18-1170

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

—against—

MAURA TRACY HEALEY, In her official capacity as ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS, BARBARA D. UNDERWOOD, ATTORNEY GENERAL OF NEW YORK, in her official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

In its opening brief, ExxonMobil established that the factual allegations in its Complaint[1] state a claim for relief, and the District Court erred by concluding otherwise. The Attorneys General appear to agree. Their briefs avoid discussing the Complaint's factual allegations almost as vigilantly as they avoid defending the District Court's reasoning.

In place of addressing whether ExxonMobil's allegations state a claim for relief, the Attorneys General ignore or distort those allegations, present their own counter-narrative that is not cognizable at this stage of the proceedings, and argue that any taint of bias was dissipated by the resignation of former Attorney General Eric Schneiderman. The Attorneys General's inability to respond to ExxonMobil's core factual allegations only confirms that those allegations are sufficient to withstand a motion to dismiss under Rule 12(b)(6). Likewise, the Attorneys General's assurances that they have acted in good faith cannot displace ExxonMobil's plausible allegations to the contrary.

Rather than defend the District Court's reasoning, the Attorneys General belabor a ripeness argument that was rejected below and a mootness argument never

[1] "Complaint" refers to ExxonMobil's First Amended Complaint ("FAC"), unless followed by a citation to its Second Amended Complaint ("SAC"); "Br." refers to ExxonMobil's opening brief; "NY Br." refers to the New York Attorney General's brief; "MA Br." refers to the Massachusetts Attorney General's brief; "TX Br." refers to the amicus brief of the Texas Attorney General and eleven other state attorneys general; and "NAM Br." refers to the amicus brief of the National Association of Manufacturers and the Chamber of Commerce.

raised before. They also urge the application of heightened pleading standards that have no place in adjudicating a motion to dismiss a civil action brought under Section 1983. Acceptance of that invitation would not only contravene binding law, but also would foreclose virtually any constitutional challenge to a government investigation. The Attorneys General urge these inappropriate standards because they must. Under the applicable standard, ExxonMobil has stated a claim for relief.

These gambits show that the Attorneys General have no reasoned basis to urge dismissal of ExxonMobil's complaint under Rule 12(b)(6). In its Complaint, ExxonMobil alleged facts supporting a plausible inference that the Attorneys General abused their law enforcement authority in violation of the First, Fourth, and Fourteenth Amendments and the Commerce Clause. The Attorneys General targeted ExxonMobil with burdensome investigations because they do not agree with its public statements about climate policy and hope to curtail its speech and participation in public discourse on that issue. The Attorneys General might believe they are on the right side of the issue, but "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988).

If ExxonMobil's factual allegations are held to be insufficient to state a claim for relief from abusive investigative practices motivated by animus toward a

particular viewpoint, no set of allegations could. Such a precedent would leave those who hold unpopular views at the mercy of any state officials determined to enforce political orthodoxy. This Court should ensure that no such precedent is set.

ARGUMENT

I. EXXONMOBIL PLAUSIBLY ALLEGED THAT THE ATTORNEYS GENERAL VIOLATED ITS CONSTITUTIONAL RIGHTS.

In its Complaint, ExxonMobil pleaded plausible factual allegations supporting each element of its constitutional tort claims sufficient to withstand a motion to dismiss under Rule 12(b)(6). In response, the Attorneys General offer a series of arguments that ignore the facts ExxonMobil alleged and the applicable legal standards. Their response further demonstrates that ExxonMobil's claims should not have been dismissed.

A. ExxonMobil Stated a Plausible First Amendment Claim.

1. ExxonMobil's Allegations of Fact, If Proven, Would Establish Viewpoint Discrimination.

According to the Complaint, the Attorneys General launched investigations of ExxonMobil because they disagreed with its viewpoint on climate policy and hoped the coercive pressure of their investigations would silence or alter ExxonMobil's speech. The Attorneys General revealed as much at their "clean power" press conference, where Attorney General Healey announced her investigation of ExxonMobil. There, the Attorneys General blamed ExxonMobil and others in the energy sector for the "gridlock in Washington" that sidelined their

preferred climate policies. (FAC ¶¶ 27–29, 35; JA-402–06, 469–70.) To the Attorneys General, ExxonMobil's speech on climate policy contributed to "confusion" and "misperceptions in the eyes of the American public" and caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (FAC ¶¶ 31–32; JA-404, 468, 478.) They pledged to "clear[] up" that public perception, using the coercive force of their investigative authority to silence perceived opponents and promote their preferred climate policies. (*Id.*) "But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 578–79 (2011). Using state power in this manner violates the First Amendment.

Additional allegations of fact, described more fully in ExxonMobil's opening brief (Br. 5–17, 29–32), provide further support for its viewpoint discrimination claim. Most significantly, the Attorneys General collaborated with climate activists who previously discussed recruiting a "sympathetic attorney general" to "maintain[] pressure on the [energy] industry that could eventually lead to its support for legislative and regulatory responses to global warming," including "converting to renewable energy." (FAC ¶¶ 46–47; SAC ¶ 45; JA-409–10, 498, 514–15, 1943.) The Attorneys General attended secret meetings with those activists mere hours before their "clean power" press conference where they denounced ExxonMobil's

speech. (FAC ¶ 41; JA-408.) In addition, the New York Attorney General exchanged over a dozen emails with the ringleaders of an "Exxon campaign" "[t]o delegitimize [ExxonMobil] as a political actor." (FAC ¶¶ 47–48; SAC ¶ 56; JA-409–10, 525, 1947–48, 2214–21.)

The document requests the Attorneys General issued to ExxonMobil betray the viewpoint discrimination animating their investigations. They seek ExxonMobil's communications with leading conservative think tanks and other organizations that have been derided as "climate change deniers," such as the American Enterprise Institute and the Heritage Foundation. (FAC ¶¶ 22, 25, 73; JA-401–02, 421, 574–76, 716, 751–52.) Many of those requests go so far as to target the precise viewpoint the Attorneys General oppose, asking ExxonMobil, for example, to provide documentary support for its policy suggestion that "[i]ssues such as global poverty [are] more pressing than climate change." (FAC ¶ 73; JA-421, 758.)

These factual allegations, which are discussed at length in the Complaint and ExxonMobil's opening brief, state a claim for viewpoint discrimination under the First Amendment. *See Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) ("The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.").

