UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,

Plaintiff,

v.

ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,

Defendants.

No. 17-CV-2301 (VEC) (SN)

EXXON MOBIL CORPORATION'S OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE AMENDED COMPLAINT UNDER RULE 12(B)(6)

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Attorneys General of New York and Massachusetts (the "Attorneys General") ask this Court to abdicate its duty to protect constitutional rights from overreaching state power. In their telling, it is "speculative" and "implausible" for a plaintiff to allege that public officials took adverse action against ExxonMobil because they disagreed with the viewpoint expressed in the Company's speech. The Federal Reporter abounds with decisions holding precisely the opposite. Consistent with that precedent, ExxonMobil has alleged that the Attorneys General, acting individually and as members of an unlawful conspiracy, determined that certain speech about climate change presented a barrier to their policy objectives, identified ExxonMobil as one source of that speech, launched investigations based on the thinnest of pretexts to impose costs and burdens on ExxonMobil for having spoken, and hoped their official actions would shift public discourse about climate policy. Each of those specific, concrete factual allegations is supported by statements and documents in the public record. A plaintiff in federal court is not required to do more at the pleading stage.

Faced with a pleading standard that ExxonMobil has easily satisfied, the Attorneys General urge this Court to apply a heightened standard of review unsupported by rule or precedent. It would be improper to do so. While the Attorneys General claim that their motives are pure and their actions justified, those assertions are entitled to no weight at this point in the proceedings. Were it otherwise, no action against state officials would ever proceed beyond the pleading stage. The Attorneys General also ask this Court to conduct fact-finding and draw inferences in their favor, but fact-finding at the motion to dismiss stage would be inappropriate (particularly, as here, in the absence of discovery) and all inferences must be drawn in favor of the plaintiff, ExxonMobil. In another futile gambit, the Attorneys General present arguments

that either ignore the factual allegations ExxonMobil has made or attempt to reshape them in a narrow, nearly unrecognizable manner. The Attorneys General's unwillingness to grapple with the full breadth of ExxonMobil's factual allegations is a tacit admission of the allegations' sufficiency. That is likely why both Attorneys General open their respective briefs by urging the Court to dismiss on "other grounds" and "defenses." (MA Br. 1, NY Br. 2.)[1]

ExxonMobil acknowledges that the Attorneys General are democratically elected officeholders who participate in the rough and tumble of electoral politics. As this Court correctly observed, the Attorneys General are fundamentally "political animal[s]."[2] But that status does not confer immunity on elected officials who abuse the powers of their office to burden and harass their perceived political opponents because of a disagreement over viewpoint. Nor should it. The Constitution protects the right of all to participate in public discourse about the merits of policy choices. Where, as here, elected public officials violate rights secured by the Constitution in furtherance of a political agenda, it is the proper role of federal courts to intervene and restrain that abuse of power.

BACKGROUND

ExxonMobil has alleged the following facts, which must be accepted as true on a motion to dismiss, establishing that the Attorneys General have abused and are abusing their law enforcement authority to violate ExxonMobil's rights under the Constitution.[3]

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[1] "MA Br." refers to the brief in support of dismissal filed by the Massachusetts Attorney General (ECF No. 246), and "NY Br." refers to the brief in support of dismissal filed by the New York Attorney General (ECF No. 247).

[2] ECF No. 244 at Tr. 23:10.

[3] ExxonMobil filed its First Amended Complaint ("FAC") on November 10, 2016, and now seeks leave to file a Second Amended Complaint ("SAC") that includes additional factual allegations largely based on further information that has become available since the FAC was filed. Even if leave to amend is not granted, the factual allegations in the FAC are sufficient to state a claim upon which relief can be granted. ExxonMobil seeks leave to amend simply to provide additional factual allegations for the Court's consideration.

A. The Attorneys General Pledge to Suppress Speech Because They Oppose Its Content.

On March 29, 2016, New York Attorney General Eric Schneiderman convened a press conference in New York City that drew national attention. (FAC ¶ 2.) At the press conference, he, Massachusetts Attorney General Maura Healey, and a coalition of other state attorneys general—self-styled the "AGs United for Clean Power"—announced a plan to regulate speech they considered an obstacle to their "clean power" agenda. (FAC ¶¶ 2–3, 27.) They were joined by former Vice President Al Gore, (FAC ¶ 2), an investor in alternative energy companies that compete with conventional energy companies like ExxonMobil.

For the Attorneys General, the public policy debate on climate change was settled and any perceived dissent was intolerable. Attorney General Schneiderman declared that there could be "no dispute" about climate policy, only "confusion" and "misperceptions in the eyes of the American public that really need to be cleared up." (FAC ¶ 31.) Attorney General Healey likewise attributed the public's failure to embrace her climate policies to speech that caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (FAC ¶ 32.)

To enforce their views on climate change policy, the Attorneys General vowed to unleash their law enforcement powers against perceived dissenters. Attorney General Schneiderman blamed any departure from his prescribed orthodoxy on those "with an interest in profiting from the [so-called] confusion" about public policy and denounced the "morally vacant forces that are trying to block every step by the federal government to take meaningful action" on climate change. (FAC ¶¶ 31, 35.) Lamenting the perceived "gridlock in Washington," Attorney General Schneiderman also expressed the coalition's intent "to step into th[e] [legislative] breach," by "battl[ing]" perceived political opponents. (FAC ¶ 35.) Directly linking his investigation of

ExxonMobil to those concerns, he boasted that his office "had served a subpoena on ExxonMobil" as part of his efforts to promote a clean energy agenda. (FAC ¶ 36.)

Attorney General Healey similarly asserted that those who purportedly "deceived" the public—by disagreeing with her about climate change policy—"should be, must be, held accountable." (FAC ¶ 32.) In the next breath, Attorney General Healey declared that she too had "joined in investigating the practices of ExxonMobil."[4] Revealing the prejudgment tainting her investigation, Attorney General Healey claimed that she had already found a "troubling disconnect between what Exxon knew . . . and what the company and industry chose to share with investors and with the American public." (FAC ¶ 37.) In a thinly-veiled reference to ExxonMobil, she then promised "quick, aggressive action" to "hold[] accountable those who have needed to be held accountable for far too long."[5] (FAC ¶¶ 3, 29.)

Mr. Gore urged the coalition of state attorneys general to investigate his business competitors for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option." (FAC ¶ 33.) He denounced those he accused of "deceiving the American people . . . about the reality of the climate crisis and the dangers it poses to all of us." (FAC ¶ 32.) The assembled attorneys general had nothing but praise for Mr. Gore, whose financial interests aligned with their political agenda. Attorney General Schneiderman enthused that "there is no one who has done more for this cause" than Mr. Gore, who recently had been "traveling internationally, raising the alarm," and "training climate change activists." (FAC ¶ 34.) Attorney General Healey praised Mr. Gore for explaining so "eloquently just how important this is, this commitment that we make," and she thanked him for his "inspiration" and "affirmation." (FAC ¶ 34.)

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[4] FAC Ex. B at App. 20.
[5] FAC Ex. B at App. 21.

B. The Attorneys General Conspire with Private Interests Antagonistic to Free and Open Debate on Climate Policy.

The March 2016 press conference was years in the making. Private interests have long urged state officials to misuse their law enforcement power to restrict disfavored viewpoints on climate change. And they too were on hand at the press conference, leading workshops that were not only closed to the public but also meant to be concealed from the public. (FAC ¶ 41.) During one of those secret meetings, Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, delivered a presentation on the "imperative of taking action now on climate change." (FAC ¶ 42.) Dr. Frumhoff has tried to silence ExxonMobil on climate policy since at least 2007, when he contributed to a publication promoting strategies for "[p]utting the [b]rakes" on ExxonMobil's alleged "[d]isinformation [c]ampaign" on climate change. (FAC ¶ 44.) Matthew Pawa, an attorney who unsuccessfully sued ExxonMobil for allegedly causing global warming, also delivered a secret presentation on "climate change litigation." (FAC ¶ 45.) It is unknown whether Mr. Pawa disclosed to the public servants in attendance that he stood to profit from any private litigation made possible by documents procured through the attorney general-led investigations of ExxonMobil.

For years, these activists and other private interests have worked to persuade state law enforcement officers to use their investigative powers to burden and coerce those who hold disfavored views on climate change. (FAC ¶ 46.) In June 2012, Dr. Frumhoff and Naomi Oreskes (then a professor at the University of California, San Diego) organized a gathering of special, private interests, including Mr. Pawa, at La Jolla, California, to participate in a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." (FAC ¶ 46; SAC ¶ 44.) During the conference, attendees criticized energy companies, including ExxonMobil, for "attempting to manufacture uncertainty about global warming." (SAC ¶ 44.) The La Jolla

workshop attendees gravitated toward using law enforcement powers to "maintain[ ] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[6] (FAC ¶ 47.) The attendees concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light." (FAC ¶ 47.)

Following the conference, the La Jolla ringleaders eagerly sought to implement their playbook. In June 2015, Dr. Oreskes met with Attorney General Schneiderman to discuss the purported "history of misinformation" she attributed to the energy industry.[7] (SAC ¶ 46.) Meanwhile, in July 2015, Dr. Frumhoff assured fellow activists that he was exploring "state-based approaches to holding fossil fuel companies legally accountable" and anticipated "a strong basis for encouraging state (e.g., AG) action forward."[8] (SAC ¶ 47.)

