COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 16-1888 F

IN RE CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36, ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL	)

MEMORANDUM OF EXXON MOBIL CORPORATION IN SUPPORT OF ITS EMERGENCY MOTION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER

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I. INTRODUCTION

Petitioner Exxon Mobil Corporation ("ExxonMobil") has filed an emergency motion under G.L. c. 93A, § 6(7) to set aside or modify Civil Investigative Demand No. 2016-EPD-36 issued by the Attorney General's Office (the "CID").[1] The CID commands ExxonMobil to produce 40 years of corporate documents related to climate change, notwithstanding the absence of any reason to believe that ExxonMobil engaged in conduct that would subject it to liability in Massachusetts under the relevant statutes.[2] The CID was issued on April 19, 2016, according to a plan devised by partisan public officials, climate change activists, and plaintiffs' side environmental attorneys.[3] The public officials made their intentions known at a highly publicized joint press conference held on March 29, 2016.[4] There, a coalition of attorneys general announced their frustration with what they viewed as insufficient congressional action on climate change and pledged to use law enforcement tools "creatively" and "aggressively," not to investigate violations of law, but to impose their preferred policy response to climate change.[5]

Attorney General Maura T. Healey (the "Attorney General"), a member of that coalition, shared these concerns, emphasizing her "moral obligation" to "speed our transition to a clean energy future" by "sound[ing] the alarm" and holding accountable fossil fuel companies that allegedly failed to disclose the risks of climate change.[6] To advance this shared agenda on climate change policy, the Attorney General announced that she "too, ha[d] joined in investigating the practices of ExxonMobil."[7] She then unambiguously revealed her preordained

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1 ExxonMobil has submitted an Appendix in Support of its Petition and Emergency Motion. The Appendix contains the affidavits and exhibits referenced in this Memorandum.
2 Ex. B at App. 23-51.
3 *See* Ex. C at App. 63.
4 Ex. A at App. 2-21.
5 *Id.* at App. 3.
6 *Id.* at App. 13-14.
7 *Id.* at App. 14.

conclusion regarding the outcome of the investigation, stating: "We can all see today the troubling disconnect between what Exxon knew . . . and what the company . . . chose to share with investors and with the American public."[8]

The CID is a product of this misguided enterprise to target ExxonMobil for its participation in public discourse on climate change policy. Because the investigation and the CID has infringed, is infringing, and will continue to infringe ExxonMobil's federal constitutional rights, ExxonMobil has requested a preliminary injunction barring enforcement of the CID.[9] ExxonMobil sought that relief in the United States District Court for the Northern District of Texas, which has jurisdiction to hear ExxonMobil's constitutional claims arising from the Attorney General's efforts to commit constitutional torts against ExxonMobil in Texas. This Court, by contrast, lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation. The absence of personal jurisdiction over ExxonMobil in connection with any claims that have been identified by the Attorney General is reason enough to set aside the CID.

For the sole purpose of protecting its rights and preserving its objections, however, ExxonMobil requests that, if this Court determines that it can exercise personal jurisdiction over ExxonMobil, it (1) recuse the Attorney General's Office and appoint an independent investigator and (2) set aside, modify, or issue a protective order concerning the CID. This relief is appropriate because the Attorney General is impermissibly biased against ExxonMobil and has violated ExxonMobil's constitutional, statutory, and common law rights. Moreover, in view of the pending federal action, judicial economy warrants a brief stay of these proceedings pending a ruling on ExxonMobil's application for a preliminary injunction in federal court.

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8 *Id.* at App. 13.

9 Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

II. STATEMENT OF FACTS

A. The Attorney General's Misuse of Law Enforcement Tools

The CID is the result of a coordinated campaign of partisan state officials urged on by climate change activists and privately interested attorneys. This campaign first exposed itself to the public on March 29, 2016, when the New York Attorney General hosted a press conference in New York City, featuring the remarks of private citizen and former Vice President Al Gore, with certain other attorneys general as the self-proclaimed "AGs United For Clean Power."[10] The attorneys general, calling themselves "the Green 20" (a reference to the number of participating attorneys general), explained that their mission was to "com[e] up with creative ways to enforce laws being flouted by the fossil fuel industry."[11] Expressing dissatisfaction with what they perceived to be "gridlock in Washington" regarding climate-change policy, the New York Attorney General said that the coalition had to work "creatively" and "aggressively" to advance that agenda.[12] Former Vice President Gore went on to condemn those who question the sufficiency or cost-effectiveness of renewable energy sources, faulting them for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[13]

