

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 4:16-CV-469-K
ERIC TRADD SCHNEIDERMAN,	)	
Attorney General of New York, in his	)	
official capacity, and MAURA TRACY	)	
HEALEY, Attorney General of	)	
Massachusetts, in her official capacity,	)	
	)	
Defendants.	)	

**APPENDIX**

**MOTION TO VACATE ORDER FOR DEPOSITION OF ATTORNEY GENERAL  
HEALEY AND STAY DISCOVERY, AND FOR A PROTECTIVE ORDER**

<b><u>Exhibit</u></b>	<b><u>Description</u></b>	<b><u>Page(s)</u></b>
n/a	Declaration of Peter C. Mulcahy (Nov. 25, 2016)	-
1	Order, <i>Exxon Mobil Corp. v. Schneiderman</i> , No. 4:16-cv-469-K (N.D. Tex. Nov. 17, 2016) (Doc. No. 117).	001-003
2	Transcript of Telephone Conference Proceedings, <i>Exxon Mobil Corp. v. Schneiderman</i> , No. 4:16-cv-469-K (N.D. Tex. Nov. 16, 2016) (Doc. No. 114).	004-030
3	Order, <i>Exxon Mobil Corp. v. Schneiderman</i> , No. 4:16-cv-469-K (N.D. Tex. Oct. 13, 2016) (Doc. No. 73).	031-037
4	Memorandum of Law in Support of the Motion to Compel Compliance with an Investigative Subpoena Issued by the Attorney General of the State of New York, <i>In the Matter of the Application of the People of the State of New York</i> , No. 451962/2016 (N.Y. Sup. Ct. Nov. 14, 2016) (Doc. No. 50), accessible at <a href="https://iapps.courts.state.ny.us/webcivil/FCASMain">https://iapps.courts.state.ny.us/webcivil/FCASMain</a> .	038-051

- |   |                                                                                                                                                                                                                                                                          |         |
|---|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| 5 | Appearance Detail, <i>In the Matter of the Application of the People of the State of New York</i> , No. 451962/2016 (N.Y. Sup. Ct.), accessible at <a href="https://iapps.courts.state.ny.us/webcivil/FCASMain">https://iapps.courts.state.ny.us/webcivil/FCASMain</a> . | 052-053 |
| 6 | Transcript of Preliminary Injunction Proceedings, <i>Exxon Mobil Corp. v. Schneiderman</i> , No. 4:16-cv-469-K (N.D. Tex. Sept. 19, 2016) (Doc. No. 68).                                                                                                                 | 054-160 |
| 7 | Notice to Appear for a Motion Hearing, <i>In re Civil Investigative Demand No. 2016-EPD-36</i> , No. 16-cv-1888F (Mass. Super. Ct. Oct. 21, 2016).                                                                                                                       | 161-162 |

Respectfully submitted,

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Dated: November 25, 2016

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on November 25, 2016, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

s/ Douglas A. Cawley  
Douglas A. Cawley

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,

Plaintiff,

v.

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

Defendants.

No. 4:16-CV-469-K

**DECLARATION OF PETER C. MULCAHY**

I, Peter C. Mulcahy, declare as follows:

1. My name is Peter C. Mulcahy. I am admitted to practice *pro hac vice* in this Court and am an Assistant Attorney General in the Environmental Protection Division of the Office of Massachusetts Attorney General Maura Healey. 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, and each of them is true and correct.

2. I submit this declaration in support of the Attorney General's Motion to Vacate November 17 Order for Deposition of Attorney General Healey and to Stay Discovery.

3. Attached to this declaration as **Exhibit 1** is a true and accurate copy of the Court's Order in this case of November 17, 2016 (Doc. No. 117). I obtained a copy of this order from the Court's Case Management / Electronic Case Files ("CM/ECF") system on November 25, 2016.

4. Attached to this declaration as **Exhibit 2** is a true and accurate copy of a transcript of the telephone conference proceedings held in this case on November 16, 2016, before the Court (Doc. No. 114). I obtained a copy of the transcript from the Court Reporter, Mr. Todd Anderson, on November 17, 2016.

5. Attached to this declaration as **Exhibit 3** is a true and accurate copy of the Court's Order in this case of October 13, 2016 (Doc. No. 73). I obtained a copy of this order from the Court's CM/ECF system on November 25, 2016.

6. Attached to this declaration as **Exhibit 4** is a true and accurate copy of the Memorandum of Law in Support of the Motion to Compel Compliance with an Investigative Subpoena Issued by the Attorney General of the State of New York, filed in the Supreme Court of the State of New York in the County of New York on November 14, 2016, by the Attorney General of New York, *In the Matter of the Application of the People of the State of New York*, No. 451962/2016 (N.Y. Sup. Ct. Nov. 14, 2016) (Doc. No. 50). I obtained a copy of this document from New York's WebCivil Supreme online docketing system, which is available at <https://iapps.courts.state.ny.us/webcivil/FCASMain>, on November 25, 2016.

7. Attached to this declaration as **Exhibit 5** is a true and accurate copy of the appearance information from the docket in *In the Matter of the Application of the People of the State of New York*, No. 451962/2016 (N.Y. Sup. Ct.). I obtained a copy of this document from New York's WebCivil Supreme online docketing system, which is available at <https://iapps.courts.state.ny.us/webcivil/FCASMain>, on November 25, 2016.

8. Attached to this declaration as **Exhibit 6** is a true and accurate copy of a transcript of the preliminary injunction proceedings held on September 19, 2016, before this Court (Doc.

No. 68). I obtained a copy of the transcript from the Court Reporter, Mr. Todd Anderson, on September 22, 2016.

9. Attached to this declaration as **Exhibit 7** is a true and accurate copy of a Notice to Appear for a Motion Hearing from the Massachusetts Superior Court, issued on October 21, 2016. I obtained a copy of this notice from the Superior Court on October 26, 2016.

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

Executed on November 25, 2016.

s/ Peter C. Mulcahy  
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**EXHIBIT 1**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:16-CV-469-K
	§	
ERIC TRADD SCHNEIDERMAN,	§	
Attorney General of New York, in	§	
his official capacity, and MAURA	§	
TRACY HEALEY, Attorney General	§	
of Massachusetts, in her official	§	
capacity,	§	
	§	
Defendants.	§	
	§	

**ORDER**

On November 16, 2016, the Court conducted a telephone status conference with the parties. In order to expeditiously conduct the necessary discovery to inform the Court on issues relating to pending and anticipated motions related to jurisdictional matters, the Court orders that Attorney General Healey shall respond to written discovery ten (10) days from the date the discovery is served.

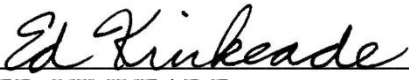
It is further ordered that Attorney General Healey shall appear for her deposition in Courtroom 1627 at 1100 Commerce Street, Dallas, Texas 75242 at 9:00 a.m. on Tuesday, December 13, 2016. Attorney General Schneiderman is also advised to be



available on December 13, 2016 in Dallas, Texas. The Court will enter an Order regarding Attorney General Schneiderman's deposition after he files his answer in this matter. The Court is mindful of the busy schedule of each of the Attorneys General Healey and Schneiderman and will be open to considering a different date for the deposition.

**SO ORDERED.**

Signed November 17<sup>th</sup>, 2016.

  
\_\_\_\_\_  
ED KINKEADE  
UNITED STATES DISTRICT JUDGE

**EXHIBIT 2**

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF TEXAS  
 FORT WORTH DIVISION

EXXON MOBIL CORPORATION, ) 4:16-CV-469-K  
 Plaintiff, )

VS. )

ERIC TRADD SCHNEIDERMAN, ) DALLAS, TEXAS  
 Attorney General of New )  
 York, in his official )  
 capacity, and MAURA TRACY )  
 HEALEY, Attorney General of )  
 Massachusetts, in her )  
 official capacity, )  
 Defendants. ) November 16, 2016

TRANSCRIPT OF TELEPHONE CONFERENCE  
 BEFORE THE HONORABLE ED KINKEADE  
 UNITED STATES DISTRICT JUDGE

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6 ALSO PRESENT:

MR. JASON BROWN

8 COURT REPORTER:

9 MR. TODD ANDERSON, RMR, CRR  
10 United States Court Reporter  
11 1100 Commerce St., Rm. 1625  
12 Dallas, Texas 75242  
13 (214) 753-2170

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23 Proceedings reported by mechanical stenography and  
24 transcript produced by computer.  
25

1 TELEPHONE CONFERENCE - NOVEMBER 16, 2016

2 P R O C E E D I N G S

3 THE COURT: Good morning. Let me make sure who I  
4 have got.

5 Mr. Anderson?

6 Hello?

7 Mr. Anderson?

8 MR. ANDERSON: Good morning, Judge.

9 THE COURT: Ms. Cortell?

10 MS. CORTELL: Yes, Your Honor. I've got a full list  
11 if that would help.

12 THE COURT: Is it Richard Johnston?

13 MR. JOHNSTON: Yes, Your Honor.

14 THE COURT: And then Mr. Arz?

15 MR. ARZ: Yes, Your Honor. Good morning.

16 THE COURT: Good morning.

17 How is the weather in New York?

18 MR. ARZ: Good.

19 MR. BROWN: And, Your Honor, this is Jason Brown.  
20 I'm the chief deputy for the New York Attorney General's  
21 office. I'm on the line as well.

22 And the weather up here is actually not so bad.

23 THE COURT: What does that mean?

24 Is it raining -- raining and cold?

25 MR. BROWN: Yesterday it was raining and cold.

1 Today, it's funny, it's a little bit warmer, so --

2 THE COURT: Oh, well, good. Good.

3 MR. BROWN: (Inaudible)

4 THE COURT: Well, good. So -- all right. Anybody  
5 else on the line?

6 MS. CORTELL: Your Honor, it's Nina Cortell. Let me  
7 give you a full list, if that's okay.

8 THE COURT: Sure.

9 MS. CORTELL: I think that might expedite it.

10 THE COURT: Okay.

11 MS. CORTELL: So for ExxonMobil, in addition to  
12 Justin Anderson, you have myself, Nina Cortell, Ted Wells, Pat  
13 Conlon, Dan Bolia, and Michele Hirshman.

14 For the Massachusetts Attorney General, in addition  
15 to Richard Johnston, you have Melissa Hoffer and Doug Cawley.

16 And for the New York Attorney General you have -- in  
17 additional to Mr. Arz and Jason Brown, you have Pete Marketos  
18 and Jeff Tillotson.

19 THE COURT: Mr. Tillotson. You haven't been in here  
20 since you became an independent lawyer. How are you doing?

21 MR. TILLOTSON: I'm doing fine, Your Honor. Thanks  
22 for asking. I'm -- I'm my own boss, and so I routinely both  
23 hire and fire myself every afternoon.

24 THE COURT: Well, there you go. I wasn't worried  
25 that you were going broke. I just wondered what was going on



1 with you. That's good. Good to have you back.

2 Okay.

3 MR. TILLOTSON: Thank you.

4 THE COURT: You know, I've got Ms. Cortell's letter,  
5 and I guess her concern and my concern, too, at this point is  
6 whether or not Attorney General Schneiderman -- isn't that the  
7 right way to say it, general? Just call him General  
8 Schneiderman and General Healey, whether they're going to  
9 comply with the order on the discovery or not and/or what's  
10 going to happen there. And I just wanted to kind of hear  
11 y'all's response from that.

12 MR. JOHNSTON: Your Honor, this is Richard Johnston.  
13 You heard from me in September when we were down there arguing.  
14 I will talk for the Attorney General's Office in Massachusetts.

15 As Your Honor will probably recall when we were  
16 before you the last time, we argued quite strenuously that the  
17 Court didn't have personal jurisdiction over Attorney General  
18 Healey. We argued secondarily that the Court should abstain  
19 from taking the case because there was almost equivalent  
20 proceeding in a Massachusetts state court.

21 We also argued there was no real irreparable harm  
22 because Exxon had already produced many of the same documents  
23 to New York.

24 And when we left court, or as we were leaving court,  
25 you told us -- you told the parties that it seemed strange that

1 Exxon had produced a lot of documents to New York but wouldn't  
2 give them to Massachusetts, and directed the parties to have a  
3 discussion, and failing a discussion between us that we would  
4 mediate before Judge Stanton.

5 We had discussions about the subject, and then we had  
6 a mediation with Judge Stanton, and we left the process with no  
7 documents from Exxon.

8 To our somewhat surprise we then got almost  
9 immediately the discovery order, which seemed to relate  
10 primarily the issue of abstention, at which point we filed a  
11 motion for reconsideration with Your Honor on the discovery  
12 order because we pointed out that the law on personal  
13 jurisdiction seemed very clear under the Fifth Circuit, that  
14 there was no ability on the part of the Court to exercise  
15 jurisdiction over an attorney general from another state, no  
16 federal court anywhere in the country had done that over the  
17 opposition of an attorney general and Exxon didn't provide any  
18 such cases. So that motion for reconsideration is still  
19 pending.

20 In the meantime, we received from Exxon approximately  
21 a hundred and so written discovery requests, including  
22 interrogatories, document requests, and requests for admission.  
23 We also got notices of the deposition for Attorney General  
24 Healey herself and -- to assist the attorneys general.

25 Now, each one of those discovery requests had a

1 particular time period for responding under the rules, and we  
2 do intend to respond to all of them under the rules. And as we  
3 have said in at least one other paper, we do intend to object  
4 to the discovery, including depositions of Attorney General  
5 Healey and her associates and to the other forms of discovery.

6 But we will be filing those in a timely fashion. I  
7 think in direct response to Ms. Cortell's concern, we do not  
8 expect that Attorney General Healey or the other assistant  
9 attorneys general will show up for depositions. We will be  
10 filing motions with respect to those prior to the depositions.

11 I should note that when we got the notices -- we got  
12 the letter from Exxon's counsel, I think on Friday during the  
13 holiday about whether we would show up or not, and when by  
14 Monday afternoon we had not yet responded, they sent a letter  
15 to Your Honor saying there was concern about whether people  
16 were going to show up.

17 So it's not as though there was any long delay in  
18 letting people know. I think less than -- there hadn't even  
19 been a working day on Friday and we were a few hours into the  
20 working day on Monday and we still had several days before our  
21 formal responses were due.

22 So we will be filing those responses, and the  
23 responses will, among other things, talk about the fact that it  
24 is heavily, heavily disfavored to have top executive officials,  
25 including attorneys general, deposed about their thought

1 processes in bringing particular matters.

2 And what we seem to have here, as we argue in our  
3 motion for reconsideration, is a situation where the normal  
4 investigatory process has been turned on its head.

5 We still in response to our civil investigation  
6 demand have not received one document from Exxon, and yet Exxon  
7 is going after the Attorney General's entire thought process  
8 through a hundred written discovery requests and more and then  
9 three depositions of key people who are involved in the  
10 decision-making process.

11 So our motion for reconsideration focuses on that as  
12 will our objections to the specific discovery requests which  
13 they have made.

14 THE COURT: Is that no?

15 MR. JOHNSTON: That is a no.

16 THE COURT: That's the longest no I have had in two  
17 or three weeks, but it's okay. I'm used to that. You're a  
18 lawyer.

19 All right.

20 MR. JOHNSTON: Also it's been a few -- it's been a  
21 couple of months now since we were before you, and I know you  
22 have been in a busy trial. And, you know, sometimes it's  
23 important to just remind everybody where we -- where we think  
24 we are on this.

25 THE COURT: I appreciate that, and that -- you know,

1 I was a history minor, and so I always like history, and so not  
2 that I always need it, and I kind of like to choose which  
3 history I'm -- you know, whatever.

4 But I kind of do keep up with my docket, what's going  
5 on. But I'm glad for you to keep up with it, too. That's  
6 always fascinating, and that's -- you know, you talk about  
7 things are unusual. I would say that's a little unusual to  
8 think that, you know, your comments about we got this unusual  
9 thing from the Court. You know, whatever.

10 You can make whatever comments you want to make. I'm  
11 going to make whatever rulings I think are appropriate, and  
12 I'll rule on your motion when I -- in due time.

13 So I'll take that as an answer of no.

14 All right. Mr. Schneiderman's representative --  
15 excuse me. General Schneiderman's representative, who is going  
16 to be -- tell me who's speaking for him.

17 Mr. Arz?

18 MR. BROWN: So, Your Honor, again, Chief Deputy Jason  
19 Brown speaking.

20 THE COURT: Oh, I'm sorry. Okay.

21 MR. BROWN: I'm going to take Your Honor's cue, the  
22 answer is no. I'm happy to expand at greater length.

23 The only thing I would note at this point is we were  
24 served as nonparty. We got nonparty discovery requests, you  
25 know, basically hours or a day or so before we became a party,

1 so that's also an issue that needs to be fleshed out.

2 But -- but for the reasons that Mr. Johnston said and  
3 others that are unique to me, you are the -- we'll need to  
4 exercise our right to make appropriate objections to that  
5 discovery request.

6 THE COURT: Are you a party now?

7 MR. BROWN: Now? Yes. I think we were served  
8 earlier. We're new to the dance, as the Court knows. Today is  
9 Wednesday. I think we became a party either on Monday or  
10 yesterday. So this is all very new to us.

11 MS. CORTELL: Your Honor, it's Nina. It may be new  
12 to New York, but the order amending was November 10th, and then  
13 they immediately went into court in New York and sought to  
14 pursue a subpoena there which they had now set for hearing on  
15 this coming Monday. And that's really what prompted our  
16 letter, because in their papers they're saying that New York is  
17 the appropriate place to litigate this, whereas we're already  
18 set here on discovery that was then pending.

19 And so what we're hoping to do is set up a protocol  
20 here to handle our discovery which was issued properly pursuant  
21 to this Court 's October 13 order permitting discovery.

22 we acted promptly, which I think the Court would have  
23 expected us to do. The discovery is returnable as early as  
24 some of it tomorrow and early next week.

25 we had asked them for confirmation if they were going

1 to comply. We had not heard back. And in the meantime they go  
2 into court in New York and assert jurisdiction there, and  
3 that's what prompted the letter.

4 So what we're here for today is to ask for a  
5 protocol, if you will, for how to handle discovery, discovery  
6 disputes, so that we, you know, get the discovery we're  
7 entitled to under this Court's order.

8 THE COURT: Y'all want to respond?

9 MR. BROWN: Yes, Your Honor. Jason Brown again. I  
10 mean, Ms. Cortel has slightly butchered the procedural history  
11 here. We had, as I think the Court knows, a prior case pending  
12 in New York where actually Justice Ostrager had issued an  
13 opinion rejecting one of their arguments, as Mr. Wells knows.  
14 He appeared in court on that.

15 So this is not some new litigation intended to do an  
16 end-run around anybody. It was simply pursuing the motion to  
17 compel that we had previously begun litigation on for a  
18 subpoena that long predated any issues that Exxon raises in the  
19 Texon case -- in Exxon case that has been pending now for over  
20 a year on the subpoena.

21 So what we did is when we got the -- when we were  
22 added as a party, we -- we wrote to Paul, Weiss and asked  
23 whether they would withdraw those subpoenas since we were now a  
24 party.

25 On Saturday we received the response no, and then the

1 next thing we knew we were being scheduled for a status  
2 conference here.

3 So I'm still a little unclear as to what is being  
4 requested, but obviously we haven't missed any deadlines yet.  
5 We are planning to participate in a way that makes the Court  
6 aware of our -- our issues.

7 Right now, because they are styled as Rule 45  
8 nonparty discovery requests, the only court that would have  
9 jurisdiction over that dispute, because the depositions have  
10 been noticed here in Manhattan, would be the Southern District  
11 of New York.

12 So right now, without withdrawing their prior  
13 subpoenas to us, we have no choice but to go to the Southern  
14 District of New York. Again, these are issues that perhaps,  
15 know, we would have been better off discussing with Paul, Weiss  
16 directly, but they requested a status conference, so here we  
17 are.

18 MR. ANDERSON: Judge, this is Justin Anderson. May I  
19 respond to a few of those points?

20 THE COURT: Yes.

21 MR. ANDERSON: Well, first, I would just like to say  
22 Ms. Cortell did not butcher any -- any history, procedural or  
23 otherwise. The matter that was pending before the New York  
24 Supreme Court had to do with a subpoena that the New York  
25 Attorney General issued to PricewaterhouseCoopers. That was



1 the subject matter of that litigation, and that is the only  
2 litigation that was pending before they rushed into court on  
3 Monday morning to raise the subpoena that was at issue before  
4 this Court.

5 So in terms of the procedural history, it is not  
6 correct to suggest that this matter was before the Court in New  
7 York. It was a separate subpoena issued to ExxonMobil's  
8 auditors.

9 Second, the request on Friday to adjourn the subpoena  
10 that had been issued to ExxonMobil to the New York Attorney  
11 General, that request had nothing to do with the addition of  
12 the New York Attorney General as a party to this action.

13 You know, the basis in the letter was that there is a  
14 motion for reconsideration and a motion to dismiss pending, and  
15 the New York Attorney General requested that we adjourn the  
16 return date pending this Court's resolution of those motions.

17 We responded in the letter promptly that that would  
18 make no sense because you ordered discovery to determine  
19 whether there is jurisdiction. So putting off discovery until  
20 jurisdiction has been resolved was nonsensical.

21 Aside from -- aside from that letter, we had heard  
22 nothing from either the Massachusetts Attorney General or the  
23 New York Attorney General in response to the discovery request  
24 that we made.

25 And we made our first set of discovery requests at

1 the end of October.

2 On October 24th we served Massachusetts.

3 We then served New York on the 3rd of November.

4 So this idea that we came rushing to you without  
5 giving them any time to respond, that is truly a butchering of  
6 the record.

7 And, finally, Judge, you know, with respect to the  
8 subpoenas, if -- if -- it is correct that right now all that is  
9 pending is the third-party subpoenas, and they naturally would  
10 be -- if there is a motion to quash or a motion to compel, it  
11 naturally would -- would begin in the Southern District of New  
12 York. But there is a procedure for transferring jurisdiction  
13 of -- of any motion to quash in connection with those subpoenas  
14 to this Court.

15 And in light of the fact that those subpoenas now  
16 pertain to parties to the litigation before this Court, they  
17 would be -- it would be quite likely that if a motion to  
18 transfer is made that those objections find their way to you.

19 THE COURT: well, here's -- let me -- let me begin by  
20 saying, Mr. Brown, you scored some points by being -- with the  
21 Court by being frank and to the point. So I'm making you an  
22 honorary, as you said, Texon. I don't know what that is. But  
23 I'm going to make you -- I look forward to having you here  
24 sometimes and I will tease you about that. That's a good name  
25 for some future company, I guess.

