COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR-28512
Appeals Court No. 2021-P-0860

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 1984-03333-BLS1

DEFENDANT-APPELLANT'S RESPONSE TO PLAINTIFF-APPELLEE'S APPLICATION FOR DIRECT APPELLATE REVIEW AND FOR EXPEDITED CONSIDERATION

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Dated: October 20, 2021

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INTRODUCTION

The Attorney General seeks direct and expedited review of Exxon Mobil Corporation's ("ExxonMobil") interlocutory appeal on two grounds that are without factual support or merit.

First, the Attorney General asserts that this appeal raises a "novel" issue: whether the Commonwealth is exempt from the anti-SLAPP statute. But that issue was not decided below, and ExxonMobil does not raise it on appeal. Nor is that issue novel. Massachusetts courts, including this Court, have long applied the anti-SLAPP statute to state actors, a result compelled by the statute's plain language.

Second, the Attorney General invokes the public interest in support of direct review by wrongly accusing ExxonMobil of causing unjustified delay. But the Attorney General's decision to excuse ExxonMobil's compliance with its Civil Investigative Demand ("CID") and its inaction over the last five years are not ExxonMobil's fault. Nor does the global phenomenon of climate change support the Attorney General's arguments about urgency. The Attorney General has repeatedly denied (including in federal district court) that this lawsuit was meant to redress climate change. The

Attorney General cannot have it both ways. The Commonwealth's application should be denied.

STATEMENT OF FACTS

On April 19, 2016, the Attorney General issued a CID to ExxonMobil seeking documents concerning climate change. ExxonMobil moved to quash the CID in Massachusetts state court. That petition was rejected by the trial court, *In re Civil Investigative Demand*, No. 2016-EPD-36, 2017 WL 627305, at *7 (Mass. Super. Ct. Jan. 11, 2017), a ruling subsequently affirmed by the Massachusetts Supreme Judicial Court, *Exxon Mobil Corp.* v. *Att'y Gen.*, 479 Mass. 312, 330(2018).

ExxonMobil also filed a civil lawsuit in federal district court challenging the Attorney General's investigation, principally for violating the First Amendment. The first judge assigned to the case found the Attorney General's investigation "concerning." *Exxon Mobil Corp.* v. *Healey*, 215 F. Supp. 3d 520, 523 (N.D. Tex. 2016). After the case was transferred, a second judge viewed the allegations differently and dismissed the action. ExxonMobil appealed to the Second Circuit which heard oral argument on the case over a year and a half ago. That appeal remains pending. *See Exxon Mobil Corp.* v. *Healey*, No. 18-1170 (2d Cir. 2020).

ExxonMobil has pursued lawful challenges in courts of competent jurisdiction. The Attorney General protests to this Court (and elsewhere) that it has not received any documents from ExxonMobil pursuant to the CID. Conspicuously absent from the Attorney General's narrative is the reason. In June 2016, the Attorney General requested that ExxonMobil enter into a tolling agreement **that voluntarily relieved ExxonMobil of any obligation to comply with the CID** while the state and federal court challenges to the CID are pending.[1]

Three years later, the Attorney General filed its complaint in October 2019, to coincide with the start of trial in a related action brought by the New York Attorney General. The Attorney General has never explained the timing of its lawsuit or why it could not wait two weeks for the trial to conclude (as ExxonMobil requested) before filing suit. ExxonMobil subsequently removed the action to federal court, opposed remand, and lost. The case was in federal court for less than four

[1] In light of the tolling agreement, Justice Brieger effectively stayed proceedings pending resolution of the federal court challenge to the CID. *See* Order, *In re Civil Investigative Demand No. 2016-EPD-36*, Mass. Sup. Ct., No. 16-1888F (Suffolk County Jan. 17, 2019). Add-16. The order is included to correct the record with respect to the procedural history and facts of the case pursuant to Mass. R. App. P. 11(c).

months when it was remanded on March 18, 2020. When it returned to state court, the Attorney General requested an additional two months to file an amended complaint, which it did on June 5, 2020.

ExxonMobil moved to dismiss under Rule 12(b) and the anti-SLAPP statute. The motions were briefed, argued, and decided on the same schedule. Nothing in the record suggests that either motion was frivolous or brought in bad faith. ExxonMobil filed a timely appeal as of right from the adverse ruling on the anti-SLAPP motion. It does not intend to raise on appeal whether the Commonwealth is immune from the anti-SLAPP statute, which was never decided below.

ARGUMENT

I. ExxonMobil's Appeal Challenges the Misapplication of Settled Law.

The Attorney General has failed to show that this appeal implicates "novel questions of law." Mass. R. App. P. 11(a)(1). The issue of whether the Commonwealth is subject to anti-SLAPP coverage was not decided below, and this Court has already applied the statute to governmental entities. The only issue on appeal is whether the trial court misapplied settled law under G.L. c. 231, § 59H.