During her turn at the podium, the Attorney General articulated her view that "there's nothing we need to worry about more than climate change," and that she has "a moral obligation to act" to alleviate the threat to "the very existence of our planet."[14] She therefore pledged to "address climate change and to work for a better future"[15] by investigating ExxonMobil.[16] She

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10 Ex. A at App. 2-21.
11 *Id.* at App. 3.
12 *Id.*
13 *Id.* at App. 10.
14 *Id.* at App. 13.
15 *Id.* at App. 14.
16 *Id.* at App. 13.

also contemporaneously reported the findings of her investigation, before ExxonMobil had even received the CID, stating:

> Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.[17]

This results-oriented approach to investigating fossil fuel companies and ExxonMobil struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. It was evident that the Attorney General and the other attorneys general had prejudged the very investigation they proposed to undertake, prompting one reporter to question whether the press conference and these investigations were "publicity stunt[s]."[18]

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

The impropriety of the attorneys general's public statements was compounded by what they said behind closed doors during two presentations held the morning of the press conference.[19] Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists, an organization that criticizes entities that "downplay and distort the evidence of climate change," gave the first presentation on the "imperative of taking action now on climate change."[20] The second presentation—on "climate change litigation"[21]—was led by Matthew Pawa of Pawa Law Group, which boasts of its "role in launching global warming litigation."[22]

For years, Frumhoff and Pawa have sought to initiate legal actions against fossil fuel

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17 *Id.*
18 *Id.* at App. 18.
19 Ex. M at App. 132-33.
20 *Id.* at App. 133; Ex. P at App. 155.
21 Ex. M at App. 133.
22 Ex. R at App. 166.

companies to promote their partisan agenda and to generate private benefit. In 2012, Frumhoff hosted and Pawa presented at a conference, in which the attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil and noted that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[23] Indeed, attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[24]

The attorneys general at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the investigations. When *The Wall Street Journal* called Pawa the next day, the environmental bureau chief at the New York Attorney General's Office told Pawa, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event" in order to conceal from the press and public Pawa's presence at the meeting.[25]

C. The CID's Burdensome Demands and Targeting of Perceived Dissent

Three weeks after the press conference, on April 19, 2016, the Attorney General's Office served the CID on ExxonMobil.[26] Spanning 25 pages and containing 38 broadly worded document requests, the CID requests essentially all of ExxonMobil's documents related to climate change dating back, in some instances, to 1976. For example, the CID requests all documents concerning ExxonMobil's "research efforts to study CO_2 emissions" and their effects on the climate since 1976.[27] Some of the more specific requests are more troubling than the

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[23] Ex. C at App. 63.
[24] Ex. D at App. 89.
[25] *Id.*
[26] Ex. B at App. 23.
[27] *Id.* at App. 34 (Request No. 1); *see also* App. 34-35 (Request Nos. 2-4).

overly broad ones because they appear to target groups holding views with which the Attorney General disagrees. The CID demands that ExxonMobil produce all climate change related documents concerning its discussions with 12 named organizations,[28] all of which have been identified by environmental advocacy groups as holding views on climate change with which they disagree.[29] By stark contrast, the CID does not seek production of ExxonMobil's communications with organizations that have expressed views on climate change with which she agrees.

D. ExxonMobil's Lack of Relevant Conduct in Massachusetts

According to the CID, the Attorney General's investigation concerns ExxonMobil's alleged violation of G.L. c. 93A, § 2,[30] which prohibits "unfair or deceptive acts or practices" in "trade or commerce" and has a four-year statute of limitations. *See* G.L. c. 93A, § 2(a); G.L. c. 260, § 5A. It specifies two types of transactions under investigation: (1) ExxonMobil's "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (2) ExxonMobil's "marketing and/or sale of securities" to Massachusetts investors.[31]

During the limitations period, however, ExxonMobil has not engaged in the type of Massachusetts-based trade or commerce out of which any violation of G.L. c. 93A, § 2, as alleged in the CID, could arise. In that time, ExxonMobil has not sold fossil fuel derived products to Massachusetts consumers,[32] and it has not marketed or sold any securities to the