Notwithstanding the prominence of the core allegations outlined above and their centrality to ExxonMobil's claims, the Attorneys General have elected not to engage them. This Court will search the New York brief in vain for any discussion of Attorney General Schneiderman's actual statements at the "clean power" press conference, other than two brief references to his self-serving characterization of the investigation and denial of wrongdoing, which are buried well past the midway point of a 53-page brief. (NY Br. 30, 45.) The New York brief never addresses Attorney General Schneiderman's vilification of ExxonMobil's speech for causing "confusion" and "misperceptions" in the minds of the public, which purportedly resulted in the "gridlock in Washington" that he hoped to dislodge by investigating the company. (FAC ¶¶ 27–28, 31; JA-402–04, 468–70.) That is the crux of ExxonMobil's viewpoint discrimination claim, and the New York brief has nothing to say about it.

Likewise, the Massachusetts brief scrupulously avoids addressing Attorney General Healey's statements, apart from passing references to only portions of the statements identified in the Complaint. (MA Br. 8–9, 35–36, 43.) The brief ignores the Massachusetts Attorney General's attack on ExxonMobil's speech for supposedly causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (FAC ¶ 32; JA-404, 478.) The brief likewise does not explain how singling out statements and

think tanks on one side of the political divide is anything other than a hallmark of viewpoint discrimination. (MA Br. 38.) The Attorneys General's duck-and-cover strategy shows that they have no response to ExxonMobil's fact allegations.[2]

Rather than engage the factual allegations set forth in the Complaint, the Attorneys General attempt to confuse the issues. They open by arguing that investigative tools like subpoenas and CIDs do not directly regulate speech. (NY Br. 28; MA Br. 27–30.) ExxonMobil agrees that there is nothing inherent in an investigative tool that violates free speech, just as there is nothing inherent in a black marker that constitutes censorship or an officer's baton that constitutes police brutality. But innocuous tools, when improperly deployed, can violate constitutional rights. *See, e.g.*, *Pittsburgh League of Young Voters Educ. Fund* v. *Port Auth. of Allegheny Cty.*, 653 F.3d 290, 299 (3d Cir. 2011). That is precisely what happened here. ExxonMobil does not dispute the Attorneys General's authority to conduct investigations and issue subpoenas; it simply contends that they may not abuse their law enforcement powers to suppress a disfavored viewpoint. Because the Attorneys General's authorities do not concern abuses of power—much less evaluate allegations of such abuses at the pleading stage—they are inapplicable to this case.

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[2] These factual allegations also show why the Attorneys General are mistaken to compare ExxonMobil's allegations to those found inadequate in *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). (NY Br. 30; MA Br. 35–40.) While the *Iqbal* complaint failed to allege that the defendants "themselves acted on account of a constitutionally protected characteristic," *id*. at 683, ExxonMobil's factual allegations directly tie the Attorneys General to the unconstitutional practices challenged here.

Compare SEC v. *McGoff*, 647 F.2d 185, 193 (D.C. Cir. 1981) (finding SEC's lawful investigation involved "no abusive governmental agency bent on 'expos(ing) for the sake of exposure'" or "broad-scale legislative or executive foray into political activity and associations implicating direct sanctions against the exercise of First Amendment liberties"), *with White* v. *Lee*, 227 F.3d 1214, 1226, 1230 (9th Cir. 2000) (holding investigation of protesters who advocated "a politically controversial viewpoint" violated First Amendment).[3]

The Attorneys General next feign confusion about the viewpoint they are accused of targeting. (NY Br. 33–34.) The New York brief asserts that its views on climate policy "align with" ExxonMobil's. (NY Br. 33.) Anyone in attendance at the "clean power" press conference could offer compelling testimony against that proposition. ExxonMobil described in its Complaint and opening brief the statements about climate policy that the Attorneys General have targeted for viewpoint discrimination. (FAC ¶ 9; SAC ¶¶ 8, 122–23; JA-396, 1929, 1975–76; Br. 5–6.) The Attorneys General themselves have derided ExxonMobil's speech for causing confusion and misperception in the public mind. (FAC ¶¶ 31–32; JA-404, 468, 478.) And the CID lists statements at odds with the Attorneys General's

[3] *White* cannot be distinguished because the New York investigation purports to investigate unprotected speech. (NY Br. 28 n.9.) In *White*, the Ninth Circuit rejected the agency's justification that its investigation probed whether the targets' speech involved unprotected "incitement to imminent lawless action." 227 F.3d at 1230.

viewpoint on climate policy. (FAC ¶ 73; JA-421, 757–58.) The Attorneys General cannot credibly claim confusion over ExxonMobil's viewpoint.

The Attorneys General do no better by claiming their "fraud" investigations are outside the First Amendment's reach. (MA Br. 30; NY Br. 28, 34.) Contrary to their pronouncements, invoking the specter of fraud does not suspend the Constitution. *See Illinois ex rel. Madigan* v. *Telemarketing Assocs.*, 538 U.S. 600, 617 (2003) ("Simply labeling an action one for 'fraud,' of course, will not carry the day."). As recognized in the amicus brief filed by Texas and eleven other states, "[t]he authority to investigate fraud does not legitimize the chilling of constitutional freedom to engage in an ongoing policy debate." (TX Br. 5.) Were it otherwise, any abuse of government power would be excused so long as a government official claimed it was in connection with a fraud investigation. That is not the law, nor should it be. And even if it were, the Attorneys General could not benefit from such a rule at this stage of the proceedings. According to the Complaint, which must be accepted as true, the Attorneys General are not conducting legitimate fraud investigations, but have invoked fraud as a pretense to falsely justify an investigation motivated by political animus.

Finally, the New York Attorney General faults ExxonMobil for not alleging that its speech has been chilled. (NY Br. 35–36.) The District Court did not accept that argument (SPA-35 n.26), and neither should this Court, because chilled speech

is not an element of a viewpoint discrimination claim. "When the government targets not subject matter, but particular views taken by speakers on a subject," that is a "blatant" violation of the First Amendment, regardless of whether any speech is chilled. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *R.A.V.* v. *City of Saint Paul*, 505 U.S. 377, 386 (1992) (A state "may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.").