1 But, anyway, here's what I would like to do,  
2 especially since I'm in this trial that may take the rest of my  
3 adult days to finish, and then I have another one starting in  
4 January with Facebook and a local company here, another big  
5 case.

6 So what I would like to do is convert Judge Stanton  
7 to a special master to deal with y'all on this so you can be  
8 talking to somebody regularly. He's my special master on this  
9 case. I have complete confidence in him. Obviously, I need  
10 y'all's permission to do that. And you're going to -- you're  
11 going to have to pay for that among yourselves.

12 But then we can get something, and you'll have  
13 somebody to have my ear when my other part of me is sitting out  
14 there and we can get this moving and can consider all of  
15 your -- you know, your various concerns.

16 I get it. And it's -- you know, we're getting pretty  
17 close to the point of loggerheads. And okay, that's fine. And  
18 try to figure that answer out.

19 Is that okay with the parties at this point?

20 I will make sure that he does not overcharge or  
21 undercharge you, if that's okay. I think he charges about  
22 \$725.00 an hour. And, you know, that's what Johnson &  
23 Johnson -- I think that's what they're paying him in here.

24 But, anyway, so that's what I would like to be able  
25 to do so we can get something going on it and try to get

1 something besides us talking on the phone and get some  
2 resolution for y'all as quickly as possible.

3 So what about New York, Mr. Brown?

4 MR. BROWN: Thank you, Your Honor. And -- and I  
5 think we all very much appreciate the spirit of that  
6 suggestion.

7 My only concern -- and I -- you know, I know lawyers  
8 always come up with concerns. But we -- we obviously do have a  
9 personal jurisdiction defense that we wanted to be careful not  
10 to waive.

11 THE COURT: I'm not trying to get you to waive -- I  
12 don't want you to waive anything. I'm not -- you know, yes,  
13 you don't know me, but I'm not -- I'm not trying to sneak up on  
14 you or anybody else. That's not my style. We're going to  
15 fight this thing out, y'all are, one way or the other, and it's  
16 not going to be based upon, you know, that sort of thing, okay?

17 I'm not -- I'm not trying to get you to do that,  
18 okay?

19 This is on the record. This is on the record. I  
20 don't know how much clearer I can be than that, okay?

21 MR. BROWN: Okay. Thank you, Your Honor.

22 THE COURT: Is that okay?

23 So it's okay with you?

24 MR. BROWN: Yeah, I mean, we haven't -- unfortunately  
25 we have taxpayer money that we have to account for, but

1 conceptually I think that's fine.

2 THE COURT: Okay.

3 MR. BROWN: I just have to work out the mechanics of  
4 how that would -- how we would be able to find funding for our  
5 payment. That's all.

6 THE COURT: Yeah, but don't you do that now in  
7 various cases?

8 MR. BROWN: No. Actually, no.

9 THE COURT: You don't?

10 MR. BROWN: I'm not looking to throw -- Your Honor,  
11 I'm not looking to throw a roadblock, so let's do this issue  
12 and then let the Court know.

13 THE COURT: Well, who's -- who's paying for Marketos?

14 MR. BROWN: Marketos, Your Honor.

15 THE COURT: Yeah, but, I mean, he's -- you're paying  
16 for him, right?

17 MR. BROWN: Yeah. No. And -- we have to get to  
18 several levels of authorization to do it. So, again, Your  
19 Honor, I don't mean to put a --

20 THE COURT: And Tillotson doesn't work for free.  
21 Tillotson doesn't work for free at all, because I've had him in  
22 here. He's the most expensive lawyer in Dallas.

23 MR. TILLOTSON: I'm going to take that as a  
24 compliment.

25 THE COURT: It is a compliment.

1 MR. TILLOTSON: Have to go through a big process and  
2 approval process that we went through, so I think there's  
3 just -- they want to make sure they can -- they can fund this  
4 in a way --

5 THE COURT: Yeah. Okay. Mr. Tillotson, will you  
6 just -- just commit to me -- yeah, Mr. Tillotson, will you just  
7 commit to me you will do your best to get this done?

8 MR. TILLOTSON: Of course, Your Honor. Absolutely.

9 THE COURT: Yeah. Okay. And you know -- you know  
10 Judge Stanton well, correct?

11 MR. TILLOTSON: I do, Your Honor. I just want to  
12 make sure -- he needs to clear conflicts, because obviously I  
13 have had relationships with him and against him in the past, so  
14 he will need to inform everyone obviously of any conflicts he  
15 may have with the parties.

16 THE COURT: Okay.

17 MR. TILLOTSON: I have no problem with him being  
18 special master.

19 THE COURT: Yeah. Yeah. Okay. Well, yeah.  
20 Obviously, everybody has got to do that.

21 All right. All right. And then I haven't meant to  
22 ignore you, Mr. Johnston.

23 MR. JOHNSTON: I will be short, Your Honor. I echo  
24 Mr. Brown's comments. Because it is taxpayer money I don't  
25 have the authority to commit to that, so I will have to have

1 discussions internally here.

2 THE COURT: Well, you did hire Mr. Cawley, correct?  
3 Is that correct?

4 MR. JOHNSTON: That's correct.

5 THE COURT: And McKool Smith is known on what I see  
6 locally as the most expensive law firm and the most  
7 successful -- one of the successful firms, I'm sure that you  
8 would agree, wouldn't you, Mr. Cawley?

9 MR. CAWLEY: Well, I'd agree -- I'd love to agree  
10 with the second half, Your Honor. On the first one I'd say  
11 maybe we're not the most expensive after getting through  
12 negotiating with the State of Massachusetts.

13 THE COURT: Oh, I'm sorry. But you are a very  
14 successful firm and do extremely well, partner by partner,  
15 correct?

16 MR. CAWLEY: Yes, Your Honor.

17 THE COURT: I know.

18 Okay. So y'all work on getting that done. Assuming  
19 that you can work through whatever layers there are -- there  
20 are, you'll work on that?

21 Yes?

22 MR. CAWLEY: Absolutely.

23 THE COURT: Who said that?

24 UNIDENTIFIED SPEAKER: Absolutely, Your Honor.

25 THE COURT: Who said that, for the record?

1 MR. CAWLEY: This is Doug Cawley. I'm one person who  
2 said we'll work on it.

3 THE COURT: And also, Mr. Johnston, do you, too?

4 MR. JOHNSTON: I do. I do, too.

5 THE COURT: Hey, is the T silent or not in your --  
6 Johnston?

7 MR. JOHNSTON: Not the way I pronounce it, Your  
8 Honor.

9 THE COURT: Okay. I'm working on trying to get you  
10 to be a -- what did we make -- what did I make Mr. Brown? A  
11 Texon.

12 MR. BROWN: Not a very strong --

13 THE COURT: Texon. A Texon. You're next. We're  
14 going to --

15 MR. BROWN: A Texon.

16 THE COURT: Okay.

17 MR. JOHNSTON: Last time you told me I was your  
18 thirteenth favorite Yankee.

19 THE COURT: That's correct. Okay. Well --

20 MS. CORTELL: And, Your Honor, for the record,  
21 ExxonMobil of course is agreeable, and we'll work with the  
22 parties to that end.

23 THE COURT: Oh, you were next.

24 Okay. So y'all work on that. And get that done in  
25 the next day or two so we can get that resolved before



1 Thanksgiving, and we can kind of get things moving, okay?

2 And then try to set up --

3 MR. BROWN: Your Honor?

4 THE COURT: Yes, sir.

5 MR. BROWN: Your Honor, this is Mr. Brown here.

6 Implicit in what you're saying, I hope, is because I think our  
7 objections -- our court filing might be due as early as  
8 tomorrow -- is that the current discovery requests are stayed  
9 pending our discussions to work with the special master?

10 THE COURT: Well, you agree on the special master and  
11 then we'll see, okay?

12 So -- all right. That does kind of put the pressure  
13 on y'all to get on it, so let me know.

14 You know what? I have always found that what we want  
15 to do or can -- we can get things done through the process of  
16 whatever. I realize there's a lot of lawyers in the attorney  
17 generals' offices, but there's one at the top and can make  
18 these decisions, and so y'all get that done, okay?

19 Anything else y'all want to talk to me about?

20 MS. CORTELL: I'm assuming that there's no implied  
21 stay as a result of this conference.

22 THE COURT: I'm not staying anything. I'm not  
23 staying anything. No. If you want to stay, file something and  
24 ask me for it, okay?

25 MS. CORTELL: Okay.

1 THE COURT: All right.

2 MS. CORTELL: Thank you, Your Honor.

3 THE COURT: All right. Y'all --

4 MR. BROWN: Thank you, Your Honor.

5 THE COURT: Thank y'all. And we'll look forward to  
6 seeing y'all again soon, and have a wonderful Thanksgiving.

7 MS. CORTELL: You, too, Your Honor. Thank you.

8 MR. BROWN: Thank you, Your Honor.

9 THE COURT: Thank y'all. Bye-bye.

10 (Hearing adjourned)

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1 I, TODD ANDERSON, United States Court Reporter for the  
2 United States District Court in and for the Northern District  
3 of Texas, Dallas Division, hereby certify that the above and  
4 foregoing contains a true and correct transcription of the  
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 17th day of November, 2016.

7  
8  
9 /s/Todd Anderson

10 TODD ANDERSON, RMR, CRR  
11 United States Court Reporter  
12 1100 Commerce St., Rm. 1625  
13 Dallas, Texas 75242  
14 (214) 753-2170  
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**EXHIBIT 3**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:16-CV-469-K
	§	
MAURA TRACY HEALEY, Attorney	§	
General of Massachusetts in her official	§	
capacity,	§	
	§	
Defendant.		

**ORDER**

Plaintiff Exxon Mobil Corporation’s Motion for a Preliminary Injunction (Doc. No. 8) and Defendant Attorney General Healey’s Motion to Dismiss (Doc. No. 41) are under advisement with the Court. Plaintiff Exxon Mobil Corporation (“Exxon”) moves to enjoin Defendant Attorney General Maura Tracy Healey of Massachusetts from enforcing the civil investigative demand (“CID”) the Commonwealth of Massachusetts issued to Exxon on April 19, 2016. The Attorney General claims that the CID was issued to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts. Exxon contends that the Attorney General issued the CID in an attempt to satisfy a political agenda. Compliance with the CID would require Exxon to disclose documents dating back to January 1, 1976 that relate to what Exxon possibly knew about climate change and global warming.

Additionally, Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint for (1) lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), (2) lack of subject matter jurisdiction under Rule 12(b)(1) under *Younger v. Harris*, 401 U.S. 37 (1971), (3) lack of subject matter jurisdiction under Rule 12(b)(1) because the dispute is not yet ripe, and (4) improper venue under Rule 12(b)(3). Before reaching a decision on either Plaintiff Exxon's Motion for a Preliminary Injunction or Defendant Attorney General Healey's Motion to Dismiss, the Court **ORDERS** that jurisdictional discovery be conducted.

### I. Applicable Law

The Court has an obligation to examine its subject matter jurisdiction *sua sponte* at any time. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.”). A district court has broad discretion in all discovery matters, including whether to permit jurisdictional discovery. *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982). “When subject matter jurisdiction is challenged, a court has authority to resolve factual disputes, and may devise a method to . . . make a determination as to jurisdiction, ‘which may include considering affidavits, allowing further discovery, hearing oral testimony, or conducting an evidentiary hearing.’” *Hunter v. Branch Banking and Trust Co.*, No. 3:12-cv-2437-D, 2012 WL 5845426, at \*1 (N.D. Tex. Nov. 19, 2012) (quoting *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir.

1994)). If subject matter jurisdiction turns on a disputed fact, parties can conduct jurisdictional discovery so that they can present their arguments and evidence to the Court. *In re Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 319 (5th Cir. 2012).

## II. The Reason for Jurisdictional Discovery

One of the reasons Defendant Attorney General Healey moves to dismiss Plaintiff Exxon's Complaint is for lack of subject matter jurisdiction under Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). The Court particularly wants to conduct jurisdictional discovery to determine if Plaintiff Exxon's Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction because of the application of *Younger* abstention. See *Younger*, 401 U.S. at 43–45; *Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008) (stating that although *Younger* abstention originally applied only to criminal prosecution, it also applies when certain civil proceedings are pending if important state interests are involved in the proceeding). The Supreme Court in *Younger* “espouse[d] a strong federal policy against federal court interference with pending state judicial proceedings.” *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431 (1982).

Jurisdictional discovery needs to be conducted to consider whether the current proceeding filed by Exxon in Massachusetts Superior Court challenging the CID warrants *Younger* abstention by this Court. If Defendant Attorney General Healey issued the CID in bad faith, then her bad faith precludes *Younger* abstention. See *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984). Attorney General Healey's



actions leading up to the issuance of the CID causes the Court concern and presents the Court with the question of whether Attorney General Healey issued the CID with bias or prejudgment about what the investigation of Exxon would discover.

Prior to the issuance of the CID, Attorney General Healey and several other attorneys general participated in the AGs United for Clean Power Press Conference on March 29, 2016 in New York, New York. Notably, the morning before the AGs United for Clean Power Press Conference, Attorney General Healey and other attorneys general allegedly attended a closed door meeting. At the meeting, Attorney General Healey and the other attorneys general listened to presentations from a global warming activist and an environmental attorney that has a well-known global warming litigation practice. Both presenters allegedly discussed the importance of taking action in the fight against climate change and engaging in global warming litigation.

One of the presenters, Matthew Pawa of Pawa Law Group, P.C., has allegedly previously sued Exxon for being a cause of global warming. After the closed door meeting, Pawa emailed the New York Attorney General's office to ask how he should respond if asked by a Wall Street Journal reporter whether he attended the meeting with the attorneys general. The New York Attorney General's office responded by instructing Pawa "to not confirm that [he] attended or otherwise discuss" the meeting he had with the attorneys general the morning before the press conference.

During the hour long AGs United for Clean Power Press Conference, the attorneys general discussed ways to solve issues with legislation pertaining to climate

change. Attorney General Eric Schneiderman of New York and Attorney General Claude Walker of the United States Virgin Islands announced at the press conference that their offices were investigating Exxon for consumer and securities fraud relating to climate change as a way to solve the problem.

Defendant Attorney General Healey also spoke at the AGs United for Clean Power Press Conference. During Attorney General Healey’s speech, she stated that “[f]ossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable.” Attorney General Healey then went on to state that, “[t]hat’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.” The speech ended with Attorney General Healey reiterating the Commonwealth of Massachusetts’s commitment to combating climate change and that the fight against climate change needs to be taken “[b]y quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long.” Subsequently, on April 19, 2016, Attorney General Healey issued the CID to Exxon to investigate whether Exxon committed consumer and securities fraud on the citizens of Massachusetts.

The Court finds the allegations about Attorney General Healey and the anticipatory nature of Attorney General Healey’s remarks about the outcome of the Exxon investigation to be concerning to this Court. The foregoing allegations about


Attorney General Healey, if true, may constitute bad faith in issuing the CID which would preclude *Younger* abstention. Attorney General Healey's comments and actions before she issued the CID require the Court to request further information so that it can make a more thoughtful determination about whether this lawsuit should be dismissed for lack of jurisdiction.

### III. Conclusion

Accordingly, the Court **ORDERS** that jurisdictional discovery by both parties be permitted to aid the Court in deciding whether this law suit should be dismissed on jurisdictional grounds.

**SO ORDERED.**

Signed October 13<sup>th</sup>, 2016.

  
\_\_\_\_\_  
ED KINKEADE  
UNITED STATES DISTRICT JUDGE

**EXHIBIT 4**

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

In the Matter of the Application of the

PEOPLE OF THE STATE OF NEW YORK, by  
ERIC T. SCHNEIDERMAN,  
Attorney General of the State of New York,

Petitioner,

For an order pursuant to C.P.L.R. § 2308(b) to compel  
compliance with a subpoena issued by the Attorney  
General

- against -

PRICEWATERHOUSECOOPERS LLP and  
EXXON MOBIL CORPORATION,

Respondents.

Index No. 451962/2016

**ORAL ARGUMENT  
REQUESTED**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL COMPLIANCE  
WITH AN INVESTIGATIVE SUBPOENA ISSUED  
BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK**

## **PRELIMINARY STATEMENT**

The Office of the Attorney General (“OAG”) issued a subpoena to ExxonMobil Corporation (“Exxon”) over one year ago seeking documents relating to Exxon’s potential violations of New York anti-fraud laws.<sup>1</sup> Almost five months ago, OAG specifically requested that Exxon prioritize the production of documents concerning the company’s valuation, accounting, and reporting of its assets and liabilities, and the impact of climate change on those processes. Exxon has failed to cooperate with this request, and thus, the OAG respectfully requests this Court to compel Exxon’s compliance by November 23, 2016.

The Court’s intervention is made more urgent by Exxon’s tactics. In correspondence with OAG, Exxon ignored this specific request for two and a half months, and then more recently claimed that it intends to comply, while at the same time refusing to commit to specific production dates or to appropriately update its search protocols, and purporting to unilaterally restrict the scope of the request. In statements made to this Court, Exxon acknowledged that the subpoena is valid and (inaccurately) boasted of the company’s compliance record. But at the very same time, in a federal district court in Texas, Exxon is effectively moving to quash the subpoena on constitutional grounds it has pointedly avoided raising in this Court. Exxon’s transparent purpose is to delay the production of these key documents to OAG and forestall judicial intervention in this jurisdiction long enough for Exxon’s forum-shopping exercise to culminate in a federal injunction barring New York courts from enforcing the OAG’s subpoena to Exxon before the relevant issues can even be joined.

---

<sup>1</sup> A true and correct copy of the subpoena is annexed to the accompanying Affirmation of John Oleske, dated November 14, 2016 (“Oleske Aff.”), as Exhibit A.

The appropriate place and time for Exxon to make arguments for evading compliance with the subpoena is here and now. This Court is fully capable of giving Exxon a full and fair opportunity to be heard on any such arguments.

The Court should order Exxon to produce the specific documents at issue here by the extended return date of November 23, 2016. The Court should also assert jurisdiction over Exxon's continuing compliance with the subpoena, and order such other and further relief as may be just and proper in implementing a schedule for the prompt production of all other responsive documents.

### **FACTUAL BACKGROUND**

Exxon is the world's largest publicly traded oil and gas company and one of the world's largest refiners and marketers of petroleum products. (Oleske Aff. ¶ 4.) Many Exxon shareholders and customers reside in New York State (*id.*), and Exxon is therefore subject to New York Executive Law 63(12), General Business Law § 352 (the Martin Act), and General Business Law § 349(a).

OAG is investigating whether Exxon's representations to investors and the public about the impact of climate change on its business, including statements made in filings with the U.S. Securities and Exchange Commission ("SEC") and other public reports, were or are fraudulent or deceptive. (*Id.*, ¶ 5.)

One such subject of the investigation is a report Exxon issued in 2014 entitled *Energy and Carbon – Managing the Risks*. (*Id.*, ¶ 6, Ex. B.) In *Managing the Risks*, Exxon assured investors and others that in making business decisions, Exxon takes into account potential government action to limit greenhouse gas emissions "through the use of a proxy cost of carbon." (*Id.*, Ex. B, p. 17.) Exxon indicated that its use of proxy-cost analysis allowed it to

predict that the valuation and recoverability of its reserves would not be affected by economic impacts of climate change. (*Id.*, Ex. B, p. 18.)

To obtain information relevant to these representations, among others, OAG propounded Subpoena Request Nos. 3 and 4. (*Id.*, Ex. A.) Request No. 3 calls for documents reflecting Exxon's general practices concerning the valuation, accounting, and reporting of its assets and liabilities, and its specific practices in integrating climate-change-related impacts in those processes as well as its business decisions more broadly. The documents OAG seeks through this request would explain Exxon's procedures for: (1) valuing its oil and gas reserves; (2) assessing the need for impairment charges or write-downs with respect to those valuations; and (3) calculating and implementing the "proxy" cost of carbon that Exxon claims it uses to evaluate the expected impact of greenhouse gas regulation on its business. Request No. 4 is addressed specifically to how the above processes were described or incorporated in various public statements by Exxon, including in *Managing the Risks*. The specific documents that are the subject of this motion are all responsive to one or both of these requests.

In a June 24, 2016 letter to Exxon's counsel, OAG specifically requested that Exxon produce documents related to OAG's "immediate investigative priorities," which were identified as:

(i) Exxon's valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting.

(Oleske Aff. Ex. C.) OAG indicated that many of those documents were likely to be held by custodians that OAG had identified in prior requests, but asked that Exxon identify additional custodians and search terms. (*Id.*) OAG provided a list of non-exclusive exemplar categories of



responsive documents, including those relating to reserves valuation and Exxon's implementation of the proxy cost of carbon. (*Id.*)

For the next eleven weeks, Exxon failed to inform the OAG whether it would produce these categories of responsive documents. (*Id.* ¶ 9.) In July 2016, Exxon's counsel stated that Exxon was evaluating the June 24, 2016 request and would respond more fully at an unspecified time in the future. (*Id.*, Ex. D.) OAG wrote Exxon later in July to request that Exxon immediately identify any additional custodians and search terms necessary to collect the documents described in the June 24 letter. (*Id.*, Ex. E.) In early August 2016, Exxon's counsel stated that it was continuing to review OAG's June 24 request. (*Id.*, Ex. F.) In a September 6 letter, OAG informed Exxon that OAG was increasingly concerned with the pace of Exxon's document production and its continued failure to address the issues raised in the June 24 letter. (*Id.*, Ex. G.) OAG also raised its ongoing concern that, even though it had requested and prioritized documents from the authors and contributors to *Managing the Risks* starting in December 2015, Exxon had still not completed its production of these documents. (*Id.*) On September 8 and 13, Exxon stated that it had identified additional potential document custodians in response to OAG's June 24 request and that that it would begin producing documents from those custodians. (*Id.*, Exs. H, I.)

In an October 14 letter, OAG requested that Exxon expand its list of search terms because—based on OAG's review of certain documents in Exxon's production—it appeared that Exxon employees had used words and phrases to reference proxy cost that might not be captured by the existing search terms. (*Id.*, Ex. J.) OAG also identified additional custodians that were likely to have documents concerning proxy cost. (*Id.*).

In a November 1, 2016 letter to Exxon, OAG noted that Exxon had not yet completed its production of the general categories of documents prioritized in OAG's June 24 letter or responded to OAG's October 14 letter specifically regarding proxy cost documents. (*Id.*, Ex. K.) OAG asked these documents be produced by November 23, 2016 and that Exxon's counsel confirm by November 4 that Exxon would do so.