The Rockefeller Family Fund (the "Rockefeller Fund") also contacted Attorney General Schneiderman to express "concern" about ExxonMobil's statements on climate change, and it was "encouraged by [Attorney General] Schneiderman's interest" in the matter. (SAC ¶ 58.) In early 2015, the New York Attorney General's Office exchanged a dozen emails with the Rockefeller Fund concerning the "activities of specific companies regarding climate change." (SAC ¶ 56.) The following year, in January 2016, the Rockefeller Fund convened a meeting, which counted Mr. Pawa among its attendees, to discuss the goals of a so-called "Exxon campaign." (FAC ¶ 48.) Those goals included to (i) "establish in [the] public's mind that Exxon

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[6] FAC Ex. C at App. 56. It is particularly objectionable for these activists to claim that ExxonMobil has misled the public about the challenges presented by climate change. For more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's 2006 Corporate Citizenship Report recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and reasoned that "strategies that address the risk need to be developed and implemented." (FAC Ex. H at App. 103.)

[7] SAC Ex. S7 at App. 549. A similar meeting with the Massachusetts Attorney General's office occurred the following year. *Id.*

[8] SAC Ex. S8 at App. 551.

is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," (ii) "delegitimize [ExxonMobil] as a political actor," and (iii) "force officials to disassociate themselves from Exxon . . . ." (FAC ¶ 48.) At the meeting, the activists also discussed "the main avenues for legal actions & related campaigns," including "AGs," "DOJ," and "Torts." (SAC ¶ 53.) Among those options, they considered which had the "best prospects" for "getting discovery" and "creating scandal." (SAC ¶ 53.) In December 2016, the Director of the Rockefeller Fund admitted, after initially attempting to conceal the connection, that the Fund had financed the so-called investigative journalism that the Attorneys General claim inspired their investigations.[9] (SAC ¶ 57.)

The New York Attorney General's Office also exchanged numerous emails with the staff of Tom Steyer (a billionaire and self-styled environmental activist (SAC ¶¶ 48, 50)), regarding "company specific climate change information," within a week of issuing its subpoena to ExxonMobil.[10] (SAC ¶ 51.) Attorney General Schneiderman then requested a "call with Tom [Steyer] regarding support for his race for governor . . . regarding Exxon case" only days before convening the March 29 press conference. (SAC ¶ 51.) In March 2015, Mr. Pawa sent Mr. Steyer's organization, NextGen America, a legal memorandum encouraging California to pursue public nuisance litigation against ExxonMobil and other energy companies. (SAC ¶ 48.) Mr. Pawa claimed "to know that certain fossil fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming." (SAC ¶ 48.)

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[9] *See* SAC Ex. S32 at App. 710–714; SAC Ex. S33 at App. 715–729. These publications advanced the theory that ExxonMobil has known "the truth" about climate change since the late-1970s—supposedly decades before the world's scientists—and lied to the public when it identified and discussed areas of scientific uncertainty. Based on this theory, both Attorneys General demanded production of ExxonMobil documents and communications related to its historic climate change research, despite ExxonMobil's acknowledgment of the risks of climate change since at least 2006, well before any applicable statute of limitations. (*See* FAC ¶¶ 63–66.)

[10] In the Summer of 2015, the company that oversees Mr. Steyer's political and philanthropic efforts boasted that it was at "the nexus between a handful of exciting and powerful efforts aimed to curb climate change." (SAC Ex. S17 at App. 618.)

Acknowledging the ulterior purpose motivating his proposed litigation against energy companies, Mr. Pawa wrote: "[S]imply proceeding to the discovery phase of a global warming case would be significant . . . . Just as obtaining such documents gave the Tobacco litigation an unstoppable momentum, here too obtaining industry documents would be a remarkable achievement that would advance the case and the cause." (SAC ¶ 48.)

Following the March 29 press conference, Mr. Pawa and Dr. Frumhoff continued to press for state-based investigations and litigations against the energy industry. (SAC ¶ 68.) Mere days after the press conference, Mr. Pawa took the lead in mobilizing the coalition of attorneys general and created an email list of "AG Folks" to "pass along information that may be of interest to AGs on the issue of our time: climate change." (SAC ¶ 68.) Meanwhile, Dr. Frumhoff's Union of Concerned Scientists co-hosted a workshop called "Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal and Historical Perspectives." (SAC ¶ 69.) "[S]enior staff from state attorneys general offices in nearly a dozen states," including Massachusetts and New York, attended the workshop, where Dr. Frumhoff led a panel discussion of "[t]he case for state-based investigations and litigation." (SAC ¶ 69.)

C. The Attorneys General Conceal Their Connections with Private Interests.

The Attorneys General recognized that the behind-the-scenes involvement of these confederates could expose the special interests urging the use of law enforcement's coercive tools in violation of the First Amendment. That is why the New York Attorney General's Office attempted to conceal the involvement of these activists from the public. For instance, when a reporter contacted Mr. Pawa shortly after the March 29 press conference and inquired about his involvement, the Chief of the Environmental Protection Bureau of the New York Attorney General's Office advised Mr. Pawa, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event." (FAC ¶ 50.)

In an effort to prevent further evidence of these suspect ties from being unearthed, the coalition also executed a so-called "Climate Change Coalition Common Interest Agreement," the mere existence of which they have likewise attempted to conceal. (FAC ¶¶ 52–53.) The New York Attorney General's efforts to hide records concerning that agreement in response to a Freedom of Information Law request have already resulted in a firm judicial rebuke. The New York Supreme Court recently awarded attorney's fees and costs against the Attorney General for "lack[ing] a reasonable basis" for refusing to produce documents related to the common interest agreement. (SAC ¶ 64.) Nevertheless, the New York Attorney General continues to resist requests for communications with the Rockefeller Fund related to his investigation of ExxonMobil. (*Id.*)

Another member of the coalition has gone so far as to concede the political motives behind the coalition's selective disclosures. The Vermont Attorney General's Office recently admitted that it conducts research into those seeking records about the coalition's activities, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before we share information with this entity." (SAC ¶ 65.)

D. The Conspiracy's Improper Purpose Is Documented in Instruments the Attorneys General Executed.

The intent to suppress disfavored voices is apparent in the very documents the Attorneys General executed. The subpoena and the CID are trained on speakers and speech that the Attorneys General perceive to run counter to climate change policy that they and their behind-the-scenes allies promote. The subpoena demands ExxonMobil's communications with trade associations and industry groups that promote oil and gas interests, rather than alternative fuels. (FAC ¶ 10.) Attorney General Schneiderman has publicly referred to many of these

organizations as "aggressive climate deniers."[11] (FAC ¶ 25.) Similarly, the CID requests ExxonMobil's communications with twelve specific organizations, all of which have been associated with positions on climate policy disfavored by the Attorneys General.[12] (FAC ¶ 73.) The CID also specifically targets statements of pure opinion that do not accord with Attorney General Healey's environmental politics, including the suggestion that "[i]ssues such as global poverty [are] more pressing than climate change." (*Id.*)

The Attorneys General's efforts to promote one side of a political debate while restricting speech on the other side are also expressly memorialized in the Common Interest Agreement. That agreement describes the coalition's "common interest" as "limiting climate change" and "ensuring the dissemination of accurate information about climate change." (FAC ¶ 52.) Through these twin goals, the Attorneys General have appointed themselves arbiters of accuracy when it comes to speech about climate policy, and confirmed the coalition's willingness to violate First Amendment rights to carry out an agenda that has nothing to do with law enforcement. (*Id.*)

E. The Attorneys General's Investigations Are Based on Easily Debunked Pretexts.

The Attorneys General have attempted to justify their investigations by pointing to articles published in the *Los Angeles Times* and *InsideClimate News*.[13] (SAC ¶ 57.) But the ease with which those articles are debunked unmasks them as flimsy pretexts incapable of justifying an unlawful investigation. Those articles rely on carefully selected excerpts of certain ExxonMobil documents to create the misimpression that ExxonMobil knew about the risks of

[11] FAC Ex. L at App 123 (naming the American Enterprise Institute, the American Legislative Exchange Council, and the American Petroleum Institute); Ex. K at App. 116.)

[12] *Compare* Ex. D, *with* Ex. C at 13 (Request No. 5).

[13] MA Br. 7; While Attorney General Healey submits that these documents were "made available by journalists in 2015," (MA Br. 9–10), the reality is that many of these documents were not unearthed by journalists at all. They had been sitting in archives at the University of Texas for years and freely available to the public. (SAC ¶ 57.)

climate change decades ago but fraudulently concealed its "knowledge" from the public. (*Id.*) A review of the relevant documents, however, demonstrates that ExxonMobil's internal knowledge was well within the mainstream of thought on the issue—the contours of which remain unsettled even today—and fully consistent with its public statements. (*Id.*)

For example, one such article references a 1984 presentation delivered by an ExxonMobil scientist at an environmental conference.[14] According to *Inside Climate News*, the scientist "showed projections of fossil fuel use through the 21st century and the growth in global carbon dioxide expected from it."[15] What the scientist actually said was, if a number of "assumptions" were valid, there could be a three-degree rise in global temperatures "by 2090," a projection that even *Inside Climate News* admits was in the "mid-range" of what several scientists predicted.[16] And that statement was entirely consistent with the views expressed at the time by the Environmental Protection Agency ("EPA"), the National Academy of Sciences ("NAS"), and the Massachusetts Institute of Technology ("MIT").[17] (*Id.*)

ExxonMobil did not have access to special insight on the risks of climate change, nor did it conceal that knowledge from the public. ExxonMobil, like the EPA, NAS, and MIT, was evaluating data and testing theories in an area of science that was evolving. That—and not a scheme to defraud—is why it took another twenty-five years before the EPA issued an endangerment finding for greenhouse gas emissions. In previous submissions, ExxonMobil has demonstrated the innocuous nature of the documents that purportedly lie at the heart of this "journalism." (ECF No. 57, 58-1 ¶¶ 3–8). No legitimate investigation could be based on such

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[14] SAC Ex. S59 at App. 1285–1295.

