" and private "plaintiffs' attorneys." *Id.* ¶ 4. The amended complaint alleges that these third parties have targeted Exxon "since at least 2007" (*id.* ¶ 44), meeting privately in late 2012 and early 2016 to discuss how to pressure Exxon and access its internal documents (*id.* ¶¶ 46–51). Two such individuals then attended a meeting at the NYOAG's offices in March 2016. *Id.* ¶¶ 40–45. From these events, Exxon weaves together an alleged conspiracy to have the NYOAG issue a pretextual document subpoena in November 2015. *Id.* ¶ 50. Such "conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983).

Moreover, since November 2015, the NYOAG separately has subpoenaed Exxon's independent auditor, PricewaterhouseCoopers; litigated Exxon's meritless claim of an accountant-client privilege to the New York Court of Appeals; engaged in a plethora of letter

[6] Multistate collaboration can take many forms, with staff from different Attorney General's offices sharing information, forming working groups, or coordinating investigation and litigation strategies. These joint efforts have greatly enhanced the ability of State Attorneys General to uncover and halt widespread practices that harm individuals and businesses across the nation. *See, e.g.*, Miss. Att'y Gen., Press Release, *AG Jim Hood Announces Settlement with Volkswagen Over Emissions Fraud* (June 28, 2016) (coalition of more than forty State Attorneys General); Nat'l Ass'n of Att'ys Gen., Press Release, *50 States Sign Mortgage Foreclosure Joint Statement* (Oct. 13, 2010).

writing and state court motion practice; and examined more than a dozen Exxon witnesses on topics ranging from the company's accounting for the costs of current and anticipated carbon regulation to its admitted destruction of clearly responsive and possibly critical material on that subject. Exxon has never argued that any of this subsequent, undisputed investigative conduct is a continuation of the alleged ruse begun with a subpoena issued in late 2015, at third parties' behest. That position "would distort basic tort concepts of proximate causation," applicable to § 1983 suits. *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999).

B. Exxon's Fourth Amendment Claim Is Waived and Otherwise Meritless.

There is no merit to Exxon's claim that the NYOAG's subpoena calls for an unreasonable search in violation of the Fourth Amendment. *See* Compl. ¶¶ 103, 112–114.

It is unclear to what extent a federal court even may adjudicate this claim. To enforce a *federal* administrative subpoena in the face of a Fourth Amendment objection, the issuing agency must show that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" to the investigation's purpose. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *accord In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995). As against a *state* subpoena that requires a court order for its enforcement, *see* C.P.L.R. 2308(b), such policy-laden determinations about the scope of state authority and the requests' relation to the public interest are properly made in the first instance by a state court, *cf. Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) ("The scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts.").[7]

[7] Exxon apparently agrees with this conclusion, having previously assured the New York State court that it was the appropriate forum "to adjudicate the scope of the subpoena" at issue (App. 177), including any questions "relating to burden and breadth" (App. 193).

Even if cognizable against a state subpoena, Exxon's federal Fourth Amendment claim would fail. Exxon's repeated claim that the subpoena amounts to a "fishing expedition" (*e.g.*, Compl. ¶ 91) is unavailing in light of the Supreme Court's recognition that agencies possess a broad "power of inquisition," which may be exercised simply for "assurance" of a subject's legal compliance, *Morton Salt*, 338 U.S. at 642. As the Second Circuit thus has noted, administrative subpoenas are evaluated under a reasonableness standard imposing "few constitutional limitations on" their enforcement. *In re McVane*, 44 F.3d at 1134. The NYOAG's subpoena meets this relaxed legal standard, and the complaint does not specifically allege otherwise. In any event, Exxon has taken the position that it has complied with the NYOAG's subpoena voluntarily, rather than under court compulsion. *See, e.g.*, ECF No. 228, at 34. That assurance converts these document demands into searches on consent, and "a search conducted on the basis of consent is not an unreasonable search" under the Fourth Amendment. *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995); *accord Handy v. City of New Rochelle*, 198 F. Supp. 3d 298, 310–11 (S.D.N.Y. 2016).

Exxon's allegations do not support a plausible claim that any lingering requests lack a "legitimate basis" or are "irrelevant" to the NYOAG's inquiry. Compl. ¶ 114. The NYOAG has the statutory authority to investigate possible fraud by a company that, like Exxon, does business in New York. *See* N.Y. Exec. Law § 63(12); N.Y. Gen. Bus. Law §§ 349, 352. As the amended complaint notes, the NYOAG's investigation here focuses on Exxon's public disclosures about climate change and its accounting for that phenomenon's predicted effects. *See, e.g.*, Compl. ¶¶ 74–76. The subpoena's requests relate directly to those topics (App. 8–9), thus falling comfortably within the NYOAG's "wide latitude" to determine relevancy, *see In re Gimbel*, 77 F.3d 593, 601 (2d Cir. 1996).

In addition, the allegedly "evolving justifications" for the investigation (Compl. ¶ 91) do not and cannot render any outstanding document requests constitutionally unreasonable. Any investigation by nature is fluid, with the goal to "discover and procure evidence, not to prove a pending charge or complaint." *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 201 (1946). As this Court remarked, if a purported shift in focus were enough to foreclose later inquiry, "then the world of investigations is going to come to a halt." Nov. 30, 2017 Hr'g Tr. at 31.

C. The Subpoena Does Not Violate the Commerce Clause.

Exxon fails to state a viable claim that the "dormant" aspect of the U.S. Constitution's Commerce Clause bars further enforcement of the NYOAG's subpoena. *See* Compl. ¶¶ 105–108. Congress's power "[t]o regulate Commerce . . . among the several states," U.S. Const. art. I, § 8, impliedly prevents States and localities from regulating in a way that "discriminate[s] against interstate commerce" and thus "operates as a form of economic protectionism." *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192, 194 (2d Cir. 2007). It is not apparent how a document subpoena could accomplish that task, and Exxon makes no such claim. Instead, Exxon offers two alternative bases for a Commerce Clause violation, neither of which passes legal muster.

First, Exxon alleges that the NYOAG's subpoena "effectively regulate[s] ExxonMobil's out-of-state speech." Compl. ¶ 120. As shown above, however, the subpoena does not regulate Exxon's speech at all. *See supra* at 3–6. Nor does the NYOAG seek to regulate economic transactions "tak[ing] place *wholly* outside of the State's borders." *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (emphasis added). Rather, the NYOAG is acting to protect consumers and investors from possible fraud in New York by a company whose shares are traded on the New York Stock Exchange. In particular, New York's consumer fraud law prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service

in this state." N.Y. Gen. Bus. Law § 349(a) (emphasis added). Similarly, New York's Martin Act prohibits misstatements in connection with "the issuance, exchange, purchase, sale, promotion, negotiation, [or] advertisement" of securities "*within or from this state*." *Id.* § 352(1) (emphasis added). If enforcement of these laws implicated the Commerce Clause, then that provision would silently invalidate (or severely constrain) "almost every state consumer protection law," *SPGGC*, 505 F.3d at 194; and impair the "legitimate state objective" of "protecting local investors," *Edgar*, 457 U.S. at 644. It does neither.

Second, in the alternative, Exxon avers that the subpoena has "the practical" and unconstitutional "effect of primarily burdening interstate commerce." Compl. ¶ 121. Yet the amended complaint does not specify the nature or extent of this purported burden on commerce. For example, Exxon does not suggest that the NYOAG's document subpoena serves to "impede the flow of interstate goods." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978). Rather, the complaint alleges that the subpoena requires Exxon "to collect, review, and produce" responsive documents. Compl. ¶ 103. Standing alone, a "burden of compliance" on the plaintiff from state regulation is "not a sufficient basis on which to establish a dormant Commerce Clause claim." *SPGGC*, 505 F.3d at 196. This conclusion reflects the broader principle that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp.*, 437 U.S. at 127–28. And as relevant here, the Clause provides no "exemption" from local measures "to prevent fraud or deception," which burden legitimate commerce, if at all, "only incidentally." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557–58 (1917) (upholding state securities regulations against Commerce Clause challenge).

D. Exxon Does Not Adequately Allege a Procedural Due Process Violation.

The amended complaint's allegations fail to support its conclusion that, as a matter of due process, the supposed "political bias" of AG Schneiderman "disqualifies" the NYOAG from seeking documentary proof of possible fraud by Exxon.[8] Compl. ¶ 92; *see id.* ¶¶ 115–117.

