COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS,	)
Plaintiff,	)
v.	)
EXXON MOBIL CORPORATION,	)
Defendant.	)

MEMORANDUM OF LAW IN SUPPORT OF THE COMMONWEALTH'S MOTION TO STRIKE CERTAIN DEFENSES IN EXXON MOBIL CORPORATION'S ANSWER

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INTRODUCTION

The Commonwealth's amended complaint alleges that Exxon Mobil Corporation (ExxonMobil or Company) has violated, and continues to violate, the Massachusetts Consumer Protection Act, G.L. c. 93A, §§ 1-11, in the marketing and sale of its securities to Massachusetts investors and in the marketing and sale of its fossil fuel products to Massachusetts consumers. After this Court, on June 22, 2021, denied both ExxonMobil's Special Motion to Dismiss and its Motion to Dismiss, Dkt. Nos. 42 & 43, the Company filed its answer. In its answer, ExxonMobil asserts forty-one "separate defenses," many of which are inapplicable to a Chapter 93A enforcement case brought by the Commonwealth to protect Massachusetts investors and consumers from deceptive conduct, while others repeat innuendo about the Attorney General's allegedly unlawful motives for filing the complaint that this Court—and others—have already rejected. Here, the Commonwealth asks the Court to strike fourteen of the most spurious of those defenses because they are insufficient as a matter of law and serve no purpose other than to obfuscate the matters actually presented by this case, unjustifiably expand discovery, and needlessly waste judicial and the Commonwealth's time and resources.[1]

The Commonwealth has organized the fourteen insufficient defenses into four groups: (i) Defenses 30-33 and 35, which raise a single selective enforcement defense grounded in the Due Process and Equal Protection clauses and the First Amendment; (ii) Defense 33-35, which assert that the Commonwealth's claims are also barred in various ways by the First Amendment; (iii) Defenses 4, 7-8, and 22-26, which raise tort and equitable defenses such as contributory

[1] By targeting just fourteen of ExxonMobil's defenses, the Commonwealth, of course, does not concede the validity of the remaining twenty-seven defenses, which also lack merit, or the propriety or relevance of any discovery based on them, and the Commonwealth reserves all its rights to the extent that ExxonMobil attempts to pursue any of them.

negligence, *in pari delicto*, and laches; and (iv) Defense 27, which asserts that the Attorney General did not provide ExxonMobil with a sufficient opportunity to meet and confer prior to the institution of this suit. Each of them fails as a matter of law. First, the selective enforcement Defenses (30-33 and 35) fail both because they are barred by res judicata and because they do not, in any event, satisfy the rigorous threshold showing that applies to them. Second, the First Amendment Defenses 33-35 (assuming *arguendo* they assert a defense other than selective enforcement) fail for additional reasons, including the facts that the First Amendment does not protect deceptive speech. Third, the tort and equitable Defenses (4, 7-8, and 22-26) fail because they simply do not apply to actions brought by the Commonwealth to enforce Massachusetts law. Fourth, the insufficient pre-suit notice Defense (27) fails because this Court (Brieger, J.) already rejected it too in a related proceeding. For these reasons, as further explained below, the Court should strike those fourteen defenses.

BACKGROUND

In April 2016, Attorney General Healey, having reason to believe that ExxonMobil had committed violations of Chapter 93A with respect to disclosures about climate change in its marketing and advertising to Massachusetts investors and consumers, served a Civil Investigative Demand (CID) on ExxonMobil. Rather than respond to the CID, ExxonMobil filed two lawsuits: one in this court, *In re Civil Investigative Demand No. 2016-EPD-36*, Civ. A. No. 16-1888F (Suffolk Super. Ct., filed June 16, 2016), and another in federal court in Texas, *Exxon Mobil Corp. v. Maura Tracy Healey*, Civ. A. No. 4:16-CV-469 (N.D. Tex., filed June 15, 2016), *transferred to*, Civ. A. No. 17-cv-02301 (S.D.N.Y. Mar. 30, 2017), *appeal pending*, No. 18-1170 (2d Cir., argued Feb. 18, 2020), to block the investigation. In its suits, ExxonMobil alleged, among other things, that the Attorney General's CID was impermissibly motivated, constituted

an abuse of process under state law, violated ExxonMobil's rights under the Massachusetts and U.S. Constitution, including the U.S. Constitution's First, Fourth, and Fourteenth Amendments, and was preempted by federal law. *E.g.*, ExxonMobil's First Amended Compl. ¶¶ 105-128 (N.D. Tex. Nov. 10, 2016) (ECF No. 100) (Addendum (Add-41-47)).[2] In its Massachusetts state court action, the Company also asked the Court to disqualify the entire Attorney General's Office from the case because, according to ExxonMobil, the Attorney General was biased against ExxonMobil. ExxonMobil Pet. to Set Aside or Modify the CID or Issue a Protective Order ¶¶ 52-67 (Add-69-72).[3]

In the federal litigation, ExxonMobil leveraged its claims that the Massachusetts and New York Attorneys General conspired together and with so-called climate activists, *see, e.g.*, First Amended Compl. ¶ 106 (Add-41-42), to violate the Company's constitutional rights—including its First Amendment rights—to initiate an unprecedented discovery expedition into the Attorneys General's motives for investigating ExxonMobil. For example, ExxonMobil served on the Attorney General over 100 requests for written discovery and documents, as well as noticed depositions of the Attorney General herself and two members of her case team. Leaving no stone unturned, ExxonMobil pursued a similar tactic that case with respect to the New York

[2] ExxonMobil's federal complaint together with filings in other judicial proceedings are included in the Addendum to this memorandum for ease of reference and are all materials of which the Court may take judicial notice. *Brookline v. Goldstein*, 388 Mass. 443, 447 (1983); *see also Herd v. Cty. of San Bernardino*, 311 F. Supp. 3d 1157, 1162 (C.D. Cal. 2018).

[3] In each of those cases, ExxonMobil's claims were based on the same three facts: (i) the Attorney General's announcement at a 2016 New York press event of her Office's investigation of the Company; (ii) a common interest agreement among certain states; and (iii) the Attorney General's CID itself. Add-8, 20-21 (First Amended Compl.); 50-73 (Super. Ct. Pet.). While, as explained *infra* pp.4-5, federal and Massachusetts courts have found ExxonMobil's claims implausible based on those facts, the Company, even today, continues to peddle those same baseless allegations in other courts without any acknowledgement that they have been found implausible. *E.g.*, Pet'rs' Br. on the Merits at 6-8, *Exxon Mobil Corp. v. City of San Francisco*, No. 20-0558 (Tex. Sept. 10, 2021), https://tinyurl.com/53mkmnpc.

Attorney General, noticing, among other things, depositions of the New York Attorney General and two of his staff, and serving that Office with extensive written discovery requests.

Contending that discovery into her rationales for investigating ExxonMobil would be inappropriate, the Attorney General asked the United States Court of Appeals for the Fifth Circuit to quash the discovery sanctioned by the trial court. Pet. for Writ of Mandamus, *In re Maura T. Healey*, No. 16-11741 (5th Cir. Dec. 9, 2016) (ECF No. 513790755). Prior to action by the Fifth Circuit, however, the trial court, six days later, *sua sponte* stayed all discovery in the case and later transferred the case, based on improper venue, to the United States District Court for the Southern District of New York. Following extensive re-briefing of the lawsuit's validity, the Southern District then dismissed ExxonMobil's complaint, flatly rejecting the Company's conspiracy theory that Attorney General Healey had issued the CID to deprive ExxonMobil of its constitutional rights. In particular, the Court found that ExxonMobil's constitutional and other claims were based on "extremely thin allegations and speculative inferences," *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018), and characterized its action as "running roughshod over the adage that the best defense is a good offense," *id.* The Court directly ruled that ExxonMobil's "allegations that the AGs are pursuing bad faith investigations . . . to violate Exxon's constitutional rights are *implausible*." *Id.* at 687 (emphasis added).

This Court likewise rejected ExxonMobil's challenges to the CID and granted the Attorney General's cross-motion to enforce it. *In re Civil Investigative Demand No. 2016-EPD-36*, Civ. A. No. 16-1888F, 2017 WL 627305 (Super. Ct. Jan. 11, 2017) (Brieger, J.). In addition to finding that the Court could exercise personal jurisdiction over ExxonMobil, this Court found that the Attorney General had rationally issued the CID based on a belief that ExxonMobil had violated Chapter 93A. *Id.* at *4. The Court, like the Southern District of New York, also flatly

rejected ExxonMobil's claim that the Attorney General had launched her investigation based on an improper purpose. *Id.* at *6. Instead, the Court found that the Attorney General's public remarks reflected only the Attorney General's effort to inform the "Massachusetts consumers she represents" about the "reasons for her investigation." *Id.* On appeal the Supreme Judicial Court affirmed this Court's opinion in all respects. *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312 (2018), *cert. denied sub nom.*, *Exxon Mobil Corp. v. Healey*, 139 S. Ct. 794 (2019). In particular, the Supreme Judicial Court rejected ExxonMobil's claim that the Attorney General's investigation was based "solely" on "a pretext" to violate ExxonMobil's constitutional rights, *id.* at 327, or on any "actionable bias," *id.* at 328.

After continuing her investigation into ExxonMobil's marketing of its securities and fossil fuel products to Massachusetts investors and consumers, on October 10, 2019, the Attorney General served notice on ExxonMobil that she intended to file a complaint against the Company for violating Chapter 93A at the close of a five-day meet and confer period required by the statute. G.L. c. 93A, § 4. On October 17, 2019, ExxonMobil—without any basis in law—filed with the Superior Court an emergency motion to extend the statutory five-day meet and confer period to prevent the Attorney General from filing her lawsuit on behalf of the Commonwealth while ExxonMobil and its out-of-state counsel were engaged in a trial in New York. There, once again, ExxonMobil alleged that the Attorney General's planned lawsuit was based on an improper purpose. *See* Add-77-79. After briefing and a hearing, where the Court indicated that ExxonMobil's motion sought relief without "any statutory authority whatsoever," Add-119 (Hr'g Tr. 28:7), this Court denied ExxonMobil's emergency motion, Add-136 (Order); *see also* Add-119 (Hr'g Tr. 28:19-21) ("I can't stand in the way of a statutorily permitted lawsuit

on the I'm too busy theory for Exxon Mobil."). With ExxonMobil's hail-Mary delay tactic thwarted, the Commonwealth commenced this action on October 24, 2019.

Discontent with the Attorney General's chosen state-court forum, ExxonMobil next removed the case to federal court even though the Commonwealth's complaint alleged only state-law Chapter 93A causes of action. Notice of Removal, *Commonwealth v. Exxon Mobil Corp.*, Civ. A. No. 19-cv-12430-WGY (D. Mass. Nov. 29, 2019) (ECF No. 1). Acting on the Commonwealth's motion for a remand to this Court and at the conclusion of the hearing on that motion, Judge Young remanded the case to this Court. Add-159-60 (Hr'g Tr. 23-24); Order of Remand (D. Mass. Mar. 18, 2020) (ECF No. 29). Later, the Court issued an opinion in which the Court rejected every one of ExxonMobil's removal arguments and repeated the Southern District of New York's "[r]unning roughshod over the adage that the best defense is a good offense" observation about ExxonMobil's litigation tactics. *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 35 (D. Mass. 2020). There, the Court found, in particular, that "contrary to ExxonMobil's caricature of the complaint," the Commonwealth's complaint "alleges only corporate fraud." *Id.* at 44. ExxonMobil did not appeal that decision.

On remand, the Commonwealth filed an amended complaint. On July 30, 2020 and August 5, 2020, ExxonMobil served two separate motions to dismiss. In its first motion, a special motion to dismiss based on the anti-SLAPP statute, ExxonMobil asserted that this Court should dismiss the Commonwealth's complaint because it is based on ExxonMobil's state and federal constitutionally protected petitioning activities. In its second motion, a motion to dismiss under Mass. R. Civ. P. 12(b)(2) and 12(b)(6), ExxonMobil asserted that the Court should dismiss the Commonwealth's amended complaint because (i) Massachusetts courts lack personal jurisdiction over ExxonMobil notwithstanding the Supreme Judicial Court's prior opinion to the

contrary, (ii) the Commonwealth failed to allege plausibly that the Company had violated Chapter 93A, and (iii) the Commonwealth's claims improperly seek to compel ExxonMobil to make affirmative statements that would violate its First Amendment rights. After briefing and a lengthy hearing, this Court (Green, J.), denied both motions on June 24, 2021.

On July 27, 2021, ExxonMobil filed its answer, which asserts forty-one separate defenses to the Commonwealth's amended complaint. Defenses 30-33, and 35 raise a singular selective enforcement defense grounded, variably, on the Due Process and Equal Protection clauses and the First Amendment of the type that ExxonMobil asserted in both of its failed lawsuits to block the CID. Defense 34 repeats a state-compelled-speech First Amendment defense that it raised in its failed motion to dismiss the Commonwealth's amended complaint. Defenses 4, 7-8, and 23-26 raise tort and equitable defenses such as lack of causation, comparative negligence, *in pari delicto*, and laches. And Defense 27 attempts to re-raise ExxonMobil's already rejected allegation that the Commonwealth failed to give Exxon sufficient notice and time to confer under Chapter 93A before filing suit. Each of those defenses are insufficient as a matter of law.

STANDARD OF REVIEW

Under Rule 12(f), this Court may strike any defense that is insufficient, redundant, immaterial, impertinent, or scandalous. Mass. R. Civ. P. 12(f). "A motion to strike . . . is the primary procedure for objecting to an insufficient defense." 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (3d ed. 2004 & Supp. 2021). In Massachusetts, the party raising the defense must state a plausible basis for relief from liability to avoid having the defense stricken as insufficient. *Deutsche Bank Nat'l Trust Co. v. Gabriel*, 81 Mass. App. Ct. 564, 571 (2012). "[A] defense," like the ones at issue here, that would "confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and

should be deleted." 5C Wright & Miller, *supra*, at § 1381. The "function" of such a motion to strike is "to avoid the expenditure of time and money that must arise from litigating spurious issues." *Kennedy v. City of Cleveland*, 797 F.2d 297, 305 (6th Cir. 1986). Moreover, courts should strike a defense that "is insufficient as a matter of law." *Kaiser Aluminum & Chem. Shales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982). Here, the fourteen affirmative defenses identified in this motion to strike fail as a matter of law.

ARGUMENT

Since being served with the Attorney General's CID in 2016, ExxonMobil has repeatedly sought to delay, impede, and misconstrue the Attorney General's actions, first to investigate, and now to hold it liable for its unlawful practices, by asserting meritless legal theories and utilizing clearly inapt procedural vehicles. Even though those specious tactics consistently have been rebuffed,[4] ExxonMobil's defenses are yet another attempt to revive its collateral attacks, including its baseless conspiracy and improper motive theories. The consequences of letting those theories stand cannot be overstated: they will serve as launching pads for an improper and time- and resource-consuming sideshow consisting of motion practice and discovery with respect to the Attorney General's motives, among other things.[5] While the "if at first you don't succeed,

[4] *E.g.*, Mem. of Decision & Order on ExxonMobil's Special Motion to Dismiss the Amended Compl. 1-8 (June 22, 2021) (Dkt. No. 43) (denying ExxonMobil's anti-SLAPP motion because Company failed to demonstrate that the Commonwealth's claims are based solely on ExxonMobil's First Amendment protected petitioning activities); *Massachusetts*, 462 F. Supp. 3d at 38-51 (rejecting ExxonMobil's Notice of Removal and remanding to this Court); *Exxon Mobil*, 316 F. Supp. 3d at 687, 704-14 (rejecting ExxonMobil's request to enjoin enforcement of CID based on alleged improper motive and affirming dismissal of complaint); *Exxon Mobil*, 479 Mass. at 327-28 (affirming denial of ExxonMobil's "pretext" and "bias" claims).

[5] Such discovery would be inappropriate in this case: it is settled that "top executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (citing cases).

try, try again" idiom is a noble one in many aspects of life, the law, for good reasons, does not similarly reward it. And here, as explained below, this Court should not either.

I. ExxonMobil's Selective Enforcement Defenses (Defenses 30-33 and 35) Are Barred by a Prior Decision in a Related Case and, In Any Event, Insufficiently Pleaded.

ExxonMobil's defenses 30-33, and 35, grounded variably on the Due Process and Equal Protection clauses, as well as the First Amendment, raise a singular selective enforcement defense through wholly conclusory allegations that the Attorney General engaged in "official misconduct," Defense 30, by having a "conflict of interest," Defense 31, and "selectively enforcing" Chapter 93A against the Company, Defense 32, in retaliation both for ExxonMobil's viewpoints and government petitioning with respect to climate change policies, Defenses 33 and 35. Those defenses should be stricken for two independent reasons. First, ExxonMobil seeks improperly through each of them to relitigate an issue already resolved against it by the Southern District of New York—whether the Attorney General's decision to pursue ExxonMobil for violations of Chapter 93 is based solely on an improper purpose. Second, even if those defenses were not barred by issue preclusion and the defense were available in civil enforcement actions like this one, ExxonMobil has failed to make the rigorous, threshold showing required for a defendant to pursue a selective enforcement defense and related discovery.[6] Indeed, it has not alleged any non-conclusory facts whatsoever.

[6] While courts question whether a selective enforcement defense is even a defense in a civil enforcement action for penalties and injunctive relief like this one, most courts have assumed that it does apply. *Compare, e.g.*, *United States v. American Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804, 807-09 (S.D. Ohio 2003) (AEP) (assuming that it applies and granting governments' motion to strike defense), *with, e.g.*, *United States v. Fleetwood Enters.*, 702 F. Supp. 1082, 1091-92 & n.26 (D. Del. 1988) ("[T]his Court is not convinced that a civil penalty action brought by the Federal Government is the punitive equivalent of a criminal action to the extent that selection of a civil defendant based on the exercise of protected rights is unconstitutional and a bar to the civil proceeding.").

A. ExxonMobil's Defenses 30-33 and 35 Are Barred by Res Judicata.

ExxonMobil's Defenses 30-33 and 35 are all issue precluded, because the Southern District of New York resolved against ExxonMobil the issue whether the Attorney General's actions are based solely on an unlawful purpose. This Court and the Supreme Judicial Court both came to precisely the same conclusion as well. *Supra* pp.4-5. "When a State court is faced with the issue of determining the preclusive effect of a Federal court's judgment, it is the Federal law of res judicata which must be examined." *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 465-66 (2013); *see also Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (same). Under federal law, "[i]ssue preclusion, also referred to as collateral estoppel, bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to [a] prior judgment,'" *Cayuga Nation v. Tanner*, 6 F.4th 361, 374 (2d Cir. 2021), and it applies if: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party [raising the issue] had a full and fair opportunity to litigate the issue [in the prior proceeding]; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits," *id.* Those elements are met here.

First, both in its defenses here and in its affirmative claims in the Southern District of New York, Exxon Mobil alleges that the Attorney General's decision to pursue it for violating Chapter 93A was based on an improper purpose to violate the Company's constitutional rights. *Exxon Mobil*, 316 F. Supp. 3d at 705 (finding that parties "appear to agree that allegations of an improper motive are essential to each" of ExxonMobil's constitutional torts); *compare e.g.*, Defense 32 ("malicious and bad faith intent"), Defense 33 ("viewpoint discrimination").[7]

[7] Indeed, while ExxonMobil did not allege any facts to support these constitutional defenses in its answer, ExxonMobil has recited the exact same factual "improper motives" narrative on

Second, the improper motive issue was actually litigated and decided in the prior, related proceeding in the Southern District of New York. The Court found, after reviewing the extensive record before it and hearing argument, that ExxonMobil had failed to show "an improper purpose," *Exxon Mobil*, 316 F. Supp. 3d at 707, "retaliat[ion]," *id.* at 708, "any actionable bias," *id.* at 708, or "pretext[]," *id.* at 710-11. Indeed, this Court and the Supreme Judicial Court too, found—based on the same outlandish allegations—that the Attorney General's actions were not based on "a pretext" to violate ExxonMobil's constitutional rights or on any "actionable bias," *Exxon Mobil*, 479 Mass. at 327-28; *see also supra* pp.4-5. For those reasons, the Southern District of New York dismissed "Exxon[Mobil's] constitutional tort and state law cognate claims" because the Company's "allegations fall well short of plausibly alleging that the . . . [Attorney General] was motivated by an improper purpose." *Exxon Mobil*, 316 F. Supp. 3d at 712. And, significantly, ExxonMobil may not now attempt to introduce new "facts" or arguments "to obtain a different determination." Restatement (Second) of Judgments § 27 cmt. c. (Am. L. Inst. 1982 & Supp. 2021).

Third, ExxonMobil had a full and fair opportunity to litigate the issue in the Southern District of New York. *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 185 (2d Cir. 1991) (rejecting argument that party was not allowed to develop record where the party "chose to place the conspiracy allegations, which," as was the case here, "were central to their section 1983 claims, directly in issue in the" prior proceeding). And that is true even though the Company's appeal of the district court's judgment remains pending before the Second Circuit. *Strunk v. City of Beverly Police Dep't*, 377 F. Supp. 3d 70, 73 (D. Mass. 2019); *O'Brien v. Hanover Ins. Co.*,

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which it relied in the Southern District of New York in this proceeding. Mem. of ExxonMobil in Supp. of Special Mot. to Dismiss the Amended Compl. Pursuant to G.L. c. 231, § 59H, at 2-10 (July 30, 2020) (Dkt. No. 30).

427 Mass. 194, 201 (1998) ("The Federal rule, followed by a majority of the States, is that a trial court judgment is final and has preclusive effect regardless of the fact that it is on appeal").

Fourth, and finally, the resolution of the improper motive issue was undisputedly necessary to support the Southern District of New York's final judgment on the merits—indeed, that was the central issue before that court. *Exxon Mobil*, 316 F. Supp. 3d at 686. To the extent there is any doubt, "a dismissal for failure to state a claim," which was the basis for the Southern District of New York's opinion and final judgment, "operates as 'a final judgment on the merits and thus has *res judicata* effects.'" *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016). For all of these reasons, this Court should strike Defenses 30-33, and 35, and thereby "prevent[] needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

B. ExxonMobil's Defenses 30-33 and 35 Fail, In Any Event, to Satisfy *Armstrong's* Rigorous Standards for a Selective Prosecution Defense.