[15] *Id.* at 1293.

[16] *Id.* at 1293–95; SAC Ex. S60 at App. 1302.

[17] SAC Ex. S60 at 1302 (noting that the EPA, NAS, and MIT predicted temperature increases of 3°C, 2°C, and 1.5-4.5°C, respectively); *see also* SAC Ex. S53 at App. 494 (EPA report from 1983 noting the possibility of a 5°C increase by 2100); SAC Ex. S54 at App. 519 (NAS report from 1983 stating that "temperature increases of a couple of degrees or so" were projected for the next century).

easily debunked articles, particularly when it was funded by the very special interests urging the unlawful use of government power to suppress speech.

Even accepting their flawed premises, the articles cannot provide a good faith basis for a securities or consumer fraud investigation in either New York or Massachusetts. The relevant statute of limitations periods are no longer than six years. The articles focus, however, on statements from the 1980s and 1990s, which are well beyond the limitations period, while entirely ignoring ExxonMobil's consistent acknowledgement, within the limitations period, of the reality of climate change and the impact that any associated regulations could have on its business. (FAC ¶¶ 8–9.) By relying on articles that describe non-actionable conduct, the Attorneys General have further exposed the political pretext animating their investigations.

F. Other State Attorneys General Have Condemned the Abuse of State Power to Impose Orthodoxy on Speech.

The overtly political nature of the March 29 press conference drew a swift and sharp rebuke from other state attorneys general who criticized the use of law enforcement power to harass particular participants in the ongoing policy debate concerning climate change. On June 15, 2016, attorneys general from thirteen states wrote a letter to their "Fellow Attorneys General," in which they explained that the Green 20's effort "to police the global warming debate through the power of the subpoena is a grave mistake" because "[u]sing law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech." (FAC ¶ 56.) The thirteen attorneys general further described the investigations as "far from routine" because (i) they "target[] a particular type of market participant," namely conventional energy companies; (ii) the Green 20 had aligned itself "with the competitors of [its] investigative targets," and (iii) "the investigation implicates an ongoing public policy debate." *Id.* They urged their fellow attorneys general to "[s]top policing

viewpoints."[18] *Id.*

G. ExxonMobil Participates in Public Discourse about Climate Policy.

ExxonMobil is an active participant in public discourse about climate change and climate policy. It has engaged in these discussions for decades, participating in the Intergovernmental Panel on Climate Change since its inception and contributing to every report issued by the organization since 1995. For more than a decade, ExxonMobil has widely and publicly confirmed that it "recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant."[19] (FAC ¶ 9.) ExxonMobil has also publicly advocated a tax on carbon emissions since 2009. (FAC ¶ 98.)

For the past decade, through its annual *Outlook for Energy* publication, ExxonMobil has sought to "promote better understanding of the issues shaping the world's energy future"—including how best to balance and manage concerns regarding the risks posed by climate change and the ever-growing energy needs of an increasing global middle class. In its 2014 *Outlook for Energy*, ExxonMobil expressed its forward-looking view that energy demand from both traditional and renewable sources is expected to rise for the foreseeable future. By the year 2040, ExxonMobil stated that it expects to see "2 billion more people on the planet," a "130 percent larger global economy," and "about 35 percent greater demand for energy." (SAC ¶ 122.) The company explained that, although renewables "will grow by . . . 60 percent," demand for natural gas and oil will also grow by "65 percent" and "25 percent," respectively. (*Id.*) "The need for energy will continue to grow as economies expand, living standards rise and the world's population grows," ExxonMobil said. (*Id.*) With respect to climate policy, ExxonMobil wrote:

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[18] Eleven state attorneys general have filed an amicus brief in support of ExxonMobil's position in this Court. *See* ECF No. 192-3.

[19] FAC Ex. G at App. 93; *see also* FAC Ex. H at App. 103 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").

> To meet this demand in the most effective way, none of our energy options should be arbitrarily denied, dismissed, penalized or promoted. And free trade opportunities should be facilitated – not curtailed. . . . Free markets supported by reliable public policies remain essential to creating economic opportunities and encouraging the private-sector investments that are critical to meeting people's energy needs. (*Id.*)

ExxonMobil has also expressed its view on the policy tradeoffs of certain climate initiatives. For example, ExxonMobil stated that any plan to reduce carbon-based emissions "in the range of 80 percent through the year 2040" in an effort to "stabiliz[e] world temperature increases not to exceed 2 degrees Celsius by 2100" is unlikely to be achieved because "the transition to lower carbon energy sources will . . . take time." (SAC ¶ 123.) ExxonMobil has stated that "renewable sources, such as solar and wind, despite very rapid growth rates, cannot scale up quickly enough to meet global demand growth while at the same time displacing more traditional sources of energy."[20] (SAC ¶ 123.) According to ExxonMobil, "[f]actors limiting further penetration of renewables include scalability, geographic dispersion, intermittency (in the case of solar and wind), and cost relative to other sources." (SAC ¶ 123.) The company further clarified that, accounting for current and future taxes on carbon emissions—which are embedded into energy demand projections that appear in the *Outlook for Energy*—did not change its perspective that the "cost limitations of renewables are likely to persist." *Id.*

ARGUMENT

Notwithstanding these detailed allegations describing the participants, objectives, means, and origins of a conspiracy to violate ExxonMobil's constitutional rights, the Attorneys General seek dismissal of the complaint by disparaging the allegations as not "plausible." (MA Br. 1, NY Br. 1.) The Attorneys General misunderstand the meaning of that word.[21] "Asking for

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[20] SAC Ex. S56 at App. 1184. ExxonMobil has stated that "Oil and natural gas will likely be nearly 60 percent of global supplies in 2040, while nuclear energy and renewables will grow about 50 percent and be approaching a 25 percent share of the world's energy mix." SAC Ex. S57 at App. 1215.

[21] The Attorneys General's characterization of ExxonMobil's complaint also departs from the view held by Judge Kinkeade, who observed that "[t]he merits of each of Exxon's claims involve important issues that should be determined by a court." ECF No. 180 at 2.

plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing]." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 556 (2007). To meet that standard, a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Indeed, this Court has recognized the "low bar" for a complaint to survive the "motion to dismiss stage." *Phoenix Light SF Ltd.* v. *Bank of New York Mellon*, No. 14 Civ. 10104 (VEC), 2015 WL 5710645, at *4 (S.D.N.Y. Sept. 29, 2015). ExxonMobil has easily cleared that low bar by alleging facts that, if proved, would establish a violation of its constitutional rights.

Misapplying this standard, the Attorneys General question ExxonMobil's ability to prove that they have engaged in misconduct. (MA Br. 13 (faulting ExxonMobil for lacking "evidence"); NY Br. 7 (asking ExxonMobil to "prove" claims).) But that is not what plausible means in this context. A claim cannot be dismissed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted). It is irrelevant that a scenario other than the one alleged by the plaintiff might seem more likely, more reasonable, or more plausible. "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). Accordingly, "a court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Id.* ExxonMobil's allegations fall well within the plausibility standard applicable here.

I. EXXONMOBIL HAS ADEQUATELY ALLEGED A VIOLATION OF ITS FIRST AMENDMENT RIGHTS BASED ON VIEWPOINT DISCRIMINATION.

According to the complaint, the Attorneys General took official action against ExxonMobil because they disagreed with the company's perspective on climate change and climate policy. Government action taken on such a basis is impermissible viewpoint discrimination prohibited by the First Amendment.

A. ExxonMobil's Allegations Establish Viewpoint Discrimination.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *see also Wandering Dago, Inc.* v. *Destito*, 16-622, 2018 WL 265383, at *7 (2d Cir. Jan. 3, 2018) ("The government discriminates against viewpoints when it disfavors certain speech because of 'the specific motivating ideology or the opinion or perspective of the speaker.'") (quoting *Rosenberger*, 515 U.S. at 829). Even where (unlike here) the underlying speech has no "claim upon the First Amendment," a state "may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed." *R.A.V.* v. *City of Saint Paul*, 505 U.S. 377, 386 (1992). "[I]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Clear Channel Outdoor, Inc.* v. *City of New York*, 594 F.3d 94, 105 (2d Cir. 2010) (internal brackets and citation omitted).