To begin with, Exxon offers no support for the idea that the NYOAG cannot be a "disinterested" prosecutor in any enforcement action. *See id.* ¶ 117. As the U.S. Supreme Court has recognized, prosecutors in civil enforcement matters "need not be entirely neutral" and may "be zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (quotation marks omitted). Due process merely restricts a prosecutor from having a "financial or personal interest" in any enforcement case. *Id.* at 250. The amended complaint does not plausibly allege that AG Schneiderman (or anyone within the NYOAG) has such a stake in the outcome of Exxon's subpoena compliance. To the contrary, the complaint describes AG Schneiderman as wanting to "'preserve our planet'" as far as possible by taking appropriate legal action within his authority. Compl. ¶ 28. Such a "sense of public responsibility" properly drives a prosecutor's decisions.[9] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

In addition, Exxon fails to state a plausible due process claim based on alleged "prejudgment" of the investigation's outcome. *See* Compl. ¶ 37. For this theory, Exxon quotes selected comments by AG Schneiderman at a March 29, 2016 press conference among State Attorneys General, who on that day attended a meeting at the NYOAG's offices. *See id.* ¶¶ 27–39. As the full transcript reveals, this press conference covered several topics, including a brief that

[8] Of note, this claim cannot be reconciled with Exxon's assertion that it has "no objection" to the NYOAG's interviewing numerous Exxon witnesses—notwithstanding any supposed political bias. App. 461.

[9] Similarly, there can be no plausible claim of a desire for financial or "institutional gain" to the NYOAG from collecting "civil penalties," *Marshall*, 446 U.S. at 250, when New York law requires that any recovery (apart from restitution for individuals) "be deposited in the state treasury," N.Y. State Fin. Law § 4(11)(a).

those States and others had filed in defense of EPA's Clean Power Plan. *See* Compl. Ex. B at 2, 4, 8, 11, 14. In addressing the Exxon investigation, AG Schneiderman emphasized that the NYOAG was "not prejudging anything" and that it was "too early to say what we're going to find." *Id.* at 17. AG Schneiderman then reiterated: "We are not prejudging the evidence. . . . [I]t is our obligation to take a look at the underlying documentation and to get at all the evidence, and we do that in the context of an investigation where we will not be talking about every document we uncover." *Id.* at 19.

As they related specifically to *Exxon*, statements made at the March 2016 press event thus signaled a *lack* of prejudgment. And a rule that prosecutors cannot investigate any subject with whom they are alleged to disagree politically, or about whom they have commented publicly, would allow many subjects to avoid scrutiny altogether. *Cf. United States v. Silver*, 103 F. Supp. 3d 370, 380 (S.D.N.Y. 2015) (noting that courts uniformly have "declined to dismiss" even pending "indictments due to improper extrajudicial statements made by government officials").

E. Exxon's Federal Preemption Defense Is Misplaced and Unripe.

Exxon mistakenly claims that a Securities and Exchange Commission (SEC) rule on accounting for proved oil and gas reserves (17 C.F.R. § 210.4-10) preempts enforcement of the NYOAG's document requests. *See* Compl. ¶¶ 77–79, 122–126. A federal preemption claim under § 1983 "amounts to a preemptive strike" on state regulation, meant to force litigation of the defense in federal rather than in state court.[10] *Fleet Bank, N.A. v. Burke*, 160 F.3d 883, 892 (2d Cir. 1998). As explained in the NYOAG's prior briefing, Exxon's strike is much *too* premature to be judicially remediable. *See* ECF No. 220, at 17–18; ECF No. 234, at 5.

[10] Nonetheless, Exxon has raised an identical preemption defense in the parallel state court proceeding. *See* App. 340 (accusing NYOAG of "improperly attempting to pursue matters preempted by the SEC").

At base, Exxon's preemption claim represents a merits defense to possible securities enforcement, which is misplaced against an investigative subpoena. It is well settled that an anticipated defense "against [an] administrative complaint" cannot "be accepted as a defense against [a] subpoena" for records. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). Such a subpoena "is an important tool in the preliminary information-gathering process designed to determine whether a violation exists, not to actually prosecute the violation." *Mollison v. United States*, 481 F.3d 119, 123 (2d Cir. 2007). Thus, an agency "must be free" to investigate "without undue interference or delay" caused by premature disputes over substantive regulatory authority. *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973); *accord United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996).

The NYOAG's subpoena calls solely for the production of documents. The subpoena does not attempt "to layer additional disclosure requirements" under the securities laws on anyone. Compl. ¶ 124. And even if the cited SEC regulation were to govern "reporting of proved reserves" (*id.* ¶ 94), that fact would not excuse Exxon's production obligations. A subpoena's requests are properly assessed against the agency's authority, the inquiry's general purpose, and the relationship between that purpose and the information sought. *See supra* at 10. They are not to be compared against "hypothetical" enforcement charges, particularly when an investigating agency has "no obligation to propound a narrowly focused theory of a possible future case." *FTC v. Texaco, Inc.*, 555 F.2d 862, 873–74 (D.C. Cir. 1977) (en banc) (rejecting subject's contention, as here, that "only proved reserves" could be relevant to agency's investigation).

To state a plausible claim for federal preemption of the *subpoena*, Exxon would need to make the distinct showing that the referenced SEC rule completely preempts the source of the

NYOAG's authority to issue any such requests.[11] Yet Exxon does not (and cannot) allege that any federal measure categorically strips the NYOAG of power to investigate possible violations of New York's securities fraud laws. To the contrary, the relevant federal law explicitly "retain[s]" every State's "jurisdiction under the laws of such State to investigate and bring enforcement actions" for securities fraud. 15 U.S.C. § 78bb(f)(4); *see also id.* § 77r(c)(1)(A) (confirming States' ability "to investigate and bring enforcement actions" to combat "fraud or deceit" relating to securities transactions). It is unclear how any agency regulation could override these clear Congressional mandates, and Exxon does not allege that the SEC's accounting rule does so here.

If and when the NYOAG files a fraud complaint, Exxon may raise preemption as a defense—meritorious or not—to any specific charge contained therein. To quote Exxon, however: "This at the moment is a mere investigation. [The NYOAG has] the right to conduct the investigation, but that is what it is." App. 128.

F. The Court Lacks Jurisdiction over Exxon's State Law Claims.

This Court lacks subject-matter jurisdiction over Exxon's state law claims for civil conspiracy and abuse of process. *See* Compl. ¶¶ 107–08, 128. The U.S. Constitution's Eleventh Amendment bars federal courts from hearing claims against state officials for declaratory or injunctive relief based on alleged violations of state law. *See Papasan v. Allain*, 478 U.S. 265, 277 (1986); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 93 (2d Cir. 1998); *Allen*, 100 F.3d at 260.

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[11] *Compare Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016) (state healthcare reporting requirement expressly preempted by ERISA), *and Cuomo v. Clearing House Ass'n LLC*, 557 U.S. 519, 536 (2009) (States' visitorial powers over national banks expressly preempted by National Bank Act), *with FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (FTC's power to investigate consumer fraud neither expressly nor impliedly preempted by federal commodities or securities laws).

CONCLUSION

The Court should dismiss Exxon's First Amended Complaint, with prejudice, for the failure to state a plausible claim for relief.

Dated: New York, NY
December 21, 2017

Respectfully submitted,

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Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM PART 61

----------X

PEOPLE OF THE STATE OF NEW YORK,
By BARBARA D. UNDERWOOD,
Attorney General of the State of New York,
Plaintiff,

- against -

EXXON MOBIL CORPORATION,
Defendant.

----------X

INDEX NO. 452044/18

60 Centre Street
New York, New York
November 7, 2018

BEFORE:

THE HON. BARRY R. OSTRAGER, J.S.C.

APPEARANCES:

FOR THE PLAINTIFF:

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BY: MANISHA M. SHETH, Executive Deputy AG
JONATHAN ZWEIG, Assistant AG
RITA BURGHARDT McDONOUGH, Assistant AG

FOR THE DEFENDANT:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
BY: THEODORE V. WELLS, JR., ESQ.
DANIEL J. TOAL, ESQ.