Insofar as the New York Attorney General questions ExxonMobil's standing to bring a First Amendment claim, a plaintiff has standing if it can show "either that [its] speech has been adversely affected by the government retaliation or that [it] has suffered some other concrete harm." *Dorsett* v. *Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). Here, in addition to the obvious and weighty reputational harms inflicted by the Attorneys General's misconduct, ExxonMobil has alleged concrete harms arising from the substantial burden and expense it has incurred responding to the Attorneys General's investigations. (FAC ¶¶ 74, 103; JA-421–22, 432.) This Court recognized in *Tabbaa* v. *Chertoff* that burdens imposed by investigative procedures can constitute such harms even where "there is no prior restraint and no clear chilling of future expressive activity." 509 F.3d 89, 101 (2d Cir. 2007). Nothing more is required.

2. The Attorneys General's Heightened Pleading Standards Are Inapplicable Here.

Implicitly recognizing that the Complaint satisfies the Rule 12(b)(6) standard and the elements of a viewpoint discrimination claim, the Attorneys General urge this Court to apply heightened standards wholly inapplicable here. Under well-settled law, ExxonMobil need only allege sufficient facts "accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). According to the Attorneys General, however, ExxonMobil faces a "high bar" (NY Br. 20) and a "heavy burden" (MA Br. 25) to rebut a strong "presumption of regularity" accorded criminal prosecutions (NY Br. 29–32; MA Br. 20, 22, 33, 45). The Attorneys General believe that, to rebut this presumption, ExxonMobil must "show[] a lack of a legitimate basis to investigate" (NY Br. 19, 31) and "disprove" the existence of a valid investigative purpose (MA Br. 25). They are wrong.

At this stage of the litigation, ExxonMobil has no evidentiary burden to prove its claims or disprove the Attorneys General's defenses. As this Court has explained, "a plaintiff's ability to prove facts . . . is an issue for summary judgment," not a motion to dismiss. *Walker* v. *Schult*, 717 F.3d 119, 130 (2d Cir. 2013); *Marcus* v. *Leviton Mfg. Co.*, 661 F. App'x 29, 32 n.2 (2d Cir. 2016) ("[A]n evidentiary standard . . . is therefore not the relevant standard at the 12(b)(6) stage."). In light of the near-universal acknowledgment of this principle, it is unsurprising that neither Attorney

General has identified any precedent requiring a plaintiff defending against a 12(b)(6) motion to come forward with evidence rebutting a presumption of regularity.

The New York Attorney General relies entirely on *Hartman* v. *Moore*, 547 U.S. 250 (2006), to support her assertion that "courts assume that a prosecutor generally 'has legitimate grounds for the action he takes' unless *shown* otherwise." (NY Br. 29 (emphasis added).) *Hartman* did not impose any such evidentiary burden at the motion to dismiss stage. Insofar as that presumption applies here, all a plaintiff need do to withstand a motion to dismiss is make "[s]ome sort of allegation . . . to address the presumption of prosecutorial regularity." *Hartman*, 547 U.S. at 263. ExxonMobil has done exactly that by alleging that the Attorneys General brought their investigations to advance their preferred climate policies by silencing perceived political opponents. (FAC ¶¶ 13, 76; JA-398, 420–21.) That allegation, not proof, is all that is required at this stage.

The decisions that the Massachusetts Attorney General cites for this presumption are even further afield, and none concerns a motion to dismiss. Even though she is pursuing only civil violations, the Massachusetts Attorney General relies principally on criminal cases that make no mention of the civil pleading

standard or a motion to dismiss under Rule 12(b)(6).[4] (MA Br. 22, 33, 45.) The procedural posture of those decisions makes them easily distinguishable and irrelevant to this case. The other cases are equally inapposite as they too do not address the pleading requirements on a motion to dismiss. For example, in *South Boston Betterment Trust* v. *Boston Redevelopment Authority*, the Massachusetts Supreme Judicial Court discussed the presumption of regularity in the context of a motion for summary judgment and ultimately affirmed a grant of summary judgment in light of the lack of "admissible *evidence*" in the record. 438 Mass. 57, 69 (2002) (emphasis added).

The absence of precedent appears to have only emboldened the Attorneys General to invent heightened standards from whole cloth. As a corollary to the inapplicable presumption of regularity, the Attorneys General argue that ExxonMobil cannot state a claim of viewpoint discrimination without "demonstrat[ing] the absence of an 'objectively reasonable' non-viewpoint-based rationale" for the investigations. (MA Br. 33; NY Br. 27, 29.) Neither Attorney General, however, offers *any* precedent demanding such a showing in a viewpoint discrimination case—much less at the pleading stage.

[4] *United States* v. *HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017), considers a motion to unseal a document in a criminal proceeding. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and *United States* v. *Davis*, 531 F. App'x 65, 71 (2d Cir. 2013), address criminal defendants' selective prosecution claims.

As established in ExxonMobil's opening brief, "[t]he existence of reasonable grounds" for government action "will not save" an action "that is in reality a facade for viewpoint-based discrimination." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). (Br. 33–34, 37.) Whether the Attorneys General can offer an objectively reasonable post hoc rationalization for their investigation "is beside the point" if they in fact brought their investigations to curtail disfavored speech. *See Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396–97 (1993). As the First Circuit has recognized, "[t]he recitation of viewpoint-neutral grounds may be a mere pretext for an invidious motive," and therefore "does not immunize [challenged] decisions from scrutiny." *Ridley* v. *Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004). Whether the Attorneys General's justifications for their actions are genuine or pretextual will turn on contested facts that cannot be appropriately resolved on a motion to dismiss. *See Tobey* v. *Jones*, 706 F.3d 379, 389 (4th Cir. 2013).

The Massachusetts Attorney General also urges this Court to abandon the familiar Rule 12(b)(6) standard in favor of the "deferential framework [used] to review CID challenges." (MA Br. 24–26.) That standard—applicable to motions to quash—has no application to a civil action under Section 1983. As the District Court correctly observed, the "discretionary standard" that governs a motion to quash "is more difficult to meet than the preponderance standard that applies to this action."

(SPA-25.) The Massachusetts Attorney General fails to identify a single case that supports applying such a standard on a motion to dismiss. Instead, she relies on cases that evaluate motions to compel or quash administrative subpoenas issued by the Internal Revenue Service ("IRS"). *See, e.g.*, *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 300–02 (1978); *United States* v. *Powell*, 379 U.S. 48, 49 (1964); *Mollison* v. *United States*, 481 F.3d 119, 120 (2d Cir. 2007). In each of those cases, the applicable framework was derived from the relevant statutory text of the Internal Revenue Code. *See LaSalle*, 437 U.S. at 317–18; *Powell*, 379 U.S. at 57–58; *Mollison*, 481 F.3d at 124. None of these cases announced legal principles that extend beyond the scope of IRS enforcement proceedings.

