UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	:	**DECLARATION OF CHRISTOPHE G. COURCHESNE**
	:	
Defendants.	:	

I, Christophe G. Courchesne, declare as follows:

1. My name is Christophe G. Courchesne. I am admitted to practice *pro hac vice* in this Court and am an Assistant Attorney General and Chief of the Environmental Protection Division of the Office of Massachusetts Attorney General Maura Healey ("AGO"). I am one of the attorneys representing Maura Healey, Attorney General of Massachusetts, in her official capacity, in this case. I am over 18 years of age and am fully competent in all respects to make this Declaration. I have personal knowledge of the facts stated herein, based on my experience or my consultation with others, or they are known to me in my capacity as counsel for Attorney General Maura Healey, and each of them is true and correct.

2. I submit this Declaration in support of the Attorney General's renewed motion to dismiss Plaintiff Exxon Mobil Corporation's ("Exxon") First Amended Complaint in this action.

3. Attached to this Declaration as **Exhibit 1** is a true and accurate copy of the order issued by the Massachusetts Superior Court (Brieger, J.) in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F, on January 11, 2017.

4. Attached to this Declaration as **Exhibit 2** is a true and accurate copy of Exxon's Petition to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, filed with the Massachusetts Superior Court in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F, on June 16, 2016.

5. Attached to this Declaration as **Exhibit 3** is a true and accurate copy of Exxon's Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, filed with the Massachusetts Superior Court in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F, on June 16, 2016.

6. Attached to this Declaration as **Exhibit 4** is a true and accurate copy of Exxon's Memorandum in Support of Its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, filed with the Massachusetts Superior Court in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F, on June 16, 2016.

7. Attached to this Declaration as **Exhibit 5** is a true and accurate copy of Exxon's Consolidated Memorandum in Further Support of Its Emergency Motion and in Opposition to Respondent's Motion to Compel Compliance with the Civil Investigative Demand, dated September 8, 2016, and filed with the Massachusetts Superior Court in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F.

8. Attached to this Declaration as **Exhibit 6** is a true and accurate copy of the transcript of the December 7, 2016, hearing before the Massachusetts Superior Court (Brieger,

J.) in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F.

9. Attached to this Declaration as **Exhibit 7** is a true and accurate copy of Exxon's and the AGO's joint letter to the Massachusetts Superior Court (Brieger, J.) in *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, Civil Action No. 2016-1888-F, dated February 14, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 2017.

/s/ Christophe G. Courchesne
Christophe G. Courchesne (admitted *pro hac vice*)
christophe.courchesne@state.ma.us
Chief, Environmental Protection Division
Assistant Attorney General
Office of Massachusetts Attorney
General Maura Healey
(617) 727-2200
(617) 727-9665 (fax)

Exhibit 1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-1888-F

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

ORDER ON EMERGENCY MOTION OF EXXONMOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER AND THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXONMOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36

On April 19, 2016, the Massachusetts Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil Corporation ("Exxon") pursuant to G. L. c. 93A, § 6. The CID stated that it was issued as:

> [P]art of a pending investigation concerning potential violations of M.G.L. c. 91A, § 2, and the regulations promulgated thereunder arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth ...: and (2) the marketing and/or sale of securities, as defined in M.G.L. c. 110A, §401(k), to investors in the Commonwealth, including, without limitation, fixed- and floating rate-notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, Exhibit B. The CID requests documents generally related to Exxon's study of CO^2 emissions and the effects of these emissions on the climate from January 1, 1976 through the date of production.

On June 16, 2016, Exxon commenced the instant action to set aside the CID. The Attorney General has cross-moved pursuant to G. L. c. 93A, § 7 to compel Exxon to comply with the CID. After a hearing and careful review of the parties' submissions, and for the reasons that follow, Exxon's motion to set aside the CID is **DENIED** and the Commonwealth's motion to

compel is **ALLOWED**, subject to this Order.

DISCUSSION

General Laws c. 93A, § 6 authorizes the Attorney General to obtain and examine documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by chapter 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G. L. c. 93A, § 2(a). General Laws c. 93A, § 6 "should be construed liberally in favor of the government," see Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 364 (1977), and the party moving to set aside a CID "bears a heavy burden to show good cause why it should not be compelled to respond," see CUNA Mutual Ins. Soc. v. Attorney Gen., 380 Mass. 539, 544 (1980). There is no requirement that the Attorney General have probable cause to believe that a violation of G. L. c. 93A has occurred; she need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G. L. c. 93A. Id. at 542 n.5. While the Attorney General must not act arbitrarily or in excess of her statutory authority, she need not be confident of the probable result of her investigation. Id. (citations omitted).

I. Exxon's Motion to Set Aside the CID

A. Personal Jurisdiction

Exxon contends that this court does not have personal jurisdiction over it in connection with any violation of law contemplated by the Attorney General's investigation. 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, page 2. Exxon is incorporated in New

Jersey and headquartered in Texas. All of its central operations are in Texas.

Determining whether the court has personal jurisdiction over a nonresident defendant involves a familiar two-pronged inquiry: (1) is the assertion of jurisdiction authorized by the longarm statute, G. L. c. 223A, § 3, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979). Jurisdiction is permissible only when both questions draw affirmative responses. Id. As the party claiming that the court has the power to grant relief, the Commonwealth has the burden of persuasion on the issue of personal jurisdiction. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612 n.28 (1979).

The Commonwealth invokes jurisdiction under G. L. c. 223A, § 3(a), which permits the court to assert jurisdiction over a defendant if the defendant "either directly or through an agent transacted any business in the Commonwealth, and if the alleged cause of action arose from such transaction of business." Good Hope Indus., Inc., 378 Mass. at 6. The "transacting any business" language is to be construed broadly. See Tatro v. Manor Care, Inc., 416 Mass. 763, 767 (1994). "Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient, generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." Id. Whether the alleged injury "arose from" a defendant's transaction of business in Massachusetts is determined by a "but for" test. Id. at 771-772 (jurisdiction only proper if, *but for* defendant's solicitation of business in Massachusetts, plaintiff would not have been injured).

The CID says that the Attorney General is investigating potential violations arising from

Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers. The Commonwealth argues that Exxon's distribution of fossil fuel to Massachusetts consumers "through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products" satisfies the transaction of business requirement. Exxon objects because it contends that for the past five years, it has neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a retail store or gas station in Massachusetts. According to the affidavit of Geoffrey Grant Doescher ("Doescher"), the U.S. Branded Wholesale Manager, ExxonMobil Fuels, Lubricants and Specialities Marketing Company at Exxon, any service station or wholesaler in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner is independently owned and operated pursuant to a Brand Fee Agreement ("BFA"). Doescher says that branded service stations purchase gasoline from wholesalers who create ExxonMobil-branded gasoline by combining unbranded gasoline with ExxonMobil-approved additives obtained from a third-party supplier. The BFA also provides that Exxon agrees to allow motor fuel sold from these outlets to be branded as Exxon or Mobil-branded motor fuel.

Exxon provided to the court and the Commonwealth a sample BFA. By letter dated December 19, 2016, the Commonwealth argued that many provisions of the BFA properly give rise to this court's jurisdiction. The Commonwealth contends that the BFA provides many instances in which Exxon retains the right to control both the BFA Holder and the BFA Holder's franchisees.[1] For example, Section 15(a) of the BFA states:

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[1] The BFA mandates that all BFA Holders require their outlets to meet minimum facility, product, and service requirements, Section 13, and provide a certain level of customer service, Section 16. Moreover, Exxon requires that the BFA Holder enter into written agreements with

> BFA Holder agrees to diligently promote and cause its Franchise Dealers to diligently promote the sales of Products, including through advertisements, all in accordance with the terms of this Agreement. BFA Holder hereby acknowledges and agrees that, notwithstanding anything set forth herein to the contrary, to insure the integrity of ExxonMobil trademarks, products and reputation, ExxonMobil shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions that will use media vehicles for the promotion and sale of any product, merchandise or services, in each case that (i) uses or incorporates and Proprietary Mark or (ii) relates to any Business operated at a BFA Holder Branded outlet. ... BFA Holder shall expressly require all Franchise Dealers to (a) agree to such review and control by ExxonMobil. ...

By letter dated December 27, 2016, Exxon disputes that any of the BFA's provisions establish the level of control necessary to attribute the conduct of a BFA Holder to Exxon. See Depianti v. Jan-Pro Franchising Int'l Inc., 465 Mass. 607, 617 (2013) (citation omitted) ("[T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter."); Lind v. Domino's Pizza LLC, 87 Mass. App. Ct. 650, 654-655 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that franchisors have undertaken an agency relationship with the franchisee such that vicarious liability should apply."); Theos & Sons, Inc. v. Mack Trucks, Inc., 1999 Mass. App. Div. 14, 17 (1999)

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each of its Franchise Dealers and in the agreement, the Franchise Dealer must commit to Exxon's "Core Values." Section 19. "Core Values" is defined on page one of the BFA:

> BHA Holder acknowledges that ExxonMobil has established the following core values ("Core Values") to build and maintain a lasting relationship with its customers, the motoring public:
> (1) To deliver quality products that consumers can trust.
> (2) To employ friendly, helpful people.
> (3) To provide speedy, reliable service.
> (4) To provide clean and attractive retail facilities.
> (5) To be a responsible, environmentally-conscious neighbor.

(obligations to render prompt and efficient service in accordance with licensor's policies and standards and to satisfy other warranty related service requirements did not constitute evidence of agency relationship because they were unrelated to licensee's day-to-day operations and specific manner in which they were conducted).

Here, though, Section 15 of the BFA evidences a retention of more control than necessary simply to protect the integrity of the Exxon brand. By Section 15, Exxon directly controls the very conduct at issue in this investigation – the marketing of Exxon products to consumers. See Depianti, 465 Mass. at 617 ("right to control test" should be applied to franchisor-franchisee relationship in such a way as to ensure that liability will be imposed only where conduct at issue properly may be imputed to franchisor). This is especially true because the Attorney General's investigation focuses on Exxon's marketing and/or sale of energy and other fossil fuel derived products to Massachusetts consumers. Section 15(a) makes it evident to the court that Exxon has retained the right to control the "specific policy or practice" allegedly resulting in harm to Massachusetts consumers. See id. (franchisor vicariously liable for conduct of franchisee only where franchisor controls or has right to control specific policy or practice resulting in harm to plaintiff). The quantum of control Exxon retains over its BFA Holders and the BFA Holders' franchisees as to marketing means that Exxon retains sufficient control over the entities actually marketing and selling fossil fuel derived products to consumers in the Commonwealth such that the court may assert personal jurisdiction over Exxon under G. L. c. 223A, § 3(a).

To determine whether such an exercise of personal jurisdiction satisfies – or does not satisfy – due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 471 U.S.

462, 474 (1985). The plaintiff must demonstrate (1) purposeful availment of commercial activity in the forum State by the defendant; (2) the relation of the claim to the defendant's forum contacts; and (3) the compliance of the exercise of jurisdiction with "traditional notions of fair play and substantial justice." Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 457 Mass. 210, 217 (2010) (citations omitted). Due process requires that a nonresident defendant may be subjected to suit in Massachusetts only where "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." Good Hope Indus., Inc., 378 Mass. at 7 (citation omitted). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief." Tatro, 416 Mass. at 773.

The court concludes that in the context of this CID, Exxon's due process rights are not offended by requiring it to comply in Massachusetts. If the court does not assert its jurisdiction in this situation, then G. L. c. 93A would be "de-fanged," and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants. Compare Bulldog Investors Gen. Partnership, 457 Mass. at 218 (Massachusetts has strong interest in adjudicating violations of Massachusetts securities law; although there may be some inconvenience to non-resident plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh Commonwealth's interest in enforcing its laws in Massachusetts forum). Also, insofar as Exxon delivers its products into the stream of

commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-298 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State).

For all of these reasons, the court concludes that it has personal jurisdiction over Exxon with respect to this CID.

B. Arbitrary and Capricious

Exxon next contends that the CID is not supported by the Attorney General's "reasonable belief" of wrongdoing. General Laws c. 93A, § 6 gives the Attorney General broad investigatory powers to conduct investigations whenever she *believes* a person has engaged in or is engaging in any conduct in violation of the statute. Attorney Gen. v. Bodimetric Profiles, 404 Mass. 152, 157 (1989); see Harmon Law Offices P.C. v. Attorney Gen., 83 Mass. App. Ct. 830, 834 (2013). General Laws c. 93A does not contain a "reasonable" standard, but the Attorney General "must not act arbitrarily or in excess of his statutory authority." See CUNA Mut. Ins. Soc., 380 Mass. at 542 n.5 (probable cause not required; Attorney General "need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G. L. c. 93A").

Here, Exxon has not met its burden of persuading the court that the Attorney General acted arbitrarily or capriciously in issuing the CID. See Bodimetric Profiles, 404 Mass. at 157 (challenger of CID has burden to show that Attorney General acted arbitrarily or capriciously). If Exxon presented to consumers "potentially misleading information about the risks of climate

change, the viability of alternative energy sources, and the environmental attributes of its products and services," see CID Demand Nos. 9, 10, and 11, the Attorney General may conclude that there was a 93A violation. See Aspinall v. Philip Morris Cos., 442 Mass. 381, 395 (2004) (advertising is deceptive in context of G. L. c. 93A if it consists of "a half truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information"); Commonwealth v. DeCotis, 366 Mass. 234, 238 (1974) (G. L. c. 93A is legislative attempt to "regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities"). The Attorney General is authorized to investigate such potential violations of G. L. c. 93A.

Exxon also argues that the CID is politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming. As discussed above, however, the court finds that the Attorney General has assayed sufficient grounds – her concerns about Exxon's possible misrepresentations to Massachusetts consumers – upon which to issue the CID. In light of these concerns, the court concludes that Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it.[2]

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[2] The court does not address Exxon's arguments regarding free speech at this time because misleading or deceptive advertising is not protected by the First Amendment. In re Willis Furniture Co., 980 F.2d 721, 1992 U.S. App. LEXIS 32373 * 2 (1992), citing Friedman v. Rogers, 440 U.S. 1, 13-16 (1979). The Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.

C. Unreasonable Burden and Unspecific

A CID complies with G. L. c. 93A, §§ 6(4)(c) & 6(5) if it "describes with reasonable particularity the material required, if the material required is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits." Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. at 360-361; see G. L. c. 93A, § 6(4)(c) (requiring that CID describe documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate material demanded); G. L. c. 93A, § 6(5) (CID shall not "contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth").

Exxon argues that the CID lacks the required specificity and furthermore imposes an unreasonable burden on it. With respect to specificity, Exxon takes issue with the CID's request for "essentially all documents related to climate change," and with the vagueness of some of the demands. 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, page 18. In particular, Exxon objects to producing documents that relate to its "awareness," "internal considerations," and "decision making" on climate change issues and its "information exchange" with other companies.

The court has reviewed the CID and disagrees that it lacks the requisite specificity. The CID seeks information related to what (and when) Exxon knew about the impacts of burning

fossil fuels on climate change and what Exxon told consumers about climate change over the years. Some of the words used to further describe that information – awareness and internal considerations – simply modify the "what" and "when" nature of the requests.

With respect to the CID being unreasonably burdensome, an effective investigation requires broad access to sources of information. See Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. at 364. Documentary demands exceed reasonable limits only when they "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." Id. at 361 n.8. That is not the case here. At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request. It would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General.

Whether there should be reasonable limitations on the documents requested for other reasons, such as based upon confidentiality or other privileges, should be discussed by the parties in a conference guided by Superior Court Rule 9C. After such a meeting, counsel should submit to the court a joint status report outlining disagreements, if any, for the court to resolve.

II. Disqualification of Attorney General

Exxon requests the court to disqualify the Attorney General and appoint an independent investigator because her "public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil." 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, page 8. In making this request, Exxon relies on a speech made by the Attorney General on March 29, 2016, during an "AGs United for Clean Power" press conference with other Attorneys Generals. The relevant portion of Attorney General Healey's comments were:

> Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of Exxon Mobil. 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.

General Laws c. 93A, § 6 gives the Attorney General power to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation G. L. c. 93A. Bodimetric Profiles, 404 Mass. at 157. In the Attorney General's comments at the press conference, she identified the basis for her belief that Exxon may have violated G. L. c. 93A. In particular, she expressed concern that Exxon failed to disclose relevant information to its Massachusetts consumers. These remarks do not evidence any actionable bias on the part of the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations. Cf. Buckley v. Fitzsimmons, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job ... and they may serve a vital public function."); Goldstein v. Galvin, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern."); see also Commonwealth v. Ellis, 429 Mass. 362, 372 (1999) (due process provisions require that prosecutor be disinterested in sense that prosecutor must not be – nor

appear to be – influenced in exercise of discretion by personal interests). It is the Attorney General's duty to investigate Exxon if she believes it has violated G. L. c. 93A, § 6. See also G. L. c. 12, § 11D (attorney general shall have authority to prevent or remedy damage to the environment caused by any person or corporation). Nothing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents. See generally Ellis, 429 Mass. at 378 ("That in the performance of their duties [the Attorney General has] zealously pursued the defendants, as is [his or her] duty within ethical limits, does not make [his or her] involvement improper, in fact or in appearance.").

III. Stay

On June 15, 2016, Exxon filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Texas alleging that the CID violates its federal constitutional rights. Exxon Mobil requests this court to stay its adjudication of the instant motion pending resolution of the Texas federal action. See G. L. c. 223A, § 5 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."); see WR Grace & Co. v. Hartford Accident & Indemnity Co., 407 Mass. 572, 577 (1990) (decision whether to stay action involves discretion of motion judge and depends greatly on specific facts of proceeding before court). The court determines that the interests of substantial justice dictate that the matter be heard in Massachusetts.

This matter involves the Massachusetts consumer protection statute and Massachusetts case law arising under it, about which the Massachusetts Superior Court is certainly more

familiar than would be a federal court in Texas. See New Amsterdam Casualty Co. v. Estes, 353 Mass. 90, 95-96 (1967) (factors to consider include administrative burdens caused by litigation that has its origins elsewhere and desirability of trial in forum that is at home with governing law). Further, the plain language of the statute itself directs a party seeking relief from the Attorney General's demand to the courts of the commonwealth. See G. L. c. 93A, § 6(7) (motion to set aside "may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"); see also G. L. c. 93A, § 7 ("A person upon whom notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth."). The court declines to stay this proceeding.

ORDER

For the reasons discussed above, it is hereby **ORDERED** that the Emergency Motion of ExxonMobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order is **DENIED** and the Commonwealth's Cross-Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36 is **ALLOWED** consistent with the terms of this Order. The parties are **ORDERED** to submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C Conference.

Heidi E. Brieger
Associate Justice of the Superior Court

Dated at Lowell, Massachusetts, this 11th day of January, 2017.

Exhibit 2

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

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

PETITION OF EXXON MOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER

Pursuant to G.L. c. 93A, § 6(7) and the standards set forth in Mass. R. Civ. P. 26(c), Petitioner Exxon Mobil Corporation ("ExxonMobil"), through this special appearance and without consenting to personal jurisdiction, respectfully requests that this Court set aside a civil investigative demand (the "CID") served on ExxonMobil by the Office of the Attorney General of the Commonwealth of Massachusetts (the "Attorney General"). The Court should set aside the CID because this Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation. Alternatively, should the Court determine that it can exercise personal jurisdiction, it should (1) exercise its inherent power to recuse the Massachusetts Attorney General's Office from pursuing this investigation because it is impermissibly biased against ExxonMobil; and (2) set aside the CID because it violates ExxonMobil's constitutional, statutory, and common law rights, as well as the standards of Mass. R. Civ. P. 26(c), which protect ExxonMobil from "annoyance, embarrassment, oppression, or undue burden or expense." ExxonMobil also respectfully requests that the Court exercise its discretion to stay adjudication of this Petition pending the resolution of an earlier filed federal action in the Northern District of Texas, which seeks to enjoin the Attorney General's investigation.

INTRODUCTION

1. Frustrated by the federal government's perceived inaction, a coalition of state attorneys general with an agenda to end the world's reliance on fossil fuel announced its "collective efforts to deal with the problem of climate change" at a press conference, held on March 29, 2016, with private citizen and former Vice President Al Gore as the featured speaker.[1] The attorneys general declared that they planned to "creatively" and "aggressively" use the powers of their respective offices on behalf of the coalition to force ExxonMobil[2] and other energy companies to comply with the coalition's preferred policy responses to climate change.[3] As their statements made unmistakably clear, the attorneys general press conference was a politically motivated event, urged on by activists.

2. The press conference represented a major achievement for a small group of climate activists. Since at least 2012, these activists sought to influence the debate surrounding climate change by gaining access to ExxonMobil's internal documents with the hope of using those documents to discredit the company and other political opponents. They recognized that appropriating law enforcement tools provided the most viable means to accomplish that goal because "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[4] To them, law enforcement was simply another means of advancing their political agenda, by "wresting potentially useful internal documents from the

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1 ExxonMobil has submitted an Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order. The Appendix contains affidavits and exhibits that are referenced in this Petition and in the Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order. A transcript of the AGs United For Clean Power Press Conference, held on March 29, 2016, was prepared by counsel based on a video recording of the event, which is available at http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across. The transcript is included in the Appendix as Exhibit A at App. 2-21.

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

3 Ex. A at App. 3.

4 Ex. C at App. 63.

fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[5]

3. Two climate activists, who have led the effort to access ExxonMobil's records, gave private presentations to the attorneys general before the press conference commenced.[6] Those presentations were closed to the press, and the contents of the presentations have been kept secret from the public. The attorneys general recognized that the involvement of the climate activists—one of whom is a plaintiffs' attorney likely to profit from any private litigation made possible by a government investigation of ExxonMobil—could expose the coordination between the attorneys general and the private, special interests that were advancing the investigation and the press conference announcing these investigative efforts. So, when that plaintiffs' attorney asked the New York Attorney General's Office what he should tell a reporter if asked about his involvement, a senior official with the office specifically requested that the plaintiffs' attorney refrain from disclosing his presence at the meeting, thus concealing it from the press and public.[7]

4. The Attorney General's statements at the press conference embraced the activists' agenda. After announcing that "there's nothing we need to worry about more than climate change," the Attorney General pledged to undertake "quick, aggressive action" in furtherance of her "moral obligation" to alleviate the threat to "the very existence of our planet" by moving the country toward a "clean energy future."[8]

5. The Attorney General pointed to her office's investigation of ExxonMobil as a means of addressing climate change. Signaling that her investigation would work backward from a preordained conclusion, the Attorney General announced the findings in advance: the

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5 *Id.* at App. 78.
6 *See* Ex. M at App. 132-33.
7 *See* Ex. D at App. 89.
8 Ex. A at App. 13-14.

investigation would reveal "the troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public."[9]

6. Three weeks later, the Attorney General's Office commenced this investigation by serving a CID on ExxonMobil. The CID purports to investigate whether ExxonMobil's statements about climate change violate G.L. c. 93A, § 2,[10] which prohibits "unfair or deceptive acts or practices" in "trade or commerce."[11] According to the CID, the Attorney General's Office is investigating ExxonMobil's (1) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (2) "marketing and/or sale of securities . . . to investors in the Commonwealth, including . . . common stock, sold or offered to be sold in the Commonwealth."[12]

7. The investigation is unwarranted, however, and constitutes an abuse of government power. Although the statute of limitations for a claim under G.L. c. 93A, § 2 is four years, *see* G.L. c. 260, § 5A, for more than a decade, ExxonMobil has widely and publicly confirmed that it "recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant."[13] The Attorney General has identified no contrary statement about climate change—nor is any identifiable—that could support ExxonMobil's c. 93A liability during the relevant limitations period.

8. Moreover, ExxonMobil has engaged in no conduct in Massachusetts which could subject it to liability for the violations of law alleged in the CID. During the limitations period,

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9 *Id.* at App. 13.
10 Ex. B at App. 23.
11 G.L. c. 93A, § 2(a).
12 Ex. B at App. 23.
13 Ex. E at App. 94; *see also* Ex. F at App. 104 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").

ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts.[14] Nor has it marketed or sold any security for sale to the general public in Massachusetts in the last five years.[15]

9. In the absence of any misleading statements *or* any relevant commercial transactions, there is no *bona fide* basis for the CID, much less a reason to believe that ExxonMobil violated G.L. c. 93A, § 2, as required to authorize the issuance of a CID under the statute.[16]

10. This Court also lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation because ExxonMobil, a New Jersey corporation, headquartered in Texas, has not engaged in suit-related conduct in Massachusetts.

11. The CID nevertheless demands that ExxonMobil produce virtually every document it has generated about climate change during the last 40 years, thereby imposing a breathtaking burden on ExxonMobil. Complying with the CID's demands would require ExxonMobil to collect, review, and produce several millions of pages of documents, and would cost millions of dollars.[17]

12. Worse still, the CID targets ExxonMobil's communications with the Attorney General's political opponents in the climate change debate—i.e., organizations that hold views

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[14] Service stations in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner are owned and operated independently. *See* Affidavit of Geoffrey Grant Doescher, dated June 10, 2016 ("Doescher Aff.") ¶ 4. In addition, distribution facilities in Massachusetts, including Everett Terminal, have not sold products to consumers during the limitations period.

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

[16] G.L. c. 93A, § 6(1) (noting that the Attorney General can conduct an investigation whenever she "believes a person has engaged in or is engaging in" an act in violation of G.L. c. 93A).

[17] Affidavit of Justin Anderson, dated June 14, 2016 ("Anderson Aff.") ¶¶ 4-5 .

about climate change and the proper policy responses to it with which the Attorney General disagrees.[18] The organizations identified by the CID are exclusively ones that have been derided by climate activists as so-called "climate deniers," meaning that they or some of their employees have expressed skepticism about the science of climate change or the Attorney General's preferred responses to the problem.[19]

13. The Attorney General's statements at the press conference and the remarkably broad scope of the CID unmask this investigation for what it is: a pretextual use of law enforcement power to deter ExxonMobil from participating in ongoing public deliberations about climate change and by fishing through decades of ExxonMobil's documents in the hope of finding some ammunition to enhance the Attorney General's position in the policy debate concerning how to respond to climate change. This effort to deter ExxonMobil from engaging in public discussions of policy issues related to climate change amounts to an abuse of government power.

14. The Attorney General's investigation violates ExxonMobil's rights. That is why ExxonMobil has filed a federal action in the United States District Court for the Northern District of Texas, seeking to enjoin the enforcement of the CID because it violates ExxonMobil's constitutional right to free speech, freedom from unreasonable searches and seizures, and guarantee of due process of law.[20] ExxonMobil respectfully requests that this Court permit the federal action to proceed before adjudicating this Petition.