A. The Issue of Immunity Was Not Decided Below, and ExxonMobil Does Not Raise It On Appeal.

In its application, the Attorney General argues that its civil action is exempt from the anti-SLAPP statute. Br. 19-24. While the Attorney General raised that argument below, the trial court expressly declined to consider it. The trial court held that it need not reach the issue because ExxonMobil failed to meet its threshold burden to show that the Commonwealth's claims are based solely on petitioning activity. Comm. Add. 44 n.3. Whether the Commonwealth is subject to the anti-SLAPP statute is simply not at issue on this appeal. The Attorney General never filed a cross-appeal, and it should not be permitted to bypass the normal appellate process by hijacking ExxonMobil's appeal to insert an issue that was not decided below and will not be raised by the appellant.

Contrary to the Attorney General's assertions, the issue of whether the Commonwealth is subject to the anti-SLAPP statute is not novel. Massachusetts courts, including this Court, have long applied the anti-SLAPP statute to government entities. *See, e.g.*, *Town of Hanover* v. *New Eng. Reg'l Council of Carpenters*, 467 Mass. 587 (2014); *Healer* v. *Dep't of Env't Prot.*, 2006

WL 4526748 (Mass. Super. Ct. Dec. 22, 2006), *vacated in part*, 73 Mass. App. Ct. 714 (2009).

This application is supported by the statute's text, which applies "[i]n any case in which a party asserts that the civil claims . . . are based on said party's exercise of its right of petition." G.L. c. 231, § 59H. While the legislature could have easily inserted language exempting the Commonwealth from anti-SLAPP coverage, as other jurisdictions have done,[2] the plain language contains no such exemption. Indeed, by expressly applying in "any case" in which a party challenges "civil claims," the anti-SLAPP statute creates an exemption for criminal prosecutors, while plainly encompassing all civil suits, including those where the Commonwealth is a plaintiff. *Id.*

B. This Appeal Challenges the Trial Court's Misapplication of Anti-SLAPP Precedent.

The only question presented on appeal is whether ExxonMobil satisfied its threshold burden under the standard articulated in *Duracraft Corp.* v. *Holmes Prods. Corp.*, 427 Mass. 156 (1998). As the Attorney General concedes, this standard is "settled" and the applicable

[2] *See, e.g.*, Cal. Code of Civ. Proc. § 425.16(d); Conn. Gen. Stat. §§ 52-196a(h)(1); Tex. Civ. Prac. & Rem. Code § 27.010(1).

framework is "now-familiar." Br. 19, 25. ExxonMobil contends that, in applying that standard, the trial court adopted an erroneously narrow interpretation of petitioning activity.

Despite recognizing that some of ExxonMobil's challenged statements qualify as petitioning activity, the trial court concluded that ExxonMobil failed to show that it made any of the challenged statements "solely, or even primarily, to influence, inform, or reach any governmental body, directly or indirectly." Comm. Add. 47-48. But the statute merely requires that the challenged statements be "reasonably likely" to influence public policy. G.L. c. 231, § 59H.

The trial court also erred by placing dispositive weight on ExxonMobil's commercial motives behind the speech. It is well settled, however, that speech involving "a commercial motive does not mean it is not petitioning." *Blanchard* v. *Steward Carney Hospital, Inc.*, 477 Mass. 141, 151 (2017).

These issues do not implicate any split in authority or question of first impression. The straightforward question of whether the trial court correctly applied the *Duracraft* standard does not warrant direct and expedited review by this Court.

II. The Attorney General Has Not Shown that the Public Interest Requires Direct Appellate Review.

Citing delay and climate change, the Attorney General claims that this appeal presents issues "of such public interest that justice requires a final determination" on an expedited basis by this Court. Mass. R. App. P. 11(a)(3). But the Attorney General cannot invoke the public interest when any delay is largely of its own making and it has denied that this lawsuit seeks to redress climate change.

A. The Attorney General's Accusations of Delay and Obstruction Are Baseless.

The Attorney General accuses ExxonMobil of delay in an attempt to support expedited review. First, the Attorney General wrongly claims that ExxonMobil is using "the shield of its still pending federal appeal to avoid producing any documents." Br. 13. But the Attorney General's tolling agreement excuses ExxonMobil's compliance with the CID. The Attorney General cannot credibly fault ExxonMobil for abiding by the terms the Attorney General proposed and to which it expressly agreed.

Second, the Attorney General wrongly claims the pendency of the federal appeal precludes discovery in this action. Br. 13. The Attorney General's actions

contradict that claim. It has served subpoenas on eight third parties since July 2021, and received documents in response to some of those subpoenas. But it has declined to share those documents with ExxonMobil, leaving those third parties exposed to receiving duplicative subpoenas from ExxonMobil, which hardly furthers the public interest.