ExxonMobil's Defenses 30-33 and 35 also must be stricken because the Company has failed to allege a single, non-conclusory fact to satisfy the rigorous threshold burden necessary to pursue the defenses. A defendant asserting a selective or vindictive enforcement defense must overcome "the presumption of regularity [that] supports . . . prosecutorial decisions," because "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotation omitted). That rule makes sense because "decisions whether and how to prosecute entail policy considerations, such as deterrence value and prosecuting priorities, that are ill suited to judicial review," *Commonwealth v. Bernardo B.*, 453 Mass. 158, 167 (2009), and exposing the government to discovery based on such defenses may "unnecessarily impair the performance of a core executive constitutional function: by "delay[ing]" the enforcement proceeding, "chill[ing]

law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and . . . undermin[ing] prosecutorial effectiveness by revealing the Government's enforcement policy," *Armstrong*, 517 U.S. at 465; *see also id*. at 468. For those reasons, the SJC has made clear that, generally, judicial review of the Attorney General's enforcement decisions "would constitute an intolerable interference by the judiciary in the executive department of the government." *Shephard v Attorney General*, 409 Mass. 398, 401 (1991).

To overcome the presumption, ExxonMobil must present "clear evidence to the contrary" demonstrating both that the enforcement action "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465; *see also id.* at 468 ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.").[8] While not all courts have applied the same "clear evidence" standard in the civil context, they all agree that a party seeking to assert a selective enforcement defense must make a threshold showing to pursue the defense and obtain related discovery that is either "colorable," "substantial," "substantial and concrete," or shows a "reasonably likelihood" of success. *Armstrong*, 517 U.S. at 468; *see also, e.g.*, *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 932 n.8 (D.C. Cir. 1982) ("colorable"); *AEP*, 258 F. Supp. 2d at 808 ("colorable"). At this stage, what that means is that ExxonMobil was required to make a plausible showing as to both

[8] The same is true with respect to ExxonMobil's First Amendment defenses even if they were construed as attempting to state something other than a selective or vindicative enforcement defense. Like *Armstrong*'s "discriminatory purpose" requirement, ExxonMobil was also required to plead facts plausibly showing that "viewpoint discrimination" was "the sole reason for the government speech restriction," *Wood v. Moss*, 134 S. Ct. 2056, 2069 (2014), and that the Attorney General's decision to sue ExxonMobil was "motivated or substantially" caused by ExxonMobil's "exercise of that right," *Smith v. Campbell*, 782 F.3d 93, 100 (2d Cir. 2015); *see also Exxon Mobil*, 316 F. Supp. 3d at 705 ("allegations of an improper motive are essential to" ExxonMobil's First Amendment and Due Process claims).

elements, which includes a threshold showing that the Attorney General's decision to sue ExxonMobil for violating, and continuing to violate, Chapter 93A was based on an improper purpose. *See Deutsche Bank*, 81 Mass. App. Ct. at 571-72 (Rule 12(b)(6) standard applies to motion to strike defense). That, as a matter of law, is something it cannot do here. *Supra* Pt.I.A.

ExxonMobil has not alleged facts plausibly showing that the Attorney General's decision to sue it had a discriminatory effect and was motivated by a discriminatory purpose. With respect to discriminatory effect, ExxonMobil's alleges only that the Attorney General "selectively treated ExxonMobil differently from others who are similarly situated," Defense 32, but an unadorned, conclusory statement like that one does not, as a matter of law, meet the "rigorous standard for discovery in aid of" a selective-prosecution defense. *See Armstrong*, 417 U.S. at 468. ExxonMobil's similarly conclusory allegation that the Attorney General acted with "malice and in bad faith" to "punish and inhibit ExxonMobil's exercise of its constitutionally protected rights" fares no better. Defense 32. "A mere allegation that the exercise of First Amendment rights led to the prosecution" is likewise insufficient. *See United States v. Bassford*, 812 F.2d 16, 22 (1st Cir. 1987).[9] And with respect to discriminatory purpose, ExxonMobil alleges only, and again in a wholly conclusory fashion, that the Attorney General engaged in "official misconduct," Defense 30, has a "conflict of interest," Defense 31, and acted with a retaliatory motive, Defenses 32, 33, 35—allegations that fall well short of plausibly alleging that a discriminatory purpose was the "but for" cause of the Attorney General's decision to prosecute this action. *Armstrong*, 517 U.S. at 465; *see also Harrington v. United States*, 673 F.2d 7, 11

[9] *See also Subash v. IRS*, 514 F. Supp. 2d 114, 119 (D. Mass. 2007) ("Even assuming that the plaintiffs could successfully prove selective treatment, there is no showing that the selective treatment was based on impermissible discriminatory considerations or on a bad faith intent to injure the plaintiffs. Mere unequal enforcement of laws, without more, does not rise to the level of a constitutional violation.").

(1st Cir. 1982) ("Absent any allegation of a discriminatory purpose, a mere failure of those who administer the law to treat equally all persons who violate the law does not constitute a denial of the constitutional right to equal protection"). Accordingly, this Court should thus strike Defenses 30-33 and 35 for these reasons as well.

II. ExxonMobil's First Amendment Defenses (33-35) Are Irreparably Deficient for Other Reasons Too.

ExxonMobil's three First Amendment defenses, Defenses 33-35, should be stricken for three additional independent reasons. First, ExxonMobil asserts in Defense 33 that the Commonwealth's claims are "barred, in whole or in part, because the claims are based on ExxonMobil's exercise of its constitutionally protected right to free speech, free from viewpoint discrimination, under" both the federal and state constitutions. But, as ExxonMobil has already conceded in prior litigation, "false statements to the market or the public are not protected speech." *Exxon Mobil*, 316 F. Supp. 3d at 710. Indeed, it is settled beyond doubt that "[t]he First Amendment does not shield fraud" and that the government has the "firmly established" power "to protect people against" false and deceptive speech. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) (citation omitted); *see also POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 484 (D.C. Cir. 2015) ("The [Federal Trade Commission Act] proscribes—and the First Amendment does not protect—deceptive and misleading advertisements."). Accordingly, neither federal nor state free speech protections constitute a defense to the Commonwealth's Chapter 93A claims here.

Second, ExxonMobil asserts in Defense 34 that the Commonwealth's claims are "barred, in whole or in part, because they require ExxonMobil to engage in state-compelled speech that is neither purely factual nor uncontroversial in violation" of both the federal and state constitutions. Like its viewpoint discrimination defense, ExxonMobil's state-compelled speech defense also is

not a defense at all. Instead, that defense is nothing more than a premature challenge to a potential remedy requiring ExxonMobil to publish corrective statements to remedy its false and deceptive marketing that this Court may require if it finds ExxonMobil violated Chapter 93A. *Provident Funding Assocs. v. Jones*, 2013 WL 1324653, at *4 (Suffolk Super. Ct. Feb. 27, 2013) (allowing Rule 12(f) motion where defenses were "akin to remedies"); *see also United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1142-45 (D.C. Cir. 2009) (rejecting tobacco companies' compelled-speech challenge to court-ordered corrective statements following district court's liability finding). In the remedy phase, ExxonMobil is free to argue that one or more proposed corrective statements runs afoul of the First Amendment's compelled speech doctrine. But because this defense is not one that would "require[] judgment for" ExxonMobil even if the Commonwealth proves its case, the Company's compelled-speech defense is not a defense and must be stricken too. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir. 1999) (a valid defense is one "that, if established, requires judgment for the defendant even if the plaintiff can prove [its] case").

Third, ExxonMobil asserts in Defense 35 that the Commonwealth's claims are "barred, in whole or in part, because the claims are based solely on ExxonMobil's exercise of its constitutionally-protected right to petition under the First Amendment," the Massachusetts cognate to it, and G.L. c. 231, § 59H (the anti-SLAPP statute). This Court, however, already rejected that very defense when it denied ExxonMobil's G.L. c. 231, § 59H Special Motion to Dismiss. Mem. of Decision & Order on ExxonMobil's Special Motion to Dismiss at 4-8. After carefully considering the parties' written and oral arguments on the issue, this Court held that "Exxon has failed to meet its threshold burden of showing that the Commonwealth's claims are based *solely* on Exxon's petitioning activities." *Id.* at 4. While ExxonMobil has appealed that

decision, it remains the law of the case and should not be reconsidered by this Court. *Kitras v. Town of Aquinnah*, 474 Mass. 132, 146 (2016). And even if that were not the case, "[n]either the [First Amendment's petitioning clause] nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentations." *Philip Morris*, 566 F.3d at 1123 (citation omitted); *see also id.* at 1123-24 (rejecting First Amendment petitioning defense because tobacco companies' statements were false and misleading). Thus, just like its First Amendment Defense 33, neither federal nor state petitioning protections are a defense to the Commonwealth's Chapter 93A claims.

III. ExxonMobil's Tort (22-26) and Equitable (4, 7-8) Defenses Do Not Apply to Chapter 93A Claims Brought by the Commonwealth to Vindicate the Public Interest.

ExxonMobil's tort-based Defenses 22-26 should be stricken because such defenses are inapplicable, as a matter of law, to a Chapter 93A enforcement action brought by the Attorney General under G.L. c. 93A, § 4 to protect and promote the public interest. It was settled, long ago that liability under Chapter 93A does not depend "on traditional tort or contract law concepts." *Heller v. Silverbranch Const. Corp.*, 376 Mass. 621, 626 (1978); *see also Exxon Mobil*, 479 Mass. at 316 (Chapter 93A liability "is neither dependent on traditional concepts nor limited by preexisting rights or remedies"); *Nei v. Burley*, 388 Mass. 307, 313 (1983) ("c. 93A dispenses with the need to prove many of the essential elements of . . . common law claims."). For that reason, the Supreme Judicial Court has made clear that Chapter 93A liability determinations "are not aided by [a] defendant's review of the various common law theories under which it might have escaped liability" if the plaintiff had asserted only common law liability theories. *Heller*, 376 Mass. at 626. Thus, for example, the Commonwealth need not prove causation or that investors or consumers were actually injured to prevail on a claim that a defendant is liable for civil penalties for violating Chapter 93A. *See Commonwealth v. Fall*

River Motor Sales, Inc., 409 Mass. 302, 312-13 (1991) (violation itself causes injury to the public and there is no need to prove actual or specific injury).[10] Accordingly, this Court should strike ExxonMobil's Defenses 22-26, because the Company improperly seeks through those defenses to insulate itself from Chapter 93A liability based on tort-based defenses that are inapplicable to this Chapter 93A action.

ExxonMobil's equitable Defenses 4, 7, and 8 suffer from a similar fatal flaw. Indeed, it axiomatic that courts will not apply the rules of equity "so as to frustrate the purpose of its laws or to thwart public policy." *Pan-Am. Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506 (1927); *see also Phipps Prods. Corp. v. MBTA*, 387 Mass. 687, 693 (1982) ("public interest in the enforcement of the laws of the Commonwealth" supersedes equitable defenses). For that reason, courts routinely strike the defenses of unclean hands (Defense 4) and *in pari delicto* (Defense 8) when asserted as defenses to an action where the government is enforcing a law like Chapter 93A to protect the public interest. *E.g.*, *United States v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 72-76 (D.D.C. 2004) (striking *in pari delicto* and unclean hands defenses in deception case against tobacco companies); *United States v. Am. Electric Power Serv. Corp.*, 218 F. Supp. 2d 931, 938 (S.D. Ohio 2002) (striking unclean hands defense in Clean Air Act enforcement action). ExxonMobil's laches Defense (4) is barred too, because "it is not available to . . . defendants where the proceeding is brought by an authorized public agency to enforce the laws of the Commonwealth." *Bd. of Health of Holbrook v. Nelson*, 351 Mass. 17, 19 (1966). And the same is true for its waiver and estoppel Defenses (7) as well, because "the right of the public to have" the Commonwealth's laws enforced "cannot be forfeited by the action of its officials."

[10] *See also Commonwealth v. Chatham Dev. Co.*, 49 Mass. App. Ct. 525, 528-29 (2000) (Court was within its discretion to assess civil penalty for each deceptive lease even though there was no allegation any tenant was actually harmed).

New City Hotel Co. v. Alcoholic Beverages Control Comm'n, 347 Mass. 539, 542 (1964).[11] For these reasons, the Court should strike these defenses.

IV. ExxonMobil's "Five-Day Notice" Deficiency Defense (27) Fails Because This Court Already Rejected It.

ExxonMobil fares no better in Defense 27 where it asserts that the Commonwealth's claims "are barred, in whole or in part, because [the Commonwealth] failed to provide adequate pre-suit notice and an opportunity to meet and confer in person at least five days prior to commencing." Indeed, this Court has already rejected that very defense. *Supra* p.5-6. As required by G.L. c. 93A, § 4, the Attorney General served notice on ExxonMobil and its local counsel of her intention to commence this action and invited ExxonMobil to confer with the Attorney General's Office prior to its filing. In response, the Company argued that the planned lawsuit was, like the investigation, *supra* pp.2-3, based on "improper motives," reminded the Attorney General of her obligation preserve communications regarding her decision to sue ExxonMobil, and proposed to confer with the Attorney General's Office nearly a month later. Add-91. After having fought for three years—in both state and federal court—to obtain the documents the Attorney General asked ExxonMobil to provide under the CID, the Attorney General, unsurprisingly, declined to wait that long and instead proposed to meet with ExxonMobil's counsel the next day to determine if the Company was serious about engaging in settlement discussions. *See* Add-113-16 (Hr'g Tr. 22-25).

[11] If the waiver doctrine applies to the Commonwealth at all, then ExxonMobil has also failed to allege facts plausibly showing that the Attorney General "intentional[ly] relinquish[ed] or abandon[ed] a known right" to allege the claims in the Commonwealth's amended complaint. *United States v. DynCorp Int'l LLC*, 282 F. Supp. 51, 56 (D.D.C. 2017) (striking waiver defense).

Consistent with its past tactics, and armed with no legal authority, ExxonMobil instead used its time to prepare, and then file, an emergency motion asking the Court to require the Attorney General to wait a month before filing suit, ostensibly because ExxonMobil—the largest publicly traded oil company in the world—and some of its counsel at a major law firm—were engaged in a trial in New York. Add-75-76, 83-84. There, again, ExxonMobil accused the Attorney General of deciding to commence suit based on improper purposes. *Id.* at 77-79; *see also* Add-91. After briefing and an oral argument, Judge Brieger denied ExxonMobil's emergency motion, finding "no statutory authority whatsoever" to support ExxonMobil's requested relief. Add-119 (Hr'g Tr. 28:7).[12] ExxonMobil did not ask a single justice of the Appeals Court to review that unassailable decision; the issue is now moot; and the Company may not, in any event, challenge that decision in this separate case. In other words, the Court's ruling on that issue is final, binds the parties in this case, and thus bars the defense as a matter of law. And even if all of that were not true, the Court's prior ruling in the related case would constitute the law of the case and there is absolutely no basis for reconsidering it here, especially where, again, no legal authority supports the Defense. *See Kitras*, 474 Mass. at 146. Accordingly, this Court should strike Defense 27.

CONCLUSION

For the foregoing reasons, this Court should strike, with prejudice, Separate Defenses 4, 7-8, 22-26, and 30-35 from ExxonMobil's answer.

[12] Judge Brieger's "concern about [ExxonMobil's] authenticity" was well founded. Add-118 (Hr'g Tr. 27:14). Indeed, the Attorney General offered to meet and confer with ExxonMobil to discuss possible settlement after she filed the complaint, Add-117 (Hr'g Tr. 26:7-19); *see also id.* at 113-16 (describing reasons for doubting ExxonMobil's interest in a serious meet and confer), but ExxonMobil has, to this day, not accepted that offer.

Dated: September 24, 2021

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

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CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on September 24, 2021, I served the foregoing document by sending a copy thereof by electronic service to:

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ADDENDUM

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

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

EXXONMOBIL'S FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Exxon Mobil Corporation ("ExxonMobil") brings this action seeking declaratory and injunctive relief against Eric Tradd Schneiderman, the Attorney General of New York, in addition to Maura Tracy Healey, the Attorney General of Massachusetts. Attorneys General Schneiderman and Healey have joined together with each other as well as others known and unknown to conduct improper and politically motivated investigations of ExxonMobil in a coordinated effort to silence and intimidate one side of the public policy debate on how to address climate change. ExxonMobil seeks an injunction barring the enforcement of a subpoena issued by Attorney General Schneiderman and a civil investigative demand ("CID") issued by Attorney General Healey to ExxonMobil, and a declaration that the subpoena and CID violate ExxonMobil's rights under federal and state law. As demonstrated in this amended pleading, the same claims and arguments asserted against Attorney General Healey apply

with equal force against Attorney General Schneiderman. For its First Amended Complaint, ExxonMobil alleges as follows based on present knowledge and information and belief:

INTRODUCTION

1. Frustrated by the federal government's apparent inaction on climate change, Attorney General Schneiderman assembled a coalition of state attorneys general, including Attorney General Healey, to use law enforcement powers as a means of promoting a shared political agenda. According to an agreement executed by its members, this coalition embraced two goals.[1] First, it sought to "limit[] climate change" by pressing for a reduction in the use of fossil fuels.[2] Second, the coalition explicitly advocated for restrictions on speech and debate to accomplish that political agenda, listing as an objective "ensuring the dissemination of accurate information about climate change."[3] The coalition's agreement was concealed from the public until third parties recently obtained it from one coalition member under public records laws. Other coalition members continue to resist similar demands for transparency.

2. The coalition first publicly surfaced when Attorney General Schneiderman hosted a press conference in New York City on March 29, 2016,[4] with former Vice President and private citizen Al Gore as the featured speaker.[5] Attorney General Schneiderman pledged that the coalition would "deal with the problem of climate

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1 *See* Paragraphs 52 to 53 below; *see also* Ex. R at App. 171–74.
2 Ex. V at App. 196.
3 *Id.*
4 *See* Paragraphs 27 to 39 below.
5 A transcript of the AGs United for Clean Power Press Conference, held on March 29, 2016, was prepared by counsel based on a video recording of the event, which is available at http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across. A copy of this transcript is attached as Exhibit B and is incorporated by reference.

change" by using law enforcement powers "creatively" and "aggressively" to force ExxonMobil[6] and other energy companies to support the coalition's preferred policy responses to climate change.[7] Considering climate change to be the "most pressing issue of our time," Attorney General Schneiderman said the coalition was "prepared to step into this [legislative] breach."[8]

3. Attorney General Healey similarly pledged "quick, aggressive action" by her office to "address climate change and to work for a better future."[9] She announced an investigation of ExxonMobil that she had already determined would reveal a "troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public."[10] The statements of Attorney General Schneiderman, Attorney General Healey, Mr. Gore and others made clear that the press conference was a purely political event.

4. It was also the result of years of planning and lobbying by private interests.[11] For nearly a decade, climate change activists and certain plaintiffs' attorneys have sought to obtain the confidential records of energy companies as a means of pressuring those companies to change their policy positions. A 2012 workshop examined ways to obtain the internal documents of companies like ExxonMobil for the purpose of "maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[12] The attendees at that

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6 ExxonMobil was formed as a result of a merger between Exxon and Mobil on November 30, 1999. For ease of discussion, we refer to the predecessor entities as ExxonMobil throughout the Complaint.
7 Ex. B at App. 9 –10.
8 *Id.* at App. 9, 11.
9 *Id.* at App. 21.
10 *Id.* at App. 20.
11 *See* Paragraphs 40 to 51 below.
12 Ex. C at App. 56.

workshop concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[13]

5. In the months leading up to the press conference, these activists and attorneys met at the offices of the Rockefeller Family Fund in New York to discuss the "[g]oals of an Exxon campaign," which included to "delegitimize [it] as a political actor" and to "force officials to disassociate themselves from Exxon."[14]

6. The leadership of this group of activists and attorneys attended a meeting with "sympathetic state attorney[s] general" prior to the March 29 press conference. While this Court and the public have not been told what was discussed, a copy of the agenda for the meeting includes presentations on the "imperative of taking action now on climate change" and on "climate change litigation."[15]

7. Members of the coalition recognized that the behind-the-scenes involvement of these individuals—especially a private attorney likely to seek fees from any private litigation made possible by an attorney general-led investigation of ExxonMobil—could expose the special interests behind their so-called investigations and the bias underlying their deployment of law enforcement resources for partisan ends. When that same private attorney asked Attorney General Schneiderman's office what he should tell a reporter if asked about his involvement, Lemuel Srolovic, Chief of the Environmental Protection Bureau, asked the private attorney not to confirm his attendance at the conference.[16]

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13 *Id.* at 40.
14 Ex. D at App. 67.
15 Ex. E at App. 70.
16 Ex. F at App. 80.

8. The investigations launched by Attorneys General Schneiderman and Healey amount to nothing more than an unlawful exercise of government power to further political objectives. The shifting justifications they have presented for their investigations are pretexts that have become more and more transparent over time.[17] Invoking state laws with limitations periods no longer than six years, the Attorneys General claim to be investigating whether ExxonMobil committed consumer or securities fraud by misrepresenting its knowledge of climate change.

9. But for more than a decade, ExxonMobil has widely and publicly confirmed[18] that it "recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant."[19] ExxonMobil has also publicly advocated a tax on carbon emissions since 2009.[20] Moreover, in conducting its business, ExxonMobil addresses the potential for future climate change policy by estimating a proxy cost of carbon, which seeks to reflect potential policies governments may employ related to the exploration, development, production, transportation or use of carbon-based fuels.[21] This cost, which in some regions may approach $80 per ton by 2040, has been included in ExxonMobil's Outlook for Energy for several years.[22] Further, ExxonMobil requires all of its business lines to include, where appropriate, an estimate of greenhouse gas-related emissions costs in their economics when seeking funding for capital investments.[23] Despite the applicable limitations periods and ExxonMobil's longstanding

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17 *See* Paragraphs 74 to 76 below.
18 *See* Paragraphs 63 to 64 below.
19 Ex. G at App. 93; *see also* Ex. H at App. 103 ("Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.").
20 Ex. T at App. 182.
21 Ex. T at App. 190.
22 *Id.*
23 *Id.*

public recognition of the risks associated with climate change, the subpoena and the CID seek documents going back nearly four decades, seeking anything having to do with the issue.

10. Worse still, the New York Attorney General's subpoena and the Massachusetts Attorney General's CID target ExxonMobil's communications with those who the Attorneys General perceive to have different political viewpoints in the climate change debate. The subpoena seeks ExxonMobil's communications with oil and gas trade associations and industry groups that advocate on energy policy, and the CID demands ExxonMobil's communications with a list of organizations labeled by the coalition as so-called "climate deniers," *i.e.*, those who have expressed skepticism about the science of climate change or the coalition's preferred policies regarding climate change.[24] The CID also identifies statements made by ExxonMobil about the tradeoffs inherent in climate change policy and demands that ExxonMobil produce records supporting those disfavored statements.

