

18-1170

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

—against—

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

Defendants-Appellees.

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Exxon Mobil Corporation states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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I. PRELIMINARY STATEMENT

Climate change and climate policy are important. They are matters of significant public concern that elicit viewpoints from diverse speakers in political, academic, non-profit, religious, and business communities, including Exxon Mobil Corporation (“ExxonMobil”). The First Amendment, which contemplates that those viewpoints will often be at odds with one another, ensures that the public can consider all viewpoints and make informed choices about public policy.

While the Constitution celebrates diverse viewpoints as a public good, certain state officials object to diversity when it comes to speech about climate policy. In their view, those who question command-and-control responses to carbon emissions and decline to advocate an immediate transition to renewable energy are not just wrong, they are unworthy of being heard. The defendants in this action, the Attorneys General of New York and Massachusetts (the “Attorneys General”), are at the forefront of this effort to cleanse the public square of disfavored speech. They believe that speech about society’s continued reliance on conventional sources of energy and market-based responses to carbon emissions has produced political gridlock that stymied their policy goals. To chill that speech, the Attorneys General singled out ExxonMobil, and launched discriminatory and pretextual investigations of the company in violation of the First Amendment.

ExxonMobil brought this action to protect its constitutional rights and supported its claims with detailed factual allegations. Those allegations included the Attorneys General's embrace of a "clean power" agenda, their objection to dissenting speech as a barrier to enacting that agenda, and their intent to use government power to chill speech unaligned with their agenda. One federal judge who reviewed these same allegations in another forum found them serious and plausible. In his view, if the allegations were true, they would establish the Attorneys General's bad faith in launching the investigations.

In sharp contrast, the District Court below concluded that ExxonMobil's claims were implausible, but its decision rests on a misapplication of well-established pleading standards. Among other things, the District Court failed to consider ExxonMobil's viewpoint discrimination claim, ignored critical allegations of fact that supported ExxonMobil's constitutional claims, and drew inference after inference in favor of the Attorneys General and against ExxonMobil. That was error. Viewed under the appropriate standard and taking into account all of its factual allegations, ExxonMobil's complaint more than satisfies the applicable standard for stating a claim of constitutional violations. ExxonMobil should be allowed to proceed to discovery and prove its case.

II. JURISDICTIONAL STATEMENT

ExxonMobil appeals from the final judgment entered on March 30, 2018, by Judge Valerie E. Caproni of the United States District Court for the Southern District of New York, dismissing ExxonMobil's complaint and denying leave to amend. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1367, and 42 U.S.C. §§ 1983, 1985. This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES PRESENTED

1. ExxonMobil's complaint alleged that state officials targeted the company for adverse treatment because of its viewpoint on climate policy. That allegation was supported with specific references to the public record showing (a) state officials advocating for certain climate policies, identifying ExxonMobil's speech as an impediment to those policies, and linking their investigations of ExxonMobil to efforts to contain its speech; (b) state officials' efforts to conceal their ties to and interactions with the architects of a plan to target ExxonMobil because of its speech about climate policy; and (c) official document requests targeting ExxonMobil's protected speech and free association. Are ExxonMobil's allegations sufficient to state a claim of viewpoint discrimination in violation of the First Amendment?

2. The District Court dismissed ExxonMobil's First Amendment claim in a decision that (a) converted ExxonMobil's unambiguously pleaded claim of

viewpoint discrimination into a retaliation claim that had not been pleaded; (b) required ExxonMobil to present “evidence” and disprove contrary inferences; (c) refused to credit ExxonMobil’s plausible inferences; (d) ignored central allegations supporting ExxonMobil’s claim; and (e) credited the state officials’ factual defenses and their assurances of good faith. Did the District Court’s analysis violate the standards for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure?

3. ExxonMobil alleged additional constitutional violations based on state officials’ burdensome fishing expedition into out-of-state records and conduct at odds with the state officials’ objectives, in furtherance of their campaign to delegitimize ExxonMobil as a political actor. The District Court adopted a position of extreme deference to the state officials and dismissed ExxonMobil’s constitutional claims for not disproving the officials’ good faith. Are ExxonMobil’s allegations sufficient to state a claim under the Fourth and Fourteenth Amendments and the Commerce Clause?