15. ExxonMobil asks this Court to conclude that it lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation. In addition, and solely to preserve its rights, ExxonMobil also requests that (i) the

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18 Ex. B at App. 35 (Request No. 5).
19 Anderson Aff. ¶ 3.
20 Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

Attorney General and her office be recused; and (ii) the CID be set aside in its entirety or, in the alternative, modified or made subject to a protective order pursuant to G.L. c. 93A, § 6(7) and Mass. R. Civ. P. 26(c) in the event the Court determines that it can exercise personal jurisdiction over ExxonMobil.

FACTS

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

16. The CID issued by the Attorney General's Office is the product of a coordinated campaign of partisan state officials urged on by climate change activists and privately interested attorneys. This campaign first exposed itself to the public on March 29, 2016, when the New York Attorney General hosted a press conference in New York City with certain other attorneys general as the self-proclaimed "AGs United For Clean Power." Private citizen and former Vice President Al Gore was the event's featured speaker. The Attorney General, along with attorneys general or staff members from over a dozen other states, attended and participated in the conference.

17. The attorneys general, calling themselves "the Green 20" (a reference to the number of participating attorneys general), explained that their mission was to "com[e] up with creative ways to enforce laws" that they claim were "being flouted by the fossil fuel industry."[21] Expressing dissatisfaction with the perceived "gridlock in Washington" regarding climate-change legislation, the New York Attorney General said that the coalition had to work "creatively" and "aggressively" to advance that agenda."[22]

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21 Ex. A at App. 3.
22 *Id.* at App. 3-4.

18. The New York Attorney General announced that the assembled "group of state actors [intended] to send the message that [it was] prepared to step into this [legislative] breach."[23] He continued:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[24]

19. In an effort to legitimize the Green 20's investigations, private citizen and Vice President Gore cited perceived inaction by the federal government, observing that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[25]

20. Gore went on to condemn those who question the sufficiency of renewable energy sources to power modern economies, faulting them for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[26] He then accused the fossil fuel industry of "using [its] combined political and lobbying efforts to put taxes on solar panels and jigger with the laws" and said "[w]e do not have 40 years to continue suffering the consequences of the fraud."[27]

21. During her turn at the podium, the Attorney General began by thanking Gore "who, today, I think, put most eloquently just how important this is, this commitment that we make."[28] The Attorney General then articulated her view that "there's nothing we need to worry

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23 *Id.* at App. 4.
24 *Id.* at App. 5.
25 *Id.* at App. 10.
26 *Id.*
27 *Id.* at App. 8, 10.
28 *Id.* at App. 13.

about more than climate change," and that the attorneys general "have a moral obligation to act" to alleviate the threat to "the very existence of our planet."[29]

22. To advance this shared agenda on climate change policy, the Attorney General pledged to take "quick, aggressive action" to "address climate change and to work for a better future"[30]—namely, by investigating ExxonMobil. She also announced, in advance, the findings of her recently launched investigation:

> Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.[31]

The Attorney General's comments unambiguously reflected her prejudicial determination that ExxonMobil had engaged in deception in connection with the debate over climate change policy.

B. The Green 20 Press Conference Is Criticized by Other Attorneys General and Legal Commentators

23. The results-oriented approach to investigating fossil fuel companies and ExxonMobil articulated by the Attorney General and her colleagues struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. The disconnect between the coalition's stated desire to fill a perceived void in federal climate change policy, and its proposed solution—to investigate a single energy company for alleged fraud—was so clear that one reporter asked whether the press conference and the

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29 *Id.*
30 *Id.* at App. 14.
31 *Id.* at App. 13.

investigations launched by the Attorney General and other members of the coalition were nothing more than "publicity stunt[s]."[32]

24. The press conference also drew a swift and sharp rebuke from other state attorneys general who criticized the Attorney General and those joining her in using the power of law enforcement as a tool to limit free speech and the free exchange of viewpoints and ideas about climate change. The attorneys general of Alabama and Oklahoma stated that "scientific and political debate" "should not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."[33] They emphasized that "[i]t is inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time."[34]

25. The Louisiana Attorney General similarly observed that "[i]t is one thing to use the legal system to pursue public policy outcomes; but it is quite another to use prosecutorial weapons to intimidate critics, silence free speech, or chill the robust exchange of ideas."[35] Likewise, the Kansas Attorney General questioned the "unprecedented" and "strictly partisan nature of announcing state 'law enforcement' operations in the presence of a former vice president of the United State[s] who, presumably [as a private citizen], has no role in the enforcement of the 17 states' securities or consumer protection laws."[36] The West Virginia Attorney General criticized the attorneys general for "abusing the powers of their office" and

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32 *Id.* at App. 18.
33 Ex. G at App. 109.
34 *Id.*
35 Ex. H at App. 111.
36 Ex. I at App. 113 (internal quotation marks omitted).

stated that the desire to "eliminate fossil fuels . . . should not be driving any legal activity" and that it was improper to "use the power of the office of attorney general to silence . . . critics."[37]

26. Two state attorneys general went a step further and filed a motion to intervene in an action pending in Texas in which ExxonMobil challenged a subpoena issued by the Virgin Islands Attorney General that, like the Massachusetts CID, seeks almost four-decades' worth of ExxonMobil's documents and communications related to climate change. The Attorneys General of Texas and Alabama criticized the investigation for being "driven by ideology, and not law."[38] The Texas Attorney General called the investigation "a fishing expedition of the worst kind" and recognized it as "an effort to punish Exxon for daring to hold an opinion on climate change that differs from that of radical environmentalists."[39] The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas "is more than a free speech case. It is a battle over whether a government official has a right to launch a criminal investigation against anyone who doesn't share his radical views."[40] He further stated that the investigation was an "abus[e] of power" used to "intimidate a company for its climate change views which run counter to that of his own."[41]

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

27. The impropriety of the statements made by the Attorney General and the other attorneys general at the press conference are surpassed only by what they said behind closed doors. In advance of the conference, the chief of the Energy & Environment Bureau in the Massachusetts Attorney General's Office indicated, in response to a questionnaire from the New

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37 Ex. J at App. 116, 118.
38 Plea in Intervention of the States of Texas and Alabama, *Exxon Mobil Corp.* v. *Walker et al.*, No. 017-284890-16 (Tex. Dist. Ct. Tarrant Cty., May 16, 2016).
39 Ex. K at App. 120.
40 Ex. L at App. 123.
41 *Id.*

York Attorney General's Office, that the Massachusetts Attorney General's Office was hoping to "learn the status of states' investigations/plans" and explore avenues for "coordination."[42] She also noted that the office was taking actions to "advance[e] clean energy."[43]

28. In addition, during the morning of the press conference, the attorneys general attended two presentations.[44] Those presentations were not announced publicly, and they were not open to the press or general public. The identity of the presenters and the titles of the presentations, however, were later released by the State of Vermont in response to a request under that state's Freedom of Information Act.[45]

29. The first presenter was Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists.[46] His subject was the "imperative of taking action now on climate change."[47]

30. According to the Union of Concerned Scientists, those who do not share its views about climate change and responsive policy make it "difficult to achieve meaningful solutions to global warming."[48] It accuses "[m]edia pundits, partisan think tanks, and special interest groups" of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[49]

31. Matthew Pawa of Pawa Law Group, P.C.[50] hosted the second presentation on the topic of "climate change litigation."[51] The Pawa Law Group, which boasts of its "role in

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42 Ex. Z at App. 201.
43 *Id.* at App. 202.
44 *See* Ex. M at App. 132-33.
45 *See* Ex. N at App. 145-46.
46 Ex. O at App. 150.
47 Ex. M at App. 132-33.
48 Ex. P at App. 154.
49 *Id.* at App. 154-55.
50 Ex. Q at App. 164.

launching global warming litigation," previously sued ExxonMobil and sought to hold it liable for negatively impacting climate change.[52] That suit was dismissed because, as the court properly held, "regulating global warming emissions is a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[53]

32. Frumhoff and Pawa have sought for years to initiate legal actions against fossil fuel companies in the service of their political agenda and for private profit. As early as 2007, Frumhoff contributed to a report issued by the Union of Concerned Scientists, titled "Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science," which brainstormed strategies for "putting the brakes" on ExxonMobil's alleged "disinformation campaign."[54] And, in 2012, Frumhoff hosted and Pawa presented at a conference entitled "Climate Accountability, Public Opinion, and Legal Strategies."[55] The conference's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[56] The 2012 conference's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[57] Even then, Frumhoff and Pawa suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[58] Indeed, that conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on

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51 Ex. M at App. 132-33.
52 Ex. R at App. 166.
53 Ex. F at App. 64; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012).
54 Ex. S at App. 169-75.
55 Ex. C at App. 56, 83-86.
56 *Id.* at App. 82.
57 *Id.* at App. 63.
58 *Id.*

the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[59]

33. As recently as January 2016, Pawa and a group of climate activists met to discuss the "Goals of an Exxon campaign."[60] The goals included:

> To establish in public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm. To delegitimize them as a political actor. To force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc. To call into question climate advantages of fracking, compared to coal. To drive divestment from Exxon. To drive Exxon & climate into center of 2016 election cycle.[61]

34. The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the investigations. In an apparent attempt to improperly shield their communications from public scrutiny, the attorneys general drafted—and may have executed—a common interest agreement in connection with the Green 20 conference.[62] In addition, the day after the conference, a reporter from *The Wall Street Journal* called Pawa.[63] In response, Pawa asked the New York Attorney General's Office "[w]hat should I say if she asks if I attended?"[64] The environmental bureau chief at the office responded, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[65]

35. The CID represents the culmination of Frumhoff's and Pawa's collective efforts to enlist state law enforcement officers in their quest to enact their preferred policy responses to climate change and obtain documents for private lawsuits.

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59 *Id.* at App. 78.
60 Ex. T at App. 177.
61 *Id.*; *see also* Ex. U at App. 179-80.
62 Ex. AA at App. 208.
63 Ex. D at App. 89.
64 *Id.*
65 *Id.*

36. The press conference, the earlier closed-door meetings with those on one side of the debate, and those private activists' long-standing desire to expose ExxonMobil's "internal documents" as part of a campaign to put "pressure on the industry," inducing it to support "legislative and regulatory responses to global warming"[66] form the partisan backdrop against which the CID must be read. The thoroughly partisan goals of these individuals—which the Attorney General and her attorneys general coalition partners adopted as their own at the press conference—are reflected in the CID itself.

D. The CID's Baseless Investigation, Burdensome Demands, and Viewpoint Bias

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

38. According to the CID, there is "a pending investigation concerning [ExxonMobil's] potential violations of G.L. c. 93A, § 2."[67] That statute prohibits "unfair or deceptive acts or practices" in "trade or commerce"[68] and has a four-year statute of limitations.[69] The CID specifies two types of transactions under investigation: ExxonMobil's (1) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (2) "marketing and/or sale of securities" to Massachusetts investors.[70] The requested documents pertain largely to information related to climate change in the possession of ExxonMobil and located at its principal place of business in Texas.

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

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66 Ex. C at App. 78.
67 Ex. B at App. 23.
68 G.L. c. 93A, § 2(a).
69 G.L. c. 260, § 5A.
70 Ex. B at App. 23.

40. First, at no point during the past five years—more than one year before the limitations period began—has ExxonMobil (1) sold fossil fuel derived products to consumers in Massachusetts, or (2) owned or operated a single retail store or station in the Commonwealth.[71]

41. Second, ExxonMobil has not sold any form of equity for sale to the general public in Massachusetts in the last five years, which is also well beyond the limitations period.[72] Furthermore, ExxonMobil's only sale of debt in the past decade has been to underwriters *outside* the Commonwealth, and ExxonMobil did not market that debt to Massachusetts consumers.[73]

42. The CID's focus on events, activities, and records outside of Massachusetts is demonstrated by the items it seeks. For example, the CID demands documents that relate to or support 11 specific statements.[74] None of those statements were made in Massachusetts.[75] The CID also seeks ExxonMobil's communications with 12 named organizations,[76] but only one of these organizations has an office in Massachusetts and ExxonMobil's communications with the other 11 organizations likely occurred outside of Massachusetts. Finally, the CID requests all documents and communications related to ExxonMobil's publicly issued reports, press releases, and Securities and Exchange Commission ("SEC") filings, which were likely issued in Texas, ExxonMobil's headquarters,[77] and all documents and communications related to ExxonMobil's climate change research, which also occurred outside of Massachusetts.[78]

43. Even if ExxonMobil had engaged in relevant conduct in Massachusetts, ExxonMobil has made no statements in the past four years that could give rise to fraud as alleged

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71 Doescher Aff. ¶ 3.
72 Luettgen Aff. ¶ 8.
73 *Id.* ¶¶ 5-6. This is subject to the one exception discussed above—*i.e.*, short-term fixed-rate notes, which ExxonMobil has sold to a handful of sophisticated institutions in the Commonwealth. *See supra* n.14.
74 Ex. B at App. 36-37 (Request Nos. 8-11).
75 *Id.*
76 *Id.* at App. 35 (Request No. 5).
77 *Id.* at App. 38-40 (Request Nos. 15-16, 19, 22).
78 *Id.* at App. 34-35, 37-40 (Request Nos. 1-4, 14, 17, 22).

in the CID. For more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's 2006 Corporate Citizenship Report recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and reasoned that "strategies that address the risk need to be developed and implemented."[79] In addition, in 2002, ExxonMobil, along with three other companies, helped launch the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."[80]

44. ExxonMobil has also discussed these risks in its public SEC filings. For example, in its 2006 10-K, ExxonMobil stated that the "risks of global climate change" "have been, and may in the future" continue to impact its operations.[81] Similarly, in its 2015 10-K, ExxonMobil noted that the "risk of climate change" and "pending greenhouse gas regulations" may increase its "compliance costs."[82]

45. Long before the limitations period governing G.L. c. 93A, § 2, ExxonMobil disclosed and acknowledged the risks that supposedly give rise to the Attorney General's investigation.

46. In stark contrast to the absence of any factual basis for investigating ExxonMobil's alleged fraud is the heavy burden imposed by the CID. Spanning 25 pages and containing 38 broadly worded document requests, the CID unreasonably demands production of essentially any and all communications and documents relating to climate change that

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79 Ex. F at App. 104.
80 Ex. V at App. 182.
81 Ex. W at App. 188-89.
82 Ex. X at App. 195.

ExxonMobil has produced or received over the last 40 years. For example, the CID requests all documents and communications "concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions . . . and the effects of these emissions on the Climate" since 1976 and all documents and communications concerning "any research, study, and/or evaluation by ExxonMobil and/or any other fossil fuel company regarding" methane since 2010.[83] It also requests all documents and communications concerning papers and presentations given by ExxonMobil scientists since 1976[84] and demands production of ExxonMobil's climate change related speeches, public reports, press releases, and SEC filings over the last 6 to 20 years.[85] Moreover, it fails to reasonably describe several categories of documents by, for example, requesting documents related to ExxonMobil's "awareness," "internal consideration[s]," and "decision making" with respect to certain climate change matters.[86]

47. The CID's narrower requests, however, are in some instances more troubling than its overly broad ones, because they appear to target groups that hold views with which the Attorney General disagrees. All 12 of the organizations that ExxonMobil is directed to produce its communications with have been accused by advocacy groups of holding views with respect to climate change science or climate change policy with which those advocacy groups disagree.[87] Curiously, the CID does not request the production of ExxonMobil's communications with organizations that have expressed views on climate change with which the Attorney General agrees.

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

84 *Id.* at App. 34-35 (Request Nos. 2-4).

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

86 *See id.* at App. 35-36, 39 (Request Nos. 7-8, 18).

87 Anderson Aff. ¶ 3.

48. The return date for the CID was initially set at May 19, 2016. To facilitate discussions between the parties regarding the legality of the CID, the parties agreed to extend the CID's return date to June 29, 2016 and the date for filing objections to the CID to June 16, 2016. While the parties have been actively engaged in these discussions without court intervention, we have not reached a resolution. Through this special appearance, ExxonMobil therefore files this Petition of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, pursuant to Superior Court Rule 9A(e), to contest the Court's jurisdiction and avoid the waiver of its right to object to the CID.

E. ExxonMobil's Motion for Preliminary Injunction in Texas to Enjoin Enforcement of the CID

49. Because the Attorney General's investigation and the CID has infringed, is infringing, and will continue to infringe upon ExxonMobil's federal constitutional rights, ExxonMobil recently filed an action in the United States District Court for the Northern District of Texas and a motion to enjoin the enforcement of the CID.[88]

50. That court has jurisdiction over the constitutional claims raised in the federal action because a substantial part of the events giving rise to ExxonMobil's federal constitutional claims occurred in the Northern District of Texas. Massachusetts courts, by contrast, lack general jurisdiction over ExxonMobil and, in the absence of suit-related conduct, also lack specific jurisdiction.

51. In view of these many infirmities of the CID and the investigation, ExxonMobil hereby seeks relief based on the following grounds:

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

GROUND ONE

THERE IS NO PERSONAL JURISDICTION OVER EXXONMOBIL

52. ExxonMobil, through this special appearance and without consenting to jurisdiction, requests that this Court set aside the CID because this Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation.

53. ExxonMobil is not subject to general jurisdiction in Massachusetts. Because ExxonMobil is incorporated in New Jersey and headquartered in Texas, it cannot be regarded as "at home" in Massachusetts for purposes of general jurisdiction.

54. ExxonMobil is not subject to specific jurisdiction in Massachusetts because it has engaged in no suit-related conduct in Massachusetts within the limitations period. The CID seeks documents that do not reflect, relate to, or concern, in any way, ExxonMobil's trade or commerce in Massachusetts. During the last five years, ExxonMobil has not sold fossil fuel derived products to Massachusetts consumers, nor has it sold or marketed any securities to the general public in Massachusetts.[89]

GROUND TWO

DISQUALIFICATION OF THE ATTORNEY GENERAL FOR BIAS AND APPOINTMENT OF AN INDEPENDENT COUNSEL

55. If the Court determines that it can exercise personal jurisdiction over ExxonMobil, then, in order to protect its rights and preserve its objections against claims of waiver, ExxonMobil seeks the following relief.

56. ExxonMobil requests that the Court exercise its inherent authority to disqualify the Attorney General and the Office of the Attorney General of the Commonwealth of

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[89] *See supra* n.14.

Massachusetts, and appoint an independent investigator not compensated on a contingency-fee basis.

57. ExxonMobil is entitled to an inquiry conducted by an impartial and even-handed investigator, but the Attorney General cannot conduct an inquiry in that manner. Her public extrajudicial statements disparaging ExxonMobil and prejudging the outcome of any investigation preclude her from serving as a disinterested prosecutor in any investigation of ExxonMobil. The Attorney General's partisan statements also undermine the public's confidence in any investigation of ExxonMobil conducted by her office.

58. In light of the Attorney General's comments about ExxonMobil and her investigation, there is little chance that the effects of this bias could be isolated. Any subordinate working in the Attorney General's Office would be hard-pressed to ignore the stated objectives of the Attorney General and her senior advisors. The bias, therefore, affects the integrity of the investigation by the entire Attorney General's Office.

59. The Court should disqualify the Attorney General and her office, and appoint an independent counsel, who is not compensated on a contingency-fee basis, to determine whether an investigation is warranted and, if so, to conduct that investigation.

GROUND THREE

THE CID VIOLATES EXXONMOBIL'S CONSTITUTIONAL, STATUTORY, AND COMMON LAW RIGHTS

60. If the Court determines that it can exercise personal jurisdiction over ExxonMobil, to protect its rights, and preserve its objections against claims of waiver, then ExxonMobil seeks the following additional relief.

61. Pursuant to G.L. c. 93A, § 6(7), the CID should be set aside because it significantly infringes on several of ExxonMobil's rights under the Massachusetts Constitution,

Massachusetts statutes, and Massachusetts common law. If the CID is not set aside in its entirety, it should, at a minimum, be modified to at least the relevant statute of limitations period or made subject to a protective order.

62. First, the CID should be set aside in light of the previously described bias harbored by the Massachusetts Attorney General's Office against ExxonMobil, in violation of ExxonMobil's due process right under Article XII of the Massachusetts Constitution to a disinterested prosecutor.

63. Second, in violation of Article XVI of the Massachusetts Constitution, the CID constitutes impermissible viewpoint discrimination by targeting ExxonMobil's climate change speech with those perceived to be on the wrong side of the climate change debate. It also impermissibly burdens ExxonMobil's right to engage in the public debate on climate change by requesting essentially all of its documents related to climate change over the past 40 years. Article XVI prohibits the Attorney General from issuing a CID to prescribe what shall be orthodox in matters of public concern.

64. Third, in violation of ExxonMobil's rights under Article XIV of the Massachusetts Constitution, the CID launches an unreasonable fishing expedition into 40-years' worth of ExxonMobil's records related to climate change. The CID purports to investigate ExxonMobil's deception of Massachusetts consumers and investors in trade or commerce. But, during the limitations period, ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts, nor has it marketed or sold any security to the general public in Massachusetts[90]—much less deceived these consumers and investors. Because ExxonMobil cannot be liable for the violations of law alleged in the CID, the CID should be aside for two additional reasons: (i) its issuance constitutes arbitrary and capricious conduct under

[90] *See supra* n.14.

Massachusetts law, and (ii) it seeks documents that are irrelevant to ExxonMobil's alleged violation of Massachusetts law.

65. Fourth, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the CID is unduly burdensome and impermissibly unspecific. The CID demands virtually all of ExxonMobil's documents and communications related to climate change over the past 40 years.

66. Fifth, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the issuance of the CID constitutes an abuse of process and harassment under Massachusetts common law because it was issued for the improper purposes described above, namely to burden ExxonMobil's right to engage in protected speech.

67. Finally, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the CID does not affirmatively state that ExxonMobil may withhold documents on the basis of privilege. ExxonMobil therefore requests that, if the CID is not set aside, it should be modified or a protective order should be issued to prevent the disclosure of privileged information.

GROUND FOUR

ADJUDICATION OF THIS PETITION SHOULD BE STAYED PENDING THE FEDERAL COURT'S RULING ON EXXONMOBIL'S APPLICATION FOR A PRELIMINARY INJUNCTION

68. ExxonMobil requests that this Court defer taking action on this matter until ExxonMobil's pending application in federal court for a preliminary injunction has been resolved.

69. On June 15, 2016, ExxonMobil filed a motion for a preliminary injunction seeking to enjoin the CID because it violates ExxonMobil's federal constitutional rights.

70. The United States District Court for the Northern District of Texas has jurisdiction over that matter and is capable of furnishing complete relief to the parties.

71. Staying the adjudication of this Petition would avoid the possibility of duplicative or inconsistent rulings on ExxonMobil's constitutional challenges to the CID, and will serve the interests of judicial economy and efficiency and the principles of comity.

WHEREFORE, Petitioner respectfully prays that this Court:

1. Determine that it lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation and therefore set aside the CID;

2. If the Court determines that it can exercise personal jurisdiction, provide the following relief:

   a. Recuse the Massachusetts Attorney General's Office from investigating this matter, and appoint an independent counsel to determine if an investigation is warranted and, if so, conduct the investigation;

   b. Pursuant to G.L. c. 93A, § 6(7) and Mass. R. Civ. P. 26(c), set aside or modify the CID, or issue a protective order; and

   c. Stay adjudication of this Petition pending the resolution of the federal court litigation; and

3. Order such other or further relief to Petitioner as it may deem just and proper.

Respectfully Submitted,

EXXON MOBIL CORPORATION

By its attorneys,

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(patrick.j.conlon@exxonmobil.com)
(*pro hac vice* pending)
Daniel E. Bolia
(daniel.e.bolia@exxonmobil.com)
(*pro hac vice* pending)
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP

By: /s/ Justin Anderson
Theodore V. Wells, Jr.
(*pro hac vice* pending)
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

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

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo
(frongillo@fr.com)
Caroline K. Simons
(simons@fr.com)
One Marina Park Drive
Boston, MA 02210
(617) 542-5070

Dated: June 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served upon the Attorney General's Office for the Commonwealth of Massachusetts by hand delivery on June 16, 2016.

/s/ Caroline K. Simons
Caroline K. Simons

Exhibit 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

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

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

Pursuant to G.L. c. 93A, § 6(7), Superior Court Rule 9A(e), and the standards set forth in Mass. R. Civ. P. 26(c), Petitioner Exxon Mobil Corporation ("ExxonMobil"), through this special appearance and without consenting to jurisdiction, respectfully requests that this Court set aside a civil investigative demand (the "CID") served on ExxonMobil by the Attorney General. As grounds for this motion, ExxonMobil states:

1. On April 19, 2016, the Attorney General served the CID on ExxonMobil, which states that the Attorney General is investigating possible violations of G.L. c. 93A, § 2. According to the CID, the Attorney General's investigation centers on two types of transactions: (1) ExxonMobil's marketing and sale of energy and other fossil fuel derived products to consumers in Massachusetts, and (2) ExxonMobil's marketing and sale of securities to Massachusetts investors.

2. The Court should set aside the CID because the Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation. During the 4-year limitations period of G.L. c. 93A, § 2, ExxonMobil has not (1) sold fossil fuel derived products to consumers in Massachusetts, (2) owned or operated a

single retail store or gas station in the Commonwealth, or (3) sold any form of equity to the general public in Massachusetts. Furthermore, ExxonMobil's only sale of debt in the past decade has been to underwriters outside the Commonwealth, and ExxonMobil did not market those sales to Massachusetts consumers.

3. However, if this Court determines that it can exercise personal jurisdiction over ExxonMobil, alternatively, and solely to protect its rights and preserve its objections, ExxonMobil respectfully requests that this Court order the following relief.

4. The Court should exercise its inherent authority to disqualify the Attorney General and her office from pursuing this investigation and appoint an independent counsel, who is not compensated on a contingency-fee basis, to determine whether an investigation is warranted and, if so, to conduct that investigation. The Attorney General's public extrajudicial statements disparaging ExxonMobil and prejudging the outcome of any investigation preclude her and her office from serving as a disinterested prosecutor in any investigation of ExxonMobil.

5. The Court also should set aside, modify, or issue a protective order concerning the CID because it violates ExxonMobil's constitutional, statutory, and common law rights. The CID impermissibly infringes on ExxonMobil's constitutional rights to free speech, freedom from unreasonable searches and seizures, and guarantee of due process of law as guaranteed by Articles XII, XIV, and XVI of the Massachusetts Declaration of Rights. The CID also runs afoul of the standards set forth in Mass. R. Civ. P. 26(c) because it imposes undue burden and expense on ExxonMobil. For instance, the CID requests production of over 40 years of documents, despite the 4-year statute of limitations. Furthermore, the CID is impermissibly unspecific and does not affirmatively state that ExxonMobil may withhold documents on the basis of privilege.

6. Finally, the Court should exercise its discretion to stay adjudication of this

Petition pending the resolution of an earlier filed federal action in the United States District Court for the Northern District of Texas, *Exxon Mobil Corp.* v. *Healey*, Case No. 4:16-CV-469 (N.D. Tex. June 15, 2016), which seeks to enjoin the Attorney General's investigation.