11. Recent events have fully unmasked the pretextual nature of these investigations and the improper bias and unconstitutional objectives animating them.[25] When Attorney General Schneiderman launched his investigation, he claimed to be investigating ExxonMobil's scientific research in the 1970s and 1980s. Subject to the assertion of privilege, including First Amendment privileges, ExxonMobil initially provided documents to Attorney General Schneiderman with the expectation that his office would conduct a neutral, even-handed investigation. As events unfolded over the

[24] *See* Paragraphs 66 and 73 below.
[25] *See* Paragraphs 74 to 76 below.

ensuing months—including the politicized press conference in March and the secret agreement's coming to light over the summer—that expectation has evaporated.

12. Within the last month, and well after ExxonMobil commenced this action, Attorney General Schneiderman continued his practice of providing unprecedented briefings to the press on the status of his "investigation" of ExxonMobil and announced his expectation that a "massive securities fraud" will be uncovered. During one of those briefings, Attorney General Schneiderman conceded that he has abandoned his original inquiry into ExxonMobil's historical scientific research and is now pursuing a new theory of investor fraud. That shift further demonstrates that Attorney General Schneiderman is simply searching for a legal theory—any legal theory—to continue his efforts to pressure ExxonMobil and intimidate one side of a public policy debate.[26]

13. It is now indisputable that the subpoena and the CID were issued in bad faith to deter ExxonMobil from participating in ongoing public deliberations about climate change and to fish through decades of ExxonMobil's documents in the hope of finding some ammunition to enhance the coalition's, and its climate activist confederates', position in the policy debate over climate change. Through their actions, Attorneys General Schneiderman and Healey have deprived and will continue to deprive ExxonMobil of its rights under the United States Constitution, the Texas Constitution, and the common law.

14. ExxonMobil therefore seeks a declaration that the subpoena and the CID violate its rights under Articles One and Six of the United States Constitution; the First, Fourth, and Fourteenth Amendments to the United States Constitution; Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution; and constitutes an abuse of

[26] *See* Paragraphs 74 to 81 below.

process under the common law. ExxonMobil also seeks an injunction barring further enforcement of the subpoena and the CID. Absent an injunction, ExxonMobil will suffer imminent and irreparable harm for which there is no adequate remedy at law.

PARTIES

15. ExxonMobil is a public, shareholder-owned energy company incorporated in New Jersey with principal offices in the State of Texas. ExxonMobil is headquartered and maintains all of its central operations in Texas.

16. Defendant Eric Tradd Schneiderman is the Attorney General of New York. He is sued in his official capacity.

17. Defendant Maura Tracy Healey is the Attorney General of Massachusetts. She is sued in her official capacity.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over this action pursuant to Sections 1331 and 1367 of Title 28 of the United States Code. Plaintiff alleges violations of its constitutional rights in violation of Sections 1983 and 1985 of Title 42 of the United States Code. Because those claims arise under the laws of the United States, this Court has original jurisdiction over them. 28 U.S.C. § 1331. Plaintiff also alleges related state law claims that derive from the same nucleus of operative facts. Each of Plaintiff's state law claims—like its federal claims—is premised on statements by Attorneys General Schneiderman and Healey at the press conference and during the course of their investigations, their issuance of the subpoena and the CID, the demands made therein, and their intention to muzzle ExxonMobil's speech in Texas. This Court therefore has supplemental jurisdiction over those claims. 28 U.S.C. § 1367(a).

19. Venue is proper within this District pursuant to Section 1391(b) of Title 28 of the United States Code because all or a substantial part of the events giving rise to the claims occurred in the Northern District of Texas. The subpoena was emailed to ExxonMobil in Texas, and both the subpoena and CID target and seek to suppress speech emanating from Texas. They also require ExxonMobil to collect and review a substantial number of records stored or maintained in the Northern District of Texas.

FACTS

A. Attorney General Schneiderman Opens His Investigation of ExxonMobil with a Press Leak Followed by a Television Interview.

20. In November 2015, ExxonMobil received Attorney General Schneiderman's subpoena at its corporate headquarters in Irving, Texas.[27] Within hours, the press was reporting on the subpoena's issuance and its contents. An article in *The New York Times* reported that the subpoena "demand[ed] extensive financial records, emails and other documents" and that the "focus" of the investigation was on "the company's own long running scientific research" on climate change.[28] The article identified as sources "people with knowledge of the investigation," all of whom "spoke on the condition of anonymity saying they were not authorized to speak publicly about investigations."[29] To state the obvious, ExxonMobil did not alert *The New York Times* or any other media to the subpoena's existence or its contents.

21. This press leak was unsettling. It is customary for law enforcement officials to maintain confidentiality of their investigations, both to protect the integrity of the investigative process and to avoid unfair prejudice to those under investigation. But

[27] Ex. I at App. 108.
[28] Ex. A at App. 2.
[29] *Id.* at App. 2–3.

Attorney General Schneiderman's investigation of ExxonMobil has been conducted with a marked disregard for traditional concerns about confidentiality or unfair prejudice. Before ExxonMobil had even accepted service of the subpoena, it had received multiple media inquiries about the subpoena and could read about the investigation in online news accounts.[30]

22. Within a week of issuing the subpoena, Attorney General Schneiderman appeared on a *PBS NewsHour* segment, entitled "Has Exxon Mobil misle[d] the public about its climate change research?"[31] During that appearance, Attorney General Schneiderman described the focus of his investigation on ExxonMobil's purported decision to "shift[] [its] point of view" and "change[] tactics" on climate change after "being at the leadership of doing good scientific work" on the issue "[i]n the 1980s."[32] Attorney General Schneiderman said his probe extended to ExxonMobil's "funding [of] organizations."[33] While he did not refer to them expressly as his political adversaries, he derided them as "climate change deniers" and "climate denial organizations."[34] Those organizations included the "American Enterprise Institute, . . . the American Legislative Exchange Council, . . . [and the] American Petroleum Institute."[35]

23. Renewable energy was another focus of the interview. Attorney General Schneiderman said he was "concerned about" ExxonMobil's purported "overestimating the costs of switching to renewable energy," but he did not explain how any supposed error in that estimate could conceivably constitute a fraud or mislead any consumer.[36]

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30 Ex. A at App. 2–7; Ex. J at App. 110–112.
31 Ex. K at App. 114.
32 *Id.* at App. 115.
33 *Id.* at App. 116.
34 *Id.* at App. 116, 118.
35 *Id.* at App. 116.
36 *Id.*. at App. 117.

24. Attorney General Schneiderman did not discuss ExxonMobil's oil and gas reserves or its assets at all during this interview.

25. Later that month at an event sponsored by *Politico* in New York, Attorney General Schneiderman said that ExxonMobil appeared to be "doing very good work in the 1980s on climate research" but that its "corporate strategy seemed to shift" later.[37] Attorney General Schneiderman claimed that the company had funded organizations that he labeled "aggressive climate deniers," again specifically naming his perceived political opponents at the American Enterprise Institute, the American Legislative Exchange Council, and the American Petroleum Institute.[38] Attorney General Schneiderman admitted that his "investigation" of ExxonMobil was merely "one aspect" of his office's efforts to "take action on climate change," commenting that society's failure to address climate change would be "viewed poorly by history."[39]

26. After this initial flurry of statements to the press, relative quiet followed, and ExxonMobil attempted in good faith to produce records demanded by the subpoena. It provided Attorney General Schneiderman with documents related to its historical research on global warming and climate change.

B. The "Green 20" Coalition Plans to Use Law Enforcement Tools for Political Goals.

27. The playing field changed on March 29, 2016, when Attorney General Schneiderman hosted a press conference in New York City. Calling themselves the "AGs United For Clean Power" and the "Green 20," Attorneys General Schneiderman and Healey were joined by other state attorneys general and Al Gore to announce their

[37] Ex. L at App. 123.
[38] *Id.*
[39] *Id.* at App. 124.

plan to take "progressive action to address climate change" by investigating ExxonMobil.[40] Attorneys general or staff members from over a dozen other states were in attendance, as was Claude Walker, the Attorney General of the United States Virgin Islands.

28. Expressing dissatisfaction with the supposed "gridlock in Washington" regarding climate change legislation, Attorney General Schneiderman said that the coalition had to work "creatively" and "aggressively" to respond to "th[e] most pressing issue of our time," namely, the need to "preserve our planet and reduce the carbon emissions that threaten all of the people we represent."[41]

29. Attorney General Healey agreed, opining that "there's nothing we need to worry about more than climate change."[42] She considered herself to have "a moral obligation to act" to remedy what she described as a threat to "the very existence of our planet," and she vowed to take "quick, aggressive action" to "address climate change and to work for a better future."[43]

30. Echoing those themes, Attorney General Walker stated that "the American people . . . have to do something transformational" because "[w]e cannot continue to rely on fossil fuel."[44] In private communications with other members of the Green 20 coalition, Attorney General Walker expressed his hope that the coalition's efforts would "identify[] other potential litigation targets" and "increase our leverage" against

[40] Ex. M at App 127.
[41] Ex. B at App. 9–11.
[42] *Id.* at App. 20.
[43] *Id.* at App. 20–21.
[44] Ex. B at App. 24.

ExxonMobil to replicate or improve on an $800 million settlement he had previously obtained against another energy company.[45]

31. For the Green 20, the public policy debate on climate change was over and dissent was intolerable. Attorney General Schneiderman declared that he had "heard the scientists" and "kn[e]w what's happening to the planet."[46] To him, there was "no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up."[47] Clearing up that "confusion"—what the First Amendment safeguards as protected political speech—was an express objective of the Green 20.

32. According to Attorney General Healey, "[p]art of the problem has been one of public perception," causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[48] She promised that those who "deceived" the public—by disagreeing with her about climate change—"should be, must be, held accountable."[49] Mr. Gore agreed, denouncing those he accused of "deceiving the American people . . . about the reality of the climate crisis and the dangers it poses to all of us."[50]

33. The attorneys general embraced the renewable energy industry, in which Mr. Gore is a prominent investor and promoter, as the only legitimate response to climate change. Attorney General Schneiderman said, "We have to change conduct" to "mov[e] more rapidly towards renewables."[51] Attorney General Healey promised to "speed our

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45 Ex. N at App. 131, 134.
46 Ex. B at App. 10.
47 *Id.*
48 *Id.* at App. 20.
49 *Id.*
50 *Id.* at App. 14.
51 *Id.* at App. 27–28.

transition to a clean energy future"[52] According to Attorney General Walker, "[w]e have to look at renewable energy. That's the only solution."[53] Mr. Gore urged the coalition of state attorneys general to investigate his business competitors for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[54]

34. The assembled attorneys general had nothing but praise for Mr. Gore, whose financial interests aligned with their political agenda. Attorney General Schneiderman enthused that "there is no one who has done more for this cause" than Mr. Gore, who recently had been "traveling internationally, raising the alarm," and "training climate change activists."[55] Equally embracing the public support of Mr. Gore, Attorney General Healey praised him for explaining so "eloquently just how important this is, this commitment that we make," and she thanked him for his "inspiration" and "affirmation."[56] Virgin Islands Attorney General Walker hailed the former Vice President as one of his "heroes."[57]

35. In an effort to legitimize what the attorneys general were doing, Mr. Gore cited perceived inaction by the federal government as the justification for action by the Green 20. He observed that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[58] Reading from the same script, Attorney General Schneiderman pledged that the Green 20 would "step into th[e] [legislative]

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52 *Id.* at App. 21.
53 *Id.* at App. 24.
54 *Id.* at App. 17.
55 *Id.* at App. 13.
56 *Id.* at App. 20.
57 *Id.* at App. 23.
58 *Id.* at App. 17.

breach" created by this alleged federal inaction.[59] He then showed that his subpoena was a tool for achieving his political goals:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[60]

36. Attorney General Schneiderman linked the coalition's political efforts to his investigation of ExxonMobil, reminding the audience that he "had served a subpoena on ExxonMobil" to investigate "theories relating to consumer and securities fraud."[61] He also suggested that ExxonMobil faced a presumption of guilt in his office, arguing that ExxonMobil had been "using the best climate models" to determine "how fast the sea level is rising" and to "drill[] in places in the Arctic where they couldn't drill 20 years ago" while telling "the public for years that there were no 'competent models,' . . . to project climate patterns, including those in the Arctic."[62] Attorney General Schneiderman went on to suggest there was something illegal in ExxonMobil's alleged support for "organizations that put out propaganda denying that we can predict or measure the effects of fossil fuel on our climate, or even denying that climate change was happening."[63]

37. Attorney General Healey was equally explicit in her prejudgment of ExxonMobil. She stated that there was a "troubling disconnect between what Exxon

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59 *Id.* at App. 11.
60 *Id.* at App. 12.
61 *Id.* at App. 11.
62 *Id.*
63 *Id.*

knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public."[64] Those conclusions were announced weeks before she even issued the CID to ExxonMobil.

38. The political motivations articulated by Attorneys General Schneiderman, Healey, and Walker, Mr. Gore, and the other press conference attendees struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. The overtly political tone of the conference even prompted one reporter to ask whether the press conference and the investigations were "publicity stunt[s]."[65]

39. Even some members of the coalition were apprehensive about the expressly political focus of its ringleader. Attorney General Schneiderman's office circulated a draft set of "Principles" for the "Climate Coalition of Attorneys General" that included a "[p]ledge" to "work together" to enforce laws "that require progressive action on climate change."[66] Recognizing the overtly political nature of that pledge, an employee of the Vermont Attorney General's Office wrote: "We are thinking that use of the term 'progressive' in the pledge might alienate some. How about 'affirmative,' 'aggressive,' 'forceful' or something similar?"[67]

C. In Closed-Door Meetings, the Green 20 Meet with Private Interests.

40. The impropriety of the statements made by Attorneys General Schneiderman and Healey and the other members of the Green 20 at the press conference is surpassed only by what is currently known about what they said behind closed doors.

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64 *Id.* at App. 20.
65 *Id.* at App. 25.
66 Ex. M at App. 127.
67 *Id.* at App. 126.

41. During the morning of the press conference, the attorneys general attended two presentations. Those presentations were not announced publicly, and they were not open to the press or general public. The identity of the presenters and the titles of the presentations, however, were later released by the State of Vermont in response to a request by a third party under that state's Freedom of Information Act.

42. The first presenter was Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists.[68] His subject was the "imperative of taking action now on climate change."[69]

43. According to the Union of Concerned Scientists, those who do not share its views about climate change and responsive policy make it "difficult to achieve meaningful solutions to global warming."[70] It accuses "[m]edia pundits, partisan think tanks, and special interest groups" of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[71]

44. Frumhoff has been targeting ExxonMobil since at least 2007. In that year, Frumhoff contributed to a publication issued by the Union of Concerned Scientists, titled "Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science."[72] This essay brainstormed strategies for "[p]utting the [b]rakes" on ExxonMobil's alleged "[d]isinformation [c]ampaign" on climate change.[73]

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68 Ex. O at App. 138.
69 Ex. E at App. 70.
70 Ex. P at App. 146.
71 *Id.* at App. 146–47.
72 Ex. Q at App. 160, 163.
73 *Id.* at App. 166.

45. Matthew Pawa of Pawa Law Group, P.C., hosted the second presentation on the topic of "climate change litigation."[74] The Pawa Law Group, which boasts of its "role in launching global warming litigation,"[75] previously sued ExxonMobil and sought to hold it liable for causing global warming. That suit was dismissed because, as the court properly held, regulating greenhouse gas emissions is "a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[76]

46. Frumhoff and Pawa have sought for years to initiate and promote litigation against fossil fuel companies in the service of their political agenda and for private profit. In 2012, for example, Frumhoff organized and Pawa presented at a workshop entitled "Climate Accountability, Public Opinion, and Legal Strategies."[77] The workshop's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[78]

47. The 2012 workshop's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of fossil fuel companies like ExxonMobil.[79] Even then, "lawyers at the workshop" suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[80] The conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, *in maintaining pressure on the industry*

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74 Ex. E at App. 70.
75 Ex. S at App. 176.
76 Ex. C at App. 41; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871–77 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).
77 Ex. C at App. 30–31, 61, 63.
78 *Id.* at App. 32–33.
79 *Id*. at App. 40–41.
80 *Id.* at App. 40.

that could eventually lead to its support for legislative and regulatory responses to global warming."[81]

48. In January 2016, Pawa and a group of climate activists met at the Rockefeller Family Fund offices to discuss the "[g]oals of an Exxon campaign."[82] The goals included:

- To establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm.
- To delegitimize [ExxonMobil] as a political actor.
- To force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc.
- To drive divestment from Exxon.
- To drive Exxon & climate into [the] center of [the] 2016 election cycle.[83]

49. The investigations by the New York and Massachusetts Attorneys General and the Green 20 press conference represented the culmination of Frumhoff and Pawa's collective efforts to enlist state law enforcement officers to join them in a quest to silence political opponents, enact preferred policy responses to climate change, and obtain documents for private lawsuits.

50. The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the announced investigations. The day after the

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81 *Id.* at App. 56 (emphasis added).
82 Ex. D at App. 67.
83 *Id.*; *see also* Ex. U at App. 192–94.

conference, a reporter from *The Wall Street Journal* contacted Pawa.[84] Before responding, Pawa dutifully asked Lemuel Srolovic, Chief of Attorney General Schneiderman's Environmental Protection Bureau, "[w]hat should I say if she asks if I attended?"[85] Mr. Srolovic—the Assistant Attorney General who had sent the New York subpoena to ExxonMobil in November 2015—encouraged Pawa to conceal from the press and the public the closed-door meetings. He responded, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[86]

51. The press conference, the closed-door meetings with activists, and the activists' long-standing desire to obtain ExxonMobil's "internal documents" as part of a campaign to put "pressure on the industry," inducing it to support "legislative and regulatory responses to global warming,"[87] form the partisan backdrop against which the New York and Massachusetts investigations must be considered.

D. The Green 20 Attempt to Conceal their Misuse of Power from the Public.

52. Recognizing the need to avoid public scrutiny, Attorneys General Schneiderman, Healey, and fifteen others entered into an agreement pledging to conceal their activities and communications in furtherance of their political agenda from the public. In April and May of 2016, the Green 20 executed a so-called "Climate Change Coalition Common Interest Agreement," which memorialized the twin goals of this illicit enterprise.[88] The first goal listed in the agreement, "limiting climate change," reflected the coalition's focus on politics, not law enforcement.[89] The second goal, "ensuring the dissemination of accurate information about climate change," confirmed the coalition's

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84 Ex. F at App. 80.
85 *Id.*
86 *Id.*
87 Ex. C at App. 40, 56.
88 Ex. V at App. 196–214.
89 *Id.* at App. 196.

willingness to violate First Amendment rights to carry out its agenda.[90] They appointed themselves as arbiters of what information is "accurate" as regards climate change and stood ready to use the full arsenal of law enforcement tools at their disposal against those who did not toe their party line.

53. To conceal communications concerning this unconstitutional enterprise from public disclosure, the signatories agreed to maintain the confidentiality of their communications by pledging that, "unless required by law," the parties "shall . . . refuse to disclose" any "(1) information shared in organizing a meeting of the Parties on March 29, 2016, (2) information shared at and after the March 29 meeting . . . and (3) information shared after the execution of this Agreement."[91] The common interest agreement stifles not only public debate about the motivations and legality of the Green 20, but also prevents the public from learning of the political genesis of the Green 20.

E. The Attorneys General of Other States Condemn the Green 20's Investigations.

54. The overtly political nature of the March 29 press conference drew a swift and sharp rebuke from other state attorneys general who criticized the Green 20 for using the power of law enforcement as a tool to muzzle dissent and discussions about climate change. The attorneys general of Alabama and Oklahoma stated that "scientific and political debate" "should not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."[92] They emphasized that "[i]t is

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90 *Id.*
91 *Id.* at App. 196–97
92 Ex. X at App. 225.

inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time."[93]

55. The Louisiana Attorney General similarly observed that "[i]t is one thing to use the legal system to pursue public policy outcomes; but it is quite another to use prosecutorial weapons to intimidate critics, silence free speech, or chill the robust exchange of ideas."[94] Likewise, the Kansas Attorney General questioned the "'unprecedented'" and "strictly partisan nature of announcing state 'law enforcement' operations in the presence of a former vice president of the United State[s] who, presumably [as a private citizen], has no role in the enforcement of the 17 states' securities or consumer protection laws."[95] The West Virginia Attorney General criticized the attorneys general for "abusing the powers of their office" and stated that the desire to "eliminate fossil fuels . . . should not be driving any legal activity" and that it was improper to "use the power of the office of attorney general to silence [] critics."[96]

56. In addition, on June 15, 2016, attorneys general from thirteen states wrote a letter to their "Fellow Attorneys General," in which they explained that the Green 20's effort "to police the global warming debate through the power of the subpoena is a grave mistake" because "[u]sing law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech."[97] The thirteen attorneys further described the Green 20's investigations as "far from routine" because (i) they "target[] a particular type of market participant," namely fossil fuel companies; (ii) the Green 20 had aligned itself "with the competitors of [its] investigative targets";

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93 *Id.*
94 Ex. Y at App. 227.
95 Ex. QQ at App. 435.
96 Ex. RR at App. 438–39.
97 Ex. SS at App. 444.

and (iii) "the investigation implicates an ongoing public policy debate."[98] In conclusion, they asked their fellow attorneys general to "[s]top policing viewpoints."[99]

57. The actions of Defendants and their Green 20 allies caught the eye of Congress. The Committee on Science, Space, and Technology of the United States House of Representatives launched an inquiry into the investigations undertaken by the Green 20.[100] That committee was "concerned that these efforts [of the Green 20] to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve as the guardian of the legal rights of the citizens and to assert, protect, and defend the rights of the people."[101] Perceiving a need to provide "oversight" of what it described as "a coordinated attempt to attack the First Amendment rights of American citizens," the Committee requested the production of certain records and information from the attorneys general.[102] The attorneys general have thus far refused to voluntarily cooperate with the inquiry.[103]

58. After Attorney General Schneiderman refused to turn over documents requested by the House Committee and criticized its "unfounded claims about the NYOAG's motives,"[104] the House Committee issued subpoenas to Attorney General Schneiderman, Attorney General Healey, and eight environmental organizations in order to "obtain documents related to coordinated efforts to deprive companies, nonprofit organizations, scientists and scholars of their First Amendment rights."[105] It further

98 *Id.*
99 *Id.* at App. 447.
100 Ex. Z at App. 229.
101 *Id.* (internal quotation marks omitted).
102 *Id.* at App. 232.
103 *See, e.g.*, Ex. TT at App. 449; Ex. UU at App. 453.
104 Ex. AA at App. 237.
105 Ex. BB at App. 240.

criticized the attorneys general for "hav[ing] appointed themselves to decide what is valid and what is invalid regarding climate change."[106]

59. Several senators have urged United States Attorney General Loretta Lynch to confirm that the Department of Justice is not investigating, and will not investigate, United States citizens or corporations on the basis of their views on climate change.[107] The senators observed that the Green 20's investigations "provide disturbing confirmation that government officials at all levels are threatening to wield the sword of law enforcement to silence debate on climate change."[108] The letter concluded by asking Attorney General Lynch to explain the steps she is taking "to prevent state law enforcement officers from unconstitutionally harassing private entities or individuals simply for disagreeing with the prevailing climate change orthodoxy."[109]

F. The Subpoena and the CID Reflect the Improper Political Objectives of the Green 20 Coalition.

60. The twin goals of the Green 20—advancing a political agenda and trammeling constitutional rights in the process—are fully reflected in the subpoena and the CID.