4. Addressing a question of first impression, the District Court held that a limited-purpose state court ruling on a motion to quash in Massachusetts had preclusive effect on a plenary civil rights action brought under 42 U.S.C. § 1983. The state court, however, did not consider or decide any of ExxonMobil’s constitutional claims, as the Massachusetts Supreme Judicial Court recently

acknowledged, and did not provide an adequate forum to litigate those claims. Did the District Court misapply the doctrine of res judicata to deprive ExxonMobil of a forum to present its claims under the United States Constitution?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. ExxonMobil Speaks about Climate Change and Advocates for Climate Policy.

As the world's largest public energy company, ExxonMobil is particularly well-positioned to participate in public discussions about energy demand, sources of supply, risks associated with sources of energy (including climate change), and energy policy. ExxonMobil's unique insight into those issues provides a perspective the public is entitled to hear, and ExxonMobil has long shared that perspective with the public. Through its annual *Outlook for Energy*, ExxonMobil "promote[s] better understanding of the issues shaping the world's energy future," including how best to address the growing energy needs of an expanding global middle class. (JA-958.)¹ Responding to recent policy proposals urging exclusive reliance on renewable energy, ExxonMobil recommended in its 2014 *Outlook for Energy* that, "[t]o meet [growing energy] demand in the most effective way, none of our energy options

¹ "JA" refers to the Joint Appendix; "SPA" refers to the Special Appendix; "FAC" refers to ExxonMobil's First Amended Complaint (JA-392-449); and "SAC" refers to ExxonMobil's proposed Second Amended Complaint (JA-1923-85).

should be arbitrarily denied, dismissed, penalized or promoted.” (SAC ¶ 122; JA-2704.)

ExxonMobil has also widely and publicly recognized the risks climate change present to society—and has done so for more than a decade. (FAC ¶ 9; JA-551, 561.) In response to those risks, ExxonMobil urged support for the Paris climate accords. (SAC ¶ 8; JA-640–41.) It also endorsed a revenue-neutral tax on carbon emissions, which it has advocated since 2009 as “a more effective market-based option” than “cap-and-trade” regulatory regimes. (*Id.*; JA-2586.) ExxonMobil informs the public of its viewpoint through various publications, including *Managing the Risks* (published in 2014) and its *Corporate Citizenship Report* (published annually), which supports climate policy that “reduce[s] the risks posed by climate change at minimum societal cost, in balance with other societal priorities such as poverty eradication, education, health, security and affordable energy.” (JA-640.)

When expressing that viewpoint, ExxonMobil has urged a healthy dialogue about the feasibility of any plan to “stabiliz[e] world temperature increases not to exceed 2 degrees Celsius by 2100.” (SAC ¶ 123; JA-2576–78.) It has also highlighted the risk that a “low carbon scenario”—even if achievable—might “harm those least economically developed populations who are most in need of affordable, reliable and accessible energy.” (JA-2579.) From ExxonMobil’s perspective, any

policy responses to climate change must take into account the costs those proposals impose on communities here and abroad.

2. Opponents of ExxonMobil's Speech Plot to Suppress It Using State Power.

ExxonMobil's viewpoint on climate policy is anathema to a well-funded coalition of public and private interests who deride their opponents as "climate change deniers." (FAC ¶ 22; JA-574, 913–15, 2751–52.) This coalition identified certain speech about climate change as a political obstacle, and plotted to use state power to suppress viewpoints unaligned with its own, including at a June 2012 gathering in La Jolla, California, denominated a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." (FAC ¶ 46; SAC ¶ 44; JA-488.) Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, and Naomi Oreskes, then a professor at the University of California, San Diego, "conceived" of this workshop and recruited Matthew Pawa, a litigator who unsuccessfully sued ExxonMobil in 2009 for allegedly causing global warming, to speak as a panelist. (SAC ¶ 44; JA-489, 499–500.)

In keeping with the workshop's title, which identified "public opinion" as one of three core objectives, the La Jolla coalition focused on speech considered obstructive to its policy aims. (JA-488.) Speaker after speaker faulted energy companies for "attempting to manufacture uncertainty about global warming." (SAC ¶ 44; JA-492–93.) To muzzle that speech, the La Jolla architects proposed

using law enforcement to “maintain[] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming.” (FAC ¶ 47; JA-514.) Recognizing the broad power of state attorneys general to launch investigations, the La Jolla participants observed that “a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.” (FAC ¶ 47; JA-498.) They also hoped that the “pressure” caused by the costs and other burdens of state investigations would cause energy companies to alter their speech on climate policies and coerce “the energy industry’s cooperation in converting to renewable energy.” (SAC ¶ 45; JA-514–15.)