7. This emergency motion is filed pursuant to Superior Court Rule 9A(e) because ExxonMobil has been unable to reach an agreement with the Attorney General that satisfactorily addresses ExxonMobil's concerns relating to the CID prior to June 16, 2016, the agreed-upon time for ExxonMobil to initiate any legal proceeding to set aside or modify the CID without waiving its right to object to the CID.

8. ExxonMobil also relies on the grounds set forth in its Memorandum in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order filed with this motion.

Respectfully Submitted,

EXXON MOBIL CORPORATION

By its attorneys,

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(patrick.j.conlon@exxonmobil.com)
(*pro hac vice* pending)
Daniel E. Bolia
(daniel.e.bolia@exxonmobil.com)
(*pro hac vice* pending)
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

By: /s/ Justin Anderson
Theodore V. Wells, Jr.
(*pro hac vice* pending)
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

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

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo (BBO# 180690)
(frongillo@fr.com)
Caroline K. Simons (BBO# 680827)
(simons@fr.com)
One Marina Park Drive
Boston, MA 02210
(617) 542-5070

Dated: June 16, 2016

CERTIFICATE OF COMPLIANCE WITH SUPERIOR COURT RULE 9C

I, Thomas C. Frongillo, hereby certify that before serving the Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify Civil Investigative Demand or Issue a Protective Order, counsel for ExxonMobil, including Theodore V. Wells Jr., Michele Hirshman, Daniel J. Toal, Patrick J. Conlon, Daniel E. Bolia, and others, conducted several Superior Court Rule 9C telephone conferences with Assistant Attorney General Andrew Goldberg and Assistant Attorney General Christophe Courchesne from the Attorney General's Office since the service of the CID on April 19, 2016. The most recent conference was conducted on June 15, 2016 at approximately 12:35 p.m. Although counsel made a good faith effort to narrow the areas of disagreement with the Attorney General's Office, the parties were unable to reach a satisfactory resolution.

/s/ Caroline K. Simons
Caroline K. Simons

Dated: June 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was served upon the Attorney General's Office for the Commonwealth of Massachusetts by hand delivery on June 16, 2016.

/s/ Caroline K. Simons
Caroline K. Simons

Exhibit 4

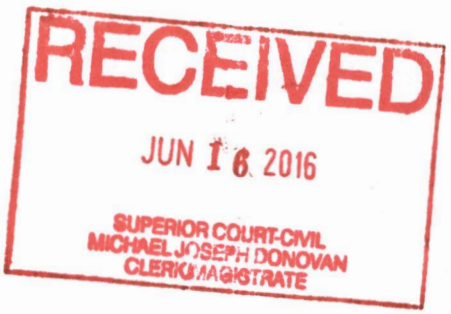
COMMONWEALTH OF MASSACHUSETTS

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

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

[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.

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(patrick.j.conlon@exxonmobil.com)
(*pro hac vice* pending)
Daniel E. Bolia
(daniel.e.bolia@exxonmobil.com)
(*pro hac vice* pending)
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

By: /s/ Justin Anderson
Theodore V. Wells, Jr.
(*pro hac vice* pending)
Michele Hirshman
(*pro hac vice* pending)
Daniel J. Toal
(*pro hac vice* pending)
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

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

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo (BBO# 180690)
(frongillo@fr.com)
Caroline K. Simons (BBO# 680827)
(simons@fr.com)
One Marina Park Drive
Boston, MA 02210
(617) 542-5070

Dated: June 16, 2016

CERTIFICATE OF 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.

/s/ Caroline K. Simons
Caroline K. Simons

Exhibit 5

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

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

ORAL ARGUMENT REQUESTED

PETITIONER'S CONSOLIDATED MEMORANDUM IN FURTHER SUPPORT OF ITS EMERGENCY MOTION AND IN OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH THE CIVIL INVESTIGATIVE DEMAND

FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02210
Tel: (617) 542-5070
Fax: (617) 542-8906

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

Counsel for Exxon Mobil Corporation

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Petitioner Exxon Mobil Corporation ("ExxonMobil") respectfully submits this memorandum of law in further support of its challenge to the April 19, 2016 civil investigative demand (the "CID") and in opposition to the Respondent's cross-motion to compel compliance.

I. INTRODUCTION

At the self-proclaimed Green 20 press conference, Attorney General Healey announced that ExxonMobil "must be[] held accountable" for disagreeing with her about "the dangers of climate change."[1] Three weeks later, she issued the CID, which demands four decades of ExxonMobil's documents, as part of a transparent fishing expedition to intimidate perceived political opponents. ExxonMobil challenged the constitutionally infirm CID by seeking a preliminary injunction in federal court in Texas—where ExxonMobil has been and is being harmed. Briefing on that application is complete, and a ruling in that action could render these proceedings moot.

ExxonMobil filed this action solely to preserve its rights and avoid waiver. Rather than join ExxonMobil's request for a stay and conserve scarce judicial resources, the Attorney General has moved to compel ExxonMobil's compliance with the CID. The Attorney General's motion should be denied and the CID set aside because, as set forth in ExxonMobil's opening brief, personal jurisdiction over ExxonMobil is lacking and the CID violates its rights.

Nothing in the Attorney General's brief establishes otherwise, beginning with her failure to show that Massachusetts is the appropriate forum for this dispute. This case is about the lawfulness of an investigation announced in New York, concerning a company based in Texas, relating to statements and research originating in Texas, and seeking 40 years of records, none of which are stored in Massachusetts. Massachusetts has no legitimate interest in this matter, which

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[1] Ex. A at App. 13. "App." refers to the Appendix filed on June 16, 2016 in conjunction with the Memorandum of Exxon Mobil Corporation in Support of Its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order.

pertains to speech and conduct well outside its borders. The Attorney General lists a number of perceived connections between ExxonMobil and Massachusetts, but none provide the suit-related contacts required to establish personal jurisdiction under Massachusetts and federal law because they bear no relationship to the present action.

Even more insubstantial are the grounds the Attorney General has advanced to justify her investigation of ExxonMobil. The Attorney General contends that consumers and investors have been deceived, but she cannot identify any trade or commerce that brings ExxonMobil within the reach of the relevant statute. Even if she could, her theories of fraud, premised on misleading excerpts from decades-old documents and a misunderstanding of a financial disclosure, amount to nothing more than pretexts for constitutional torts. After pretext is set aside, all that remains is unlawful viewpoint discrimination, a baseless fishing expedition, and a biased investigation with preordained results. These improper objectives find no refuge in Massachusetts law.

II. FACTS

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

The improper, partisan purpose of the Attorney General's investigation is well documented. Joining other members of the so-called "Green 20" coalition of attorneys general at a March 29, 2016 press conference in New York, Attorney General Healey announced her "moral obligation" to "speed our transition to a clean energy future."[2] She declared that "certain companies" needed to be "held accountable" for public statements that did not conform to her beliefs about "the catastrophic nature" of climate change.[3] Acknowledging that "public perception" was her principal concern, the Attorney General pledged to take "quick, aggressive action" to "address climate change" by investigating ExxonMobil.[4] The Attorney General then

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2 *Id.* at App. 13-14.
3 *Id.* at App. 13.
4 *Id.* at App. 13-14.

prejudged the results of her investigation and prejudiced any future adjudication of her claim by informing the public that her office had already found a "troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[5]

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

Three weeks later, the Attorney General issued the CID to ExxonMobil demanding, among other things, all of ExxonMobil's communications with 12 organizations, each of which has been derided as a so-called climate change "denier."[6] It also targets specific statements ExxonMobil made about climate change that do not accord with the Attorney General's views.

Many of the CID's requests expressly target speech originating in Texas. Request 10 asks for documents concerning a speech given "in Dallas, Texas."[7] Likewise, Request 16 seeks documents concerning a press release that, on its face, was issued from ExxonMobil's headquarters in Irving, Texas.[8] Other requests, such as the securities filings sought by Requests 19 and 31, pertain to matters routinely handled at a company's corporate headquarters.[9] Equally inapt, Request 8 seeks documents concerning a presentation made in Beijing, China, and Request 11 demands records concerning a speech given in London, England.[10]

The breadth and intrusiveness of the CID are further evidence of an effort to burden a disfavored speaker. It seeks 38 categories of documents (more than 60 including sub-categories) on a worldwide basis for a period spanning 40 years.[11] Given the relevant four-year statute of limitations, *see* G.L. c. 260, § 5A, this scope suggests a fishing expedition.

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5 *Id.* at App. 13.
6 Ex. B at App. 35; Affidavit of Justin Anderson, dated June 14, 2016, ("Anderson June 2016 Aff.") ¶ 3.
7 Ex. B at App. 37.
8 *Id.* at App. 38-39.
9 *Id.* at App. 39, 41.
10 *Id.* at App. 36-37.
11 *Id.* at App. 34-42.

C. Recently Obtained Documents Further Demonstrate the Political Nature of the Attorney General's Investigation and Her Efforts to Restrict Speech.

Documents recently obtained by third parties through public record demands further confirm the ulterior political objectives driving the Attorney General's investigation. The first set of documents show the partisan origins of the "Green 20." A draft set of "Principles" guiding the group's actions included a "Pledge" to "work together" to enforce laws "that require progressive action on climate change."[12] Fellow coalition members expressed qualms about this overtly political language, which the Vermont Attorney General's Office feared "might alienate" some constituents.[13] The second set of documents relates to a common interest agreement executed in April and May 2016 by Attorney General Healey and sixteen fellow coalition members to shield the participants' communications from the public.[14] The agreement describes their common interest as "limiting climate change and ensuring the dissemination of accurate information about climate change."[15] That description reflects the Attorney General's political objective, while embracing the regulation of speech to accomplish that end.

III. ARGUMENT

A. This Court Lacks Personal Jurisdiction over ExxonMobil.

The Attorney General has failed to demonstrate that this Court has personal jurisdiction over ExxonMobil. For personal jurisdiction to exist, ExxonMobil's contacts with Massachusetts must potentially violate the law identified in the CID. But there are no relevant in-state contacts. The Attorney General concedes as much by premising personal jurisdiction on a handful of activities lacking any connection to her theory of wrongdoing. Indeed, she does not offer any

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12 Ex. KK at Supp. App. 112. "Supp. App." refers to the supplemental appendix filed in support of this brief.
13 *Id.* at Supp. App. 111.
14 Ex. LL at Supp. App. 115-33.
15 *Id.* at Supp. App. 115.

argument that such a connection exists. Opp. 20.[16] Under these circumstances, both Massachusetts law and the Due Process Clause prevent a Massachusetts court from ordering ExxonMobil to comply with the CID.

1. Applicable Law

The Due Process Clause permits Massachusetts courts to exercise personal jurisdiction (i) over an entity that is "at home" in the Commonwealth in any suit, and (ii) over a nonresident only when the cause of action is related to the nonresident's contacts with the state. For an entity to be "at home" in Massachusetts, it must have "unique" ties to Massachusetts, such as being incorporated or having its principal place of business there. *See Daimler AG* v. *Bauman*, 134 S. Ct. 746, 760 (2014). For entities like ExxonMobil that are incorporated out of state and maintain no place of business in Massachusetts,[17] personal jurisdiction must be based on specific instances of "in-state conduct . . . [that] form an important, or at least material, element of proof" in the relevant legal dispute. *United Elec., Radio & Mach. Workers of Am.* v. *163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (internal quotation marks and alteration omitted). An out-of-state entity's in-state contacts are sufficiently related to a cause of action only if the injury complained of "would not have occurred 'but for' the defendant's forum-state activity." *Id.*

This personal jurisdiction requirement is incorporated into the very text of Massachusetts's long-arm statute, which has been held to be "an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 771 (1994) (internal quotation marks omitted). The long-arm statute expressly permits jurisdiction over an out-of-state entity where the legal claims "aris[e] from" business activities or torts occurring in the state. G.L. c. 223A, § 3. Thus, where, as here, a claim is premised on Chapter

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[16] "Opp." refers to the memorandum filed by the Attorney General in opposition to ExxonMobil's emergency motion and in support of her cross-motion; "Mem." refers to the memorandum filed by ExxonMobil in support of its emergency motion; and "Pet." refers to the petition filed by ExxonMobil.

[17] Affidavit of Robert Luettgen, dated June 14, 2016, ("Luettgen Aff.") ¶¶ 3-6.

93A, the only "wrongful conduct to be considered for purposes of personal jurisdiction . . . is that conduct which violated 93A." *Roche* v. *Royal Bank of Can.*, 109 F.3d 820, 827 (1st Cir. 1997) (citation omitted).

The Attorney General, as the "party claiming that a court has power to grant relief," bears "the burden of persuasion on the jurisdictional issue." *Chapman* v. *Hous. Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979) (citation and internal quotation marks omitted). To meet this burden, the Attorney General "must make a prima facie showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." *Fern* v. *Immergut*, 55 Mass. App. Ct. 577, 579 (2002).

2. Discussion

The Attorney General has failed to carry her burden of establishing that this Court can exercise personal jurisdiction over ExxonMobil because her proffered in-state contacts bear no connection either to ExxonMobil or to her theories of consumer and investor deception.

(a) The Consumer Deception Theory Does Not "Arise out of" ExxonMobil's In-State Contacts.

There is a stark disconnect between the Attorney General's legal theory of consumer deception and the in-state contacts she points to as a basis for personal jurisdiction. According to the CID, her statements at the press conference, and her brief, the Attorney General is investigating potential violations of Chapter 93A premised on consumer and investor deception.[18] In relation to consumers, she contends that ExxonMobil "deceived . . . consumers about the dangers of climate change,"[19] causing them (i) to purchase unspecified ExxonMobil products, rather than an unidentified "cleaner alternative energy," and (ii) not to support "policies that would reduce greenhouse gas emissions." Opp. 4, 28. For this theory to have any legs in a Massachusetts court,

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[18] *See* Ex. A at App. 13; Ex. B at App. 23; Opp. 1-2, 4, 10, 13, 15, 18, 20, 23, 27-30, 35.

[19] *See* Ex. A at App. 13.

the Attorney General must identify in-state contacts with Massachusetts consumers that give rise to such a claim. She has failed to do so.

The Attorney General's brief does not contain a single factual allegation suggesting that ExxonMobil has actually transacted business with Massachusetts consumers or specifically directed representations about climate change at Massachusetts consumers. Instead, the Attorney General points vaguely to "transactions" between ExxonMobil and Massachusetts wholesalers and retailers that, in turn, sell ExxonMobil products. Opp. 16-17. But none of those transactions constitute a sale to a Massachusetts "consumer" within the meaning of Chapter 93A. Courts interpreting the statute have defined a consumer as one "who participates in commercial transactions on a private, nonprofessional basis" as opposed to one who acts in a "business context." *Gargano & Assocs., P.C.* v. *John Swider & Assocs.*, 55 Mass. App. Ct. 256, 262 (2002) (citations and internal quotation marks omitted); *see also Kraft Power Corp.* v. *Merrill*, 464 Mass. 145, 155 (2013) (contrasting "consumers" with "persons engaged in trade or commerce in business transactions"). Because wholesalers and retailers purchase ExxonMobil products for resale, they do not act on a "private, nonprofessional basis," and transactions with them cannot give rise to a *consumer* deception claim.

Equally insufficient is the Attorney General's reference to an ExxonMobil affiliate's "contract to supply the Massachusetts State Police with motor oil for its cruisers." Opp. 17. Such a contract, even if attributable to ExxonMobil itself rather than a separately incorporated affiliate,[20] does not constitute a sale to a "consumer." Under Chapter 93A, a government entity may act in a business context, *see City of Bos.* v. *Aetna Life Ins. Co.*, 399 Mass. 569, 575 (1987), or in pursuit of a "legislative mandate," *Lafayette Place Assocs.* v. *Bos. Redev. Auth.*, 427 Mass. 509, 535 (1998) (internal quotation marks omitted). But a government entity, unlike a consumer, does not

[20] It is well-settled that personal jurisdiction over a parent corporation cannot ordinarily be based on the acts of its subsidiary. *See Andresen* v. *Diorio*, 349 F.3d 8, 12-13 (1st Cir. 2003).

act for "personal reasons." *See id.*; *see also All Seasons Servs., Inc.* v. *Comm'r of Health & Hosps. of Bos.*, 416 Mass. 269, 272 (1993) (noting that a municipal "hospital was not a 'person' engaged in 'trade or commerce'"). Government entities are not consumers under Chapter 93A, and, therefore, transactions with them cannot support a consumer deception claim.

The Attorney General also points to "Exxon-branded retail service stations" that sell fossil fuel derived products directly to consumers. Opp. 16. But those service stations are not part of ExxonMobil; they are independently owned and operated under franchise agreements.[21] Their conduct is not attributable to ExxonMobil in a Chapter 93A action because, even if ExxonMobil permits franchise holders to use its logos and sell its branded products, it is undisputed that ExxonMobil does not control "the operations, staffing, sales, or marketing" of the franchisees.[22] *See Depianti* v. *Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 617 (2013). A franchisee's mere "use of a manufacturer's label or logo is not sufficient to clothe the franchisee with apparent authority so as to render the franchisor vicariously liable" for the franchisee's conduct. *Theos & Sons, Inc.* v. *Mack Trucks, Inc.*, No. 9542, 1999 WL 38393, at *5 (Mass. App. Div. Jan. 25, 1999), *aff'd*, 431 Mass. 736 (2000); *see also BP Expl. & Oil, Inc.* v. *Jones*, 558 S.E.2d 398, 403 (Ga. Ct. App. 2001) ("An apparent agency does not arise simply because an independent gasoline station displays a national oil company's trademark."). The conduct of franchisees is not ExxonMobil's conduct, and nothing in the Attorney General's brief provides a sound basis to disregard that fact.

Equally untenable is the Attorney General's observation that ExxonMobil operates an interstate oil pipeline system with distribution terminals in Massachusetts for storing and transporting gasoline and other fuels. Opp. 16. This allegation bears no discernable connection to the Attorney General's theory of consumer fraud.

The Attorney General also believes that in-state advertisements for ExxonMobil products

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21 Affidavit of Geoffrey Grant Doescher, dated Aug. 31, 2016, ("Doescher Aug. 2016 Aff.") ¶ 3.

22 *Id.* ¶ 4; *see also id.* ¶ 6 (noting that the franchisees, not ExxonMobil, create the gasoline that is sold).

are sufficient to establish personal jurisdiction. Opp. 16. But she "has failed to establish how [ExxonMobil's] advertising in Massachusetts publications is related to" her claim that ExxonMobil deceived consumers about the dangers of climate change. *See Gray* v. *O'Brien*, 777 F.2d 864, 867 (1st Cir. 1985). None of ExxonMobil's Massachusetts-specific advertisements mention the cause, magnitude, or impact of climate change.[23] And neither the CID nor the Attorney General's brief says otherwise.[24] Rather than point to any advertising that pertains to climate change, the Attorney General focuses on ExxonMobil's statements in public speeches, press releases, and communications with shareholders and the SEC. Opp. 26.[25] But none of those statements originated in Massachusetts or specifically targeted Massachusetts consumers. And it is well-settled that advertisements "which happen to circulate in the forum State, but which are not aimed at customers in a particular area," are merely fortuitous contacts that cannot supply a basis for exercising personal jurisdiction. *Gunner* v. *Elmwood Dodge, Inc.*, 24 Mass. App. Ct. 96, 99 (1987); *see also High Country Inv'r, Inc.* v. *McAdams, Inc.*, 221 F. Supp. 2d 99, 102-04 (D. Mass. 2002).

Because it is undisputed that ExxonMobil does not transact business with Massachusetts consumers, the Attorney General's jurisdictional allegations in support of her consumer deception claim boil down to this: ExxonMobil's products flow to Massachusetts consumers through the stream of commerce. But "[m]erely placing a product into the stream of commerce . . . even when a seller is aware that the product will enter a forum state" is inadequate to establish personal jurisdiction over a defendant in a Chapter 93A claim, even when bolstered by "advertisements and

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23 Affidavit of Justin Anderson, dated Sept. 6, 2016, ("Anderson Aff.") ¶ 29; Affidavit of Laura Bustard, dated Aug. 31, 2016 ("Bustard Aff.") ¶ 3.

24 To the extent the Attorney General relies on advertisements disseminated after the date the Petition in this action was filed, "such contacts have no bearing on the jurisdictional analysis." *Noonan* v. *Winston Co.*, 135 F.3d 85, 95 (1st Cir. 1998). Nor does the Attorney General allege that such advertisements mention the cause, magnitude, or impact of climate change.

25 *See, e.g.*, Ex. B at App. 36-37 (Request Nos. 8-11).

websites that do not specifically target a forum state." *Zuraitis* v. *Kimberden, Inc.*, No. 071238, 2008 WL 142773, at *3 (Mass. Super. Jan. 2, 2008) (citation omitted). Because the Attorney General has failed to cite any direct contacts with Massachusetts consumers, her consumer deception theory cannot support personal jurisdiction over ExxonMobil.

(b) The Investor Deception Theory Does Not "Arise out of" ExxonMobil's In-State Contacts.

There is an equally fatal error in the Attorney General's theory of financial fraud. She believes that ExxonMobil made misleading statements to investors that downplayed ExxonMobil's "knowledge of the extent of climate-driven risks to its assets." Opp. 27. The in-state conduct she associates with this theory is (i) ExxonMobil's sale of commercial paper to institutional investors and (ii) the presence of ExxonMobil stock in the holdings of Massachusetts investment managers. Neither of these in-state contacts is sufficient to confer personal jurisdiction over ExxonMobil.

The Attorney General contends that by selling short-term, fixed-rate notes (*i.e.*, commercial paper) to institutional investors in the Commonwealth, ExxonMobil has engaged in conduct that could give rise to a claim for deceiving investors about climate change.[26] Opp. 17. The contention is untenable. Commercial paper is, by definition, a short-lived asset, with maturity dates no longer than 270 days.[27] An investor in such a security is focused on the issuer's ability in the near term to make payments on the instrument; questions about the long-term viability of the company or its industry group are not relevant to the investment decision. *See*, *e.g.*, Ex. ZZ at Supp. App. 279-80 ("The typical investment decision to purchase commercial paper involves a two- or three-minute telephone conversation between the purchasing investor and a commercial paper salesman for one

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[26] Luettgen Aff. ¶ 10.

[27] Ex. MM at Supp. App. 135 ("Commercial paper refers generally to unsecured, short-term promissory notes issued by commercial entities, and while maturities vary, they generally are less than nine months and typically are 30 days or less.").

of the large broker-dealers . . . . [M]ost purchasers move in and out of the commercial paper market rapidly, often holding a particular investment no more than 24 hours."). The Attorney General offers no argument that would explain why an investor in short-term notes would find the long-term impact of climate change material to an investment decision. Absent such a link, these transactions cannot provide a basis for personal jurisdiction in Massachusetts.[28]

The Attorney General also attempts to support personal jurisdiction by pointing to the ExxonMobil holdings of four Boston-based financial institutions. Opp. 17-18. Those holdings do nothing to support jurisdiction. To satisfy Chapter 93A's "trade or commerce" requirement, a defendant accused of securities fraud must have "engaged in the actual sale of securities." *Reisman* v. *KPMG Peat Marwick LLP*, 965 F. Supp. 165, 174 (D. Mass. 1997) (discussing G.L. c. 93A, § 1); *see also Frishman* v. *Maginn*, No. 04-0673, 2006 Mass. Super. LEXIS 187, at *34 (Mass. Super. Ct. Apr. 12, 2006) (requiring a "commercial transaction"). Nothing in the Attorney General's brief suggests that the securities were purchased anywhere but in the secondary market, much less that they were directly purchased from ExxonMobil. When an issuer of securities, like ExxonMobil, publicly disseminates statements about its prospects, those statements alone "do not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets." *Salkind* v. *Wang*, No. Civ.A. 93-10912 (WGY), 1995 WL 170122, at *9 (D. Mass. Mar. 30, 1995) (citation omitted). The mere ownership of ExxonMobil securities in Massachusetts therefore is insufficient to support jurisdiction.

B. The CID Violates ExxonMobil's Free Speech Rights.

Even if ExxonMobil were subject to jurisdiction in Massachusetts, it cannot lawfully be ordered to comply with the CID. As set forth in ExxonMobil's opening papers, the CID engages

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[28] The Attorney General incorrectly asserts that ExxonMobil cited the commercial paper carve-out in G.L. c. 110A, § 401(k) to dispute its status as a "security." Opp. 17 n.54. To the contrary, these provisions exempting commercial paper from state and federal regulations support ExxonMobil's argument that its public filings are not relevant to its commercial paper transactions.

in explicit viewpoint discrimination and targets core political speech, all in violation of Article XVI of the Massachusetts Constitution.[29] In defense of her actions, the Attorney General offers platitudes and non-sequiturs, but she fails to contradict evidence showing the CID to be nothing more than a vehicle to cleanse the public forum of views on climate change inimical to her own.

1. The Attorney General Has Engaged in Impermissible Viewpoint Discrimination and the CID Seeks to Restrict Core Political Speech.

The evidence of the Attorney General's viewpoint bias has come in multiple forms, beginning with her highly improper public statements, continuing in the content of the CID, and most recently memorialized in a common interest agreement with her collaborators. In a public statement, the Attorney General pledged to reshape "public perception" on climate change by investigating ExxonMobil for causing the public to "misapprehend" what she considers "the catastrophic" impact of climate change and for supposedly contributing to the legislative delay in enacting her desired policies.[30] Her statements made clear that suppressing disfavored speech on a matter of public concern was the animating principle behind her official actions.

Making good on her pledge to use government power to curtail disfavored speech, the CID demands every document pertaining to ExxonMobil's speech and research on climate change for the last 40 years.[31] Exhibiting express viewpoint bias, the CID seeks ExxonMobil's communications with 12 specific organizations, all of which have been branded as climate "deniers" for failing to support the Attorney General's favored policies on climate change.[32]

Insofar as any doubt remained about the partisan and political purpose behind the Attorney General's investigation, it was dispelled by the common interest agreement, which memorialized the purpose of the investigation as "ensuring the dissemination of accurate information about

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29 *See* Pet. ¶¶ 12, 13, 46, 47, 63; Mem. at 11-14.
30 Ex. A at App. 13.
31 Ex. B at App. 34-39 (Request Nos. 1-4, 8-12, 14-17).
32 *Id.* at App. 35 (Request No. 5); Anderson June 2016 Aff. ¶ 3.

climate change."[33] According to the agreement, statements about climate change are "accurate" if they accept that "Climate Change is Real" and urge "act[ion] now to reduce emissions of climate change pollution."[34] The agreement laid bare that the climate change investigations were nothing more than tools to advance one side of a policy debate by silencing perceived opponents.