The New York Subpoena

61. Attorney General Schneiderman is authorized to issue a subpoena only if (i) there is "some factual basis shown to support the subpoena";[110] and (ii) the information sought "bear[s] a reasonable relation to the subject matter under investigation and the public purpose to be served."[111] Neither standard is met here.

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106 *Id.*
107 Ex. DD at App. 248.
108 *Id.*
109 *Id.*
110 *Napatco, Inc.* v. *Lefkowitz*, 43 N.Y.2d 884, 885–86 (1978).
111 *Myerson* v. *Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256 (1973).

62. The New York subpoena purports to investigate whether ExxonMobil violated New York State Executive Law Article 5, Section 63(12), General Business Law Article 22-A or 23-A and "any related violation, or any matter which the Attorney General deems pertinent thereto."[112] These statutes have at most a six-year limitations period.[113]

63. During the six-year limitations period, however, ExxonMobil made no statements that could give rise to fraud as alleged in the subpoena. For more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's *2006 Corporate Citizenship Report* recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and reasoned that "strategies that address the risk need to be developed and implemented."[114] In addition, in 2002, ExxonMobil, along with three other companies, helped launch the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."[115]

64. ExxonMobil has also discussed these risks in its public SEC filings. For example, in its 2006 10-K, ExxonMobil stated that "laws and regulations related to . . . risks of global climate change" "have been, and may in the future" continue to impact its operations.[116] Similarly, in its 2015 10-K, ExxonMobil noted that the "risk of climate

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[112] Ex. EE at App. 251.
[113] *See, e.g.*, *State ex rel. Spitzer* v. *Daicel Chem. Indus., Ltd.*,840 N.Y.S.2d 8, 11–12 (1st Dep't 2007); *Podraza* v. *Carriero*, 630 N.Y.S.2d 163, 169 (4th Dep't 1995); *State* v. *Bronxville Glen I Assocs.*, 581 N.Y.S.2d 189, 190 (1st Dep't 1992).
[114] Ex. H at App. 103.
[115] Ex. FF at App. 270.
[116] Ex. GG at App. 277–78.

change" and "current and pending greenhouse gas regulations" may increase its "compliance costs."[117] Long before the six-year statute of limitations period, ExxonMobil disclosed and acknowledged the risks that supposedly gave rise to Attorney General Schneiderman's investigation.

65. Notwithstanding that six-year limitations period and the absence of any conduct within that timeframe that could give rise to a statutory violation, the document requests in the subpoena span 39 years and extend to nearly every document ExxonMobil has ever created that in any way concerns climate change. For example, the subpoena demands "[a]ll Documents and Communications" from 1977 to the present, "[c]oncerning any research, analysis, assessment, evaluation, modelling or other consideration performed by You, on Your behalf, or with funding provided by You Concerning the causes of Climate Change."[118]

66. The subpoena includes 10 other similarly sweeping requests, such as (i) a demand for all documents and communications that ExxonMobil has produced since 1977 relating to "the impacts of Climate Change"; and (ii) exemplars of all "advertisements, flyers, promotional materials, and informational materials of any type" that ExxonMobil has produced in the last 11 years concerning climate change.[119] Other requests target Attorney General Schneiderman's perceived political opponents in the climate change debate by demanding ExxonMobil's communications with trade associations and industry groups that seek to promote oil and gas interests.[120]

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117 Ex. HH at App. 284.
118 Ex. II at App. 257–58 (Request No. 1).
119 *Id.* at App. 258–59 (Request Nos. 2, 8).
120 *Id.* at App. 258 (Request No. 6).

67. In response to some of these requests, ExxonMobil asserted First Amendment privileges, including in connection with ExxonMobil scientists' participation in non-profit research organizations.

68. Moreover, almost all of the sweeping demands in the subpoena reach far beyond conduct bearing any connection to the State of New York. Ten of the eleven document requests make blanket demands for all of ExxonMobil's documents or communications on a broad topic, with no attempt to restrict the scope of production to documents or communications having any connection to New York.[121] Only two of the requests even mention New York.[122] And, while the subpoena seeks ExxonMobil's communications with five named organizations, only one of them is based in New York.[123]

The Massachusetts CID

69. The CID was served by Attorney General Healey on ExxonMobil's registered agent in Suffolk County, Massachusetts, on April 19, 2016. According to the CID, there is "a pending investigation concerning [ExxonMobil's] potential violations of [Mass. Gen. Laws] ch. 93A, § 2."[124] That statute prohibits "unfair or deceptive acts or practices" in "trade or commerce"[125] and has a four-year statute of limitations.[126] The CID specifies two types of transactions under investigation: ExxonMobil's (i) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (ii) "marketing and/or sale of securities" to Massachusetts

[121] *Id.* at App. 258–59 (Request Nos. 1, 10).
[122] *Id.* at App. 259 (Request Nos. 9, 11).
[123] *Id.* at App. 258 (Request No. 6).
[124] *Id.* at App. 286.
[125] Mass. Gen. Laws ch. 93A, §2(a).
[126] Mass. Gen. Laws ch. 260, § 5A.

investors.[127] The requested documents pertain largely to information related to climate change in the possession of ExxonMobil in Texas where it is headquartered and maintains its principal place of business.

70. ExxonMobil could not have committed the possible offenses that the CID purports to investigate for at least two reasons. First, at no point during the past five years—more than one year before the limitations period began—has ExxonMobil (i) sold fossil fuel derived products to consumers in Massachusetts, or (ii) owned or operated a single retail store or gas station in the Commonwealth.[128] Second, ExxonMobil has not sold any form of equity to the general public in Massachusetts since at least 2011, which is also well beyond the limitations period.[129] In the past decade, ExxonMobil has sold debt only to underwriters outside the Commonwealth, and ExxonMobil did not market those offerings to Massachusetts investors.[130]

71. The CID's focus on events, activities, and records outside of Massachusetts is demonstrated by the items it demands that ExxonMobil search for and produce. For example, the CID demands documents that relate to or support 11 specific statements.[131] None of those statements were made in Massachusetts.[132] The CID also seeks ExxonMobil's communications with 12 named organizations,[133] but only one of these organizations has an office in Massachusetts and ExxonMobil's communications

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127 Ex. II at App. 86.

128 Any service station that sells fossil fuel derived products under an "Exxon" or "Mobil" banner is owned and operated independently. In addition, distribution facilities in Massachusetts, including Everett Terminal, have not sold products to consumers during the limitations period.

129 Ex. JJ at App. 317.

130 *Id.* This is subject to one exception. During the limitations period, ExxonMobil has sold short-term, fixed-rate notes, which mature in 270 days or less, to institutional investors in Massachusetts, in specially exempted commercial paper transactions. *Id.*; *see* Mass. Gen. Laws ch. 110A, § 402(a)(10); *see also* 15 U. S. C. § 77c(a)(3).

131 Ex. II at App. 299–300 (Request Nos. 8–11).

132 *Id.* (Request Nos. 8–11).

133 *Id.* at App. 298 (Request No. 5).

with the other 11 organizations likely occurred outside of Massachusetts. Finally, the CID requests all documents and communications related to ExxonMobil's publicly issued reports, press releases, and Securities and Exchange Commission ("SEC") filings, which were issued outside of Massachusetts,[134] and all documents and communications related to ExxonMobil's climate change research, which also occurred outside of Massachusetts.[135]

72. The absence of any factual basis for investigating ExxonMobil's alleged fraud is glaring, particularly in light of the heavy burden imposed by the CID. Spanning 25 pages and containing 38 broadly worded document requests, the CID unreasonably demands production of essentially any and all communications and documents relating to climate change that ExxonMobil has produced or received over the last 40 years. For example, the CID requests all documents and communications "concerning Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions . . . and the effects of these emissions on the Climate" since 1976 and all documents and communications concerning "any research, study, and/or evaluation by ExxonMobil and/or any other fossil fuel company regarding the Climate Change Radiative Forcing Effect of" methane since 2010.[136] It also requests all documents and communications concerning papers and presentations given by ExxonMobil scientists since 1976[137] and demands production of ExxonMobil's climate change related speeches, public reports, press releases, and SEC filings over the last 20 years.[138] Moreover, it fails

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134 *Id.* at App. 301–03 (Request Nos. 15–16, 19, 22).
135 *Id.* at App. 297–98, 300–03 (Request Nos. 1–4, 14, 17, 22).
136 *Id.* at App. 297, 302 (Request Nos. 1, 17).
137 *Id.* at App. 297–98. (Request Nos. 2–4).
138 *Id.* at App. 299 (Request No. 8 (all documents since April 1, 1997)); *id.* at App. 302–03 (Request No. 22 (all documents since 2006)); *id.* at App. 299–302 (Request Nos. 9–12, 14–16, 19 (all documents since 2010)). The CID also demands the testimony of ExxonMobil officers, directors, or managing

to reasonably describe several categories of documents by, for example, requesting documents related to ExxonMobil's "awareness," "internal consideration," and "decision making" with respect to certain climate change matters.[139]

73. The CID's narrower requests, however, are in some instances more troubling than its overly broad ones. They appear to target groups simply because they hold views with which Attorney General Healey disagrees. All 12 of the organizations that ExxonMobil is directed to produce its communications with have been identified by environmental advocacy groups as opposing policies in favor of addressing climate change or disputing the science in support of climate change.[140] The CID also targets statements that are not in accord with the Green 20's preferred views on climate change. These include statements of pure opinion on policy, such as the suggestion that "[i]ssues such as global poverty [are] more pressing than climate change, and billions of people without access to energy would benefit from oil and gas supplies."[141]

G. Attorney General Schneiderman Shifts Investigative Theories in a Search for Leverage over ExxonMobil in a Public Policy Debate.

74. After receiving Attorney General Schneiderman's subpoena, ExxonMobil made a good-faith effort to comply with his request for information about its climate change research in the 1970s and 1980s. ExxonMobil provided his office with well over one million pages of documents, at substantial cost to the Company, with the expectation that a fair and impartial investigation would be conducted. Less than a month ago, and well after ExxonMobil commenced this action against Attorney General Healey, the

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agents who can testify about a variety of subjects, including "[a]ll topics covered" in the CID. *Id.* at App. 306 (Schedule B).

139 *Id.* at App. 298–99, 302 (Request Nos. 7–8, 18).

140 *See, e.g.*, Ex. VV at App. 455–57.

141 *See, e.g.*, Ex. II at App. 299–300 (Request No. 9).

spokesman for Attorney General Schneiderman stated that ExxonMobil's "historic climate change research" was no longer "the focus of this investigation."[142]

75. Rather than close the investigation, however, Attorney General Schneiderman simply unveiled another theory. As he explained in a lengthy interview published in *The New York Times*, Attorney General Schneiderman now focused on the so-called "stranded assets theory." His office intended to examine whether ExxonMobil had overstated its oil and gas reserves and assets by not accounting for "global efforts to address climate change" that might require it in the future "to leave enormous amounts of oil reserves in the ground"—*i.e.*, cause the assets to be "stranded."[143] Without offering—or possessing—any supporting evidence whatsoever, Attorney General Schneiderman inappropriately opined that there "may be massive securities fraud" at ExxonMobil based on its estimation of proved reserves and the valuation of its assets.[144]

76. Attorney General Schneiderman has directed ExxonMobil to begin producing documents on its estimation of oil and gas reserves, and ExxonMobil has engaged in a dialogue with his office about that request. It is now apparent that Attorney General Schneiderman is simply searching for a legal theory, however flimsy, that will allow him to pressure ExxonMobil on the policy debate over climate change. With the filing of this lawsuit, ExxonMobil is challenging what has now been revealed as a manifestly improper investigation being conducted in bad faith.

142 Ex. KK at App. 321.
143 Ex. MM at App. 351.
144 *Id.*

H. An Investigation of ExxonMobil's Reporting of Oil and Gas Reserves and Assets Is a Thinly Veiled Pretext.

77. Attorney General Schneiderman's decision to investigate ExxonMobil's reserves estimates under a stranded asset theory is particularly egregious because it cannot be reconciled with binding regulations issued by the SEC, which apply strict guidelines to the estimation of proved reserves.

78. Those regulations prohibit companies like ExxonMobil from considering the impact of future regulations when estimating reserves. To the contrary, they require ExxonMobil to calculate its proved reserves in light of "*existing* economic conditions, operating methods, and *government regulations*."[145] The SEC adopted that definition of proved reserves as part of its efforts to provide investors with a "comprehensive understanding of oil and gas reserves, which should help investors evaluate the relative value of oil and gas companies."[146] The SEC's definition of proved oil and gas reserves thus reflects its reasoned judgment about how best to supply investors with information about the relative value of energy companies, as well as its balancing of competing priorities, such as the agency's desire for comprehensive disclosures, that are not unduly burdensome, and which investors can easily compare. Attorney General Schneiderman's theory of "massive securities fraud" in ExxonMobil's reported reserves cannot be reconciled with binding SEC regulations about how those reserves must be reported.

79. The same rationale applies to Attorney General Schneiderman's purported investigation of the impairment of ExxonMobil's assets. The SEC recognizes as authoritative the accounting standards issued by the Financial Accounting Standards

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

[146] *Id.* at *1.

Board ("FASB").[147] The FASB's rules concerning the impairment of assets require ExxonMobil to "incorporate [its] own assumptions" about future events when deciding whether its assets are impaired.[148] Contravening those rules, the Attorney General's theory requires that ExxonMobil adopt his assumptions about the likelihood of possible future climate change regulations and then incorporate those assumptions into its determination of whether an asset has been impaired. Attorney General Schneiderman cannot hold ExxonMobil liable for complying with federal law.

80. Attorney General Healey's investigation also purports to encompass the same unsound theory of fraud.[149] The decision to embrace this theory speaks volumes about the pretextual nature of the investigations being conducted by Attorneys General Schneiderman and Healey. To read the relevant SEC rules is to understand why ExxonMobil may not account for future climate change regulations when calculating its proved reserves. And to read the applicable accounting standards is to understand why it is impermissible for the Attorneys General to impose their assumptions about the financial impact of possible future climate change regulations on companies that are required to develop their own independent assumptions. The Attorneys General's claims that they are conducting a bona fide investigation premised on ExxonMobil's supposed failure to account for the Attorneys Generals' expectations regarding the financial impact of future regulations thus cannot be taken seriously. Their true objectives are clear: to

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147 *See* Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333–401 (May 1, 2003).

148 *See* FASB Accounting Standards Codification 360-10-35-30; *see also* Statement of Financial Accounting Standards No. 144 ¶ 17.

149 Ex. NN at App. 367, 372; Opp'n. of Att'y Gen. Maura Healey to Pl. Exxon Mobil Corp.'s Mot. for Prelim. Inj. at 8, *ExxonMobil* v. *Healey*, No. 4:16-cv-00469-K (N.D. Tex. Aug. 8, 2016) (Dkt. No. 43) ("If substantial portions of Exxon's vast fossil fuel reserves are unable to be burned due to carbon dioxide emissions limits put in place to stabilize global average temperature, those assets—valued in the billions—will be stranded, placing shareholder value at risk.").

fish indiscriminately through ExxonMobil's records with the hope of finding some violation of some law that one of them might be empowered to enforce, or otherwise to harass ExxonMobil into endorsing the Green 20's policy views regarding how the United States should respond to climate change.

81. The desire of Attorneys General Schneiderman and Healey to impose liability on ExxonMobil for complying with SEC disclosure requirements, and the accounting methodologies incorporated in them, would create a direct conflict with federal law. Even if the New York or Massachusetts Attorneys General were to seek only to layer additional disclosure requirements beyond those imposed by the SEC, this would frustrate, and pose an obstacle to, Congress's and the SEC's efforts to create a uniform market for securities and provide consistent metrics by which investors can measure oil and gas companies on a relative basis.

I. ExxonMobil Files Suit to Protect its Rights.

82. ExxonMobil has challenged members of the Green 20 for violating its constitutional rights. Attorney General Walker issued a subpoena to ExxonMobil on March 15, 2016.[150] ExxonMobil responded by seeking a declaratory judgment that Attorney General Walker's subpoena was illegal and unenforceable because it violated ExxonMobil's rights under the United States and Texas constitutions.[151]

[150] Ex. WW at App. 459–77.
[151] Ex. LL at App. 323–49.

83. The Attorneys General of Texas and Alabama intervened in that action in an effort to protect the constitutional rights of their citizens. They criticized Attorney General Walker for undertaking an investigation "driven by ideology, and not law."[152] The Texas Attorney General called Attorney General Walker's purported investigation "a fishing expedition of the worst kind" and recognized it as "an effort to punish Exxon for daring to hold an opinion on climate change that differs from that of radical environmentalists."[153] The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas "is more than just a free speech case. It is a battle over whether a government official has a right to launch a criminal investigation against anyone who doesn't share his radical views."[154]

84. On June 30, 2016, Attorney General Walker and ExxonMobil entered into a joint stipulation of dismissal, whereby the Attorney General agreed to withdraw his subpoena and ExxonMobil agreed to withdraw its litigation challenging the subpoena.

85. ExxonMobil commenced this action on June 15, 2016, seeking a preliminary injunction from this Court that would bar Attorney General Healey from enforcing the CID. In an attempt to defend Attorney General Healey's constitutionally infirm CID, Attorney General Schneiderman, along with other attorneys general, filed an amicus brief on August 8, 2016.[155] They argued that Attorney General Healey has a

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152 Ex. OO at App. 395.
153 Ex. CC at App. 244–45.
154 Ex. W at App. 216.
155 Mem. of Law for *Amici Curiae* States of Maryland, New York, Illinois, Iowa, Maine, Minnesota, Mississippi, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia and the U.S. Virgin Islands in Support of Def.'s Mot. to Dismiss and in Opp'n. to Pl.'s Motion for a Prelim. Inj. at 1, *Exxon Mobil Corp.* v. *Healey*, No. 4:16-CV-469-K (N.D. Tex. Aug. 8, 2016) (Dkt. No. 47).

"compelling interest in the traditional authority" of her office "to investigate and combat violations of state law."[156]

86. Recognizing that there was nothing "traditional" about Attorney General Healey's use of state power, attorneys general from eleven states filed an amicus brief in support of ExxonMobil's preliminary injunction motion.[157] "As chief legal officers" of their respective states, they explained that their investigative power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates."[158] As a result, they noted that "[u]sing law enforcement authority to resolve a public policy debate undermines the trust invested in our offices and threatens free speech."[159] They concluded, "Regrettably, history is embroiled with examples where the legitimate exercise of law enforcement is soiled with political ends rather than legal ones. Massachusetts seeks to repeats that unfortunate history. That the statements and workings of the 'AG's United for Clean Power' are entirely one-sided, and target only certain participants in the climate change debate, speaks loudly enough."[160]

87. ExxonMobil's motion for a preliminary injunction against Attorney General Healey has been briefed and argued and is now submitted before this Court.

THE SUBPOENA AND CID VIOLATE EXXONMOBIL'S RIGHTS

88. The facts recited above demonstrate the pretextual nature of the stated reasons for the investigations conducted by Attorneys General Schneiderman and Healey.

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156 *Id.*

157 Br. of Texas, Louisiana, South Carolina, Alabama, Michigan, Arizona, Wisconsin, Nebraska, Oklahoma, Utah, and Nevada as *Amici Curiae* in Supp. of Pl.'s Mot. for Prelim. Inj. at Attachment 2, *Exxon Mobil Corp.* v. *Healey*, No. 4:16-CV-469-K (N.D. Tex. Sept. 8, 2016) (Dkt. No. 63).

158 *Id.* at 1.

159 *Id*.

160 *Id.* at 9.

The statements Attorneys General Schneiderman and Healey made at the press conference and after, the climate change coalition common interest agreement, and recently released emails reveal the improper purpose of the investigations: to change the political calculus surrounding the debate about policy responses to climate change by (1) targeting speech that the Attorneys General perceive to support political perspectives on climate change that differ from their own, and (2) exposing ExxonMobil's documents that may be politically useful to climate activists.

89. The pretextual character of the investigations is brought into sharp relief when the scope of the subpoena and the CID—which demand nearly 40 years of records—are contrasted with the, at most, six-year limitations periods of the statutes that purportedly authorize the investigations.

90. Neither Attorney General Schneiderman nor Attorney General Healey (nor, indeed, any other public official) may use the power of the state to prescribe what shall be orthodox in matters of public concern. By deploying the law enforcement authority of their offices to target one side of a political debate, their actions violated—and continue to violate—the First Amendment.

91. It follows from the political character of the subpoena and the CID and their remarkably broad scope that they also violate the Fourth Amendment. Their burdensome demands for irrelevant records violate the Fourth Amendment's reasonableness requirement, as well as its prohibition on fishing expeditions. Indeed, the evolving justifications for the New York and Massachusetts inquiries confirm that they are investigations driven by the identity of the target, not any good faith belief that a law was broken.

92. The investigations also fail to meet the requirements of due process. Attorneys General Schneiderman and Healey have publicly declared not only that they believe ExxonMobil and other fossil fuel companies pose an existential risk to the planet, but also the improper purpose of their investigations: to silence ExxonMobil's voice in the public debate regarding climate change and to pressure ExxonMobil to support polices the Attorneys General favor. Even worse, Attorney General Schneiderman has publicly accused ExxonMobil of engaging in a "massive securities fraud" without any basis whatsoever, and Attorney General Healey declared, before her investigation even began, that she knew how it would end: with a finding that ExxonMobil violated the law.[161] The improper political bias that inspired the New York and Massachusetts investigations disqualifies Attorneys General Schneiderman and Healey from serving as the disinterested prosecutors required by the Constitution.