3. The Attorneys General's Counter-Narrative Is Irrelevant at this Stage of the Proceedings.

The Attorneys General are not content to simply propose inapplicable legal standards. They also ask this Court to consider a factual narrative unmoored from the Complaint that is entitled to no weight on a motion to dismiss.

Throughout their briefs, the Attorneys General urge the Court to accept their self-serving justifications for their investigations based on factual assertions that do not appear in the Complaint. In sections of their briefs that should recount the allegations in ExxonMobil's Complaint (MA Br. 8–11, NY Br. 6–9), the Attorneys General instead assert that they are "investigating the accuracy of Exxon's financial disclosures" (NY Br. 8) and commenced their investigations based on concerns that

"climate change and related actions could adversely affect the value of the company's assets and businesses" (MA Br. 9).[5] But the Complaint alleged no such thing, clearly pleading that the Attorneys General's purported concern about securities fraud was pretextual.

The Attorneys General also distort the factual allegations in the Complaint to suit their narrative. In response to ExxonMobil's detailed allegations about the Attorneys General's coordination with climate activists aiming to suppress speech with government power, the Attorneys General reframe the allegations as simply "meet[ing] with people . . . to hear about the issues that concern them" (MA Br. 39) and "following leads proposed by people whose motives may be questionable" (NY Br. 51). But the Complaint does not allege an isolated meeting or a single questionable tip. It alleges ongoing collaboration with those activists, including exchanging dozens of emails (the contents of which remain undisclosed in the absence of discovery), in-person meetings with activist ringleaders prior to launching their investigations, a private meeting moments before the "clean power" press conference where the Attorneys General denounced ExxonMobil's speech along the lines urged by the activists, and attempts to conceal from the press and public the extensive ties between these private interests and the Attorneys General.

[5] While both Attorneys General observe that a securities class action lawsuit recently withstood a motion to dismiss (NY Br. 42 n.17; MA Br. 2 & n.1), neither saw fit to report that the United States Securities and Exchange Commission recently closed its climate-change investigation of ExxonMobil with a recommendation that no enforcement action be taken.

(FAC ¶¶ 41–51; SAC ¶¶ 3–6, 39–69; JA-407–411, 1927–28, 1941–53.) The Attorneys General's response to these serious allegations is to improperly recast them as something fleeting and trivial.

The Attorneys General also contest the accuracy of whether they have shifted their investigative theories over time. (MA Br. 41–42; NY Br. 42–43.) That factual question is not properly resolved at the pleading stage, but its relevance is clear: "[I]f the Government proffers one reason when" launching an investigation "but another when it later defends" that investigation, "then that in itself is evidence of pretext." *Am. Freedom Def. Initiative* v. *Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 366 (D.C. Cir. 2018). The Attorneys General cite no authority for their position that these shifting justifications should be deemed neutral, much less disregarded at the pleading stage.

Based on their counter-narrative, the Attorneys General accuse ExxonMobil of suing them for "merely investigating" potential fraud. (NY Br. 28; MA Br. 28–29.) But the Attorneys General's factual assertions and self-serving justifications are entitled to no weight at this stage of the litigation. According to the Complaint, the Attorneys General's real reasons for imposing investigative burdens on ExxonMobil were expressed at the "clean power" press conference, in secret meetings with climate activists, and in communications with operatives seeking to

"delegitimize ExxonMobil as a political actor." (FAC ¶¶ 31–45, 48–51; SAC ¶¶ 4, 53, 58; JA-404–411, 1927, 1947–48.)

The Complaint also alleges that the justifications recounted at length in the Attorneys General's briefs are nothing more than pretext for silencing a political adversary. (FAC ¶¶ 8, 11, 77–81; JA-396–97, 423–25.) At this stage of the litigation, ExxonMobil's plausible explanation of the Attorneys General's conduct must be credited. As this Court has stated, it is improper to "dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). The Attorneys General's alternative set of facts and inferences cannot dislodge the plausible allegations ExxonMobil has presented.

4. ExxonMobil Has Not Brought a Retaliation Claim.

Instead of addressing the viewpoint discrimination claim ExxonMobil actually alleged, the New York Attorney General insists it must be analyzed as a claim of retaliation that was not pleaded. (NY Br. 32 n.12, 33, 35–37.) This maneuver only further confirms the New York Attorney General's inability to refute the plausibility of the claims clearly described in ExxonMobil's Complaint.

The New York Attorney General cites no authority for her contention that "[v]iewpoint discrimination occurs when the government denies a speaker a forum based on viewpoint, not when the government punishes a speaker for past speech."

(NY Br. 37.)[6] The Supreme Court said no such thing in *Rosenberger* v. *Rector & Visitors of University of Virginia*, where it noted that the government can engage in content discrimination by "impos[ing] financial burdens on certain speakers based on the content of their expression." 515 U.S. 819, 828 (1995). This Court likewise has recognized that the government engages in impermissible "viewpoint discrimination" when it "take[s] adverse action against" a speaker "on the basis of the views expressed" by that speaker. *Husain* v. *Springer*, 494 F.3d 108, 125, 127 (2d Cir. 2007) (holding college president engaged in impermissible viewpoint discrimination where decision to nullify student election was "driven by her belief that only one perspective was acceptable for speech . . . and that contrary views . . . were inappropriate"). And Justice Kennedy recently recognized viewpoint discrimination outside the forum context. *See Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018).