2. The CID's Viewpoint Discrimination Is Impermissible.

Article XVI, like the First Amendment, prohibits government action that targets speech because of its content. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (referring to such actions as an "egregious form of content discrimination"); *Roman* v. *Trs. of Tufts Coll.*, 461 Mass. 707, 713 (2012) ("[W]e have interpreted the rights guaranteed by art. 16 as being coextensive with the First Amendment."). To comply with this constitutional requirement, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. No justification can excuse this type of violation.

The Attorney General attempts to evade this bedrock principle of free speech by changing the subject. First, she submits that, generally speaking, the issuance of CIDs does not violate Article XVI. Opp. 32-33. While it is a truism that government power properly exercised generally does not violate the Constitution, it is equally clear that an abuse of government power can have such an effect. Whether through a subpoena, CID, or court order, a government demand for records can, as here, violate constitutional rights. *See, e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 466 (1958). Viewpoint discrimination perpetrated through a CID is no different from any other misuse of government power in its ability to violate Article XVI.

Second, the Attorney General argues that mere "routine corporate business records" are not protected by Article XVI. Opp. 33. But the CID is not limited to conventional business records

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[33] Ex. LL at Supp. App. 115.
[34] Ex. KK at Supp. App. 112.

like shipping invoices, accounting records, or business plans. For example, it seeks ExxonMobil's communications with third parties on matters of public policy, as well as its underlying climate change research.[35] Such materials are hardly outside the concern of Article XVI. *See, e.g.*, *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 776-86 (1978).

But even if the Attorney General sought nothing more than routine business records, and those records in fact were not protected by Article XVI, her argument would still be incorrect as a matter of law. That is because, even if the speech at issue can "be regulated because of [its] constitutionally proscribable content," that does not make the speech "entirely invisible to the Constitution, so that [it] may be made the vehicle[] for content discrimination unrelated to [its] distinctively proscribable content." *Commonwealth* v. *Lucas*, 472 Mass. 387, 393 (2015) (quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 383-84 (1992)). For example, libel is not protected by Article XVI or the First Amendment, but the state may not ban it based on its disagreement with a speaker's political views. *See R.A.V.*, 505 U.S. at 386. Accordingly, where, as here, the demand for records is motivated by viewpoint bias, Article XVI prohibits the state action.

Third, the Attorney General faults ExxonMobil for not coming forward with evidence that the "CID itself has chilled or silenced Exxon's speech or will do so in the future." Opp. 34. There is no such requirement. An Article XVI violation premised on viewpoint discrimination does not require proof that any speech has been curtailed. *See, e.g.*, *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009) ("[R]estrictions based on viewpoint are prohibited."); *Lucas*, 472 Mass. at 392 (noting that content-based restrictions on speech are "presumptively invalid"). The Attorney General has identified no authority holding otherwise. In fact, the precedents she cites are irrelevant because they do not address viewpoint discrimination. Opp. 34 & 34 n.77.[36]

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[35] *See, e.g.*, Ex. B at App. 34-39 (Request Nos. 1-5, 8-12, 14-17).

[36] Of the cases cited by the Attorney General, two considered whether a plaintiff plausibly alleged that a government's request for documents pursuant to a legitimate government investigation chilled his speech. *See In re Enf't of Subpoena*, 436 Mass 784, 791, 797-98 (2002); *Dole* v. *Milonas*, 889 F.2d 885, 889, 891 (9th Cir. 1989).

It is equally mistaken for the Attorney General to suggest that the confidentiality provisions of Chapter 93A lessen the constitutional harm. Opp. 35. ExxonMobil is not pressing a claim sounding in privacy, but in free speech. The harm of viewpoint discrimination is not that the Government will release private records to the public, but that it imposes a burden on those who hold a certain viewpoint because of that viewpoint. *See Ridley* v. *Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004) ("The essence of viewpoint discrimination is . . . a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic."). Confidentiality provisions do not mitigate this harm.

Finally, the Attorney General falls back on the proposition that "Article XVI and the First Amendment . . . do not protect false, deceptive, or misleading statements in the marketplace." Opp. 35-36. ExxonMobil does not quarrel with the proposition that fraud finds no refuge in the First Amendment or Article XVI. ExxonMobil does, however, contest the Attorney General's belief that mere incantation of the word "fraud" dispels all First Amendment and Article XVI concerns raised by the CID. Were that so, the State of Alabama could have circumvented the holding of *NAACP* v. *Alabama*, 357 U.S. 449 (1958), simply by claiming it sought the NAACP's membership list in connection with a "fraud" investigation.

The Supreme Court has rejected any such sleight of hand, recognizing that "[s]imply labeling an action one for 'fraud,' of course, will not carry the day." *Ill. ex rel. Madigan* v. *Telemarketing Assocs.*, 538 U.S. 600, 617 (2003). The Attorney General must offer more than her say-so that her investigation pertains to fraud and not the suppression of disfavored speech. But, as discussed in Subsection III.C.1 below, she has presented little more than a pretextual defense

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In neither case was viewpoint discrimination or any other improper motive alleged. The other cases addressed First Amendment violations based on academic freedom, the right to expression and confidential information gathering, and the "mere existence" of the army's intelligence gathering system related to 'lawful and peaceful civilian political activity.'" *See Univ. of Penn.* v. *EEOC*, 493 U.S. 182, 195-202 (1990); *In re Roche*, 381 Mass. 624, 633, 635 (1980); *Laird* v. *Tatum*, 408 U.S. 1, 2, 13-14 (1972).

of her viewpoint discrimination based on (i) selective excerpts from documents that, seemingly by design, create a misimpression about ExxonMobil's climate change research, and (ii) a theory of financial fraud that is half-baked and easily debunked.

3. The Attorney General's Targeting of Political Speech Is Unjustified.

Even if the Attorney General's viewpoint discrimination were not so well documented, the CID would remain impermissible under Article XVI because it targets core political speech. Where, as here, government action burdens political speech, the government must demonstrate that its action is narrowly tailored to achieve a compelling state interest. *See Associated Indus. of Mass.* v. *Attorney Gen.*, 418 Mass. 279, 288-89 (1994); *Bellotti*, 435 U.S. at 786.

The CID probes ExxonMobil's speech and deliberations on climate change—a matter of public concern that is currently contested in the political sphere. For example, the CID demands that ExxonMobil produce all of its climate change research since 1976 and all documents relating to its speeches, press releases, federal securities filings, and presentations about climate change.[37] The Attorney General does not and cannot explain why these materials enjoy no constitutional protection. *See, e.g.*, *Associated Indus. of Mass.*, 418 Mass. at 287-89.

To justify this intrusion on protected speech, the Attorney General states that she has a compelling interest in "enforcing Chapter 93A." Opp. 34 n.76. But this Court is not bound to accept her *ipse dixit* on this point. The Attorney General's pretextual theories of wrongdoing are easily refuted, as explained in Subsection III.C.1 below. Indeed, the investigation's true purpose, as revealed in the Attorney General's public statements and recently released documents, is to regulate statements on climate change so that only messages she approves reach the public.[38] This is not a compelling state interest; it is an impermissible one. As the Attorney General recognized

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[37] Ex. B at App. 34-41 (Requests Nos. 1-5, 8-12, 14-17, 19, 22, 31).

[38] *See, e.g.*, Ex. A at App. 13 (noting that the Attorney General hopes to reshape "public perception" on climate change); Ex. LL at Supp. App. 115 (expressing the Attorney General's and her colleagues' common goal of "limiting climate change and ensuring the dissemination of accurate information about climate change").

in another context, "preventing organizations from engaging in lobbying to further their viewpoints" is not "a sufficient government interest to survive intermediate or strict scrutiny."[39] The Massachusetts Supreme Judicial Court has similarly recognized that "[g]overnment domination of the expression of ideas is repugnant to our system of constitutional government." *Anderson* v. *City of Bos.*, 376 Mass. 178, 191 n.14 (1978).

Even if the Attorney General were not seeking to regulate a viewpoint with which she disagreed, her desire to investigate ExxonMobil in order "to address climate change" and "speed our transition to a clean energy future"[40] similarly would not constitute a compelling state interest because the "Attorney General may not use [her] regulatory authority to pursue general policy goals or public issues." *Am. Shooting Sports Council, Inc.* v. *Attorney Gen.*, 429 Mass. 871, 876-77 (1999). Because the CID constitutes impermissible viewpoint discrimination and the Attorney General cannot identify a compelling state interest that justifies her intrusion on ExxonMobil's political speech, the Court should set aside the CID.

C. The Attorney General Has Articulated No Legitimate Basis to Investigate ExxonMobil.

Evidently intent on making her "broad powers to investigate" absolute, the Attorney General asks this Court to abandon its role as gatekeeper on the reasonableness of government intrusions. Opp. 24. This Court should reject that invitation and apply the mandate of Article XIV that "unreasonable" demands for records, such as those presented in the CID, "must be quashed or modified." *Fin. Comm'n of City of Bos.* v. *McGrath*, 343 Mass. 754, 765 (1962).

1. The Attorney General's Allegations Are Baseless.

The government may not conduct searches based "on mere suspicion or by random dragnet." *Commonwealth* v. *Kimball*, 37 Mass. App. Ct. 604, 608 (1994). Rather, Article XIV

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[39] Ex. NN at Supp. App. 140.
[40] Ex. A at App. 14.

demands that all searches—whether "criminal, regulatory, or civil in nature"—be reasonable. *Commonwealth* v. *Cantelli*, 83 Mass. App. Ct. 156, 164 (2013). Chapter 93A imposes a similar restriction on the Attorney General's power. Under that statute, courts may set aside or modify a CID upon a showing of "good cause." G.L. c. 93A, § 6(7). Good cause is established when the Attorney General acts arbitrarily or capriciously or the information sought by the CID is not relevant to a "valid investigation" of the "alleged unlawful . . . act or practice." *In re Yankee Milk, Inc.*, 372 Mass. 353, 357-59 (1977); G.L. c. 93A, § 6(1).

Striving to justify her investigation, the Attorney General identifies two grounds for investigating ExxonMobil. Both are pretextual. First, the Attorney General contends that ExxonMobil had special insight into the dangers of climate change but concealed that information from the public. Opp. 2-3, 8-9, 25-27. This is nonsense, as revealed by the Attorney General's effort to support this allegation with carefully selected and misleading excerpts of certain ExxonMobil documents. Opp. 2-3, 8-9. A review of those documents demonstrates that ExxonMobil's internal knowledge was well within the mainstream of thought on the issue—the contours of which remain unsettled even today—and fully consistent with its public statements.

Consider, for example, the Attorney General's reference to a 1984 presentation delivered by an ExxonMobil scientist at an environmental conference. The Attorney General claims that the scientist "predict[ed] significant increases in global temperature as a result of the combustion of fossil fuels." Opp. 2. Hardly. What the scientist actually said was, if "a number of assumptions" were valid, there could be a three-degree rise in global temperatures "in 2090."[41] That statement was entirely consistent with the views expressed at the time by the EPA, the National Academy of Sciences ("NAS"), and MIT.[42] ExxonMobil did not have special insight into the risks of climate

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41 Ex. II at Supp. App. 98.

42 *See id.* at Supp. App. 91 (noting that the EPA, NAS, and MIT predicted temperature increases of 3°C, 2°C, and 1.5-4.5°C, respectively); *see also* Ex. OO at Supp. App. 147 (EPA report from 1983 noting the possibility of a

change, nor did it conceal its knowledge from the public. ExxonMobil, like the EPA, NAS, and MIT, was evaluating data and testing theories in an area of science that was evolving. That—and not a scheme to defraud—is why it took another 25 years before the EPA even issued an endangerment finding for greenhouse gas emissions.[43] As shown in the Anderson Affidavit, the other documents excerpted by the Attorney General are equally innocuous, revealing her fraud theory as a mere smokescreen for a constitutional tort.[44]

Even more fanciful is the Attorney General's claim that ExxonMobil failed to "disclose" that future climate change regulations are likely to bar further development of its "vast fossil fuel reserves." Opp. 2, 25-27. "Proved Reserves," under SEC regulations, encompass only energy sources that ExxonMobil estimates with "reasonable certainty" to be economically producible "under existing economic conditions, operating methods, and government regulations."[45] By definition, future government regulations, which may or may not be enacted, are not to be considered when estimating and disclosing proved reserves. But even if they were, at current production rates, ExxonMobil's proved reserves are expected to be produced, on average, within 16 years.[46] The Attorney General has identified no regulation—federal, state, or international—within that timeframe that is reasonably likely to prevent ExxonMobil from developing its proved reserves.[47] Instead, she points to the advocacy of certain entities calling for such regulations. Opp.

5°C increase by 2100); Ex. YY at Supp. App. 273 (NAS report from 1983 stating that "temperature increases of a couple of degrees or so" were projected for the next century).

43 Ex. PP at Supp. App. 157-60.

44 Anderson Aff. ¶¶ 3-11.

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

46 Ex. QQ at Supp. App. 168.

47 ExxonMobil is not alone in its conclusion that near-term regulations are unlikely to strand proved reserves. Other energy companies have reached the same conclusion. *Compare* Ex. RR at Supp. App. 172 (explaining that producing reserves "is essential to meeting growing energy demand worldwide"), *with* Ex. SS at Supp. App. 210-11 (noting that projections of stranded assets "do[] not take into account the fact that the demand for oil and gas would be much higher than what can possibly be produced from existing, producing oil and gas fields"), *and* Ex. TT at Supp. App. 222 ("Shell does not believe that any of its proven reserves will become 'stranded' as a result of current or reasonably foreseeable future legislation concerning carbon.").

2, 25-27. As the Attorney General is well aware, however, it is far from clear that anything will come from that advocacy; indeed, she and her colleagues identified Congressional inaction as the catalyst for their climate change "investigations."[48] That acknowledgment eviscerates her new claim that any such urged, but unenacted, laws or regulations will cause ExxonMobil's proved reserves to be "stranded."

The ease with which these two pretexts are rebutted unmasks the CID as nothing more than an unlawful fishing expedition that is "inconsistent" with "constitutional norms." *Commonwealth* v. *Torres*, 424 Mass. 153, 161 (1997). It should be stopped.

2. The CID's Demands for Four Decades of Documents Are Overbroad.

A CID also violates Article XIV and Chapter 93A when it is overly broad or places an undue burden on its recipient. *See Fin. Comm'n of City of Bos.*, 343 Mass. at 764-65; *In re Yankee Milk*, 372 Mass. at 359-61 (citing G.L. c. 93A, § 6(5)). The Attorney General believes that the CID is permissible so long as it does not "seriously interfere" with ExxonMobil's business. Opp. 36-37. But that is not the only constraint. A CID, like the one at issue here, may also be set aside when the broad scope of its requests is untethered to the violation alleged.

The CID seeks 40 years of records notwithstanding the four-year statute of limitations governing Chapter 93A claims. *See* G.L. c. 260, § 5A. Such a request is presumptively impermissible. To prevent "discovery abuse," Massachusetts courts deny document requests that are "beyond the relevant time period" of an action. *Donaldson* v. *Akibia, Inc.*, No. 03CV1009E, 2008 WL 4635848, at *15 (Mass. Super. Ct. Aug. 30, 2008); *see also In re Prograf Antitrust Litig.*, No. 1:11-MD-02242-RWZ, 2013 WL 3334962, at *1 (D. Mass. June 21, 2013). Such requests are improper because they place "an unreasonable burden" on the recipient. *Makrakis* v. *Demelis*, No. 09-706-C, 2010 WL 3004337, at *2 (Mass. Super. Ct. July 15, 2010).

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[48] Ex. A at App. 4.

The Attorney General has failed to explain how the breadth of the CID can be reconciled with this precedent. Her only defense is to raise the possibility that somewhere in the 36 years of records outside the limitations period there might be evidence that ExxonMobil "knew that statements it made during the limitations period were false, misleading, or fraudulent." Opp. 30. That is the definition of a fishing expedition. And the only authority the Attorney General references in connection with her argument does not support her position; in fact, it does not even pertain to discovery demands.[49] Furthermore, ExxonMobil's climate change research from the 1970s and 1980s is not probative of whether its recent statements are deceptive in light of the sea change in society's understanding of climate change during the intervening decades.[50]

The other grounds the Attorney General presents to justify this fishing expedition are even more speculative. She believes that the time-barred records "*may* reveal facts that would demonstrate that Exxon's conduct prior to the limitations period is actionable" as a "continuing violation" or under tolling principles. Opp. 30 (emphasis added). There is no daylight between such a request and a general warrant, purporting to authorize a nearly limitless search for proof of wrongdoing, which was reviled by the founding generation, and is prohibited by Article XIV.

Nor would decades-old records be of any use to support a tolling argument. In an action based on misrepresentations, the "cause of action accrues at the time a plaintiff learns or reasonably should have learned of the misrepresentation." *Kent* v. *Dupree*, 13 Mass. App. Ct. 44, 47 (1982). When an alleged misrepresentation has been subsequently corrected, the claim accrues when

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[49] In *Ocean Spray Cranberries, Inc.* v. *Mass. Commission Against Discrimination*, the Massachusetts Supreme Judicial Court addressed an evidentiary rule peculiar to employment discrimination actions, holding that it could consider 10-month old events "as background evidence" of discrimination despite the abbreviated 6-month statute of limitations governing those claims. 441 Mass 632, 647 (2004). This is not a discrimination case, and the issue before this Court is not the admissibility of a known, but recently expired violation.

[50] Since 1990 alone, there have been five Assessment Reports of the Intergovernmental Panel on Climate Change and three National Climate Assessments of the U.S. Global Change Research Program documenting the evolving state of climate science. *See* Ex. UU at Supp. App. 242-44; Ex. VV at Supp. App. 246-47; Ex. WW at Supp. App. 252-53.

information contradicting the prior misrepresentation is "disclosed." *Skelley* v. *Trs. of Fessenden Sch.*, No. CIV.A. 94-2512, 1994 WL 928172, at *4 (Mass. Super. May 2, 1994). For the last decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business.[51] Even assuming, contrary to fact, that ExxonMobil had understated known risks associated with climate change in the 1970s and 1980s, the Attorney General reasonably should have become aware that ExxonMobil's prior statements were inaccurate in 2006, when ExxonMobil disclosed those risks. In such case, the claims would have expired no later than 2010 and would remain time barred regardless of what decades-old records might say.

Falling equally wide of the mark is the Attorney General's assertion that ExxonMobil is not injured by complying with the CID because it has produced certain records to the New York Attorney General. Opp. 37. That argument misconceives the relevant injury. ExxonMobil has been injured, not because complying with the CID would be impossible, but because its constitutional rights have been violated by the demand that it produce documents in an unconstitutionally conceived and executed investigation. Nothing about ExxonMobil's response to a different demand issued by a different state agency under a different statute excuses the Attorney General's violation of ExxonMobil's rights here.

D. The Court Should Disqualify the Attorney General and Her Office and Appoint an Independent Investigator.

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

[51] Ex. F at App. 103.

exhibited while announcing this investigation during an unprecedented press conference.

Although permitted to make public statements, a prosecutor has no duty to publicly discuss investigations. Indeed, the secondary source cited by the Attorney General recognizes that most cases "receive neither public comment from prosecutors nor press interest or coverage."[52] When a prosecutor, does speak, however, her statements must be "strictly limited by the prosecutor's overarching duty to do justice." *Aversa* v. *United States*, 99 F.3d 1200, 1216 (1st Cir. 1996). She must "not be nor appear to be influenced" by "her personal interests." *Commonwealth* v. *Ellis*, 429 Mass. 362, 372 (1999). Public statements that falsely "create[] the impression" that the subject of an investigation is bound to be found liable violate this standard. *Aversa*, 99 F.3d at 1204, 1213-16. Here, not only has the Attorney General sought out publicity for her improper investigation, she has created a dedicated website to prejudice the public against ExxonMobil and poison the jury pool.[53]

The Attorney General's partisan comments violate Article XII and require disqualification because—as underlined by recently released documents—they reveal that her personal and political motivations are improperly influencing her investigation. The Attorney General has "[p]ledge[d]" to use state laws to "require progressive action on climate change,"[54] and the common interest agreement she signed memorialized her goal of "limiting climate change and ensuring the dissemination of accurate information about climate change."[55] Toward that end, she issued a CID explicitly targeting those she deems her political opponents. She then prematurely announced what that investigation would find: a "troubling disconnect between what Exxon knew . . . and what the company . . . chose to share with investors and with the American public."[56] In

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52 Ex. AAA at Supp. App. 287.
53 *See* Opp. 12 n.42; Ex. XX at Supp. App. 256-58.
54 Ex. KK at Supp. App. 111-13 (attaching the "Principles" and "Pledge" of a "Coalition of Attorneys General," which the Massachusetts Attorney General agreed to join).
55 Ex. LL at Supp. App. 115.
56 Ex. A at App. 13.

light of this record, which has caused some to wonder whether "the investigation [is] a publicity stunt,"[57] the Attorney General's conduct cannot be excused as the "customary and routine practice" of a state law enforcement officer. Opp. 23.

E. The Court Should Stay These Proceedings Pending Resolution of the Earlier-Filed Federal Action.

ExxonMobil asks this Court to stay adjudication of this action because a fully briefed motion for a preliminary injunction is now pending before a federal court, and the resolution of that motion could render this litigation moot. This request has nothing to do with "forum shop[ping]," as the Attorney General contends. Opp. 37. It has to do with judicial economy and proceeding in a proper forum. There can be no reasonable dispute that the U.S. District Court for the Northern District of Texas is a proper forum. ExxonMobil exercises its constitutional rights in the Northern District of Texas, and it is in that district that the Attorney General's improper actions have caused injury. The Attorney General cannot protest appearing in that forum after she elected to commit a constitutional tort against one of its residents.

It is within this Court's discretion to "stay or dismiss" an action when it finds "in the interest of substantial justice" that "the action should be heard in another forum." G.L. c. 223A, § 5. The federal case should be allowed to proceed not solely because it was filed first, but also because it raises important claims of federal constitutional violations. By allowing that action to proceed first, this Court can conserve scarce judicial resources by deferring consideration of claims that overlap with those presented in the federal case. It can also avoid resolving questions about the scope of Chapter 93A that could be rendered moot by a ruling in the federal court on federal constitutional grounds.

The presumption favoring staying an action when it seeks the same relief as an earlier-filed

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[57] *Id.* at App. 18.

action bolsters this conclusion. *See Seidman* v. *Cent. Bancorp, Inc.*, No. 030547BLS, 2003 WL 369678, at *2 (Mass. Super. Ct. Feb. 3, 2003). No Massachusetts law supports the Attorney General's assertion that this presumption applies only when the pending actions are filed by two different plaintiffs. Opp. 37. Moreover, such a rigid application of this rule would be against "the interest of substantial justice" under these circumstances, as ExxonMobil commenced this action only to protect its rights from a waiver argument and is prepared to proceed expeditiously in federal court where all of its claims can be resolved.

IV. CONCLUSION

If the Attorney General is right, nothing is to stop a state prosecutor from issuing a subpoena to a political opponent seeking decades of records on the theory that a disagreement about policy constitutes fraud. That is not how our democracy is supposed to work. Policy disagreements get resolved at the ballot box, not in the courthouse—or in the shadow of the courthouse. The Attorney General's misuse of her investigative powers to advance a political agenda escalates the politicization of government agencies once celebrated for their even-handedness and neutrality. It is a trend that could very well result in retaliatory investigations, as those with other policy preferences issue subpoenas of their own. But this Court can stop that trend while it is still in its infancy. A fully briefed motion for a preliminary injunction is now pending before a federal court in Texas. If this Court elects not to stay this action in favor of the earlier-filed federal case, ExxonMobil asks that it strike a blow against the politicization of law enforcement by vacating the CID.

Respectfully submitted,

EXXON MOBIL CORPORATION

By its attorneys,

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo
Thomas C. Frongillo (BBO# 180690)
(frongillo@fr.com)
Caroline K. Simons (BBO# 680827)
(simons@fr.com)
One Marina Park Drive
Boston, MA 02210
(617) 542-5070

EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon
Patrick J. Conlon
(patrick.j.conlon@exxonmobil.com)
(*pro hac vice*)
Daniel E. Bolia
(daniel.e.bolia@exxonmobil.com)
(*pro hac vice*)
1301 Fannin Street
Houston, TX 77002
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

By: /s/ Justin Anderson
Theodore V. Wells, Jr.
(*pro hac vice*)
Michele Hirshman
(*pro hac vice*)
Daniel J. Toal
(*pro hac vice*)
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Fax: (212) 757-3990

Justin Anderson
(*pro hac vice*)
2001 K Street, NW
Washington, DC 20006-1047
(202) 223-7300
Fax: (202) 223-7420

Dated: September 8, 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 8th day of September 2016.

/s/ Caroline K. Simons
Caroline K. Simons

Exhibit 6

Volume I
Pages: 1-113
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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EXXON MOBIL CORPORATION *
Plaintiff *
v. * DOCKET NUMBER 1684CV01888
*
OFFICE OF ATTORNEY GENERAL *
Defendant *

****

HEARING
BEFORE THE HONORABLE HEIDI E. BRIEGER

APPEARANCES:
For the Plaintiff:
Fish & Richardson, P.C.
One Marina Park Drive
Boston, Massachusetts 02210
By: Thomas Carl Frongillo, Esq.

Paul, Weiss, Rifkind, Wharton LLP
1285 Avenue of the Americas
New York, New York 10019
By: Theodore V. Wells, Esq.
Justin Anderson, Esq.

For the Defendant:
Massachusetts Attorney General's Office
One Ashburton Place
Boston, Massachusetts 02108
By: Melissa Ann Hoffer, Esq.
Peter C. Mulcahy, Esq.
Richard Johnston, Esq.

Boston, Massachusetts
December 7, 2016

Recording produced by digital audio recording system. Transcript produced by Approved Court Transcriber, Donna Holmes Dominguez

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
None - Hearing				

PROCEEDINGS

(Court called to order.)

THE CLERK: Your Honor, next before the Court is Civil Docket Number 2016-1888, *Exxon Mobil Corporation v. the Office of the Attorney General*.

I'd ask if the parties could please approach with the Attorney General's Office at the front table, Exxon at the back table.

I'm sorry. What -- I think -- my mistake.

I think we wanted to do -- my mistake -- a -- AG's at the front table, Exxon at the back table. My apology.

Counsel, just to clarify, early on we talked about possibly AG's at the front table because we have more Attorney Generals than we do have for Exxon Mobil, is that right?

And I believe the table was set up in advance for the AG's at the front table.

I'm sorry --

UNIDENTIFIED ATTORNEY: We -- we'll just take three --

THE CLERK: We're good? We're all good.

MS. HOFFER: Yes.

THE CLERK: Very good.

MS. HOFFER: Thank you.

THE CLERK: Thank you, counsel.

So before the Court, Your Honor, is Civil Docket Number 2016-1888, *Exxon Mobil Corporation v. the Office of Attorney*

General.

I'd ask if counsel would please identify themselves for the record.