Those documents are the documents that OAG now seeks to compel, consisting of:

Documents concerning (i) Exxon's valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting, including documents held by additional custodians and documents found using appropriately-targeted search terms, *including, but not limited to*, documents relating to the disclosure, calculation, use and application of the proxy cost of carbon/greenhouse gases (also known as the carbon price).

(*Id.*, ¶ 17.) Exxon did not confirm by November 4, 2016 that it would produce those documents by November 23, 2016. (*Id.* ¶ 18.)

In a November 11, 2016 letter to OAG, Exxon stated that it would produce the requested documents, but refused to confirm that production would be completed by November 23, 2016, or any other date. (*Id.*, Ex. L.) Exxon also refused to expand its search terms to address obvious deficiencies in its prior methodology. (*Id.*) Finally, Exxon unilaterally declared that it would not produce documents revealing how it values, accounts for and reports its assets and liabilities generally, but only documents that specifically discuss how those processes are affected by climate change, which would leave OAG understanding only one half of the relevant equation. (*Id.*) Exxon's unilateral limitation would deprive the OAG of documents reflecting Exxon's procedures for assessing the impact, for example, of declining oil and gas prices on reserves, impairments, and capital expenditures.

Contemporaneous with this pattern of delay and resistance, and while feigning compliance in this forum, Exxon is improperly seeking to quash the OAG's subpoena outright in a different forum based on arguments it has not advanced here. Specifically, one business day after OAG moved in this Court to enforce its related third-party subpoena to Exxon's independent auditor, PricewaterhouseCoopers, Exxon sought to add OAG to its pending federal lawsuit in the Northern District of Texas against the Attorney General of Massachusetts. (*Id.*, Ex. M.) This was so Exxon could ask that court to enjoin enforcement of the subpoena to Exxon on constitutional grounds, without revealing this Court's role in supervising compliance with OAG's underlying investigation. (*Id.*) That motion was granted on November 10, 2016. (*Id.*, Ex. N.) The amended complaint in the Texas federal forum that Exxon is now permitted to serve on OAG seeks preliminary and permanent injunctive relief that, if granted, would effectively terminate OAG's investigation of Exxon in New York and with it, the Court's supervision of Exxon's compliance under a New York investigative subpoena. (*Id.*, Ex. O.)

## **ARGUMENT**

### **THE COURT SHOULD GRANT THE ATTORNEY GENERAL'S MOTION TO COMPEL**

C.P.L.R. 2308(b)(1) provides that a court "shall order compliance" with a non-judicial subpoena if it finds "the subpoena was authorized." To show that an investigatory subpoena issued by OAG is authorized, the Attorney General need only show "his [legal] authority, the relevance of the items sought, and some factual basis for his investigation." *Am. Dental Coop., Inc. v. Attorney General of N.Y.*, 127 A.D.2d 274, 280 (1st Dep't 1987).

Exxon has conceded in this Court that OAG has the authority to investigate it and it does not dispute that the Subpoena is valid or that OAG has acted in good faith. (ECF Docket No. 42 at pp. 33, 63-64.) Nor would there be any basis to dispute OAG's authority, basis for the

Subpoena, or good faith. As discussed below, OAG has legal authority under New York Executive Law § 63(12), General Business Law § 352 (the Martin Act), and General Business Law (G.B.L.) § 349 to investigate whether Exxon’s disclosures to investors and the public are fraudulent, deceptive or misleading. As further discussed, OAG has a factual basis for exercising that authority based Exxon’s public and investor-facing statements concerning the risks posed to its business by climate change. Moreover, the specific documents that OAG seeks to compel here are reasonably related to that investigation because Exxon’s potentially misleading statements include representations regarding the valuation, accounting and reporting of its assets and liabilities, and the impact of climate change-driven risk on those processes.

**A. The Attorney General Had Legal Authority to Issue the Subpoena.**

It is settled law in New York that the Attorney General has broad authority under Executive Law § 63(12), the Martin Act, and G.B.L. § 349 to issue and compel compliance with subpoenas. Courts have long recognized that these statutes grant the Attorney General “broad” investigative authority to issue subpoenas to “conduct investigations into possible violations of the law.” *See, e.g., Am. Dental Coop.*, 127 A.D.2d at 279. And the Court of Appeals has declared that “[t]he Attorney General has been given broad investigatory responsibilities to carry out his vital role to protect the public safety and welfare.” *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 589 (1984).

***Executive Law § 63(12).*** Executive Law § 63(12) empowers the Attorney General to investigate “repeated fraudulent or illegal acts or . . . persistent fraud or illegality in the carrying on, conducting or transaction of business.” Exec. Law § 63(12). In support of this investigatory authority, the statute empowers the Attorney General to “take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.” *Id.* Fraudulent conduct covered by Executive Law § 63(12) is broadly defined to include any act

that “has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud.” *State of N.Y. v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 314 (1st Dep’t 2003); *see also State of N.Y. v. Applied Card Sys., Inc.* 27 A.D.3d 104, 106 (3d Dep’t 2005), *aff’d on other grounds*, 11 N.Y.3d 105 (2008).

It is well-settled that the Attorney General has expansive investigatory authority under Executive Law § 63(12). *See Am. Dental Coop.*, 127 A.D.2d at 279 (Attorney General has “broad” authority “to conduct investigations into possible violations of the law” under Executive Law § 63(12)); *see also Lennon v. Cuomo*, 92 A.D.3d 411, 412 (1st Dep’t 2012) (same); *Matter of Hogan v. Cuomo*, 67 A.D.3d 1144, 1146 (3d Dep’t 2009) (upholding “broad” subpoena by Attorney General under Executive Law § 63(12) for decades of records); *Matter of Schneiderman v. Rillen*, 33 Misc. 3d 788, 789 (Sup. Ct., Dutchess County 2011) (“The Attorney General is permitted broad authority to conduct investigations based on the complaints of others or on his own information, with respect to fraudulent or illegal business practices.”).

***The Martin Act, G.B.L. § 352.*** The Martin Act empowers the Attorney General to investigate securities fraud, “either upon complaint or otherwise.” G.B.L. § 352(1). Under the Martin Act, the Attorney General can conduct investigations by examining witnesses and “requir[ing] the production of any books or papers which he deems relevant or material to the inquiry.” *Id.* § 352(2).

Courts have repeatedly recognized the broad investigatory authority of the Attorney General under the Martin Act. *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 N.Y.3d 341, 349-50 (2011) (“[T]he Attorney-General [has] broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public[.]”); *Greenthal v. Lefkowitz*, 342 N.Y.S.2d

415, 417 (1st Dep’t 1973), *aff’d*, 32 N.Y.2d 457 (1973) (recognizing that the Martin Act grants the Attorney General “exceedingly broad” power and “wide discretion in determining when an inquiry is warranted”); *Gardner v. Lefkowitz*, 97 Misc. 2d 806, 811-12 (Sup. Ct., N.Y. County 1978) (“[T]he power of the Attorney-General under article 23-A of the General Business Law . . . is exceedingly broad and grants a wide discretion to the Attorney-General in determining whether an inquiry is warranted[.]”).

**G.B.L. § 349.** New York General Business Law § 349 empowers the Attorney General to investigate “[d]eceptive acts or practices in the conduct of any business, trade or commerce[.]” G.B.L. § 349(a). The Attorney General may issue subpoenas in connection with investigations under this statute. *Id.* § 349(f). The Attorney General’s authority to issue subpoenas under G.B.L. § 349 is construed broadly. *See Lennon*, 92 A.D.3d at 412 (enforcing subpoena under Attorney General’s “broad authority” pursuant to G.B.L. § 349 and Executive Law § 63(12)).

**B. There Is A Factual Basis for OAG’s Investigation.**

To show the validity of a nonjudicial subpoena, it is sufficient that “the Attorney General has set forth the basis for his investigation in sufficient detail in an attorney affirmation.” *Rillen*, 33 Misc. 3d at 790; *see also Matter of Roemer v. Cuomo*, 67 A.D.3d 1169, 1170 (3d Dep’t 2009) (Attorney General need only show “some factual basis for his investigation”); *Abrams v. Thruway Food Mkt. & Shopping Ctr., Inc.*, 147 A.D.2d 143, 147 (2d Dep’t 1989) (Attorney General “is not required to establish the existence of probable cause” to issue subpoena); *Am. Dental Coop.*, 127 A.D.2d at 280 (requiring “some factual basis for his investigation”); *Wiener v. Abrams*, 119 Misc. 2d 970, 973 (Sup. Ct., Kings County 1983) (“While persistent and repeated fraud or illegality is an essential predicate for the granting of an injunction under [Executive Law § 63(12)] . . . such a showing is not necessary at this investigatory stage for the issuance of subpoenae duces tecum . . . At this time, it is only required that the Attorney-General establish

some relevancy and basis for its investigation[.]” (citations omitted). Further, courts apply a presumption is that the Attorney General is acting in good faith when commencing an investigation and issuing a subpoena. *See, e.g., Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988); *Roemer*, 67 A.D.3d at 1171; *Thruway Food Mkt. & Shopping Ctr.*, 147 A.D.2d at 147; *Am. Dental Coop.*, 127 A.D.2d at 280.

Thus, the Attorney General need not show that there “has actually been a repeated and persistent commission of fraudulent or illegal acts” to justify the issuance of a subpoena pursuant to Executive Law § 63(12). *Prestige Sewing Stores of Queens, Inc. v. Lefkowitz*, 54 Misc. 2d 188, 189 (Sup. Ct., N.Y. County 1967) (noting that subpoena power is intended to allow the Attorney General to determine whether or not prohibited acts have been committed). Nor does the Attorney General need to demonstrate probable cause that an illegal act was committed. *Thruway Food Mkt. & Shopping Ctr.*, 147 A.D.2d at 147.

**C. The Documents that OAG Seeks to Compel Are Reasonably Related to the Investigation.**

An investigatory subpoena is valid if the material sought has “a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.” *Virag v. Hynes*, 54 N.Y.2d 437, 442 (1981) (citation omitted). A court will sustain a subpoena by the Attorney General unless it calls for information that is “utterly irrelevant to any proper inquiry,” or the subpoena’s “futility . . . to uncover anything legitimate is inevitable or obvious.” *La Belle Creole Intl., S. A. v. Attorney General of N.Y.*, 10 N.Y.2d 192, 196-97 (1961) (citations omitted) (holding that, “[w]hatever the ultimate outcome” of the investigation, “there can be no doubt” that the records sought “were material and pertinent in an investigation whose purpose was to ascertain whether or not [a company] was carrying on its affairs in compliance” with State alcohol beverage control laws and Executive Law § 63(12)); *see also Anheuser-Busch*, 71

N.Y.2d at 331-32; *Roemer*, 67 A.D.3d at 1170; *Thruway Food Mkt. & Shopping Ctr.*, 147 A.D.2d at 147. “An investigation would be stymied at the outset if law enforcement officials had to pinpoint exactly what the subpoenaed materials were expected to reveal.” *Am. Dental Coop.*, 127 A.D.2d at 283. Further, “[a] subpoena is not rendered invalid merely because it requires production of a substantial number of documents,” as “relevancy, and not quantity, is the test of the validity of a subpoena.” *Id.* at 282-83 (citation and internal brackets omitted).

Moreover, Exxon cannot use its recalcitrance to use updated search terms or a failure to agree on the same with OAG as a basis to cast doubt on the continuing, reasonable relationship between OAG’s ongoing requests and its investigation. *Shaw Group Inc. v. Zurich Am. Ins. Co.*, No. 12-257-JJB-RLB, 2014 U.S. Dist. LEXIS 122516, at \*14 (M.D. La. Sept. 3, 2014) (“Failure to reach an agreement on search terms does not relieve [party that received requests] of its obligation to respond to discovery requests.”); *see also Tyler v. City of San Diego*, 2015 U.S. Dist. LEXIS 56309, at \*5 (S.D. Cal. Apr. 29, 2015) (same).

As established above, the information that OAG seeks to compel bears a reasonable relationship to OAG’s investigation of Exxon’s public statements concerning the impact of climate change on its business and the company’s potential violations of New York law in that regard. Indeed, Exxon has never contested the relationship between the requested categories of documents and OAG’s admittedly proper investigative purpose.



### CONCLUSION

For the reasons stated above, the Attorney General respectfully requests this Court to issue the proposed Order: (1) compelling Exxon to produce, no later than November 23, 2016:

Documents concerning (i) XOM's valuation, accounting, and reporting of its assets and liabilities, including reserves, operational assets, extraction costs, and any impairment charges; and (ii) the impact of climate change and related government action on such valuation, accounting, and reporting, including documents held by additional custodians and documents found using appropriately-targeted search terms, *including, but not limited to*, documents relating to the disclosure, calculation, use and application of the proxy cost of carbon/greenhouse gases (also known as the carbon price);

and (2) retaining continuing jurisdiction over Exxon's compliance with the subpoena, and mandating such other and further relief as the Court deems just and proper in implementing a schedule for the prompt production of all other responsive documents called for by the subpoena.

Dated: New York, New York  
November 14, 2016

Respectfully submitted,

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York

By:   
John Oleske  
Senior Enforcement Counsel

Katherine C. Milgram  
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**EXHIBIT 5**

# New York State Unified Court System



## WebCivil Supreme - Appearance Detail

Court: **New York Civil Supreme**  
 Index Number: **451962/2016**  
 Case Name: **PEOPLE OF STATE OF NEW YORK vs. PRICEWATERHOUSECOOPERS LLP**  
 Case Type: **Cd-Eother Commercial**  
 Track: **Complex**

### Appearance Information:

Appearance Date	Time On For	Appearance Outcome	Justice / Part	Comments	Motion Seq
12/15/2016	Supreme Initial (first time on)		OSTRAGER, BARRY R. IAS PRELIMINARY CONFERENCE 61	9:30AM	
11/21/2016	Motion		OSTRAGER, BARRY R. IAS MOTION 61EFM	3:00PM	<a href="#">002</a>
11/21/2016	Motion	Motion Decided-Open Appearance	OSTRAGER, BARRY R. EFSUBM		<a href="#">003</a>
10/24/2016	Motion	Motion Decided-Open Appearance	OSTRAGER, BARRY R. IAS MOTION 61EFM	9:30AM	<a href="#">001</a>
01/01/2016	Motion	Adjourned	OSTRAGER, BARRY R. ORDER TO SHOW CAUSE PART	3:00PM	<a href="#">002</a>
01/01/2016	Motion	Adjourned	OSTRAGER, BARRY R. ORDER TO SHOW CAUSE PART	9:30AM	<a href="#">001</a>

Close

**EXHIBIT 6**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

EXXON MOBIL CORPORATION, ) 4:16-CV-469-K  
Plaintiff, )  
)  
VS. )  
) DALLAS, TEXAS  
)  
MAURA TRACY HEALEY, )  
Attorney General of )  
Massachusetts, in her )  
official capacity, )  
Defendant. ) September 19, 2016

TRANSCRIPT OF PRELIMINARY INUNCTION HEARING  
BEFORE THE HONORABLE ED KINKEADE  
UNITED STATES DISTRICT JUDGE

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Proceedings reported by mechanical stenography and  
transcript produced by computer.

1 PRELIMINARY INJUNCTION HEARING - SEPTEMBER 19, 2016

2 P R O C E E D I N G S

3 THE COURT: Okay. Case of Exxon Mobil Corp. versus  
4 Maura Tracy Healey and a bunch of others, Cause Number  
5 4:16-CV-00469-K, set today for hearing on this motion for  
6 preliminary injunction.

7 And before I begin, let me know. If y'all have  
8 already settled this, let me know and I'll stop right now. No?  
9 Y'all didn't settle this? I'm just shocked. I would have  
10 thought for sure. I'm kidding. I'm kidding. I'm just trying  
11 to keep y'all from being so serious.

12 I know it's an important case, but as far as I know  
13 there is no dead bodies in this case, correct? There's not --  
14 it's not a murder case. There's no -- death penalty is not --  
15 so y'all kind of calm it down a little bit.

16 All right. So here we go.

17 Mr. -- who's going to argue for ExxonMobil? Y'all  
18 have 300 lawyers on your side.

19 Ms. Cortell, are you going to do it?

20 MS. CORTELL: I am not, Your Honor. I'm sort of the  
21 introducer.

22 THE COURT: Introducer.

23 MS. CORTELL: Introducer, yes, sir.

24 THE COURT: Well, good.

25 MS. CORTELL: Your local introducer.



1 THE COURT: well, good, good.

2 Okay. well, tell me who these folks are.

3 MS. CORTELL: Presenting for ExxonMobil today will be  
4 Justin Anderson at the far end of the table.

5 MR. ANDERSON: Good morning, Judge.

6 THE COURT: Gosh, are you out of law school? You  
7 look so young.

8 MS. CORTELL: Your Honor, he's a little older than he  
9 looks.

10 THE COURT: Is he? You've got to admit he looks  
11 pretty young.

12 MS. CORTELL: He does.

13 THE COURT: I mean, really.

14 MS. CORTELL: And they're looking younger every day.  
15 In fact, younger next to him is Sam Rudman.

16 THE COURT: Okay.

17 MS. CORTELL: And then our senior lawyer from Paul  
18 Weiss is Ted Wells.

19 THE COURT: Hi, Mr. Wells. How are you?

20 MR. WELLS: Would somebody say I look younger?

21 THE COURT: I wasn't going to say that about you,  
22 Mr. Wells. Okay.

23 MS. CORTELL: And from Cantey Hanger, local counsel  
24 with me, is Ralph Duggins.

25 THE COURT: Okay. Hi, Mr. Duggins.

1 MR. DUGGINS: Good morning, Your Honor.

2 MS. CORTELL: And then on behalf of ExxonMobil we  
3 have vice president and general counsel, Jack Balagia.

4 MR. BALAGIA: Good morning, Your Honor.

5 THE COURT: The only person with any white hair on  
6 your side.

7 MS. CORTELL: Your Honor, I won't disclose my true --

8 THE COURT: Well, okay. I won't tell. Well, good.

9 Okay. And y'all are going to take 45 minutes; is  
10 that right? And you're going to offer whatever you've got to  
11 offer. And I understand that's what both side are going to do.  
12 We're not calling any witnesses. Is that right?

13 MR. ANDERSON: That's right, Judge. We had an  
14 agreement to just use the materials that are already in the  
15 record.

16 THE COURT: I want to tell you I appreciate y'all  
17 doing that and y'all working together on that.

18 MR. ANDERSON: Of course, Judge.

19 THE COURT: Okay. On the other side is there an  
20 introducer, or do I need to go through it?

21 MR. CAWLEY: Good morning, Your Honor. Douglas  
22 Cawley from McKool Smith, and I am the introducer. I am out of  
23 law school, but I do have white hair.

24 THE COURT: Yes, you do. And my hair was as long as  
25 yours until I got a haircut yesterday.

1 MR. CAWLEY: Ah-oh. All right.

2 THE COURT: All right.

3 MR. CAWLEY: Thank you, Your Honor.

4 THE COURT: Tell me about all these --

5 MR. CAWLEY: Also presenting for Attorney General  
6 Healey will be Rich Johnston.

7 MR. JOHNSTON: Good morning, Your Honor.

8 MR. CAWLEY: He is chief legal counsel to the  
9 Attorney General of Massachusetts.

10 THE COURT: Well, good. Good to have you.

11 MR. JOHNSTON: Thank you very much.

12 THE COURT: You have one of those really strong "park  
13 the car" and Boston kind of accents or --

14 MR. JOHNSTON: No, I wasn't born there, so I'm not as  
15 strong as my neighbors --

16 THE COURT: Okay. But --

17 MR. JOHNSTON: -- in terms of accent.

18 THE COURT: If I need an interpreter, I'll tell you  
19 as you get to talking, okay?

20 MR. JOHNSTON: Okay. Thanks.

21 THE COURT: All right. Good.

22 MR. CAWLEY: We also have with us Melissa Hoffer.

23 MS. HOFFER: Good morning, Your Honor.

24 MR. CAWLEY: She is chief of the Energy and  
25 Environmental Bureau of the Attorney General's Office.

1 THE COURT: Also in Massachusetts, correct?

2 MS. HOFFER: Yes, Your Honor.

3 THE COURT: Okay. Great.

4 MR. CAWLEY: And beside her, Mr. Peter Mulcahy.

5 MR. MULCAHY: Good morning.

6 THE COURT: Good morning.

7 MR. CAWLEY: Mr. Mulcahy is an Assistant Attorney  
8 General in the Environmental Protection Division of the  
9 Attorney General's Office.

10 THE COURT: Okay.

11 MR. CAWLEY: And then Richard Kamprath --

12 MR. KAMPRATH: Good morning, Judge.

13 MR. CAWLEY: -- who's with McKool Smith in Dallas.

14 THE COURT: Okay.

15 MR. CAWLEY: We're ready to proceed, Your Honor.

16 THE COURT: All right. Well, it's good to have  
17 y'all. And I appreciate it. And I've got all your documents  
18 and I've read everything, except there were some things filed  
19 late that I'm sorry I haven't, but I'll get to those as soon as  
20 I can.

21 And I've got the Defendant's PowerPoint of what  
22 you're going to present today.

23 And I'm glad to take y'all's, too, at some point if  
24 you've got some sort of PowerPoint of what you're doing later  
25 on. You can file it. You don't have to file it right now, but

1 you can, okay?

2 MR. ANDERSON: And, Judge, we're happy to hand up now  
3 a copy.

4 THE COURT: Okay. That would be great.

5 MR. ANDERSON: And, of course, to opposing counsel  
6 also.

7 THE COURT: Great.

8 MR. ANDERSON: We also prepared for the Court a  
9 binder that has all of the exhibits that we intend to use  
10 during today's hearing, and it's cited in this presentation.  
11 So it might be a little bit easier to flip through a binder  
12 than to go through the appendices that were filed.

13 THE COURT: Okay. That's great.

14 Okay. And I'm assuming we've got some really sharp  
15 computer people that are going to make all of this work  
16 correctly today. I see a gentleman back there in front of a  
17 computer, so I'm assuming you're the man? He's the man. Okay.  
18 All right.

19 Okay. Where did you go to law school?

20 MR. MULCAHY: Harvard.

21 THE COURT: Do they teach this computer stuff there?

22 MR. MULCAHY: Not well.

23 THE COURT: Okay. All right. We're going to find  
24 out.

25 All right. Who's doing it on y'all's side? Who's

1 doing the computer side?

2 MR. ANDERSON: I have a clicker here, Your Honor, but  
3 we have redundancy.

4 THE COURT: Okay. All right.

5 All right. So here we go. I'm ready.

6 MR. ANDERSON: Thank you, Judge. May I approach?

7 THE COURT: Sure.

8 MR. ANDERSON: And, Your Honor, we also prepared two  
9 poster boards. With the Court's permission I'd like to use  
10 them during the presentation.