JACK L. MORELLI
Senior Court Reporter

PROCEEDINGS

THE COURT: All right, in the Exxon case. Let me preface my remarks this afternoon by noting that although there are seven justices of the Commercial Division, at this time and for a significant period of time prior to today, only five justices of the Commercial Division are in the wheel, including me. None of the other four justices to whom this case could conceivably be assigned have presided over seven hearings in proceedings that generated 434 docket entries. None of the other four justices read almost 500 pages of pretrial submissions or investigation related submissions that the parties made to the Court, which resulted in the Court supervising the production of a half million documents by Exxon Mobil to the New York AG.

So, against that background I have a very elegant solution to the New York Attorney General's problems. I am prepared to liquidate all holdings that I have in Exxon Mobil by the time the sun goes down tomorrow, assuming that the New York Attorney General has no further concerns about the Court's impartiality and no further concerns about the propriety of proceeding with this case in accordance with the general schedule that I outlined to the parties, with no objection whatsoever from the New York Attorney General's office last August.

I'll hear from the New York Attorney General's

office.

MS. SHETH: Your Honor, thank you for that proposed solution. Manisha Sheth, on behalf of the Office of the Attorney General. Let me begin by saying that we fully appreciate all the care, the time and the attention that Your Honor has been --

THE COURT: I don't want any reference to the historic efforts that I invested in this case. I've told you that I'm prepared to divest all of my holdings in Exxon Mobil by the close of business tomorrow. Even though under well-settled principles of law I have no obligation to do so.

So I'm simply asking you, yes or no, is that satisfactory to the New York Attorney General's office?

MS. SHETH: Your Honor, we appreciate --

THE COURT: Yes or no.

MS. SHETH: Your Honor, I don't believe it's a yes or no. I can't answer that yes or no at this time because I don't have enough --

THE COURT: What would prevent you from answering that question yes or no? You appeared before me seven times. You were told last August that we were going to trial in 2019. You caused me to make Exxon Mobil produce a half million documents. You caused me to read close to 500 pages of briefs, not to mention a number of

affidavits. You completely waived any conflict associated with my ownership of Exxon Mobil stock expressly the first day that you appeared before me and each time that you came back to appear before me.

MS. SHETH: Your Honor, respectfully, we don't believe that we have waived. The reason I can't answer your question yes or no is because the rules provide for two economic interests. The first is the interests in the party. Your Honor is telling us that you're prepared to sell Your Honor's interest in the party. That resolves one portion of the economic interest in the --

THE COURT: Yes, and there are myriad cases that say that the conflict that you waived, which isn't a conflict any more anyway, can be cured by divesture. So what's the second point that you have?

MS. SHETH: The second point is that there is a second economic interest and that is the interest of the Court in the subject matter in controversy. So although that Your Honor may disavow, may get rid of the Exxon stock, what we don't know if Your Honor held the stock during a time period when we would allege that the stock price was inflated. If that is the case, see, if Your Honor purchased the stock during the relevant time period of the alleged scheme which goes from 2000 to the present, that Your Honor still could be part of the class of

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individuals who would recover, who would benefit from any recovery. So that's the part where I don't --

THE COURT: This is patent nonsense and I'm not going to abide it.

Do you have anything to say, Mr. Wells?

MR. WELLS: No, Your Honor. But I assume if this is not too intrusive and to the extent the New York AG has some concern that in theory you might be part of some class even though you sell, and to the extent that you were part of some class, I assume that you would relinquish any --

THE COURT: I relinquish any interest I have whatsoever.

MR. WELLS: Future or past.

THE COURT: From this time the sun goes down tomorrow in perpetuity.

MR. WELLS: Or in the past. That seems to be what she's talking about.

THE COURT: Is that what you're talking about?

MS. SHETH: That is what I'm talking about.

THE COURT: If there is a class action and by virtue of my historic holdings I am entitled to collect 33 cents, I'm going to not collect the 33 cents. Is that satisfactory to the New York Attorney General?

MS. SHETH: Your Honor, the way that we read the

rule is, that Rule 100.3, E sub (1) sub (23) provides security of divestment is available where the judge has an economic interest in the party. But the rule is cited when the interest is in the subject matter of the controversy.

THE COURT: I have no interest in the subject matter of the controversy. We are dealing with a situation in which you expressly waived my presiding over the case even if I continue to hold the stock. Now, this is gamesmanship and judge shopping and I'm not going to abide it.

MS. SHETH: Your Honor, what I was going to finish saying was, that the rule is silent as to the economic interest in the subject matter of the proceeding.

That being said, if Your Honor is, we are willing to consider that. I think that we need to get --

THE COURT: I'm not interested in what you're willing to consider. Your motion to disqualify me is denied. Even though the Court has no obligation whatsoever to divest itself of Exxon Mobil shares because you waived my holding in Exxon Mobil, I'm going to divest myself in all interests in Exxon Mobil from tomorrow to the end of time. Understood?

MS. SHETH: We understand, Your Honor.

THE COURT: Then you can take this to the

PROCEEDINGS

Appellate Division. I would like to see an opinion finding that after your waive and after my voluntary undertaking to divest myself of shares I do not have to divest myself because you waived my holding this stock, you're still quibbling.

MS. SHETH: Your Honor, with respect, we are not quibbling. We don't submit, we don't agree that our waiver was a waiver as to all cases. There is a distinction between the case that was to be an enforcement proceeding and the instant plenary action; they are not the same.

THE COURT: I don't know what you're talking about and I don't think that anybody in this room does either. You waived my involvement in this case after I disclosed to you the first 30 seconds the case was before me.

MS. SHETH: I'm sorry, Your Honor. Go ahead.

THE COURT: And I presided over seven different hearings without objection. I told you in August that when the case ceases to be an enforcement proceeding and seeks to be a formal complaint I will give you a 2019 trial. That is what I'm going to do. You'll meet with my court attorney and you will work out a preliminary conference order. Your motion to disqualify me is denied and you have an appealable order. I will divest myself of

any Exxon Mobil shares that I beneficially own.

MS. SHETH: May we?

THE COURT: I'm sorry?

MS. SHETH: May we take a five minute recess so I can just consult with my colleagues?

THE COURT: Yes.

MS. SHETH: Thank you, Your Honor.

(Short recess taken)

MS. SHETH: Thank you for Your Honor's indulgence. I wanted to answer more directly Your Honor's question. Assuming that Your Honor divest Your Honor's shares in Exxon as well as any interest in the proceeding in this instant plenary filed action against Exxon, the AG's office is prepared to proceed with Your Honor as the trial court judge and we do not intend to seek an appeal of Your Honor's ruling.

THE COURT: All right, thank you.

MS. SHETH: Then in addition with regard to --

THE COURT: I'm sorry?

MS. SHETH: With regard to our proceeding in this action, we would propose that we contact the defense counsel, work out a schedule for the pretrial phase of this case and approach Your Honor at the appropriate time with the preliminary conference.

THE COURT: All right, that is satisfactory to

the Court. It is my intention for the benefit of the People of the State of New York, for the New York Attorney General to have a trial of this action in 2019.

Yes, Mr. Wells?

MR. WELLS: There is a reference just now to the pretrial conference. I know that we have a date on the calendar to appear before Your Honor on November 14th. Is that the date that you were referring to?

MS. SHETH: That would be fine with the AG.

MR. WELLS: I just want to know is November 14th still on? That date is fine.

THE COURT: If you can work things out with the Attorney General's office between now and the 14th, we'll proceed on the 14th. If you can't work things out between now and the 14th you'll let the Court know and we'll have a different date before the end of 2018.

MR. WELLS: Okay. I would suggest, Your Honor, that we hold the appearance for November 14th regardless of whether we're able to work out every point.

THE COURT: There is no point of you coming here on the 14th if you haven't agreed on how you wish to proceed. Unless there is an issue that requires guidance from the Court. But as I recall, the New York Attorney General's office has taken pretrial examinations of at least 19 custodians of documents. Has reviewed something

on the order of a half million documents in connection with its investigation into this matter. So I assume that the New York Attorney General is in a position to work with you on a meet and confer basis, a targeted schedule that will get this case ready for trial by the end of 2019.

MR. WELLS: Your Honor, first, Exxon Mobil wants to try the case in 2019 and we are delighted that you're going to move the case. What I'm concerned about and I think that the New York AG may have the same concerns in order to get the case trial ready for 2019, if we are not able to reach agreement on the meet and confer, I would prefer that we not start a whole motion schedule around that we can't agree to, but come here on November 14th.