MR. FRONGILLO: Good afternoon, Your Honor. Thomas Frongillo from Fish and Richardson, and I'd like to introduce my co-counsel.

THE COURT: All right. Good afternoon, Mr. Frongillo.

MR. CONLON: Patrick Conlon from Exxon Mobil.

THE COURT: All right. Good afternoon, Mr. Conlon.

MR. FRONGILLO: Theodore Wells from Paul Weiss.

THE COURT: All right. Good afternoon, Mr. Wells.

MR. FRONGILLO: And Justin Anderson from Paul Weiss who's going to be arguing.

THE COURT: All right. Good afternoon, Mr. Anderson.

MR. ANDERSON: Good afternoon, Judge.

MR. JOHNSTON: Your Honor, I'm Richard Johnston from the Attorney General's Office, and I have with my colleagues, Melissa Hoffer --

MS. HOFFER: Good afternoon, Your Honor.

THE COURT: All right. Good afternoon, Mr. Johnston, Ms. Hoffer.

MR. JOHNSTON: Yes.

THE COURT: Good afternoon.

MR. JOHNSTON: And Peter Mulcahy.

MR. MULCAHY: Good afternoon.

THE COURT: I missed that.

MR. MULCAHY: Mulcahy.

THE COURT: Mulcahy. All right. Good afternoon.

If I could see at sidebar, please, Mr. Frongillo, Mr. Johnston, and Mr. Wells.

COURT OFFICER: This way. Over this way, please.

Right this way.

(DISCUSSION AT SIDEBAR)

(Inaudible at 02:05:00 through 02:06:48, low audio at sidebar.)

(END OF DISCUSSION AT SIDEBAR)

THE COURT: All right. Good afternoon, ladies and gentlemen, visitors from near and far, to Courtroom 1006.

I have the pleasure of having read a number of memoranda, all of which were extraordinarily well written and very informative.

That makes my job much easier.

That is not always the case. I cannot complain today. I have had the benefit of a number of very educational legal briefs.

We are here, as I understand it, and I will give you where I think we are, and then you can take it from there, the Attorney General has issued a civil investigative demand upon Exxon Mobil based on -- and I'm not relying on legal vocabulary here, but based on the Attorney General's belief

that Exxon Mobil knows things about climate change and has said or omitted to say other things.

As a consequence of that belief, the Attorney General has elected to investigate that to determine whether in fact there is some violation of Chapter 93A which is the Consumer Protection Statute here in Massachusetts.

In response, Exxon has suggested that the Attorney General has no such belief, but is instead engaged in a politically motivated fishing expedition designed to chill the free speech rights and perhaps the business activities of Exxon Mobil and that there is no jurisdiction for that particular undertaking, and if there is, jurisdiction, the investigative demand is far too broad to be permissible.

In addition to that, Exxon Mobil asks me to stay the Attorney General's civil investigative demand and any related proceedings because there is an ongoing federal case that I understand from what I have read has put before a Federal District Court Judge in Texas the question about whether the principles of Younger require or do not require the Texas Federal Court Judge to discourage or prohibit his involvement in investigating this particular undertaking by the Massachusetts Attorney General, or whether the Younger principles do not apply and he may go ahead and -- and investigate it based on what Exxon Mobil suggests is an impermissible or arbitrary and capricious investigation.

I understand from the recent letters that have come to this Court that the initial question of whether or not the Attorney General will be required to appear there has now been placed before the Fifth Circuit Court of Appeals. There has not been any further action as I understand it onto the underlying merits of the Younger analysis. I'm sure if that's not accurate, I will hear about it momentarily.

But that is what I believe is the current state of play, and I now am proposed to hear from counsel.

So that you know, I have read the petition to set aside or modify the civil investigative demand. I have also read the memorandum in support of that. I have read Exhibit B which is the actual civil investigative demand. I've read the Attorney General's answer as well as the Attorney General's cross motion to compel a response from Exxon Mobil.

I have read the Attorney General's memorandum in support of that motion. I have also read Exxon Mobil's opposition to that, and in addition, I have reviewed two letters that were provided to the Court, one from the Attorney General and one from Exxon Mobil which purported to bring me up to date on various extra-judicial I should say activities.

Some of them are -- are related to Court filings and some are not.

And so that is where I am.

I would appreciate greatly if counsel, as they are arguing,

would call my attention to whatever Exhibits are informing that particular argument because I cannot say that I have my hands on each one of those as we go, so I may need some time to keep up with you, all right?

Mr. Anderson?

MR. ANDERSON: Yes, Judge.

THE COURT: All right.

MR. ANDERSON: Perhaps to make things easier with respect to that last request, we've prepared both a binder of what we consider to be the key Exhibits that I intend to address during argument today, as well as a copy of the slides that I'm going to use during the presentation.

THE COURT: All right. And is one of those copies for me?

MR. ANDERSON: It is, Judge.

THE COURT: Thank you.

MR. ANDERSON: Well, two actually are --

THE COURT: All right.

MR. ANDERSON: -- are for the Court, and I'd be happy to hand them up at this time.

THE COURT: That'd be great. Thank you.

I take it there's no objection, Mr. Johnston?

MR. JOHNSTON: I have no objection.

THE COURT: All right.

MR. ANDERSON: And we -- we have copies for --

THE COURT: All right.

MR. ANDERSON: -- the Attorney General's Office as well, Judge.

THE COURT: If there is an extra copy for my research attorney, that would be helpful.

MR. ANDERSON: Your Honor, our request today is -- is actually quite a modest one, and your recitation of the briefing that's been submitted to date is -- is accurate, and there have been a number of issues that have been presented to the Court.

But today, their -- our application is that only one of those issues be decided, and it is the application for a stay.

There is a lawsuit pending in Federal Court as the Court mentioned that not only was first filed, but raises a number of issues that are not before this Court and that are also much further along than the proceedings before this Court which are really just commencing today. This is our initial appearance in the case.

Meanwhile, in Federal Court, we've had multiple rounds of briefing on a few different issues. We've had oral argument on the preliminary injunction motion where we also discussed the motion to dismiss that was filed by the Attorney General.

We've had Court -- subsequent Court conferences where we addressed issues that have come up in connection with the discovery orders that had been entered, so we've had Court appearances, we've had Court orders that were issued.

We had Court ordered mediation where the parties attended a mediation that was conducted by another Judge, a retired Judge who'd been appointed by the Court to do so. We had part -- the parties conducted their own settlement talks before that.

And now, we learn this week that we're likely to be in the Fifth Circuit. At -- there's nothing that's been actually filed, but the Attorney General has said that it has an intention of raising these issues in the Fifth Circuit.

THE COURT: All right. So before you go forward, does that mean that you are not pursuing your motion to set aside or modify the CID?

MR. ANDERSON: In the alternative, yes.

THE COURT: In the alternative. All right.

MR. ANDERSON: But our principle request is that --

THE COURT: I see.

MR. ANDERSON: -- is that we just stay these proceedings in light of -- in light of the factors that all of which weigh in favor of granting a stay, beginning with the first filed presumption.

And it -- it's really not -- not so surprising that so much would have happened in Federal Court while very little has happened here because Exxon Mobil filed it's petition to set aside the CID in this Court simply as a protective measure, simply to avoid -- and we wrote this in our brief, simply to avoid the risk that there would be an argument about waiver or

forfeiture.

That was -- this was a placeholder suit.

In Federal Court, we have challenged a course of conduct that we argue violates Exxon Mobil's constitutional rights, and that course of conduct is attributable to this Attorney General as well as one in New York and then others who have not been named in the complaint.

The CID that's at issue before this Court is -- is just one piece. It's a manifestation of that course of conduct, but it's not the entirety of the conduct.

So a resolution of the lawsuit in Federal Court could very well settle and afford complete relief to the parties here, but a resolution of the issues that are pending before this Court couldn't resolve the broader issues that are pending in Federal Court.

THE COURT: Well, if the Federal Judge declines to become involved in the investigation of this investigation, where does that case go?

MR. ANDERSON: Well, then -- then I think the Judge -- at that point, you would lift the stay.

THE COURT: In other words, that case goes away if Younger applies?

MR. ANDERSON: Correct. If Younger applies, or if the -- if there's on personal jurisdiction as the Attorney General has argued, then that case would -- would be dismissed, and the

proceeding here could -- could resume.

But -- but, Your Honor, if -- if a -- if a stay is not granted, then we would recommend, and we urge the Court, to vacate the CID.

You know, you touched on all of the principles arguments, and I'd like to review them in -- in some detail today, that, you know, there's no personal jurisdiction over Exxon Mobil for any of the claims that are within the scope of the CID.

The CID was issued arbitrarily and capriciously. It imposes an unreasonable burden seeking almost forty years of records, you know, for a statute -- for a violation of a statute that has a limitations period of four years.

It's impermissibly in -- you know, unspecific in what it asks for.

And, finally, and most -- most egregiously, it constitutes an impermissible attack on free speech. It is directed at a viewpoint that the Attorney General disagrees with, and that's impermissible under the constitution.

And so with -- with the Court's permission, I'd just like to briefly talk about the reasons why a stay should issue before addressing more substantive arguments.

THE COURT: That's fine.

MR. ANDERSON: Okay, Judge. And so what I'd like to do is turn -- is turn to the presentation. And I wanted to begin with the Court's authority to issue a stay.

It's inherent in the Court's ability to manage its docket and organize its calendar and conserve its resources, but there's also statutory authority and rules based authority.

But one of the principle objectives of the rule is to conserve judicial resources, and you can see that in Rule 12(b)(9) in the -- the Reporter's Notes to that and under the statute where there's the interest of justice favors allowing another Court to proceed, this Court is fully authorized to either stay the action or even dismiss it.

So we looked at the case law applying -- applying the -- the standards for when a stay should issue, and there are certain factors that cut across and are common to all of the case law.

The first is the First File Presumption which is important, and that is the presumption that the plaintiff who files first gets to select the forum, and that's true even if the complaint is filed a day before as in this case.

And we point the Court to *Siderman* where you had a very similar circumstance, that there was a federal action filed first, and then two days later a state action was filed, and the State Judge in that case, citing 12(b)(9) and other principles, stayed the first action -- or stayed the State Court action in deference to the first filed federal action even though it was just filed two days earlier.

So I think after the presumption, you have --

THE COURT: Before we go further, I guess what I have to ask you is that if a -- if the -- if the Attorney General issues CID's to any company, and that company then decides that they would prefer to litigate this in Federal Court, wouldn't a stay under your theory be necessary in almost every contested CID?

MR. ANDERSON: Not necessarily, Judge. In the normal -- in the normal case where there isn't a showing like we've made of bad faith where there is federal jurisdiction, the Federal Court would simply dismiss the lawsuit, and it would acknowledge that there is a lack of jurisdiction, and then the case would proceed in State Court if -- if that's where the parties decided to press the suit.

But in this case, we have a -- we have an unusual circumstance where the -- in the record, as it exists now, before any discovery's been had, before any depositions have been taken, we've made a strong showing already of bias such that the Federal Judge who's supervising this litigation has expressed concern and asked the record to be further developed by the parties.

Now, to date, despite this discovery order being over a month old, and despite the fact that Exxon Mobil has issued requests pursuant to the discovery order to obtain documents, to have interrogatories answered, to have admissions made, there's been no response from the Attorney General.

But the District Judge has expressed concern about the bad faith, and has asked for the record to be developed and has -- that's why has -- he has directed the Attorney General to appear in his Court next Tuesday for her deposition.

Now, this is an unusual circumstance.

So this would not be, you know, an average case, you would not have such a strong showing of bad faith such that a Federal Judge would order further discovery on the matter.

So the Attorney General has mentioned in -- in multiple briefs both in Federal Court and in State Court that the sky is falling and some of these Chicken Little arguments about the -- the -- the flood gates being opened.

But in the normal case, no, the Federal Court would simply dismiss the lawsuit and it would proceed in State Court.

And -- and, Your Honor, it -- and if that's right, if it is right that there is no federal jurisdiction here, we will soon know that this argument has been teed up before the Federal Judge with jurisdiction over the matter, and I would expect it will feature prominently in the brief that the Attorney General intends to file in the Fifth Circuit this week.

So this is not a situation where we won't know for an extended period of time whether there is jurisdiction in Federal Court.

Turning to the other factors, Judge --

THE COURT: You're not an appellate lawyer obviously.

But go ahead.

MR. ANDERSON: There's efficiency, and that probably is the most common sense of all of the factors that are relevant when considering whether a stay should issue, and it's just the idea that you -- why have duplicative proceedings.

There is a proceeding in Federal Court that where these issues are teed up as well as others, but they're overlapping issues, overlapping parties, a decision there could very well obviate the need for the proceedings here to go forward.

There's another intuitive rationale which is to avoid inconsistent rulings.

It could be that the -- this Court finds that the CID is invalid and that it was impermissibly issued, that it -- you know, there's bad faith, that it is impermissibly attacking a viewpoint that's disfavored by the Attorney General, and it could be the Federal Judge finds the other way.

And so a key and core principle here is to avoid the risk of inconsistent rulings by allowing one Court to proceed and the other stands back.

That's also -- it overlaps with the principle of comity and respect for one Court's jurisdiction, particularly here where the Federal Judge is actively supervising this case.

He issued multiple order -- scheduling orders this week.

We -- we have briefs due today at 5PM in responding to different applications that have been made in the case.

The Judge is actively supervising it.

Another factor that weighs in favor strongly of proceeding in Federal Court is the question about whether one Court or both Court can provide complete relief, whether it has jurisdiction over all of the parties, whether all of the claims are before the Court.

And the Federal Court here can provide complete relief. This Court cannot.

And I -- I would just turn to slide four where you just provide an overview of what is at issue in Federal Court, and it is a conspiracy claim, that is the first cause of action to violate the constitutional rights of Exxon Mobil.

The named co-conspirators are the New York Attorney General and the Massachusetts Attorney General.

Those claims are not before this Court, and one of those two parties is not before this Court.

There's also a federal -- federal preemption claim related to the attempt to investigate and -- investigate in a way that's counter to SEC regulations the way Exxon Mobil reports its (inaudible at 02:24:34, low audio) preserves.

And so, Your Honor, the Federal Court can offer complete relief to these claims, but this Court cannot.

And then finally is the question of the active as opposed to the placeholder lawsuit.

And usually what that means is if the placeholder lawsuit

was filed first, then the Court might say that the presumption should be set aside because no one's actively litigating that first lawsuit, but they just filed it for -- you know, for whatever improper purpose.

Here, the first filed lawsuit is the active lawsuit. We're appearing again for the first time today before this Court, but we've appeared in front of Judge Kincaid multiple times both in person, over the phone, we had the mediation. We -- we've -- we're now going to be on appeal in the Fifth Circuit there.

So it -- it -- I think the Attorney General would be hard pressed to argue that the first filed suit here is anything but a legitimate bonafide attempt for Exxon Mobil to obtain relief.

And if there is a placeholder suit between the two, it -- it's this one, and explicitly so.

In our brief, we -- we made clear that we are filling --

THE COURT: Well --

MR. ANDERSON: -- just to protect --

THE COURT: -- am I correct --

MR. ANDERSON: -- our rights.

THE COURT: -- that the suit in Texas would not be filed had it not been for the investigative demand?

MR. ANDERSON: That's right.

The investigative demand was the basis for us filing the --

for the lawsuit.

It was --

THE COURT: There were no other -- I -- all of these claims arise from the civil investigative demand.

MR. ANDERSON: I'd say that and the press conference, and then some of the other facts that we've uncovered since.

I would say, Judge, at the time we filed, we knew less. The record was less developed about some of the underlying events.

So the CID of course was apparent to us because we received it, and it drew -- drew our attention.

But we also saw the press conference because that was public.

You know, more recently, we've seen things like the common interest agreement that came to light through a Freedom of Information Act request that a third party made, and we saw right there on the face of the document that the Massachusetts Attorney General and others are -- you know, were working together to regulate --

THE COURT: When --

MR. ANDERSON: -- speech.

THE COURT: What is the date of the CID?

MR. ANDERSON: The date of the CID was March -- it was -- it was late March of this year, Judge.

THE COURT: All right. And what was the date of the filing

of the Texas lawsuit?

MR. ANDERSON: Let's see. We filed in Texas on June 15th, and so during that --

THE COURT: So --

MR. ANDERSON: -- period --

THE COURT: So if -- if the -- if the Texas lawsuit arose out of the CID which was filed or served two months before, since this isn't really a -- a filing process the way it is in most lawsuits, it's a service and then motion practice, it would seem to me, just looking at the dates, that the CID preceded the Texas suit.

MR. ANDERSON: The -- the service of the CID did. But there was no litigation over the CID until June 15th when we filed in Federal Court.

During that period, we -- we negotiated in good faith with the Attorney General to -- to resolve the dispute that we had with the Attorney General. And there just came a time when the -- there was no -- I mean there was always a deadline by which we were expected to produce documents, and there came a time when the Attorney General was no longer willing to extend that deadline.

And so then we commenced litigation, and we brought the action first in Federal Court.

But then recognizing that we have -- that under Massachusetts law, there was a risk of forfeiture or waiver if

we didn't also move here, we then filed subsequently a lawsuit in this Court just to preserve our rights.

But those two actions were commenced June 15th and June 16th, that the litigation was commenced.

And, so, Judge, what -- what's apparent to us -- and by the way, you had asked that -- to make sure that we refer to the underlying sources, and so for these factors, we've listed at the bottom of the slide, and you have it in -- in your printout, the authority that we researched to develop this list of factors that have been used by Courts to determine whether a stay should issue.

And as we see it, every single one of those factors weighs in favor of issuing a stay to allow the Federal case to proceed, to allow the Fifth Circuit to decide whether discovery's appropriate, whether there's personal jurisdiction if that's something that that Court decides to reach, allow the District Court to determine whether there is jurisdiction and whether there's been bad faith.

I would -- if the Court decides not to issue a stay, then we ask the Court to vacate the CID.

And the first one -- the first basis for that request, Judge, is the absolute lack of jurisdiction over Exxon Mobil for any claims that could be brought that's within the scope of the CID.

Now, the Attorney General bears the burden of establishing

jurisdiction, but just -- there's some general principles.

The first is that there are basically two ways that we could be before the Court. One is on general jurisdiction and the other is -- is specific jurisdiction.

I don't think there is a dispute between the parties that Exxon Mobil is not subject to the general jurisdiction of this Court.

We're incorporated in New Jersey and our principle place of business is Texas, and under *Dimler*, there's really no question that we're not subject to the general jurisdiction of the Court where we don't have context like principle place of business or in corp -- state of incorporation in Massachusetts.

And I think the -- the real question is whether there is sufficient suit related conduct in the jurisdiction for there to be specific jurisdiction over Exxon Mobil.

And what we know, both from the Long Arm Statute and from relevant case law, is that jurisdiction over an entity can only arise from conduct in the forum that's related to the claims.

So for there to be any jurisdiction over Exxon Mobil, it has to relate to conduct in Massachusetts that is connected to these claims about what Exxon Mobil knew about climate change, as -- as you described Judge, in -- in, you know, the opening of today's proceeding.

So it has to be suit related conduct that has a substantial connection to the claims at issue that occurred in the state.

And, you know, I -- in our research we found that, you know, just to support this, especially in the context of 93A which is the statute at issue, the only relevant conduct is the conduct that could be violative of that statute.

And we've discussed what the focus of the AG's investigation is on. It's on statements to consumers and investors about climate change, and that's common ground.

And we look at the subpoena or the CID and what we see is that the focus on its face is not on any statements to consumers or investors that were actually made in Massachusetts. None of them were made in Massachusetts.

And when we look at specific statements, we see that they were explicitly not made in Massachusetts.

We have some that were made in China, New York, Texas, many -- you know, most are made in Texas, and in London.

THE COURT: I -- I looked at that. I mean that was part of your pleading.

And when I reviewed the case law, particularly I'm sure you're more familiar with it than I am, *In Re Yankee Milk*, it struck me that the threshold for the documents that are being sought is extraordinarily low. It's simply relevance.

If the allegation, as I understand it, is that the company knows things and is either omitting or misconstruing that

information in some way, the proof as to what the company knows might come from a number of sources not necessarily in Massachusetts.

MR. ANDERSON: I think that's fair, Judge. But then the Attorney General would have to identify the conduct in Massachusetts that would justify the investigation because you're right that there might be evidence, you know, outside of Massachusetts that would shed light on statements that were made in Massachusetts.

The problem for the Attorney General is that there are no statements in Massachusetts that that office has identified that could be actionable, that could be contradicted by these statements that were made somewhere else.

And that's really the crux of our argument. It's not that -- you know, if there had been a number of actionable statements or actionable conduct in Massachusetts, then of course an investigation could then go to see if maybe there were contradictory statements made elsewhere so you could build a case.

THE COURT: I'm sure --

MR. ANDERSON: That's not our argument.

THE COURT: -- that will be at the top of Mr. Johnston's list of things to argue.

MR. ANDERSON: Well, you know, Judge, they tried before but they haven't done very well.

They pointed to six contacts that Exxon Mobil has with the state, and they say, Judge, this is why we have jurisdiction over Exxon Mobil, these contacts.

And so we -- we -- we take that seriously. We looked at each of these theories, and none of them hold up.

So the theories are that we sell fossil fuels to wholesalers, that we supply motor oil, like a lubricant to the State Police, that we have in Massachusetts service stations that are labeled Exxon and some that are labeled Mobil, there's a pipeline, we have a website, and instate advertisements.

None of them mention climate change, but there are instate advertisements.

So those -- those are the six theories that it -- it presented in briefing about why this Court has jurisdiction, and each one of them is insufficient to establish personal jurisdiction for these claims.

Either the transactions at issue don't involve consumers, for example, or it's not actually --

THE COURT: Like what?

MR. ANDERSON: Well, for example, the transactions with the wholesalers, so they -- they've argued that there's jurisdiction because presumably we sell motor oil to, you know, Advanced Auto Parts, and then Advanced Auto Parts sells it to consumers.

Well, under the law, a consumer is someone who does not engage in trade or commerce. There's basically a distinction under 93A that's born out in the case law where you have consumers on one side and then you have those who engage in trade and commerce on the other side.

In fact, if the -- in the legislative history, you'll see that initially it was just to protect consumers, but then 93A was extended to also reach those who engage in trade and commerce.

So there's a clear distinction between consumers on the one hand and those who engage in trade and commerce on the other.

Now, Advanced Auto Parts in that theory -- you know, that -- that first theory of the Attorney General is not a consumer, and they're not an investor. They engage in trade and commerce.

So that's not in -- that's not within the scope of the CID. The CID purports to investigate statements to consumers and investors.

So the wholesaler transactions is -- that's just out.

The other -- the other thing -- the idea that we've sold motor oil to the State Police, that one has problems of its own, I mean just on the merits.

You know, it was actually no Exxon Mobil but a subsidiary and there's been no showing that that subsidiary's actions are transferrable to Exxon Mobil Corporation under veil piercing

principles.

But even setting that aside, you know, motor oil is a lubricant. It's what allows the engine to work.

So even if the engine was running on electricity or, you know, wind power, you would still need a lubricant to allow the -- the engine to actually function.

So this idea that that's somehow related to climate change is a bit of a stretch.

But more significantly it's the State Police, and that's the government. It is not a consumer.

Again, a government engages in trade or commerce. Consumers don't.

So their first two theories just don't pan out. The fact that we sell to wholesalers and the fact that we've supplied the Police with motor oil, those aren't consumer transactions.

The other one, a common sense one most people would say, well what about all the service stations. We see--

THE COURT: Did you happen to include in any of your filings a copy of your standard franchise agreement with your service stations?

MR. ANDERSON: Your Honor, we -- we don't. We did not file that yet.

But if the Court would like to see that type of information, we can arrange to provide a copy in a supplemental --

THE COURT: Yeah.

MR. ANDERSON: -- submission.

THE COURT: I would -- I would like to see that.

MR. ANDERSON: Okay, Judge. We'll -- we'll do that.

But, you know, in the interim, we -- we had -- we did provide a declaration from a knowledgeable representative of the company that in the State of Massachusetts, there are no service stations that are directly owned by Exxon Mobil at present or during the relevant limitations period.

And what that means is all of those service stations that say Exxon and that say Mobil are franchises, and the law is awfully clear that the mere use of a corporate logo or, you know, the branding is not sufficient to establish personal jurisdiction unless there's more greater indicia of control.

And the Attorney General recognizes that, and that's why they -- they came forward with a settlement agreement involving the sale of tobacco from a few years back, and they say that's right, Judge, it's true that franchisees don't automatically get -- you know, their conduct doesn't get automatically attributed to the corporation.

But here we have this agreement where Exxon Mobil said it controls the franchisees sufficiently that it could execute a settlement agreement.

The problem with that is that if you read carefully in the settlement agreement, there's a distinction between the stores

that were directly owned by Exxon Mobil and those that were just franchises.

And for the ones that were directly owned, Exxon Mobil, under paragraph eleven, knowingly and voluntarily agrees to adopt and implement settlement agreement.

But for twelve, where we're talking about the service stations that aren't owned by Exxon Mobil directly but are owned by third parties under franchise agreements, Exxon Mobil said it would make good faith efforts to affect compliance.

THE COURT: I'm sorry. I lost you. What settlement agreement is this?

MR. ANDERSON: This relates to the selling of tobacco. The Attorney General had submitted it I believe in an appendix in support of the reply that was filed, and so we didn't have a chance to -- we didn't have a sur reply in this -- you know, I'm sure the Court was appreciative of that.

So this is our response to that piece of evidence.

So we're saying the Attorney General recognizes that franchise arrangements don't give rise to personal jurisdiction, they -- they came forward with this piece of evidence to show that Exxon Mobil has sufficient control. It doesn't show that.

It shows a clear distinction between the service stations that we own where we do have that control, and those where we don't own them, the franchise agreements, where all we can do

is just make our good faith efforts to ask those franchise -- those third parties to carry out the terms of the settlement agreement.

So we think that actually supports -- their evidence supports our position.

And then the last three principles -- or the last three theories are -- are awfully weak.

The first one is about advertisements, and there's good case law that, you know, general advertisements that are, you know, in nationwide publications, are not sufficient to establish personal jurisdiction.

I mean if that were true, then any corporation that advertises in, you know, something like the, you know, Time Magazine, would be subject to jurisdiction in every state, and we know that's not true.

And then if there are advertisements that reach the state that are targeted to people in the state, well then they should say something about climate change if there were to be personal jurisdiction.

And -- and I reviewed the -- you know, the -- the recordings of a handful of -- of advertisements that -- that like incorporated -- were in local radio stations, none of them have anything to do with climate change.

There's also a pipeline. We have the -- the Everett Terminal and the Springfield Terminal in -- in Massachusetts.

So there's a -- there's a pipeline here that Exxon Mobil operates. You know, the problem is that the Attorney General can't connect that in-state conduct to its theory of lawsuit.