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28 *Id.* at App. 35 (Request No. 5).
29 Affidavit of Justin Anderson, dated June 14, 2016 ("Anderson Aff.") ¶ 3.
30 Ex. B. at App. 23.
31 *Id.*
32 Affidavit of Geoffrey Grant Doescher, dated June 10, 2016 ("Doescher Aff.") ¶ 3-4. Service stations selling fossil fuel derived product under an "Exxon" or "Mobil" banner are owned and operated independently. *Id.*

general public in Massachusetts.[33] Moreover, ExxonMobil has made no statements concerning climate change in the limitations period that could give rise to fraud as identified in the CID. Importantly—for more than a decade—ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. ExxonMobil's 2006 Corporate Citizenship Report, for example, expressly recognized that "the risk to society [posed by] greenhouse gas emissions could prove significant" and that "strategies that address the risk need to be developed and implemented."[34]

E. ExxonMobil's Motion for a Preliminary Injunction in Federal Court

On June 15, 2016, ExxonMobil filed a complaint in the U.S. District Court for the Northern District of Texas and a motion for a preliminary injunction against enforcement of the CID because it violates ExxonMobil's federal constitutional rights.[35] The federal court in Texas has jurisdiction because a substantial part of the events giving rise to ExxonMobil's federal constitutional claims occurred there.

III. ARGUMENT

A. There Is No Personal Jurisdiction Over ExxonMobil

The Court should set aside the CID because this Court has no general or specific personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation.[36] ExxonMobil is incorporated in New Jersey, headquartered in Texas, and maintains all of its central operations in Texas.[37] It cannot be "regarded as at home"

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33 Affidavit of Robert Luettgen, dated June 14, 2016 ("Luettgen Decl.") at ¶ 7. During the limitations period, ExxonMobil has sold short-term, fixed-rate notes in Massachusetts in specially exempted commercial paper transactions. *See* G.L. c. 110A, § 402(a)(10); *see also* 15 U.S.C. § 77c(a)(3). These notes, which mature in 270 days or less, were sold to institutional investors, not individual consumers. Luettgen Aff. ¶¶ 9-10.

34 Ex. F at App. 104; *see also* Ex. W at App. 189 (stating that the "risks of global climate change" "have been, and may in the future" continue to impact its operations).

35 Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

36 Counsel for ExxonMobil have filed a special appearance to make this motion to set aside the CID; ExxonMobil does not consent to jurisdiction through this emergency motion.

37 Luettgen Aff. ¶¶ 5-6.

in Massachusetts, and is thus not subject to general jurisdiction there. *See Daimler AG* v. *Bauman*, 134 S. Ct. 746, 760 (2014).

ExxonMobil is also not subject to specific jurisdiction in Massachusetts because it has no "suit-related" contacts with Massachusetts. *See Walden* v. *Fiore*, 134 S. Ct. 1115, 1121-23 (2014). It is inconceivable that ExxonMobil deceived Massachusetts consumers or investors during the limitations period. In the past five years, ExxonMobil has neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a single retail store or gas station in the Commonwealth.[38] As to the sale of securities, ExxonMobil has not issued any form of equity for sale to the general public in Massachusetts in the past five years.[39] Furthermore, ExxonMobil's only sales of debt in the past decade were to underwriters residing outside Massachusetts.[40] Those sales fall outside the ambit of the CID, which states that it is investigating the sale of securities to "investors in the Commonwealth." Because the Constitution prohibits the exercise of personal jurisdiction over a foreign corporation with no in-state, suit-specific contacts, the Court should set aside the CID. *See Walden*, 134 S. Ct. at 1121-23.

B. The Court Should Disqualify the Attorney General and her Office and Appoint an Independent Investigator

If the Court were to determine that it can exercise personal jurisdiction over ExxonMobil, it nevertheless should disqualify the Attorney General and her Office from conducting this investigation because the Attorney General's public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil. ExxonMobil

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38 Doescher Aff. ¶¶ 3-4.

39 Luettgen Aff. ¶ 8.

40 Ex. B at App. 23. This is subject to the one exception discussed above—*i.e.*, short-term fixed-rate notes, which ExxonMobil has sold to a handful of sophisticated institutions in the Commonwealth. *See supra* n.33.

recognizes that it is not immune from legitimate governmental inquiries. But, like any other company, it is entitled to an inquiry conducted by a fair, impartial, and evenhanded investigator.