The First Amendment applies "to investigations as to all forms of governmental action." *See, e.g.*, *Watkins* v. *United States*, 354 U.S. 178, 187–88 (1957) (congressional investigation); *Sweezy* v. *State of N.H. by Wyman*, 354 U.S. 234, 245 (1957) (state attorney general investigation). Because "[t]he government rarely flatly admits it is engaging in viewpoint

discrimination" courts recognize that "statements by government officials on the reasons for an action can indicate an improper motive" to regulate speech. *Pittsburgh League of Young Voters Educ. Fund* v. *Port Auth. of Allegheny Cty.*, 653 F.3d 290, 297 (3d Cir. 2011); *Ridley* v. *Mass. Bay Transp. Auth.,* 390 F.3d 65, 86 (1st Cir. 2004).

In support of its viewpoint discrimination claim, ExxonMobil alleges that the Attorneys General have subjected it to the burdens and harassment of pretextual investigations because of hostility to ExxonMobil's views on climate change and climate policy. At the press conference publicizing their investigations, the Attorneys General identified speech they disfavored as an obstacle to accomplishing their policy goals. Attorney General Schneiderman derided that speech as causing "confusion" and "misperceptions," while Attorney General Healey claimed it led "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (FAC ¶ 32.) After identifying speech as the problem, the Attorneys General pledged to use their law enforcement power against those "with an interest in profiting from the [so-called] confusion" in order to "hold[] accountable those who have needed to be held accountable for far too long."[22] Both Attorneys General linked their efforts to combat "confusion" and "misappreh[sion]"—what the First Amendment considers protected speech—with their investigations of ExxonMobil.[23]

The Attorneys General's willingness to use law enforcement tools to burden and harass ExxonMobil reflected the express aims of their advisors—Mr. Pawa and Dr. Frumhoff—who advocated for "maintaining pressure on the [energy] industry that could eventually lead to its support for legislative and regulatory responses to global warming" and sought out the assistance of "sympathetic state attorney[s] general." (FAC ¶ 47.) It also furthered the Attorneys General's

[22] FAC Ex. B at App. 21.
[23] *Id.* at App. 20.

stated "common interest" in "ensuring the dissemination of accurate information about climate change." (FAC ¶ 52.) The very instruments of the investigations—the subpoena and the CID—betray the viewpoint bias that animated their issuance. The subpoena demands ExxonMobil's communications with trade associations and industry groups that Attorney General Schneiderman has derided as "aggressive climate deniers." (FAC ¶ 25, naming the American Enterprise Institute, the American Legislative Exchange Council, and the American Petroleum Institute.) The CID requests ExxonMobil's communications with organizations that have been associated with positions on climate policy disfavored by the Attorneys General. (FAC ¶ 71.) The CID also specifically targets statements of pure opinion, including the suggestion that "[i]ssues such as global poverty [are] more pressing than climate change"—as though such a statement could ever give rise to a fraud case.[24] (FAC ¶ 73.)

These allegations provide more than ample support for ExxonMobil's viewpoint discrimination claim. They show that the Attorneys General have "target[ed]" ExxonMobil, in the form of burdensome and harassing investigations, for "particular views" it has held or expressed. *Rosenberger,* 515 U.S. at 829. Attorney General Healey contends these allegations are "conclusory" and considers them analogous to the allegations the Supreme Court found insufficient in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). (MA Br. 9, 11.) To the contrary, a comparison to *Iqbal* shows precisely why the allegations challenged here are sufficient to state a claim. In *Iqbal*, unlike here, the plaintiff did not concretely connect the defendants—Attorney General John Ashcroft and FBI Director Robert Mueller—to the specific harm alleged, which was confining a certain set of plaintiffs under a specific set of conditions. 556 U.S. at 683. The complaint in *Iqbal* was lacking because it did not adequately allege that the defendants "themselves acted" to deprive plaintiff of constitutional rights. *Id.* That is a far cry from the

[24] Indeed, an Op-ed making this very point appeared in the *Wall Street Journal* on January 5, 2018. SAC Ex. S63.

case here, where ExxonMobil has alleged that the Attorneys General themselves are personally involved in the investigations, and ExxonMobil has provided detailed, concrete allegations linking the Attorneys General to private climate activists seeking to harass perceived political opponents.

When viewed in the light most favorable to ExxonMobil, as they must on a motion to dismiss, these allegations establish a plausible claim of viewpoint discrimination. To hold otherwise would doom all claims of viewpoint discrimination to dismissal on the pleadings unless the state officer made a public confession of misconduct. Such rigors are not required at this stage of the litigation, and nothing more is needed to state a claim of viewpoint bias here.

B. The Attorneys General's Objections to ExxonMobil's Claim Are Unavailing.

Rather than contest the adequacy of ExxonMobil's allegations, the Attorneys General focus on the merits of ExxonMobil's claims. That approach is preordained to fail.

First, the Attorneys General fault ExxonMobil for not specifying what "protected corporate speech or viewpoint" has been "targeted." (NY Br. 1, 3, 5; MA Br. 11.) The argument is disingenuous. ExxonMobil has been an active and longstanding participant in public discourse on climate change and climate policy. (SAC ¶ 120.) It has supported the Paris accords and endorsed a revenue-neutral carbon tax. But it has also questioned whether, notwithstanding the Paris accords' aspirational goals, existing or reasonably anticipated climate policies and technology will be able to limit global temperature increase to two-degrees Celsius by 2100. And ExxonMobil regularly issues an *Energy Outlook* describing the likely mix of energy sources in the future, which includes significant roles for oil and natural gas. ExxonMobil's participation in public discourse about climate change and climate policy is precisely what attracted the attention of the Attorneys General and the special interests that met at La Jolla. It is also why

ExxonMobil has been targeted for official action. The Attorneys General cannot plausibly claim to be unaware of the speech at issue—they claim it is the subject of their pretextual investigations.

Second, Attorney General Schneiderman argues that ExxonMobil's speech does not constitute "protected speech" because it amounts to "fraudulent misstatements." (NY Br. 3.) That assertion is wholly inconsistent with Attorney General Schneiderman's assurance that he has "not prejudg[ed] the evidence" of ExxonMobil's conduct. (NY Br. 15.) It also rests uneasily with the standard applicable to a motion to dismiss. At this stage of the litigation, Attorney General Schneiderman's self-serving contentions about ExxonMobil's speech carry no weight, and this Court must set them aside. Even if those allegations could be considered, they would have no traction, as "[s]imply labeling an action one for 'fraud,' of course, will not carry the day." *Illinois ex rel. Madigan* v. *Telemarketing Assocs.*, 538 U.S. 600, 617 (2003). The fig leaf of a "fraud" investigation does not absolve public officials of their duty not to suppress speech. Based on the record before this Court, there is no basis to classify ExxonMobil's speech on climate change and climate policy as anything but fully protected by the First Amendment.

Third, Attorney General Schneiderman persists in arguing that ExxonMobil must allege a chill to state a claim of viewpoint discrimination. (NY Br. 4–5.) He is demonstrably wrong. "When the government targets not subject matter, but particular views taken by speakers on a subject," that is a "blatant" violation of the First Amendment. *Rosenberger*, 515 U.S. at 828–29; *see also First Nat. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784–85 (1978) (The government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."). And while all plaintiffs must establish standing to file suit, standing can be established by any "concrete harm" flowing from the targeting of

speech expressing a particular viewpoint. *Dorsett* v. *Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) (a plaintiff has standing if he can show "*either* that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm."). Here, ExxonMobil has alleged such a concrete harm in the form of the substantial burden and expense it has incurred in responding to the Attorneys General's investigations. (FAC ¶¶ 74, 103.) This harm is the same burden the Attorneys General and the La Jolla participants expected to use to coerce ExxonMobil and other energy companies into compliance with their orthodoxy on climate policy.

The burdens occasioned by selective investigation suffice to state an actionable First Amendment injury, as confirmed by the Second Circuit's decision in *Tabbaa* v. *Chertoff*, 509 F.3d 89 (2d Cir. 2007). There, the Second Circuit found that plaintiffs had pled an imposition on speech sufficient to invoke the First Amendment where they were subject to heightened investigation in response to protected conduct. The plaintiffs had been "detained for [4 to 6 hours], interrogated, fingerprinted, and photographed [at customs] when others, who had not attended [a particular] conference, did not have to endure these measures." *Id.* at 102. Here, as in *Tabbaa*, ExxonMobil is compelled to "endure" burdensome investigative processes "when others" who are not perceived to have opposed the Attorneys General's preferred policy responses to climate change are not so targeted. If the comparatively limited investigation at issue in *Tabbaa* sufficed to support First Amendment standing, the far greater impositions occasioned by the Attorneys General's investigations—forced collection and review of millions of documents, at the expense of many millions of dollars, and compelled testimony—plainly do as well.

Further, "abuses of the investigative process may imperceptibly lead to abridgment of

protected freedoms" under the First Amendment. *Watkins,* 354 U.S. at 197. As the Supreme Court has recognized, such harm is pernicious, and effects not only the speaker but also society. *Id.* ("There is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time."). In short, public debate suffers and the only safe course is to distance oneself from those targeted. Notably, this is precisely the stated purpose of the so-called "Exxon Campaign": to leverage legal action by "AGs" in order to "delegitimize [ExxonMobil] as a political actor," and "force officials to disassociate themselves from Exxon . . . ." (FAC ¶ 48.)