There's -- the operation of a pipeline has nothing to do with statements to consumers or investors about climate change.

The instate conduct has to be connected to the basis for the suit.

THE COURT: Sorry. We have -- this is an antiquated courtroom. We have -- have to have human activity to make it cooler.

Go ahead.

MR. ANDERSON: My -- my first apartment in Brooklyn was the same way.

THE COURT: Yeah.

MR. ANDERSON: You had to open the window for it to cool off in winter.

And then the last argument is this idea that we have a website.

Yes, we have a website. It's like advertising. All -- all corporations have a website. It doesn't mean that just because someone in the state can access your website that there's personal jurisdiction over the corporation in the state.

There has to be suit related conduct in the state.

And here, the -- the test is whether you can actually purchase a product through the website. So if you can purchase a product, then maybe you do have an argument, if Massachusetts consumers could go onto the Exxon Mobil website and buy fossil fuel, maybe there would be an argument.

But where you can't do that, and our website doesn't work that way, the law is pretty clear that there's no personal jurisdiction based on the mere existence of a website.

And so that -- that takes care of really all of their theories on personal -- or on personal jurisdiction based on statements to consumers. None of them pan out.

And so then we turn to the theories for false statements to investors, and these don't work either.

The -- the first one has to do with the fact that there are investors in the state who hold shares in Exxon Mobil's common stock.

That's not sufficient under Massachusetts law. For there to be a violation of 93A, it's not enough to say that you have a shareholder in the jurisdiction and that optimistic statements about the corporation or statements at all about the corporation were made that were heard by a Massachusetts investor.

For 93A -- so it's different than Federal Securities Law.

For a 93A violation, the defendant actually has to have engaged in the securities transaction.

So the Mass -- the Attorney General would have to point to a securities transaction in common stock where Exxon Mobil actually bought or sold.

But all that it's been able to identify is the ownership of stock that was purchased on the secondary market, so purchased from third parties.

There's been no primary issuance. There's been no new issues of Exxon Mobil stock directly to Massachusetts investors during the relevant time period.

So that theory doesn't work.

And then that leaves us with the debt. And there has been -- so in this one, we have issued what is called commercial paper. It's the -- the short term debt instruments that companies issue to obtain credit on a -- on a short term basis.

None of them last longer than 270 days. It's commercial -- it's called commercial paper. It's short term debt financing.

We looked in a treatise to learn a little more about this, and there is no investor -- these decisions are often made in two or three minutes on the telephone about whether, you know, the company has sufficient short term credit rating to be -- you know, make good on a loan like this.

And this type of instrument, anyone who's investing in commercial paper is not looking a year down the road, five years, ten years, never mind the -- the timeframe that the

Attorney General's talking about for climate change regulations that might or might not be happening in the future.

These investors are focused on the short term and climate -- any statements about --

THE COURT: Are they Massachusetts investors?

MR. ANDERSON: Yes, Judge.

We -- we've issued commercial paper to Massachusetts investors. That is clear.

And if there were -- for example, if the Attorney General were to identify some -- some statement that was made in connection with those purchases or sales that -- that was arguably fraudulent, then --

THE COURT: Well --

MR. ANDERSON: -- the --

THE COURT: -- is that what they have to do at this juncture? Or is that what they have to do if they decide later to bring a lawsuit?

Is at -- is at this juncture the -- the obligation of the AG, as I understand it, and I may be wrong, is that they just have to show that it's relevant.

MR. ANDERSON: Right. And -- and that's what --

THE COURT: And they have a belief.

MR. ANDERSON: Yes, a reasonable belief.

THE COURT: It doesn't say reasonable.

MR. ANDERSON: Well, it --

THE COURT: Nor do the cases.

MR. ANDERSON: If it's unreasonable on its face, then it's arbitrary and capricious.

THE COURT: Well, that's -- that's the inquiry, I understand that.

MR. ANDERSON: And -- and so I think -- but I think that's exactly -- but that's the crux of it right there, Judge, is in that transaction, is it reasonable to think that someone buying commercial paper cares about Exxon Mobil statements on climate change.

It's not. It's not reasonable. Those transactions are held for that -- for debt instruments that are held on a very short term basis. All that matters to those investors is the creditworthiness of the corporation in the short term.

Climate change -- a statement about climate change could only matter in that context if -- if there was something -- some event in the next few weeks that was going to alter the finances of the company based on climate change.

And there's been no argument, no credible argument on that.

And I think the Attorney General would be hard pressed to identify any investor who makes an investment decision about commercial paper based on statements about climate change.

It's just not the way those transactions work.

And by the way, that's the only -- of all of these theories

that we've just covered, it's the only one where there actually is conduct by Exxon Mobil that you could -- you could even -- you could argue might possibly in some theoretical world give rise to liability.

And, so, Judge, in light of that, you know, in light of the absence of jurisdiction over any claim that could arise from the subject matter of the CID, you know, our position is that the CID should be vacated.

And there's certainly no jurisdiction of the Court to order us to comply with it when there's no jurisdiction over Exxon Mobil in the first instance.

So be -- before compliance can be ordered, there should be jurisdiction over -- over Exxon Mobil.

You know, the next argument, Judge, is even if you -- even if you were to say there will be no stay and there is personal jurisdiction over the company, then the question then is what -- what you identified about whether there is a belief of wrongdoing.

And that's what the statute requires, is that if there is a belief of wrongdoing, then the Attorney General can obtain information that is relevant to investigate the basis for that belief.

And the test here is a familiar one about relevance, the -- the whole fishing expedition idea that you -- you can't just go riffling through documents with the hope that you might

find something.

And that ties in with the standard that if -- if you are issuing a CID that is, you know, issued in disregard for the facts and circumstances, then it's an arbitrary and capricious act.

And here, Judge, we think that the -- the record is clear that the issuance of this CID was arbitrary and capricious.

Exxon Mobil, for over the last decade, has publically acknowledged the risks associated with climate change.

From 2002 onward, I -- we have here just a selection of the public documents that Exxon Mobil has issued where it's acknowledged in one way or another the risk associated with climate change, and we -- we did that in 2002. We've done that in our securities filings in 2006, 2015.

There's been no statements, certainly not in the four year time period that's relevant under the statute of limitations that do anything but acknowledge the risks of climate change, and the Attorney General has pointed to none.

What it has done is relied on a bunch of historical documents that it says is the basis for its investigation.

And, Your Honor, our -- our position here is that this is all pretextual, that --

THE COURT: Pretextual?

MR. ANDERSON: Pretext -- absolutely. That these are pretexts, and they're not really that hard to debunk.

The Attorney General has said that it's reviewed documents where Exxon Mobil admit -- recognized in the '70s and early '80s that climate change was real, it was serious, it was happening, and that if action wasn't taken swiftly, there would be serious long term consequences.

So we said, all right, so you -- you've identified the basis for your theory. It is a set of documents from the '70s and '80s.

Do those documents actually stand for the propositions that you assert?

And, for example, here we have from one of the -- from the opening brief, the Attorney General argues that in one of the documents from 1982, Exxon Mobil acknowledged that the mitigation of greenhouse effect would require significant greenhouse gas reductions.

Now, let me actually go look at that document --

THE COURT: Well, are you suggesting that's not relevant?

MR. ANDERSON: No. I -- no, Judge. I'm saying that this document doesn't stand for that proposition.

THE COURT: Well, I -- I understand that, but that I assume is a second tier analysis.

And the first tier, the first catch basin if you will is a relevance question.

So I'm -- I don't think anybody at this stage is going to be testing the relevance in a -- in a minute sense, but if it

involves Exxon Mobil and their view of climate change and whether it relates to the Attorney General's belief that there is some misstatement or omission, would you find that that was not relevant?

MR. ANDERSON: I think it's relevant, but it's relevant because it shows that her belief is based on a disregard of the facts. And that's why it's arbitrary and capricious.

That -- the point of this argument is that she is -- the Attorney General has said that there is -- I have a belief that Exxon Mobil has misstated what it's -- what it knows about climate change, and my belief is based on these documents that I've reviewed from --

THE COURT: Well, remember tough I'm sure you've read the case law, they don't have to establish the basis of the belief.

MR. ANDERSON: That's correct.

THE COURT: And in fact, it's your obligation to disprove that there is a belief and to prove in some way or to establish that it's arbitrary and capricious.

So I'm not analyzing what the AG tells me is relevant or not relevant.

But I am analyzing what you're telling me is arbitrary and capricious.

And in order to be out -- arbitrary and capricious, I have to have the sense that the documents are irrelevant.

So what you're telling me is you think these are irrelevant?

MR. ANDERSON: Well, Judge, I -- I'd say that these documents are not relevant to the inquiry that -- I think that the documents very well could be relevant actually.

What they're relevant to is demonstrating that there is an arbitrary and capricious action here.

And, Judge, you're right that the Attorney General has no obligation to come forward and explain what the basis for her belief is. That's correct.

But when the Attorney General does come forward and say my belief is based on these documents, well that allows Exxon Mobil the opportunity --

THE COURT: Understood.

MR. ANDERSON: -- to say --

THE COURT: That's what I'm asking you. Are you telling me that these documents are not relevant?

In other words, if this CID lands on your desk, are you going to doc -- are you going to take those documents and put them to the side because they're not relevant?

MR. ANDERSON: And that's why I hesitated, Judge, because I think -- I think that's right.

If there was a good faith investigation into these issues, these documents would certainly pass the test --

THE COURT: All right.

MR. ANDERSON: -- of relevance.
THE COURT: That's -- that's all I was asking.
MR. ANDERSON: And I -- I'm -- and I'm sorry I misunderstood the --
THE COURT: No. That's all right.
MR. ANDERSON: -- question, Judge.
And we're not saying that they aren't relevant. What we're saying is that these documents do not support the belief that the Attorney General has formed.
THE COURT: I see. But they don't have to support it.
MR. ANDERSON: They don't have to, but when they do come forward and say my belief is based on this --
THE COURT: All right.
MR. ANDERSON: -- and --
THE COURT: I'm --
MR. ANDERSON: -- then you look --
THE COURT: I'm with you.
MR. ANDERSON: -- and you see --
THE COURT: I understand.
MR. ANDERSON: -- that it's not --
THE COURT: I understand.
MR. ANDERSON: -- that sheds light on whether it's a pretext or not.
THE COURT: Right.
MR. ANDERSON: And --

THE COURT: I --

MR. ANDERSON: -- whether it's a truly held belief.

THE COURT: -- I understand.

MR. ANDERSON: They volunteered it. And so we -- we put them to the test. And Judge, I'm not going to go through each of these. It's in the -- it's in the flip book if you'd like to take a hard look at this.

The Attorney General's identified about a half dozen documents, and it has said these are the -- you know, these are the smoking guns, these are -- you know, these -- this is what has formed my belief that Exxon Mobil knew the truth about climate change in the '70s and '80s.

And when you go through these documents, and they're in -- both in the binder, and you've got the summary of -- on the -- on the flipbook, you'll see that they are riddled with uncertainty.

I mean this one here, they say -- they say there is currently no unambiguous scientific evidence these factors are uncertain. There's considerable uncertainty about whether any of this would occur, making significant changes in energy consumption patterns now would be premature, key points need better definition, uncertainties -- you know, recognizing uncertainties and a further study and monitoring is necessary for any action to be taken.

These are the documents that they say supports their

position, and when you flip through these, you just see statements that support Exxon Mobil's position.

THE COURT: Well, let me ask you something.

Is -- is it your view that the Attorney General has to put forth all the bases for their belief --

MR. ANDERSON: I --

THE COURT: -- their -- her belief?

MR. ANDERSON: -- I don't, Judge. I agree with what --

THE COURT: So if --

MR. ANDERSON: -- you said initially.

THE COURT: So there may be other -- other documents or other conclusions that aren't publically provided to Exxon Mobil but could fuel this belief.

And I don't know if that's legally permissible, but is it your view that it is?

MR. ANDERSON: My view, Judge, is that the Attorney General had no obligation to come forward and say the basis for my belief is the following.

But if it chooses to do so, then it subjects its belief to a little scrutiny.

THE COURT: I see.

MR. ANDERSON: And our position is that there is not a reason -- there is not a belief here a -- a good faith belief as we've argued to Judge Kincaid and as discovery will further reveal.

Our position is that this is all about bad faith. This is about regulating speech. It's about viewpoint discrimination. It's about attacking through legal means, through law enforcement power, those who simply are on the other side of a political debate.

So we think this is bad faith, but we think this is the evidence of bad faith, is that when they come forward to try to justify what they've done, and when they come -- when they try to say our belief is well founded, here is the proof, and then you take a look at it, and you feel like that if I were dong a trial, these would probably be my Exhibits showing the uncertainty and the doubt within the company, and by no means conclusive proof in the '70s and '80s that -- that Exxon Mobil had recognized that -- that climate change was occurring, that it was occurring on a certain timetable, you know, that -- the ability to predict the amount of, you know, CO2 that would be omitted and how that would translate into warming or not, I mean it -- it's just fanciful.

And so that -- that's why, Judge, we -- you know, we encourage you to take a look at the documents, take a look at this analysis, and it -- it really just puts -- it just undermines the argument that this is a belief that's held in good faith.

And the other reason to be skeptical of the --

THE COURT: Before --

MR. ANDERSON: -- the --
THE COURT: -- you go on, I -- I just didn't quite catch the end of that, and I thought it summarized your argument.
It's -- they're maneuvers that are designed to chill speech that's on the other side.
So -- so disagreements over whether climate change exists?
MR. ANDERSON: Well, disagreements about climate change policy.
I think that there --
THE COURT: And what --
MR. ANDERSON: -- the --
THE COURT: -- you had a -- another two examples that I just didn't quite catch fast enough.
MR. ANDERSON: For the viewpoint discrimination?
THE COURT: Yes.
MR. ANDERSON: It's -- it -- basically, it -- if you look at the CID itself, and Judge, I could -- I could move forward to that --
THE COURT: No. I just wanted you to repeat what you had just said, and you've already forgotten it --
MR. ANDERSON: I --
THE COURT: -- haven't you?
MR. ANDERSON: -- I think I might have forgotten --
THE COURT: All right.
MR. ANDERSON: -- the --

THE COURT: That's --

MR. ANDERSON: -- the words --

THE COURT: -- all right.

MR. ANDERSON: The thrust was that it's -- this was viewpoint discrimination --

THE COURT: All right.

MR. ANDERSON: -- targeting those on the other side of a political debate.

It might have been political debate. That -- that --

THE COURT: All right.

MR. ANDERSON: -- sounds familiar, but.

The -- the other way -- so we've talked a lot about the -- the theories on -- on the consumer side, and we looked at those documents.

The other theory that they've come up with more recently is one involving our disclosures of proved reserves.

And again, Judge, I don't -- I don't put any burden on them to come forward to explain in the first instance their -- their basis for the belief. It's a belief. They don't have to disclose their reasons in the normal course unless we show bad faith.

But they came forward with this, and they said well here's another reason that we have a belief that there is something wrong with Exxon Mobil. It's that they're reporting prove reserves without taking into account the risk that in the next

decade or 20 years or whatever, there would be climate change policies put in place that put limits on Exxon Mobil's ability to develop its -- its reserves, to extract oil from the ground.

That's a theory. It's called stranded assets theory.

Now, there's a fundamental problem with this that has never been addressed by the Massachusetts Attorney General or the New York Attorney General, and it's what the SEC requires Exxon Mobil to do when it reports prove reserves, and under regulations that are binding on Exxon Mobil and all other energy companies, we can't take into account future regulations that might or might not happen.

All reporting of proved reserves has to be based on regulations as they are today.

So this argument that we failed to take into account the risk that there will be restrictions on our ability to develop fossil fuels is rebutted just by reading the relevant SEC rules.

And so we think that when you come forward and justify your belief with -- with the -- with support like this that can be so easily rebutted, that that shows you don't have a good faith belief, that it's for some other reason that you've taken this action, and you've taken in dis -- in disregard for the facts.

Judge, the next problem with the CID, as we go through the

series of problems that the CID presents, is the burden that it imposes.

Well recognized body of law developed about the requirement that there be no unreasonable burden put on the recipient of the subpoena or a CID, there must be limits, either, you know, in terms of length of time or categories of documents that make it reasonable for the person or the party who receives the CID to actually comply with it.

Law is well-established, and we have some precedent and some statutes that address that.

Here, the relevant statute, Section 93A, has a four year statute of limitations.

So the relevant conduct is within that four year period.

Exxon Mobil is not saying that when the Attorney General or any other prosecutor is investigating an offense, it must limit itself literally to the statute of limitations period.

No one's making that argument. So if that strawman is set up, no -- no one is backing that strawman.

But what we are saying is that 36 years beyond the four years' limitation period is too much. And we have not seen any authority or any Court approve a -- for a four year statute of limitations ten times as much going back in time, so a forty year period when you only have a four year statute of limitations.

THE COURT: Well, let me ask you something because I was

struck by that.

But if -- if 36 years ago there is a particular memorandum or report, and I have no idea if there is, but if there were to be a piece of correspondence or some other scientific study that digests any current view of climate change and advises, for example, the Board of Directors to do something or not do something or advises the business unit to do something or not do something in order to avert or not avert -- in other words, what if 36 years ago there is that document? Would that not be relevant regardless of its age?

MR. ANDERSON: Well, Judge, it -- it -- it arguably -- it arguably could be relevant in a certain type of investigation.

So if you had a long time period like that and you made a very narrow request -- request for documents that fit maybe that description, but just going back for a period of time, you might be able to reasonably accommodate --

THE COURT: So you're arguing --

MR. ANDERSON: -- that request.

THE COURT: -- you're arguing about breadth, not depth.

MR. ANDERSON: Yeah, absolutely, Judge.

THE COURT: All right.

MR. ANDERSON: The -- they want -- they want research, broad research going back for four years.

And, you know, on the relevance point, I hesitated for just a second because if there is some scrap of paper in the

archives of a -- of a company from forty years ago, I think that would be -- you'd be hard pressed to --

THE COURT: That might be your archive, but there are people in the room for whom that's not an archive.

Go ahead.

MR. ANDERSON: It -- it's true.

But how many -- how many people would -- would be making decisions within a four -- within the last four years based on a document that's buried somewhere from forty years ago that hasn't come up in any year --

THE COURT: I -- I understand.

MR. ANDERSON: -- you know, except for forty.

So the idea that this document from forty years ago, like a needle in a haystack is buried somewhere -- somewhere, but it's had no impact on the operation of the company for forty --

THE COURT: Well, that's --

MR. ANDERSON: -- years.

THE COURT: -- the issue, I suppose.

I don't know anything what I -- except what I read. I think that's the issue. How much did documents from forty years ago inform the collective decisions of a company over the period leading up to 2016?

MR. ANDERSON: Well, and, Judge, maybe then if -- you know, if the investigation were conducted in a more reasonable way,

you would begin with a narrow subpoena asking for, you know, maybe five years. And see if any documents in -- that are responsive reference documents from an earlier time period, so you'd at least have a good faith basis to believe that those documents were being discussed during the relevant time period, rather than just, you know, just lying dormant, collecting dust in some archive not being relevant to any decision making or even having been read quite honestly by a decision maker in the company for decades.

And that -- that is just the nature of a burdensome, unreasonable approach to an investigation.

And you know, if that were permitted -- it sounds a lot like fishing to be perfectly honest, that -- oh there --

THE COURT: Or --

MR. ANDERSON: -- might be --

THE COURT: -- or scorched earth, one or the other.

MR. ANDERSON: Correct, Judge.

THE COURT: A territorial or hydrospheric search.

All right.

MR. ANDERSON: And so that -- that is our argument there, that there's just a mismatch between the relevant limitations period and -- and the -- the burdensome nature of these requests for really all and everything.

And we found some precedent where, you know, shorter periods of time were found to be completely inappropriate, 22

years, 27 years.

I think the Attorney General would be hard pressed to come up here and -- and identify some precedent justifying a forty year period of time for such a broad request for documents.

And there's also the question about specificity. I mean some of these are just how -- where do you even begin to respond with something like documents and communications concerning Exxon's awareness?

How would you even begin to -- our awareness? Who's awareness? The whole company? And what does -- what does it mean to be aware?

Or concerning our decision making information exchange, what does that mean?

It -- the -- these requests are just so amorphous, and it's unclear what they're even asking us to produce.

And so, Your Honor, I think now that we've -- we've, you know, covered the -- the -- the absence of a -- you know, a belief that's actually supported by the documents that the Attorney General has put forward, and we've talked about this burden, I think the -- the question becomes so why are we here?

Why was this CID issued that has all of these problems, you know, that was issued even though there's no jurisdiction? You know, it's issued even though there's no statements in Massachusetts that have been identified. It's issued even

though it's on its face burdensome and beyond any reasonable scope.

And we -- we'd like to ask the Court to take a hard look at the statements that the Attorney General has made about this investigation.

As the Court knows, this came to light in a press conference.

THE COURT: Right. That was also interesting to me, and I did look to see whether there are cases -- there's certainly nothing in the statute, but whether there are cases suggesting that an Attorney General should not discuss the basis of an investigation.

In other words, it's not like the Grand Jury where you obviously cannot discuss it, and there's explicit case law and statutes on that.

There is nothing that I could find suggesting that an Attorney General who, since 1885, is an elected official, is not permitted to discuss or reveal the belief or the basis for the belief.

So if you know of something, that would be interesting to me.

MR. ANDERSON: Well -- well, Judge, we would rely on the general principles that are reflected in the due -- due process clause, the requirement that a prosecutor not show bias in the conduct of, you know, an investigation.

THE COURT: Does that mean not speak?

MR. ANDERSON: If speak -- if -- if the -- if the prosecutor chooses to speak, choose the words carefully.

There's a First Circuit case called *Aversa* where the -- the circuit found -- I believe it was a federal prosecutor who spoke about a suspect's guilt openly and improperly, found that he might have very well been protected by qualified immunity or maybe it was absolute immunity, but that the conduct was egregious and referred the matter to a disciplinary committee.

So there very well, you know, could be disciplinary rules that would apply here.

There's also the obligation not to taint the jury pool. You know, in theory if charges are ever brought and a case is -- is brought and there -- there's a -- a trial, it would have been wholly improper for the Attorney General to announce at the outset of the investigation, you know, statements about Exxon Mobil's guilt, statements about, you know, misleading the public, about the priority for her to pursue a clean energy agenda.

And you know, Judge, with -- with the Court's permission, I -- I'd like to -- to play these statements for the Court.

THE COURT: I actually read them in the filing.

Did -- was this the press conference that you're talking about?

MR. ANDERSON: Yes --
THE COURT: I --
MR. ANDERSON: Yes, Judge.
THE COURT: -- I did read -- I did read the transcript.
MR. ANDERSON: And -- and - -and Judge, we found this to be -- to be entirely inconsistent with the Attorney General's obligation to be evenhanded, to -- you know, if -- if she chooses to speak, and we don't dispute the fact that the Attorney General or any prosecutor has the right to speak to the press. It's an -- it's an important function of the office, whether elected or appointed, to explain the decisions of the office, you know, the press releases and press conferences all the time.
But there are certain rules that apply.
THE COURT: Where are they? That's what I was looking for.
MR. ANDERSON: Oh --
THE COURT: Just basic due process --
MR. ANDERSON: Basic --
THE COURT: -- is that --
MR. ANDERSON: -- due --
THE COURT: Okay.
MR. ANDERSON: -- process --
THE COURT: All right.
MR. ANDERSON: -- rules that -- that require the overarching -- that require the -- that require the prosecutor to balance

whatever he or she says in public against the overarching need that justice be done.

And that's recognized by the Federal Law and State Law, and there is an ethical rule of the Supreme Court of this Commonwealth that -- that bears on this as well, Judge. And we'll -- we'll provide that citation to the Court momentarily.

And so if the Attorney General chooses to speak, she needs to speak carefully and make sure she's not biasing the jury pool against a target, but even more importantly not demonstrating bias in the investigation because an investigation where there is a preordained result is impermissible.

And here, what we saw in the Attorney General's statements --

THE COURT: Just giving you the five minute warning.

MR. ANDERSON: Okay.

Okay. Judge, I think that will not be a problem.

THE COURT: All right.

MR. ANDERSON: What -- what we saw here was that there is an agenda that has nothing to do with false statements to consumers.

It has to do with a moral obligation that this group of Attorneys General and Al Gore accept to take certain actions to combat climate change, in particular because the Federal Government has not done enough in their view, that they need

to take certain actions to combat climate change.

And one of the ways that they hope to enact that agenda is by restricting what is said in public about climate change.

So the Attorney General said that part of the problem that she's identified is one of public perception. You know, the public doesn't seem to support her policies.

And the problem for that is that they misapprehend the catastrophic nature of the impact of climate change and the need to speed our transition to a clean energy future.

So that's what she -- she was saying at the press conference, is it's not that, you know, there's fraud that we need to uncover. It's that the public doesn't agree with me, and then the reason they don't agree with me is because companies like Exxon Mobil are not towing the party line. They're saying something different.

And that is the basis, the real basis for this investigation. It's not about this -- you know, these documents that you can easily debunk just by looking at them. It's not about our regulatory filings where you can debunk that theory just by reading what the SEC requires.

It's about this. It's about the document that the Attorney General signed with a number of other Attorney Generals from different states where they say that our common interest is in ensuring the dissemination of accurate information about climate change.

What law enforcement objective is that?

This is about regulating speech on an issue of public concern.

You look at the CID itself. It targets over a dozen groups and says Exxon Mobil, give us all your communication with these groups about climate change.

What do these groups have in common?

We're talking about the Heritage Foundation, ALEC, Americans for Prosperity.

What -- what do these groups have in common is that they're all conservative. They're all known for being on the side of this debate about climate change that is the opposite side from Attorney General Healey.

None of these groups -- none of these entities named in the CID support the Attorney General's policies on climate change, and that's telling.

You take her statements at the press conference. You take what they wrote in the CID itself targeting those on the other side of this debate. You take this common interest agreement that all of the Attorneys General signed saying we want to regulate the dissemination of information about climate change, and what you see is that the purpose of this investigation is to regulate speech and to engage in viewpoint discrimination, and is not really about these fig leaves about, oh, well maybe in connection with selling gas to

consumers, there was a misrepresentation about climate change.

And the way you know that this is right is look at the things they're investigating.

It -- it's basically statements about policy. It's not about statements to consumers.

It's, you know, this policy that the CEO made that humans have adapted to change, that it's an engineering problem with engineering solutions, that issues like global poverty might be more pressing than climate change, and that the level of GDP growth requires accessible, reliable, and affordable energy, these aren't -- these aren't -- these aren't fraudulent statements. These are statements about public policy.

And that's why about a dozen Attorneys General from other states filed an amicus brief in Federal Court in support of Exxon and criticizing this investigation.

All right. So -- so getting back to the first principle here which is that it is a 93A investigation and that, as I understand what deception is, that the question is would it -- would the statements or the omitted statements affect in any way the decision of an investor or a consumer for example not to invest or a consumer to buy an electric car or to drive less or to take the T.