The Attorney General's statements at the Green 20 press conference reveal a partisan bias that disqualifies her and her Office from serving as disinterested investigators. Article XXIX of the Declaration of Rights guarantees the "impartial interpretation of the laws, and administration of justice." Due process safeguards are abridged where a state official's prejudicial comments indicate bias and a predisposition over a pending matter. *See Doe* v. *Sex Offender Registry Bd.*, 84 Mass. App. Ct. 537, 541-43 (2013) (vacating administrative board's order as violative of plaintiff's due process rights because hearing examiner's comments demonstrated his bias against plaintiff and his prejudicial predisposition of the matter); *see also Ott* v. *Bd. of Reg. in Medicine*, 276 Mass. 566, 574 (1931) (affirming order vacating administrative board's decision based, in part, on board's adverse remarks about petitioner that were "incompatible with an open and an unbiased mind"). Moreover, "[a] prosecuting attorney's obligation is to secure a fair and impartial trial for the public and for the defendant." *Commonwealth* v. *Ellis*, 429 Mass. 362, 367 (1999). Because a "prosecutor has considerable discretion, the exercise of which in most instances is outside the supervision of a judge," she "may not compromise h[er] impartiality." *Id.* at 367-68. The rules governing disqualification are designed "to avoid even the *appearance* of impropriety." *Pisa* v. *Commonwealth*, 378 Mass. 724, 728-29 (1979) (emphasis added).

The Attorney General's conclusory comments concerning ExxonMobil and the fossil fuel industry create just such "an appearance of impropriety," undermining public confidence in any investigation conducted by her office. *Pisa*, 378 Mass. at 728-29. The Attorney General revealed personal and partisan bias against ExxonMobil by invoking her "moral obligation" to act because, "in [her] view, there's nothing we to need to worry about more than climate

change."[41] While the Attorney General is certainly entitled to her policy views, she must not allow them to impair her impartiality. But a lack of impartiality is exactly what her comments at the Green 20 conference indicate. The Attorney General took aim at "certain companies, certain industries [that] may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[42] And then, before even serving the CID, she announced to the public the preordained conclusion of her investigation: "We can all see today the troubling disconnect between what Exxon knew . . . and what the company . . . chose to share with investors and with the American public."[43]

Statements of this kind are entirely inconsistent with the impartiality that Massachusetts law and fundamental principles of fairness require of law enforcement officers vested with the power to investigate, prosecute, and punish. *See Borman* v. *Borman*, 378 Mass. 775, 788 (1979). Moreover, the Attorney General's bias against ExxonMobil violates ExxonMobil's due process right to a disinterested investigator under Article XII of the Massachusetts Constitution. Due process guarantees ExxonMobil a prosecutor who neither is nor "appear[s] to be influenced" by "her personal interests." *Ellis*, 429 Mass. at 371 (1999).

Importantly, the rules governing disqualification do not require a showing of the probabilities of actual harm or prejudice in the absence of disqualification. *See Pisa*, 378 Mass. at 728. Rather, "[t]he rules are applied not only to prevent prejudice to a party, but also to avoid even the appearance of impropriety." *See id.* Nonetheless, ExxonMobil would be prejudiced by allowing the Attorney General or any of her subordinates, who are well aware of the Attorney General's public statements and personal bias, to conduct a results-oriented investigation.

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41 Ex. A at App. 13.
42 *Id.*
43 *Id.*

Consequently, this Court should disqualify the Attorney General's Office and appoint an independent investigator, who is not paid on a contingency-fee basis, to determine whether an investigation is warranted and, if so, to conduct the investigation.

C. The CID and the Investigation Violate ExxonMobil's Constitutional, Statutory, and Common Law Rights

Should the Court find that it can exercise personal jurisdiction, it nevertheless should set aside, modify, or issue a protective order concerning the CID because the CID violates ExxonMobil's constitutional, statutory, and common law rights, as well as the standards set forth in Mass. R. Civ. P. 26(c). *See* G.L. c. 93A, § 6(7).

1. The CID and the Investigation Violate ExxonMobil's Free Speech Rights under Article XVI

The CID is a direct and deliberate assault on ExxonMobil's right under Article XVI of the Massachusetts Constitution to participate in a public debate over climate change policy. The Attorney General has burdened ExxonMobil's right to participate in that debate in two ways. First, as her comments at the press conference and the CID itself make clear, the Attorney General has chosen to regulate ExxonMobil's speech because she disagrees with ExxonMobil's views about how the United States should respond to climate change. Second, the CID impermissibly intrudes on ExxonMobil's political speech.