Fourth, Attorney General Schneiderman submits that his investigation cannot violate ExxonMobil's First Amendment rights because his subpoenas "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political associations." (NY Br. 3 (quoting *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir. 1981)).) That truism is beside the point. ExxonMobil does not allege that Attorney General Schneiderman's subpoenas are an instrument of direct regulation of speech. The claim ExxonMobil has clearly and consistently presented is that the Attorneys General have abused their law enforcement powers (including the authority to issue subpoenas) to impose burdens and costs on those who express a disfavored viewpoint on climate policy. It is not the instrument itself that is at issue, but how the instrument has been used. As the Second Circuit has held:

> [A] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.

Okwedy v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

Fifth, Attorney General Schneiderman suggests that his status as a "statewide elected

official" who engages in politics should color this Court's view of his abuse of power. (NY Br. 6–7.) It should not. Whatever rules might apply on the campaign trail, a different set govern the use of official power when in office. In America, it is impermissible for any public official—elected or appointed—to promote his political agenda by taking adverse official action against someone because that person disagrees about policy. *See Watkins*, 354 U.S. at 187 ("Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.").

Sixth, the Attorneys General assert that ExxonMobil's allegations are not "plausible," but their arguments address the merits of ExxonMobil's claims, not the plausibility of its allegations. (NY Br. 7–8, MA Br. 9–10.) It is not surprising that the Attorneys General's take this approach since ExxonMobil's allegations are not just plausible, they are sourced from documents in the public record that are available for inspection. And one federal judge has already found the allegations to be "concerning to this Court." (ECF No. 73 at 5.)

Attorney General Schneiderman describes ExxonMobil's burden to "plead and prove" that his investigation is illegitimate (NY Br. 7), but ExxonMobil has no burden to prove anything at this stage in the proceedings. *Wegmann* v. *Young Adult Institute, Inc.*, No. 15 Civ. 3815 (KPF), 2016 WL 827780, at *4 (S.D.N.Y. Mar. 2, 2016) ("at the pleading stage, the Court does not require proof of a Plaintiff's claims"); *see also Phoenix Light SF Ltd.*, 2015 WL 5710645, at *4 (contrasting the "pleading stage" with "trial or summary judgment," where "plaintiffs must produce proof."). Seeking to impose such a burden on ExxonMobil, Attorney General Schneiderman invokes the burden shifting framework for retaliation cases described in *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). (NY Br. 7.) But that analysis, by necessity, "is factual in nature," *Berl* v. *Westchester Cty.*, 849 F.2d 712, 715 (2d Cir. 1988), and has no application to a

motion to dismiss. *Johnson* v. *Eggendorf*, 8 F. App'x 140, 144 n.1 (2d Cir. 2001) (holding that burden shifting is the "appropriate standard for a § 1983 claim at trial, not for a motion to dismiss based on the pleadings"); *see also People United for Children, Inc.* v. *City of New York*, 108 F. Supp. 2d 275, 296 n.14 (S.D.N.Y. 2000) (burden shifting analysis "is inappropriate at the motion to dismiss stage because the parties have not yet engaged in any significant discovery."). All ExxonMobil need do is plead that Attorney General Schneiderman's investigation is objectively unjustifiable, and it has done so. (FAC ¶¶ 40–51.)

Attorney General Healey likewise faults ExxonMobil for failing to come forward with "evidence" in support of its allegations (MA Br. 13), but no such obligations exist at this stage of the case. Next, Attorney General Healey asks this Court to find that she has a "clear supported basis for believing her office's investigation of Exxon is warranted based on . . . internal Exxon documents, made available by journalists in 2015." (MA Br. 9.) It would be improper to do so at this stage of the proceedings. In the complaint, ExxonMobil alleged that the documents referenced by Attorney General Healey do not support the claims presented by the journalists and that those biased journalists received funding from the very groups urging the Attorneys General to target ExxonMobil for abuse. (SAC ¶ 57.) As alleged, those documents demonstrate that ExxonMobil's historic climate research was fraught with uncertainty about the timing and severity of any climate impacts, and that the company's projections aligned with the projections of other scientists at the time—including those at MIT, the NAS, and the EPA. ExxonMobil has unambiguously alleged that the Attorneys General relied on this so-called journalism to provide a convenient pretext for their unlawful exercise of state power to discriminate based on viewpoint. To credit Attorney General Healey's self-justification would require fact-finding that is inappropriate in the pre-discovery posture of this case.

II. EXXONMOBIL HAS MADE SUFFICIENT ALLEGATIONS OF AN UNLAWFUL CONSPIRACY TO VIOLATE ITS RIGHTS.

The Attorneys General would have this Court believe that ExxonMobil's factual allegations of conspiracy are limited to those related to the common interest agreement executed by the Attorneys General and other members of the Green 20. (NY Br. 8–9.) Not so. As a matter of law, the basis for establishing conspiratorial agreement is not restricted to formal documents executed by co-conspirators. *United States* v. *Rubin,* 844 F.2d 979, 984 (2d Cir. 1988); *see also Anderson News, L.L.C.* v. *Am. Media, Inc*., 680 F.3d 162, 183 (2d Cir. 2012) ("conspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators." (internal quotation marks omitted)). Such agreements can be inferred from meetings, conduct, and coordinated action. All that the law requires is allegations of "[c]ircumstances [that] reveal a unity of purpose or a common design and understanding." *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012).

ExxonMobil has satisfied that burden with factual allegations that the Attorneys General jointly (i) announced their intent to suppress speech on climate policy using law enforcement tools; (ii) met with and were advised by special interests (Mr. Pawa, Dr. Frumhoff, Dr. Oreskes, and others) who had a stated aim of persuading "sympathetic" state officials to impose investigative burdens on ExxonMobil and other members of the energy sector to alter their viewpoint on climate policy; (iii) acted in conformity with the aims of those special interests by launching pretextual investigations of ExxonMobil; (iv) communicated regularly with each other and the special interests promoting this unlawful conduct; and (v) attempted to conceal the involvement of those special interests by misleading a newspaper reporter, improperly resisting public-record requests, and executing a common interest agreement designed to restrict public

scrutiny. (FAC ¶¶ 1, 46; SAC ¶¶ 1, 110.) These factual allegations are sufficient at the pleading stage to state a claim of conspiracy.[25] *See, e.g.*, *Simmtech Co.* v. *Barclays Bank PLC (In re Foreign Exch. Benchmark Rates Antitrust Litig.*), 74 F. Supp. 3d 581, 594 (S.D.N.Y. 2015) (finding a complaint sufficiently alleged "a long-running conspiracy" based on allegations of specific communications between conspirators and parallel conduct where an inference of collusion was "logic[al] [and] is at least facially simple and intuitive"). Whether ExxonMobil can prove the existence of a conspiracy, which is the real point of contention the Attorneys General raise in the briefs, will depend on the evidence obtained during discovery. *See, e.g.*, *Anderson News*, 680 F.3d at 184 ("[T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action.").

The Second Circuit's holding in *Anderson News,* 680 F.3d at 187, demonstrates the adequacy of ExxonMobil's allegations. In that case, a magazine wholesaler alleged that a number of publishers had conspired to boycott it in an attempt to force it out of business, after the wholesaler had attempted to impose a surcharge to reimburse it for the cost of collecting and destroying unsold magazines. 680 F.3d at 169–71. In support of that claim, Anderson News alleged that a number of publisher defendants—ostensibly competitors—communicated with each other and held meetings, after which they all agreed to stop supplying Anderson News with

[25] Attorney General Healey questions whether ExxonMobil has stated a claim under 42 U.S.C. § 1985 and feigns confusion about which provision of Section 1985 is at issue here. (MA Br. 11 n.11.) ExxonMobil is proceeding under 42 U.S.C. § 1985(3)—the other two subsections of that statute deal with (1) conspiracies to prevent officers from performing duties, and (2) conspiracies to intimidate witnesses or jurors, neither of which is alleged in the FAC. To state a claim under Section 1985(3), a plaintiff must plead "1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Dolan* v. *Connolly*, 794 F.3d 290, 296 (2d Cir. 2015). ExxonMobil has pled each of these elements. And Section 1985(3) has been held applicable to conspiracies, like that here, arising out of political animus. *See Dolan*, 794 F.33d at 296 (noting that "political affiliation" is a protected classification for purposes of Section 1985(3)).

magazines to distribute. *Id.* at 171–72. In addition, it was alleged that executives of the defendants had made statements consistent with coordinated action—including that, after forcing Anderson News from business, they would "control" the "space" in the market. *Id.* at 171. The Second Circuit found these allegations sufficient to state a claim of conspiracy.

Consistent with *Anderson News*, ExxonMobil has alleged that the Attorneys General and their staffs "met or communicated with" special interests, *Anderson News*, 680 F.3d at 187, who hoped to identify "sympathetic state attorney[s] general" to abuse law enforcement power to restrict speech. (FAC ¶ 47.) In addition, the Attorneys General "made statements that may plausibly be interpreted as evincing their agreement" to pursue the same goals as those special interests, *Anderson News*, 680 F.3d at 187, by pledging to use their power as law enforcement officers to "h[o]ld accountable" the "morally vacant forces" who the Attorneys General and special interests accuse of disseminating inaccurate information about climate change and climate policy. (FAC ¶ 35.)