93. In the rush to fill what Attorney General Schneiderman described as a "[legislative] breach" in Congress regarding climate change, both he and Attorney General Healey have also openly and intentionally infringed on Congress's powers to regulate interstate commerce. Their investigations seek to regulate speech and conduct that occur almost entirely outside of New York and Massachusetts. Where a state seeks to regulate and burden out-of-state speech, as the subpoena and the CID do here, the state improperly encroaches on Congress's exclusive authority to regulate interstate commerce and violates the Dormant Commerce Clause.

94. Attorneys General Schneiderman and Healey's new focus on ExxonMobil's reporting of proved reserves and assets is equally impermissible. They seek to hold ExxonMobil liable for not taking into account possible future regulations

[161] Ex. B at App. 20–21.

concerning climate change and carbon emissions when estimating proved reserves and reporting assets. But that theory cannot be reconciled with the SEC's requirement that ExxonMobil calculate its proved reserves based only on "existing" regulations, not future regulations. This facet of the investigation, therefore, impermissibly conflicts with, and poses an obstacle to, the goals and purposes of federal law. That conflict is also present in the Attorneys General's investigation of how ExxonMobil determines under binding accounting rules whether an asset has become impaired.

95. The subpoena and the CID also constitute an abuse of process because they were issued for the improper purposes described above.

96. ExxonMobil asserts the claims herein based on the facts available to it in the public record from, among other things, press accounts and freedom of information requests made by third parties. ExxonMobil anticipates that discovery from Attorneys General Schneiderman and Healey, as well as third parties, will reveal substantial additional evidence in support of its claims.

EXXONMOBIL HAS BEEN INJURED BY THE SUBPOENA AND THE CID

97. The subpoena and the CID have injured, are injuring, and will continue to injure ExxonMobil.

98. ExxonMobil is an active participant in the policy debate about potential responses to climate change. It has engaged in that debate for decades, participating in the Intergovernmental Panel on Climate Change since its inception and contributing to every report issued by the organization since 1995. Since 2009, ExxonMobil has publicly advocated for a carbon tax as its preferred method to regulate carbon emissions. Proponents of a carbon tax on greenhouse gas emissions argue that increasing

taxes on carbon can "level the playing field among different sources of energy."[162] While Attorneys General Schneiderman and Healey and the other members of the Green 20 are entitled to disagree with ExxonMobil's position, no member of that coalition is entitled to silence or seek to intimidate one side of that discussion (or the debate about any other important public issue) through the issuance of baseless and burdensome subpoenas. ExxonMobil intends—and has a constitutional right—to continue to advance its perspective in the national discussions over how best to respond to climate change. Its right to do so should not be violated through this exercise of government power.

99. As a result of the improper and politically motivated investigations launched by Attorneys General Schneiderman and Healey, ExxonMobil has suffered, now suffers, and will continue to suffer violations of its rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and under Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution. Attorneys General Schneiderman's and Healey's actions also violate Articles One and Six of the United States Constitution and constitute an abuse of process under common law.

100. Acting under the laws, customs, and usages of New York and Massachusetts, Attorneys General Schneiderman and Healey have subjected ExxonMobil, and are causing ExxonMobil to be subjected, to the deprivation of rights, privileges, and immunities secured by the United States Constitution and the Texas Constitution. ExxonMobil's rights are made enforceable against Attorneys General Schneiderman and Healey, who are acting under the color of law, by Article One, Section Eight of the United States Constitution, and the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, all within the meaning and

[162] Ex. PP at App. 402.

contemplation of 42 U.S.C. § 1983, and by Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

101. Absent relief, Attorneys General Schneiderman and Healey will continue to deprive ExxonMobil of these rights, privileges, and immunities.

102. In addition, ExxonMobil is threatened with further imminent injury that will occur if it is forced to choose between conforming its constitutionally protected speech to Attorneys General Schneiderman and Healey's shared political views or exercising its rights and risking sanctions and prosecution.

103. The subpoena and the CID also threaten ongoing imminent injury to ExxonMobil because they subject ExxonMobil to an unreasonable search in violation of the Fourth Amendment. Complying with this unreasonably burdensome and unwarranted fishing expeditions would require ExxonMobil to collect, review, and produce millions more documents, and would cost millions of dollars.

104. If ExxonMobil's request for injunctive relief is not granted, and Attorneys General Schneiderman and Healey are permitted to persist in their investigations, then ExxonMobil will suffer these imminent and irreparable harms. ExxonMobil has no adequate remedy at law for the violation of its constitutional rights.

CAUSES OF ACTION

A. First Cause of Action: Conspiracy

105. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

106. The facts set forth herein demonstrate that, acting under color of state law, Attorneys General Schneiderman and Healey have agreed with each other, and with others known and unknown, to deprive ExxonMobil of rights secured by the law to all,

including those guaranteed by the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

107. In furtherance of these objectives, Attorneys General Schneiderman and Healey have, among other things, issued the unlawful subpoena and CID and entered the common interest agreement described above at paragraphs 52–53. The subpoena and CID were issued without having a good faith basis for conducting any investigation, and with the ulterior motive of preventing ExxonMobil from enjoying and exercising its rights protected by the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution.

108. ExxonMobil has been damaged, and has been deprived of its rights under the United States and Texas Constitutions, as a proximate result of the unlawful conspiracy entered into by Attorneys General Schneiderman and Healey. The conduct of Attorneys General Schneiderman and Healey therefore violates both 42 U.S.C. § 1985 and the Texas common law.

B. Second Cause of Action: Violation of ExxonMobil's First and Fourteenth Amendment Rights

109. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

110. The focus of the subpoena and the CID on one side of a policy debate—in an apparent effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in that debate—contravenes, and any effort to enforce the subpoena or CID would further contravene, the rights provided to ExxonMobil by the First

Amendment to the United States Constitution, made applicable to the State of New York and the Commonwealth of Massachusetts by the Fourteenth Amendment, and by Section Eight of Article One of the Texas Constitution.

111. The subpoena and the CID are impermissible viewpoint-based restrictions on speech, and they burden ExxonMobil's political speech. Attorneys General Schneiderman and Healey issued the subpoena and the CID based on their disagreement with ExxonMobil regarding how the United States should respond to the risks of climate change. And even if the subpoena and the CID had not been issued for that illegal purpose, they would still violate the First Amendment, because they burden ExxonMobil's political speech without being substantially related to any compelling governmental interest.

C. Third Cause of Action: Violation of ExxonMobil's Fourth and Fourteenth Amendment Rights

112. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

113. The issuance of the subpoena and the CID contravenes, and any effort to enforce the subpoena would further contravene, the rights provided to ExxonMobil by the Fourth Amendment to the United States Constitution, made applicable to the State of New York and the Commonwealth of Massachusetts by the Fourteenth Amendment, and by Section Nine of Article One of the Texas Constitution, to be secure in its papers and effects against unreasonable searches and seizures.

114. The subpoena and CID are each unreasonable searches and seizures because each of them constitutes an abusive fishing expedition into 40 years of ExxonMobil's records, without any legitimate basis for believing that ExxonMobil

violated New York or Massachusetts law. Their overbroad and irrelevant requests impose an undue burden on ExxonMobil and violate the Fourth Amendment's reasonableness requirement, which mandates that a subpoena be limited in scope, relevant in purpose, and specific in directive.

D. Fourth Cause of Action: Violation of ExxonMobil's Fourteenth Amendment Rights

115. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

116. The investigations conducted by Attorneys General Schneiderman and Healey contravene the rights provided to ExxonMobil by the Fourteenth Amendment to the United States Constitution and by Section Nineteen of Article One of the Texas Constitution not to be deprived of life, liberty, or property without due process of law.

117. The subpoena and CID deprive ExxonMobil of due process of law by violating the requirement that a prosecutor be disinterested. The statements by Attorneys General Schneiderman and Healey at the Green 20 press conference and elsewhere make clear that they are biased against ExxonMobil.

E. Fifth Cause of Action: Violation of ExxonMobil's Rights Under the Dormant Commerce Clause

118. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

119. Article I, Section 8 of the United States Constitution grants Congress exclusive authority to regulate interstate commerce and thus prohibits the States from doing so. The issuance of the subpoena and the CID contravenes, and any effort to enforce the subpoena and the CID would further contravene, the rights provided to ExxonMobil under the Dormant Commerce Clause.

120. The subpoena and the CID effectively regulate ExxonMobil's out-of-state speech while only purporting to investigate ExxonMobil's marketing and/or sale of energy and other fossil fuel derived products to consumers in New York and Massachusetts and its marketing and/or sale of securities to investors in New York and Massachusetts.

121. The subpoena and the CID demand documents that relate to (1) statements ExxonMobil made outside New York and Massachusetts, and (2) ExxonMobil's communications with organizations residing outside New York and Massachusetts. The subpoena and CID therefore have the practical effect of primarily burdening interstate commerce.

F. Sixth Cause of Action: Federal Preemption

122. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

123. Article VI, Clause 2 of the United States Constitution provides that the laws of the United States "shall be the supreme law of the land." Any state law that imposes disclosure requirements inconsistent with federal law is preempted under the Supremacy Clause.

124. Federal law requires ExxonMobil to calculate and report its proved oil and gas reserves based on "existing economic conditions, operating methods, and government regulations." This requirement reflects the SEC's reasoned judgment about how best to supply investors with information about the relative value of oil and gas companies, as well as its balancing of competing priorities, such as the agency's desire for comprehensive disclosures, that are not unduly burdensome, and which investors can easily compare. Similarly, accounting standards recognized as authoritative by the SEC

require ExxonMobil to use its own assumptions about future events when determining whether assets are impaired, not the assumptions of the Attorneys General. Attorneys General Schneiderman and Healey have stated that they seek to impose liability on ExxonMobil for failing to account for what they believe will be the financial impact of as-yet-unknown "carbon dioxide emissions limits put in place to stabilize global average temperature" in estimating and reporting ExxonMobil's proven reserves and valuing its assets. The Attorneys General therefore would seek to punish ExxonMobil for complying with federal law and the accounting standards embedded therein.

125. Even if the New York or Massachusetts Attorneys General were to seek only to layer additional disclosure requirements concerning oil and gas reserves and asset valuations beyond those imposed by the SEC, this would frustrate, and pose an obstacle to, Congress's and the SEC's efforts to create a uniform market for securities and provide consistent metrics by which investors can measure oil and gas companies on a relative basis.

126. Because these investigations under New York and Massachusetts law create a conflict with, and pose an obstacle to, federal law, the application of New York and Massachusetts law to this case is preempted.

G. Seventh Cause of Action: Abuse of Process

127. ExxonMobil repeats and realleges paragraphs 1 through 104 above as if fully set forth herein.

128. Attorneys General Schneiderman and Healey committed an abuse of process under common law by (1) issuing the subpoena and the CID to ExxonMobil without having a good faith basis for conducting an investigation; (2) having an ulterior motive for issuing and serving the subpoena and the CID, namely, an intent to prevent

ExxonMobil from exercising its right to express views with which they disagree; and (3) causing injury to ExxonMobil's reputation and violating its constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that Attorneys General Schneiderman and Healey be summoned to appear and answer and that this Court award the following relief:

1. A declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that the subpoena and the CID violate ExxonMobil's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution; violate ExxonMobil's rights under Sections Eight, Nine, and Nineteen of Article One of the Texas Constitution; and violate the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution;

2. A declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that the issuance of the subpoena and the CID constitute an abuse of process, in violation of common law;

3. A preliminary and permanent injunction prohibiting enforcement of the subpoena and of the CID;

4. Such other injunctive relief to which Plaintiff is entitled; and

5. All costs of court together with any and all such other and further relief as this Court may deem proper.

Dated: October 17, 2016

EXXON MOBIL CORPORATION

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, a copy of the foregoing instrument was served on the following party via the Court's CM/ECF system in accordance with the Federal Rules of Civil Procedure:

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/s/ Ralph H. Duggins
Ralph H. Duggins

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

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

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

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

INTRODUCTION

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

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

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

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

3 Ex. A at App. 3.

4 Ex. C at App. 63.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

87 Anderson Aff. ¶ 3.

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

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

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

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

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

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

GROUND ONE

THERE IS NO PERSONAL JURISDICTION OVER EXXONMOBIL

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

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

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

GROUND TWO

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

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

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

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[89] *See supra* n.14.

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

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

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

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

GROUND THREE

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

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

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

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

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

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

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

[90] *See supra* n.14.

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

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

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

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

GROUND FOUR

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

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

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

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

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

WHEREFORE, Petitioner respectfully prays that this Court:

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

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

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

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

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

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

Respectfully Submitted,

EXXON MOBIL CORPORATION

By its attorneys,

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Dated: June 16, 2016

CERTIFICATE OF SERVICE

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

/s/ Caroline K. Simons
Caroline K. Simons

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	))))))

MEMORANDUM OF EXXON MOBIL CORPORATION IN SUPPORT OF ITS EMERGENCY MOTION TO EXTEND THE TIME TO MEET AND CONFER WITH THE ATTORNEY GENERAL UNDER G.L. c. 93A, § 4

INTRODUCTION

After more than three years of inaction, the Attorney General now threatens Exxon Mobil Corporation ("ExxonMobil") with a lawsuit mere days before a trial against the New York Attorney General is set to begin. The timing of the Attorney General's threat is no coincidence. It is an intentional and cynically transparent ploy to distract ExxonMobil from its trial preparations, gain some trial-related media attention for itself, and assist a fellow member of the attorney-general coalition that announced a campaign against ExxonMobil in 2016. It is also contrary to the rule of law. Massachusetts law directs the Attorney General to provide potential defendants an opportunity to present their side of the case, in person, before the State files a lawsuit against them. The Attorney General has ignored that requirement here by insisting that ExxonMobil either meet with the Attorney General two or three business days before the first day of trial or else forfeit the statutory protection of a meet and confer. The Attorney General's intentional maneuvering renders completely worthless ExxonMobil's statutory right to meet and confer. It is a plain and simple abuse of power and a denial of due process.

The Attorney General has known for months of the upcoming trial in New York and that

ExxonMobil's in-house and outside counsel were focused on preparing for it. Earlier this year, the Attorney General attempted to derail trial preparations by insisting that oral argument in a related case take place a week before the New York trial. The Attorney General held firm to that argument date even after counsel for ExxonMobil explained the conflict. The court agreed with ExxonMobil and did not schedule argument a week before trial, but the Attorney General appears to have been undeterred in its desire to disrupt and distract.

The threatened lawsuit is simply the latest gambit. Even though the Attorney General has not obtained a single document from ExxonMobil, has not interviewed a single ExxonMobil witness, and has not had a substantive conversation with ExxonMobil's counsel in years, it now claims it cannot wait until mid-November to file a civil action against the company. There is no legitimate reason for this rush to judgment. As the Court knows, a tolling agreement has been in place for three years that provides full protection to the Attorney General, and ExxonMobil has not sought to modify, alter, or do anything other than live up to its end of the agreement. The Attorney General's race to the court house has nothing to do with the sound administration of justice or the rule of law. It has everything to do with gamesmanship and unfairness that is unworthy of the chief legal officer for the Commonwealth.

That is why ExxonMobil has filed an emergency motion asking the Court to extend the time to meet and confer until a date after the conclusion of the New York trial. This short extension would preserve ExxonMobil's statutory right to exercise its opportunity to meaningfully meet and confer with the Attorney General in person about the threatened lawsuit. The requested relief would not prejudice the Attorney General or the Commonwealth because any possible claims that they may assert against ExxonMobil are preserved by a tolling agreement between the parties. It would also vindicate the text and purpose of the statute, which provides an opportunity to meet

with state officials before the power of the state is brought to bear on a defendant. The rule of law requires no less.

FACTUAL BACKGROUND

A. The Attorney General Leads a Coalition of State Officials Targeting ExxonMobil.

The Attorney General has publicly aligned herself with a coordinated campaign of partisan attorneys general dedicated to "creatively" and "aggressively" using their law enforcement powers to "limit[] climate change" and "ensur[e] the dissemination of accurate information about climate change."[1] This campaign first exposed itself to the public on March 29, 2016, when New York Attorney General Eric Schneiderman hosted a press conference in New York City with a coalition of state attorneys general, self-styled as the "AGs United for Clean Power" and the "Green 20." He was joined by Attorney General Maura Healey, who attributed the public's failure to embrace her climate change policies to speech that caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts."[2] Attorney General Healey asserted that those who purportedly "deceived" the public—by disagreeing with her about climate change policy—"should be, must be, held accountable."[3] In the next breath, Attorney General Healey declared that she too had "joined in investigating the practices of ExxonMobil." She then promised "quick, aggressive action" to "hold[] accountable those who have needed to be held accountable for far too long."[4]

The March 2016 press conference was years in the making. Private interests have long urged state officials to misuse their law-enforcement power to restrict disfavored viewpoints on climate change. And they were on hand at the press conference, leading workshops attended by

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1 June 16, 2016 App'x in Support of ExxonMobil's Motion, Ex. A at App. 003.
2 *Id.* at App. 013.
3 *Id.*
4 *Id.* at App. 014.

both Attorney General Healey and others, that were meant to be concealed from the public. During one of those secret meetings, Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, delivered a presentation to the attorneys general on the "imperative of taking action now on climate change."[5] Matthew Pawa, a global warming plaintiff's lawyer, who unsuccessfully sued ExxonMobil for allegedly causing global warming also delivered a secret presentation on "climate change litigation."[6]

For years, these activists and other private interests have worked to persuade state law enforcement officers to use their investigative powers to apply pressure those perceived to hold disfavored views on climate change. For example, in 2012, both Frumhoff and Pawa attended a workshop in La Jolla, California, which examined ways to obtain the internal documents of companies like ExxonMobil for the purpose of "maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." (Ex. 1 at 27.) Recognizing the broad power of state attorneys general, the La Jolla participants observed that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light." (*Id.* at 11.) Frumhoff began to put that agenda into action by July 2015, when he assured fellow activists that he was exploring "state-based approaches to holding fossil fuel companies legally accountable" and anticipated "a strong basis for encouraging state (e.g., AG) action forward."[7]

The Rockefeller Family Fund (the "Fund") also helped to devise the playbook Attorney General Healey and others have followed for their investigations. In January 2016, the Fund

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5 June 16, 2016 App'x in Support of ExxonMobil's Motion, Ex. M. at App. 133.

6 *Id.*

7 Michael Bastasch, *Emails: Eco-Activists Plotted Oil Industry Lawsuits Before Anti-Exxon Stories Released*, Daily Caller (May 16, 2016), http://dailycaller.com/2016/05/16/emails-eco-activists-plotted-oil-industry-lawsuits-before-anti-exxon-stories-released/.

convened a meeting to discuss the "Goals of an Exxon campaign" such as "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm" and "[t]o delegitimize [ExxonMobil] as a political actor." (Ex. 2.) In December 2016, the President and Director of the Fund admitted, after initially failing to disclose the connection, that the Fund had financed the so-called investigative journalism that Attorney General Healey claims inspired her investigation. *See City of San Francisco* v. *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1 (Tarrant Cty. Tex. Apr. 24, 2018) (Ex. 3).

B. ExxonMobil and the Attorney General Entered into a Tolling Agreement.

Fewer than three weeks after the press conference, on April 19, 2016, the Attorney General issued a Civil Investigative Demand ("CID") to ExxonMobil seeking over 40 years of records pertaining to speech and research on climate change. According to the CID, the Attorney General's investigation centered on two types of transactions: (1) ExxonMobil's marketing and sale of energy and other fossil fuel derived products to consumers in Massachusetts, and (2) ExxonMobil's marketing and sale of securities to Massachusetts investors. After receiving the CID, ExxonMobil engaged in negotiations with the Attorney General to address its concerns relating to the CID. Those discussions were unsuccessful.

On June 15, 2016, ExxonMobil filed a complaint and a motion for a preliminary injunction in the United States District Court for the Northern District of Texas against the Attorney General, alleging the CID violated its rights under state and federal law (the "Federal Court Challenge"). The next day, ExxonMobil filed an Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order ("Motion to Set Aside the CID") in this Court, and the Attorney General responded with a cross-motion to compel compliance.

Shortly after ExxonMobil filed the two legal actions, the Attorney General suggested the parties enter into a tolling agreement regarding the CID. On June 24, 2016, the parties executed a tolling agreement whereby the Attorney General agreed it would not seek to enforce ExxonMobil's compliance with the CID until both the Federal Court Challenge and the Massachusetts State Court Challenge before this Court were fully adjudicated, including through appeal (the "Tolling Agreement"). (Ex. 4.) The parties further agreed that "any time limit for the assertion of any claims arising from the Investigation that have not expired as of the Effective Date . . . be tolled and postponed." *Id.* Given the terms of the Tolling Agreement, ExxonMobil has not produced any documents to the Attorney General in response to the CID; nor have any ExxonMobil employees or former employees testified before the Attorney General, as requested by the CID.

On January 11, 2017, the Court denied ExxonMobil's Motion to Set Aside the CID and allowed the Attorney General's cross-motion to compel compliance. The Court also ordered the parties to "submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C conference." Pursuant to the Court's order, the parties filed a Joint Status Report on February 14, 2017. (Feb. 14, 2017, Joint Status Report.) In the Joint Status Report, the parties advised the Court that they had entered into the Tolling Agreement and explained its key terms.

The parties have continued to file status reports to apprise the Court of developments in this case as well as pending, related cases. For example, on August 22, 2018, the Attorney General filed a Status Report again advising the Court that under the terms of the Tolling Agreement, ExxonMobil was not obligated to produce responsive documents until the pending litigation in Massachusetts and the then-pending litigation in federal court in Texas were fully resolved. (Aug. 22, 2018 MAAG Status Report.) In that Status Report, the Attorney General further informed the

Court that the Federal Court Challenge was transferred to the Southern District of New York. (*Id.*) And on September 5, 2018, ExxonMobil filed a Status Report informing it of recent developments in related actions, also referencing the parties' Tolling Agreement and noting that both actions remain unresolved and at the appellate level. (Sept. 5, 2018 ExxonMobil Status Report.)