11 THE COURT: Look, there's no jury here. Y'all can  
12 do -- you can even walk around.

13 Now, if this were normal, I would make you wear white  
14 wigs and stay at the podium and use English that was used a  
15 hundred years ago, but not today.

16 MR. ANDERSON: Thank you. Thank you in particular  
17 for the white wigs.

18 THE COURT: Yeah. That's right.

19 MR. ANDERSON: It would be hot in here.

20 THE COURT: It would be good.

21 (Pause)

22 THE COURT: And I know it kind of seems like we have  
23 low lights in here, but that's so we can really get good --  
24 it's not so that we'll look like a lounge or something. It's  
25 just so we can really see this up here.

1           So if you need to turn it up a little bit, we can  
2           turn it up a little bit, Ronnie.

3           Go ahead.

4           MR. ANDERSON: Judge, are you able to see the poster  
5           boards from where you're sitting?

6           THE COURT: I can see this one. I can't see that  
7           one.

8           Okay. And y'all can get up and walk around if you  
9           can't see it. That's fine.

10          Okay. All right.

11          MR. ANDERSON: May I proceed?

12          THE COURT: Sure.

13          MR. ANDERSON: Judge, a preliminary injunction is an  
14          extraordinary remedy, and this is an extraordinary case. It's  
15          extraordinary because the Massachusetts Attorney General  
16          announced a plan to shape public opinion on climate change by  
17          holding her perceived political opponents to account for  
18          disagreeing with her.

19          She memorialized her plan with her collaborators in a  
20          common interest agreement that has its express purpose  
21          regulating speech. It listed among its objectives ensuring the  
22          accurate dissemination of information about climate change,  
23          accurate information according to the Attorney General.

24          And she issued a civil investigative demand that was  
25          focused on speech that she disagrees with and that targeted

1 entities who she perceives to be her political opponents.

2 So, Your Honor, this case is extraordinary because  
3 the evidence of viewpoint bias is so clear even before  
4 discovery is started.

5 And it's also extraordinary because of the widespread  
6 criticism that this investigation has drawn, including in the  
7 amicus brief that was filed by 11 state attorneys general  
8 before this Court last week. Those state AG's would be in a  
9 position to know the difference between a legitimate use of law  
10 enforcement power and a pretextual abusive one to regulate  
11 speech.

12 Your Honor, that's why we're here today. We're here  
13 today to ask this Court to prevent this pretextual use of law  
14 enforcement power to constrain and restrict the public debate  
15 on climate change.

16 THE COURT: why did y'all get singled out? There's a  
17 lot of energy companies.

18 MR. ANDERSON: Well, Your Honor, as part of the  
19 evidence in the record --

20 THE COURT: I'm asking that because obviously I'm  
21 going to ask them that. And I just want you to tell me why you  
22 think you got singled out.

23 I mean, could they have gone against Shell, who is  
24 based in another part of the world, or gone against some  
25 wildcatters here in Texas, or people in California? Oh, no,



1 there's no drilling out there, so it wouldn't be in California.  
2 So why y'all?

3 MR. ANDERSON: Your Honor, it's a good question. And  
4 in the record we see that there has been a campaign to  
5 discredit ExxonMobil in particular that was spearheaded by  
6 climate change activists and trial attorneys who actually  
7 presented their theories at the conference that kicked off this  
8 investigation.

9 And so what you see is actually documented, and we  
10 have it in the presentation, Your Honor, where, you know, back  
11 in January of this year at the Rockefeller Family Fund there is  
12 explicitly an agenda about discrediting ExxonMobil,  
13 delegitimizing it as a political actor.

14 And so they've targeted ExxonMobil as, from their  
15 point of view, a perceived political opponent perhaps because  
16 it's one of the most prominent, if not the most prominent,  
17 traditional energy company. And it's well documented.

18 Now, there are reasons -- I think that's a good  
19 question for the other side about why they're targeting  
20 ExxonMobil.

21 THE COURT: I'm going to ask them. That's why I'm  
22 asking you. I get that. I mean, there's nothing else other  
23 than this that prompted this?

24 You know, I came up through the world of politics.  
25 That's how I got here. I mean, I wasn't just out here because

1 I went to Harvard and they just found me. I came through the  
2 world of running for election and that sort of thing, so I  
3 understand a little bit about politics.

4 Did y'all poke the bear, so to speak? Did you do  
5 something to the Attorney General in Massachusetts that brought  
6 this on? Or did y'all give -- did the president of Exxon give  
7 money trying to promote somebody else or -- no?

8 MR. ANDERSON: Your Honor, you know, that doesn't  
9 seem to be the story here.

10 THE COURT: Okay.

11 MR. ANDERSON: The issue is that -- what's  
12 extraordinary about this is that ExxonMobil doesn't really do  
13 anything in Massachusetts. I mean, we don't sell gas there.  
14 We don't -- we don't issue securities there.

15 THE COURT: There's no ExxonMobil stations there?

16 MR. ANDERSON: Oh, there are, but they're owned by  
17 franchisees, so they're not actually owned by the company  
18 there. They're owned by independent owners.

19 But what's more -- what's even more remarkable is  
20 that for the last ten years -- and, again, this is part of the  
21 presentation as well -- it's well documented ExxonMobil has  
22 acknowledged the risks of climate change, acknowledged that  
23 climate change could affect its business, and that regulations  
24 that might be enacted in response to climate change could  
25 affect its business as well.

1 In fact, it's been promoting for at least since, I  
2 think, 2009 the carbon tax as a way of responding to climate  
3 change.

4 So this idea that someone has poked the bear or has  
5 been antagonistic towards -- in particular towards the views of  
6 the Attorney General is just contradicted by the record.

7 But, you know, if it would help the Court, what  
8 perhaps I could do is just proceed through the facts that  
9 are --

10 THE COURT: Oh, I'm going to stop you when I want to.  
11 It doesn't work that way.

12 I don't know. They may -- where are you from? I  
13 forgot.

14 MR. ANDERSON: I'm from Washington, Judge.

15 THE COURT: Yeah, yeah. They may do that there.  
16 That's not how we do it here, okay? I tied my horse outside  
17 and ran in here to ask questions.

18 MR. ANDERSON: Well, Your Honor, what could be  
19 helpful, if it would be usable to the Court --

20 THE COURT: Oh, go through your deal and I'll stop  
21 you when I want to.

22 MR. ANDERSON: Okay. Why don't we begin with the way  
23 this investigation began. It began with a press conference in  
24 New York back in March where the Attorney General announced,  
25 you know, the investigation.

1           And there are really three critical takeaways from  
2 this conference. First, the explicitly political nature of the  
3 objective.

4           And as you can see in the picture there, you know,  
5 they're standing behind "AG's United for Clean Power," you  
6 know, a policy objective. It's this idea that in order to  
7 address climate change we -- the country has to move from  
8 traditional sources of energies into renewable sources of  
9 energy. And they're all very frustrated. Members of this  
10 coalition are frustrated with the Federal Government for not  
11 doing more.

12           And then what you see they identify as a big part of  
13 the problem here is that the public is not on their side, that  
14 there's confusion, there's public perception where the public  
15 hasn't yet agreed that these are the correct solutions to the  
16 climate change problem.

17           And to this coalition that debate is over, the  
18 solutions are clear, and so what they need to do is clear up  
19 the confusion that remains. And the way they're going to do  
20 that is by holding accountable those entities and voices that  
21 disagree.

22           THE COURT: Basically, what they're saying is Exxon  
23 hasn't been telling the truth and we want to show that so that  
24 the public perception will change; is that right?

25           MR. ANDERSON: Essentially -- essentially what

1 they're saying is even more than that, is that -- and you'll  
2 see this in documents -- is that what we want to do is get  
3 ExxonMobil to stop speaking or to speak in favor of the  
4 policies we support so that public perception will come over to  
5 our side so we can enact the policies that we prefer, you know,  
6 renewable energy and the other things that Al Gore invests in.

7 And the problem with that is that that's just an  
8 improper use of an investigative law enforcement authority. It  
9 might be appropriate to hold congressional hearings or rallies  
10 outside of -- you know, outside of Congress to support a  
11 transition from traditional energy to these renewable sources.  
12 But the idea that you use a subpoena to burden those on the  
13 other side of the debate, to chill them, to ask about their  
14 policy positions, is just a misuse of law enforcement power.  
15 That's not what that power is for.

16 And, Judge, maybe it would be helpful to hear some of  
17 the Attorney General's own words --

18 THE COURT: Okay.

19 MR. ANDERSON: -- as she describes this political  
20 objective.

21 THE COURT: Okay.

22 (video played)

23 "But make no mistake about it, in my view, there's  
24 nothing we need to worry about more than climate change. It's  
25 incredibly serious when you think about the human and the

1 economic consequences and indeed the fact that this threatens  
2 the very existence of our planet. Nothing is more important.  
3 Not only must we act, we have a moral obligation to act. That  
4 is why we are here today.

5 "We know from the science and we know from experience  
6 the very real consequences of our failure to address this  
7 issue. Climate change is and has been for many years a matter  
8 of extreme urgency, but, unfortunately, it is only recently  
9 that this problem has begun to be met with equally urgent  
10 action. Part of the problem has been one of public perception,  
11 and it appears, certainly, that certain companies, certain  
12 industries, may not have told the whole story, leading many to  
13 doubt whether climate change is real and to misunderstand and  
14 misapprehend the catastrophic nature of its impacts.

15 "The states represented here today have long been  
16 working hard to sound the alarm, to put smart policies in  
17 place, to speed our transition to a clean energy future, and to  
18 stop power plants from emitting millions of tons of dangerous  
19 global warming pollution into our air."

20 MR. ANDERSON: So, Your Honor, as you see in these  
21 statements, it's all about politics. It's all about moving  
22 from traditional energy to renewables.

23 And in particular, part of the problem that the  
24 Defendant identifies is one of perception that there are  
25 certain industries, certain companies -- in the next slide

1 she'll name ExxonMobil as one of them -- that have been causing  
2 people not to agree with her about the catastrophic nature of  
3 the impact of climate change or the need to adopt these smart  
4 policies that she prefers that speed our transition to a clean  
5 energy future.

6 And then the next -- in the next breath she says, so  
7 this is how we're going to clear that up.

8 (video played)

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

16 THE COURT: So if you stop there --

17 (video played)

18 "By quick, aggressive action --"

19 THE COURT: -- that seems to imply they're going to  
20 go after other companies, too. That's what she says.

21 That's -- I don't know what other -- I guess there are other  
22 inferences, but that's what it seems.

23 MR. ANDERSON: Yeah. I mean, I think it's a fair --  
24 fair argument, Judge.

25 THE COURT: And I guess my question is going to be,

1 so why aren't they here?

2 why don't we just have up here everybody at once, get  
3 all this over with? Is it just one of many beginning, or  
4 what's going on?

5 MR. ANDERSON: Judge, it's unclear, and I think a lot  
6 will depend on what the Court does today about whether it  
7 allows this type of abusive, you know, use of law enforcement  
8 power to continue or whether it orders it to stop.

9 And I think it's exactly right, that, you know, based  
10 on that statement -- and by the way, based on the previous  
11 subpoena that was before this Court that was issued by the  
12 virgin Islands, they actually targeted some of the nonprofit  
13 groups that speak out on this issue, and there's still  
14 litigation going on in DC over that effort.

15 So I think you're right to see that this is the  
16 beginning of a trend, a trend that 11 state AG's have raised  
17 the alarm about and others are raising the alarm about. But  
18 it's in its infancy, and so there's still time to put an end to  
19 it.

20 THE COURT: Okay.

21 (video played)

22 "-- educating the public, holding accountable those  
23 who have needed to be held accountable for far too long, I know  
24 we will do what we need to do to address climate change and to  
25 work for a better future."



1 MR. ANDERSON: And these statements, Judge --

2 THE COURT: My question is, regardless of what we do  
3 here, if China and India and third world countries don't do  
4 something -- doesn't science say we've still got to get ahold  
5 of that? I mean, it seems to me.

6 I don't -- they are belching out stuff in China. I  
7 mean, you can barely go into their main cities without a mask  
8 on. It's terrible. I mean, I guess I don't get it. But,  
9 anyway, at that point, I don't get it. But I'll -- you can  
10 explain it to me.

11 MR. ANDERSON: Judge, that's a great point, because  
12 one of the very observations this subpoena, this civil  
13 investigative demand seeks to have ExxonMobil explain, is the  
14 former chairman's statement that in order to address climate  
15 change there needed to be a global effort that included  
16 reducing emissions from third world countries, so --

17 THE COURT: But I guess their answer is going to be,  
18 and I'll anticipate it, is that if you're lying, you're kind of  
19 the lead liar, and so you're leading everybody else down the  
20 primrose path. You are the pied piper.

21 MR. ANDERSON: But that's exactly the point. This is  
22 lying about public policy. For every debate there's someone on  
23 one side, someone on the other side.

24 THE COURT: No, no, no. I agree with that. But we  
25 kind of know back when those who were growing tobacco, it's

1 going to cause cancer. I mean, it isn't just public policy.  
2 There was -- there were things being hidden by the tobacco  
3 companies that weren't -- they weren't telling the truth about  
4 it, I mean, if that's what they're saying.

5 Is this -- is this that argument that, hey, there's  
6 really bad stuff behind all this that's causing terrible  
7 things?

8 MR. ANDERSON: Well, you know, Judge, if that were  
9 the argument, then you would expect the Defendants to be able  
10 to come forward and explain to you what the basis for the  
11 argument is, because we've shown that for the last ten years  
12 ExxonMobil has openly acknowledged the risks of climate change  
13 and again supports the carbon tax.

14 We have shown to you that this is a statute -- this  
15 is a statute that is a four-year limitations period. So all  
16 we're really talking about is what happened in Massachusetts  
17 over the last four years.

18 And we said in our briefs, identify the misleading  
19 statement, identify the falsehood, tell us what you think  
20 ExxonMobil did wrong. And what we got were basically two  
21 things in response: five documents from the 1980s where, if  
22 you look at them and -- you know, in the brief it makes it  
23 sound like in the 1980s ExxonMobil had it all figured out, it  
24 essentially determined that climate change was a serious  
25 threat, it knew how many degrees of temperature increase we

1 were looking at, and it knew the policies that had to be  
2 enacted in order to respond.

3 THE COURT: Okay.

4 MR. ANDERSON: And that's the characterization of the  
5 documents. And this has been in the press, too. But it's  
6 entirely misleading.

7 we put those documents in front of you. They're in  
8 the binder. They're in this presentation. You read them and  
9 they're riddled with caveats, hesitation, doubt. They say  
10 things like, you know, this is all subject to further analysis,  
11 we need better models, it would be premature to take any action  
12 based on this.

13 So, first of all, you've got that. The documents  
14 themselves are not these declarative, decisive statements that  
15 the Defendants would like them to be.

16 Then you also have the fact that what's in those  
17 documents is entirely consistent with the record that was being  
18 issued by the EPA, by MIT, by basically everyone speaking on  
19 this. So there's no big disconnect between what these internal  
20 documents say and what was generally available to the public at  
21 the time in the 1980s.

22 And three is, you know, these documents have been  
23 sitting at the University of Texas since 2003. They're not --  
24 they're not these smoking guns that were being locked away and  
25 hidden that were somehow rested and came to light. They're

1 just corporate records that nobody was ashamed of, no one was  
2 embarrassed, because this is not at all different from what the  
3 public knew or indicative of any type of effort to conceal.

4 So that was one, and I think --

5 THE COURT: Why are they at U.T.? Remind me about  
6 that.

7 MR. ANDERSON: I'm sorry?

8 THE COURT: Why are they at the University of Texas?

9 MR. ANDERSON: They were deposited there, I think,  
10 around 2003.

11 THE COURT: That's where Exxon puts its old archives  
12 or something or --

13 MR. ANDERSON: It might have been Legacy Mobil. We  
14 could find out and provide the Court with more information, but  
15 I believe it was just the nature of providing corporate records  
16 to a university --

17 THE COURT: Okay.

18 MR. ANDERSON: -- as is often the case.

19 So that was one theory, Judge. And it doesn't  
20 withstand scrutiny. It's pretextual. This is not what this is  
21 about. This is about this. This is about changing public  
22 perception by putting a subpoena on ExxonMobil to discourage it  
23 from speaking out on the other side of this debate.

24 But they came up with this other theory which was  
25 about the idea, well, if climate change regulations come into

1 place, then ExxonMobil might not be able to take the oil out of  
2 the ground and might not be able to refine and sell it.

3 Now, you know, that's -- their argument is that our  
4 proved reserves might have to be impaired or written down or  
5 something, as the theory goes, because of these regulations  
6 that might come up in the future.

7 Now, that sounds -- it sounds sketchy anyway, but  
8 let's say you take it as a plausible argument. Big problem  
9 with that is that the SEC in its regulations makes it  
10 unambiguous, clear as day, that you can't anticipate future  
11 regulations. You have to calculate proved reserves based on  
12 regulations as they exist today.

13 So even if the Defendants were right, and I don't  
14 think they are, but even if they were right that regulations  
15 are coming in the next few years that would limit the ability  
16 to extract traditional fossil fuel, SEC says you don't take  
17 that into account in reporting proved reserves. So that theory  
18 of fraud easily is swept away.

19 And so I guess the question still is, so what is the  
20 theory that would justify 40 years of records about climate  
21 change? what is the theory that justifies asking all of these  
22 questions about policy statements that ExxonMobil has made in  
23 the past? And it's this --

24 THE COURT: Well, I mean, let's think about the other  
25 side of that. If y'all were doing some really terrible things,

1 which apparently they think you are, shouldn't they be  
2 aggressive, and isn't that what the courts are for, and they're  
3 being innovative, and that's what we do here?

4 I mean, that's -- that's why we have courts, to come  
5 in here and fight about that, and try to use the court system  
6 to punish evildoers. Isn't that what it's for?

7 MR. ANDERSON: The Court doesn't -- the Court is  
8 really -- actually, it's explicitly not for the purpose of  
9 punishing evildoers because they speak out on the wrong -- on  
10 the perceived wrong side of a policy debate.

11 THE COURT: No, no, no, no, not just about speech,  
12 but if you were withholding -- you know, like the tobacco  
13 companies just lied about stuff for years and years and years,  
14 oh, no, we don't have this, we don't have that, we don't know  
15 that it's cancer causing, or the same in the asbestos kinds of  
16 cases.

17 If companies were doing that, companies ought to be  
18 held accountable. That's what I'm assuming they're going to  
19 argue ultimately. I don't know -- they're not arguing that  
20 today, but ultimately that's what they're going to say is, see,  
21 we told you, they had these documents that showed all this  
22 terrible stuff.

23 MR. ANDERSON: Well, Judge, again, it would have to  
24 fit into some theory of fraud that could be litigated.

25 I mean, you might have noticed that the New York

1 Attorney General has entirely walked away from this theory that  
2 we knew in the past and that that was fraudulent because we  
3 didn't disclose it.

4 He's completely -- it's reported in the press. He's  
5 completely walked away from that, is now focused on the  
6 stranded asset theory that is equally flawed for the reasons I  
7 just described.

8 THE COURT: The what?

9 MR. ANDERSON: The idea that our reserves need to be  
10 impaired because of future government regulations. That seems  
11 to be what he's shifted his focus on.

12 THE COURT: That they should be impaired?

13 MR. ANDERSON: They should be, even though the SEC  
14 regulations prohibit that.

15 THE COURT: Okay.

16 MR. ANDERSON: But the -- Judge, I think that there  
17 would need to be some type of theory that actually made sense,  
18 some theory of fraud that you could present with a straight  
19 face and not turn red when you're explaining it, because what  
20 we have here is a statute that says don't defraud consumers,  
21 don't defraud investors in the state of Massachusetts,  
22 four-year limitations period.

23 And so we have said, what have we said? What have we  
24 done that could possibly give rise to this -- to an enforcement  
25 action against the company?

1           And, you know, we've gone through it about we don't  
2   sell gas there, we don't talk -- we don't sell gas to  
3   consumers, we don't sell our equity to investors. We've gone  
4   through. And what are the statements that could give rise to  
5   it?

6           And all they've been able to come back with are these  
7   two pretexts. They say, oh, these five documents show that you  
8   knew something. That's absurd. They don't show anything.  
9   They show that in the early '80s ExxonMobil knew about as much  
10   as anyone else on climate change and recognized that it was a  
11   fluid situation, the research needed to be developed, and we'll  
12   see where it goes.

13           And in the last ten years, as science has gotten a  
14   little more clear, as people's understanding has become a  
15   little more focused, ExxonMobil has been right there saying  
16   climate change is real, we recognize that, and it could have  
17   impacts on our business.

18           So when you talk about the comparisons to tobacco  
19   companies, it's just totally inept. There's no comparison  
20   here. The idea that ExxonMobil knew anything that others  
21   didn't, there's no basis for that. The idea that ExxonMobil  
22   concealed information to the public, you've got no basis for  
23   that, certainly not during the four-year limitations period.

24           THE COURT: Well, they want to -- they want to look  
25   and see. That's what they want. They want to look and see.



1 They don't trust you.

2 I mean, they just -- hey, he's a nice man, we like  
3 him, he's a good lawyer and all that, but we don't trust Exxon.  
4 We'll just look and we'll determine one way or the other what  
5 the real -- what the real truth is. Isn't that going to be  
6 their argument?

7 MR. ANDERSON: Well, that is, and that sounds like a  
8 fishing expedition to me. It sounds like they're going out  
9 there to see what they can find. And the Fourth Amendment  
10 doesn't authorize that. It doesn't authorize them to go out on  
11 a lark and see -- you know, let's see if we can stir up in the  
12 corporate -- 40 years of corporate records at ExxonMobil to see  
13 if maybe somewhere in there there's a document we can use.

14 And that would just -- that would be even without  
15 this press conference, even without the press. The problem is  
16 when you hear -- so when you hear what was --

17 THE COURT: Do you want me to hear some more?

18 MR. ANDERSON: Actually -- well, you know, Judge, we  
19 have a bit more, but not to hear, just to read.

20 THE COURT: All right.

21 MR. ANDERSON: Also present was the New York Attorney  
22 General. And he was sounding similar themes about the need to  
23 clear up this confusion, confusion about policy.

24 Again, this is called -- you know, the First  
25 Amendment calls this debate, disagreement, free exchange of

1 ideas. what he's talking about is cleaning up confusion,  
2 stepping into the breach of federal inaction, going after the  
3 morally and vacant forces -- I think they're talking about  
4 us -- that are trying to block Federal Government action, and  
5 talking about an unprecedented level of commitment and  
6 coordination.