So I -- putting aside what these statements are, I mean -- and going back to the statute, that's what the CID is designed

to do, correct?

MR. ANDERSON: That's correct, Judge.

And so for instance, if there were actually securities transaction, because again no one bought common stock directly from Exxon Mobil during the four year time period, so if -- if there actually were such a transaction, then an investigation of whether there was a false statement in connection with it that led an investor to buy stock from the company could very well be relevant.

But there, there is no such transaction because Exxon Mobil did not directly sell --

THE COURT: No, I understand.

MR. ANDERSON: -- any stock to any -- any investors.

And when you look at these statements, you know, we -- when you look at these statements, there is nothing here that has to do with an investment decision.

It has to do with something like the -- you know, the issues of global poverty are more pressing than climate change.

Why is the Attorney General even investigating that? What is fraudulent about that?

That's a belief that people who are poor in the third world would like to have access to cheap energy so they can no longer be poor.

That's not a question about -- about fraud. That is not a

statement about whether the company is strong or weak or whether its reserves are high or low.

It's about policy. It's about policy choices.

THE COURT: All right. This is now a one minute warning.

MR. ANDERSON: All right, Judge.

So then what I'll -- what I'll do is just -- is just provide you with the rule that you had asked for.

THE COURT: Yes.

MR. ANDERSON: It's Rule 3.6. It's titled Trial Publicity. This is the Supreme Judicial Court Rules of Professional Conduct, and it requires that a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extra judicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

THE COURT: so I guess the issue is does that apply to an elected official who also happens to be a lawyer?

I -- I don't know the answer to that, but we will --

MR. ANDERSON: We can --

THE COURT: -- find that out.

MR. ANDERSON: We can submit --

THE COURT: Yeah.

MR. ANDERSON: -- further briefing --

THE COURT: That's fine.
MR. ANDERSON: -- on that, Judge.
THE COURT: All right.
Thank you very much.
MR. ANDERSON: Thank you.
THE COURT: Mr. Johnston?
MR. JOHNSTON: Would you mind greatly, Your Honor, if we took a short break?
THE COURT: Not at all. I think that's an excellent suggestion.
MR. JOHNSTON: Thank you.
THE COURT: Court --
COURT OFFICER: All rise.
THE COURT: -- will be in a brief recess.
COURT OFFICER: Court will stand in a brief recess.
(Discussion off the record.)
(Recess Taken.)
COURT OFFICER: Court, all rise.
This Honorable Court is now back in session. You may be seated.
MR. JOHNSTON: Thank you, Your Honor.
I only hope that some of the rest of what I say is as well received as the recess suggestion.
Your Honor, also just as a housekeeping matter, we have a CD with some slides that we may --

THE COURT: All right.

MR. JOHNSTON: -- end up using so --

THE COURT: All right. Any objection, Mr. Anderson?

MR. ANDERSON: No objection --

THE COURT: All right.

MR. ANDERSON: -- Judge.

MR. JOHNSTON: Your Honor, this is a very important case for the authority of the Attorney General's Office to conduct civil investigations under the State's Consumer Protection Act.

It is also a very important case for the authority of this Court and the Appellate Courts of the Commonwealth to oversee the civil investigative demand process as the Consumer Protection Act specifically provides without enabling the targets of investigations to run to the Federal Courts in their home states in an effort to invade -- evade investigations.

The Consumer Protection Act, well known to lawyers as well as the public as Chapter 93A, is one of the most significant pieces of legislation cast by the legislature in the last fifty years, providing countless consumers and investors protection against unfair and deceptive business practices.

Under the laws of the Commonwealth, the Attorney General is the guardian and the enforcer of Chapter 93A on behalf of the public.

Likewise, this Court is the statutory overseer of the civil investigative demands issued by the Attorney General.

Chapter 93A, as Your Honor has already said, grants the Attorney General wide latitude over investigations when she believes the Consumer Protection Act has been violated.

The Courts of the Commonwealth have liberally construed the Attorney General's authority, and any recipient seeking to challenge a CID bears a heavy burden under state law to come to this Court and show that the Attorney General has acted arbitrarily or capriciously.

Exxon's petition here challenges not only the statutory authority, but the very integrity of Attorney General Healey.

At the same time, by Exxon's recourse to a Federal Court in Texas, Exxon appears to be questioning the ability of this Court to decide the issues which the Massachusetts legislature has made this Court's responsibility.

Earlier this year, as we all know, Attorney General Healey served a civil investigative demand, or CID for short, on Exxon in Massachusetts to learn from Exxon's own documents and Exxon's witnesses whether Exxon had been truthful with its Massachusetts -- Massachusetts consumers and investors about what it knew about climate change and the likely impact of oil and gas on the environment as well as the impact of climate change on its own business.

The CID followed the announcement of a similar

investigation by the New York Attorney General as well as another one by the US Department of Justice, and it was not unlike other CIDs that the Attorney General had issued to dozens of other companies in the past and still continues to issue to other companies currently.

Attorney General Healey expected compliance from Exxon particularly in view of the fact that Exxon was already producing documents to the New York Attorney General.

But instead of receiving documents form Exxon like the Attorney General in New York had, to the tune by the way of hundreds of thousands of documents by that point, the Attorney General found herself forced to defend herself in a free front war over the alleged politics of her investigation.

On one front, the Attorney General received a demand to produce the documentation about her investigation from a US Congressional Committee chaired by a congressman from Exxon's home State of Texas.

When the Attorney General declined to provide documents to the Congressional Committee because of the lack of any constitutional authority over her, the committee then issued a subpoena for her documents.

We understand that no Congressional Committee had ever in the history of congress subpoenaed a sitting Attorney General -- sitting Attorney General before.

The other two fronts were lawsuits both filed by Exxon.

On successive days in June, Exxon filed a Federal lawsuit against the Attorney General in Exxon's home district of northern Texas and filed this lawsuit in this Court.

The forum shopping in Texas is really in disregard of Fifth Circuit Law on personal jurisdiction because Fifth Circuit Law is quite clear that a Federal District Court in that circuit may not exercise jurisdiction over a state official from another state with respect to that state official's duties.

Exxon's Federal Lawsuit in Texas also should be regarded as a --

THE COURT: Is that --

MR. JOHNSTON: -- slight --

THE COURT: -- Younger? Are you referring to Younger?

MR. JOHNSTON: I'm not referring to Younger.

It's --

THE COURT: Younger --

MR. JOHNSTON: -- it's the --

THE COURT: -- and it's pro --

MR. JOHNSTON: That's --

THE COURT: -- progeny?

MR. JOHNSTON: -- another issue which I'll get to.

THE COURT: All right.

MR. JOHNSTON: That's -- there are a series of cases, both of which are called Strawman because Strawman was a business in Texas and kept suing officials from other states who were

trying to regulate I think his real estate business in those states, and brought successive cases in Texas, and each time, the Fifth Circuit said you can't -- the -- the District Court can't take jurisdiction over those out-of-state officials.

So Exxon had no business bringing the Attorney General to Texas Federal Court.

But Exxon's Federal Lawsuit in Texas should also be regarded as a slight to this Court which is expressly designated by Chapter 93A as the Court in which disputes over CIDs are to be decided and which of course is also fully capable of deciding the issues raised in this case.

After being sued in Texas, Attorney General Healey promptly moved to dismiss the case, citing among other things the Court's lack of personal jurisdiction over her, the fact that venue is improper, and also the fact that Federal Courts customarily defer to State Courts involving State Court enforcement proceedings under the Younger abstention principle.

However, the Court in Texas, without any motion by Texas, ordered discovery into the issue of whether Attorney General Healey had commenced her investigation in, quote, bad faith.

Then after Attorney General Healey moved for reconsideration of the discovery order, the Court, again on its own initiative, ordered to -- her to appear in person in a courtroom in Dallas for deposition on December 13th, next week.

Two days ago, the District Court without citing any reasons denied Attorney General Healey's further motion to vacate the discovery orders including the order with respect to the deposition.

And as was indicated earlier by Mr. Anderson, by the end of this week, we expect to file an emergency motion in the Fifth Circuit to stay the discovery orders as well as a petition for mandamus seeking a stay until the issue of personal jurisdiction can first be resolved.

Now, Attorney General Healey continues to oppose the efforts of Exxon in Texas to turn her 93A investigation in effect upside down because what Exxon is seeking is to allow it to conduct discovery into Attorney General Healey's investigation before Attorney General Healey gets to investigate one document or one witness from Exxon.

That is not how Chapter 93A is designed, as Your Honor knows.

It's certainly not how Massachusetts Courts, which are the only Courts really relevant, have interpreted it.

So now we're here before Your Honor in the Court where, as I've said, disputes like this are supposed to be determined and where the burden is very heavy on Exxon to prove that Attorney General Healey had no business issuing a CID.

Exxon's effort to vacate the CID on the grounds of political bias based feebly on the participation of Attorney

General Healey at a press conference in New York in March --

THE COURT: Are you aware of any limits on an Attorney General's ability to communicate the basis for an investigation during the investigation or before it starts?

MR. JOHNSTON: I haven't seen any law to that effect in general.

And if you look at Chapter 93A, the statute specifically provides that the documents that are provided by the recipient --

THE COURT: Are secret.

MR. JOHNSTON: -- to the Attorney General are confidential, but says nothing about not being able to speak about the investigation.

So as I was about to say, Exxon -- Exxon's effort to vacate the CID were based already on a very feeble effort based on the -- the press conference in New York and was really doomed to failure from the outset when it began the effort in this Court.

But during the course of the three front war that Attorney General Healey has been fighting, developments on a bunch of other fronts involving Exxon but not necessarily the Attorney General, as we set out in our reply brief and in the letter that we sent to you on December 2nd, have only confirmed the appropriateness of this office's investigations.

And I'd like to cite what they are.

First, the United States Securities and Exchange Commission which is responsible for overseeing the nation's Federal Security Laws has opened its own investigation into Exxon's potential failure to disclose climate driven risks and the impact on Exxon's assets and -- and certain related issues.

Second, the New York Attorney General has obtained a Court order and other directions from a New York State Trial Court to obtain additional documents from Exxon as well as Exxon's auditors as part of his year-long investigation.

THE COURT: Did the -- did Exxon Mobil resist the document request or CID that the Attorney General in New York served upon them?

MR. JOHNSTON: As far as I'm aware, it didn't.

And I believe that Exxon has acknowledged that in other places.

THE COURT: What is the distinction, if you know, between the investigation that AG Healey has initiated and the one from AG Schneiderman?

THE COURT: Well, aside from the fact that they are under the respective statutes of the two states, I think they are very similar.

They both, as far as I know, deal with consumers.

They both, as far as I know, deal with investors. We have looked at the subpoena from New York and compared it against our CID and there's a very substantial amount of overlap.

So Exxon has continued to produce documents to New York. We understand that the volume is now up to 1.4 million pages.

Third, among these developments, in late October, Exxon announced that it might have to write off on the value -- write off on its books a value of 4.7 -- 4.6 billion barrels of tar sands oil reserves among reputedly the dirtiest and most polluting kinds of oil because they're too expensive at this point to extract.

The write off, according to Exxon's own press release, would be the biggest accounting revision of reserves in its history.

And this announcement occurred despite Exxon's recent repeated claims including in a 2015 risk report to shareholders and to the SEC that none of its oil and gas reserves were at risk and therefore would not ever be written down.

The Wall Street Journal reported on the write down and said that all -- although Exxon did not refer specifically to climate change or regulations in its disclosure, that most of the assets that it said would not be economical and would have to be written down were among those most scrutinized by climate change activists, namely the Canada oil -- tar -- oil -- the tar oil in Alberta.

And, fourth, the news of the SEC investigation and Exxon's announcement of the big write down prompted large declines in

Exxon's stock, and caused -- or led to at least one shareholder class action suit that's been filed against Exxon in Texas.

The suit alleges that Exxon violated Federal Securities Laws by failing to disclose, among other things, its longstanding internal knowledge of how climate change and efforts to address it would impact Exxon's own business and the valuation of its own assets.

And we referred to all of these things in our letter to you last week.

Notwithstanding the existence of these additional investigatory developments providing further support for Attorney General Healey's CID, Exxon continues to ask this Court to not only stay this action in deference to the Federal Court in Texas, but alternatively to set aside the CID or disqualify Attorney General Healey and her entire staff from participating in any way in the investigation.

For the reasons outlined in our briefs, and for reasons I expect to fully ex -- more fully explain in the next little while, all of this relief requested by Exxon should be denied.

I'm going to go through the various issues which Mr. Anderson discussed today, and explain to you why we think Exxon is wrong, and our position is correct, and I'll go through then a series of issues.

The first issue is, should this Court stay this action in

favor of the Texas Federal Court, and the answer to that question is no.

There simply is no reason why this Court should abdicate its assigned statutory responsibility to oversee CIDs.

Chapter 93A confers on this Court express authority to decide the enforceability or non-enforceability of CIDs.

I -- and I'll direct your attention, Your Honor, to various sections of Chapter 93A.

First, Chapter 93A Section 7 says that a recipient of a CID must comply with a CID unless a, quote, Court of this Commonwealth orders otherwise.

Actually it says Court of the Commonwealth orders otherwise.

Chapter 93A Section 6(7) says that any recipient who objects to a CID can apply to this Court to set it aside or modify it.

And on the flipside, Section 93A, Section 7 provides that the Attorney General can seek enforcement of the CID in this Court.

So Chapter 93A provides in black and white what a recipient of a CID must do, that it must comply unless it is provided otherwise in a Court of the Commonwealth.

That presumably is because the legislature didn't want people -- people who were subject to investigations to be filing lawsuits all over the country and forcing the Attorney

General to chase from Florida to California in order to simply pursue a statutory remedy of its own on behalf of Massachusetts consumers and investors.

THE COURT: What is the best case that says that, if there is one?

MR. JOHNSTON: I -- I don't think that there's a case that stands for that principle. But I think it stands to reason that the -- the legislature set up that prescribed mechanism because the Attorney General is enforcing on behalf of the Commonwealth, on behalf -- on behalf of consumers and investors here.

And so as you see, Your Honor, both parties have done here exactly what Chapter 93A provides when there's -- a dispute arises over a CID, which is to come here for determination.

But of course Exxon has asked Your Honor to step aside so it can essentially have the enforceability of the CID enforced in a Texas Federal Court that likely has never heard of 90 -- chapter 93A before this case.

Now, Exxon has really presented no viable reason why it needs to sue the Attorney General of Massachusetts in Texas Federal Court with respect to a Massachusetts CID issued by the Massachusetts Attorney General pursuant to Massachusetts Law and pursuant to another law that requires such disputes to occur in this Court.

Nor has Exxon really offered any viable reason why this

short -- this Court should advocate the expressed authority given to it.

Exxon argues implausibly that Exxon needs a stay in favor of the Federal Lawsuit in part because this Court lacks jurisdiction over it.

But of course, Exxon has brought its personal jurisdiction arguments to this Court and there's no Court better able to address personal jurisdiction in Massachusetts than this Court because that's what this Court routinely does.

Second, this Court is not only charged with, but is fully capable of resolving all the issues under Chapter 93A and in particular whether Attorney General Healey has followed the parameters of Chapter 93A, or alternatively has acted arbitrary -- arbitrarily or capriciously.

And as I've said, while this Court really has a great deal of familiarity with all of the contours and purposes of Chapter 93A, it's fair to say that the Federal Court in Texas would not have such expertise.

Finally, this Court is abler to decide the constitutional challenges to this CID which Exxon has raised. This Court is perfectly familiar with free speech issues and with search and seizure issues.

And this Court has never been a stranger to constitutional issues and should have no reason to be afraid of confronting them.

So the real reasons that Exxon has decided to ask this Court to back away from its statutory duty are as follows.

It knows that it has enough business connections in this state for the -- for Your Honor to find personal jurisdiction over it.

It knows that under Massachusetts law, the Attorney General's CID power is construed very strongly in favor of her office.

And as a corollary, Exxon knows that under Massachusetts Law, it shoulders a heavy burden to show that the Attorney General acted arbitrarily or capricious -- capriciously, which it cannot do.

Nor is Exxon any more convincing as to why this Court should cede its statutory mandate over CIDs to a Texas Federal Court just because of the procedural posture in Texas.

In the Texas case, Exxon recently filed a motion to amend its complaint to allege a claim that Attorney General Healey and Attorney General Schneiderman from New York are coconspirators in a plot against Exxon.

But that means that --

THE COURT: Is he --

MR. JOHNSTON: -- the --

THE COURT: -- now a party in the case --

MR. JOHNSTON: He is.

THE COURT: -- in --

MR. JOHNSTON: He is.

THE COURT: -- Texas?

MR. JOHNSTON: and both Attorney General Healey and Attorney General Schneiderman in the last week or so have filed motions to dismiss the amended complaint.

So that procedure is really at the very beginning of the process.

And we don't even have a schedule or a hearing date on the motion to dismiss, and as you can image, there would be no hearing date on summary judgment, or an eventual trial in that matter.

By contrast, both parties are here today on what is in effect the Super Bowl.

I mean this is the end of the season here.

Exxon is here trying to have you vacate the CID. We're here having you -- or seeking to have you enforce it.

You've heard the arguments from Exxon. You're hearing the arguments from me.

At the end of the day, you can go back to your chambers and you can write a decision saying that either Exxon wins and the CID is vacated, or we win and we get to enforce it.

So in effect, this Court is way ahead of the process in Texas because the finality is upon us.

For all of these reasons, as well as the ones in our brief, I submit, Your Honor, that the Court should reject Exxon's

request that it stay this proceeding.

I might also now just address one other matter because Mr. Anderson raised something called the first filed rule.

Well, that has less sway in a situation where a plaintiff is the one that files both of the lawsuits because of course the plaintiff has the ability to control the timing of where it files.

So that rule is applied in the same degree with both actions being on the same side of the case.

But even if the rule did apply, the factors that Courts use in applying the rule don't really cut in favor of having you stay, but rather cut in the favor of having the case proceed.

One is the severe inconvenience to the Commonwealth of having to litigate -- challenge the CID in Texas.

Another is the Court's lack of personal jurisdiction in Texas.

A third is the distinction between the cases created by the Commonwealth's cross motion to compel here which isn't involved in the Texas Court.

And also the principles of Federal and State Comity which favor the application of Massachusetts Law, Chapter 93A that authorizes the CID.

And frankly, staying the case here and allowing the matter to be decided fully in Texas would undercut the principles and purposes of Chapter 93A as well as be severely damaging to the

Commonwealth.

Second question, Your Honor, is did the Attorney General have a basis under Chapter 93A to issue a CID? And the answer is yes.

As Your Honor knows, the Attorney General is the top Law Enforcement Officer in the Commonwealth.

As part of her overall authority, she is, among other things, statutorily responsible under General Laws Chapter 12, Section 11D for protecting the environment.

In addition, Chapter 93A provides her, as I've said, with broad powers to investigate and take enforcement actions with respect to potential unfair and deceptive practices.

And by its expressed terms, the law applies both to consumers and investors.

Chapter 93A prohibits misleading or deceptive statements, but it also prohibits the failure to disclose relevant information to consumers or investors in the marketing and sale of products and services, or in the marketing and sale of securities.

So it's both if you say something that's wrong, you can be liable, and if you don't say something that needs to be said so that people can make good purchasing decisions, that's also a potentially Chapter 93A violation.

Now, as Your Honor pointed out earlier, Chapter 93A in Section 6 authorizes the Attorney General to issue a CID for

documents and testimony whenever she has a belief that an unfair business practice has been committed.

CIDs are quite frankly the bread and butter of what the civil enforcement side of the office does.

In the past three years, the Attorney General has issued hundreds of CIDs, many to large national and international companies.

Under the Supreme Judicial Court's decision in the *Cunha* case, the Attorney General doesn't need probable cause, doesn't need a substantial belief that a Chapter 93A violation has occurred, only a belief that a person or business in engaged -- or is engaging in an unfair or deceptive practice.

And if the recipient of the CID wants to challenge it, it has a very heavy burden to establish the CID is arbitrary or capricious.

As I'll get to shortly, Exxon has failed miserably in meeting its heavy burden because the press conference that it showcased to you is simply not a disqualifier for the CID.

But I would like to give the Court just a little background on the CID which demonstrates some of the basis for her belief that Exxon committed violations.

In 2015, in the fall, the LA Times, in conjunction with the Columbia School of Journalism which is a Pulitzer Prize winning organization, published -- and also Inside Climate News, published a series of investigative reports, and they're

just highlighted up there on the screen.

The reports and certain internal Exxon documents which were published as part of the reports make several key points.

First, based on a very robust internal science program back in the 1970s and early 1980s, Exxon knew that increasing carbon dioxide concentrations in the atmosphere were causing global -- global temperatures to rise.

Second, Exxon knew that fossil fuels, obviously oil and gas use was a primary contributor to increasing carbon dioxide and therefore increasing climate change.

Third, Exxon knew that mitigating climate change would require major reductions in fossil fuel use, in other words, major reductions in the use of the products that it sold.

The articles and the documents also indicate that in the 1990s, Exxon engaged in a concerted effort, working with other fossil fuel interests, to create doubt and uncertainty about the science of climate change despite what its own scientist and management knew from the research that the scientists had done.

In our papers, we submitted a number of those documents to Your Honor.

They're particularly Exhibits 1, 5, 27, 29, 32, and 55.

And these documents help support the points that I just recited.

I don't think, in the interest of time, that I'll go

through each one of them now unless you have an interest in having me do so.

But they're in the materials and you can amply read them.

One of the offshoots or results of the various investigative journalism series was that while the series were actually in the process of coming out, Attorney General Schneiderman initiated an investigation and sent the subpoena to Exxon that we have mentioned before.

And as we've said, Exxon began to comply and has now produced about 1.4 million pages of documents.

In I believe it was January of 2016, the US Department of Justice asked the FBI to investigate Exxon's conduct.

And our office conducted its own review of the LA Times and Inside Climate News reports as well as the internal Exxon documents that were referenced in those reports, as well as other Exxon documents that were published to investors and others over the years, as well as certain other publically available -- available documents.

And that review, coupled with the knowledge of Attorney General Schneiderman' s investigation into Exxon, led to a belief on the part of Attorney General Healey that there was a basis for issuing a CID.

Now, if you look at the CID, and in particular Schedule B, the schedule makes clear the general subjects that Attorney General Healey's office is interested in.

One is the marketing, advertising, or sale of Exxon products and services in the Commonwealth or to Massachusetts residents, including the environmental impacts of those products, such as oil and gas and services.

The -- the environmental impacts of those.

The second major topic is the marketing, advertising, or sale of securities in the Commonwealth or to Massachusetts residents including as to Exxon's disclosures of risks to its business of climate change.

THE COURT: If -- if it is a fact that those securities have not been marketed in the last four years, how does that affect the request for documents relating to that?

Or do you -- do you disagree that there has been no marketing of securities?

MR. JOHNSTON: We disagree that there's been no marketing of securities.

We also would cite, Your Honor, to the fact that section -- Chapter 93A Section 4 doesn't require a completed sale of securities.

It only requires a solicitation of marketing under the --

THE COURT: And have there been such solicitations?

MR. JOHNSTON: I -- I'll tell you what we do know.

We know, for example, that Exxon, as it acknowledged, did sell some short term note -- term notes in Massachusetts over the four year -- the last four year period.

We also know, and I'll get into this a little bit in the jurisdictional section, but we also know that two of the largest institutional holders of Exxon stock in the world are headquartered right here.

We also know --

THE COURT: Does ownership in -- I mean there are pension funds I assume all around the country that own Exxon Mobil shares in the funds.

Does that subject them to liability in 93 -- under 93A?

MR. JOHNSTON: We don't --

THE COURT: Does that subject Exxon Mobil -- I'm sorry.

MR. JOHNSTON: It potentially does and --

THE COURT: For jurisdictional purpose -- purposes?

MR. JOHNSTON: -- and I have to say, you know, that because we are at the incipient stage of the investigation, we don't really know all of what Exxon has done with respect to sales over that time period.

What we know is that there are a huge number of Exxon shares in Massachusetts.

We know that there are Exxon shares in the Massachusetts pension fund.

And so we expect that there have been any number of communications between Exxon and those institutional investors like Fidelity, like State Street, like Wellington through investor conference calls or the like.

THE COURT: All right. So is it --

MR. JOHNSTON: I think it's hard --

THE COURT: -- is it accurate to say then that if the investigation should go forward, find out that those shares were purchased through some intermediary and not directly from Exxon Mobil, for example, does that still permit the Commonwealth to request proof of that?

Do you see what I'm saying?

MR. JOHNSTON: I think I'm following you.

That if we get partway into the investigation and learn that they haven't --

THE COURT: Right.

MR. JOHNSTON: -- can we keep going?

THE COURT: Well --

MR. JOHNSTON: I --

THE COURT: -- can you keep going or is it -- do you have to have any threshold showing that -- that there are sales of securities to individual investors?

Is that necessary in order to have jurisdiction to proceed?

MR. JOHNSTON: I think, Your Honor, that because of the very limited threshold or the low level threshold for the institution of a CID, the fact that there are so many shareholders in Massachusetts or so much stock in Massachusetts creates a presumption that we should be able to go forward.

Given the -- the nature of the two principle things that we are looking at in the investigation, the CID asks Exxon among other things for its marketing materials on the consumer side, it -- its marketing materials on the investor side.

It asks for the backup and research that it did with respect to climate change.

It asks for the backup for the number of public statements with -- Exxon made over the years with respect to doubts about -- or ambiguities about climate change and the impact of its product on climate change.

And as I mentioned, you know, since we issued the CID, these other events including various other investigations, the write down of -- that -- or the announcement of potential write down of assets as well as the shareholder litigation all tend to buttress the legitimacy of the CID.

And to the extent that Exxon argues, oh, well all those things are after the issuance of the CID, the fact of the matter is they all relate to things that are covered during the period of the CID, and there's nothing in the statute, as I understand it, that presents current factors from contributing to the Court's decision about whether the CID is currently a viable thing.

Because remember, we haven't received one document yet or one deposition.

So what we're looking at is the prospective enforcement of

the CID.

So all in all, Your Honor, given the very modest requirements for a CID, and the very generous standards which the Courts of the Commonwealth have -- have accorded the Attorney General in issuing CIDs, the Court should find that the CID is valid.

Subject of course to the other defenses, which Exxon has raised, which I'll get to.

Next question is does the Court have personal jurisdiction over Exxon to enforce the CID? And the answer to this question is yes, the Court should find that it has personal jurisdiction over Exxon.

Exxon implausibly seeks to convince Your Honor that the Courts have no jurisdiction over it because it supposedly doesn't engage in the correct type of business here to subject itself to jurisdiction.