In January 2019, the Court sent notice to the parties regarding the possible scheduling of a status conference. In separate submissions, the parties took different positions on whether a status conference was necessary at that time. On January 14, 2019, ExxonMobil sent a letter to the Court proposing "that a status conference be adjourned at this time in light of the tolling agreement between the parties." (Jan. 14, 2019 ExxonMobil Letter.) ExxonMobil explained that the federal litigation was still pending, and "judicial economy and the interests of justice would be best served by holding a status conference only after the federal case has been resolved." (*Id.*) The Attorney General disagreed, suggesting that holding a status conference to discuss the litigation would be constructive. (Jan. 15, 2016 MAAG Letter.) Once again, the Attorney General reiterated the terms of the Tolling Agreement and acknowledged that the federal litigation was still pending on appeal before the United States Court of Appeals for the Second Circuit. (*Id.*)

On January 18, 2019, the Court agreed with ExxonMobil's position and decided to hold a status conference after the conclusion of the federal appellate litigation. The Court ordered, "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[.]"

C. A Related New York Action Is Moving Toward Trial on an Expedited Basis.

As noted, the Federal Court Challenge was transferred to the Southern District of New York. That case currently is pending appeal before the Second Circuit and has been fully briefed. On July 15, 2019, the Second Circuit proposed to calendar the case for oral argument during the

week of October 15, 2019. ExxonMobil's counsel notified the Court that the week of October 15 "presents a conflict because of a multi-week trial beginning on October 23 where both ExxonMobil and the New York Attorney General's Office are parties" and counsel would be "busy preparing for that trial along with the rest of Exxon's team the prior week." Due to the expected duration of the trial, ExxonMobil's counsel asked the Court to postpone argument until the week of December 2, 2019 or later.

The Attorney General, a party in the case, vehemently objected to ExxonMobil's proposed date, insisting that the argument be scheduled during the week of October 15. (Ex. 8.) In a written submission to the Court on July 26, 2019, the Attorney General discussed its knowledge of ExxonMobil's upcoming trial on October 23 and ExxonMobil's intense preparation for that trial during the prior week. (*Id.*) The Second Circuit has not yet scheduled the date for oral argument thereby implicitly rejecting the Attorney General's attempt to force the argument to occur during the week before the trial in the New York State action.

The New York State action involves securities fraud claims brought by the New York Attorney General against ExxonMobil. In August 2018, Justice Ostrager placed this case on an expedited basis by ordering the Attorney General to either close the investigation or "bring a formal complaint" that would result in a "2019 trial." (Aug. 28, 2019 Hr'g Tr. 16:11–15, 20:4–6, *People* v. *PricewaterhouseCoopers LLP*, Index No. 451962/2016 (NY Sup. Ct.).) Shortly thereafter, Justice Ostrager scheduled trial for October 23, 2019, one year from the date the Attorney General filed her complaint. (Prelim. Conference Order at 3, *People* v. *Exxon Mobil Corp.*, Index No. 452044/2018 (NY Sup. Ct. Nov. 15, 2018), Dkt. No 45. The trial is scheduled to begin next week on October 22, 2019 and conclude on conclude on or about November 12, 2019. As indicated by its written submission to the Second Circuit in July 2019, the Attorney

General has known for months about this looming trial date. (Ex. 8.)

D. The Attorney General Provided Pre-Suit Notice to ExxonMobil on the Eve of the New York Trial.

On October 10, 2019—less than two weeks before the commencement of the trial in the New York State action—the Attorney General served notice of its intent to file suit against ExxonMobil under G.L. c. 93A, § 2 (the "Notice"). (Ex. 5.) The Attorney General also offered, as required by law, that representatives of its Office were available to confer with ExxonMobil prior to the filing of the action. As a precondition to filing suit, Section 4 of the statute requires the Attorney General to provide a possible defendant with the opportunity to confer with the Attorney General in person at least five days before the commencement of any action. G.L. c. 93A, § 4.

On October 14, 2019, ExxonMobil responded stating its position that the Notice circumvents the letter and spirit of the Tolling Agreement and constitutes a breach of the Tolling Agreement. (Ex. 6.) In addition, ExxonMobil expressed concern that the Attorney General intends to sue even though it has not reviewed a single document from ExxonMobil or interviewed a single ExxonMobil employee. (*Id.* at 2.) ExxonMobil further identified the highly suspect timing of the Attorney General's Notice—the Notice was sent on the eve of trial in the New York State action. Nevertheless, ExxonMobil accepted the Attorney General's offer to meet and confer and proposed to do so following the conclusion of the New York action in mid-November. On October 15, 2019, the Attorney General replied, rejecting ExxonMobil's request to meet and confer after the trial in the New York State action. (Ex. 7 at 2.) Instead, the Attorney General stated that it will confer with ExxonMobil on October 16 or 17. (*Id.*)

In view of the Attorney General's insistence that any meet and confer occur immediately and not following the imminent trial, ExxonMobil has filed this emergency motion requesting this

Court to extend the time to meet and confer under c. 93A, § 4 to a date following the conclusion of the trial in the New York State action on or about November 12, 2019.

ARGUMENT

Under Section 4 of G.L. c. 93A, the Attorney General is required to give notice to a potential defendant prior to filing a lawsuit: "At least five days prior to the commencement of any action brought under this section, except when a temporary restraining order is sought, the attorney general shall notify the person of his intended action, and *give the person an opportunity to confer with the attorney general* in person or by counsel or other representative as to the proposed action." G.L. c. 93A, § 4 (emphasis added). Section 4's "opportunity to confer" is not a mere formality. *Id.* It affords the parties a *meaningful* opportunity to address, and potentially narrow, legal and factual issues as well as engage in discussions regarding the merits of the claims and a possible resolution. Indeed, Section 5 expressly contemplates that "where the attorney general has authority to institute an action or proceeding under section four, *in lieu thereof* he may accept an assurance of discontinuance of any method, act or practice in violation of this chapter." G.L. c. 93A, § 5 (emphasis added).

A meaningful opportunity to confer, such that the matter could be resolved, is also reflected in G.L. c. 93A, § 9. In private actions brought by consumers under Section 9(3), the consumer must send a written demand for relief before filing suit. The function of this demand letter is "to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct." *Slaney* v. *Westwood Auto, Inc.*, 366 Mass. 688, 705 (1975). It also "gives the addressee an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied." *Id.*

Months before sending its Notice, the Attorney General knew of the October 22, 2019 trial

date and that ExxonMobil and its attorneys would be fully engaged in intense trial preparation during the period preceding the trial. (Ex. 8 at 2.) Nevertheless, the Attorney General made a tactical decision to serve the Notice on the eve of trial despite claiming that it had already obtained "sufficient grounds" to bring suit over the past three and one-half years. (Ex. 7.) The timing of the Notice—which affords a brief five-day period for the parties to confer—plainly indicates the Attorney General's intent to disrupt and disturb ExxonMobil's trial preparation and benefit the New York Attorney General's Office, its co-defendant in the federal case. In fact, this is the second time that the Attorney General has attempted to interfere with ExxonMobil's trial preparation. The first instance was when the Attorney General insisted that the oral argument before the Second Circuit occur during the week of October 15. (Ex. 8.) It is evident that this also is a transparent media ploy, in which the Attorney General intends to file suit and pile on the news coverage of the high-profile trial.

Aside from the timing of the Notice, the Attorney General's decision to bring an action in the first place is highly suspect given its complete lack of communication with ExxonMobil over the past several years. ExxonMobil has not had a substantive conversation about the Attorney General's investigation or potential claims in three years. The Attorney General has not interviewed a single employee of ExxonMobil or reviewed a single document from ExxonMobil. Its determination to race to the courthouse without information from ExxonMobil or a meaningful meet and confer with the Company further evinces the improper motive here.

The statute's guarantee of a meaningful opportunity to confer would enable ExxonMobil and its counsel to discuss the proposed claims and supporting evidence with the Attorney General. ExxonMobil and its counsel would then be in a position to conduct internal discussions regarding the basis of the alleged claims and defenses, and to make a reasoned business decision whether to

attempt to resolve the matter or engage in litigation.

Moreover, Section 4 explicitly affords a potential defendant with the option to *"confer with the attorney general in person"* as to the proposed action. ExxonMobil has previously met with the Attorney General in person and intends to do so in this instance. Given the timing of the Attorney General's Notice, an in-person meeting is now virtually impossible. As the Attorney General is well aware—as evidenced by its letter to the Second Circuit last July—ExxonMobil's trial counsel "would be busy preparing for that trial along with the rest of Exxon's team the prior week." (Ex. 8 at 2.) The few remaining days leading into the trial—which was scheduled on an expedited basis—are entirely dedicated to trial preparation and the final pre-trial conference. The final pre-trial conference and argument on motions in limine was held on October 16. Members of the trial team will be conducting pre-scheduled witness preparation in Texas and New York on October 17 and 18. There simply is no realistic likelihood that ExxonMobil and its trial counsel can attend an in person conference with the Attorney General until after the New York trial concludes on or about November 12, 2019.[8]

The Attorney General's conduct in this case nullifies ExxonMobil's right to engage in a meaningful conference with the Attorney General, as required by Section 4. In view of the Attorney General's inequitable and calculated acts, the Court should exercise its inherent power and authority to extend the statutory time period for the conference to a date after the trial concludes on or about November 12. *See O'Coin's, Inc.* v. *Treasurer of the Cty. of Worcester*, 362 Mass. 507, 514 (1972) ("[S]ince these inherent powers have their basis in the Constitution,

[8] That ExxonMobil also has counsel in Boston does not solve the problem created by the Attorney General's flagrant effort to derail ExxonMobil's trial preparation and undermine the purpose of the opportunity to confer. Whether ExxonMobil has counsel in Boston or elsewhere does not cure the fact that the trial team, which has been the Company's counsel since the inception of the myriad legal proceedings, is unavailable as are the Company's key decision-makers. Moreover, Boston counsel has not been substantively involved in this matter for three years.

regardless of any statute, every judge must exercise his inherent powers as necessary to secure the full and effective administration of justice.") (internal citation omitted). This relief will cause no prejudice to the Attorney General or the Commonwealth because any possible claims that they may assert against ExxonMobil are preserved by the Tolling Agreement.

CONCLUSION

For these reasons, ExxonMobil respectfully requests that the Court extend its opportunity to confer with the Attorney General, afforded by G.L. c. 93A, § 4, to a date after the conclusion of the trial in the New York State action.

Dated: October 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Frongillo, hereby certify that a true and correct copy of the above document was served upon the Attorney General's Office by hand on this 17th day of October 2019.

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October 14, 2019

By Email

Richard A. Johnston
Chief Legal Counsel
Office of the Massachusetts Attorney General
One Ashburton Place
Boston, MA 02108

Notice Letter to ExxonMobil

Dear Mr. Johnston:

We write on behalf of Exxon Mobil Corporation ("ExxonMobil"), in response to your letter, dated October 10, 2019, stating an intent to commence a civil action against ExxonMobil.

Your notice is highly unusual in light of existing circumstances. After reaching a tolling agreement with ExxonMobil over two years ago, your office relieved ExxonMobil of any obligation to respond to your Civil Investigative Demand ("CID"). Under the tolling agreement, your office agreed it would take no action to compel compliance with the CID's discovery requests. And ExxonMobil has not provided your office with any discovery. To the extent you intend to obtain that discovery now through a civil suit, your action would violate the letter and spirit of the tolling agreement. It would be an improper attempt to

obtain the discovery requested in the CID and therefore a breach of the agreement. ExxonMobil reserves the right to seek any and all appropriate remedies under the circumstances, including specific performance and rescission.

Even more troubling is your office's decision to sue ExxonMobil without having reviewed a single document from ExxonMobil or having interviewed a single ExxonMobil employee. It appears your office has decided to charge the company without any consideration or concern for the underlying facts. The timing of your notice provides further cause for concern that improper motives animate your office's decision to file suit. We view the sending of your notice on the eve of both oral argument before the U.S. Court of Appeals for the Second Circuit and trial before Justice Ostrager in New York Supreme Court to be an act of harassment consistent with the claims in our lawsuit now before the Second Circuit. We also view the timing of your letter as further proof of the collusive conduct between your office and the New York Attorney General's office, as set forth in ExxonMobil's federal complaint. Neither ExxonMobil nor, we suspect, the courts or any objective observer will view the timing of your letter as a mere coincidence unconnected to the upcoming Second Circuit argument and New York State trial. It is far more likely to be seen for what it is: the freshest evidence of your office's participation in a conspiracy with other state attorneys general.

We trust this letter serves as an adequate reminder that your office has a continuing obligation to preserve all documents and communications that might be relevant to the lawsuit now before the Second Circuit or the CID enforcement proceeding pending in the Massachusetts Superior Court. This obligation extends to any communication relating to your decision to send the letter advising ExxonMobil of your intent to file a lawsuit, including any communications with the New York Attorney General, other state attorney generals, or third parties. It also requires the preservation of all documents and communications relating to the tolling agreement between your office and ExxonMobil.

We accept your offer to meet and confer about the notice. We propose to do so following the conclusion of the New York State trial in mid-November, less than a month away.

Finally, we request that you refrain in the future from communicating directly with ExxonMobil's Chief Executive Officer, Darren Woods, or other ExxonMobil employees. As you are well aware, ExxonMobil is represented by counsel, and ethical rules prohibit direct contact with represented clients.

Sincerely,

/s/ Theodore V. Wells, Jr.
Theodore V. Wells, Jr.

cc: Thomas C. Frongillo

Volume: I
Pages: 1-31
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

EXXON MOBIL CORPORATION,

Plaintiff,

V.

OFFICE OF ATTORNEY GENERAL,

Defendant.

Docket No. 1684CV01888

MOTION HEARING
BEFORE THE HONORABLE HEIDI BRIEGER

APPEARANCES:
For the Plaintiff:
Pierce Bainbridge Beck Price & Hecht LLP
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By: Thomas Carl Frongillo, Esq.
Christina Lindberg, Esq.

For the Defendant:
Mass Attorney General's Office
Mass Attorney General's Office
One Ashburton Place
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Boston, M 02108
By: Richard Johnston, Esq.
I. Andrew Goldberg, Esq.
Melissa Ann Hoffer, Esq.
Christophe Gagnon Courchesne, Esq.

Boston, Massachusetts
Courtroom 1006
October 24, 2019

Proceedings recorded by electronic sound recording, transcript produced by an Approved Court Transcriber.

(Case called.)

(2:06 p.m.)

THE CLERK: The next matter is Exxon Mobil Corporation vs. Office of Attorney General, Civil Action 2016-1888. This is on Exxon Mobil's emergency motion to extend time.

Counsel, could you please identify yourselves for the Court?

MR. FRONGILLO: Good afternoon, Your Honor. Thomas Frongillo on behalf of Exxon Mobil.

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

MS. LINDBERG: Good afternoon, Your Honor. Christina Lindberg on behalf of Exxon Mobil.

THE COURT: Burk?

MS. LINDBERG: Christina Lindberg.

THE COURT: Lindberg. All right. Good afternoon, Ms. Lindberg.

MR. JOHNSTON: Your Honor, Richard Johnston for the Commonwealth.

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

MS. HOFFER: Melissa Hoffer for the Commonwealth.

THE COURT: Good afternoon, Ms. Hoffer.

MR. COURCHESNE: Good afternoon. Christophe Courchesne for the Commonwealth.

THE COURT: Courchesne? Good afternoon, Mr. Courchesne.

MR. GOLDBERG: I'm Andrew Goldberg for the Commonwealth.

THE COURT: All right. Good afternoon.

Let me tell you what I have received and reviewed. I have received, first of all, the emergency motion from Exxon Mobil to extend the timeframe for a meet and confer with the attorney general. I read the memorandum, including, I believe, eight separate -- nine separate attachments to that memorandum. I received and read the opposition from the Commonwealth, and then I received also a reply memorandum from Exxon Mobil to that opposition.

I have looked at all of these, and I understand the import of the motion and the opposition.

I'll hear from you.

MR. FRONGILLO: Your Honor, with your permission, I have a one-page diagram that I think might be helpful to the discussion. I've given a copy to the Attorney General's Office.

THE COURT: All right. Before you begin let me ask you a preliminary question. Is there anything that requires Exxon Mobil other than this obligation for the meet and confer five days ahead to consider other issues relating to Exxon Mobil before filing a lawsuit? Is there any -- anything else?

I gather the tolling agreement has been presented as an impediment to them bringing this action, and you're suggesting that they need to put it off, so that they can meet and confer in person with Exxon Mobil.

Is there anything else that affects their ability to bring the suit?

MR. FRONGILLO: I don't believe so, Your Honor.

THE COURT: so those two things?

MR. FRONGILLO: Yeah. There may be dispute about the import of the tolling agreement as we go forward with the discussion. And, you know, we principally rely on it to --

Of course, the Court is aware of it from the three status reports that have been filed, and I understood from your ruling back in early '19 -- the beginning of the year, 2019, that you felt the need for a conference with the Court wouldn't occur until there had been notice given under the tolling agreement. At which point we would come before you again and let you know what the status was.

I actually think that that agreement is important on the prejudice issue here of --

THE COURT: The tolling agreement, having read it, refers to the enforcement of the CID.

MR. FRONGILLO: Correct.

THE COURT: It does not in any way affect the decision whether to file an action under Section 4.

MR. FRONGILLO: Right. I don't believe we've argued that in the papers, that the tolling agreement --

THE COURT: Well, Mr. Wells raised it quite clearly.

MR. FRONGILLO: He raised it in his letter on the 14th

that this is violative of the spirit and the intent of it. And that it may well be a violation if there was an attempt to take the discovery in the litigation as a way to circumvent the tolling agreement.

As a basis for this discussion, I think the tolling agreement's import really has to do with this prejudice issue. What we're looking for here --

And actually, I would like to reiterate, if I could, our position. I would still hope that the attorney general might consider it.

As you can see from the chart that I gave you, Exxon is willing and prepared to come to Boston with its executive team, its in-house attorneys that are involved and would be critical to any decisions to be made on whether to discuss a resolution or litigate the case, as well as the Paul Weiss team which has been actively involved in the litigation for several years. They're prepared to come here in three weeks.

And I would ask the attorney general again, because I think it's a simple resolution to the motion before you. They're prepared --

THE COURT: Are they required to wait three weeks to bring an action to accommodate a potential defendant's litigation schedule?

MR. FRONGILLO: Well, I have two responses to that. One is a factual one, and one is a legal one. Let me just say this

first factually.

The letter that Mr. Johnston sent, which is Exhibit 5, on October 10 said the following: Representatives of the Attorney General's Office are available to confer with Exxon Mobil prior to the filing of the action.

What Mr. Wells wrote back, which is Exhibit 6, on the 14th -- he said expressly: We accept your offer to meet and confer about the notice. We propose to do so following the conclusion of the New York State trial in mid-November less than a month away.

Mr. Johnston in his letter didn't say you've got to do this within five days. He said before the filing of the action.

Under 93A, Section 4, there's no requirement that the attorney general give notice and then file a lawsuit five days later. The notice provision, Section 4, is that at least five days before the commencement of an action the notice has to be given to a potential defendant.

And in fact, Your Honor, if you look at Section 5 of 93A, which is to be read really in tandem with Section 4, it contemplates, really, a possible resolution proceeding in which, under Section 5, which specifically makes reference to Section 4, it says that the party may come in and give a reasonable assurance to refrain from or stop the complained about conduct, that this can be done in writing, that it can be

filed with the Court, and it can be used much the way a consent decree in the SEC would be used to enforce a proceeding if there's a violation.

So the two sections of the statute -- Section 4 and Section 5 -- really need to be read together in terms of what the purpose of conferring is.

And I know, given the Court's background, that the Court is well aware that the opportunity to confer with a regulator, the United States Attorney's Office, the SEC, the attorney general, before the commencement of a legal proceeding, whether it's an indictment or a regulatory enforcement action, can actually sometimes be the most important part of the case.

Because at that conference, first of all, the party can find out, as in this case, the AG is required to do, to talk about what the proposed action is. It is very common that there would be a discussion of the evidence at that point. There oftentimes is a narrowing of issues. There could be five claimed infractions, and issues could be narrowed to one or two. This is often an opportunity for the other party to make a presentation to the regulator or the U.S. Attorney's Office.

THE COURT: So I guess --

I do understand all of that.

And what I guess I missed from the pleadings was the reason why Exxon Mobil could not comply with the five-day window.

MR. FRONGILLO: Here's the reason why. They're involved in a trial right now that was conducted on an expedited basis. In fact, they were taking depositions in our office in Boston in September in this case, late September. This is a bench trial that is going to last probably a little bit less than a month with a beginning and a distinctive ending. They're involved in -- were involved -- they're in the trial right now.

But as the Court is aware, the preparation leading up to the trial is quite intensive. There were witnesses being interviewed in different parts of the country. There was a pretrial conference scheduled on one of the days, the 16th, that was offered by the attorney general.

If you look at the diagram, the notice came on Thursday the 10th without a we'll meet with you, we have to meet with you within five days. It was open-ended.

Mr. Wells responded: We will take you up, accept your offer. We're willing to meet with you at the conclusion immediately.

I mean, these people are in -- some of these people are in Texas. They're going to be in New York for a month. They might get home for a day to see their families, and then they're going to come right back to Boston. They're prepared to do that.

Because it was served -- the notice was served on the 10th, Exxon responded on Monday proposing the date. The next

day was given two dates, which by the way weren't given in the original notice. And those two days were the following day, the 16th, at which -- a day in which they had to be in COURT at the pretrial conference, and then the next day which --

THE COURT: Who's the "they" you're referring to?

MR. FRONGILLO: All right. The "they" --

Since the outset of this case, Exxon Mobil has a in-house team of attorneys that are assigned to work on this, including one who was counsel of record, Patrick Conlan (phonetic). And they are actively -- unlike, often other companies, they're actively involved in the litigation, taking depositions and participating.

So that whole team, the Paul Weiss team, the decision-makers that would be able to attend this conference and make a decision that is contemplated by Sections 4 and 5, are in New York right now with pedal to the metal. They're prepared to come here once the dust settles and meet in three weeks.

And the reason why we're a little baffled over this is because for three and a half years because of the tolling agreement nothing has happened, at least in so far as an interaction with Exxon Mobil.

THE COURT: Was there supposed to be?

MR. FRONGILLO: No. But typically what would happen is with an investigation a company would know what was going on.

They'd interact with the regulator, produce documents, depositions --

THE COURT: But is there any obligation to do that before an action is brought?

MR. FRONGILLO: No, there isn't.