Moreover, the New York Attorney General radically distorts ExxonMobil's claims by characterizing them as merely alleging that the Attorneys General "punishe[d] a speaker for past speech." (NY Br. 37.) Relying on the Attorneys General's own statements concerning their investigations, the Complaint alleged that, in an effort to break the congressional "gridlock" that was stymying their "clean

[6] The New York Attorney General is not aided by her reliance on *Tobey*, 706 F.3d at 389, where the Fourth Circuit merely held that the plaintiff plausibly alleged a First Amendment retaliation arrest, without deciding whether a claim also could have been stated for viewpoint discrimination.

power" agenda, the Attorneys General launched investigations of ExxonMobil to alter "public perception" and, in the words of the activists, "maintain[] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." (FAC ¶¶ 27–28, 32, 47; JA-402–04, 409–410, 514.) According to the Complaint, these efforts to "delegitimize [ExxonMobil] as a political actor" (FAC ¶ 48; JA-410) did not merely seek to punish past conduct, but to prospectively silence views about climate policy that the Attorneys General disfavored. Such allegations hardly resemble the New York Attorney General's retaliation cases, all of which involve retaliation for criticizing the government. ExxonMobil did not file a retaliation claim, but the New York Attorney General's need for it to be treated as one shows that she has no response to ExxonMobil's viewpoint discrimination claim.

B. ExxonMobil's Other Constitutional Claims Are Also Supported by Plausible Allegations.

The Attorneys General deploy similar diversionary tactics against ExxonMobil's claims under the Fourth Amendment, the Due Process Clause, and the Commerce Clause. Those efforts should be rebuffed. ExxonMobil's plausible factual allegations fully support its claims for relief.

1. ExxonMobil Stated a Fourth Amendment Claim.

The Attorneys General concede that a valid Fourth Amendment claim can arise from plausible allegations that document requests were not brought for a

"legitimate purpose." (NY Br. 40; MA Br. 41.) ExxonMobil has plausibly alleged exactly that because (as described above, in its opening brief, and in the Complaint) the investigations were launched for the illegitimate purpose of silencing ExxonMobil's voice on climate policy. That alone would be sufficient to reverse the dismissal of this claim.

But an illegitimate purpose and bad faith are not essential elements of a Fourth Amendment claim. Objectively unreasonable investigative tactics can also violate the Fourth Amendment, even if they are not brought for illegitimate reasons. *See In re Horowitz*, 482 F.2d 72, 78 (2d Cir. 1973). The Attorneys General defend the reasonableness of the investigative burdens they have imposed on ExxonMobil, but conclusory assertions of good faith and propriety (NY Br. 16, 29–30, 41; MA Br. 2, 20, 26, 31) cannot refute ExxonMobil's plausible allegations of unreasonableness. (Br. 45–48; FAC ¶¶ 11–13, 69–96, 103, 113; JA-397–98, 418–430.) The utter mismatch between the breadth of documents requested—in subject matter and time frame (Br. 47–48)—and the violations purportedly under investigation raise a valid Fourth Amendment concern that cannot be brushed away with casual assurances of proportionality.

The New York Attorney General proposes two other invalid reasons to dismiss ExxonMobil's Fourth Amendment claim. First, she contends that ExxonMobil's certification on May 3, 2017 that it had completed document

production in response to one of the Attorney General's subpoenas moots the need for any relief. (NY Br. 13, 39.) That would come as a surprise to the New York Supreme Court, where the New York Attorney General has moved to compel ExxonMobil's compliance with its document requests twice since the certification was filed (JA-1680), most recently in June 2018.

That is presumably why the New York Attorney General would "not represent[ ] to th[e] [District] Court that Exxon is done with the first subpoena." (JA-3013.) The Attorney General should not be allowed to peddle one narrative to this Court and a diametrically opposed narrative to the Supreme Court and the District Court. Even if that maneuver were countenanced, it would be irrelevant because ExxonMobil's Fourth Amendment claim challenges the entire investigation, not only the "first subpoena" that the New York Attorney General issued.[7] (JA-1983–84.)

Second, the New York Attorney General maintains that New York State law preempts the Fourth Amendment. Under that theory, it "is almost impossible for a federal court to resolve" ExxonMobil's Fourth Amendment claim, because such determination is premised on "the scope of state investigative authority, and the relationship of this exercise of authority to the public interest." (NY Br. 39–40.) To

[7] Even if the New York Attorney General were to conclude its investigation, the "[d]elivery of the documents does not moot this appeal." *McGoff*, 647 F.2d at 190 n.4. The "other injunctive relief to which ExxonMobil is entitled" (JA-1984) might include the return of improperly seized documents.

describe the New York Attorney General's position is to refute it. "[T]he Fourth Amendment's meaning d[oes] not change with local law enforcement practices—even practices set by rule." *Virginia* v. *Moore*, 553 U.S. 164, 172 (2008). Because "the Constitution prescribes a floor below which protections may not fall," *United States* v. *Hammad*, 846 F.2d 854, 859 (2d Cir. 1988), ExxonMobil's Fourth Amendment claim does not turn on state law.

2. ExxonMobil Stated a Claim Under the Due Process Clause.

The Attorneys General adopt the District Court's reasoning that their status as "political animal[s]" immunizes their public statements demonstrating unmitigated bias against ExxonMobil and other energy companies. (MA Br. 44; NY Br. 44–45; SPA-38; JA-3032.) Both Attorneys General avoid quoting, let alone defending, the statements that form the crux of ExxonMobil's due process claim, and the Massachusetts Attorney General attempts to recast ExxonMobil's objection as related to her "decision to announce [her investigation] publicly" rather than the content of that announcement. (MA Br. 43–44; NY Br. 30, 44–45.) The content of the Attorneys General's statements supports a plausible inference that they have "an axe to grind," *Wright* v. *United States*, 732 F.2d 1048, 1056 (2d Cir. 1984), which is all that is required at this stage.

In her brief, Attorney General Healey tips her hand by admitting she is investigating ExxonMobil for "participat[ing] in a large, coordinated effort,

including funding third parties, to spread disinformation casting doubt on climate science." (MA Br. 38.) This unfounded suspicion bears no relation to consumer or securities fraud. Moreover, the "third parties" presumably reference the conservative think tanks named in her CID, such as the Heritage Foundation and American Enterprise Institute. (FAC ¶ 73; JA-421, 751–52.) No investigation brought in good faith and without bias should be centered on the target's association with think tanks for promoting policy at odds with a politician's agenda.

Equally wrong is the suggestion that former New York Attorney General Eric Schneiderman's resignation moots ExxonMobil's claim. (NY Br. 44.) Shortly after that resignation, the current New York Attorney General announced her resolve to continue along the course Mr. Schneiderman charted and offered no apology for the office's previous improprieties. And, as set out in the Complaint, those improprieties were not limited to Mr. Schneiderman. Senior staff in the New York Attorney General's Office exchanged emails with the Rockefeller Family Fund, corresponded with climate activists Matthew Pawa and Peter Frumhoff concerning the secret meetings held prior to the "clean power" press conference, attended those secret meetings, and also attended the workshop led by Mr. Frumhoff. (FAC ¶¶ 41–45; SAC ¶ 56; JA-408–09, 528, 1947–48, 2215–21, 2283, 2369.) Further, it was the current Chief of the Office's Environmental Protection Bureau, not Mr.