In January 2016, the Rockefeller Family Fund (the “Rockefeller Fund”) hosted a sequel to the La Jolla conference with Pawa again in attendance. (SAC ¶ 4; JA-525, 2007–08.) During that meeting, the coalition’s objectives came into sharper focus, with ExxonMobil directly in its crosshairs. According to the meeting’s agenda, the “Goals of an Exxon campaign” 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”
- “To drive divestment from Exxon.”
- “To drive Exxon & climate into [the] center of [the] 2016 election cycle.”

(FAC ¶ 48; JA-525, 650–52.) Those expressly political goals, targeting ExxonMobil’s freedoms of speech and association, are not legitimate objectives of any bona fide government investigation. Nevertheless, the Rockefeller Fund attendees considered “AGs” as one of the “the main avenues for legal actions & related campaigns” for “creating scandal” and “getting discovery.” (SAC ¶ 53; JA-2007–08.)

The La Jolla ringleaders eagerly implemented their playbook. In June 2015, Oreskes met with Eric Schneiderman, the Attorney General of New York at that time, to discuss the purported “history of misinformation” she attributed to ExxonMobil.² (FAC ¶ 46; JA-2074.) In July 2015, Frumhoff assured fellow activists that he was likewise exploring “state-based approaches to holding fossil fuel companies legally accountable” and anticipated “a strong basis for encouraging state (e.g., AG) action forward.” (SAC ¶ 47; JA-2076.) The Rockefeller Fund also contacted Attorney General Schneiderman to express “concern” about ExxonMobil’s positions on climate change, and was “encouraged by Schneiderman’s interest” in the matter. (SAC ¶ 58; JA-2256–57, 2268, 2759.) The New York Attorney General’s Office and the Rockefeller Fund exchanged at least a

² A similar meeting with the Massachusetts Attorney General’s office occurred the following year. (JA-2074.)

dozen emails concerning the “activities of specific companies regarding climate change.” (SAC ¶ 56; JA-2216–21.)

3. The Attorneys General Adopt the La Jolla Playbook and Rockefeller Agenda Targeting ExxonMobil’s Speech.

The activists’ efforts paid off when a collection of state attorneys general self-styled the “AGs United for Clean Power” made public statements endorsing the goals and tactics of La Jolla. Appearing at a press conference with former Vice President Al Gore on March 29, 2016, those attorneys general promoted a plan to regulate speech they considered an obstacle to their “Clean Power” agenda. (FAC ¶¶ 2, 27; JA-467.) That agenda promoted “clean power” from renewable sources as the only legitimate response to climate change. (FAC ¶ 33; JA-479, 482, 485–86.) Attorney General Schneiderman insisted, “We have to change conduct” to “mov[e] more rapidly towards renewables.” (FAC ¶ 33; JA-485–86.) Massachusetts Attorney General Maura Healey likewise promised to “speed our transition to a clean energy future.” (FAC ¶ 33; JA-479.) When Al Gore, an investor in alternative energy with a direct financial stake in this public issue, took his turn at the podium, he urged the attorneys general to investigate his business competitors for “slow[ing] down this renewable revolution.” (FAC ¶ 33; JA-475.)

Attorney General Schneiderman declared that there could be “no dispute” about his climate policy proposals, only “confusion” and “misperceptions in the eyes of the American public that really need to be cleared up.” (FAC ¶ 31; JA-468.)

Attorney General Healey likewise attributed the public's failure to embrace her preferred climate policies to speech that caused "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (FAC ¶ 32; JA-478.)

The Attorneys General vowed to unleash their law enforcement powers against perceived dissenters. Attorney General Schneiderman blamed any departure from his climate policy orthodoxy on those "with an interest in profiting from the [so-called] confusion" and denounced "morally vacant forces that are trying to block every step by the federal government to take meaningful action." (FAC ¶ 31; JA-468, 470.) Lamenting perceived "gridlock in Washington," Attorney General Schneiderman vowed "to step into th[e] [legislative] breach" by "battl[ing]" perceived political opponents. (FAC ¶ 35; JA-469–70.) Directly linking this political agenda to his investigation, he boasted that his office already "had served a subpoena on ExxonMobil."³ (FAC ¶ 36; JA-469.)