(a) The CID Is an Impermissible Content-Based Discrimination

Article XVI forbids state officials from regulating speech because of its "message, its ideas, its subject matter, or its content." *Commonwealth* v. *Lucas*, 472 Mass. 387, 392 (2015). Such regulation is "presumptively invalid," meaning that the government bears the burden of showing that such a regulation is narrowly tailored to serve a compelling state interest. *Id*. at 395.

The same statements that disqualify the Attorney General from serving as a disinterested

prosecutor also reveal that the CID is an impermissible content-based regulation of ExxonMobil's speech. The Attorney General and the other speakers at the press conference left no doubt that their decision to target ExxonMobil for investigation followed from their disagreement with the company's perceived views concerning which policies the United States should implement in response to climate change. The Attorney General herself characterized the investigation as one aspect of her campaign "to address climate change," and remedy "the problem . . . of public perception," by "holding accountable those who have needed to be held accountable for far too long."[44]

The CID's demands confirm these impermissible motives because they expressly target organizations holding views about climate change or climate change policy with which the Attorney General disagrees. The CID requests ExxonMobil's documents and communications with 12 named organizations,[45] all of which have been identified by advocacy organizations as, at times, opposing the views and policies favored by those advocacy organizations with respect to climate change science or policy.[46] A state official's targeting of speakers based on their views is improper content-based discrimination. *Cf. In re Roche*, 381 Mass. 624, 637 (1980). Because that is precisely what the Attorney General has done here through the issuance of the CID, the CID is presumptively invalid.

(b) The CID Impermissibly Probes ExxonMobil's Political Speech

Political speech concerning how a government should operate is "at the very heart" of speech protected by Article XVI. *See Associated Indus. of Mass.* v. *Attorney Gen.*, 418 Mass. 279, 287-88 (1994). This protection is no less stringent when the speaker is a corporation rather than a person. *See id.* at 288. State action that infringes on political speech is subject to strict

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44 *Id.* at App. 13-14.
45 Ex. B at App. 35 (Request No. 5).
46 Anderson Aff. ¶ 3.

scrutiny. *See id.* at 289.

The CID impermissibly infringes ExxonMobil's political speech. It requires ExxonMobil to produce documents that reflect its participation in the long-running and still unfolding national debate about the most appropriate policy approach the United States should take in response to the risks of climate change. The CID effectively demands all of ExxonMobil's communications and documents related to the subject of climate change. For example, it compels ExxonMobil to produce any and all documents related to ExxonMobil's speeches, press releases, SEC filings, papers, and presentations about climate change.[47] It also requests virtually all of ExxonMobil's research related to climate change since 1976.[48] Research of that kind is indispensable to determining what the proper policy response to climate change is, and it therefore falls comfortably within the protections of Article XVI.

(c) The CID Is Not Narrowly Tailored

Because the CID infringes ExxonMobil's speech in two significant ways, the Attorney General bears the burden of showing that the CID's demands are narrowly tailored to achieve a compelling state interest. *See Lucas*, 472 Mass. at 398. She cannot meet this burden. The only interest that the Attorney General discussed at the press conference was her "moral obligation" to combat climate change by identifying and suppressing the speech of fossil fuel companies that stand in the way of that goal.[49] Far from qualifying as a compelling interest, the Attorney General's desire to target companies that hold views with which she disagrees is itself illegal.

Even if the Attorney General could identify a compelling state interest, the CID is not narrowly tailored to advance any such interest. The CID's overly broad and unduly burdensome demands for, inter alia, 40 years of research into climate change cannot possibly qualify as

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47 *See* Ex. B at App. 34-41 (Request Nos. 2-4, 8-12, 14-17, 19, 22, 32).
48 *See id.* at App. 34-35 (Request Nos. 1-4).
49 *See* Ex. A at App. 13-14.

narrowly tailored. Indeed, such requests would not survive even an ordinary motion to quash, let alone the searching inquiry required where free speech rights are threatened. *See, e.g., Cardone* v. *Pereze*, No. 01-P-92, 2003 WL 118605, *4 (Mass. App. Ct. Jan. 14, 2003) (affirming denial of motion to compel a request for "all documents relating to all services, billings, and accounts of the fertility center covering four and one-half years").