ExxonMobil's allegations go substantially beyond those in *Anderson News*. Here, unlike in *Anderson News*, there are well-founded allegations of concealment, which create a powerful inference that the Attorneys General themselves perceived impropriety in their actions. From the instructions to mislead a newspaper reporter, to the improper stonewalling of public-records requests, the Attorneys General have demonstrated a concern for concealment, from which a reasonable mind could infer consciousness of wrongdoing. *See United States* v. *Savoy*, 199 F.3d 1324 (2d Cir. 1999) (finding it "reasonable for [police] to infer" a "consciousness of wrongdoing" where a suspect "disavowed" and "denied knowing" co-conspirators); *United States* v. *Sureff*, 15 F.3d 225, 229 (2d Cir. 1994) (a defendant's "attempt to conceal" his conduct "was evidence of his consciousness of guilt").

It is therefore legally and factually wrong for Attorney General Schneiderman to ask this Court to consider only the common interest agreement as support for ExxonMobil's conspiracy claim. But even on its own terms, Attorney General Schneiderman's argument cannot be credited. In his brief, Attorney General Schneiderman scrupulously omits the very elements of the common interest agreement that ExxonMobil relies on to support its claims. Among the "common legal interests" memorialized in the agreement are "limiting climate change" and "ensuring the dissemination of accurate information about climate change." (FAC ¶ 52.) Attorney General Schneiderman quotes other interests recited in the agreement, but not those ExxonMobil identified as being probative of an unlawful intent. And perhaps for good reason. Those interests are not "legal" at all; they are policy objectives. They reflect the Attorneys General's preoccupation with obtaining their policy goals by restricting the range of viewpoints about public policy. That is why they seek to use law enforcement power against those who fail to "disseminat[e] . . . accurate information about climate change." It is a statement of purpose to regulate debate. Ignoring these allegations, as Attorney General Schneiderman does in his brief, does not make them implausible or insufficient to state a claim.[26]

III. EXXONMOBIL HAS ADEQUATELY ALLEGED A VIOLATION OF ITS FOURTH AMENDMENT RIGHTS BASED ON AN UNREASONABLE SEARCH.

ExxonMobil's allegations also state a claim under the Fourth Amendment for an unlawful search.

A. ExxonMobil Has Preserved Its Fourth Amendment Claim.

Attorney General Schneiderman argues that ExxonMobil waived its Fourth Amendment challenge by complying with one of his subpoenas (NY Br. 1), but the facts and the law

[26] Insofar as Attorney General Schneiderman questions whether his investigative actions post-dating the First Amended Complaint are within the scope of this action, ExxonMobil's proposed Second Amended Complaint confirms that they are. (SAC ¶¶ 85–86, Prayer for Relief ¶ 3.)

contradict that argument.

Shortly after Attorney General Schneiderman issued his first subpoena, his office confirmed, in writing, that "by producing documents in accordance with our discussions prior to the return date as extended, Exxon is not waiving any right to seek to quash or otherwise object to the subpoena."[27] ExxonMobil's Fourth Amendment challenge to Attorney General Schneiderman's investigation—and the subpoenas that are among the instruments of that investigation—are well within the scope of that reservation of rights. *Cf. United States* v. *Ceballos*, 812 F.2d 42, 44 (2d Cir. 1987) (acknowledging reservation of rights to challenge alleged Fourth Amendment violation). Even in the absence of an agreement between the parties, Attorney General Schneiderman's waiver argument would be meritless. Compliance with the demands of a subpoena is compulsion under the law, not consent. *See United States* v. *Simmonds*, 641 F. App'x 99, 104 (2d Cir. 2016) ("[W]here consent is granted only in submission to a claim of lawful authority, the consent is not considered voluntary." (internal quotation marks omitted)); *In re Nwamu*, 421 F. Supp. 1361, 1366 (S.D.N.Y. 1976) (finding compliance with a subpoena mere "acquiescence to a claim of lawful authority," not a "voluntary" consent to search.). Because the documents ExxonMobil has produced were under the compulsion of the subpoena, there has been no voluntary waiver of any right. ExxonMobil's Fourth Amendment claims are thus intact and preserved.

B. ExxonMobil Has Adequately Pled an Unreasonable Search.

The Fourth Amendment guarantees corporations and individuals alike the "right to be free from baseless investigations (commonly referred to as 'fishing expeditions')." *Major League Baseball* v. *Crist*, 331 F.3d 1177, 1187 (11th Cir. 2003). As Attorney General Schneiderman acknowledges, his "subpoenas are evaluated under a reasonableness standard."

[27] SAC Ex. S55 at App. 1138.

(NY Br. 11.) While executive agencies may have broad powers of inquisition, "[t]his is not to say that an agency may conduct any investigation it may conjure up; the disclosure sought must always be reasonable." *United States* v. *Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996) (citing *Okla. Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 209 (1946) (additional citation omitted). Under Second Circuit precedent, a subpoena is reasonable when, among other things, "an agency establishes that an investigation will be conducted pursuant to a legitimate purpose, [and] the inquiry may be relevant to the purpose." *Constr. Prods. Research*, 73 F.3d 464, 471 (2d Cir. 1996) (internal quotation marks and additional citation omitted) (citing *SEC* v. *Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir. 1970)). And it is equally "well settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *In re Horowitz*, 482 F.2d 72, 78 (2d Cir. 1973) (quoting *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967)).

Consistent with that precedent, ExxonMobil has provided factual allegations supporting its claim that the Attorneys General's investigations are not "conducted pursuant to a legitimate purpose." As described above, ExxonMobil alleges that the Attorneys General have launched investigations not for a lawful and legitimate purpose, but to apply burdens and costs on ExxonMobil for expressing a disfavored viewpoint on climate policy. That improper purpose cannot justify the investigative instruments challenged here.

Those investigative instruments are also wildly disproportionate to the needs of any legitimate investigation the Attorneys General could conceivably conduct. Attorney General Schneiderman's subpoena purports to be investigating potential violations of New York Executive Law §63(12), as well as General Business Law Article 22-A or 23-A—statutes which,

at most, have six-year limitations periods. N.Y. CPLR 213(8). Yet the subpoena seeks 39 years' worth of documents within exceedingly broad categories, including "all Documents and Communications" since 1977 "[c]oncerning any research, analysis, assessment, evaluation, modelling or other consideration … [c]oncerning the causes of [c]limate [c]hange."[28] Attorney General Schneiderman's subpoena is also aimed at perceived political opponents, as it targets ExxonMobil's communications with, among others, the American Petroleum Institute and the US Oil & Gas Association.[29] Attorney General Healey's CID is even worse. Despite being issued in April 2016 to investigate potential unfair trade practices under a statute, Mass. Gen. Laws ch. 93A, §2, with a four-year limitations period, Mass. Gen. Laws ch. 260, § 5A, it asks for essentially every climate-related document in ExxonMobil's files dating back to 1976.[30] Attorney General Healey's CID is also even more transparently aimed at her political opponents, as it expressly seeks communications between ExxonMobil and a number of conservative and libertarian advocacy groups, including the American Enterprise Institute, the American Legislative Exchange Council, and the Heritage Foundation.

The shifting justifications the Attorneys General offer for their investigations—from historical climate research, to stranded reserves, to impaired assets—provide a further indication of the unreasonableness and illegitimacy of those investigations. It is plausible to infer from those shifts in justification that the Attorneys General have already decided to impose burdens and costs on ExxonMobil but simply seek a pretext that could provide a cover for their unlawful exercise of state power. *See, e.g.*, *Schmitz* v. *St. Regis Paper Co.*, 811 F.2d 131, 132–33 (2d Cir.1987) (finding an employer's shifting explanations for an adverse action supplied evidence of pretext). As one pretext is debunked in public, it becomes necessary to seek out other

[28] FAC Ex. EE at App. 257–58.
[29] *Id.* at 258.
[30] FAC Ex. II at App. 297–98.

justifications for the Attorneys General's abuse of power.

Attempting to explain away these shifts in justification, Attorney General Schneiderman argues that investigations are "fluid" with the goal to "discover and procure evidence, not to prove a pending charge or complaint." (NY Br. 12.) The Attorneys General might elect to use that argument as a defense on the merits, but at this pleading stage it cannot be credited. ExxonMobil has alleged facts supporting the plausible inference that these shifting justifications are the product of the Attorneys General's desire to identify some legal theory—any legal theory—that might support the costs and burdens they have imposed and continue to impose on ExxonMobil. Competing inferences favorable to the defense cannot be credited at this stage of the proceeding.

IV. EXXONMOBIL HAS ADEQUATELY ALLEGED A VIOLATION OF ITS FOURTEENTH AMENDMENT RIGHTS BASED ON IMPERMISSIBLE BIAS.

Due process requires law enforcement offers, like the Attorneys General, to set aside their own interests—financial, political, or otherwise—in favor of a single interest: "that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). That requirement bars a public official from "injecting a personal interest . . . into the enforcement process." *Marshall* v. *Jerrico, Inc*., 446 U.S. 238, 249–50 (1980). It also prohibits the pursuit of a case where the public officer is "influenced by improper motives." *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). These principles establish "standards of prosecutorial ethics" that include an obligation to "respect the presumption of innocence" and "refrain[] from speaking in public about pending and impending cases except in very limited circumstances." *United States* v. *Bowen*, 799 F.3d 336, 353–54 (5th Cir. 2015); *see also Martin* v. *Merola*, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring). Prosecutors violate these requirements when they make "[i]nflammatory and biased" comments about ongoing matters. *Bowen*, 799 F.3d at 358.