Finally, during the three and a half years between the tolling agreement and this action, the Attorney General appears to have issued no more than a dozen CIDs to third parties in furtherance of its investigation of ExxonMobil. That amounts to fewer than four CIDs a year and is comparable to the third-party discovery the Attorney General has pursued while this appeal has been pending. This dearth of activity suggests the Attorney General is more interested in press coverage than pursuing its investigation in earnest. ExxonMobil cannot be faulted for the Attorney General's inaction during the pre-suit investigative phase.

B. The Alleged Effects of Climate Change Do Not Justify Direct and Expedited Review.

The Attorney General also argues that this appeal presents an issue "of such public interest" due to the "grave threat" posed by "climate change." Br. 30. In

doing so, it notes that ExxonMobil is "one of the United States' largest greenhouse gas emitters." *Id.* But the Attorney General previously stated that this lawsuit is not about greenhouse gas emissions and climate change. In Boston federal court, the Attorney General emphasized that its suit was merely about "Exxon's deception," not its greenhouse gas emissions.[3] Indeed, the Attorney General stated that "it seeks no damages for the climate change harms caused by greenhouse gas emissions attributable to Exxon's operations and products."[4] The Attorney General should not be allowed to use climate change to justify direct and expedited review of an anti-SLAPP appeal in an action which the Attorney General claims has nothing to do with emissions.

CONCLUSION

The Attorney General creates a baseless sense of urgency and raises an issue that was never decided below in an attempt to justify direct and expedited review. But the only issue on appeal is whether the trial court misapplied settled law under the anti-SLAPP statute. The application should be denied.

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[3] Mem. of Law ISO Pl.'s Mot. to Remand, *Massachusetts v. Exxon Mobil Corp.*, No. 19-12430-WGY (D. Mass. Dec. 26, 2019), ECF No. 14, at 3.

[4] *Id.* at 1.

Respectfully submitted,

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By its attorneys,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. App. P. 11 (application for direct appellate review), Mass R. App. P. 16(e) (references to the record), Mass R. App. P. 20(a) (form and length of briefs, appendices, and other documents), Mass R. App. P. 21 (redaction); and

2. This brief complies with the format and type-volume limitations of Mass R. App. P. 11(c) and Mass. R. App. P. 20 because the brief has been prepared in a monospaced font using Microsoft Word with 12-point, Courier New-style fond, and this response consists of not more than 10 pages of text, excluding the parts exempted by Mass. R. App. P. 20(a)(2)(D).

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CERTIFICATE OF SERVICE

I hereby certify that on, October 20, 2021, I served Defendant-Appellant's Response to the Application of Plaintiff-Appellee for Direct Appellate Review and for Expedited Consideration by the Electronic Filing System and electronic mail on:

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ADDENDUM

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BY HAND

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CLERK / MAGISTRATE

In re Civil Investigative Demand No. 2016-EPD-36,
Suffolk Superior Court Civil Action No.: 16-1888F

Dear Justice Brieger:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil") in connection with the captioned proceeding.

The Court has inquired about the parties' availability for a status conference, and the parties have provided potential dates to the Court's clerk. While ExxonMobil will readily appear for any status conference the Court might schedule, we respectfully propose that a status conference be adjourned at this time in light of the tolling agreement between the parties.

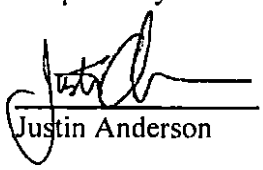
1/17/19 In view of the parties' Tolling Agreement, Counsel shall contact the Assistant Clerk at the conclusion of the federal appellate litigation to schedule a status conference in this matter. Brieger, J. attest: Ann Burgess for Asst. Clerk

Under the tolling agreement, ExxonMobil is not required to comply with the Attorney General's civil investigative demand ("CID") until the litigation in Massachusetts state court and New York federal court has been fully adjudicated, including through any appeals. After ExxonMobil commenced this proceeding and filed its action in federal court, the parties agreed that the Attorney General's limitations period for asserting certain claims against ExxonMobil would be tolled from June 18, 2016, until 60 days after the final resolution (including appeals) of this proceeding and the federal action. The parties further agreed that ExxonMobil need not comply with the CID until both this proceeding and the federal action have been fully resolved (including appeals). *See* Joint Letter dated Feb. 14, 2017 (describing tolling agreement) (attached).

While the state proceeding has been resolved, the federal litigation is still pending. At present, ExxonMobil's appeal to the United States Court of Appeals for the Second Circuit is fully briefed, and oral argument is expected in the near future. In light of the pendency of the federal litigation, ExxonMobil respectfully suggests that judicial economy and the interests of justice would be best served by holding a status conference only after the federal case has been resolved. That would accord with the parties' tolling agreement and avoid imposing unnecessary costs and burdens on the Court and the parties. In that regard, if a status conference is held, ExxonMobil respectfully requests permission to appear by telephone.

I have conferred with counsel for the Attorney General and understand that the Attorney General intends to submit a response to this letter.

Respectfully submitted,



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