7 THE COURT: I guess one of the things that really  
8 concerns me looking at all those attorney generals, I don't  
9 recognize them personally, but they're all from the Northeast,  
10 correct?

11 MR. ANDERSON: Your Honor, I think Maryland is in  
12 there. Does that -- does that count as the Northeast?

13 THE COURT: Yes. Yes, it does.

14 MR. ANDERSON: And, of course, the Virgin Islands.

15 THE COURT: Well, and the Virgin Islands are a  
16 different animal, but they are what they are.

17 I guess my concern is, is that you've got a group of  
18 very bright, well-meaning, thoughtful folks in the Northeast  
19 obviously disagreeing with, I think, bright, thoughtful,  
20 careful people in the Southeast and the Southwest.

21 You know, it's a -- it's an interesting -- it's an  
22 interesting precedent. I guess someday we'll end up with much  
23 smarter folks at the Supreme Court to try to decide that. But,  
24 you know, it's just one of those things that are really sad. I  
25 guess I would rather have geniuses and scientists deciding this

1 versus a generalist in Dallas, Texas. But it is what it is.  
2 And it's just -- it's just difficult. That's a very difficult  
3 thing to see.

4 There's not one southern attorney general on this, is  
5 there? Not one, correct?

6 MR. ANDERSON: Correct. And, in fact, the  
7 southern --

8 THE COURT: And no producing states attorney generals  
9 are on this, correct? None of those people are producing.

10 MR. ANDERSON: Judge, in the coalition there is  
11 Virginia as well, just to be clear.

12 THE COURT: Is Virginia there?

13 MR. ANDERSON: Virginia.

14 THE COURT: Yeah. How much drilling happens in  
15 Virginia?

16 MR. ANDERSON: Yeah. I just want to be clear, Judge.

17 THE COURT: Let me tell you, you can count those rigs  
18 on one hand.

19 Is Pennsylvania there?

20 MR. ANDERSON: Pennsylvania was not -- you know,  
21 Judge, I have this -- have this on a binder.

22 THE COURT: Pennsylvania is not going to be there. I  
23 don't have to look. Pennsylvania is not going to be there.  
24 They drill the heck out of Pennsylvania, because it goes right  
25 up to the border -- I mean not the border but the state line

1 with New York. They drill right on the state line.

2 It's very interesting when you look at the study of  
3 that. I mean, it just goes right up to it. So those  
4 Pennsylvania people are sucking the heck out of the oil  
5 underneath New York. I mean, they are. Just the way it is.

6 But, anyway, go ahead.

7 MR. ANDERSON: Well, it must be busy --

8 THE COURT: I'm just saying that is a very -- it's  
9 problematic or it's not problematic. And I guess I don't -- I  
10 mean, doesn't it concern y'all if we're kind of getting a us  
11 and them kind of a thing? I hate that.

12 MR. ANDERSON: Oh, Judge, absolutely. We'd prefer  
13 not to be here. We'd prefer not to be in the middle of this.  
14 But it is -- it is one of these regional disputes that is  
15 essentially political where one side is attempting to use law  
16 enforcement power to silence the other side.

17 And just to answer your question about  
18 Pennsylvania --

19 THE COURT: No, the real answer is -- and I'm going  
20 to ask them. If you had oil underneath your state like Texas  
21 has underneath its state, would you take the same position? of  
22 course, I know the answer is going to be "yes." And I'm just  
23 saying, think about that.

24 Is that really -- I mean, mercy, we could drill under  
25 this courthouse probably and find gas or oil in Texas. It's

1 just -- that's just the way the Earth was made. The Barnett  
2 shale actually comes even over here.

3 But, anyway, just a curious -- I'm just curious about  
4 that.

5 Go ahead.

6 MR. ANDERSON: It's a valid point, Judge. And, in  
7 fact, if you think about it, it would be something like -- you  
8 know, we have Al Gore up here. He's not an AG, but he was at  
9 this press conference. What he's known for is two things:  
10 climate change activism and investing in companies that are  
11 developing alternative sources of fuel.

12 THE COURT: And creating Al Jazeera, or selling his  
13 company to Al Jazeera.

14 But go ahead.

15 MR. ANDERSON: Right. Well, Judge, no one is  
16 criticizing -- if what you're saying -- I think you're onto  
17 something here when you say that.

18 If this became a regional type dispute -- he says a  
19 lot of things about the dire consequences of climate change and  
20 the need to adopt renewables and how renewables are the only  
21 solution. Now, of course, that affects his financial  
22 interests. And you could see if this were to escalate, you  
23 could see the attorneys general and producing states  
24 investigating him.

25 And so you could see how this type of thing -- if the

1 Defendant is right that it's appropriate to drop subpoenas on  
2 people and entities that disagree with you on politics, then  
3 you could just see how this snowballs, because for as many  
4 states that are on one side of the issue, you have an equal  
5 number on the other side of the issue. And they all have the  
6 same power to issue subpoenas that go outside of their states.

7 And that's why what we're doing today is just so  
8 important, Judge, because you are right that this is a  
9 troubling -- and you can see it in the way that this whole  
10 enterprise drew this swift criticism from the state attorney  
11 generals in producing states and elsewhere.

12 THE COURT: why didn't you bring in the State of  
13 Texas and other states on your side?

14 MR. ANDERSON: Bring them in?

15 THE COURT: Yeah. why didn't you bring them in?

16 MR. ANDERSON: You mean as parties?

17 THE COURT: Yeah.

18 MR. ANDERSON: well, you know, Judge, it's a good  
19 question. They filed an amicus --

20 THE COURT: This is an innovative -- this is a very  
21 innovative, unique kind of sort of thing. I'm just saying if  
22 you thought outside the box, I kind of would have -- I mean, if  
23 I had a state on my team, I think I would like it. I mean, I  
24 just -- you're telling me this is all political. If it is, I  
25 think I would bring in some political animals. It's your

1 business, not mine.

2 MR. ANDERSON: Well, Judge, we do have 11 states on  
3 our side.

4 THE COURT: Yeah, I know. They filed amicus briefs.  
5 But I'm saying as -- you know, whatever.

6 Okay. Go ahead.

7 MR. ANDERSON: Well, Judge, the litigation is  
8 proceeding, and people are hearing --

9 THE COURT: Who knows what will happen after that? I  
10 know.

11 MR. ANDERSON: Right. I mean, look, this was an  
12 unprecedented filing. I mean, this is not just one. Eleven  
13 state attorneys general are saying we're law enforcement, these  
14 are our powers, we know the proper use, we know the improper  
15 use, and what Massachusetts is doing is wrong.

16 These are some of the statements in the brief:

17 That law enforcement power doesn't include the right  
18 to engage in unrestrained investigative excursions to  
19 promulgate a social ideology, or chill the expression of points  
20 of view.

21 Using law enforcement to resolve a public policy  
22 debate undermines the trust in the offices -- undermines the  
23 trust in offices of state AG's and threatens free speech.

24 Silencing Exxon not only harms ExxonMobil, it harms  
25 those who want to hear the views that are expressed by

1 ExxonMobil.

2 And probably most -- most hard-hitting, Judge, is the  
3 way they conclude, is that, you know, our history is embroiled  
4 with examples where legitimate exercise of law enforcement is  
5 soiled with political ends rather than legal ones, and  
6 Massachusetts seeks to repeat that unfortunate history.

7 They might not be parties -- I mean, they might not  
8 be parties yet, but this statement speaks -- it sends a loud  
9 message about where their views are and the threat that they  
10 perceive to not only their -- you know, their institution and  
11 the public confidence in their institutions but also to the  
12 free exchange of ideas on this matter.

13 THE COURT: You know, when you're looking at law  
14 enforcement, it's always troubling. I'll give you another law  
15 that's troubling that could be used. For example, when Al Gore  
16 was attacked for making political phone calls from the White  
17 House, was that an overreach? Is that similar to this? And  
18 eventually that was all thrown out.

19 Are those the sort of things that, you know -- or  
20 using RICO in political efforts that go after political --  
21 whether it's by Republicans or Democrats or Whigs or whoever is  
22 doing it, is that too much?

23 I mean, are we using -- are we going too far? I  
24 don't know. I guess that's something -- all of these are  
25 questions, I guess, for you and the other side, so I wanted to



1 warn them.

2 You know, it's -- the power of Government, and I  
3 would say especially in criminal cases, is always -- needs to  
4 be checked. It can't be unfettered. I mean, it can't be  
5 unfettered. Is this one that has gone too far? And that's  
6 what they're saying. Is that what you're saying?

7 MR. ANDERSON: Yeah. Absolutely, Judge. Your  
8 instinct here is exactly right. This is -- this is on the  
9 wrong side of that line.

10 The law enforcement -- and no one up here is saying  
11 that law enforcement can't issue subpoenas to investigate  
12 crimes, that the proper use of law enforcement authority isn't  
13 important and appropriate. We recognize that. These 11 state  
14 attorneys general recognize that. Among all, they would  
15 recognize that. But what we're saying is that --

16 THE COURT: You're saying this ought to be done in  
17 legislatures and Congress and --

18 MR. ANDERSON: Exactly.

19 THE COURT: -- all those places?

20 MR. ANDERSON: Exactly. And that's what they're --  
21 and they recognize that. And that's what they're complaining  
22 about. What they say is, oh, there is gridlock in Washington  
23 because some of the northeastern states don't agree with some  
24 of the southeastern states about how to resolve this conflict.  
25 And to them, that is not acceptable. To them, they're saying

1 what we need to do is change the focus of the debate and take  
2 it out of Congress where things aren't happening and put it in  
3 states -- the attorney generals' offices to start issuing  
4 subpoenas on those who disagree with us so that the policy we  
5 like gets enacted, because the people who are saying that it  
6 shouldn't be enacted are terrified of getting these subpoenas  
7 in the mail asking for 40 years of records so that the  
8 investigators can search through those records and find  
9 something, really anything that they can find in there, so they  
10 can start to piece together some type of case.

11 And, meanwhile, while you're responding, you've got  
12 that sword of Damocles dangling over you. You know, is it  
13 going to drop? It this -- you know, what can we say to appease  
14 the regulator? And that's exactly -- Judge, and that's exactly  
15 the plan here.

16 You know, let me back up just a second, because, you  
17 know, at this meeting back in March before they got out there  
18 and had their press conference -- and one of the things that --  
19 you know, of the things that they tried to conceal is that  
20 they had a meeting --

21 THE COURT: Is this all in the booklet you gave me?

22 MR. ANDERSON: Yeah.

23 THE COURT: Okay.

24 MR. ANDERSON: Yes, Judge. I could direct you to  
25 the --

1 THE COURT: "Yeah"? "Yeah"? This is federal court.  
2 "Yeah" is not acceptable even in the South, okay?

3 MR. ANDERSON: Sorry, Judge. It's page 13 of the  
4 presentation.

5 THE COURT: Yes, sir. Yes, sir, I can see it.

6 MR. ANDERSON: And what we see here is that, you  
7 know, before they came out on the stage in the clips that we  
8 just saw --

9 THE COURT: Yes, sir.

10 MR. ANDERSON: -- they had this meeting with two  
11 people, Peter Frumhoff of the Union of Concerned Scientists,  
12 and Matthew Pawa, who's a climate change attorney. He sued  
13 ExxonMobil before over climate change, and a judge threw out  
14 the case and said this is what you should be taking to -- this  
15 is what you should be taking to Congress, not to the courts.

16 Anyway, they had a meeting where they met with these  
17 men. This was not in public. This wasn't recorded. We don't  
18 know what -- we don't know exactly what was said, but we know  
19 what these two men believe. We know that they pioneered this  
20 theory back in 2012 that if they could persuade a single  
21 sympathetic state attorney general to go issue a subpoena and  
22 get some documents, they could then use those documents --

23 THE COURT: Wait. You used the tobacco example.

24 MR. ANDERSON: That's right, Judge. They see that  
25 you can see the power of state prosecutors to get lots of

1 records and then see if you can pressure the companies once you  
2 get those records -- well, first of all, maybe into a  
3 settlement or something like that, but that's not even what  
4 he's talking about. What he's talking about is putting  
5 pressure on the industry that could eventually lead to its  
6 support for legislative and regulatory responses to global  
7 warming.

8 THE COURT: What do they really want out of y'all,  
9 other than your documents? What do they want? What do you  
10 want? What do they want?

11 MR. ANDERSON: I think they want ExxonMobil to get on  
12 their train. They want ExxonMobil to support the policies that  
13 they favor, including a shift to renewables, or to be quiet.  
14 They might settle for that.

15 They either want us to be quiet or to agree with  
16 them, but to stop being on the side that they perceive as  
17 wrong, to stop being on the side that's slowing down the  
18 progress towards renewables that's sowing the confusion that  
19 bothers them so much.

20 According to one of the attorneys general, I think it  
21 was Schneiderman, the debate is settled, the debate is over.

22 And so what they would like ExxonMobil to do is to  
23 stop speaking, stop presenting another point of view, and  
24 either be quiet or support their position.

25 And this is laid out -- I mean, it's laid out in a

1 document about the goal here is not to protect consumers, it's  
2 not to protect investors. The goal is to get these documents  
3 so that you can put pressure on the industry to change its  
4 support for legislative and regulatory responses to global  
5 warming. I mean, it's well documented. It's in the public  
6 record.

7 And you see also, Judge, I think -- I think my  
8 clicker stopped. Oh, there it goes. You can see in the -- I  
9 was describing this meeting before back in January. It's all  
10 pursuant to this strategy that Matthew Pawa and others have  
11 been cooking up about targeting ExxonMobil, delegitimizing them  
12 as a political actor.

13 I mean, this is a movement that is being -- it's a  
14 playbook that's being created by Pawa and Frumhoff.

15 And so it shouldn't come as a surprise that when a  
16 Wall Street Journal reporter contacted Matthew Pawa and he was  
17 concerned that that reporter might ask about whether he  
18 attended that meeting in March with the Defendant and her  
19 collaborators and Al Gore, he reached out to the Environmental  
20 Bureau Chief at the New York Attorney General's Office saying,  
21 what should I do? And he wrote back, my ask is if you speak to  
22 the reporter, do not confirm that you attended or otherwise  
23 discuss the event.

24 So they know. They know this.

25 THE COURT: I don't get that either. I didn't

1 make -- I mean, let's just have this fight out in the public,  
2 it just seems to me. I mean, whatever. I mean, it's pretty  
3 clear how these fellows feel. They're scientists and feel  
4 strongly about it, and they have strong feelings about it.  
5 Okay. Nothing wrong with that, I don't think.

6 MR. ANDERSON: I agree.

7 THE COURT: I mean, they can say and do what they  
8 want. I mean, and they can file lawsuits if they want and  
9 pressure y'all if they want to.

10 Okay. All right. I don't know why they wouldn't  
11 confirm they were at the event.

12 MR. ANDERSON: Well --

13 THE COURT: I mean, that doesn't make any sense, but  
14 anyway.

15 MR. ANDERSON: Well, Judge, I agree with you that  
16 they are entitled under the First Amendment to have their  
17 views. I think the reason -- I think what the evidence shows  
18 here is the reason that they were trying to conceal the  
19 involvement of these men is because they don't want the public  
20 to know that this is political. They don't want the public to  
21 know that it's about pressuring ExxonMobil.

22 THE COURT: Yeah, I get it. I get all that. I just  
23 don't know why. They're not good politicians. They need to  
24 stick to science. No offense.

25 But go ahead.

1 MR. ANDERSON: Thank you, Judge. What I --

2 THE COURT: You're getting close to your time, so  
3 tell me what else you really want me to -- this is a swift  
4 review from the other AG's?

5 MR. ANDERSON: We did that.

6 THE COURT: Let me see all the states that they're  
7 from. Let me see them, all the states.

8 MR. ANDERSON: Texas --

9 THE COURT: Louisiana, Texas, South Carolina,  
10 Alabama, Michigan. Hmm. What's in Michigan? Where they make  
11 cars. Arizona, Wisconsin. Now, I don't know if they drill in  
12 Wisconsin. Nebraska, Oklahoma, Utah, Nevada. Interesting.

13 kind of a -- are there any -- if we were going to  
14 have red and blue states, all red states on your side, all blue  
15 states on their side, that's kind of interesting, too, isn't  
16 it?

17 MR. ANDERSON: Well, I think under --

18 THE COURT: I just hate this us and them thing, but  
19 it is what it is.

20 MR. ANDERSON: And, Judge, we hate it, too. And I  
21 think --

22 THE COURT: Although Michigan might be a blue state.  
23 We don't know.

24 MR. ANDERSON: Yeah, Wisconsin also might be one that  
25 goes back and forth, I know.

1 THE COURT: You're right.

2 MR. ANDERSON: Paul Ryan, I think, is from there.

3 But, Judge, it does -- but it does highlight the  
4 points you're making, is that this isn't about consumer  
5 protection versus consumer fraud or securities protection,  
6 securities fraud. It's about politics. It's about --

7 THE COURT: I get that. You've made that point.

8 MR. ANDERSON: Okay.

9 THE COURT: What else?

10 MR. ANDERSON: Here's the other thing I think you  
11 really need to know, Judge, about this CID, is that it's -- in  
12 its own request it tells you that this is about viewpoint  
13 discrimination. It lists out all the groups -- in one of the  
14 many requests, it lists out all the groups that it wants  
15 ExxonMobil to produce its documents, its communications with.

16 And look at that group of 11. Every single one of  
17 them, if you Google, you're going to find out that people in  
18 the press deride these entities as climate deniers, like  
19 Heritage, American Enterprise Institute, API, ALEC. All of  
20 these are like the boogie man.

21 THE COURT: I get that point. I get that.

22 MR. ANDERSON: The next thing is, look at some of the  
23 statements that the CID wants to investigate. These are policy  
24 statements that we were talking about at the beginning about  
25 energy rationing.



1           You mentioned before that China and India would have  
2 to get onboard to limit CO2. Well, that was part of what the  
3 former chairman discussed at the World Petroleum Conference in  
4 China, that they would have to resort to energy rationing and  
5 in another statement by the current chairman about adaptation  
6 to change, about it's an engineering problem with engineering  
7 solutions and that issues such as global poverty might be more  
8 pressing than climate change. So policy tradeoff between  
9 development which requires energy and maintaining a certain  
10 level of CO2 that might require less, that's not fraud. That's  
11 a policy question. And they want to investigate this? They  
12 want to know why ExxonMobil was saying it.

13           And here's another great example. This is in their  
14 subpoena. They want to know why we said that the level of GDP  
15 growth requires more accessible, reliable, and affordable  
16 energy to fuel that growth, and it's vulnerable populations who  
17 would suffer most should that growth be artificially  
18 constrained. That's fraud? That's policy.

19           That's a question about tradeoff that everyone  
20 recognizes between limiting CO2 emissions and restricting  
21 energy production and the growth that comes with it. That's  
22 exactly what society is dealing with.

23           And so, Judge, we went through this before. And I  
24 encourage you, if you want to see it, the presentation has the  
25 detail.

1 THE COURT: So you're saying four years is really the  
2 max of what they should be able to get?

3 MR. ANDERSON: Well, yeah.

4 THE COURT: They shouldn't get anything is what  
5 you're arguing, I know, but four years is what it should be?

6 MR. ANDERSON: Yeah. It --

7 THE COURT: Because that's it. That's the statute of  
8 limitations.

9 MR. ANDERSON: The statute of limitations said we had  
10 to do something in the last four years in Massachusetts with  
11 consumers or investors that would give rise to the claims. And  
12 so we've asked repeatedly what have we done. Because  
13 everything we're seeing takes us back to 1976, '76, '97. I  
14 mean, these go back far into the past to find the documents  
15 that they don't like generally about public policy. And then  
16 you read what they're looking for: a policy, the design,  
17 communications about climate change, regulation of methane gas.

18 Again, for the last decade we've been saying climate  
19 change is a serious issue. We don't do anything in  
20 Massachusetts that would give rise to these claims in the last  
21 four years and even beyond. And yet what they want to know  
22 about has nothing to do with Massachusetts. They want to know  
23 about our statements in China, our statements at a Council on  
24 Foreign Relations meeting in New York, here in Dallas, our  
25 statements in England.

1           And then, Judge, you know, this one we obviously  
2     don't have time to do in the courtroom, but the idea that based  
3     on their review of these five documents from the '80s that  
4     ExxonMobil knew in 1982 that the mitigation of greenhouse  
5     effect would require major reductions in fossil fuel  
6     combustion, that's what they say? This is the document that  
7     they say supports it?

8           Look at this. Currently no unambiguous scientific  
9     evidence.

10           The relative contribution of each is uncertain.

11           Considerable uncertainty about whether these effects  
12     should occur.

13           Making significant changes in energy consumption  
14     patterns now would be premature.

15           These key points need better definition.

16           Uncertainties. Further study is necessary.

17     Monitoring is necessary before any specific actions are taken.

18           This is called pretext. The fact that they are  
19     grasping at straws to justify their investigation tells you it  
20     didn't come from the right place. This investigation didn't  
21     come out of the right place. It came out of the place that was  
22     revealed in the press conference when they told you and then  
23     when they put it in their common interest agreement.

24           THE COURT: What do you mean it didn't come out of  
25     these documents? What are you saying?

1 MR. ANDERSON: This is the pretext for it.

2 THE COURT: I get it.

3 MR. ANDERSON: The real purpose is to silence -- I  
4 mean, it says it in the common interest agreement. It says  
5 we're doing two things here, this coalition of state attorney  
6 generals, we're limiting climate change and we're ensuring the  
7 dissemination of accurate information about climate change.

8 They memorialized it in their agreement.

9 THE COURT: Is that it?

10 MR. ANDERSON: Yes, Judge.

11 THE COURT: No, no. Give me your last shot.

12 MR. ANDERSON: All right. Judge, look, again, if  
13 this case were about a challenge to legitimate exercise of law  
14 enforcement power -- because we see that a lot in their briefs:  
15 It is routine, this is normal, they get to issue subpoenas.

16 No one is saying that's not true. No one is saying  
17 that the Massachusetts Attorney General can't issue subpoenas.  
18 No one is saying that she can't make appropriate comments about  
19 her priorities so if fighting drug dealers is a priority and  
20 she wants to hold a press conference saying, I'm putting 40  
21 assistants on a drug enforcement task force and they're going  
22 to handle that today, no one is saying that's inappropriate.  
23 But that's not what this case is about, and if it were, we  
24 wouldn't have the support from the 11 state attorneys general.

25 what we are saying and what those state attorneys

1 general are saying and so many others are saying is that it's  
2 objectionable to use law enforcement tools to silence political  
3 opponents.