ExxonMobil's detailed factual allegations fully support its Due Process claim under the Fourteenth Amendment. As alleged, the Attorneys General are pursuing investigations of ExxonMobil based on improper motives and with a preordained result. The Attorneys General launched their investigations, consistent with the urgings of the special interests who gathered a La Jolla, to impose burdens and costs on ExxonMobil for holding a viewpoint disfavored by the Attorneys General. (SAC ¶¶ 44–46.) They explained their reasons for launching the investigation with direct references to speech they disfavored:

- **Attorney General Healey:** "Part of the problem has been one of public perception," causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[31]

- **Attorney General Healey:** "Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil."[32]

- **Attorney General Schneiderman:** "We know what's happening to the planet. There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up."[33]

- **Attorney General Schneiderman:** "We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action."[34]

That improper motive cannot support a lawful investigation that passes muster under the Due Process Clause. *See Young*, 481 U.S. at 807 (a case cannot be pursued by an official "influenced by improper motives").

The Attorneys General have also prejudged the results of their so-called investigations,

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[31] FAC Ex. B at App. 20.
[32] *Id.*
[33] *Id.* at App. 10.
[34] *Id.* at App. 12.

with both declaring presumptively that ExxonMobil has engaged in unlawful conduct even though neither has completed their fact gathering, let alone filed a formal complaint. (FAC ¶¶ 36–37.) Attorney General Schneiderman himself has recognized that it is inappropriate "to comment on ongoing investigations." (SAC ¶ 18.) At the press conference, the Attorneys General made the following statements prejudging their investigations:

- **Attorney General Healey:** "We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[35]

- **Attorney General Healey:** "By quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long, I know we will do what we need to do to address climate change and to work for a better future."[36]

- **Attorney General Schneiderman:** "They are using the best climate models so that when they spend shareholder dollars to raise their oil rigs, which they are doing, they know how fast the sea level is rising. Then they are drilling in places in the Arctic where they couldn't drill 20 years ago because of the ice sheets. They know how fast the ice sheets are receding. And yet they have told the public for years that there were no 'competent models,' was the specific term used by an Exxon executive not so long ago, no competent models to project climate patterns, including those in the Arctic."[37]

Such public accusations of guilt are well-recognized as improper, in part for their tendency to poison the jury pool. *See Martin* v. *Merola*, 532 F.2d at 196 (Lumbard, J., concurring) (recognizing that "improper pre-trial publicity endanger a fair trial and may constitute a denial of due process"). At a minimum, they create "an appearance of impropriety" that "undermine [the public's] confidence" in the Attorneys General's investigations. *U.S. ex rel. SEC* v. *Carter*, 907 F.2d 484, 488 (5th Cir. 1990); *see also United States* v. *Terry*, 806 F. Supp. 490, 495 (S.D.N.Y. 1992) ("[D]isqualification is required when there is even the appearance of a conflict.").

In response, Attorney General Schneiderman posits that he "need not be entirely neutral"

[35] *Id*. at App. 20.
[36] *Id*. at App 21.
[37] *Id.* at App. 11.

in civil enforcement matters. (NY Br. 14.) But whatever leeway he might have in civil cases is not broad enough to permit actions brought with an improper motive or to achieve a preordained result. *Wright* v. *United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (a prosecutor cannot be "disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have"). Recognizing that his conduct must comport with the Due Process Clause, Attorney General Schneiderman endeavors to excuse his biased and prejudicial statements by pointing to a statement where he claimed "not [to be] prejudging the evidence" against ExxonMobil. (NY Br. 15.) But as this Court has previously held, judges cannot "accept the Government's suggestion that any prejudicial effect of otherwise improper comments is magically dispelled by sprinkling the words 'allege(d)' or 'allegation(s)' liberally throughout [a] press conference. . . ." *United States* v. *Silver*, 103 F. Supp. 3d 370, 378 (S.D.N.Y. 2015). Attorney General Schneiderman's perfunctory disclaimer cannot whitewash his prior comments evincing improper bias and prejudgment.[38]

V. EXXONMOBIL HAS ADEQUATELY ALLEGED THAT THE ATTORNEYS GENERAL HAVE VIOLATED THE COMMERCE CLAUSE.

ExxonMobil's allegations support a claim under the Commerce Clause that the Attorneys General, through their investigative powers, seek to regulate out-of-state speech. The Commerce Clause prohibits state conduct "that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders." *Am. Booksellers Found.* v. *Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (quoting *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989)). Put differently, one state may not

[38] Attorney General Healey's only response to ExxonMobil's Due Process argument is to observe that a Massachusetts state court found her comments did not bespeak bias. For the reasons set forth in ExxonMobil's prior briefing (ECF No. 228 at 30–36.), that determination has no preclusive effect. And Rule 12(b)(6) precludes this Court from making an "interpretive finding" in the context of a motion to dismiss in which all of ExxonMobil's factual allegations must be taken as true. *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 184, 190 (2d Cir. 2012).

"project" its regulations of speech into other states. *Healy*, 491 U.S. at 334. When it does so, its action "is invalid under the Commerce Clause because it 'exceeds the inherent limits of the enacting State's authority.'" *SPGGC Ltd.* v. *Blumenthal*, 505 F.3d 183, 193 (2d Cir. 2007) (quoting *Healy*, 491 U.S. at 336). These restrictions apply with as much force to actions targeting speech as they do to actions concerning the sale of goods. *See generally Am. Booksellers*, 342 F.3d at 104 (striking down Vermont law attempting to regulate out-of-state speech).

As alleged, the Attorneys General have violated the Commerce Clause by using their law enforcement power to target a speaker for statements made and viewpoints expressed outside of New York and Massachusetts. The Attorneys General and La Jolla workshop participants viewed certain speech about climate change as a barrier to achieving their policy objectives. That speech, however, emanates from outside New York and Massachusetts. That fact is well illustrated by the subpoena and CID itself, which collectively seek ExxonMobil's communications with 15 organizations, only two of which are located in New York or Massachusetts. The specific statements identified by the CID for further investigation were made by ExxonMobil largely in Dallas, Texas, but also in England and China—not in Massachusetts. This is not surprising. As a Texas-based corporation, ExxonMobil engages in public discourse about climate change and climate policy from its corporate headquarters in Texas, and not New York or Massachusetts. (SAC ¶¶ 12, 20.) The Attorneys General's focus on speech outside their borders is well supported by the factual allegations ExxonMobil has made.

That is why the Attorneys General argue that subpoenas and CIDs are inherently incapable of regulating speech. (NY Br. 12, MA Br. 17.) That assertion is false. Government action in any form can have the effect of regulating speech by discouraging some speakers and

encouraging others. *See Okwedy* v. *Molinari*, 333 F.3d 339 (2d Cir. 2003) (finding that an informal letter from a government official without direct regulatory power over a speaker can violate the First Amendment if it can be interpreted as suggesting a speaker should cease speaking or face consequences). Even facially neutral forms of government power can have an impermissible effect on First Amendment rights when their deployment has the natural effect of restricting expression. *See, e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Nothing about the investigative tools at issue here exempt them from that precedent. While subpoenas and CIDs might not necessarily constitute regulations on speech, when they are used to target and burden disfavored viewpoints, as alleged here, they become tools of impermissible speech regulation.

It is equally unpersuasive for Attorney General Schneiderman to claim that the Commerce Clause has no application here because ExxonMobil's stock is listed on the New York Stock Exchange. (NY Br. 12–13.) That argument is premised on Attorney General Schneiderman's misreading of *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), as exempting state action from Commerce Clause scrutiny unless the state regulates commerce "taking place wholly outside [its] borders." (NY Br. 12.) *MITE* states no such rule. The Illinois statute at issue in that case sought to regulate tender offers made to Illinois corporations. *See* 457 U.S. at 626–27. MITE, the tender offeror, was a Delaware corporation with its principal offices in Connecticut, and Chicago Rivet, the target of the tender offer, was an Illinois corporation "with shareholders scattered around the country, 27% of whom live[d] in Illinois." *Id.* at 641–42. The Court held that the statute was invalid under the Dormant Commerce Clause because it "sought to prevent MITE from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also with those living in other States and having no connection with Illinois." *Id.* at 642. In other words, the statute was invalid even though some of the

regulated speech occurred within the state, since most of the regulated speech took place outside of the state.

The same reasoning supports ExxonMobil's claim for relief under the Commerce Clause. Here, through their investigations, the Attorneys General seek to punish speech that occurred outside their states' borders, and deter the speech of ExxonMobil (virtually all of which occurs beyond New York's borders) and countless others who might support policy positions that do not neatly align with the preferences of the Attorneys General. The Commerce Clause does not permit the Attorneys General to utilize the Martin Act or Chapter 93A to punish and intimidate speakers outside New York or Massachusetts, respectively.

Similarly unavailing is Attorney General Schneiderman's claim that the FAC does not identify a burden on interstate commerce. (NY Br. 13.) But the Attorney General himself notes that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." (NY Br. 13 (quoting *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127–28 (1978)).) Through their subpoenas, the Attorneys General have essentially erected a checkpoint in the interstate flow of political speech in an attempt to ensure that the national discourse on climate policy is cleansed of undesirable viewpoints. That *some* of the affected speech might have *some* connection to New York or Massachusetts does not immunize this conduct because its primary, practical effect is to inhibit speech by actors nationwide.