Schneiderman, who instructed Mr. Pawa to conceal his involvement in the "clean power" press conference. (FAC ¶ 50; JA-410–11, 538.)[8]

3. ExxonMobil Stated a Claim Under the Commerce Clause.

ExxonMobil's claim under the Commerce Clause is premised on the Attorneys General's efforts to impose extraterritorial restrictions on speech originating in Texas and other places outside of New York and Massachusetts. The Attorneys General respond predictably by offering the platitude that their document requests do not regulate speech. (NY Br. 46; MA Br. 45–46.) ExxonMobil does not challenge the inherent nature of those investigative tools, but their "practical effect," which "is to control conduct beyond the boundaries of the State." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *see also BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by the jury's application of a state rule of law in a civil lawsuit as by a statute."). Likewise, the Attorneys General's attempt to depict ExxonMobil's claim as an abstract challenge to Blue Sky laws and the authority to investigate in-state fraud is nothing but a strawman.[9] (MA Br. 46; NY Br. 46.) ExxonMobil claims that the Attorneys General have abused their authority under the law, not that the laws themselves are facially unconstitutional under the Commerce Clause.

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[8] Mr. Pawa's climate-change lawsuits against ExxonMobil and other energy companies were recently dismissed by federal judges in New York and California.

[9] ExxonMobil does not quarrel with the authority of investigative bodies to conduct bona fide investigations; it never filed a court challenge to the SEC's recently closed investigation.

The New York Attorney General urges this Court not to "assume that the State will misapply these laws by targeting out-of-state conduct." (NY Br. 46–47.) ExxonMobil joins that request and asks only for the application of the familiar Rule 12(b)(6) standard. The Complaint plausibly alleges the Attorneys General are using their investigative authority to limit speech and associational activities outside their borders. (FAC ¶¶ 19, 68–69, 71, 93, 120–21.) Whether that allegation is correct is a question of fact to be resolved on a full evidentiary record following discovery.

The Massachusetts Attorney General's arguments about the "burdens of compliance" are likewise misplaced. (MA Br. 46.) ExxonMobil has not alleged that the burdens imposed by the Attorneys General exceed their benefits, which might be relevant in a *Pike* balancing case. *See SPGGC, LLC* v. *Blumenthal*, 505 F.3d 183, 192 (2d Cir. 2007). ExxonMobil has alleged extraterritorial regulation, which is per se invalid without a need for balancing benefits and burdens. *See Freedom Holdings, Inc.* v. *Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004).

II. EXXONMOBIL'S CONSPIRACY CLAIM AND REQUEST FOR LEAVE TO AMEND ARE PROPERLY BEFORE THIS COURT.

The Attorneys General fault ExxonMobil for supplying this Court with concise arguments in support of its conspiracy count and request for leave to amend. (NY Br. 48–49; MA Br. 47.) Those arguments, which are further supported by and incorporate by reference the same arguments that permeate ExxonMobil's opening brief and this brief, are well presented for this Court's review. *See Umeugo* v.

Barden Corp., 307 F. App'x 514, 516 (2d Cir. 2009). Nothing in the Attorneys General's briefs undermines their validity.

III. EXXONMOBIL'S CONSTITUTIONAL CLAIMS ARE RIPE.

The New York Attorney General's ripeness arguments, which the District Court correctly rejected and the Massachusetts Attorney General wisely abandoned on appeal, present no barrier to this action. Improperly characterizing the Complaint as a challenge to an "administrative subpoena,"[10] the New York Attorney General contends that ripeness principles bar federal courts from reviewing constitutional challenges to her subpoenas, which can be raised "only through the subpoena's procedures for judicial review" in state court. (NY Br. 22–24.) The premise of the Attorney General's argument is invalid because ExxonMobil has challenged her investigation as unlawful, not merely one of the subpoenas her office issued. (JA-1983–84). Her argument's conclusion is equally meritless. If the Attorney General's ripeness arguments were accepted, they would strip federal courts of jurisdiction over Section 1983 challenges to subpoenas and other investigative demands issued by state officials. Such a result would defeat "[t]he very purpose of § 1983" which is "to interpose the federal courts between the States and the people,

[10] Insofar as the Attorney General's argument is premised on the contents of the FAC (NY Br. 26), it is refuted by the SAC, which expressly challenges the investigation as a whole (JA-1983–84). The Attorney General's reliance on the FAC to support an argument contradicted by the SAC shows that amendment is not futile.

as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). The law requires no such perverse result.

As the District Court correctly held, ExxonMobil's claims, insofar as they arise from the subpoena, are ripe because ExxonMobil "cannot refuse to respond to the [Attorney General's] document demands without consequence." (SPA-18.) Consequently, ExxonMobil's claims are constitutionally ripe because it has alleged an "actual or imminent" injury. *Nat'l Org. for Marriage, Inc.* v. *Walsh*, 714 F.3d 682, 688 (2d Cir. 2013). Its claims are also prudentially ripe, because the issues are not "contingent on future events," and withholding judicial review would cause hardship to ExxonMobil. *Id.* at 691.

The Attorney General misstates the law by arguing that ripeness requires being held in or threatened with contempt. (NY Br. 24–26.) None of the precedents cited in the Attorney General's brief supports that proposition. Under the Attorney General's own precedents, challenges to investigative demands are premature only where "no consequence whatever can befall a [recipient] who refuses, ignores, or otherwise does not comply with [the instrument] until [it] is backed by a . . . court order." *Schulz* v. *IRS*, 395 F.3d 463, 465 (2d Cir. 2005), *as clarified on reh'g*, 413 F.3d 297, 464–65 (2d Cir. 2005). (NY Br. 20–21.) Contempt is not required. *See Citizens United* v. *Schneiderman*, 882 F.3d 374, 388–89 (2d Cir. 2018).