THE COURT: All right, you'll come back here on November 14th. But between now and November 14th I'm requesting in the most polite and emphatic terms, that you use the week to accomplish something constructive.

MR. WELLS: I promise. I think that it will help both sides, I think that it will help both sides if we have a date where we have to come back here if we have not been able to get there. I promise we're going to work out to come back with an expedited trial schedule.

THE COURT: If anything comes back between now and then you demonstrated in the past you know how to

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reach chambers.

MR. WELLS: Yes, Your Honor. Thank you.

MS. SHETH: Thank you.

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

JACK L. MORELLI, CM, CSR

SO ORDERED

BARRY R. OSTRAGER, J.S.C.

- J L M -

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARRY R. OSTRAGER JSC
Justice

PART 61

Index Number : 452044/2018
PEOPLE OF THE STATE OF NEW
vs.
EXXON MOBIL CORPORATION
SEQUENCE NUMBER : 001
JUDICIAL DISQUALIFICATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by the Office of the Attorney General to disqualify Justice Barry R. Ostrager from presiding over this action is denied in accordance with the proceedings on the record on November 7, 2018 (see NYSCEF Doc. No. 43).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: December 3, 2018

Barry R. Ostrager, J.S.C.
BARRY R. OSTRAGER JSC

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, By BARBARA D. UNDERWOOD, Attorney General of the State of New York, Plaintiff, – against – EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT EXXON MOBIL CORPORATION

PLEASE TAKE NOTICE that pursuant to Article 31 of the New York Civil Practice Law and Rules, Plaintiff People of the State of New York, by Barbara D. Underwood, Attorney General of the State of New York ("OAG"), hereby makes this First Request of Defendant Exxon Mobil Corporation ("Exxon") for Production of the Documents described herein, in accordance with the Definitions and Instructions set forth below, on or before January 14, 2019, at the Office of the Attorney General of the State of New York, 28 Liberty Street, New York, New York 10005.

DEFINITIONS AND INSTRUCTIONS

A. General Definitions and Rules of Construction

1. "All" means each and every.

2. "Any" means any and all.

3. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Requests all information or Documents that might otherwise be construed to be outside of its scope.

4. "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.

5. "Complaint" shall mean the Complaint filed by Plaintiff in the above-captioned action on October 24, 2018.

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 maintained, possessed, or otherwise kept or controlled such Document.

8. "Date" means the specific numerical calendar date, month and year, where available; where the specific numerical calendar date is not available, the term date shall mean the most specific date available, whether the week, month, quarter, year, or otherwise.

9. "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 ("email"), instant messages, text messages, Blackberry or other wireless device messages, voicemail, calendars, date books, appointment books, diaries, books, papers, work papers, files, desk files, permanent files, temporary files, notes, confirmations, account 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, other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, notices, summaries, and written or electronic data. 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.

10. "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.

11. "Identify" or "Identity," as applied to any Document, means the provision in writing of information sufficiently particular to enable Plaintiff to request the Document's production through Document Request or otherwise, including but not limited to: (a) document control number or Bates number, if applicable, (b) Document type (letter, memorandum, etc.); (c) Document subject matter; (d) Document date; and (e) Document author(s), addressee(s) and recipient(s). In lieu of identifying a Document, Plaintiff 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.

12. "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.

13. "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), email address(es), mailing addresses and physical address(es), and (if applicable) employment history at Exxon.

14. "Including" means including but not limited to.

15. "OAG" or "Plaintiff" means the New York State Office of the Attorney General.

16. "Person" means any natural person, or any Entity.

17. "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

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 these Requests encompass all such relevant ones worldwide.

B. <u>Particular Definitions</u>

1. "You," "Your," or "Exxon" means Exxon Mobil Corporation, and Any present or former parents, subsidiaries (including but not limited to Imperial Oil Limited), affiliates, whether direct or indirect; and All directors, officers, partners, employees, agents, representatives, attorneys or other Persons associated with or acting on behalf of the

foregoing, or acting on behalf of Any predecessors or successors or Any affiliates of the foregoing.

2. "Answer" means Exxon's Answer filed on November 13, 2018.

3. "Beginning Bates" shall mean a Document bearing the specified Beginning Bates stamp, and shall include the entire Document.

4. "Cash Flow Spreadsheet" means Any cash flow or economic spreadsheet, model, or projection, and includes Any input files related to a Cash Flow Spreadsheet.

5. "Company Reserves Evaluation" means Exxon's process of estimating the recoverable portion of in-place volumes of hydrocarbons, and assigning those volumes to classes of reserves or resources, except where this process is based on price and cost methodologies prescribed by the U.S. Securities and Exchange Commission or another government agency.

6. "Corporate Plan" means Exxon's Corporate Plan Dataguide and Appendices, including All versions and revisions.

7. "Corporate Plan Prices" mean Exxon's Oil and Gas price bases and projections, including the Financial Case and Opportunity Case prices in Exxon's Corporate Plans.

8. "Greenhouse Gases" or "GHGs" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

9. "Impairment Evaluation" means Any evaluation, assessment, or testing of long-lived assets pursuant to the Financial Accounting Standards Board's Accounting Standards Codification 360 or Any equivalent accounting standard, including Any such evaluation, assessment, or testing of (i) whether an event or change in circumstances indicates that the carrying value of an asset or asset group may not be recoverable (i.e. whether an impairment trigger is present), (ii) whether the asset or asset group's carrying value is recoverable, and (iii) the magnitude of Any impairment loss.

10. "Intensity," as applied to emissions, means Any rate, percentage, amount, or formula, whether expressed in mathematical or narrative terms, used to determine the quantity of GHG emissions, actual or projected, to which a Proxy Cost or Legislated GHG Cost is applied.

11. "Interrogatories" mean the interrogatories served by OAG on Exxon on December 14, 2018.

12. "Investigation" means OAG's investigation of Exxon, commencing with OAG's November 4, 2015 Subpoena for Production of Documents by Exxon.

13. "Investment Decision" means Any decision to proceed or not to proceed with an Investment or Project at Any stage, gate, checkpoint, or other point defined by or encompassed within the ExxonMobil Capital Project Management System (EMCAPS),

as depicted on page 2 of Beginning Bates EMC 001352335.

14. "Legislated GHG Cost" means Any cost, price, fee, or tax on GHG emissions imposed by Any governmental or regulatory body at Any time.

15. "MTR Figure" means the figure on page 9 of Exxon's Energy and Carbon – Managing the Risks report entitled "Substantial Costs for CO2 Mitigation," and includes the material explaining that figure on pages 8 and 9 of that report.

16. "OECD" means the Organisation for Economic Co-operation and Development.

17. "Oil and Gas" shall include crude oil, synthetic oil, petroleum, bitumen, natural gas, natural gas liquids, and All derivative fuels and other products, and shall include "oil or gas."

18. "Project," "Asset," or "Investment" mean Any Oil and Gas project, asset, or investment, and Any associated reserves or resource base, in which Exxon has Any working interest.

19. "Proxy Cost" means Any implied, imputed, shadow, or proxy cost, price, fee or tax on GHG emissions, however denominated (whether as proxy costs, GHG costs, GHG planning bases, or otherwise), including Any such cost, price, fee, or tax applied as a proxy for potential policies that might be adopted by Any government or regulatory body over time to help stem GHG emissions.

20. "PwC" means PricewaterhouseCoopers LLP 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.

21. "Requests" mean these Requests for Production of Documents.

22. "Sensitivity Analysis" means Any analysis undertaken to determine the sensitivity of a Cash Flow Spreadsheet to variation in certain of its parameters or assumptions.

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 First Request for Production of Documents 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 First Request for Production of Documents, 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. This First Request for Production of Documents 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 (including but not limited to Imperial Oil Limited) or Persons from whom You could request Documents or information. If Documents or information responsive to a Request in this First Request for Production of Documents are in Your control, but not in Your possession or custody, You shall promptly Identify the Person with possession or custody.

3. Documents Already Produced. Requests for Documents do not include those previously produced by Exxon to OAG.

4. Shared Drives. Requests for custodial Documents include Documents in shared electronic or physical files, folders, and drives to which those Custodians have access.

5. 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.