Attorney General Healey likewise declared herself to have "a moral obligation" to remedy what she described as a threat to "the very existence of our planet." (FAC ¶ 29; JA-478.) She asserted that those who purportedly "deceived" the public—by disagreeing with her about climate policy—"should be, must be, held

³ On November 4, 2015, Attorney General Schneiderman issued a subpoena to ExxonMobil seeking nearly 40 years of records regarding its speech and research on climate change. (JA-709.)

accountable.” (FAC ¶ 32; JA-478.) In the next breath, Attorney General Healey announced that she too had “joined in investigating the practices of ExxonMobil.”⁴ (JA-478.) Revealing the prejudgment tainting her investigation, Attorney General Healey claimed that she had already found a “troubling disconnect between what Exxon knew . . . and what the company and industry chose to share with investors and with the American public.” (FAC ¶ 37; JA-478.) She then promised “quick, aggressive action” to “hold[] accountable those who have needed to be held accountable for far too long.” (FAC ¶¶ 3, 29; JA-479.)

As the press conference unfolded, the La Jolla architects were lurking in the background. (SAC ¶ 5.) Mere hours earlier, Pawa and Frumhoff led workshops for the Attorneys General and their staffs that were closed to the public. (FAC ¶¶ 41–45.) During those secret meetings, Pawa delivered a presentation on “climate change litigation” (FAC ¶ 45; JA-528), and Frumhoff delivered a presentation on the “imperative of taking action now on climate change.” (FAC ¶ 42; JA-528.) The content of those presentations has never been released to the public.

Building on the momentum of the “AGs United for Clean Power” press conference, Pawa and Frumhoff continued to press for state investigations of ExxonMobil and other energy companies. (SAC ¶ 68.) Pawa took the lead in

⁴ On April 19, 2016, less than three weeks after secretly meeting with Pawa, Attorney General Healey issued a Civil Investigative Demand (“CID”) to ExxonMobil seeking 40 years of records regarding its speech and research on climate change. (JA-744.)

mobilizing the coalition and created an email list of “AG Folks” to “pass along information that may be of interest to AGs on the issue of our time: climate change.” (*Id.*; JA-2358.) Meanwhile, Frumhoff’s Union of Concerned Scientists co-hosted a workshop on “Potential State Causes of Action Against Major Carbon Producers,” where Frumhoff led a panel discussion of “[t]he case for state-based investigations and litigation.” (SAC ¶ 69; JA-2360.) “[S]enior staff from state attorneys general offices,” including New York and Massachusetts (JA-2366, 2369), attended the workshop, which sought to “[c]reate a ‘safe space’” to discuss strategies “against major carbon producers and the cultural context in which such cases may be brought” (SAC ¶ 69; JA-2360).

4. The Attorneys General Conceal Their Connections to the La Jolla and Rockefeller Activists.

The Attorneys General recognized that the partisan influence of Pawa, Frumhoff, and other activists, if reported, would expose that special, private interests were behind the improper use of law enforcement’s coercive tools to limit political discourse. (FAC ¶ 50.) When a reporter contacted Pawa shortly after the press conference to inquire about his role, the chief of Attorney General Schneiderman’s Environmental Protection Bureau advised Pawa to dissemble, writing “My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event.” (*Id.*; JA-538.)

Attorney General Schneiderman has also refused to produce records in response to a public record request concerning the coalition's activities. (SAC ¶ 64.) That refusal resulted in a firm judicial rebuke when the New York Supreme Court awarded attorney fees and costs against the Attorney General for "lack[ing] a reasonable basis" for his failure to produce the documents. (*Id.*; JA-2292–93.) Another member of the "AGs United for Clean Power" coalition acknowledged the political motives behind the selective disclosures made in response to public record requests. The Vermont Attorney General's Office admitted that if a requester is affiliated with "coal or Exxon or whatever," the office "give[s] this some thought . . . before we share information with this entity." (SAC ¶ 65; JA-2332.)

5. Documents Confirm the Attorneys General's Intent to Suppress Speech.

The Attorneys General's document requests and common interest agreement confirm their intent to cleanse the climate policy debate of disfavored viewpoints.

The Attorneys General's document requests focus on speakers and speech opposing the Attorneys General's favored climate policies. Attorney General Schneiderman's subpoena demands ExxonMobil's communications with trade associations and industry groups that promote oil and gas, rather than alternative fuels. (FAC ¶¶ 10, 66; JA-716 (naming the American Enterprise Institute, American Legislative Exchange Council, and American Petroleum Institute).) Attorney General Schneiderman has publicly denounced many of those groups as "aggressive

climate deniers.” (FAC ¶¶ 22, 25; JA-574, 581.) Similarly, Attorney General Healey’s CID requests ExxonMobil’s communications with twelve organizations, all of which have been labeled “climate deniers” for opposing climate policies favored by the Attorneys General. (FAC ¶ 73; JA-751–52 (naming the Acton Institute, AEI, Americans for Prosperity, ALEC, API, Beacon Hill Institute at Suffolk University, CEI, CIP, George C. Marshall Institute, the Heartland Institute, the Heritage Foundation, and Mercatus Center at George Mason University); JA-913 (listing alleged “climate denial” organizations).)