(d) The CID Is an Impermissible Form of Official Harassment

The Attorney General's public statements also demonstrate that the CID is being wielded as an improper tool of official harassment. A government agency must not employ "harassing tactics unjustified by the requirements of sober investigation." *Ward* v. *Peabody*, 380 Mass. 805, 814 (1980). Courts, therefore, have broad discretion to set aside a civil investigative demand if it was issued to harass an entity for expressing a particular point of view. *See In re Roche*, 381 Mass. 636-37; *Cronin* v. *Strayer*, 392 Mass. 525, 536 (1984).

As described in Section III.C.1, the Attorney General's statements indicate that ExxonMobil was targeted based on its speech. State actors' attempts to "chill a particular point of view," amount to official harassment, and courts may refuse to order the production of materials demanded for that unlawful reason.[50] *In re Roche*, 381 Mass. at 636-37 (internal quotation marks omitted).

2. The CID's Demands Are Irrelevant and Unduly Burdensome

The CID is itself defective in its entirety because it launches a baseless fishing expedition, demanding unreasonable volumes of materials of no relevance to the violations purportedly under investigation. Because the Massachusetts Constitution, G.L. c. 93A, § 6, and rules of civil procedure prohibit such dragnet investigations, the Court should set aside the CID.

[50] For the same reasons, the Attorney General's issuance of the CID constitutes an abuse of process. *See Jones* v. *Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389 (1975).

(a) The CID's Irrelevant Demands Are Arbitrary and Capricious

When the Attorney General "believes" that a corporation has violated G.L. c. 93A, § 2, she is authorized to request materials that are "relevant" to the alleged violation of law. *See* G.L. c. 93A, § 6(1). The Attorney General may not, however, "act arbitrarily or in excess of [her] statutory authority." *CUNA Mut. Ins. Soc.* v. *Attorney Gen.*, 380 Mass. 539, 542 n.5 (1980). When analyzing whether a government agency's action was arbitrary and capricious, a court must examine whether the agency action "was authorized by the governing statute . . . in light of the facts." *Fafard* v. *Conservation Comm'n of Reading*, 41 Mass. App. Ct. 565, 568 (1996).

Here, the Attorney General has acted arbitrarily and in excess of her authority because the CID was issued in "willful . . . disregard of [the] facts" that ExxonMobil has engaged in no trade or commerce in Massachusetts during the relevant statute of limitations period which could potentially give rise to liability for the state-law claims alleged in the CID. *Long* v. *Comm'r of Pub. Safety*, 26 Mass. App. Ct. 61, 65 (1988). *See* Section III.A. Because the materials sought are plainly irrelevant to any conceivable claim under G.L. c. 93A identified in the CID, the CID violates the statutory requirement that an Attorney General may seek only those documents that are "relevant" to a "valid investigation." *In re Yankee Milk, Inc.*, 372 Mass. 353, 357 (1977) (discussing G.L. c. 93A, § 6(1)); *see also Harmon Law Offices, P.C.* v. *Attorney Gen.*, 83 Mass. App. Ct. 830, 837 (2013).

(b) The Attorney General's Fishing Expedition Is Impermissible

For similar reasons, the CID's demands constitute a baseless fishing expedition in violation of ExxonMobil's Article XIV rights. Pursuant to Article XIV, "unreasonable" civil investigative demands "must be quashed or modified." *See Fin. Comm'n of City of Bos.* v. *McGrath*, 343 Mass. 754, 764-65 (1962). This restriction bars the government from "fish[ing]" into the records of an entity until it has "caught something." *Commonwealth* v. *Torres*, 424

Mass. 153, 161 (1997); *see also Commonwealth* v. *Dwyer*, 448 Mass. 122, 145 (2006) (barring baseless "fishing expeditions for possibly relevant information").

This roving investigation contravenes the prohibition on fishing expeditions. First, the CID requires ExxonMobil to produce documents that bear no relation to ExxonMobil's trade or commerce in the Commonwealth. *See* Sections III.A, III.B. Second, the Attorney General's stated theory, that ExxonMobil "deceived investors and consumers about the dangers of climate change"[51] lacks a factual basis. For the last decade, ExxonMobil has publicly "recognize[d] that the risk to society posed by greenhouse gas emissions may prove significant," that "action is justified now,"[52] and that the "risks of global climate change" "have been, and may in the future" continue to impact its operations.[53] The CID lacks any legitimate investigatory purpose and must be set aside.