6. No Documents Responsive to Requests. If there are no Documents responsive to any particular Request, You shall so state in writing, identifying the paragraph number(s) of the request concerned.

7. Format of Production. You shall produce Documents and information responsive to this First Request for Production of Documents in the format specified in Attachments 1 and 2.

8. 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. Likewise, all Documents that are physically attached to each other in Your files shall remain so attached in any production; or if such production is electronic, shall be accompanied by notation or information sufficient to indicate clearly such physical attachment.

9. Document Numbering. All Documents responsive to this Document Request, 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.

10. Privilege Placeholders. For each Document or portion of a 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.

11. Privilege. If You withhold or redact any Document responsive to these Requests on ground 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.

12. Continuing Obligation to Produce. This First Request for Production of Documents 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 to Plaintiff. Documents in the custody of individuals identified by Exxon in response to the Interrogatories, and Documents identified by witnesses in depositions or in other discovery, shall also be promptly produced to Plaintiff.

13. No Oral Modifications. No agreement purporting to modify, limit or otherwise vary this First Request for Production of Documents 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.

14. Time Period. Unless otherwise specified, the time period for Documents and Communications requested is from January 1, 2007 through the present.

PRODUCTION REQUESTS

1. All Documents not produced by Exxon during the Investigation Concerning Exxon's justification, if Any, for including in its Corporate Plan different Proxy Costs than those set forth in Exxon's public reports, as alleged in ¶¶ 121-146 of the Complaint, and Documents sufficient to show Exxon's basis to generally deny those allegations in its Answer.

2. Documents sufficient to show Exxon's process, if Any, for ensuring that employees throughout the company followed a "consistent corporate planning basis" with respect to Proxy Costs, as referenced in Exxon's *Energy and Climate* report at 20, and as referenced in ¶¶ 89, 182, 202, and 258-264 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

3. All Documents not produced by Exxon during the Investigation Concerning Exxon's decision to "align[]" the Proxy Costs in the Corporate Plan "with [Exxon's] long term Energy Outlook basis" in 2014, as referenced in Beginning Bates EMC 001608351 at 31, and as alleged in ¶ 132 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

4. All Documents not produced by Exxon during the Investigation Concerning Exxon's decision to include Proxy Costs for non-OECD countries in the Corporate Plan in 2016, as alleged in ¶¶ 139-140 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

5. Documents sufficient to show the effect or projected effect of Exxon's decision to "align[]" the Proxy Costs in the Corporate Plan "with [Exxon's] long term Energy Outlook basis" in 2014, as referenced in Beginning Bates EMC 001608351 at 31, and as alleged in ¶ 132 of the Complaint, on Exxon's cost projections in Investment Decisions, business planning, and

Company Reserves Evaluations, including but not limited to profitability study reviews and Any other analyses or reports, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

6. Documents sufficient to show the effect or projected effect of Exxon's decision to include Proxy Costs for non-OECD countries in the Corporate Plan in 2016, as alleged in ¶¶ 139-140 of the Complaint, on Exxon's cost projections in Investment Decisions, business planning, and Company Reserves Evaluations, including but not limited to profitability study reviews and Any other analyses or reports, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

7. Documents sufficient to show Any Sensitivity Analyses Concerning Proxy Costs that Exxon performed for cost projections in Investment Decisions, business planning, or Company Reserves Evaluations in non-OECD countries between 2010 and June 2016, inclusive, as referenced in ¶¶ 136-146 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

8. All Documents not produced by Exxon during the Investigation Concerning Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that alternative, with respect to cost projections in Investment Decisions, business planning, or Company Reserves Evaluations for Alberta oil sands Assets and Investments, as referenced in ¶¶ 152-169 and 206-216 of the Complaint, including but not limited to Documents in the custody of Millie Crawford, Daniel Hoy, Ken Gordon, Deidre Norman, Rick Luckasavitch, Christina Stobart, and All witnesses identified by Exxon in response to Interrogatories 6 and 14, and Documents sufficient to show Exxon's basis to generally deny those allegations in its Answer.

9. To the extent not produced by Exxon in response to Request No. 8 or during the Investigation, All Documents Concerning Exxon's decision to apply an "alternate methodology" in lieu of Proxy Costs, as referenced in Beginning Bates EMC 002875747, and as alleged in ¶¶ 11, 148, 153-154, 156, 159, and 162 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

10. To the extent not produced by Exxon in response to Requests Nos. 8 and 9 or during the Investigation, All Documents Concerning Exxon's "management decision" to apply "'legislated' GHG guidance . . . versus the global strat[egic] planning guidance," as referenced in Beginning Bates EMC 002879540, and as alleged in ¶ 163 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

11. Documents sufficient to show Exxon's basis, if Any, to project in 2015 and 2016 that Legislated GHG Costs in Alberta, and the Intensity of those costs, as referenced in ¶¶ 152-169 and 206-216 of the Complaint, will remain static, rather than increasing, through 2030, 2040, and beyond, and Documents sufficient to show Exxon's basis to generally deny those allegations in its Answer.

12. All Documents not produced by Exxon during the Investigation Concerning Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that alternative, with respect to cost projections in Investment Decisions, business planning, or Company Reserves Evaluations for: (a) refineries in OECD countries, as referenced in ¶¶ 178-182 of the Complaint, including but not limited to Documents in the custody of Susan Blevins, Robert Fountain, Richard Igercich, and All witnesses identified by Exxon in response to Interrogatory 10; and (b) other Assets or Investments in the United States, as referenced in ¶¶ 170-173 of the Complaint, including but not

limited to Documents in the custody of Susan Blevins; and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

13. All Documents not produced by Exxon in the Investigation Concerning Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that alternative, with respect to cost projections in Investment Decisions, business planning, or Company Reserves Evaluations for liquefied natural gas Assets or Investments, as referenced in ¶¶ 174-177 of the Complaint, including but not limited to Documents in the custody of Wesley Jacobs, Richard Schreiber, Kevin Stooksbury, and All witnesses identified by Exxon in response to Interrogatory 11, and Documents sufficient to show Exxon's basis to generally deny those allegations in its Answer.

14. All Documents not produced by Exxon during the Investigation, including but not limited to Cash Flow Spreadsheets, reflecting or Concerning Exxon's decision not to apply Proxy Costs to its cost projections, or to limit its application of such costs, with respect to the following full funding decisions described in Exxon's October 1, 2018 interrogatory responses to OAG: (a) Baytown chemical facility – $144M 3Q 2011, as referenced in ¶ 172 of the Complaint; (b) Beaumont chemical facility – $844M 4Q 2016, as referenced in ¶ 172 of the Complaint; (c) Point Thomson – $1,573M 4Q 2012, as referenced in ¶ 171 of the Complaint; and (d) Syncrude – $81M 2Q 2014, $87M 1Q 2012, and $498M 3Q 2012, as referenced in ¶ 166 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

15. All Documents not produced by Exxon during the Investigation Concerning the September 21, 2016 "GHG Workshop," as referenced in Beginning Bates EMC 003260413, and Any exercises or analyses prepared for, presented or discussed at, or resulting from, that GHG Workshop.

16. All Documents not produced by Exxon during the Investigation Concerning Any review or analysis of the effects or projected effects of applying Proxy Costs, not applying Proxy Costs, or applying an alternative to Proxy Costs on Exxon's costs, revenues, profitability, or Company Reserves Evaluation or Impairment Evaluation results, for Any Project or Asset, Any group of Projects or Assets, Any division or business line within Exxon, Any group of such divisions or business lines, or Exxon as a whole, including Any such review or analysis by Exxon or by Any third party, and including but not limited to Any such review or analysis of Exxon's Cash Flow Spreadsheets.