4 And when states engage in this conduct, when they  
5 misuse their power to violate the First Amendment rights of  
6 others, of citizens, that's when Federal courts come in. And  
7 so we're asking you to issue a preliminary injunction  
8 preventing this activity from continuing.

9 THE COURT: Okay.

10 MR. ANDERSON: Thanks, Judge.

11 THE COURT: Thank you.

12 All right. And so who's going to make the argument?

13 MR. JOHNSTON: Your Honor, my name is Richard  
14 Johnston.

15 THE COURT: Okay. Good to see you, Mr. Johnston.

16 MR. JOHNSTON: Thank you very much.

17 Your Honor, I know you're going to have a lot of  
18 questions for me because you've already telegraphed them, but I  
19 would appreciate it if I could just spend a couple of minutes  
20 explaining to you a couple of things about why I think it's  
21 inappropriate for the Court to be considering preliminary  
22 injunction at this time.

23 THE COURT: Sure.

24 MR. JOHNSTON: Mr. Anderson has been very passionate  
25 and eloquent about his position, but all of that eloquence and

1 passion doesn't really make up for the fact that he has a fatal  
2 defect in his case, that there's no irreparable harm sitting  
3 here today that should cause Your Honor to interfere with an  
4 ongoing legal proceeding in Massachusetts between the same  
5 parties on the same issues or to interfere with the efforts of  
6 an attorney general from another state to investigate what it  
7 considers potential wrongdoing.

8           As Exxon has indicated in its own papers, for it to  
9 get an injunction, it needs to show imminent harm. But there  
10 isn't any imminent harm because the Attorney General has no  
11 ability to enforce its CID on her own.

12           In order for the Attorney General to be able to  
13 enforce a CID, she needs the approval, once there is a  
14 challenge by a recipient, of the Superior Court in  
15 Massachusetts. And then the recipient has the ability to seek  
16 an appeal in the Massachusetts courts.

17           So as Your Honor knows from the papers, I believe,  
18 Exxon filed an almost identical proceeding in Massachusetts the  
19 day after it filed here, and that case is proceeding on the  
20 normal course of things. We have filed an initial brief.  
21 Exxon has filed a brief. We have another brief due in three  
22 weeks. Afterwards there will be a hearing in Massachusetts.

23           In the meantime, there's absolutely nothing that we  
24 as an attorney general can do to force Exxon to comply with the  
25 CID. For example, Exxon has not produced one document to us.

1 THE COURT: So regardless of how I rule here, one of  
2 your state superior judges may do something different? I mean,  
3 regardless of what I do, they'll do something different.

4 MR. JOHNSTON: Well, the Judge in Superior Court is  
5 going to do something.

6 THE COURT: Yeah, but it can't be exactly the same as  
7 what I do, unless he goes, oh, that Kinkeade is a smart judge,  
8 I'm going to do what he -- that never happens. We're too  
9 independent to do that as judges, so --

10 who's going to win that fight?

11 MR. JOHNSTON: Well, my point is, Your Honor, that  
12 you should take a look at how the Massachusetts CID statute is  
13 set up.

14 THE COURT: Okay.

15 MR. JOHNSTON: Okay. Because the statute provides  
16 very precise rights and remedies for above Exxon and above the  
17 Attorney General, and we have been following that very  
18 prescribed procedure in Massachusetts state court.

19 we have some slides that I would like to refer Your  
20 Honor to.

21 THE COURT: Okay. Is your time up now when I can  
22 start blasting you with questions?

23 MR. JOHNSTON: No.

24 THE COURT: You're not ready yet?

25 MR. JOHNSTON: No.

1 THE COURT: Okay. Tell me when.

2 MR. JOHNSTON: I want to get into a few procedural  
3 things so you understand the context.

4 THE COURT: Okay.

5 MR. JOHNSTON: And also I want to talk a little bit  
6 about Your Honor's lack of jurisdiction over the Massachusetts  
7 Attorney General, and then I'm all yours.

8 THE COURT: Okay. I kind of felt that lack of  
9 jurisdiction might come up at some point.

10 MR. JOHNSTON: Well, you wouldn't --

11 THE COURT: Although, you know, in Texas we kind of  
12 think everything is in Texas. I don't know if y'all know that.  
13 I mean, you know, actually the Northern District of Texas is  
14 larger than all of New England. I didn't know if you know  
15 that. But, I mean, you could put all of New England in the  
16 Northern District of Texas. We have three other districts in  
17 here.

18 MR. JOHNSTON: Yeah, we had a debate this morning how  
19 many Massachusetts would fit in Texas on the way over to the  
20 courthouse. Some people said five. I thought it was probably  
21 closer to 20.

22 THE COURT: Yeah, probably -- I don't know. I would  
23 have to look -- I'll have to look at it and see.

24 But, anyway, a jurisdictional question is key and  
25 critical. And then I'm curious --



1 MR. JOHNSTON: And I'm going to get to that, but  
2 could I just explain the Massachusetts procedure?

3 THE COURT: Sure. Yes, sir.

4 MR. JOHNSTON: First we start with Chapter 93A, which  
5 is our consumer protection statute, which provides in one of  
6 its sections that the Attorney General can investigate also  
7 violations with the consumer protection statute, which applies  
8 to consumers and investors through the issuance of a civil  
9 investigative demand.

10 Section 7 of that statute says that the recipient  
11 must comply with the terms thereof unless otherwise provided by  
12 the order of a court of the commonwealth.

13 Now, I know Texas is the Lone Star state. We're the  
14 commonwealth of Massachusetts. So that means us,  
15 Massachusetts.

16 Now, there's another provision, Section 6.7, which  
17 provides that at any time before the date specified in the  
18 notice, or 21 days, the Court can extend the reporting date or  
19 modify or set aside such demand or grant a protective order, in  
20 accordance with Rule 26(c) of the Massachusetts Rules of Civil  
21 Procedure.

22 And what the Attorney General did when it sent out  
23 the CID to Exxon was to tell Exxon, by the way, you have rights  
24 to challenge this. And it says, you can make a motion prior to  
25 the production date or within 21 days in the appropriate court

1 of law to modify or set aside this CID. And if it's  
2 burdensome, you can call us.

3 In any event, that's exactly what Exxon --

4 THE COURT: You didn't really expect that call to  
5 come in, did you?

6 MR. JOHNSTON: We didn't get the call.

7 THE COURT: Right, right. Okay. I mean, you kind of  
8 knew you were starting a firestorm, didn't you?

9 MR. JOHNSTON: Well, we certainly expected that when  
10 we sent out the CID.

11 THE COURT: I'm going to ask you this again. Yes.  
12 The answer is yes.

13 MR. JOHNSTON: Okay. We certainly knew --

14 THE COURT: I'm going to cross-examine you, and I'm  
15 going to do that until you say yes.

16 MR. JOHNSTON: Yes, we expected that there would be  
17 some resistance.

18 THE COURT: Some resistance?

19 MR. JOHNSTON: Well -- well, let me just say it this  
20 way, Your Honor.

21 THE COURT: You thought Exxon would kind of go, hey,  
22 it's okay?

23 MR. JOHNSTON: Well, in fact, Your Honor, you raised  
24 a good point, because about six months -- no -- four months  
25 before we sent out our CID, the State of New York Attorney

1 General, Mr. Schneiderman, sent a CID to Exxon. And as far as  
2 we know, Exxon never submitted any written objection to it,  
3 never submitted any legal challenge, and has produced 700,000  
4 pages of documents or more to the New York AG.

5 THE COURT: So they're working with them and not with  
6 you?

7 MR. JOHNSTON: Yes, that's true, or what we  
8 understand to be true.

9 THE COURT: Why don't you just work with  
10 Schneiderman?

11 MR. JOHNSTON: Well, because under -- as I understand  
12 it, New York rules, Schneiderman can't release --

13 THE COURT: He can't share?

14 MR. JOHNSTON: -- those documents with us without the  
15 consent of Exxon. Just as in our CID law, we can't share what  
16 we get with other people unless Exxon were to agree.

17 THE COURT: Okay.

18 MR. JOHNSTON: So what they did was within the 21-day  
19 period they filed a lawsuit or a motion in Suffolk Superior  
20 Court which said they wanted to set aside or modify the CID.

21 And we will show you in a moment the table of  
22 contents from their brief that they filed with Massachusetts  
23 Superior Court which lists essentially all the issues that they  
24 have raised here. You know, it's a violation of their free  
25 speech rights, they're a victim by us --

1 THE COURT: Right.

2 MR. JOHNSTON: -- et cetera, bad faith. So they  
3 raised all those issues in Massachusetts.

4 Then what we did, which is what the statute  
5 prescribes for us, is that we can file a motion to confirm the  
6 CID and enforce it. We can file in the Superior Court a  
7 petition for an order of such court for the enforcement of this  
8 section and section six.

9 That's what we did. We filed a cross motion in  
10 Exxon's paper -- in Exxon's case seeking to have the Court  
11 enforce the CID. And that is where things stand.

12 As I said, each of the two parties have filed a  
13 brief. We have briefs that are due in three weeks, on October  
14 the 11th, at which point the whole case will be fully briefed  
15 in Massachusetts.

16 And as I said, until a court does something there, as  
17 a practical matter there isn't anything we can do. You know,  
18 we can't bang down the doors at Exxon and say, give us those  
19 documents. We can't send the sheriff out to collect a witness.  
20 We can't say that they can't sell Exxon gasoline in  
21 Massachusetts until a court in Massachusetts tells us that we  
22 can.

23 So for that matter alone, Your Honor --

24 THE COURT: Is that what you're seeking?

25 MR. JOHNSTON: No, we're not seeking any of that, in

1 terms of shutting Exxon down. What we will be seeking from --

2 THE COURT: Except in Massachusetts? You don't want  
3 them to sell gasoline there?

4 MR. JOHNSTON: No, I said we are not seeking that at  
5 all. I was just telling --

6 THE COURT: No, you just said that earlier. You  
7 said, we haven't done this, haven't done that, but --

8 MR. JOHNSTON: I said we couldn't. In the absence of  
9 a court order, we couldn't go out and do any of those things.

10 THE COURT: Until. Until. I'm just saying, some day  
11 down the road that's what you would like?

12 MR. JOHNSTON: No, that's not what we're looking for.  
13 What we want are documents and witnesses.

14 NOW --

15 THE COURT: Okay.

16 MR. JOHNSTON: -- given the fact, Your Honor, that we  
17 can't do anything on our own, there's no need for you today to  
18 say we want to enjoin the Attorney General from doing anything,  
19 because we can't.

20 But beyond that, there's no irreparable harm, because  
21 as Your Honor knows, if there's an adequate remedy at law,  
22 there's no reason for a court to grant an injunction. Here  
23 there's no irreparable harm, because they have a full-blown  
24 statutory remedy in Massachusetts to deal with whatever their  
25 objections are. They've raised their objections fully. They

1 can argue all of them. So --

2 THE COURT: Have they argued jurisdiction?

3 MR. JOHNSTON: They certainly are arguing no  
4 jurisdiction over them in Massachusetts.

5 THE COURT: The same argument you're making here?

6 MR. JOHNSTON: Correct.

7 THE COURT: They don't have jurisdiction over you,  
8 and you don't have jurisdiction over them?

9 MR. JOHNSTON: They are arguing that. A difference  
10 is that in Massachusetts under their consumer protection  
11 statute, Chapter 93A, they're free to come in and argue without  
12 prejudice. And they have argued without prejudice. They've  
13 said, we're here to try to set aside the CID. Please be  
14 advised we don't think that Massachusetts has jurisdiction over  
15 us, and that's one of our key arguments as to why the CID  
16 shouldn't issue.

17 THE COURT: In fact, that's their first argument,  
18 right?

19 MR. JOHNSTON: It is their first argument.

20 THE COURT: Right. And then that it's too broad, I  
21 guess, is one of their other big arguments.

22 MR. JOHNSTON: well, and they also say, it violates  
23 our First Amendment rights.

24 So everything that you've heard from Mr. Anderson  
25 this morning, he or one of his colleagues will be arguing in

1 Massachusetts in a few weeks in the place where the statute  
2 says it's supposed to be argued.

3 You also indicated --

4 THE COURT: We're glad still to have you down here.  
5 Even if I don't have jurisdiction, I just want you to know, I'm  
6 glad to have you here, and it's a very interesting case.

7 Y'all have done a great job as lawyers. It's very  
8 unique. I'm very interested in it. And I appreciate -- I  
9 don't want you to think that I don't appreciate the importance  
10 of this, and I'm looking at that hard. I really am. I think  
11 y'all -- it's a very unique effort, and I think that's what  
12 lawyers should do.

13 MR. JOHNSTON: Well, I appreciate the very  
14 open-minded way in which you're hearing all these issues this  
15 morning.

16 I would like to get to my next point, which is why I  
17 think that no matter how interested you may be in this and how  
18 much fun this case may be at an intellectual level, the fact  
19 is, Your Honor, with all due respect, we don't think you have  
20 the jurisdiction to hear a case against the Attorney General of  
21 Massachusetts. So let me get on to that.

22 Not only the U.S. Supreme Court, but the Fifth  
23 Circuit in several cases and Your Honor yourself in the 2010  
24 case of *Saxton v. Faust* --

25 THE COURT: You're going to cite my own case?

1 MR. JOHNSTON: I'm going to cite your own case, among  
2 others.

3 THE COURT: Wow. Man. How cruel. Go ahead.

4 MR. JOHNSTON: Among others. But Your Honor relied  
5 on Fifth Circuit cases, which I'll talk about as well.

6 But what this series of cases has held quite  
7 conclusively is that a federal court in one state should not  
8 exercise jurisdiction over a state official in another state  
9 simply because the impact that the plaintiff may be feeling  
10 occurs in the forum state.

11 Exxon's really purported basis for being here and  
12 asserting jurisdiction is the claim that Attorney General  
13 Healey somehow committed a tort in Massachusetts by serving a  
14 CID in Massachusetts on Exxon where Exxon has a registered  
15 agent with the expectation that Exxon was going to have to  
16 produce all these documents from Texas where its headquarters  
17 is.

18 But as the cases I referred to in our brief,  
19 including the *Walden* case from the Supreme Court, the *Stroman*  
20 cases from the Fifth Circuit, which you relied on in your  
21 *Saxton* case, and your *Saxton* case, that simply is not an  
22 appropriate measure for gaining jurisdiction.

23 And I would like to cite some of the language in Your  
24 Honor's own decision back from *Saxton*. You said in dismissing  
25 that case, quote, the only contacts with Texas alleged by the



1 Saxtons are the effects felt of Judge Faust's rulings in Utah  
2 state court, because this case involved a judge who had issued  
3 a decision from Utah. And then you went on to say, the Fifth  
4 Circuit recently rejected the idea that a nonresident  
5 government official may be haled into a Texas court simply  
6 because the effects of a ruling are felt in Texas. And then  
7 you cited *Stroman versus Wercinski*. And I will end the quote.

8 Now, what had happened in *Stroman* upon which Your  
9 Honor was relying is that the Fifth Circuit had said that an  
10 Arizona official who took regulatory action against a Texas  
11 company that happened to have facilities in Arizona, as well as  
12 a bunch of other states, couldn't be sued in Texas where the  
13 only thing that had happened in Texas was that this company was  
14 feeling the regulatory effects in Texas.

15 And the Supreme Court found the same thing in the  
16 *Walden* case, which we cite in our brief, where a DEA agent at  
17 an airport in Georgia fraudulently took some money off of  
18 somebody who was going through the security system and then  
19 filed a false affidavit, trying to seize the money.

20 And the person whose money was stolen tried to sue in  
21 Nevada, and the Supreme Court said you can't do that because  
22 the only effect upon -- the only thing that happened in Nevada  
23 was that the people who lost the money had less money in Nevada  
24 and felt the loss of that money there. But everything happened  
25 on the defendant's side in Georgia. And the defendant, not

1 having done anything in Nevada, couldn't be sued there.

2 So let's apply that to Attorney General Healey's  
3 situation. Now, she has no office or presence here in Texas.  
4 She hasn't conducted any official business here. She served  
5 the CID in Massachusetts, as I said, on the registered agent.  
6 She's not alleged to have called upon the Texas Attorney  
7 General or anyone else here in Texas to help her with the CID.

8 So this case really couldn't get too much closer to  
9 your decision in *Saxton*. We've got an official from an outside  
10 state, one Utah, one Massachusetts. We've got a state action,  
11 one a judge's decision, one the issuance of a CID. And in both  
12 cases we have an outside state official who had nothing to do  
13 with Texas.

14 Now, Exxon has cited to you not one case in which a  
15 federal judge asserted jurisdiction over an out-of-state  
16 attorney general where the attorney general had resisted  
17 jurisdiction.

18 And we did find several decisions from other federal  
19 district courts that found that a federal court could not  
20 exercise jurisdiction over another state's attorney general.

21 And I would invite Your Honor's attention in  
22 particular to a case that we cited in our reply brief, among  
23 several others that we cited, and that's the case of *Turner*  
24 *versus Abbott* in the DC -- in DC District Court where the court  
25 refused jurisdiction over the Texas Attorney General where he

1 had been sued by somebody who wanted to declare the Texas  
2 foreclosure statute unconstitutional. And the Court simply  
3 said that it was not appropriate to take jurisdiction over the  
4 Texas AG.

5 Now, if Your Honor elects not to dismiss this case,  
6 what's going to happen is that you will be opening up this  
7 courthouse potentially to every disgruntled Texas business and  
8 individual who feels slighted by some action whether it's a tax  
9 or a law or something else undertaken in some other state and  
10 they want to be able to sue here in their home state.

11 Similarly, you open up the prospect, as the Fifth  
12 Circuit referred to in the *Stroman* case, of every attorney  
13 general in every state, as well as every other state official  
14 in other states, are going to have to be subjected to the  
15 possibility that they're going to be dragged across the country  
16 every time they do something because one of their decisions  
17 impacts somebody who lives in Oregon or Nevada or Texas. And  
18 the Fifth Circuit in *Stroman* said it wasn't going to take  
19 jurisdiction in part to avoid that problem.

20 And I would also refer Your Honor to the amicus brief  
21 that was filed on our behalf in this case. And I would note  
22 that that amicus brief was filed by 20 attorneys general. And  
23 you asked about who's on --

24 THE COURT: Oh, you did get Alaska. I'm sorry.

25 MR. JOHNSTON: We did get Alaska. We got Virginia.

1 we got Mississippi, as well as 17 other attorneys general.

2 And one of the things that they said in their  
3 brief -- and I'll quote -- is the race to the federal  
4 courthouse would also undermine the States' compelling interest  
5 in protecting their citizens from fraudulent or deceptive  
6 practices, by forcing state Attorneys General to defend  
7 themselves against federal lawsuits filed all across the  
8 country. The federal courts should not facilitate such  
9 friction between the state and federal governments when  
10 recipients of state law CIDs have an adequate state court  
11 remedy available.

12 So I would suggest, Your Honor, that there just isn't  
13 jurisdiction here. And even if there were jurisdiction, Your  
14 Honor is familiar with the very prevalent concept of *Younger*  
15 abstention. *Younger* held that a federal court should abstain  
16 from hearing a case when there was a pending state criminal  
17 enforcement proceeding. And that principle was later extended  
18 to civil enforcement proceedings as well. And numerous federal  
19 courts have abstained from hearing cases involving parallel  
20 state enforcement proceedings precisely because they need to  
21 rely on the *Younger* abstention.

22 And I'm going to refer you to one particular  
23 decision, because it involves a CID. That's the case of *Lupin*  
24 *Pharmaceuticals versus Richards*. Richards was the Attorney  
25 General of Alaska, and Lupin was a Maryland drug company,

1 pharmaceutical company, that sued in federal court in Maryland  
2 to block the Alaska Attorney General from enforcing a CID that  
3 he'd issued in Alaska.

4 And the court in *Lupin* said, quote, the Lupin  
5 Plaintiffs have failed to demonstrate that they have no way of  
6 vindicating their rights through the Alaska proceeding and,  
7 thus, they have failed to show that the threatened harm  
8 constitutes an irreparable injury for purposes of *Younger*.

9 So I would suggest that based on the *Lupin* precedent,  
10 as well as the larger abstention doctrine in *Younger*, even if  
11 you had jurisdiction, given that there is an existing  
12 Massachusetts proceeding, you should defer to that proceeding  
13 and abstain.

14 I also would suggest, Your Honor, that the Plaintiffs  
15 have to show they have a decent chance of substantial  
16 likelihood of winning on the merits. And let me explain to you  
17 why I don't think that they're going to be able to do that.  
18 And, again, it goes back to the CID statute under which we're  
19 operating and the basis on which we brought this CID.

20 First off, I would like to refer you to the statute  
21 itself. The statute says that any person -- I'm sorry. I'll  
22 talk a little bit about the statute itself. The statute, 93A,  
23 says that anybody that commits an unfair business practice can  
24 be subject to liability. Then it says that in the regulation  
25 that we cited here that any person who fails to disclose to a

1 buyer or prospective buyer any fact, the disclosure of which  
2 may have influenced the buyer or prospective buyer not to enter  
3 into the transaction.

4 So, you know, that's a pretty broad statute and broad  
5 set of regulations.

6 The Attorney General has power under the CID statute  
7 to issue a CID whenever he believes a person has engaged or is  
8 engaging in any method, act, or practice declared to be  
9 unlawful, including, of course, failing to make disclosures  
10 that may have influenced a buyer or -- a buyer of a consumer  
11 product or stock to make a different decision.

12 Now, it's important to recognize that the Attorney  
13 General doesn't need to have probable cause, you know, doesn't  
14 have to have substantial cause or substantial belief. He or  
15 she needs to have a reasonable belief.

16 And one of the purposes of the CID statute which  
17 allows the Attorney General to obtain information before  
18 bringing suit is so that an Attorney General who has a belief  
19 can conduct the investigation and then determine at the end of  
20 the investigation whether he or she has enough to proceed with  
21 a civil lawsuit or he or she doesn't, and --

22 THE COURT: So your contention in Massachusetts is  
23 that -- is that they lied and people wouldn't have bought their  
24 stock?

25 MR. JOHNSTON: In general, that they would not

1 have -- they would not have bought the stock or may have made  
2 other investment decisions if they knew the full extent of what  
3 Exxon's scientists knew or that consumers may have made  
4 different consumer choices.

