COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

II. FACTS

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

A. This Court Lacks Personal Jurisdiction over ExxonMobil.

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

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

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

1. Applicable Law

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

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

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

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

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

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[26] Luettgen Aff. ¶ 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The CID's Viewpoint Discrimination Is Impermissible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Attorney General's Allegations Are Baseless.

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

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

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

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

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

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[41] Ex. II at Supp. App. 98.

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

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

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

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

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

44 Anderson Aff. ¶¶ 3-11.

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

46 Ex. QQ at Supp. App. 168.

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

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

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

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

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

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

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[48] Ex. A at App. 4.

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

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

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

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

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

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

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

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

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

[51] Ex. F at App. 103.

exhibited while announcing this investigation during an unprecedented press conference.

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

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

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52 Ex. AAA at Supp. App. 287.

53 *See* Opp. 12 n.42; Ex. XX at Supp. App. 256-58.

54 Ex. KK at Supp. App. 111-13 (attaching the "Principles" and "Pledge" of a "Coalition of Attorneys General," which the Massachusetts Attorney General agreed to join).

55 Ex. LL at Supp. App. 115.

56 Ex. A at App. 13.

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

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

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

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

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

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

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

IV. CONCLUSION

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

Respectfully submitted,

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Dated: September 8, 2016

CERTIFICATE OF SERVICE

I, Caroline K. Simons, hereby certify that a true and correct copy of the above document was served upon the Attorney General's Office by hand on this 8th day of September 2016.

/s/ Caroline K. Simons
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