17. Documents sufficient to show whether and how Exxon applied an assumption that it would be able to pass through Proxy Costs to customers (*i.e.*, recover Proxy Costs in the market through increased prices), and Exxon's basis for applying such an assumption, as referenced in ¶¶ 183-190 and 245-247 of the Complaint, for purposes of cost projections in Investment Decisions, business planning, Company Reserves Evaluations, and Impairment Evaluations; including but not limited to Documents Concerning (a) Any analysis of the elasticity or inelasticity of Oil and Gas markets, and (b) Any analysis of the relative quantities of GHGs emitted by Exxon's Assets compared to competitors' Assets, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

18. Documents sufficient to show how Exxon's assumption that it would be able to pass through Proxy Costs to customers (*i.e.*, recover Proxy Costs in the market through increased prices) affected Exxon's Oil and Gas demand projections and Corporate Plan Prices, if at all, as referenced in ¶¶ 185-187 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

19. Documents sufficient to show Exxon's methodology, if Any, for applying Proxy

Costs to its cost projections for Company Reserves Evaluations, including but not limited to Any differences between Exxon's methodology (a) before 2016 and (b) in and after 2016, as alleged in ¶¶ 217-220 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

20. All Documents not produced by Exxon during the Investigation Concerning Exxon's decision to "go to 'full legislated' (legislated price of carbon, legislated intensity)" with respect to Company Reserves Evaluations, as referenced in Beginning Bates EMC 001850439, and as alleged in ¶ 209 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

21. All Documents not produced by Exxon during the Investigation Concerning Exxon's decision to "redo [its] calculations using legislated GHG taxes," as referenced in Beginning Bates EMC 003010467, and as alleged in ¶ 211 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

22. All Documents not produced by Exxon during the Investigation Concerning the "warnings" that using Exxon's "corporate forecast" for Proxy Costs for purposes of Exxon's Company Reserves Evaluations "would result in large write-downs," as referenced in Beginning Bates EMC 003010467, and as referenced in ¶ 211 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

23. All Documents not produced by Exxon during the Investigation Concerning Exxon's decision to apply "legislated price and intensity" to Company Reserves Evaluations at its Cold Lake oil sands Asset, as referenced in Beginning Bates EMC 001098246, and as alleged in ¶ 215 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

24. All Cash Flow Spreadsheets used for year-end Company Reserves Evaluations, as referenced in ¶¶ 191-224 of the Complaint, for the years 2013 through 2016, including but not limited to Cash Flow Spreadsheets for the 26 Projects and Assets that were the subject of OAG's June 19, 2018 Motion to Compel Compliance with Investigatory Subpoenas, as well as Exxon's liquefied natural gas Projects in Alaska and Cyprus, and Documents sufficient to show Exxon's basis to generally deny those allegations.

25. All of Dominic Genetti's Communications Concerning Company Reserves Evaluations, as referenced in Beginning Bates EMC 003030973 ("please contact Dominic Genetti"), and All Documents not produced by Exxon during the Investigation Concerning those Communications.

26. All Documents not produced by Exxon during the Investigation Concerning Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that alternative, in cost projections for Impairment Evaluations of Alberta oil sands Assets, as referenced in ¶ 244 of the Complaint, including but not limited to Any Cash Flow Spreadsheets used for purposes of such evaluations, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

27. Documents sufficient to show Exxon's justification, if Any, for assuming that the GHG emissions associated with its XTO natural gas Assets are likely to decline, and the costs that Exxon expects to be required to achieve those emissions reductions, as referenced in ¶ 248 of the Complaint, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

28. Documents sufficient to show Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that

alternative, for purposes of cost projections Concerning Exxon's decision to purchase XTO Energy, Inc., as referenced in ¶ 97 of the Complaint, including but not limited to Documents in the custody of Scott Nauman, and All witnesses identified by Exxon in response to Interrogatory 19, and Documents sufficient to show Exxon's basis to deny those allegations in its Answer.

29. All Documents not produced by Exxon during the Investigation Concerning Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that alternative, with respect to Exxon's analysis of future Oil and Gas demand (including but not limited to demand in the transportation, asphalt, and lubricants sectors) and Corporate Plan Prices, as referenced in ¶¶ 265-285 of the Complaint; or Concerning the actual or potential pass-through of Proxy Costs to customers (*i.e.*, the recovery of Proxy Costs in the market through increased prices) as referenced in ¶¶ 183-190 and 245-247 of the Complaint; including but not limited to Documents in the custody of Bargo Adibatla, Steve Briggs, Irene Chang, Dong Fu, Robert Gardner, Scott Nauman, and All witnesses identified by Exxon in response to Interrogatories 12, 20, 21, and 22; and Documents sufficient to show Exxon's basis to generally deny those allegations in its Answer.

30. Documents sufficient to show how Exxon incorporated assumptions as to future climate policies, including Any cost figures embedded in those assumptions, into its projections of Oil and Gas demand in the transportation, asphalt, and lubricants sectors, as referenced in ¶¶ 270-275 of the Complaint, and Documents sufficient to show Exxon's basis to generally deny those allegations in its Answer.

31. Documents sufficient to show the methodology, if Any, by which Exxon incorporated its Oil and Gas demand projections into its Corporate Plan Prices, as referenced in ¶¶ 276-285 of the Complaint, and Documents sufficient to show Exxon's basis to deny those

allegations in its Answer.

32. Documents sufficient to show (a) the rationale for Exxon's original development of Proxy Costs and of Any subsequent expansion of Exxon's application of Proxy Costs, and (b) Exxon's methodology for setting and revising the dollar value of its Proxy Costs.

33. All Documents not produced by Exxon during the Investigation Concerning the preparation and calculation of the MTR Figure, which is reproduced in ¶ 293 of the Complaint.

34. All Communications not produced by Exxon during the Investigation between Exxon and Any third party, including but not limited to equity and debt investors, credit rating agencies, public relations firms, opposition research firms, accounting firms including but not limited to PwC and Ernst & Young LLP, equity research analysts, proxy advisory services, and consultants, Concerning (a) Proxy Costs or the application of Any alternative to Proxy Costs, (b) the likelihood of a low carbon scenario (as discussed in Exxon's *Energy and Carbon—Managing the Risks* report and referenced in ¶¶ 286-308 of the Complaint), (c) the Investigation, or (d) the allegations in the Complaint.

35. All Documents not produced by Exxon during the Investigation Concerning the Communications referenced in Request No. 34, including but not limited to Documents in the custody of employees in Exxon's Investor Relations group.

36. All Documents Concerning Exxon's application of Proxy Costs, decision not to apply Proxy Costs, or decision to apply an alternative to Proxy Costs and application of that alternative, in the custody of Kirsten Bannister, William Colton, Richard DuCharme, Brant Edwards, Norma Fisk, Dominic Genetti, Stephen Littleton, Robert Luettgen, Guy Powell, David Rosenthal, Mark Shores, Peter Trelenberg, Theodore (T.J.) Wojnar, Jeff Woodbury, or Darren Woods, created between January 1, 2017, and the date of the Complaint.

37. Documents sufficient to show Exxon's GHG emissions forecasts for its Projects and Assets through 2040 (and later if available), including but not limited to GHG emissions forecasts for the 26 Projects and Assets that were the subject of OAG's June 19, 2018 Motion to Compel Compliance with Investigatory Subpoenas, as well as Exxon's liquefied natural gas Projects in Alaska and Cyprus.

38. All submissions by Exxon to Any governmental or regulatory body containing GHG emissions forecasts for Any of its Projects or Assets, including but not limited to Any such submissions to Any European Union agencies, and including but not limited to Any such submissions to the Alberta Energy Regulator (including but not limited to Operator's Forecast Reports, CARE Cost Mining Workbooks, CARE Subsurface Workbooks, and Economic Evaluation Templates).

39. All Documents not produced by Exxon during the Investigation that were produced or otherwise provided by Exxon to the plaintiffs in *Ramirez v. Exxon Mobil Corporation et al.*, No. 3:16-CV-3111-K (N.D. Tex.) ("*Ramirez v. Exxon*"), and transcripts of All testimony in *Ramirez v. Exxon*.

40. All Documents not produced by Exxon during the Investigation that were produced or otherwise provided by Exxon to Any regulatory or investigatory body, and transcripts of All testimony before Any such body, Concerning (a) Proxy Costs or the application of Any alternative to Proxy Costs, (b) the likelihood of a low carbon scenario (as discussed in Exxon's *Energy and Carbon—Managing the Risks* report and referenced in ¶¶ 286-308 of the Complaint), (c) the Investigation, or (d) the allegations in the Complaint.

41. Documents sufficient to Identify All investors who hold shares of Exxon common stock, or who held shares of Exxon common stock at Any time between January 1, 2007 and the

present, including the names and addresses of All investors; the number, class and series of shares held by each; the dates when they respectively became shareholders; and the dates when they respectively sold Any shares.