Frankly, it seems astounding to our office, and I suspect it will be astounding to some members of the public as well that a company which is the largest publically held oil and gas company in the world which generates millions of dollars every year in revenues from the marketing and sales of petroleum products in Massachusetts is not conducting business in Massachusetts and feels that it would be in -- unfair for it to have to defend itself in the Courts of Massachusetts.

As the Court is aware, the Massachusetts Long Arm Statute

provides for the Court to have jurisdiction over a company if it, one, transacts any business here in the Commonwealth; two, contracts to supply services or things in the Commonwealth; three, commits acts or omissions in the Commonwealth; or, four, solicits business and drives substantial revenue from goods sold or used in the Commonwealth.

Exxon's personal jurisdiction arguments are really hollow, belied by the nearly ubiquitous presence of Exxon branded products in Massachusetts and Exxon's Massachusetts directed marketing of these brands, as well as Exxon's own affidavits in the case and the numerous Exxon documents which we have submitted to Your Honor demonstrating the Court's involvement -- I'm sorry -- Ex -- demonstrating the company's involvement with the Commonwealth.

Your Honor should look particularly at the affidavit of Melissa Hoffer and Exhibits 42 to 52 of our initial appendix which primarily reproduces pages from Exxon's own website.

And we'd like to walk you through some of the things from Exxon's website.

First, this slide shows that Exxon distributes -- well, first, Exxon does distribute fuel products to consumers in Massachusetts through more than 300 Exxon and Mobil branded retail service stations that sell Exxon or Mobil gasoline and other fuel products.

THE COURT: Now, they -- they say --

MR. JOHNSTON: The --

THE COURT: -- that these are franchisees or owned by some other entity.

MR. JOHNSTON: They do. And -- and I'll get to that in just a moment because I -- we don't have any reason to be able to challenge that they now have franchisees.

They used to have a bunch that they own, but you know, perhaps in an effort to reduce their potential exposure for jurisdiction, they decided to farm them out to franchisees.

I'm only guessing about that. I don't know.

And I'll actually withdraw it.

But if you look at this website here, this shows all of the stations -- well, first, this part of the website shows the 300 branded stations in Massachusetts.

And the prior one shows the stations that are located in this part of the state.

And Exxon has an interactive website which allows a consumer to go in and type in his address and find the Exxon Mobil station which is closest to it.

And this is not a website operated by the franchisees. This is a website operated by Exxon Mobil which is responsible for the marketing of Exxon Mobil branded products to Massachusetts consumers.

Next slide please.

Exxon also offers extensive integrated support to its

franchisees in Massachusetts, including support for payment options like its speed pass and credit cards offered to Massachusetts consumers as described in Exhibit 46 at page 743.

Exxon is also one of the leading suppliers of oil and gas products in Massachusetts through retailers, routinely conducting hundreds if not thousands of transactions a year with Massachusetts retailers such as Pep Boys, Advanced Auto Parts, Auto Zone, Napa Auto parts, Costco, and Target.

Again, Exxon's website -- its corporate website allows Massachusetts users to enter their zip codes and also to enter the name of the product that they want to buy, and it then shows them which stores they can go to in order to buy those specific products.

And if you take a look at the map that we've put on the -- showed form the website, that is focused on this Courthouse and all of the various stores that Exxon Mobil, the corporation, the national corporation, tells consumers they can go to to buy the Exxon Mobil branded products.

THE COURT: Does that include gasoline?

MR. JOHNSTON: Those are the things that you would buy at a retail store like oil products and the like.

I don't think you can buy gasoline from those retail stores.

But, you know, that's a separate arm from the -- the

franchise gas stations to which you also are directed by Exxon advertisements to go and by which you also get there through the interactive website.

Exxon also advertised the sale of its products in Massachusetts via television, via the internet -- internet, and newspapers on -- and on radio as Exxon's own affidavit confirms.

And that's the Bustard affidavit at paragraph three.

On the investor side, I think we've already dealt with that in terms of the various types of connections that Exxon has to investors here, so I'm not going to belabor that point.

But what I would like to do next is to go onto some of the important cases and principles in Massachusetts for personal jurisdiction.

And I'd like to start with the case of *Gunner v. Elmwood Dodge*. It's an Appeals Court case from 1987, and it's actually a case which -- which Exxon cites in one of its briefs.

In there, the Appeals Court found that it had personal jurisdiction over a car dealer from Rhode Island who had no property in Massachusetts, no other business operations in Massachusetts, no employees in Massachusetts, but it did advertise in the Fall River newspaper to try to get people from Fall River to come over to Rhode Island to buy a car.

And I'm going to quote Justice Katz about the personal

jurisdiction issue because it bears directly on this case.

Justice Katz asked a question and then answered it. He said, does the dissemination on a persistent basis of advertising, print and electronic, aimed at cultivating a market area in Massachusetts without any other contact in Massachusetts constitute transacting business for purposes of General Laws Chapter 223, Section 3A, question mark.

We think it does.

Other examples of similar fact patterns where Massachusetts Courts have found personal jurisdiction involved -- a case involving Vermont Law School which had no Massachusetts operations, but which recruited students in Massachusetts by mail.

And also a case involving a hotel in California which had no operations in Massachusetts but which advertised for convention business in Massachusetts, and these cases are both cited in our briefs.

Exxon tries to point out that the statements in its advertisements don't seem to mention anything about climate change.

That's the point of the CID, that Exxon has been selling products in Massachusetts for a long time knowing full well that there is a serious impact of those products on climate change and didn't tell consumers that that was a factor that should be considered.

And as Your Honor suggested, maybe people would be interested in buying electric cars. Maybe people would take the T if they had known more about the actual impact of -- of these products on climate change.

That's our concern.

We wouldn't expect to find -- based on what we've seen so far, we wouldn't expect to find lots of disclosures in the advertisements because that's the gravamen of our CID.

Finally, Your Honor, with the jurisdiction point, jurisdiction over Exxon would certainly comport with the due process requirement in the constitution.

The Attorney General's claims arise out of the contacts which Exxon has had with Massachusetts, both consumers and investors.

Furthermore, Exxon's activities in Massachusetts are clearly deliberate, and they far exceed the required minimum contacts.

It certainly would not be unfair for the Court to conclude that Exxon has purposefully availed itself of the privileges of conducting business here and that an assertion of jurisdiction would not have been principles of fair play.

Therefore, the Court should find personal jurisdiction.

The next question that the Court should answer is were the New York press conference and the affiliate events of that day so impermissible that the CID should be set aside or the

Attorney General and her entire staff disqualified from investigating Exxon?

The answer to this question is clearly no.

And that -- that really brings us to Exxon's bias argument.

Exxon states much of its argument that the CID is invalid because Attorney General Healey allegedly acted in -- inappropriately before issuing it.

And Exxon only cites to a few principle events. In their papers, they say something about the fact that there's been a conspiracy out there since 2012 among environmental activists against Exxon, but there is nothing to suggest that Attorney General Healey had anything to do going back to 2012, and as Your Honor well knows, she became Attorney General in January of 2015.

What Exxon does allege by way of conduct by the Attorney General is that a few people from her office attended a meeting in New York with representatives of other Attorney General's Offices on the morning of the press conference and discussed some issues about climate change and -- including Exxon.

Second of all, that those Attorney General's Offices signed what is a common interest agreement, a routine thing that Attorneys General from various states often enter into.

And number three, that she participated in -- and then spoke at the press conference with Attorney General

Schneiderman and six or seven other Attorneys General.

There's nothing wrong with any of these three activities which would require the setting aside of the CID or the disqualification of the Attorney General.

First, discussing it -- environmental issues with other AGs and even other professionals such as scientists or -- or other lawyers is something that Attorney General Healey should do as part of her statutory charge to protect the environment as well as her historical role in litigating national issues over climate problems.

Working with other Attorneys General, and sometimes with the Federal Government, is just something that Attorney Generals do including from other states.

Many investigations are conducted jointly. Sometimes they're conducted just among Attorneys General. Sometimes they're conducted in conjunction with the Federal Government, either an agency or US Attorneys.

And I point to the affidavit of Melissa Hoffer again, the -- paragraphs 13, 14, and 15 and appendix Exhibits 11 to 18 which set out the routineness with which we engage -- or in which we engage in joint investigations with other Attorneys General.

A very good recent example which I think everybody's familiar with the Volkswagen settlement. There, the Department of Justice and numerous State Attorneys General

investigated, including Massachusetts, pursuant to a CID, and then settled massive claims against Volkswagen for unfair and deceptive produce -- practices towards car purchasers in the marketing, advertising of cars, misrepresenting the cars as being environmentally friendly or green, and also misrepresenting that they were compliant with all federal and state emission standards when in fact the cars emitted contaminants at levels many times higher than law allowed.

Second, entering into common interest agreements with other State AGs -- AGs, as I expect Your Honor is fully aware, is customary in multistate and even some joint State and Federal investigations because it enables government agencies to share information with each other on a protected basis.

The signing of a common interest agreement is nothing that would invalidate a CID.

Indeed, I think it would come as a shock and I think Your Honor would probably agree it would come as a shock to government investigators, such as Attorneys General or US Attorneys as well as to corporations who are jointly being investigated or prosecuted by governments or are being jointly sued by plaintiffs that they can't enter into common interest agreements to share information on their respective sides of the case.

As the Court is probably aware, in the 2007 case of *Hanover Insurance Company v. Rapo and Jepsen*, the Supreme Judicial

Court specifically recognized the legitimacy and validity of common interest agreements.

That could be surprising if Exxon itself has not entered into common interest agreements with other companies in con -- in conjunction with either investigations or a litigation.

Third, Exxon's alleged due process claim of improper bias and pre-judgement based on Attorney General Healey's statements at the press conference are also without merit.

And Your Honor said that she has read the statement Attorney General Healey sought, so I'm not going to go over it in detail.

But I do want to give the Court just a little bit of background about what led to the -- the gathering of the group in New York that day and the press conference.

This group had previously -- or most of the members of this group had previously succeeded in a 2007 US Supreme Court case called *Massachusetts v. The EPA* which ended up requiring the EPA to regulate greenhouse gas emissions from new cars.

Former Assistant Attorney General James Milky, who is now a Justice on the Massachusetts Appeals Court, argued that case successfully on behalf of Massachusetts and other petitioners.

And in the course of the case, the Supreme Court said -- in the course of the decision, the Supreme Court said in specifically recognizing Massachusetts allegations of ongoing and future harms to its own property from climate change, said

. as follows.

Global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts costal land. Because the Commonwealth owns a substantial portion of the State's costal property, it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century.

If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of costal property will either permanently be lost through inundation or temporary lost through periodic storm, surge, and flooding events.

Remediation costs alone could well run into the hundreds of millions of dollars.

Now many of the AGs who sided with the Commonwealth in *Massachusetts v. EPA* and later participated in the press conference have also worked together on other Federal litigation on behalf of climate change issues in large part because , as we all know, things such as air pollution aren't confined to one state. They cross boundaries and further much of the legislation involving control of pollution and other environmental issues is Federal

So for example many of these same AGs intervened in support

of the EPA's mercury and air toxic standards to reduce hazardous mercury pollution and they also worked together on the clean power plan which was the first national effort to reduce carbon dioxide emissions from power plants.

So a review of the topics at the press conference included support for the EPA's clean power plan in which almost all of those AGs, if not all of them, were actively involved in either amicus briefs or otherwise in the case.

Another topic was oil company's knowledge of climate change and potential disclosure issues under state law.

And then the third major issue was support for clean energy which many of the AGs' States including Massachusetts have laws that need to be supported and encouraged.

Now, Attorney General Schneiderman mentioned the fact that he had been investigating Exxon since November 2015, and Attorney General Healey then announced that she would be investigating as well.

Now, Your Honor has seen what Attorney General Healey said, but there's really nothing inappropriate about it.

She said that fossil fuel companies that -- have deceived investigators should be held accountable without saying that Exxon had been one of those -- had been a company that deceived investors.

She did say that there had been a troubling disconnect between what Exxon knew and what it said, but she didn't draw

any conclusions about whether that violated the law or not and certainly didn't say anything with respect to Chapter 93A.

And there are a couple of problems that Your Honor alluded to earlier about the suggestion that what Attorney General Healey said was improper.

For one thing, it is quite common for Attorneys General to make comments about investigations that are matters of public concern.

And I would point out, as Your Honor may have read in the local press, that in the last year or so Attorney General Healey has made comments about other investigations or reviews such as with respect to the cancellation of the anticipated Boston Grand Prix, high drug prices, problems with the Massachusetts health connector, sign up difficulties.

And as the Supreme Court has said in the *Buckley* case, statements of the press may be an integral part of a prosecutor's job and they may serve a vital public function.

And as I said before, while Chapter 93A says that the Attorney General can't turn over documents that it receives from a CID without a recipient's permission, there's nothing in the statute that prevents her from talking about an investigation.

The fact that she expressed concerns about climate change is also no reason to invalidate the CID.

She's charged with protecting the environment.

Furthermore, Massachusetts has a series of environmental statutes including the public health law, the global warmings solution act, and a recent Massachusetts law from 2016 requiring utilities to increase their reliance for energy on alternative sources of energy, all of which bear upon the Attorney General's responsibility.

And, finally, her comments about the investigation hardly speak of bad faith.

If Exxon is essentially criticizing her for talking about a troubling disconnect, what they're criticizing her for is abiding by the law of Chapter 93A because as Your Honor has pointed out, to issue a CID, the Attorney General needs to have a belief that a Chapter 93A violation has occurred.

So there's nothing wrong with talking about a troubling disconnect.

I'd also just like to mention one thing that goes beyond vacating the CID because the -- the Exxon papers suggest that, well, maybe you don't vacate the CID, maybe you just disqualify Attorney General Healey and everybody in her office from investigating Exxon.

Well, that would require Attorney General Healey to go out and appoint probably a half dozen or more attorneys as special attorneys -- Assistant Attorneys General and a bunch of paralegals, all at a considerable public expense, to do what her staff is already doing without any evidence that her

current staff or her are inappropriate for conducting the investigation.

So the Court should deny Exxon's request to invalidate the CID or set it aside or to replace Attorney General Healey and her staff as the investigators.

Next question is did the CID violate Exxon's right of first -- of free speech?

And the answer to this is no.

As the Court -- as the Court is aware, the only step at this point that the Attorney General has taken is to issue a CID. And Courts -- and a CID is essentially a subpoena.

Courts at the highest levels have said that the enforcement of a subpoena doesn't typically violate the First Amendment.

And a -- a subpoena for corporate records as the CID asks for is a generally applicable order unconcerned with regulating speech.

Furthermore, there's no evidence that the CID compels or chills any of Exxon's speech.

The CID doesn't say Exxon has to stop making any statements. It doesn't tell Exxon what to say.

It only seeks documents in order to find out whether what Exxon said is what Exxon knew and whether Exxon told appropriate constituencies what it knew about climate change.

And there certainly is no evidence in the record that the CID has in any way chilled Exxon from making statements and

anybody who watches what Exxon says in the public these days knows that it is a very candid speaker that very rarely looks inhibited.

Another point which they make in their brief is that the Attorney General's CID somehow constitutes viewpoint discrimination.

This is again just not true. Chapter 93A is neutral. It doesn't target any particular speech. It targets fraud and deception in the marketplace.

If a company's viewpoint and statements are fully supported by its research and its knowledge, the company is generally free to express its viewpoint.

But on the other hand, if what it says is at -- at variance with what it fully well knows to be true, then that's a problem, and that's what the CID is looking at, not speech in the generic or in the abstract.

I'd also like to deal with the next question --

THE COURT: I'm just going to give you about a six minute warning. Otherwise, the people in this courtroom will flee me.

MR. JOHNSTON: Well, let me finish --

THE COURT: Not you --

MR. JOHNSTON: -- then --

THE COURT: -- but the people that I rely on every day to support my activities.

MR. JOHNSTON: Well, since you gave me the opportunity to go out at the recess, I'm certainly not going to inconvenience anybody else.

THE COURT: No, no, no.

I'm just -- just mindful of the --

MR. JOHNSTON: And I --

THE COURT: -- end of the Court day.

MR. JOHNSTON: -- will be too.

THE COURT: All right.

MR. JOHNSTON: Next issue is does the CID represent an unreasonable search -- search or seizure?

The answer to that is no. The Courts routinely have upheld the rights of government to obtain corporate records and civil investigations or enforcement proceedings.

The -- the Exxon complaints seem to also be centered around the notion that the CID is too big, too broad, too expansive.

Well, as I said earlier, from our comparison of the CID to the New York subpoena, they look to be pretty similar.

And if you consider the fact that Exxon has been complying with the CID from New York for a year and has produced 1.4 million documents and is still, according to what it told the New York state Court this week, still producing documents, it can't really reasonably contend that what we have asked for would be burdensome and beyond the capability of the company to produce.

I suspect that for starters, they could simply send us a disk with everything that they've given to New York which would take about ten seconds to do.

Next issue, Your Honor, is the CID barred -- barred by the statute of limitations.

The answer to that is no. Mr. Anderson is correct that there is a nominal four year statute of limitations for unfair business practices, but as we have pointed out, there have been statements or failures to make statements that have happened over the last four years, and, furthermore, we're talking about getting a CID that may provide for relevant information that things that have happened even within the statute of limitations.

As Your Honor pointed out, there may well be documents that existed 20 or 30 years ago that can have a bearing on what Exxon has known for a long time and have an important role in whether Exxon is telling what it knows to consumers and investors.

There are also a number of things that could serve to extend the statute of limitations backward.

One of those is the so-called continuing tort theory, and that's been recognized in the -- the *Taygeta* case, that if some sort of contact has been going on for a long, long time, it isn't just the tail of that conduct that is allowed to be chased after by unfair and deceptive business practices or

other tort claim, but everything going after -- back to the beginning may well be if it's all part of a pattern.

Second of all, there are various equitable tolling principles, one of which is the discovery rule, that if people don't discover that something has been withheld, then they can't be expected to have brought suit.

And clearly, you know, if Exxon wasn't saying anything about climate change in the appropriate ways, then nobody can be expected to have brought a claim against it.

And a related concept is fraudulent concealment to the extent that a defendant willfully conceals what it knows when it knows that that information would be material, then the statute of limitations is tolled.

The last issue I'd like to raise briefly is something -- is about something that we sent you in our letter last Friday.

And the question is this. Is the recent CID decision about Glock relevant to this case? And the answer to that is yes.

We sent you a copy of the decision issued by Judge Leibensperger of this Court in October, and it involved a challenge by the gun manufacturer --

THE COURT: I read it.

MR. JOHNSTON: -- Glock to a CID.

And then as you know, Your Honor, a large portion of what Glock argued was that Attorney General Healey was acting arbitrarily and capriciously because she had a political

agenda about guns.

And Judge Leibensperger wrote several things which we submit are relevant to your decision.

One is he repeated the standard rule that the Attorney General has broad investigatory powers under Chapter 93A.

Also the statute to be -- should be construed liberally in favor of the Attorney General.

And then addressing the allegation about political implications, he found that Glock had totally failed to satisfy its burden because the Attorney General has, quote, good and sufficient grounds to issue the CID based on safety and other concerns about Glock pistols all throughout the Commonwealth.

We submit that this case is very relevant to your decision here because Exxon similarly argues that Attorney General Healey has a political agenda about climate change when in fact, as we've suggested, her concern is whether consumers and investors were given the full and correct story by Exxon.

In conclusion, Your Honor, it is important that this Court decide this issue.

This Court is the proper forum. Indeed, it is the only appropriate forum for this decision to be made because you are the designated hearer for this kind of an issue in Massachusetts.

It's also important that the Massachusetts Court make --

make it clear to Exxon that Exxon should not be hijacking the review of a State CID from this Court where it belongs and spiraling it off to a distant Federal Court in Texas.

We submit that it is important for the viability -- I'm sorry.

It is important for the -- really the integrity of this Court that this Court do what it is entrusted to do by the legislature.

And what it should do is find that Exxon has fully failed to meet its heavy burden of showing that the CID should be vacated, so Exxon's motion to set aside the CID should be denied, and at the same time, the Attorney General's motion to enforce the CID should be granted.

THE COURT: All right.

Thank you, Mr. Johnston.

MR. JOHNSTON: Thank you.

THE COURT: Mr. Wilson -- is it Wilson? I've now forgotten.

MR. ANDERSON: Anderson, Your Honor.

THE COURT: Anderson. I'm sorry. I don't know where that came from.

Mr. Anderson, I have two questions for you.

The first is why has your client responded so differently to the CID from the New York Attorney General as compared to the Massachusetts Attorney General?

MR. ANDERSON: Your Honor, the -- the difference is -- it's

almost more rhetorical than real.

When --

THE COURT: Well, I --

MR. ANDERSON: -- he received --

THE COURT: -- I do want to know is there a legal basis for the reasons why documents were produced without having a Judge like me involved in New York, but I am involved here.

MR. ANDERSON: Yes.

At the time that we received the CI -- the subpoena from New York, which was around this time last year, there was no press conference. There was no common interest agreement indicating an intent to regulate speech.

None of the events that have re -- revealed the impermissible source of this investigation were known at the time.

So Exxon Mobil received the subpoena, worked out a way of complying with it the way you normally do with an Attorney General, as we tried to do with Massachusetts candidly.

And then over time, it became apparent that the Attorney General was not conducting an investigation in good faith, that it was part of this conspiracy to violate --

THE COURT: That's my question because I -- I think of a conspiracy as some kind of an agreement for an improper purpose.

MR. ANDERSON: Right.

THE COURT: What is precisely the improper purpose?

MR. ANDERSON: It's the use of law enforcement tools to inhibit the exercise of First Amendment rights in connection with a matter of public concern, which is the climate change.

THE COURT: All right. And per -- in specifically the request for documents, how does that inhibit the exercise of speech?

MR. ANDERSON: Well, Judge, in the same way that the -- you know, in the landmark case of *NAACP against Alabama*, where the request for a membership list, a government request for information from the NAACP violated that organization's First Amendment right because of the -- of the chilling effort, number one, that government oversight has over the willingness to engage in free speech, but also here, when government actions are motivated by a bias based on viewpoint, it doesn't even matter whether it chills speech or not.

If you issue a subpoena to one side of a political debate so that side will stop talking --

THE COURT: I --

MR. ANDERSON: -- that's improper --

THE COURT: I -- all right.

MR. ANDERSON: -- even if --

THE COURT: I --

MR. ANDERSON: -- they don't stop.

THE COURT: -- I just wanted to know exactly where that came

from.

All right.

Well, I don't have to tell you, I'm sure you know, that I have to take this under advisement.

I will carefully review all of the referred to Exhibits and reread these pleadings which, as I said, were extraordinary helpful, as were the arguments. I -- I truly appreciate that.

And I will get an answer as soon I can, all right?

Anything further?

MR. JOHNSTON: Well, two things, Your Honor.

One is, you know, if it would be interest to you to have a copy of the New York subpoena, we could make that available.

Second --

THE COURT: I would like to see the New York subpoena and particularly the timing of that subpoena with reference to when it was responded to if that's available publically, and as I believe the -- Mr. Anderson was going to give me a franchise agreement so I could see that.

MR. JOHNSTON: Yeah. And --

MR. ANDERSON: Yes, Judge.

We'll also supply the Court with additional authority on whether the rule about public statements applies to elected --

THE COURT: That's --

MR. ANDERSON: -- DAs and --

THE COURT: That's fine.

MR. ANDERSON: -- Attorneys General.

THE COURT: Right. All right.

MR. JOHNSTON: Then, last, Your Honor -- I would -- I know that Your Honor has a very, very busy schedule, lots of matters come to your attention.

But I would urge you to rule on this as promptly as possible because, as you know, it would be very helpful to have clarity in this rather complex world.

THE COURT: I -- I -- I understand, and I will do my very best.

MR. JOHNSTON: Thank you, Your Honor.

THE COURT: All right.

Anything else?

MR. ANDERSON: No. Thank you --

THE COURT: All right.

MR. ANDERSON: -- Judge.

THE COURT: All right.

Court will be in recess.

COURT OFFICER: All rise.

Court is adjourned.

(Adjourned)

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Donna Holmes Dominguez
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Notary Public, Commission Expires 6-9-17

December 12, 2016
Date

(781) 575-8000

donna@dhreporting.com

Exhibit 7

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

LLOYD K GARRISON (1946-1991)
RANDOLPH E PAUL (1946-1956)
SIMON H RIFKIND (1950-1995)
LOUIS S WEISS (1927-1950)
JOHN F WHARTON (1927-1977)

1285 AVENUE OF THE AMERICAS
NEW YORK NY 10019-6064
TELEPHONE (212) 373-3000

UNIT 3601 OFFICE TOWER A BEIJING FORTUNE PLAZA
NO 7 DONGSANHUAN ZHONGLU CHAOYANG DISTRICT
BEIJING 100020, PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300

12TH FLOOR HONG KONG CLUB BUILDING
3A CHATER ROAD CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U K
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2 2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100 0011 JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
PO BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

WRITER'S DIRECT DIAL NUMBER
202-223-7321
WRITER'S DIRECT FACSIMILE
202-204-7393
WRITER'S DIRECT E-MAIL ADDRESS
janderson@paulweiss.com

February 14, 2017

By Hand

Honorable Heidi Brieger
Massachusetts Superior Court
Suffolk County Courthouse – 13th Floor
Three Pemberton Square
Boston, Massachusetts 02108

In re Civil Investigative Demand No. 2016-EPD-36,
Suffolk Superior Court Civil Action No : 16-1888F

Dear Justice Brieger:

Exxon Mobil Corporation ("ExxonMobil") and the Office of the Attorney General submit this letter in response to the Court's instructions to confer on compliance with Civil Investigative Demand No. 2016-EPD-36 (the "CID") and provide a joint status report to the Court.

On January 12, 2017, this Court entered an order denying ExxonMobil's motion to set aside the CID and allowing the Attorney General's motion to compel.[1]

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[1] On February 8, 2017, ExxonMobil filed a notice of appeal from that order.

Following the entry of that order, the parties conferred on compliance with the CID and, pursuant to the terms of the tolling agreement[2] entered into by the Attorney General and ExxonMobil in this matter, concur that, until the pending litigation in Massachusetts state court and in federal court in Texas is fully resolved, including through any appeals, ExxonMobil is not obligated to produce responsive materials.

Respectfully submitted,

Justin Anderson
Counsel for Exxon Mobil Corporation

Agreed:
Richard A. Johnston
Chief Legal Counsel
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2028

cc: Patrick J. Conlon, Esq. (ExxonMobil)
Thomas C. Frongillo, Esq. (Fish & Richardson)

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2 After ExxonMobil filed this action and its action in federal court, the parties agreed that the Attorney General's limitations period for asserting certain claims against ExxonMobil would be tolled from June 18, 2016, until 60 days after the final adjudication (including appeals) of this action and the federal action. The parties further agreed that ExxonMobil need not comply with the CID until both this action and the federal action have been fully adjudicated (including appeals).