(c) The CID Imposes an Undue Burden on ExxonMobil

A civil investigative demand issued pursuant to G.L. c. 93A, § 6(7) must not place an undue burden on its recipient. *See In re Yankee Milk*, 372 Mass. at 360-61 (citing G.L. c. 93A, § 6(5)); *see also* G.L. c. 93A, § 6(7) (incorporating the standards of Mass. R. Civ. P. 26(c), including that a discovery request must now impose an "undue burden or expense" on a party). A civil investigative demand imposes an undue burden if it requests a "quantum of material" that "exceed[s] reasonable limits." *In re Yankee Milk*, 372 Mass. at 360-61.

Here, the CID demands 40 years of documents, despite the four-year statute of limitations applicable to the alleged violation. A state agency may not request documents over "such a long period of time as to exceed reasonable limits." *Gardner* v. *Mass. Tpk. Auth.*, 347 Mass. 552, 561

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51 Ex. A at App. 13.

52 Ex. E at App. 94; *see also* Ex. F at App. 104 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").

53 Ex. W at App. 188-89.

(1964) (internal quotation marks omitted). For example, in *Makrakis* v. *Demelis*, the court held that a request for records over a 22-year period placed "an unreasonable burden" on the recipient because it was "not limited to a narrow time frame." No. 09-706-C, 2010 WL 3004337, at *2 (Mass. Super. Ct. July 15, 2010); *see also In re United Shoe Machinery Corp.*, 7 F.R.D. 756, 757 (D. Mass. 1947) (reducing subpoena requesting documents dating back 27 years to just 10 years, which "seem[ed] to be the longest period of time which has been allowed by any court" at that time). Similarly, an agency may not request documents "beyond the relevant time period" of an action. *See Donaldson* v. *Akibia, Inc.*, No. 03CV1009E, 2008 WL 4635848, at *15 (Mass. Super. Ct. Aug. 30, 2008).

In contravention of these holdings, the CID requests all documents and communications since 1976 concerning ExxonMobil's "research efforts to study CO_2 emissions" and their effects on the climate.[54] The CID also requests all documents since 1976 concerning the papers and presentations given by three ExxonMobil scientists and all documents since 1997 concerning an ExxonMobil executive's statements about climate change.[55] Even the requests that seek ExxonMobil's documents over the past six to ten years[56] exceed reasonable limits in light of the four-year statute of limitations. At a minimum, the CID must be modified to limit the scope of its demands to the four-year limitations period.

(d) The CID Lacks Proper Specificity

The lack of specificity of the CID's document requests also violates Massachusetts restrictions on civil investigative demands. Under G.L. c. 93A, § 6(4), a civil investigative demand must be set aside if it fails to describe with "reasonable specificity" the documents sought "so as to fairly indicate the material demanded." *See In re Yankee Milk*, 372 Mass. at

[54] Ex. B at App. 34 (Request No. 1).
[55] *Id.* at App. 34-36 (Request Nos. 2-4, 8).
[56] *See, e.g., id.* at App. 34-42 (Request Nos. 5, 9-35, 37-38).

361. A civil investigative demand that seeks "all classes of records" on a single topic "without limitation" fails this requirement, as does a request for documents related to a vague or generic topic. *See Comm'r of Revenue* v. *Boback*, 12 Mass. App. Ct. 602, 603 n.2 & 610 (1981).

The CID suffers from both flaws. It fails to properly specify the material demanded by seeking essentially all documents related to climate change. In addition, several of the demands are impermissibly vague, seeking, for instance, documents and communications related to ExxonMobil's "awareness," "internal considerations," and "decision making" with respect to certain climate change matters, and "information exchange" with "other companies and/or industry groups representing energy companies."[57] *See Enargy Power (Shenzhen) Co*. v. *Xiaolong Wang*, No. 13-11348-DJC, 2014 WL 4687542, at *3 (D. Mass. Sept. 17, 2014) (noting that a document request that "call[s] for all" documents related to a broad topic "without any restriction as to the subject matter of" that topic because such a request is "overly broad").