42. Documents sufficient to Identify All investors who hold Exxon bonds, or who held Exxon bonds at Any time between January 1, 2007 and the present, including the names and addresses of All bondholders; the number, class and series of bonds held by each; the dates when they respectively became bondholders; and the dates when they respectively sold Any bonds.

43. All Documents not produced by Exxon during the Investigation Concerning Proxy Costs or the application of Any alternative to Proxy Costs, or the likelihood of a low carbon scenario (as discussed in Exxon's *Energy and Carbon—Managing the Risks* report and referenced in ¶¶ 286-308 of the Complaint), in the custody of Any member of Exxon's Management Committee, identified using the same search methodology that Exxon used during the Investigation for producing Documents from non-Management Committee Custodians.

44. Documents sufficient to show the yearly compensation and bonuses, including Any performance-based compensation, of each of the members of Exxon's Management Committee, as well as David Rosenthal and Jeff Woodbury.

45. All Documents not produced by Exxon during the Investigation Concerning Proxy Costs or the application of Any alternative to Proxy Costs, or the likelihood of a low carbon scenario (as discussed in Exxon's *Energy and Carbon—Managing the Risks* report and referenced in ¶¶ 286-308 of the Complaint), presented to, or generated by, Exxon's Board of Directors or Any member thereof, or Exxon's Management Committee or Any member thereof.

46. All Employee Assessment & Development Summaries (EADs) and job handover memoranda for (a) the individuals listed in Exxon's Interrogatory responses, and (b) All Investor

Relations and other employees that communicated with the public, Exxon equity or debt investors, or other third parties, Concerning Proxy Costs or the likelihood of a low carbon scenario (as discussed in Exxon's *Energy and Carbon—Managing the Risks* report and referenced in ¶¶ 286-308 of the Complaint).

47. All of Exxon's Document retention policies Concerning the Investigation and this litigation, and Documents sufficient to show that Exxon followed and supervised compliance with those policies.

48. Documents sufficient to Identify All Documents or Communications within the scope of these requests that were disposed of, destroyed, or otherwise not properly retained.

49. All Documents that were withheld or redacted on privilege grounds in the course of the Investigation that do not meet the legally defined scope of Any relevant privilege.

50. All Documents establishing or Concerning the Separate Defenses that Exxon has asserted in its Answer, including but not limited to Exxon's:

a. Tenth Defense ("The claims purportedly asserted by Plaintiff are barred, in whole or in part, because some or all of the information that Plaintiff alleges was misrepresented or omitted was publicly available.");

b. Sixteenth Defense ("The claims purportedly asserted by Plaintiff are barred, in whole or in part, by failure to mitigate damages.");

c. Seventeenth Defense ("The claims purportedly asserted by Plaintiff are barred, in whole or in part, because any alleged losses were the result of intervening causes not under Defendant's control.");

d. Twentieth Defense ("The purported damages, if any, allegedly sustained were proximately caused or contributed to, in whole or in part, by market

conditions and/or the conduct of others, or both, rather than any conduct of Defendant.");

e. Twenty-Ninth Defense ("The claims purportedly asserted by Plaintiff, are barred, in whole or in part, due to official misconduct, conflict of interests, and other official improprieties in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and other clauses of the United States and New York State Constitutions."); and

f. Thirtieth Defense ("The claims purportedly asserted by Plaintiff, are barred, in whole or in part, due to selective enforcement of the law in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and other clauses of the United States and New York State Constitutions.").

ATTACHMENT 1
Electronic Document Production Specifications

Unless otherwise specified and agreed to by the Office of Attorney General, all responsive documents must be produced in LexisNexis® Concordance® format in accordance with the following instructions. Any questions regarding electronic document production should be directed to the Office of the Attorney General.

1. Concordance Production Components. A Concordance production consists of the following component files, which must be produced in accordance with the specifications set forth below in Section 7.

A. ***Metadata Load File.*** A delimited text file that lists in columnar format the required metadata for each produced document.

B. ***Extracted or OCR Text Files.*** Document-level extracted text for each produced document or document-level optical character recognition ("OCR") text where extracted text is not available.

C. ***Single-Page Image Files.*** Individual petrified page images of the produced documents in tagged image format ("TIF"), with page-level Bates number endorsements.

D. ***Opticon Load File.*** A delimited text file that lists the single-page TIF files for each produced document and defines (i) the relative location of the TIF files on the production media and (ii) each document break.

E. ***Native Files.*** Native format versions of non-printable or non–print friendly produced documents.

2. Production Folder Structure. The production must be organized according to the following standard folder structure:

- data\ (contains production load files)
- images\ (contains single-page TIF files, with subfolder organization)
\0001, \0002, \0003…
- native_files\ (contains native files, with subfolder organization)
\0001, \0002, \0003…
- text\ (contains text files, with subfolder organization)
\0001, \0002, \0003…

3. De-Duplication. You must perform global de-duplication of stand-alone documents and email families against any prior productions pursuant to this or previously related subpoenas or requests.

4. Paper or Scanned Documents. Documents that exist only in paper format must be scanned to single-page TIF files and OCR'd. The resulting electronic files should be pursued in Concordance format pursuant to these instructions. You must contact the Office of the Attorney

General to discuss (i) any documents that cannot be scanned, and (ii) how information for scanned documents should be represented in the metadata load file.

5. Structured Data. Before producing structured data, including but not limited to relational databases, transactional data, and xml pages, you must first speak to the Office of the Attorney General. Structured data is data that has a defined length and format and includes, but is not limited to, relational databases, graphical databases, JSON files, or xml/html pages.

A. Relational Databases

1. Database tables should be provided in CSV or other delimited machine-readable, non-proprietary format, with each table in a separate data file. The preferred delimiter is a vertical bar "|". If after speaking with the Assistant Attorney General and it is determined that the data cannot be exported from a proprietary database, then the data can be produced in the proprietary format so long as the Office of the Attorney General is given sufficient access to that data.

2. Each database must have an accompanying Data Dictionary.

3. Dates and numbers must be clearly and consistently formatted and, where relevant, units of measure should be explained in the Data Dictionary.

4. Records must contain clear, unique identifiers, and the Data Dictionary must include explanations of how the files and records relate to one another.

5. Each data file must also have an accompanying summary file that provides total row counts for the entire dataset and total row counts.

B. Compression

1. If Documents are provided in a compressed archive, only standard lossless compression methods (e.g., gzip, bzip2, and ZIP) shall be used. Media files should be provided in their original file format, with metadata preserved and no additional lossy encoding applied.

6. Media and Encryption. All documents must be produced on CD, DVD, or hard-drive media. After consultation with the Assistant Attorney General, Documents may also be produced over a secure file transfer protocol (FTP), a pre-approved cloud-based platform (e.g. Amazon Web Services S3 bucket), or the Attorney General's cloud platform OAGCloud. All production media must be protected with a strong, randomly-generated password containing at least 16 alphanumeric characters and encrypted using Advanced Encryption Standard with 256-bit key length (AES-256). Passwords for electronic documents, files, compressed archives and encrypted media must be provided separately from the media.

7. Production File Requirements.

A. ***Metadata Load File***

- Required file format:
  - ASCII or UTF-8
  - Windows formatted CR + LF end of line characters, including full CR + LF on last record in file.
  - .dat file extension
  - Field delimiter: (ASCII decimal character 20)
  - Text Qualifier: þ (ASCII decimal character 254). Date and pure numeric value fields do not require qualifiers.
  - Multiple value field delimiter: ; (ASCII decimal character 59)
- The first line of the metadata load file must list all included fields. All required fields are listed in Attachment 2.
- Fields with no values must be represented by empty columns maintaining delimiters and qualifiers.
- ***Note:*** All documents must have page-level Bates numbering (except documents produced only in native format, which must be assigned a document-level Bates number). The metadata load file must list the beginning and ending Bates numbers (BEGDOC and ENDDOC) for each document. For document families, including but not limited to emails and attachments, compound documents, and uncompressed file containers, the metadata load file must also list the Bates range of the entire document family (ATTACHRANGE), beginning with the first Bates number (BEGDOC) of the "parent" document and ending with the last Bates number (ENDDOC) assigned to the last "child" in the document family.
- Date and Time metadata must be provided in separate columns.
- Accepted date formats:
  - mm/dd/yyyy
  - yyyy/mm/dd
  - yyyymmdd
- Accepted time formats:
  - hh:mm:ss (if not in 24-hour format, you must indicate am/pm)
  - hh:mm:ss:mmm

B. ***Extracted or OCR Text Files***

- You must produce individual document-level text files containing the full extracted text for each produced document.
- When extracted text is not available (for instance, for image-only documents) you must provide individual document-level text files containing the document's full OCR text.
- The filename for each text file must match the document's beginning Bates number (BEGDOC) listed in the metadata load file.
- Text files must be divided into subfolders containing no more than 500 to 1000 files.