5 Now, if there had been full disclosure of the full  
6 extent of the impact of gasoline products on climate change and  
7 on the environment, some consumers may have said, well, I think  
8 I'm going to switch to electric cars or I'm going to take the  
9 bus or I'm going to walk to work or I'm going to move so that I  
10 don't have to commute every day, which in fact many people  
11 these days are doing, so --

12 THE COURT: Not in Texas.

13 MR. JOHNSTON: Maybe not, but certainly in  
14 Massachusetts. I mean, we have a much smaller state. Many --

15 THE COURT: All compacted up.

16 MR. JOHNSTON: Yeah.

17 THE COURT: Right. Sure.

18 MR. JOHNSTON: I walk to work. Every day I have  
19 walked to my office for 30 years.

20 THE COURT: Yeah, move down here and see if that  
21 works out for you.

22 MR. JOHNSTON: It would be harder, I suspect.

23 THE COURT: It would be harder, I'm just telling you.

24 MR. JOHNSTON: But --

25 THE COURT: It's just a different world.

1 MR. JOHNSTON: But there are other methods of  
2 transportation, and also there are other things that could be  
3 done to try to --

4 THE COURT: How many times have y'all used this  
5 before, this very method of going against and using a CID to do  
6 this?

7 MR. JOHNSTON: We issued in the last three years  
8 about 300 CIDs.

9 THE COURT: I didn't say all your CIDs. Like this,  
10 though, using this same theory.

11 MR. JOHNSTON: We have used a number of CIDs for that  
12 theory. Let me give you an example --

13 THE COURT: Yeah, just give me an example.

14 MR. JOHNSTON: -- of one we just settled. And this  
15 is one that I think you probably read about in the papers,  
16 involving volkswagen. volkswagen made representations to the  
17 public, including consumers and regulators --

18 THE COURT: Involving diesel?

19 MR. JOHNSTON: -- about the diesel emissions.

20 THE COURT: And the switch?

21 MR. JOHNSTON: Right. And they knew based on what  
22 their own engineers and scientists knew that their emissions  
23 were different than what they were representing.

24 We issued a CID to volkswagen, along with a bunch of  
25 other states, and the multi-state group recently announced a



1     rather substantial settlement with volkswagen based in our case  
2     on our unfair and deceptive trade practices statute, Chapter  
3     93A. I mean, it's not an uncommon thing at all.

4             we also, Your Honor, recently settled a case with a  
5     for-profit school where the for-profit school was making  
6     certain claims about the graduation rates of people who had  
7     taken out huge amounts of federal loans to go to school, and it  
8     turned out the graduation rates were really minimal. They  
9     represented that there were all sorts of employers who were  
10    taking their graduates in, when in fact those employers weren't  
11    taking their graduates in.

12            And we settled that case through a consent judgment  
13    in which they admitted to not disclosing things to their  
14    students that reflected what was really happening at the  
15    school.

16            So this is a very common thing. Our Consumer  
17    Protection Division is a very busy division.

18            THE COURT: Okay.

19            MR. JOHNSTON: Okay. So you asked the question --

20            THE COURT: Are you going to answer any of my  
21    questions?

22            MR. JOHNSTON: well, I'm going to answer the first  
23    question.

24            THE COURT: No, no, no. I'm done with you.

25            MR. JOHNSTON: Oh.

1 THE COURT: You've gone as far as you're going to go  
2 for a while. You're going to answer all those questions I  
3 asked earlier.

4 MR. JOHNSTON: Well, the first one I think you asked  
5 Mr. Anderson was why Exxon, why did they pick on Exxon.

6 THE COURT: Yeah. Why?

7 MR. JOHNSTON: So can I answer that? There are  
8 obviously lots of oil companies. The reason why Exxon is  
9 featuring prominently now is because in November or so, late  
10 last fall, two different periodicals, one the Los Angeles  
11 Times, which, as you know, is a well-known metropolitan  
12 newspaper, and the other, Inside Climate News, which was  
13 nominated for a Pulitzer Prize for the articles that are  
14 published, they published a series of articles. I think there  
15 are something like eight articles. They're all in our papers  
16 which you can read to understand where we derived our belief  
17 from.

18 Those articles had gone and interviewed a whole bunch  
19 of people from Exxon, and they had looked at a whole bunch of  
20 Exxon documents, including at various repositories of Exxon  
21 documents, and they had concluded that it looked as though  
22 Exxon had not been forthcoming over the years with what its  
23 scientists knew and concluded back when.

24 And what we have gleaned from those articles are at  
25 least the following. And this is gleaned from the articles as

1 well as having read the documents that the articles made  
2 public.

3 So we read those articles and we read the documents,  
4 and it appears to us as though the following is at least  
5 evident from what we have read.

6 First, that Exxon knew that rising carbon dioxide  
7 emissions were causing global temperatures to increase.

8 Second, that Exxon knew that certain levels of  
9 warming would likely cause very significant adverse impacts on  
10 natural resources or human populations.

11 And third, that Exxon knew that using the products  
12 that it sells, like oil and gas, were playing a significant  
13 role in the CO2 emissions and warming and that sharp -- quote,  
14 sharply curtailing those uses would help mitigate the risk of  
15 climate change.

16 Now, the Attorney General said publicly before the  
17 CID was issued -- and you heard a part of what she said at the  
18 press conference -- that there was a disconnect between what  
19 Exxon knew and what Exxon told investors and customers. And  
20 that was based on the review of those articles as well as our  
21 own review of a bunch of documents.

22 In addition, Attorney General Healey knew at the time  
23 that she issued her CID that, as I mentioned earlier, Attorney  
24 General Schneiderman from New York had already issued a CID,  
25 and that Exxon -- for similar reasons, consumers and investors,

1 and that Exxon had produced a lot of documents in response.  
2 Attorney General Healey also knew that there had been calls in  
3 Congress for the DOJ to investigate Exxon.

4 Thus, you know, based on the statute in Massachusetts  
5 of having a belief that there may be problems with  
6 communications to investors and to consumers, she has a basis  
7 for being able to issue the CID.

8 THE COURT: How can she go back more than four years?

9 MR. JOHNSTON: Well, let me explain it to you as we  
10 see it. And Your Honor alluded to the tobacco cases. I think  
11 as you know then, the same thing pretty much happened in the  
12 tobacco cases. In fact, the DC circuit case which found that  
13 the tobacco companies had committed RICO violations basically  
14 starts out the opinion, as I recall it, with a discussion about  
15 a meeting that took place -- and the decision of the DC circuit  
16 was somewhere around 2009, I think.

17 Anyway, the DC circuit starts out the opinion by  
18 saying this all began back in 1952 when the vice presidents or  
19 executive vice presidents of each of the major tobacco  
20 companies got together in a room and talked about the fact that  
21 there were problems with the way tobacco might cause cancer,  
22 and none of those companies were supposed to use any kind of  
23 public pronouncements the fact that one of them was safer than  
24 another cigarette, and went on to talk all about what the  
25 tobacco companies' scientists knew, what they had seen in the

1 lab, and what they didn't tell consumers or regulators and, in  
2 fact, denied there was any sort of problem for a long time.

3 So, you know, the fact is that there are a number of  
4 means under Massachusetts law by which the Massachusetts courts  
5 can hold somebody liable for things that happened a pretty long  
6 time ago. And let me discuss a couple of them.

7 First, what somebody knew a while ago is relevant to  
8 whether they are saying something that's truthful now.

9 I mean, for example, if, you know, you knew from 20  
10 years ago that your brother stole something and it was somehow  
11 relevant to a case today, the fact that you learned it 20 years  
12 ago doesn't stop you from having the knowledge that your  
13 brother stole something.

14 And the same thing here. If Exxon scientists were  
15 telling Exxon back when all of our products are going to cause  
16 a disaster for the environment, you know, the fact that Exxon  
17 knew that then bears upon what they're telling people now.

18 The other three specific ways in which old documents  
19 can be relevant and toll the statute -- or deal with the  
20 statute of limitations are that there is a concept in  
21 Massachusetts called continuing tort. So if something goes on  
22 for a long time, you know, you can reach back to the beginning  
23 of that time as opposed to just the last four years.

24 THE COURT: So basically the law in Massachusetts  
25 allows you to go way beyond --

1 MR. JOHNSTON: In some circumstances. I'm not saying  
2 in every circumstance. But in some circumstance it is. So if  
3 it's a continuous string where this was going on for 30 or 40  
4 years, the courts may say it's the string that we get, not just  
5 the last piece of the string.

6 THE COURT: I get it.

7 MR. JOHNSTON: The second concept is the tolling of  
8 the statute of limitations for discovery purposes.

9 You know, if people don't know what Exxon was doing  
10 and don't find it out until the L.A. Times or Inside Climate  
11 News publishes all that stuff and then people start to look at  
12 it, the courts can say, well, your trigger started when you  
13 learned in those articles that Exxon may have been lying, not  
14 four years ago. How would you have known? Because you didn't  
15 know what Exxon scientists were doing.

16 And then the final theory is fraudulent concealment.  
17 You know, if a company takes steps to conceal what it knew, the  
18 courts will sometimes say, shame on you, we're not going to  
19 apply the statute of limitations where you were taking active  
20 steps to keep the plaintiffs from learning what you know that  
21 they would have known if you hadn't been hiding it from them.

22 So it's for all of those reasons that we believe --

23 THE COURT: I get it.

24 MR. JOHNSTON: -- at this stage that we have the  
25 right to at least get the documents.

1           And make no mistake, Your Honor, we aren't saying  
2           that today we're able to go into court and file a case against  
3           Exxon for misrepresentation or violations of the consumer  
4           protection law.

5           THE COURT: Or fraud or anything else.

6           MR. JOHNSTON: Or fraud or anything else. What we're  
7           saying is, we have this statute which allows us to get  
8           information before we have to make that decision. And we're  
9           saying to the courts -- we think it should be the Massachusetts  
10          court -- but we're telling you, too, because we're here.

11          THE COURT: You can do that based on nothing?

12          MR. JOHNSTON: Pardon me?

13          THE COURT: You can do that based on nothing just  
14          because you want to?

15          MR. JOHNSTON: No. We have to have a belief based on  
16          something.

17          THE COURT: Those five documents. Those five  
18          documents. That's it?

19          MR. JOHNSTON: Well, we cited those documents, but --  
20          and, you know, if you would like to have a further analysis of  
21          those documents, you know, I would invite my colleague,  
22          Ms. Hoffer, who is chief of our Environmental Bureau, to deal  
23          with those documents.

24          THE COURT: I'm just saying those are your -- those  
25          are your bases?

1 MR. JOHNSTON: Those are our principal documents  
2 which we believe make out some of the points that we address.  
3 But keep in mind, Your Honor --

4 THE COURT: So what is the level? what's the level  
5 you've got to achieve to be able to do this?

6 MR. JOHNSTON: We would have to satisfy the Rule 11  
7 criteria.

8 THE COURT: Okay.

9 MR. JOHNSTON: I mean, that's -- that's the burden on  
10 us. And so we, as an attorney general's office, have been --

11 THE COURT: I mean, you can't just go to any company  
12 and say, we want all your stuff because we think you might be  
13 doing some shenanigans.

14 MR. JOHNSTON: No. We have to have a reasonable  
15 belief.

16 THE COURT: Right.

17 MR. JOHNSTON: That's the limit on us.

18 And Exxon has raised the issue of the Fourth  
19 Amendment and how it's unreasonable and so forth. well, I'll  
20 say a couple of things about that. One is the courts have long  
21 recognized since at least the *Morton Salt* case by the Supreme  
22 Court that governments, of course, have the right to obtain  
23 documents as part of investigations from companies. That's  
24 what investigations are. And to the extent that the requests  
25 are unreasonable, well, Exxon has every right in the world to



1 object in a Massachusetts court to say they are unreasonable.

2 As I mentioned, our CID statute says that it's  
3 governed by Rule 26(c), so, you know, we have to basically  
4 comply with the Rules of Civil Procedure with respect to what  
5 documents we're entitled to get. They have raised these  
6 objections. And, in fact, I suspect that when we're arguing in  
7 Massachusetts Superior Court, you know, we'll be hearing from  
8 Exxon as to why this category of documents is no good and that  
9 category of documents is no good.

10 But most of the documents that we have requested have  
11 dealt with either the scientific evidence that was referenced  
12 in the articles that we read or backup for that, for what  
13 people were doing with that research, and what Exxon was  
14 telling investors, what Exxon was telling consumers, and what  
15 sort of marketing strategies Exxon was developing in view of  
16 the fact that it knew that it had this perceived problem with  
17 respect to climate change. So --

18 THE COURT: Maybe I'm -- maybe I'm wrong, but I think  
19 he said, look, we agree there's climate change and that fossil  
20 fuels obviously add to that and -- isn't that different than  
21 volkswagen hiding what they were doing so they could pass those  
22 tests in your state and all the other states, particularly  
23 California?

24 I mean, they're going to say, hey, that's a whole lot  
25 different. We're not hiding. We agree. We agree with you

1 that this is a problem. We just didn't see it as developed as  
2 you see it, the science.

3 MR. JOHNSTON: Well, from the documents that we have  
4 reviewed, Your Honor --

5 THE COURT: There are things that say --

6 MR. JOHNSTON: We think --

7 THE COURT: -- hey, we know it's all bad back in the  
8 '50s or '60s or whenever?

9 MR. JOHNSTON: '60s, '70s, yes.

10 And instead of telling the world, hey, we think  
11 gasoline products are going to be having a catastrophic impact  
12 on climate and one way to reduce that catastrophic effect would  
13 be to sell less and use less gasoline, instead, you know, they  
14 went on selling gasoline at the ordinary clip.

15 And, you know, if we're correct that we have the  
16 right to go back that distance because of various extensions of  
17 the statute of limitations, the fact that in 2010 they get  
18 around to saying, oh, in our financial disclosures in a little  
19 piece that says, oh, global warming is an issue that we have to  
20 think about, you know, that's not the same as saying 30 years  
21 ago we should be telling the world now what's happening.

22 THE COURT: I get it. Sure. I get it.

23 MR. JOHNSTON: Okay.

24 THE COURT: What else did I cut you off that you  
25 really want to tell me?

1 MR. JOHNSTON: Well, Your Honor --

2 THE COURT: You didn't answer my other questions, but  
3 it's okay. It's all right. That's all right. I'll just have  
4 to decide that on my own without your benefit. That's okay.

5 I always tell lawyers this is like stepping out into  
6 the street and you have a gun and it was like the beginning of  
7 Gunsmoke. You're probably too young to remember that. And  
8 somebody shoots somebody and they're dead. This is your only  
9 shot to make an argument in front of me.

10 I will not call y'all back, so you better take your  
11 shots, all I'm telling you. If you don't want to answer them,  
12 I'm okay with that.

13 MR. JOHNSTON: Well, I do know Gunsmoke, and James  
14 Arness went to my high school.

15 THE COURT: And he also didn't pull the gun as fast  
16 as the other guy, so every time he should have gotten shot in  
17 the beginning of that show.

18 But, anyway, go ahead.

19 MR. JOHNSTON: Well, I remember that one of the  
20 questions you posed to Mr. Anderson was, you know, why you?  
21 Did you poke the bear? And I've explained why Exxon.

22 In terms of poking the bear --

23 THE COURT: They're the biggest. Of course that's  
24 why you went after them.

25 MR. JOHNSTON: Well, we also have access to Exxon

1 documents.

2 THE COURT: And they're pretty -- they make a lot of  
3 money. They're pretty effective at what they do, wouldn't you  
4 agree?

5 MR. JOHNSTON: They are, according to their own  
6 records, the largest publicly held oil and gas company in the  
7 world.

8 THE COURT: And arguably the largest company in the  
9 world if we -- I don't know how we consider Apple and all those  
10 other companies, whether they're real or not.

11 MR. JOHNSTON: You will never get an argument out of  
12 me that they are a big, big company. They are a big, big  
13 company. They do business everywhere.

14 But in terms of poking the bear, I mean, I'm not  
15 aware that Exxon went out of its way to do anything to the  
16 Attorney General. I wasn't even aware until I read their  
17 papers that Exxon is or was back in March of 2016 a political  
18 opponent of the Attorney General. I didn't think they made --  
19 had any particular presence in political elections or so on.

20 You know, our CID was based on --

21 THE COURT: You're saying that very wryly like that  
22 doesn't happen.

23 MR. JOHNSTON: Well --

24 THE COURT: Like Al Gore wasn't freaking involved in  
25 all the politics that there could be of this. Mercy, he's

1 front and center of this thing. He's the politician, wouldn't  
2 you say?

3 MR. JOHNSTON: I didn't say that he wasn't. What I  
4 said was, I wasn't aware that Exxon had done anything in  
5 particular against Attorney General Healey.

6 THE COURT: Yeah, I understand that. But, you know,  
7 you can't deny that these are politicians involved in this.

8 MR. JOHNSTON: Well --

9 THE COURT: Doesn't -- your Attorney General is not  
10 appointed by the governor in Massachusetts.

11 MR. JOHNSTON: No, no. The attorney general --

12 THE COURT: She runs.

13 MR. JOHNSTON: -- runs for office.

14 THE COURT: Right. And she has run for other offices  
15 prior to this, correct?

16 MR. JOHNSTON: No, she hasn't.

17 THE COURT: This is her first time?

18 MR. JOHNSTON: Yeah. She's 44. In fact, there's  
19 alleged in their papers some sort of conspiracy going back to  
20 2012. I mean, she took office in 2015, was her first office.  
21 She had been a line attorney general until about a year before  
22 the election, and then she stepped down and ran for Attorney  
23 General.

24 THE COURT: And I'm assuming well thought of or she  
25 wouldn't have got elected?

1 MR. JOHNSTON: I think that many people think well of  
2 her in Massachusetts.

3 THE COURT: Good. And I'm sure other states do, too.  
4 Okay. Are you going to answer my other ones?

5 MR. JOHNSTON: I've probably forgotten what some of  
6 them are.

7 THE COURT: That's okay. That's all right.

8 MR. JOHNSTON: But, no, if they're burning issues to  
9 Your Honor, by all means, please ask me, because that's what  
10 I'm up here for.

11 THE COURT: Sorry, I only ask them once. I don't go  
12 back.

13 MR. JOHNSTON: Yeah. Well, I have my notes that  
14 you -- you asked about why just Exxon. You asked is this case  
15 like tobacco.

16 THE COURT: And it is going to go beyond Exxon,  
17 right, if this is successful?

18 MR. JOHNSTON: Well --

19 THE COURT: I mean, you don't think other companies  
20 were doing anything differently than they were, or do you?

21 MR. JOHNSTON: Look, depending on what we find in  
22 Exxon, we may look other places. But, you know, Exxon is the  
23 place that we've started, because there appeared to be a basis  
24 from published documents about Exxon.

25 THE COURT: Oh, I get it. I understand it. I

1 think -- I get why you did it. But you're likely to go after  
2 other oil producers?

3 MR. JOHNSTON: Depends where this investigation leads  
4 us.

5 Let me respond to some other things that came up a  
6 little bit earlier about the First Amendment and Exxon's  
7 speech. This is not --

8 THE COURT: The bottom line is, you want to have the  
9 fight in Massachusetts, and you think that's the appropriate  
10 place, right?

11 MR. JOHNSTON: We certainly do think it's  
12 appropriate --

13 THE COURT: Right.

14 MR. JOHNSTON: -- because of the statutes and because  
15 of jurisdiction.

16 THE COURT: And that's your strongest argument, way  
17 stronger than your argument about, hey, the statute of  
18 limitations can be extended. Anytime lawyers get into that,  
19 you'd agree that's not your number one argument, correct?  
20 That's not the strongest argument?

21 MR. JOHNSTON: No. It's toward the end of our brief.

22 THE COURT: Right. Exactly. I mean, that's the one  
23 where you're -- you're being a pioneer. Nothing wrong with  
24 that.

25 MR. JOHNSTON: Well, no, I'm not being a pioneer.

1 I'm not arguing for an extension of the law. Those principles  
2 exist in Massachusetts. We're saying that this case would fit  
3 one of those exceptions.

4 THE COURT: Okay. That's a better -- you're right.  
5 You're -- that's a better way of saying it.

6 MR. JOHNSTON: But with respect to the arguments  
7 about political speech, you know, Mr. Anderson said we're  
8 trying to basically squelch Exxon from saying stuff. You know,  
9 what we're trying to do by our CID is not deal with what Exxon  
10 necessarily wants to say five years from now, but, you know,  
11 what has Exxon said already.

12 THE COURT: I get it.

13 MR. JOHNSTON: Did it make statements that were at  
14 variance with what it knew? If it did, there could be  
15 liability under the consumer protection statute.

16 THE COURT: If they had had information about how bad  
17 global warming was and they said something other than that or  
18 withheld it, then you want to know?

19 MR. JOHNSTON: That's correct.

20 THE COURT: Right?

21 MR. JOHNSTON: That's correct, so we can determine  
22 whether the totality of the circumstances warrant bringing a  
23 civil enforcement action. The circumstances may; they may not.  
24 Attorney General Healey hasn't made any predetermination.

25 I mean, if she had, which is what Exxon suggests, I



1 mean, we would have filed the lawsuit. But, you know --

2 THE COURT: You made a predetermination there's some  
3 reasonable belief that there's some shenanigans going on.

4 MR. JOHNSTON: That's right. We had to have that  
5 belief --

6 THE COURT: Right.

7 MR. JOHNSTON: -- in order to get the CID in the  
8 first place.

9 THE COURT: Right.

10 MR. JOHNSTON: But we have to wait till we have the  
11 evidence before we could stand up, sign our names on a pleading  
12 under Rule 11, and say we have a right to collect something or  
13 get an injunction against Exxon going forward.

14 THE COURT: I get it. I get it.

15 whatever else you want to tell me that I cut you off,  
16 tell me.

17 MR. JOHNSTON: I think that I probably dealt with  
18 most of the things that I wanted to deal with, but may I just  
19 confer with my associates?

20 THE COURT: Oh, sure, sure.

21 MR. JOHNSTON: Thank you very much.

22 (Pause)

23 THE COURT: Yes, sir?

24 MR. JOHNSTON: The consensus is sit down.

25 THE COURT: Okay. I would love to hear from all your

1 other lawyers, especially Ms. Hoffer.

2 Is it "Hoffer" or "Hoffer"?

3 MR. JOHNSTON: Ms. Hoffer.

4 MS. HOFFER: Hoffer, Your Honor.

5 THE COURT: Hoffer. Because I know she's the one  
6 that did all the special research, but I know her time is  
7 limited. So I'll know that she would have liked to have told  
8 me all about it, but that's okay. Okay?

9 Thank you.

10 MR. JOHNSTON: Yes.

11 THE COURT: Good presentation. I thought you did a  
12 good job. You know, you're one of my -- I guess you're about  
13 my thirteenth favorite Yankee, okay?