But in this particular case with the parties reporting to the Court, I'm just saying Exxon doesn't have a clue as to what the allegations are under 93A.

The letter that the attorney general wrote pretty much mirrors what was in the CID before the investigation began, that Exxon is being looked at or investigated because of its sales and marketing practices or as they relate to consumers -- I imagine that that means people who buy gasoline at the pump -- and investors in the company, and that's it. There's no detail at all as to any type of specifics.

So coming into this it's not like, all right, we know there's four or five areas that they're really concerned with. There's been no witnesses from Exxon that have testified under the CID. Not a piece of paper has been produced under the CID.

THE COURT: But there wasn't going to be, because there was a tolling agreement; correct?

MR. FRONGILLO: There wasn't going to be because of the tolling agreement that was requested by the attorney general.

Under that agreement, which had benefits for both sides, the benefit for the attorney general was there would be no

running of the statute of limitations on any --

THE COURT: On an action.

MR. FRONGILLO: Yeah, on any of these actions that could arise out of their investigations. And so --

THE COURT: And the benefit to Exxon Mobil was that they didn't have to bring the documents that they gave to New York to Massachusetts. But --

MR. FRONGILLO: Correct.

THE COURT: -- there wasn't anything in that tolling agreement that said or even suggested that the attorney general was going to come to a standstill in its investigation.

MR. FRONGILLO: That's right. It was specifically between the two parties: Exxon Mobil and the attorney general.

And the attorney general, of course, is free to conduct whatever investigation.

And we're not --

By the way, we're not trying to block a lawsuit here. At all. I'm assuming that by the time this notice was written, that the attorney general has prepared a complaint. Otherwise, they wouldn't have written a letter. They don't have to serve a complaint or file a complaint within five days. They can do it at any time they want.

But we do have a statutory right to confer in person, and when you give --

THE COURT: But it -- but a person --

That's somewhat misleading, isn't it, when you're talking about Exxon Mobil? I mean, there is a person who can come to meet and confer from Exxon Mobil. It might not be the four people that you would prefer or that Exxon Mobil would prefer, but I'm --

And I don't think it says in the statute the chief executive officer or the general counsel. It just says a person.

MR. FRONGILLO: That's correct. But it does confer an important statutory right to meet in person. I think you can read into that, though, that the people that are going to be there, because of what could happen in Section 5, have to be key decision makers.

Nobody goes to a meditation or a settlement conference or a meeting with the United States Attorney without having people who can make a decision. And the key decision makers here are available to come up here in three weeks and meet and confer.

And a meet and confer, by the way, could also last for a period of time. If there are meaningful discussions at a meet and confer, it's not a perfunctory exercise where, yes, you came in, you said what you wanted to say and left -- and leave and we're filing suit. Certainly, the attorney general can do whatever it wants to do. But this statute contemplates the meet and confer along with Section 5 -- it specifically cross-references Section 4 -- as a meaningful opportunity for

the parties to have a discussion of the intended action of the attorney general.

And the Court certainly has the authority in reading Section 4 and 5 to make a determination as to whether or not that opportunity is being abridged when -- if you know that Exxon is starting a major trial against a party that's actually a co-defendant of yours in another case, the New York Attorney General, and this is an all out case where there's not going to be a lot of sidebar conferences, no jury, it's going to be a lot of evidence done on an expedited basis with discovery that was continuing to occur in September because of the fast track nature of that case. It's really unreasonable for there to be a meaningful opportunity to confer with the attorney general under these circumstances.

Again, we're not trying to push this into 2020. We're not trying to push it down the road. We assume a complaint is prepared. We want to be at the conference. We want to hear what the attorney general has to say. We want to be able to, if it's appropriate, to provide evidence as well. And we don't have that opportunity right now.

The fact that we are here, we haven't been involved, in large part, because of the tolling agreement for the past three and a half years. There's been nothing for us in Boston or the Court for that matter to do. The case has pretty much sat dormant from our perspective. And we're not --

We're looking at this as follows. We are willing to meet with them. I don't think it's an unreasonable request given the circumstances.

The notice could have been filed at any time evidently. They've been investigation for three and a half years. It could have been filed a month ago and a meet and confer could have occurred. It could be filed three weeks later and a meet and confer could happen. It's not going to affect anything, because the statute of limitations has been tolled. And there's absolutely no prejudice at all.

And we don't understand why the notice has been filed, except for the fact of what it would do to the pretrial preparation. For the people to come here for this to be a meaningful meet and confer, they have to leave New York, stop preparing for the trial and prepare for the meet and confer up here.

And this diagram shows that that's a virtual impossibility for them to do on the eve of trial. They would have had one of the two days, the 17th, in which they were prepping witnesses for trial. Opening statements were Tuesday. And you can see it's all blocked off. There were three days, 13, 14, 15, three business days after the conclusion.

THE COURT: I really do -- I do get this, but I just don't think of Exxon Mobil as a sole proprietorship which would be a significant prejudice. So that's my concern is that it's

not a, you know, mom and pop shop.

MR. FRONGILLO: No. It clearly isn't.

Like in any matter in which you're representing a company, if you have been representing that company for three years, and you are in the trenches, and you have knowledge of the facts, knowledge of the law, knowledge of what the client's objectives are --

This is a publicly traded company. Its team of advisors that has been involved in this case from day one ought to be part of a meet and confer. In fact, they have had some discussions directly. The Exxon people have been and met with the attorney general a couple of times during the course of these proceedings, not the least of which was to negotiate this tolling agreement.

So they're --

I think the attorney general is well aware that the legal team of Exxon Mobil is part and parcel of this.

Yeah, sure. I mean, any company of almost any size -- I mean, I don't know where you would draw the line -- could put a person there. But I don't think that's what the intent of Section 4 is.

THE COURT: All right. No, I understand that. Ms. Lindberg, is there anything you'd like to highlight?

MS. LINDBERG: No, thank you.

THE COURT: Did he leave anything out? I'm sure he did.

This is your chance.

MS. LINDBERG: No, thank you, Your Honor.

THE COURT: All right. Mr. Johnston?

MR. JOHNSTON: Do you mind, Your Honor, if I step back here?

THE COURT: Not at all.

MR. JOHNSTON: I can see a lot better when it's up a little bit higher.

Your Honor, I think you've hit most of the significant points yourself; namely, that the statute requires us to give five days' notice, doesn't require any particular person from Exxon to be there. Exxon Mobil is a large corporation with many lawyers around the world and certainly could have participated in a conference with us.

I'd like to just point out a little bit of a background, though, so you can understand your position as to why we aren't interested in delaying this proceeding any longer.

Exxon's emergency motion is really just the latest in a long series of efforts by Exxon to thwart and delay the attorney general's investigation of litigation against Exxon for misleading consumers and investors. Almost from the day that the attorney general filed a civil investigative demand on Exxon in 2016 --

THE COURT: Which apparently you didn't need.

MR. JOHNSTON: Pardon me?

THE COURT: Apparently you did not need that civil investigative demand in order to bring an action.

MR. JOHNSTON: Well, let me respond to that.

THE COURT: All right.

MR. JOHNSTON: Yeah, we sent out a civil investigative demand in 2016. Exxon has done nothing for three years except try to block us from being able to get anything. And we entered, as you recognized, into a tolling agreement that said that as long as their litigation was pending, they didn't have to comply with the CID, and we couldn't do anything to enforce the CID.

But as we reported to Your Honor in one of the status reports we filed, the fact that we couldn't get documents from Exxon didn't mean that we weren't still continuing to investigate. And we've had the occasion in these last three years to obtain documents and evidence and other information from lots of different sources, and that's what has led us to be in a position to be able to draft and file the complaint.

But as I was beginning to say, literally from the very first day of the CID, Exxon has tried in every way to block us from being able to investigate at least the Exxon piece of it.

As Your Honor knows, shortly after we filed the CID, Exxon --

We did have some discussions about compliance with the CID, and of course those discussions -- we gave them extra

time, and they still wouldn't produce any documents.

But during that extra time, what they did was they utilized it to be able to go off and draft two different complaints: One to file in this Court which is the proper place to be able to challenge a CID under Chapter 93A, and the second was a federal complaint in the Northern District of Texas, which as you probably know is the home district of Exxon and also is a district where there was absolutely no possibility for personal jurisdiction over the attorney general.

The Commonwealth was successful in all of the litigation efforts. As you know, Exxon argued that there was a substantial conspiracy between the Attorney General of Massachusetts and the Attorney General of New York, and that that was a bar to the attorney general being able to investigate.

In essence, Exxon was looking through this case as well as through the case in the Northern District of Texas for the opportunity to, quote, investigate the investigator before the investigator was allowed to proceed with this investigation against Exxon.

Your Honor rejected that political bias challenge. The Supreme Judicial Court affirmed your decision. Exxon filed a petition for certiorari to the U.S. Supreme Court, which the Supreme Court rejected.

Exxon, as I said, filed its federal action in the Northern District of Texas where it was clear there was no basis to be holding a case against the Attorney General of Massachusetts. The Texas judge transferred the venue of the case to New York, which -- and at the time, the New York Attorney General was a co-defendant in that case. The federal district judge in New York in the Southern District soundly rejected all of Exxon's theories, denied a motion to amend the complaint and dismissed the complaint without prejudice.

Exxon then filed an appeal to the Second Circuit, and as the papers on both sides, I think, have made clear, Exxon has twice asked the Second Circuit to postpone the oral argument in that case. I think the first notices we started getting about a scheduling of an oral argument were at the beginning of the summer or sometimes in the summer. Exxon has twice said that the hearing had to be postponed; once because of the New York trial.

And so now we're sitting in a position where we don't even have an oral argument in the Second Circuit because of Exxon's request to have the things put aside.

So when we --

We're in a position, having assembled enough information to file a complaint against Exxon. We gave them notice properly under Chapter 93A, and Exxon immediately requested that we put off the meet and confer conference which is

scheduled to take place within five days under the statute for over 30 days.

THE COURT: Do you agree that there is contemplated in the statute a notion of a meaningful meet and confer, and that the meaningful part of that suggests that the person with the most familiarity with the issues should be present?

MR. JOHNSTON: I think what Section 4 contemplates is that there be an opportunity to meet and confer. I don't think the statute requires that it be of any particular length. I don't think it requires that it be with any particular person. I think the statute envisions that it could be somebody from the company, it could be counsel. But I don't think that there's anything that says that we need to wait until an entire phalanx or army of people from Exxon can assemble when they're all sufficiently conveniently able to do so to come to Boston to talk with us.

And I would note, as we have in our papers, that during the time period in which they said that they weren't able to come and meet with us, they managed to file a motion, memorandum, affidavit and a pile full of exhibits with this Court. They managed to file a reply memo, again with an affidavit, another pile of exhibits. All of that took more time than a meet and confer conference would have taken.

And I would also point out to bring somewhat more the hollowness of Exxon's argument is that during the same period

of the last two weeks when they said that they were able to confer with us; Exxon Mobil's lawyers from Paul Weiss, who are supposedly the ones who were going to be unable to participate in the conference with us, managed to file in the Supreme Court of the United States an emergency petition to stay the remand of several cases that have been brought in state court, which Exxon had removed to federal court, and which the federal courts had all remanded to state court. That was in Rhode Island, it was in Maryland, and it was in Colorado.

So, you know, they found time to do all of these things in this case. They found time to apply to the Supreme Court for a stay of the remands -- which, by the way, the Supreme Court summarily rejected. But they didn't have time to be able to spend with us.

And there's nothing, Your Honor, in the statute, in 93A, Section 4, that requires that the matter -- that the conference be in person. It could just as easily be by telephone.

And in my letter to Mr. Wells after he said that he'd like a month delay, I said that we were prepared to confer in person or confer by telephone.

So during all of these many hours in which they were able to filed papers in this Court and the U.S. Supreme Court, they could have taken one hour to have a telephone conference with us.

Let me tell you a couple of other reasons why we have

been reluctant to extend the time period, and it goes back to the history of the case which I just gave you.

THE COURT: So am I correct in understanding that under no circumstances are you amenable to waiting until the 19th?

MR. JOHNSTON: I'm not amenable to wait for the 19th, and I'll explain why, if I may.

As I mentioned, we gave Exxon some more time back in early 2016, and all it got us was two lawsuits. One that was a legitimate lawsuit in this Court under Chapter 93A. One was a totally illegitimate lawsuit in the federal district court for the Northern District of Texas.

So it has been our serious concern that if we put off the conference for another month, that Exxon would use that month to cook up some other lawsuit that they'd file against us who knows where. And so that was certainly one problem that we had.

A second problem is that Mr. Frongillo himself mentioned in the course of his presentation that Exxon, in fact, did come and met with us a couple of times, and that's true. After the lawsuits were filed in early 2016, we had two different encounters with Exxon to try to resolve the issue of documents. One was with a team of people from Paul Weiss and in-house counsel who came to our office in Boston. They departed without offering to -- without producing a single document.

We then were required to attend a mediation in the

Northern District of Texas. Again, it was pretty much the same crew from Exxon. There were three or four of them from Paul Weiss, local counsel in Texas and same in-house counsel. Again we walked away without a single document being produced.

So, you know, we have serious reservations or serious doubts and skepticism that if we sit down with Exxon, the same Exxon which has been accusing us of conspiracy and bad faith for three and a half years, based on our history of not even being able to get a single document out of them when they gave 4 million pages of documents to New York, the prospect of ending the day with a resolution of our very serious claims against them is nil or less than nil.

So, you know, we're reluctant to, therefore, spend a month waiting for something that is probably going to be a non-event.

I also would point out that Exxon, as you may recall -- and maybe you don't. But when Exxon brought two cases, one in this Court and one in the Southern District, Exxon even had the -- what I would call the audacity -- to ask Your Honor to stay this case which is statutorily prescribed so they could pursue their case in the Northern District of Texas. Your Honor declined, and the SJC affirmed the refusal of a stay.

But it just reinforces our concern that Exxon's real focus is not to respond in a meaningful way in Massachusetts either in settlement or in litigation, but to try to find some

other place, some other thing that it might try to do to, to again get in the way of the attorney general's legitimate objective in the lawsuit.

And I would also point out that when Mr. Wells asked in his letter for a month to be able to pursue a settlement discussion, you know, he basically started out with a series of accusations against the Attorney General's Office, including some of the time worn old conspiracy allegations with the New York Attorney General.

So on top of the fact that three years ago we had a series of discussions with them that went nowhere, to be told that we are bad faith, that we are politically inspired and malevolent, you know, doesn't really open up the prospects for a very favorable or successful settlement.

And then, of course, is the point that we simply saw no reason why Mr. Frongillo, for example, could not participate in a discussion with us. He's here today. I'm happy to have a discussion with Mr. Frongillo the minute we leave court.

But I really do not think that the attorney general should have to countenance Exxon's request in order to have a settlement conference in what would be really a month after we had originally noticed our intention to sue.

I think, Your Honor, that we could have a plausible conversation with Mr. Frongillo this afternoon. Certainly he has been involved in the case from the very beginning. We can

tell him generally what our case is going to involved.

But we really should -- if we're going to give this sort of a conference, we should be able to file our lawsuit at the earliest possible moment. It is now well beyond the time period when we were legally permitted to file the case under Chapter 93A, Section 4.

As Your Honor knows from the papers we filed, we got a notice about this emergency hearing from Mr. Frongillo and he said, you know, I fully expect that you won't take any action to file the lawsuit while this case is pending or this hearing is pending. And although, you know, there was no order from the Court that we had to defer filing the lawsuit in the meantime, you know, out of respect for the Court and the fact that you had scheduled this hearing, we did defer and forebear from bringing a lawsuit. But, you know, we're under no protections at this point from anything that Exxon might do, and we would like to move forward with our plan to sue Exxon as soon as we can, which we think should be when this hearing ends.

THE COURT: All right. I see you have two other chiefs with you. Is there anything, Ms. Hoffer, that you would like to highlight, or?

MS. HOFFER: No, Your Honor. Thank you.

THE COURT: He covered it all?

MR. JOHNSTON: Well, I think -- oh, sorry.

MS. HOFFER: He always does.

THE COURT: All right. And --

MR. JOHNSTON: I did get -- just one more note, Your Honor, and I will pass on.

THE COURT: Sure.

MR. JOHNSTON: And this is a very good point.

Obviously, if we're permitted to file the lawsuit ASAP, there's nothing that stops Exxon from conferring with us after it has read the complaint. The complaint's going to be detailed and voluminous, and Exxon can review the complaint, and before they're obliged to file a responsive pleading -- and I'm sure we'd be prepared to give them a reasonable extension of time to do that, they can come in and have a discussion with us.

I don't expect that they're going to come and offer the significant kinds of relief that we expect out of the lawsuit, but if they want to come talk to us after the complaint is filed, we will have an open office for them to confer with us in.

THE COURT: All right.

MR. FRONGILLO: Yes, Your Honor. One of the themes of Mr. Johnston's argument has been that Exxon has tried to delay this proceeding.

The tolling agreement was entered into within days of the filing of the petition in this case. It was initiated by the

Attorney General's Office.

In the tolling agreement --

And it was made effective as of June 18, 2016. The petition was filed on June 16, 2016. So the effective date of the tolling agreement agreed to by the attorney general saying we don't need to take any depositions, you don't need to produce any documents, was effective within two days of the filing of the petition, which was not a --

THE COURT: But you're not willing to meet and confer within two days of --

I understand the issues here. I'm concerned that the --

As I have said, it's not a mom and pop shop, and they're not represented by solo practitioners. And that leads me to have concern about the authenticity of the we're too busy kind of response. Because being too busy I have great sensitivity to when I'm talking to solo practitioners or people from small firms who really can't be in ten places at once. But I don't see that about Paul Weiss or, frankly, about your term.

So I'm going to --

I'd like to Mr. Johnston and Mr. Frongillo at sidebar, if I could.

(On the record discussion at sidebar with Mr. Johnston and Mr. Frongillo.)

THE COURT: I thought maybe it would be easier to have a conversation not in front of the entire courtroom.

But I'm going to deny your motion to have an emergency stay of this, and I will say that in open court.

But I hope that you can schedule a meaningful meet and confer time within the next three days, because I think that the attorney general --

I cannot step in the way of their filing their lawsuit. I don't see I have any statutory authority whatsoever to suggest that the attorney general cannot file a suit after they've given a five-day notice under Section 4.

MR. FRONGILLO: Can I make a suggestion?

THE COURT: Yes.

MR. FRONGILLO: In situations where there are time deadlines in by statutes written of course by the legislature which I'm sure if the issue that you're thinking about, courts can extend the statutory time period based on --

THE COURT: I have to have good and sufficient reason to do so. The argument that you're giving me, that your client is giving me, is that it's too busy, it has litigation in a city that is a three-hour train ride or two-hour flight, and I can't stand in the way of a statutorily permitted lawsuit on the I'm too busy theory for Exxon Mobil.

As I said, the combination of your firm and Paul Weiss and all of the in-house counsel that they have doesn't suggest to me that that's an authentic basis for extending it.

So I'm asking that you agree to three days. I'm not

going to order it. In my view the attorney general has given its notice, and I think Mr. Johnston is correct that he can leave this courtroom and file a lawsuit. I don't think there's any way that I can order him not to. Nor would I.

But I do think that it would be wise and proper if you could have a meaningful meet and confer, whether that be with you or with somebody who flies up at night or in the morning and does that. I'm not going to suggest that, but that's my --

MR. FRONGILLO: Can I make one other --

THE COURT: Yes. Yeah.

MR. FRONGILLO: Mr. Johnston, one of his concerns was, that the company would use this time period to prepare a lawsuit and file it in some other jurisdiction. One of the points that I was going to make in response before we came up was I am relatively confident that that would not happen.

THE COURT: Well, I'm not going to get involved in that. Yeah.

MR. FRONGILLO: We're willing to get him an assurance that that wouldn't --

THE COURT: Yeah, I'm not going to get involved in that. That's beyond my jurisdiction.

All right. Thank you.

(End of discussion at sidebar.)

THE COURT: All right. I have had a conference with counsel at sidebar.

I have indicated at that conference that I intend to deny the emergency motion from Exxon Mobil.

I do not think that there is a sufficient basis for granting an extension under the statute, because as I have said, I don't believe that the extension is necessary for the reasons that have been offered.

I did suggest that the meaningful meet and confer requirement of Section 4 and Section 5 is important. It's in the statute for a reason. I do hope that it can occur.

But as I said to Mr. Frongillo, I think that Mr. Johnston is correct, under the statute, that he has given -- or rather, the attorney general has given the necessary five-day warning. I suggested that a meaningful meet and confer could occur within three days before filing the suit, but I cannot and will not stay the filing of a lawsuit under these circumstances.

I don't intend to write anything other than what has now been put on the record.

And have I covered everything, Mr. Frongillo?

MR. FRONGILLO: Yes, Your Honor.

THE COURT: All right. Mr. Johnston?

MR. JOHNSTON: I think so, Your Honor. Thank you.

THE COURT: All right. Thank you.

(Hearing adjourned at 2:49 p.m.)

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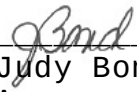

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SUPERIOR COURT DEPARTMENT
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CIVIL ACTION NO. 16-1888F

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

SUFFOLK SUPERIOR COURT CIVIL CLERK'S OFFICE 2019 OCT 1 A8:58 MICHAEL JOSEPH DONOVAN CLERK/MAGISTRATE

EMERGENCY MOTION OF EXXON MOBIL CORPORATION TO EXTEND TIME TO MEET AND CONFER WITH THE ATTORNEY GENERAL UNDER G.L. c. 93A, § 4

Pursuant to G.L. c. 93A, § 4 and Superior Court Rule 9A(d), Petitioner Exxon Mobil Corporation ("ExxonMobil"), respectfully requests that this Court issue an order extending the time for it to meet and confer with the Attorney General's Office to a date after the conclusion of ExxonMobil's multi-week trial against the New York Attorney General in New York state court, which is scheduled to begin on October 22, 2019 and conclude on November 12, 2019. As grounds for this motion, ExxonMobil states:

1. Over three and one-half years ago, the Attorney General initiated an investigation of ExxonMobil under G.L. c. 93A, § 6, by serving a civil investigative demand ("CID") on the Company. The CID indicated the Attorney General was investigating possible violations of G.L. c. 93A, § 2 based on ExxonMobil's marketing and sale of energy products to consumers and securities to Massachusetts investors.

2. As a result of a tolling agreement between the parties, ExxonMobil has not produced a single document to the Attorney General. Nor has any ExxonMobil current or former employee testified before the Attorney General as contemplated by the CID. There have been no substantive discussions between the parties for several months.