C. ***Single-Page Image Files (Petrified Page Images)***

- Where possible, all produced documents must be converted into single-page tagged image format ("TIF") files. See Section 7.E below for instructions on producing native versions of documents you are unable to convert.
- Image documents that exist only in non-TIF formats must be converted into TIF files. The original image format must be produced as a native file as described in Section 7.E below.
- For documents produced only in native format, you must provide a TIF placeholder that states "Document produced only in native format."
- Each single-page TIF file must be endorsed with a unique Bates number.
- The filename for each single-page TIF file must match the unique page-level Bates number (or document-level Bates number for documents produced only in native format).
- Required image file format:
  - CCITT Group 4 compression
  - 2-Bit black and white
  - 300 dpi
  - Either .tif or .tiff file extension.
- TIF files must be divided into subfolders containing no more than 500 to 1000 files. Where possible documents should not span multiple subfolders.

D. ***Opticon Load File***

- Required file format:
  - ASCII
  - Windows formatted CR + LF end of line characters
  - Field delimiter: , (ASCII decimal character 44)
  - No Text Qualifier
  - .opt file extension
- The comma-delimited Opticon load file must contain the following seven fields (as indicated below, values for certain fields may be left blank):
  - ALIAS or IMAGEKEY – the unique Bates number assigned to each page of the production.
  - VOLUME – this value is optional and may be left blank.
  - RELATIVE PATH – the filepath to each single-page image file on the production media.
  - DOCUMENT BREAK – defines the first page of a document. The only possible values for this field are "Y" or blank.
  - FOLDER BREAK – defines the first page of a folder. The only possible values for this field are "Y" or blank.
  - BOX BREAK – defines the first page of a box. The only possible values for this field are "Y" or blank.
  - PAGE COUNT – this value is optional and may be left blank.
- ***Example*:**
  ABC00001,,IMAGES\0001\ABC00001.tif,Y,,,2
  ABC00002,,IMAGES\0001\ABC00002.tif,,,,
  ABC00003,,IMAGES\0002\ABC00003.tif,Y,,,1
  ABC00004,,IMAGES\0002\ABC00004.tif,Y,,,1

E. ***Native Files***

- Non-printable or non–print friendly documents (including but not limited to spreadsheets, audio files, video files and documents for which color has significance to document fidelity) must be produced in their native format.
- The filename of each native file must match the document's beginning Bates number (BEGDOC) in the metadata load file and retain the original file extension.
- For documents produced only in native format, you must assign a single document-level Bates number and provide an image file placeholder that states "Document produced only in native format."
- The relative paths to all native files on the production media must be listed in the NATIVEFILE field of the metadata load file.
- Native files that are password-protected must be decrypted prior to conversion and produced in decrypted form. In cases where this cannot be achieved the document's password must be listed in the metadata load file. The password should be placed in the COMMENTS field with the format Password: <PASSWORD>.
- You may be required to supply a software license for proprietary documents produced only in native format.

ATTACHMENT 2
Required Fields for Metadata Load File

FIELD NAME	FIELD DESCRIPTION	FIELD VALUE EXAMPLE[1]
DOCID	Unique document reference (can be used for de-duplication).	ABC0001 or ###.######.###
BEGDOC	Bates number assigned to the first page of the document.	ABC0001
ENDDOC	Bates number assigned to the last page of the document.	ABC0002
BEGATTACH	Bates number assigned to the first page of the parent document in a document family (*i.e.*, should be the same as BEGDOC of the parent document, or PARENTDOC).	ABC0001
ENDATTACH	Bates number assigned to the last page of the last child document in a family (*i.e.*, should be the same as ENDDOC of the last child document).	ABC0008
ATTACHRANGE	Bates range of entire document family.	ABC0001 - ABC0008
PARENTDOC	BEGDOC of parent document.	ABC0001
CHILDDOCS	List of BEGDOCs of all child documents, delimited by ";" when field has multiple values.	ABC0002; ABC0003; ABC0004…
DOCREQ	List of particular Requests for Documents to be Produced	1; 2; 3 . . .
INTERROG	List of particular [Requests for Information] [interrogatories]	1; 2; 3 . . .
COMMENTS	Additional document comments, such as passwords for encrypted files.	
NATIVEFILE	Relative file path of the native file on the production media.	.\Native_File\Folder\...\BEGDOC.ext

[1] Examples represent possible values and not required format unless the field format is specified in Attachment 1.

SOURCE	For scanned paper records this should be a description of the physical location of the original paper record. For loose electronic files this should be the name of the file server or workstation where the files were gathered.	Company Name, Department Name, Location, Box Number…
CUSTODIAN	Owner of the document or file.	Firstname Lastname, Lastname, Firstname, User Name; Company Name, Department Name...
FROM	Sender of the email.	Firstname Lastname < FLastname @domain >
TO	All to: members or recipients, delimited by ";" when field has multiple values.	Firstname Lastname < FLastname @domain >; Firstname Lastname < FLastname @domain >; …
CC	All cc: members, delimited by ";" when field has multiple values.	Firstname Lastname < FLastname @domain >; Firstname Lastname < FLastname @domain >; …
BCC	All bcc: members, delimited by ";" when field has multiple values	Firstname Lastname < FLastname @domain >; Firstname Lastname < FLastname @domain >; …
SUBJECT	Subject line of the email.	
DATERCVD	Date that an email was received.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
TIMERCVD	Time that an email was received.	hh:mm:ss AM/PM or hh:mm:ss
DATESENT	Date that an email was sent.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
TIMESENT	Time that an email was sent.	hh:mm:ss AM/PM or hh:mm:ss

CALBEGDATE	Date that a meeting begins.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
CALBEGTIME	Time that a meeting begins.	hh:mm:ss AM/PM or hh:mm:ss
CALENDDATE	Date that a meeting ends.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
CALENDTIME	Time that a meeting ends.	hh:mm:ss AM/PM or hh:mm:ss
CALENDARDUR	Duration of a meeting in hours.	0.75, 1.5…
ATTACHMENTS	List of filenames of all attachments, delimited by ";" when field has multiple values.	AttachmentFileName.; AttachmentFileName.docx; AttachmentFileName.pdf; …
NUMATTACH	Number of attachments.	1, 2, 3, 4….
RECORDTYPE	General type of record.	IMAGE; LOOSE E-MAIL; E-MAIL; E-DOC; IMAGE ATTACHMENT; LOOSE E-MAIL ATTACHMENT; E-MAIL ATTACHMENT; E-DOC ATTACHMENT
FOLDERLOC	Original folder path of the produced document.	Drive:\Folder\...\...\
FILENAME	Original filename of the produced document.	Filename.ext
DOCEXT	Original file extension.	html, xls, pdf
DOCTYPE	Name of the program that created the produced document.	Adobe Acrobat, Microsoft Word, Microsoft Excel, Corel WordPerfect…
TITLE	Document title (if entered).	
AUTHOR	Name of the document author.	Firstname Lastname; Lastname, First Name; FLastname
REVISION	Number of revisions to a document.	18

DATECREATED	Date that a document was created.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
TIMECREATED	Time that a document was created.	hh:mm:ss AM/PM or hh:mm:ss
DATEMOD	Date that a document was last modified.	mm/dd/yyyy, yyyy/mm/dd, or yyyymmdd
TIMEMOD	Time that a document was last modified.	hh:mm:ss AM/PM or hh:mm:ss
FILESIZE	Original file size in bytes.	128, 512, 1024…
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IMPORTANCE	Email priority level if set.	Low, Normal, High
TIFFSTATUS	Generated by the Law Pre-discovery production tool (leave blank if inapplicable).	Y, C, E, W, N, P
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MD5HASH	MD5 hash value computed from native file (a/k/a file fingerprint).	BC1C5CA6C1945179FEE144F25F51087B
SHA1HASH	SHA1 hash value	B68F4F57223CA7DA3584BAD7ECF111B8044F8631
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