As the District Court held, the Attorney General cannot make the showing required by *Schulz* because her office has (three times) moved to compel compliance with the subpoenas, and the New York Supreme Court has ordered compliance with portions of those subpoenas by directing ExxonMobil to produce documents and give testimony. (SPA-17–18; JA-1804–05, 3073–74.) *Google, Inc.* v. *Hood* is likewise no help to the Attorney General (NY Br. 25) because that decision was premised on the absence of proceedings to enforce compliance, meaning there was "no current consequence for resisting the subpoena." 822 F.3d 212, 225–26 (5th Cir. 2016). Unlike in *Google*, it is undisputed that a court has ordered ExxonMobil to comply with the Attorney General's subpoena. (SPA-17.)

In an effort to salvage its meritless ripeness argument, the Attorney General appears to pivot to an unpreserved mootness argument that was not argued below and is not supported by the record on appeal. It is also meritless. According to the Attorney General, ExxonMobil's ripe claims became moot when it provided a certification of compliance for one of the Attorneys General's subpoenas on May 3, 2017. That argument has no force here for the same reasons discussed above. *See supra* 21–22. The New York Attorney General has not accepted that certification of compliance as ending ExxonMobil's obligations, continues to demand what she in Orwellian fashion calls "residual production[s]," and moved most recently for another order compelling the production of documents in June 2018. (NY Br. 39.)

The compliance proceedings remain open, and ExxonMobil has not yet attained the ability to refuse compliance with the Attorney General and face "no consequence whatever." *Schulz*, 395 F.3d at 465.

Furthermore, as ExxonMobil argued below, this action is ripe on the independent ground that it alleges a current First Amendment injury. (ECF No. 228 at 14.) It is well established that a presumption of injury flows from "the alleged violation of a constitutional right," *Jolly* v. *Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (emphasis omitted), and the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). ExxonMobil has alleged that the New York Attorney General "violated—and continue[s] to violate—the First Amendment" by "deploying [the office's] law enforcement authority . . . to target one side of a political debate," including through "[t]he statements Attorney[] General Schneiderman . . . made at the press conference and after." (FAC ¶¶ 88, 90; JA-427–28.) Such allegations are sufficient on their own to raise a ripe claim.

IV. RES JUDICATA DOES NOT BAR EXXONMOBIL'S CLAIMS.

The Massachusetts Attorney General does not deny that Massachusetts courts never ruled on ExxonMobil's First Amendment claim. (MA Br. 52 n.29.) Nor could she. The Superior Court expressly stated that it would "not address Exxon's arguments regarding free speech." (JA-1017 n.2.) The Supreme Judicial Court

likewise did not reach the issue. *Exxon Mobil Corp.* v. *Attorney Gen.*, 479 Mass. 312, 328–29 (2018). Because the state court "expressly reserve[d]" ExxonMobil's free speech challenge to the CID, *Apparel Art Int'l, Inc.* v. *Amertex Enters. Ltd.*, 48 F.3d 576, 586 (1st Cir. 1995) (citing Restatement (Second) of Judgments § 26), ExxonMobil's First Amendment claim is not barred by res judicata, which indisputably requires a "final judgment on the merits." *Kobrin* v. *Bd. of Registration in Med.*, 444 Mass. 837, 843 (2005).

The Massachusetts Attorney General responds that res judicata reaches all matters that "*could have been adjudicated* in the [state] action." (MA Br. 51.) But she fails to establish that predicate. It is well recognized that this test refers to claims that a litigant had "the opportunity and the incentive to litigate" in the prior proceeding but did not. *See Bendetson* v. *Bldg. Inspector of Revere*, 36 Mass. App. Ct. 615, 619 (1994) (citing *Heacock* v. *Heacock*, 402 Mass. 21, 24 (1988)). No Massachusetts court has held it applies to matters that a court could have adjudicated but elected not to. *Cf. Smith* v. *Colonial Inn, LLC*, No. 15-ADMS-40009, 2015 WL 9594223, at *1 (Mass. App. Div. 2015) (declining to apply claim preclusion where "the only issue litigated in the first proceeding between the parties was [plaintiff's] request for a temporary restraining order . . . and not the full spectrum of the parties' claims"). That is the case here as to ExxonMobil's First Amendment challenge to the CID, which was deliberately and expressly excluded by the state court from its

ruling. By their own terms, the state court decisions have no preclusive effect on ExxonMobil's First Amendment claim here.

Even if the state court had ruled on ExxonMobil's constitutional challenges to the CID, res judicata would remain inapplicable. The Attorney General has failed to show that, as due process requires, ExxonMobil was afforded "a full and fair opportunity to" raise the claims at issue here, but that opportunity "was not taken." *Bernier* v. *Bernier*, 449 Mass. 774, 797 (2007). Nothing in the Attorney General's brief establishes that ExxonMobil could have filed affirmative claims alleging constitutional torts within the context of the summary "discovery proceedings" before the state court. *See Exxon Mobil Corp.*, 479 Mass. at 324.

Deploying a sleight-of-hand, the Attorney General observes that, in its motion to quash, ExxonMobil could have objected to the CID on constitutional grounds. (MA Br. 52.) But *asserting objections* to a CID's requests in summary proceedings is not the equivalent of *filing affirmative claims* for relief in plenary state court proceedings.[11] The Attorney General's cases stand for nothing more than the acknowledgment that the recipient of a CID can move to quash "demands which invade any constitutional rights of the investigated party [as] unreasonable." *See In*

[11] To the extent the Attorney General—like the District Court—suggests that, to avoid preclusion, ExxonMobil was required to bring its Section 1983 claims in a separate state court proceeding, she "misconstrues the doctrine of claim preclusion" and replaces it with "an argument in favor of reading an exhaustion requirement into § 1983—a position that . . . the Supreme Court has expressly rejected." *Leather* v. *Eyck*, 180 F.3d 420, 424–25 (2d Cir. 1999).

re Yankee Milk, Inc., 372 Mass. 353, 361 n.8 (1977); *Attorney Gen.* v. *Colleton*, 387 Mass. 790, 791–92 (1982) (affirming denial of motion to compel testimony, based on witness's assertion of Fifth Amendment privilege against self-incrimination). (MA Br. 52–53.) They do not describe the procedure for filing counterclaims for constitutional torts in the summary proceedings authorized by Massachusetts law. That should not be surprising, as the sole purpose of those summary proceedings is to test the validity of CIDs—not to litigate claims and counterclaims arising from a common set of facts.