(e) The CID Improperly Demands the Production of Privileged Documents

Massachusetts courts protect entities from compelled disclosure of documents protected by privilege, such as the attorney-client privilege, work product, and the First Amendment privilege. *See, e.g.*, *In re Reorganization of Elec. Mut. Liab. Ins. Co., Ltd. (Bermuda)*, 425 Mass. 419, 421 (1997) (attorney-client privilege); *Ward*, 380 Mass. at 817 (work product); *In re Roche*, 381 Mass. at 632 (First Amendment privilege). While the CID contains provisions requiring documentation if ExxonMobil withholds a document based on privilege, it does not affirmatively state that ExxonMobil may withhold privileged documents. ExxonMobil therefore requests that if the CID is not set aside, it should be modified or a protective order should be issued to prevent

[57] *Id.* at App. 35-36, 39-40 (Request Nos. 7-8, 18, 23); *see also id.* at App. 39 (Request Nos. 18, 20 (requesting information about ExxonMobil's "marketing decisions")).

the disclosure of privileged information.

D. The Court Should Stay Adjudication of this Motion Pending Resolution of the Related Federal Action

ExxonMobil's motion for a preliminary injunction is now pending in the United States District Court for the Northern District of Texas.[58] If granted, the relief sought in that action would render this Petition and motion moot. This Court should therefore stay adjudication of this motion, pending decision in the earlier-filed action.

Courts presume that a second action should be stayed or dismissed when it seeks relief that would be redundant of the relief sought in an earlier-filed suit. *See Ethicon Endo-Surgery, Inc.* v. *Pemberton*, No. 10-3973-B, 2010 WL 5071848, at *3 (Mass. Super. Ct. Oct. 27, 2010). When determining whether special circumstances justify permitting the second suit to proceed, courts consider: "judicial and litigant economy, the just and effective disposition of disputes, the possible absence of jurisdiction over all necessary desirable parties, as well as a balancing of conveniences that may favor the second forum." *Id.*

Here, ExxonMobil has moved in federal court in Texas for a preliminary injunction barring the enforcement of the CID. That action was filed first, presented to a court with jurisdiction over the matter, and raises important constitutional claims. A presumption thus attaches in favor of permitting the federal court to adjudicate that motion before this Court takes any action here. *See Mun. Lighting Comm'n* v. *Stathos,* 13 Mass. App. Ct. 990, 991 (Mass. App. Ct. 1982); *see also Seidman* v. *Cent. Bancorp, Inc.*, No. 030547BLS, 2003 WL 369678, at *2-3 (Mass. Super. Ct. Feb. 3, 2003) (staying a later filed Massachusetts state court action in light of an earlier filed action in Massachusetts federal court).

None of the relevant factors rebuts this presumption. First, it is expected that the federal

[58] Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

court will promptly resolve the pending motion. Second, the federal court is "fully capable of furnishing complete relief to the parties," so it can justly and effectively resolve ExxonMobil's motion. *See Stathos*, 13 Mass. App. Ct. at 991. Third, jurisdictional considerations favor staying this action, since Massachusetts courts lack jurisdiction over ExxonMobil. Finally, any "balancing of conveniences" supports the application of the presumption. The documents that are subject to the CID are located in Texas, where ExxonMobil alleges that it will feel the effects of the unconstitutional CID.[59] Accordingly, the relevant considerations confirm—rather than rebut—the presumption permitting the earlier-filed action to proceed.

IV. CONCLUSION

The Attorney General's personal views on climate change cannot justify a warrantless fishing expedition into the records of a company that conducts no relevant activities in Massachusetts. The Attorney General's public statements leave no ambiguity about the outcome of any investigation to be conducted by her office and demonstrate a personal bias against ExxonMobil. Results-oriented government investigations shake the public's confidence in the impartial administration of justice. It is the special role of courts to provide a check against misuse of government power. Under these circumstances, finding an absence of personal jurisdiction is a sound exercise of judicial authority. The Court should grant ExxonMobil's motion, and enter an order setting aside the CID.

Respectfully submitted,

EXXON MOBIL CORPORATION

By its attorneys,

[59] Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

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Dated: June 16, 2016

CERTIFICATE OF SERVICE

I, Caroline K. Simons, hereby certify that a true and correct copy of the above document was served upon the Attorney General's Office by hand on this 16th day of June, 2016.

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