The Attorney General's reliance on *SPGGC* v. *Blumenthal*, 505 F.3d 183 (2d Cir. 2007), is likewise misplaced. Attorney General Schneiderman claims that, under *SPGGC*, the mere "burden of compliance" with state law is "not a sufficient basis" for a claim under the Commerce Clause. (NY Br. 13.) But this selective quotation of the opinion in *SPGGC* omits the very next

clause, which says "where the state law at issue does not otherwise interfere with interstate commerce." *SPGGC*, 505 F.3d at 196. Here, the Attorneys General's subpoenas—aimed at a Texas speaker, and sending a shot across the bows of speakers nationwide who might not agree with their climate orthodoxy—manifestly do "otherwise interfere" with commerce. *SPGGC* is therefore of no help to the Attorneys General.

VI. EXXONMOBIL HAS ADEQUATELY ALLEGED THAT THE ATTORNEYS GENERAL'S INVESTIGATION OF RESERVES AND ASSET IMPAIRMENTS IS PREEMPTED.

ExxonMobil has stated a timely preemption claim arising from the Attorneys General's investigation of reporting requirements mandated by the Securities and Exchange Commission (the "SEC"). Arguing that the claim is "much too premature," Attorney General Schneiderman insists that ExxonMobil must wait until "a possible securities enforcement" action is brought to press its preemption claim. (NY Br. 15–16.) The Supreme Court disagrees. In *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016), the State of Vermont subpoenaed an insurer for health information of its customers—the disclosure of which, the insurer feared, could place it in violation of its obligations under federal law. The insurer sought, as ExxonMobil seeks here, a declaratory judgment that the Vermont subpoena was preempted and an injunction against any requirement to turn over the requested information. 136 S. Ct. at 942. The Supreme Court discerned no ripeness problem, holding that a subpoena recipient can raise a preemption challenge upon receipt of the subpoena and "need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs." *Id.* at 945.

Similarly, in *Cuomo* v. *Clearing House Ass'n, L.L.C.*, the Supreme Court enjoined "the threatened issuance of executive subpoenas by the Attorney General for the State of New York" long before any enforcement action had commenced. 557 U.S. 519, 536 (2009). There, the New

York Attorney General sent banks letters of inquiry "in lieu of issuing a formal subpoena" requesting the voluntary production of non-public information. *Clearing House Ass'n, L.L.C.* v. *Cuomo*, 510 F.3d 105, 109 (2d Cir. 2007). The Second Circuit held that the Attorney General's threatened use of his subpoena power presented a ripe controversy because it required companies "to take affirmative steps in response" to the Attorney General's demand "or else risk finding themselves in violation of state law, despite their belief that the Attorney General's authority to enforce such law was federally preempted." *Id.* at 124. So too here. ExxonMobil is not raising a defense to hypothetical claims that might or might not be brought in an enforcement action. It is asserting a right not to be subject to an investigation of matters fully preempted by federal law.

Although states remain free to enact and apply their own securities laws, the Attorneys General may not apply state securities law in a manner that conflicts with federal securities regulations. *See, e.g.*, *Romano* v. *Kazacos*, 609 F.3d 512, 519 (2d Cir. 2010) (federal law precluded plaintiffs from bringing class action based on state law securities claims). That is precisely what the Attorneys General are alleged to be doing here.

SEC regulations require energy companies to estimate and report proved reserves in light of "existing . . . government regulations." 17 C.F.R. § 210.4–10(a)(22). The agency issued that regulation after considering how best to provide investors with a "comprehensive understanding of oil and gas reserves, which should help investors evaluate the relative value of oil and gas companies." *Modernization of Oil & Gas Reporting*, SEC Release No. 78, 2008 WL 5423153, at *1 (Dec. 31, 2008). The SEC likewise exercised its reasoned judgment to adopt as authoritative the accounting standards issued by the Financial Accounting Standards Board (the "FASB"), which govern when, and how, ExxonMobil assesses whether its assets are impaired.[39] Where, as

[39] *See Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter*, 68 Fed. Reg. 23,333–401 (May 1, 2003).

here, "an agency is required to strike a balance between competing statutory objectives," that factor weighs heavily in favor of "a finding of conflict preemption." *Farina* v. *Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010).

Those SEC regulations cover the ground tread upon by the Attorneys General. Attorney General Schneiderman's May 2017 subpoena purports to compel the production of documents pertaining to oil and gas reserves and the impairment of assets. (SAC ¶ 86.) Those requests are designed largely to support the Attorney General's discredited "stranded asset" theory of fraud. As Attorney General Schneiderman has explained to the press, his investigation concerns whether ExxonMobil has overstated its assets by not accounting for "global efforts to address climate change" that might require it "to leave enormous amounts of oil reserves in the ground."[40] Similarly, as Attorney General Healey previously stated in an attempt to justify the CID, "[i]f substantial portions of Exxon's vast fossil fuel reserves are unable to be burned due to carbon dioxide emissions limits put in place to stabilize global average temperature, those assets—valued in the billions—will be stranded, placing shareholder value at risk." (ECF No. 43 at 8.)

As the Attorneys General are well aware, however, federal law requires ExxonMobil to estimate proved reserves in light of *current* regulatory conditions. The Attorneys General therefore may not penalize ExxonMobil for failing to estimate its reserves in light of possible *future* government regulations. Nor may they second-guess the SEC's reasoned judgment by requiring additional disclosures beyond those required by federal law. To do so would result in a "re-balancing" of the objectives that the SEC has already considered and weighed in crafting its own regulations. *Farina*, 625 F.3d at 123. The Attorneys General's proffered investigative theory related to ExxonMobil's oil and gas reserves is thus preempted, and there is no good faith

[40] FAC Ex. MM at App. 351.

basis to "investigate" it.

The document requests are also designed to support the Attorneys General's theory that energy companies must evaluate assets for impairment using the Attorneys General's assumptions about the possible future effects of climate change. Indeed, in an "extensive" *New York Times* interview regarding his investigation, the Attorney General Schneiderman advanced the baseless theory that ExxonMobil may be engaged in a "massive securities fraud" by not utilizing the Attorney General's own assumption that future international efforts to reduce climate change will require ExxonMobil to leave oil in the ground untouched.[41] The FASB's rules, however, require ExxonMobil to "incorporate [its] own assumptions" about future events when deciding whether to impair oil and gas assets.[42] The Attorneys General's theories would punish ExxonMobil for complying with accounting standards mandated by the SEC and therefore would create a textbook conflict with federal regulations. ExxonMobil has thus adequately pled that the investigations seeking to further these theories are preempted.

VII. EXXONMOBIL'S STATE LAW CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT.

Finally, ExxonMobil's state law claims are not barred by the Eleventh Amendment. As a general matter, the Attorneys General are correct that the Eleventh Amendment provides state officials with immunity from state law claims in federal courts. (NY Br. 17, MA Br 18.) In a "firmly established" exception to that general rule, however, "a state officer loses the protection of the amendment if he acts ultra vires." *Minotti* v. *Lensink*, 798 F.2d 607, 609 (2d Cir. 1986) (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101 n.11 (1984)). "A state officer acts *ultra vires* when he acts beyond the scope of his statutory authority, or pursuant to

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[41] FAC Ex. MM at App. 351–352. This interview seems to violate Attorney General Schneiderman's stated policy of not commenting on pending investigations. *See* SAC Ex. S62 at 1316.

[42] *See* FASB Accounting Standards Codification 360-10-35-30; *see also* Statement of Financial Accounting Standards No. 144 ¶ 17.

authority deemed to be unconstitutional." *Brown* v. *New York*, 975 209, 227 (N.D.N.Y. 2013). The misuse of official power to accomplish a purpose the Constitution forbids constitutes an *ultra vires* action that deprives the official of Eleventh Amendment immunity. *See Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 696–97 (1982) ("If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity.").

In this case, ExxonMobil has plausibly alleged that the Attorneys General have acted *ultra vires* by launching investigations to burden an out-of-state speaker they disfavor. This abuse of state power to limit the range of viewpoints participating in national discourse about climate change is well beyond the limits of their official authority. And in so acting, the Attorneys General have violated the First, Fourth, and Fourteenth Amendments, as well as the Dormant Commerce Clause. No such actions can be justified as a proper exercise of authority within the metes and bounds of their offices. Under the circumstances alleged, this Court may examine whether that same *ultra vires* conduct gives rise to state law claims, notwithstanding the Eleventh Amendment.

CONCLUSION

ExxonMobil has alleged facts sufficient to state a claim for relief. Relying only on information in the public record, and without the benefit of court-supervised discovery, ExxonMobil has provided the Court and the defendants with a detailed account of the official misconduct at issue in this case. That misconduct is rooted in the express aims of a collection of special interests who viewed speech as an impediment to their policy objectives. It is documented in the instruments the Attorneys General executed and issued, which betray a focus

on speech and speakers not aligned with the climate policies they prefer. And it was committed by the Attorneys General, who pledged to use their law enforcement authority to apply pressure on those who might not agree with them about a matter of public policy. A plaintiff alleging constitutional violations of this nature cannot be expected to come forward with more. ExxonMobil's claims should proceed to resolution on the merits.

Dated: January 12, 2018

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