Even if ExxonMobil's affirmative claims could have been filed somehow in the summary state court proceedings, inherent limitations in those proceedings would have deprived ExxonMobil of a full and fair opportunity to litigate those claims. The Attorney General does not dispute that ExxonMobil could not have obtained discovery in the context of a motion to quash (MA Br. 54), which does not qualify as a "pending *action*" under Mass. R. Civ. P. 26(b)(1). (Br. 59.) As a Massachusetts practitioner—and the party bearing the burden of establishing her entitlement to this defense—the Massachusetts Attorney General would presumably come forward with some precedent demonstrating the availability of procedures for obtaining discovery if any existed.

The Attorney General also does not cite any authority suggesting that ExxonMobil could have obtained declaratory relief or an injunction within the

limited state court proceedings. Instead, Attorney General Healey attempts to minimize the difference between the relief ExxonMobil seeks here and the state court's more limited power to quash or modify the CID. (MA Br. 52.) That response amounts to a concession that the relief sought here—injunctive and declaratory relief as to her investigation—was unavailable in the state court proceedings pertaining to the enforceability of a specific CID. Her argument ignores that this action challenges her investigation as a whole, not simply a document request she issued pursuant to that investigation.

Faced with her inability to satisfy the "full and fair opportunity" requirement, the Attorney General attempts to trivialize that requirement. Relying on dicta in *Pactiv Corporation* v. *Dow Chemical Company*, 449 F.3d 1227, 1233 (Fed. Cir. 2006), the Attorney General argues that due process requires only "proper notice and service of process and a court of competent jurisdiction." (MA Br. 54.) But that nonbinding decision concerned the unrelated question of whether a litigant's fraud in a prior plenary proceeding can block a res judicata defense, and did not address the due process implications where the prior proceeding was summary in nature or permitted only limited relief. This Court's precedents are clear that such limitations in the prior proceedings are directly relevant to whether the plaintiff was afforded a "full and fair opportunity" to litigate its claims. *See Bank of India* v. *Trendi Sportswear, Inc.*, 239 F.3d 428, 439 (2d Cir. 2000) (holding plaintiff "was never

afforded the full and fair opportunity" to litigate its claims, where the prior court "did not address the merits" of its claims, denied leave to join a necessary party, and barred plaintiff "from presenting evidence of . . . damages").

Massachusetts precedents, including those referenced in the Attorney General's brief, likewise do not support her position. For instance, *Charlette* v. *Charlette Bros. Foundry* (MA Br. 50) declined to apply res judicata precisely because the plaintiff "could not have" pursued the same relief in the earlier receivership action, 59 Mass. App. Ct. 34, 45–46 (2003). Attorney General Healey does not even attempt to distinguish *Heacock*, where the Massachusetts Supreme Judicial Court held that a prior divorce proceeding did not give rise to res judicata in a subsequent tort action between former spouses because the purpose and relief available in each proceeding was different, 402 Mass. at 24.

As the District Court recognized (SPA-24), this Court has refused to afford preclusive effect to a subpoena enforcement proceeding where the "opportunity to litigate the pertinent issues in the earlier proceeding was considerably narrower than the opportunity available in a plenary civil action," due to the proceedings being "summary in nature," the "substantially disparate opportunities for discovery," and the "heavy burden" to obtain relief. *Sprecher* v. *Graber*, 716 F.2d 968, 972 (2d Cir. 1983).

The Attorney General continues to assert that these considerations, which arise under the Due Process Clause, are relevant only to issue preclusion (*i.e.*, collateral estoppel). She is wrong. When holding that res judicata did not bar a Section 1983 action, this Court stated that "a later claim is not precluded when the first court lacked the power to grant all the relief sought in the later action." *West* v. *Ruff*, 961 F.2d 1064, 1065 (2d Cir. 1992); *see also Bank of India*, 239 F.3d at 439 (holding party "cannot be precluded under the doctrine of res judicata from litigating its claim for . . . damages because it was never afforded the full and fair opportunity to do so in the [earlier] [a]ction and therefore never 'could have raised' that claim"). The Attorney General's reliance on *O'Shea* v. *Amoco Oil Co.* (MA Br. 53–54) is misplaced because that decision (1) applied New Jersey law, and (2) said nothing about whether limitations on remedies and discovery in a prior proceeding impact res judicata. 886 F.2d 584, 593–94 (3d Cir. 1989).

The Attorney General asks the Court to disregard these precedents based on an unfounded allegation of improper claim splitting. (MA Br. 18, 21.) But that accusation remains inaccurate and unfair. ExxonMobil raised all of its claims in this first-filed federal action, which, unlike the Massachusetts state proceedings, could be brought against both Attorneys General. The special appearance that ExxonMobil entered in Massachusetts state court after filing this action was

unambiguously presented as prophylactic in nature (to avoid forfeiture of rights) and contained a request for a stay to combat the risk of inconsistent rulings.

The Attorney General has failed to carry her burden of establishing that the state court proceedings offered ExxonMobil a full and fair opportunity to file the claims it pursues here. Res judicata cannot bar this action from proceeding.

CONCLUSION

ExxonMobil's plausible allegations state claims for relief under the Constitution. Implicitly conceding the point, the Attorneys General ignore those allegations, urge this Court to apply inapplicable legal standards, and improperly present their own counter-narrative as a basis to dismiss the Complaint. These arguments cannot support dismissal under Rule 12(b)(6). ExxonMobil's factual allegations support the reasonable inference that the Attorneys General launched pretextual investigations against the company to burden its speech and silence its voice in discussions of climate policy. That is enough to withstand a motion to dismiss. The New York Attorney General's ripeness argument cannot be credited in light of the current and ongoing consequences ExxonMobil faces in connection with pending discovery demands. Nor does res judicata bar ExxonMobil's claims against the Massachusetts Attorney General. The state court's express refusal to rule on the claims at issue and the absence of a full and fair opportunity to litigate those claims bar the application of that doctrine here. Accordingly, the District Court erred

by dismissing the Complaint and denying leave to amend. The judgment of the District Court should be reversed.

Dated: October 19, 2018

Respectfully submitted,

EXXON MOBIL CORPORATION

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4), as modified by the Order of the Honorable Deborah A. Livingston, Circuit Judge, dated October 15, 2018, allowing ExxonMobil to file an oversized brief not to exceed 9,000 words. This brief contains 8,965 words, excluding the parts of this document exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ Justin Anderson
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