3. Now, after more than three years of inaction, the Attorney General has threatened

10/23/19 After hearing oral argument on multiple written submissions, this Motion is Denied consistent with the court's rulings in open court this date. BJB

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:19-cv-12430-WGY

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff

vs.

EXXON MOBIL CORPORATION,
Defendant

****

For Lobby Teleconference Hearing Before:
Judge William G. Young

Motion for Remand

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, March 17, 2020

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REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
bulldog@richromanow.com

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P R O C E E D I N G S

(Begins, 2:00 p.m.)

THE CLERK: Now hearing Civil Matter 19-12430, the Commonwealth of Massachusetts versus Exxon Mobil Corporation.

THE COURT: Well, good afternoon counsel. I'm here in chambers with the Courtroom Deputy Clerk, Ms. Jennifer Gaudet, and the Court Reporter, Mr. Rich Romanow. I understand one of my law clerks is on the line and he will introduce himself.

MR. LEMPEL: I'm Jesse Lempel, I'm a law clerk for Judge Young.

THE COURT: Thank you.

Now also we have two members of the press who have identified and they are Chris Vallani of Law 360 and Nate Raymond and I'm assuming they're both on the line. The rest of you can all identify yourselves, if you wish, but certainly not more than two of you are going to be arguing, and those are the ones I need identification. So I'll call upon counsel to identify themselves and who they represent. I'll make the following general comments.

I have read the briefs, I believe I'm prepared for oral argument. I shouldn't think, on each side, argument would take more than 10 minutes. So with those

instructions, we'll ask if counsel who's going to argue would identify themselves and who they represent.

MS. HOFFER: Hi. Good afternoon, your Honor, this is Melissa Hoffer for the Attorney General's Office for the Commonwealth of Massachusetts and with me at our virtual counsel table today is my colleague, Matthew Berge, of our Consumer Protection Division, and we have several other colleagues on the line, your Honor, and thank you.

THE COURT: And they are of course welcome. Thank you.

And for Exxon?

MR. SHANMUGAM: And, yes, your Honor. This is Kannon Shanmugam of Paul, Weiss here in Washington for the defendant, Exxon Mobil Corporation, and with me at my virtual counsel table, I believe, are Ted Wells and Dan Toal from Paul, Weiss, as well as Pat Conlon from Exxon Mobil, and a number of our other colleagues. We're very sorry not to be in front of you in person today, but glad to be with you by phone.

THE COURT: Well no sorrier than I am. Let's begin and I -- it's the defendant's motion and I want to hear the defendant argue, but really, before we get into your argument, I have just a couple of practical questions here. I'm not sure why you removed, and, um,

I mean to ask you some questions about that.

Do you think -- and understand we're making a record of all this. Do you think that there's available some sort of defense that, um, in the courts of the United States, that would not be available to you in the courts of the Commonwealth?

MR. SHANMUGAM: Sure, and I'm happy to start with that, it's obviously the Commonwealth's motion, but I understand there's a certain logic to our going first here, so --

THE COURT: I didn't say you were going to go first, I said I want you to answer my question.

What advantage, as a practical matter -- and I try to be practical, I know I'm bound by the law and I will follow the law strictly. But really, what practical advantage do you think you derive from removing to the United States District Court?

MR. SHANMUGAM: Sure. So, your Honor, let me start and address that directly.

As your Honor is aware, removal is available in a wide range of contexts and it doesn't require there to be some defense that is not available in the state court --

THE COURT: I didn't say it did. Please try my question, I want to know why you did it, not what the

legal framework is. God willing I have some familiarity with the legal framework.

Why did you remove?

MR. SHANMUGAM: Well, um, because we wanted these issues to be resolved in federal court by virtue of the federal and national implications of these claims, and --

THE COURT: But I'm bound in this action, I'll be applying the law of the Commonwealth of Massachusetts. Is that not correct?

MR. SHANMUGAM: Well, potentially, yes. As your Honor is aware, we have an argument that this case would be governed by federal law and not state law, but if you don't accept that argument, then, yes, the plaintiffs have alleged state law claims, those claims could be subject to a variety of federal offenses, and there are a variety of additional arguments as to why we believe that these claims -- even if state law claims would belong in a federal court, at bottom the reason why we're here, your Honor, and the reason why we're in federal court is because we believe that this complaint is broadly challenging our business practices in an effort to prevent us from producing and selling fossil fuels.

THE COURT: Well on the macro-level, you know,

there is some merit to that claim or that, um -- that argument, but I'm bound by the well-pleaded complaint rule.

Let me just ask two other practical questions and then, um, I really do want to let you go. And the first one is this.

You know that I -- I will get this case to adjudication faster -- and I have no pride of place here, but if we stay here, you're going to get to an adjudication, a factual adjudication, if -- should we get that far, you're going to get that faster than -- and I have the greatest respect for the Superior Court of the Commonwealth of Massachusetts, but they are swamped with cases, we are not, so you're going to trial faster here.

And you want that, is that correct?

MR. SHANMUGAM: We have no reservation about that, your Honor.

THE COURT: All right.

MR. SHANMUGAM: I'm well aware of the fact that the last time I was in front of you was in a case that went through to trial and to judgment, and as your Honor is aware, we have litigated similar claims in New York and we litigated those claims through the trial and to a favorable judgment.

THE COURT: All right.

MR. SHANMUGAM: And so we have, you know, every confidence and every eagerness to have these claims resolved on the merits if they aren't resolved on some threshold grounds.

THE COURT: One last point and then I do want to hear your developed argument, at least briefly.

You know that in this court their 93A action is triable as of right to a jury, and that's what you want, correct?

MR. SHANMUGAM: So I don't think that we have made that decision yet and --

THE COURT: But it isn't a decision, you see, it's not a decision, it's triable as of right to a jury, and if you stay here, I will give the Commonwealth a reasonable time, and I'll give you a reasonable time to take a position on that point, because that's not the law in Massachusetts. But it's crystal clear in the federal courts that the Seventh Amendment really sweeps here, and you're looking at a jury trial.

So I want to know, on the record, that's what you want? Assuming that the Commonwealth asks for a jury, you're fine with that, correct?

MR. SHANMUGAM: So as the Commonwealth has not yet asked for a jury and so, you know --

THE COURT: But of course in Massachusetts -- in Massachusetts 93A is not triable as of right to a jury, so there's no occasion for them to do it. I'm saying if you're here, you get -- if you want it, you get a jury. Don't worry, I'll ask the other side.

MR. SHANMUGAM: And again I will say, your Honor, that my understanding of the law on this -- and I may be mistaken about this, but my understanding is that the First Circuit has made clear that a jury trial is available for a Section 9 claim. I'm not frankly sure that that reasoning extends to a Section 4 claim. But again I think the issue is premature because the Commonwealth hasn't asked for one, and if they do, you know we would certainly want the opportunity to address that. But the bottom line is we're happy to be in a federal court.

THE COURT: Thank you, you've answered my questions and I should hear you now as to why I ought not remand this case as most of the District Court decisions have done here. This is -- you're not the first one out of the box here.

I'll hear you.

MR. SHANMUGAM: Sure. Thank you, your Honor. And we have litigated a number of the other climate change-related cases and as your Honor points out, a number of

courts have remanded those cases, um, at least one court has refused to remand, and, you know we think that the better view, not surprisingly, is that these claims belong in federal court.

And at bottom, as I indicated a minute ago, that's because we don't think that these are garden-variety consumer protection claims, these are claims that are directed to stopping Exxon Mobil from producing and selling fossil fuels, and as such these are claims that are really seeking to substitute the Commonwealth's judgment for the judgment of the federal government on questions of national and indeed international energy policy and environmental protection. And indeed that's the whole point of this lawsuit, it's to have an impact on national and international policy.

And as such our submission is, as this complaint requires you to resolve on questions of federal law, it involves causes of action that arguably arises, if at all, under federal common law, and it implicates the actions that we took at the direction of federal officers. And finally there is an aspect of this case that is distinct to this case, as from those other cases that your Honor referenced, and that is that this case is subject to removal under CAFA because it is functionally a class action being brought on behalf of

Massachusetts consumers and investors.

THE COURT: But what's the authority -- what's the authority for that last claim? What's the best case you have to say that an action brought by the Attorney General of the Commonwealth, in exercise of her constitutional responsibilities, is in fact a class action?

And there's no authority for that, is there?

MR. SHANMUGAM: Well, Judge Young, I would cite the statute and two cases, and start with the statute because after all this is a question involving CAFA. Section 32(b)(1)(B) defines a class action to include an action "brought under a state statute that authorizes an action be brought by one or more representative persons as a class action," and as such that statute depends on an appropriate characterization of the cause of action under state law.

And we've cited two cases to your Honor, the ***DeCotis*** case from the Supreme Judicial Court and the ***Chatham Development*** case from the intermediate court, both of which describe an action under Section 4 as comparable to or indistinguishable from a class action under Section 9.

And I think that this case, your Honor, well illustrates why that is true, because the Attorney

General is really quite explicitly seeking to address alleged wrongs in her representative capacity on behalf of Massachusetts consumers and investors, that is clear from the first two paragraphs of the complaint, and if anything it's particularly true with regard to the claims concerning Massachusetts investors.

Your Honor will be aware that the Commonwealth at great length details the alleged misrepresentations to Massachusetts investors, including particular enumerated institutional investors, and these claims can't easily be characterized as parens patriae-type claims that are being brought to protect the welfare of the Commonwealth as a whole. And there's no dispute here that if that is true, all the other requirements of CAFA, of minimal diversity and numerosity and the amount in controversy, are satisfied here. And again that's an aspect of this case that's somewhat different from the other cases which are being brought on state law nuisance theories, and it's an option for removal --

THE COURT: Well wait a minute. Wait. Wait. Just one second here.

Let's say -- let's say there's something to your argument. Even CAFA requires minimal diversity, but there is no diversity here because the Commonwealth is not a citizen for purposes of diversity jurisdiction.

And this action properly, or at least I can't see any reason why it isn't properly brought as the Commonwealth of Massachusetts, it's brought by the Attorney General. Let's say I accept your argument, but I -- your claim is that it is before the Court under diversity jurisdiction?

MR. SHANMUGAM: Yeah, your Honor, um, my -- so I'm going to make two points in response to that.

The first is that I think that, you know, properly understood, if this is viewed as the equivalent of a representative action, it is as if this action is being brought by a Massachusetts citizen, and there's no dispute that -- and of course Exxon Mobil is not a citizen of the Commonwealth of Massachusetts. And so, you know, at bottom, you know this depends on the fact that this is being viewed under (b)(1)(B) as an action being brought by a representative person, it just so happens that the representative person here, as you say, is the Attorney General. And it's a --

THE COURT: About 5 more minutes, counsel. About 5 more minutes, counsel. Go ahead.

MR. SHANMUGAM: Okay. Great. And I don't believe the Commonwealth to be disputing this.

And if your Honor disagrees with that argument, of course we have our other bases for removal, and in this

limited time I really want to focus primarily under our argument under ***Grable***, our argument that even if this was a state law claim, these claims necessarily raise a federal issue that is disputed and substantial. The reason why we think that that requirement is satisfied is because these claims themselves, by their terms, appear to mandate an inquiry into whether the production and sale and use of fossil fuels is itself safe and, as we've been discussing, they appear to demand that Exxon reduce -- or Exxon Mobil reduce their stop-gap production.

THE COURT: Excuse me. Excuse me. It's difficult in a telephone conference for me to appear anything other than an interrupter, and I apologize. If we were in court, I could do it with raised eyebrows and you could respond accordingly, but we're not, and I apologize.

So with the apology, this idea that ***Grable*** somehow gets you into federal court, there isn't a single decision that has adopted that. The one decision that went your way didn't deal with ***Grable.***

That's true, isn't it?

MR. SHANMUGAM: I think that there are some cases that are close. I would be willing to acknowledge that there's no case on all fours.

We cite the ***Board of Commissioner's*** case from the Fifth Circuit, which is the case involving a state law claim challenging certain dredging operations, and I think that the reasoning of that case is pretty closely on point here because there the Fifth Circuit upheld removal under ***Grable*** on the grounds that the lawsuit, in the Court's view, constituted a collateral attack on an entire federal regulatory scheme based on the notion that that scheme provides inadequate protection. And here that is really what is going on because the federal policy here is essentially national and indeed international energy policy, it's embodied both in international agreements and in specific federal statutes, and the federal government itself, in these climate-change cases, has expressed a concern that if these lawsuits go forward, it would undermine the exclusive grant of authority to the federal government to establish policy in this area, and that's why we think that ***Grable*** removal is appropriate here. If these claims go forward, it would alter the balance established by federal law, the balance between economic development, on the one hand, and environmental concerns on the other, and indeed it would, you know, institutionally create a conflict with congressional and executive branch decisions, a conflict that goes not

only to preemption, but really, um, to the disruption of the entire federal scheme.

And so we think that ***Grable*** preemption, given the nature of the claims here -- or ***Grable*** jurisdiction, I should be very careful about my words, is appropriate here given the nature of the claim.

We also have our arguments about federal common law and the federal officer removal statute, and I'm happy to address those, but aware of the fact that, as you say, your Honor, it's often hard to have the back and forth as we would if we were in person, so I think it probably makes sense for me to stop and answer any other questions that you have.

THE COURT: Actually you've done ably within the time that I've recorded, and by not allowing you to argue orally, nothing that has been briefed is abandoned in any way and I appreciate it.

MR. SHANMUGAM: Thank you, your Honor.

THE COURT: Ms. Hoffer, you're not limited to what he's argued. What do you say?

MS. HOFFER: Thanks, your Honor.

I'd like to just make three points, if I may. The first is just a little bit about what our case is about, the second is why ***Grable*** does not provide a basis for removal here, and the third is about the CAFA arguments

that Exxon Mobil has raised.

At the outset, your Honor, it is a Massachusetts state law case filed in a Massachusetts state court by the Massachusetts Attorney General, the case about what Exxon Mobil has said and not said to Massachusetts consumers and investors.

THE COURT: I just want to be clear, and this may be unfair and you don't have to answer.

If this case remains here, are you going to claim a jury?

MS. HOFFER: We certainly would like the opportunity to have a jury, your Honor.

THE COURT: Well you'll have it and that means --

MS. HOFFER: Yeah.

THE COURT: So you're telling me you're going to claim it?

MS. HOFFER: Yes, we would, your Honor.

THE COURT: Thank you. You go ahead with your argument.

MS. HOFFER: Thank you.

So the Commonwealth has alleged in our complaint that Exxon's made misleading and deceptive statements to Massachusetts consumers and investors, that the statements and omissions were material to their purchasing investment decisions, and that's it, your

Honor, that's our claim in a nutshell. There's no federal issue in our case at all. The Commonwealth's complaint alleges only violations of our state () act on fair and deceptive acts and practices statute, that's our Chapter 93A, there's no federal question presented on the face of this complaint, as your Honor has observed. The complaint raises no federal issues necessary to the disposition of our claims. The claims do not arise under federal common law --

THE COURT: But in fairness -- again I'm interrupting and I must apologize, but you know in fairness, Exxon's argument, again as a practical matter, granting you all of that, it certainly touches on -- this may not be legally determinative, but it touches on matters of most significant federal, United States import, doesn't it?

MS. HOFFER: Your Honor, it does involve climate change representations -- and I'd just like to respond to the point that my brother made, which is, you know, that this really implicates national energy policy and that the complaint is somehow striving to ensure that Exxon Mobil can no longer manufacture its fossil fuel products.

So that assumes Exxon's characterization of our complaint, which we believe is not accurate, and it's

led Exxon to take the position that our complaint amounts to a demand that Exxon levels the production and sales of fossil fuels, but that's a really big leap and it has no logical support in our complaint. The obvious way for Exxon Mobil to cure its misleading and deceptive conduct is to stop settling the falsehoods that we've alleged.

So it's really not a case about carbon emissions, it's not a case about any kind of solution abatement, it is not a case about national treaties, it doesn't implicate any federal scheme, your Honor, it's a case about making sure we have accurate statements about the products and securities that Exxon Mobil sells in the Commonwealth to its consumers and to its investors.

And your Honor knows well that we have many cases like this come out of our office where it may involve activity that may also touch upon matters that are regulated by the federal government. For example we investigated and filed suit against Purdue Pharmaceuticals, we alleged that Purdue violated Chapter 93A when it falsely denied and downplayed the addiction risk to consumers that --

THE COURT: Well, excuse me. Excuse me. I don't mean at all to detract from the Attorney General's litigation strategy, but I have this case, I must

adjudicate this case, and I must adjudicate it in accordance with the law. So what you did in other cases and whether that was beneficent or not, you know candidly that's not material.

What do you say to this ***Grable*** exception? About 5 more minutes.

MS. HOFFER: For the ***Grable*** exception, your Honor, in the application of ***Grable*** here it's not even a close question, Exxon's completely failed to meet its burden to identify a specific federal issue necessary to determine our claims. Chapter 93A supplies the rules, and even now, when your Honor says, "Ask opposing counsel," the company's still unable to provide a specific issue.

We know, if we look at the cases, whether they, um, resulted in remand decisions or not, the issues, they were very specific. In ***Grable***, it was a provision of the federal tax law. In ***Merrill Dow***, it was a federal misbranding provision. In ***Dunn***, it was a 1338(a) patent jurisdiction. In ***Rockwell***, it was a government contract provision involving an actual securities. In ***V & M***, it was a federal contractor involving federal agencies with breach arising from the implementation of the federal guidelines. In ***Olny***, it was federal railroad administration approval of parking

increases.

And in the case that the company cites for your Honor, the ***Citizens of Louisiana*** case, it's equally distinguished here because in that case, unlike here, the defendants pointed to specific provisions in specific federal statutes, including the Coastal Home Management Act, the ***Moore Act*** where the target was actually relevant, the question of whether the State's common law claims have been established. So those federal claims in essence established the standard of care for the common law claims at issue in the Louisiana case.

For several of the plaintiff's claims in that case, the federal law provided the sole vehicle for holding the defendant liable, including for the unauthorized operation of federal levy systems, etc. So it's completely inapposite, we have nothing like that here, your Honor. As you said at the beginning of our hearing today, if you were to keep this case, you would be applying Chapter 93A, that's the exclusive basis.

Now quickly I would like to turn to case law. I think your Honor knows what the second circuit said in the Ninth Circuit, that numerous district courts have for the past 10 years specifically held that because suits like the Attorney General's 93A suit here parens

patriae actions in the public interest, CAFA provides the basis for removal.

And I would just like to turn your Honor's attention to Section 4 of Chapter 93A, what it describes as precisely an action in the nature of parens patriae, and I'll just briefly excerpt some of the text out there, "Whenever the Attorney General has reason to believe that any person is using or is about to use a method, act, or practice declared by Section 2 to be unlawful, proceedings will be in the public interest, he may bring an action."

That's also, your Honor, amplified by the structure and text of 93A itself in the SJC's decision in ***Aspinal***.

So I know your Honor is very familiar with Chapter 93A. Section 2 prohibits deceptive acts and practices. Section 4 provides authority for us to file actions like the one here to enjoin violations, we can get penalties and injunctive relief. Section 6 grants us authority to investigate. Section 9 grants any person into bringing an action on behalf of herself or other similarly-situated injured person, and for injunctive relief.

So the legislature clearly distinguished between actions brought by persons under Section 9, which can be certified as class actions if the Section 9 elements are

satisfied, and actions brought by the Attorney General, like the ones here under Section 4, which does not include a similar class certification process.

The Supreme Judicial Court in ***Aspinal*** walked through this in some detail, that Court held that private plaintiffs could be certified as a consumer class under Section -- it was then Section 2, it's now Section 9 of 93A, when they alleged that Philip Morris carried out a campaign of deception marketing and not selling their light cigarettes as having less tar and nicotine and that was false.

So the Court went on in ***Aspinal*** to specifically distinguish the standards for consumer class certification from those applicable to class certification under natural Civil Procedure 23, which is analogous to the federal rule. So clearly they're not the same, your Honor, and we've got a decision from our Supreme Judicial Court precluding concluding that.

So unless your Honor has further questions for me, I think I will pause there.

THE COURT: That's a good -- actually that's a good place to pause and I thank you.

Counsel, this is a significant case, significant before this Court, and I've devoted a fair amount of time to prepare for this argument, and it's a case that

warrants an opinion. But with all respect to the able advocacy that I have heard and is evidenced in these briefs, this is not a case where the issue is in any substantial doubt.

Under the decided -- under the statutory framework and the great weight of the case law, this is a case which must -- and I do today remand it, the case is remanded to the Massachusetts Superior Court sitting in and for the County of Suffolk.

Now it is my intention to write an opinion, but the order is the order I entered today so that there will not be any delay while I pull myself together and write an opinion aided by your skillful arguments. So the case is remanded, an opinion will follow.

I do thank counsel, you are outstanding exemplars of what oral advocacy actually should be and I'm very grateful. We'll recess.

MR. SHANMUGAM: Your Honor, this is Kannon Shanmugam for Exxon Mobil.

Could I ask if you would be willing to consider the possibly of briefly staying a remand to allow us to assess the possibility of an appeal to the First Circuit?

THE COURT: I don't think you have a right to appeal on a remand. Am I mistaken?

MR. SHANMUGAM: Well we would potentially have a right to appeal, I believe, under Section 1442 because of the presence of an argument that the Federal Officer Removal Statute applies here, and as your Honor may be aware, that has been the basis for appellate review on a number of the other cases.

THE COURT: I don't mean to -- I never would take any action to foreclose any litigant their right to appeal, but if I remand, and in fact, as you advocate, you have a right to appeal, you can perfect the appeal. If, as I thought the rule was, you don't have a right to appeal, well you don't. The reason I act today, rather than first getting my opinion out, explaining my action, is to avoid delay.

Delay is the great bane of federal litigation, it's delay that drives up the costs, it's delay that, um, puts the courts in disrepute. I -- I cannot, in all honesty, contribute to delay. I'm not staying it. If you have a right and it can be vindicated in the Court of Appeals, certainly I'm not trying to avoid review by the Court of Appeals, I never would do that, um, go ahead and appeal. But I'm remanding the case. The order is effective today. Thank you. We'll recess.

MR. SHANMUGAM: Okay, thank you, your Honor.

(Ends, 2:34 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Judge William G. Young, on Tuesday, March 17, 2020, to the best of my skill and ability.

/s/ Richard H. Romanow 03-24-20

RICHARD H. ROMANOW Date