14 MR. JOHNSTON: Well, may I say, Your Honor, that I  
15 hope you won't be upset at me if I say that I hope this is the  
16 last time we see each other.

17 THE COURT: It's okay. It's okay. I have actually  
18 been to some football games in Boston, and I might go back one  
19 of these days again.

20 MR. JOHNSTON: I didn't think that people in Texas  
21 thought that we played football in Massachusetts.

22 THE COURT: Oh, no. You beat my team when I went up  
23 there.

24 MR. JOHNSTON: Oh, pro football. Okay.

25 THE COURT: It was good.

1 MR. JOHNSTON: All right.

2 THE COURT: No, it was college. It was college.

3 MR. JOHNSTON: College?

4 THE COURT: So I love it, and I love your state.

5 It's a wonderful place for people to be, and I don't blame  
6 y'all for living there.

7 MR. JOHNSTON: You are welcome in a friendly capacity  
8 anytime.

9 THE COURT: Thank you.

10 MR. JOHNSTON: I'll put you up.

11 THE COURT: Thank you. I appreciate it. Thank you  
12 very much.

13 MR. JOHNSTON: Okay. Thank you.

14 THE COURT: Do you have any response to any of  
15 theirs? And then I'll give him a response, too.

16 MR. ANDERSON: Sure.

17 THE COURT: Particularly about jurisdiction. How the  
18 heck do I have jurisdiction?

19 MR. ANDERSON: You have personal jurisdiction, Judge,  
20 because the Defendant directed her intentional tort at Texas.

21 The face of the CID itself indicates that what she's  
22 investigating is speech that occurred in Texas. She wants the  
23 records of that speech that are in Texas, and she wants to  
24 suppress speech that's coming out of Texas.

25 THE COURT: Okay. Stop. I get that.

1           Here's my other question. Is it true what he said  
2 about y'all cooperating in New York and not cooperating with  
3 them?

4           MR. ANDERSON: Your Honor, we were served with a  
5 subpoena before the press conference, and we are cooperating  
6 with it.

7           THE COURT: Yes? No? Or whatever?

8           MR. ANDERSON: Yes.

9           THE COURT: So why the heck are we having this big  
10 fight? I'm about to start a case involving 10,000, the largest  
11 case in federal court. Why are y'all poking this bear? If you  
12 are agreeing to cooperate there, why aren't you cooperating  
13 with them?

14           MR. ANDERSON: Well, Your Honor, when we started  
15 complying with New York, that was before the press conference,  
16 and so circumstances have changed. And with respect to New  
17 York, all options are on the table, and so --

18           THE COURT: What does that mean?

19           MR. ANDERSON: That means that we are considering our  
20 options with respect to further compliance.

21           THE COURT: You're maybe going to comply or maybe  
22 going to fight?

23           MR. ANDERSON: (Indicating in the affirmative)

24           THE COURT: Yes?

25           MR. ANDERSON: That's right, Judge. When we started

1 complying with New York, it's a different landscape.

2 THE COURT: So if they had not had that press  
3 conference, some poor judge somewhere else would be fiddling  
4 with this, not me, right?

5 MR. ANDERSON: Your Honor, it's so rare that you have  
6 evidence like this in the public record about an impermissible  
7 motive behind a government action. Normally, that's the type  
8 of thing that's concealed.

9 THE COURT: Yeah, but doesn't New York have the same  
10 motive they've got?

11 MR. ANDERSON: Oh, New York -- like I said, judge, it  
12 could very well be that -- that, you know, all options are  
13 available, and they're being considered now, and it's possible.

14 THE COURT: All options are available. Mercy, you  
15 sound like the Secretary of State or Defense or the guy that's  
16 driving our nuclear submarines or something. It doesn't tell  
17 me what that even means.

18 MR. ANDERSON: Judge, it just reflects the fact that  
19 this has been a very fluid situation. And ExxonMobil's initial  
20 reaction whenever it receives an inquiry from Government is to  
21 respond and comply and to do what it's supposed to do like  
22 everybody else. It's this press conference and these documents  
23 that have come to light that have upended that normal  
24 presumption.

25 And that's why everything that the defense says

1 about, you know, we issue CIDs to investigate fraud, we issued  
2 400 of them, including to Volkswagen -- you know, we're not  
3 contesting any of that. That's all well and good and  
4 appropriate.

5 THE COURT: So you're saying if they hadn't had this  
6 press conference and it hadn't been pointed out that y'all are  
7 doing something -- something that's a shenanigan, it might have  
8 had a different outcome?

9 MR. ANDERSON: Right. If there had not been these  
10 express public statements that the problem we have with  
11 ExxonMobil is that it's confusing the public about the need for  
12 the policies we support in the press conference, in the common  
13 interest agreement, and in the CID itself --

14 THE COURT: How many documents have you produced to  
15 New York? 700,000 or more? A bunch?

16 MR. ANDERSON: A bunch, Judge. Yeah, that production  
17 has been ongoing for a while and --

18 THE COURT: Are you still producing?

19 MR. ANDERSON: We are still producing to New York,  
20 yes.

21 THE COURT: Okay.

22 MR. ANDERSON: And, Judge, even --

23 THE COURT: But Schneiderman, is he part of this  
24 still? Is he still part of this one?

25 MR. ANDERSON: Oh, yes. He's pictured on the right

1 of -- in the press conference looking on, or on my right, the  
2 Attorney General's left. He's there.

3 THE COURT: So I'm assuming after this press  
4 conference and you had already been cooperating there was a  
5 frank conversation with somebody from the Attorney General's  
6 office and a lawyer for Exxon, correct?

7 MR. ANDERSON: That would -- that -- without going  
8 into those details, that would be a fair assumption, Judge.

9 THE COURT: Without going into those details, there  
10 was a -- I don't know how frank -- very frank, kind of like  
11 what happens at halftime at some football game between the  
12 coach and the kid that let the guy score the touchdown. Those  
13 really hard conversations, or that I had with my children  
14 growing up when they messed up, you know.

15 MR. ANDERSON: Right.

16 THE COURT: A very hard conversation, correct?

17 MR. ANDERSON: Correct, Judge. Because this is the  
18 type of thing that you don't expect to see in a normal  
19 investigation --

20 THE COURT: Okay.

21 MR. ANDERSON: -- where the political objectives are  
22 totally laid bare.

23 THE COURT: All right. Any other response?

24 MR. ANDERSON: Judge, I just think it's important to  
25 address personal jurisdiction, Judge, because we are confident

1 that you have personal jurisdiction. And the reason is --

2 THE COURT: He said no other federal judge has ever  
3 done this. He even pulled my own cases out. I mean, how --  
4 how appropriate.

5 MR. ANDERSON: *Saxon*, Judge, is a case that I'm sure  
6 you remember.

7 THE COURT: I do remember.

8 MR. ANDERSON: You told, Judge, with the parties in  
9 front of them, complaining about the fact that the orders that  
10 were issued in Utah might have some effect here.

11 *Walden* is another case where the seizure of the money  
12 took place in Georgia where the plaintiffs had been traveling.  
13 The DEA agent was in Georgia. He seized the money there. They  
14 go home to Arizona, and that's where they would like to have  
15 their money. And then they file their lawsuit there. And the  
16 Supreme Court says that's not enough. The fact that you feel  
17 some of the effects in Arizona is not enough.

18 But then you have *Calder* which is where in California  
19 there's a celebrity named Shirley Jones who resided there, and  
20 the National Inquirer published a story in Florida which is  
21 where all the defendants were, in Florida, criticizing her,  
22 something about her personal life. She sues them for libel in  
23 California. And the Supreme Court says that was appropriate,  
24 there's personal jurisdiction over the National Inquirer and  
25 those defendants in California because the brunt of the injury



1 and the cause of action occurs in California.

2 Here, the cause of action occurs in Texas. This is  
3 where ExxonMobil speaks. This is where the speech that the  
4 Attorney General disapproves of is coming from. When she  
5 issued her CID, she directed that intentional tort at this  
6 state. And that is why the tort is here. She intentionally --

7 Let's think about the principle of personal  
8 jurisdiction.

9 THE COURT: I get the principle, but you're comparing  
10 Ms. Healey to the National Inquirer. So you're saying what she  
11 did was akin to that?

12 MR. ANDERSON: It was akin to it in the sense that  
13 she intentionally committed a tort and directed it at the State  
14 of Texas. What she did was, she knows that Massachusetts is  
15 not the state where ExxonMobil operates. We have a registered  
16 agent there who receives service of process and sends it on  
17 down to Texas.

18 what she did not like -- and it's in the CID -- is  
19 she didn't like that there were certain statements that were  
20 being made in Texas. She didn't like that speech. And she  
21 wants the records that are here in Texas. And so she sent the  
22 CID to the registered agent knowing that it would come to  
23 Texas.

24 And there's -- you know, in addition to *Calder*,  
25 there's plenty of Fifth Circuit authority on the proposition

1 that where the communication creates a tort in Texas, like *Wien*  
2 *Air* or *Lewis*, where you intentionally direct your conduct at  
3 the State of Texas knowing that an intentional tort will occur  
4 there, there's personal jurisdiction.

5 THE COURT: I get all that. I know those cases. I'm  
6 not -- that's not it. I mean, has there ever been a judge do  
7 this and shut down an attorney general?

8 MR. ANDERSON: Well, Judge, this is -- I mean, this  
9 is honestly unprecedented. Has there ever been an amicus brief  
10 filed by 11 state attorneys general saying one of our peers is  
11 doing something wrong, she's violating the Constitution by  
12 issuing it?

13 If there is such a case where we had that record and  
14 a federal judge turned down jurisdiction, then I say that's a  
15 good point. But the reason there's no precedent here is  
16 because these actions are unprecedented. They're outrageous.  
17 This is a misuse of law enforcement authority, because the  
18 Attorney General and those she's working with, including Al  
19 Gore --

20 THE COURT: All right. Let me stop you. What about  
21 his argument that you have adequate remedy there in  
22 Massachusetts?

23 MR. ANDERSON: Well, that presupposes that there is  
24 some type of exhaustion requirement for a 1983 action that  
25 first you have to go to state court, and if you can go to state

1 court then you can't come to federal court. But if that were  
2 true, then all 1983 actions would be heard in state courts  
3 because you could always go. The court is a general  
4 jurisdiction. You can bring your claims there. There's no  
5 exhaustion requirement.

6 And so the idea that we could be in Massachusetts is  
7 just -- it's just a false premise; that if we could be there,  
8 then we can't be here. That's just not true.

9 THE COURT: You could be both?

10 MR. ANDERSON: We could be both, but the problem is  
11 that the Massachusetts state court doesn't have personal  
12 jurisdiction over ExxonMobil.

13 we filed there because we had to. We were  
14 conservative. We didn't want to forfeit any rights we might  
15 have, so we filed a petition there.

16 THE COURT: I'm assuming -- I have not looked at your  
17 petition there, but I'm assuming that whatever you filed said  
18 we're not giving up on our jurisdictional point. And there's a  
19 procedure to do that, like we do with special appearance in  
20 Texas, something like that?

21 MR. ANDERSON: Exactly right, Judge.

22 THE COURT: Something like that?

23 MR. ANDERSON: Precisely that. We made a special  
24 appearance.

25 THE COURT: Appearance. Okay. Is that what it's

1 called up there?

2 MR. ANDERSON: I believe it's called a special  
3 appearance.

4 THE COURT: Is it? Okay.

5 MR. ANDERSON: Or it may have a different name, but  
6 has that effect.

7 THE COURT: Okay. Okay.

8 MR. ANDERSON: We appeared to contest jurisdiction.  
9 That was the first point in the brief, is that the Court does  
10 not have personal jurisdiction over ExxonMobil. We asked that  
11 the Court not do anything. We said just stay this action  
12 pending the lawsuit that we filed here.

13 THE COURT: And they didn't do that.

14 MR. ANDERSON: So far the state hasn't done anything.  
15 We're still in the middle of briefing. So we'll see if the  
16 state -- when we go up there, we'll see if the Judge who's  
17 assigned the case --

18 THE COURT: Stays it?

19 MR. ANDERSON: -- decides to stay it --

20 THE COURT: Okay.

21 MR. ANDERSON: -- in deference to these actions.

22 THE COURT: Okay.

23 MR. ANDERSON: So for those two reasons -- and, you  
24 know, the third one, Judge, even if a *Younger* abstention was  
25 relevant, you know, there's an exception for bad faith. And

1 that's the idea that, you know, if there is a forum in state  
2 court, if you're there because of the bad faith of the  
3 defendant, well, that's not an argument for putting you in that  
4 forum.

5 And so here there is a bad faith that permeates the  
6 entire case. What we're arguing here is bad faith, that the  
7 Attorney General brought this investigation in bad faith. She  
8 brought it to deter the exercise of constitutional rights.  
9 That is the definition of bad faith. And that means that  
10 *Younger* abstention doesn't apply and the normal presumption  
11 applies, which is that when a federal court has subject matter  
12 jurisdiction over the cause and personal jurisdiction over the  
13 parties, it hears the case.

14 THE COURT: And so you're saying -- he said, hey,  
15 we've got a reasonable belief from these documents. You're  
16 saying they can't have a reasonable belief. That's your  
17 argument?

18 MR. ANDERSON: What I'm saying, Judge, is that that's  
19 exactly right. They say they have a reasonable belief, but  
20 everything they've told you about this case is pretext, and now  
21 we hear for the first time that there are documents from the  
22 '50s and '60s that might support their investigation? Well,  
23 why didn't they put it in their briefs.

24 They've had -- they filed three -- at least three  
25 briefs in this case, and all that they've cited as the basis

1 for their investigation were those handful of documents from  
2 the '80s, which we looked at and we told -- and we encourage  
3 you to look at them, too, Judge. All they show is uncertainty  
4 and doubt and the need for further research, the same as  
5 everybody else in the '80s.

6 And then this theory about -- which the Defendants  
7 haven't even tried to defend, this idea that the assets, the  
8 proved reserves, might become stranded because of future  
9 regulations that might be enacted -- who knows -- in response  
10 to climate change.

11 THE COURT: Anything else?

12 MR. ANDERSON: Yes, Judge. May I have just one  
13 moment?

14 THE COURT: Sure, sure, sure.

15 (Pause)

16 MR. ANDERSON: Could I make two final points, Judge?

17 THE COURT: Sure.

18 MR. ANDERSON: The first is the nature of the First  
19 Amendment harms that we are asking for relief. Here those --  
20 those are irreparable injuries. The injury is irreparable for  
21 the reason that we were discussing before, is that you have  
22 that constant risk that your regulator is going to take an  
23 adverse action because she doesn't like what you're saying.

24 That's why it's settled precedent, and the defense  
25 hasn't contended otherwise, that if you accept that there is a

1 substantial likelihood that we will prove a First Amendment  
2 violation here, then you've also found irreparable injury.  
3 It's just a legal truism. If you find one, then you've got the  
4 other.

5 so all of this back-and-forth about irreparable harm  
6 is settled if you find that there is a First Amendment  
7 violation, which we believe we have established.

8 THE COURT: I get that, but go back to -- what's  
9 the -- what's the tort?

10 what do you think is the tort?

11 MR. ANDERSON: The tort is a constitutional tort.  
12 It's, number one, the viewpoint discrimination that --

13 THE COURT: I get it. Okay.

14 MR. ANDERSON: -- motivates, and then the political  
15 speech that's being burdened, the fishing expedition in  
16 violation of the Fourth Amendment, and the biased investigation  
17 in violation of due process.

18 THE COURT: Okay. I get that.

19 Okay. Go back to your other point.

20 MR. ANDERSON: Judge, I think the other point that is  
21 very important here is that with respect to Volkswagen, which  
22 was the example of an investigation that is on -- that is  
23 similar to this one, Volkswagen. Perhaps I missed it, but was  
24 there a press conference where the Attorney General and others  
25 announced they were against diesel fuel, and so, therefore,

1 would be investigating volkswagen because they had a policy  
2 disagreement about whether diesel fuel was an appropriate fuel  
3 for Americans to use? I doubt it.

4 Did the subpoena to volkswagen ask for 40 years of  
5 records, or did it pertain only to a violation that occurred  
6 within the limitations period?

7 Everyone knows the volkswagen issue is a recent one.  
8 It's within the four-year period. It's not from the '80s.

9 And, Judge, I think that comparison actually  
10 undermines their argument quite a bit, because it shows the  
11 difference between a real investigation and one that is -- one  
12 that is pretext, one that's about changing the political debate  
13 by putting pressure on a company to produce 40 years of records  
14 so that someone can sift through all of them and find something  
15 that can be used as leverage so the company will change its  
16 position.

17 You know, that's the playbook that Matthew Pawa and  
18 Peter Frumhoff wrote up a few years ago. It's the one that  
19 they likely presented just before that press conference with  
20 the Defendant and Al Gore. And it's the reason that this  
21 Government action is impermissible.

22 THE COURT: Is that it?

23 MR. ANDERSON: That's all, Judge.

24 THE COURT: Thanks.

25 MR. ANDERSON: Thank you.



1 THE COURT: Mr. Johnston, anything else?

2 MR. JOHNSTON: Just a few quick points, Your Honor --

3 THE COURT: You bet.

4 MR. JOHNSTON: -- in response to what Mr. Anderson  
5 just said.

6 First off, it's my understanding in response to your  
7 question that even though Attorney General Schneiderman was at  
8 the press conference, even though there may have been frank  
9 conversations, that Exxon continues to produce documents to New  
10 York.

11 Second of all, Exxon has suggested that there is no  
12 comparison between the Volkswagen case and this one. In fact,  
13 there are plenty of similar comparisons. There were press  
14 articles about what had happened at Volkswagen. We sent out a  
15 CID. We worked collaboratively with other attorneys general to  
16 find out whether, in fact, there had been deceptive conduct.  
17 We ended up settling the case on the basis of what we learned  
18 through the CID.

19 I want to also make one last point about something  
20 that is unclear in what Exxon is seeking here. Exxon has asked  
21 you to grant an injunction preventing us from enforcing the CID  
22 or seeking to enforce the CID. And that may mean simply that  
23 they don't want the Attorney General to do something unilateral  
24 about the CID, which, as I have explained to you, we can't,  
25 because we need court authority to do so.

1 But it may also mean, although they don't say it so  
2 explicitly, that if you were to grant an injunction against us  
3 enforcing the CID, it means that we can't even file our brief  
4 in three weeks in Massachusetts Superior Court.

5 And we certainly would urge you, regardless of what  
6 you are thinking about the case, not to tell us we can't file  
7 our briefs in Massachusetts court.

8 And the last corollary to that is that Mr. Anderson  
9 has suggested that they have irreparable harm because of the  
10 First Amendment. They don't have any irreparable harm if  
11 they're not producing any documents. And at least until the  
12 Massachusetts court rules under our state procedure that we're  
13 entitled to documents, there's no First Amendment issue because  
14 there's no document being produced.

15 So for all of these reasons, including the ones that  
16 I raised earlier, Your Honor --

17 THE COURT: What about his argument *Younger* doesn't  
18 apply where you've got 1983?

19 MR. JOHNSTON: Well, I think that in a number of  
20 cases that *Younger* -- that addressed *Younger*, I think some were  
21 1983, but I won't --

22 THE COURT: I'll look. You know, I don't know. I'm  
23 not trying to set you up. I don't know the answer.

24 MR. JOHNSTON: And, frankly, I can't remember whether  
25 any of the cases we cited did or not.

1 THE COURT: Okay. I'll look at it. I promise you.

2 MR. JOHNSTON: And I don't want to make a statement  
3 that I can't back up --

4 THE COURT: Okay. Thank you.

5 MR. JOHNSTON: -- since, after all, that's what this  
6 case is about.

7 THE COURT: Yes, sir. Yes, sir. Thank you.

8 MR. JOHNSTON: Thank you.

9 THE COURT: Anything else?

10 MR. ANDERSON: Judge, could I just clarify that the  
11 *Younger* point wasn't that it was because it's a 1983 action.

12 THE COURT: Oh, I'm sorry.

13 MR. ANDERSON: But it was because it's bad faith.  
14 *Younger* abstention could easily apply in a 1983 action --

15 THE COURT: It could. Okay.

16 MR. ANDERSON: -- when there is no bad faith. It's  
17 the bad faith.

18 The other point was just that as a general  
19 proposition the mere existence of a state forum doesn't  
20 preclude a 1983 action from proceeding in federal court.

21 THE COURT: Oh, okay. Okay.

22 MR. ANDERSON: It's two different --

23 THE COURT: I got it backwards.

24 MR. JOHNSTON: But, Your Honor, just with respect to  
25 *Younger*, the case law does say that that bad-faith exception to

1     *Younger* --

2             THE COURT: Yes, sir.

3             MR. JOHNSTON: -- is to be applied. And the term  
4 they use is parsimonious things. So we would urge you to be  
5 very parsimonious --

6             THE COURT: whoa. I better write that word down.  
7 That's a big word.

8             MR. JOHNSTON: It means --

9             THE COURT: Could that be rarely?

10            MR. JOHNSTON: Very, very rarely.

11            THE COURT: Mercy. We use that in waco occasionally.  
12 okay. Off the record.

13            (Discussion off the record)

14            (Hearing adjourned)

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1 I, TODD ANDERSON, United States Court Reporter for the  
2 United States District Court in and for the Northern District  
3 of Texas, Dallas Division, hereby certify that the above and  
4 foregoing contains a true and correct transcription of the  
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 19th day of September, 2016.

7  
8  
9 /s/Todd Anderson

10 TODD ANDERSON, RMR, CRR  
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**EXHIBIT 7**

<b>NOTICE TO APPEAR FOR</b> Motion Hearing	DOCKET NUMBER  <b>1684CV01888</b>	<b>Trial Court of Massachusetts</b> <b>The Superior Court</b> 
CASE NAME: <b>Exxon Mobil Corporation vs. Office of Attorney General</b>		Michael Joseph Donovan, Clerk of Court
TO:  Melissa Ann Hoffer, Esq. Massachusetts Attorney General's Office One Ashburton Place 18th Floor Boston, MA 02108		COURT NAME & ADDRESS  Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108
<p>The Court will hear the following event:</p> <p style="text-align: center;"><b>Motion Hearing</b></p> <p>Counsel should appear as follows:</p> <p style="text-align: center;"><b>Date: 12/07/2016</b></p> <p style="text-align: center;"><b>Time: 02:00 PM</b></p> <p><b>Session/ Courtroom Location: Civil F / BOS-10th FL, CR 1006 (SC)</b></p> <p><b>FURTHER ORDER OF THE COURT:</b></p>		
DATE ISSUED  10/21/2016	ASSOCIATE JUSTICE	<b>Michael Joseph Donovan, Clerk of Court</b> App. 162