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.

[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.

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Respectfully submitted,

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