The Massachusetts CID also targets statements of pure opinion by ExxonMobil’s former CEOs that are in tension with the Attorneys General’s politics. For example, the CID demands materials concerning ExxonMobil’s suggestion that “[i]ssues such as global poverty [are] more pressing than climate change” and the rhetorical question “[w]hat good is it to save the planet if humanity suffers?” (FAC ¶ 73; JA-758.)

The CID likewise targets the following ExxonMobil statements that would be well at home on the opinion page of any newspaper in America (JA-2737):

- “[G]overnments should create policies to cope with the Earth’s rising temperatures”;
- Climate change should be addressed by “engineering methods . . . rather than trying to eliminate use of fossil fuels”; and
- “[G]overnments would have to resort to energy rationing administered by a vast international bureaucracy responsible to no one” in order “[t]o

achieve th[e] kind of reduction in carbon dioxide emissions” advocated by climate activists.

(JA-757.)

The subpoena and the CID also focus on publications, such as the *Outlook for Energy* and the *Corporate Citizenship Report*, that ExxonMobil uses to communicate its positions on climate policy to the public. (JA-716, 760–61.) Both investigative instruments probe ExxonMobil’s communications concerning *Managing the Risks*, in which ExxonMobil suggests that “a revenue-neutral carbon tax is better . . . than alternatives such as cap-and-trade.” (JA-716, 758–59, 2586.) These statements of pure opinion should not be subject to review by state officials for “accuracy.”

But that is precisely what the Attorneys General propose to do. Their “Climate Change Coalition Common Interest Agreement” memorializes their intent to promote one side of a political debate by restricting speech on the other side. That agreement, which was executed shortly after the March 29 press conference, describes the coalition’s “common interest” as “limiting climate change” and “ensuring the dissemination of *accurate* information about climate change.” (FAC ¶ 52; JA-654 (emphasis added).) Presumably the Attorneys General will determine which speech about climate policy is “accurate” based on the “[p]rinciples” for “progressive” climate policy the coalition has endorsed. (JA-585.) Political speech is not properly subject to such review.

6. The Attorneys General’s Public Justifications Are Pretext for Viewpoint Discrimination.

The Attorneys General attempted to justify their investigations by pointing to articles published in the *Los Angeles Times* and *InsideClimate News*, which they claim inspired their investigations. (SAC ¶ 57; JA-581; ECF Nos. 43 at 6–10, 246 at 7–8 n.7.) But these articles were funded by the very organization that seeks to “delegitimize [ExxonMobil] as a political actor.” (FAC ¶ 5; JA-650–52, 2007.) In December 2016, the Rockefeller Fund admitted—after initially attempting to conceal the connection—that it financed the so-called investigative journalism, which unsurprisingly aligned with the Fund’s agenda. (SAC ¶ 57; JA-2227, 2236, 2276–77 n.5, 2751–52.)

Even if the articles were not tainted by their funding, their analysis and conclusions are readily debunked. As ExxonMobil demonstrated earlier in this litigation, the articles rely on manipulative excerpts of ExxonMobil documents to falsely accuse ExxonMobil of misleading the public about climate change. (JA-269–74, 1887–89.) Setting aside those substantial shortcomings, the articles are independently insufficient to support the Attorneys General’s claimed investigative theories. Both the CID and subpoena are brought pursuant to statutes that have limitations periods no longer than six years. (FAC ¶¶ 65, 69; JA-709, 744.) Yet the articles focus on ExxonMobil’s statements from the 1980s and 1990s, while entirely ignoring ExxonMobil’s consistent acknowledgment since at least 2006—over a

decade ago—that climate change presents risks to society and stakeholders that warrant tangible action. (FAC ¶¶ 8–9; JA-551, 561, 716, 755–56.) By relying on articles that describe non-actionable conduct, the Attorneys General exposed their proffered investigative theories as mere pretext.

B. Procedural History

1. Proceedings in the Northern District of Texas

On June 15, 2016, ExxonMobil commenced this action against Attorney General Healey, seeking declaratory and injunctive relief for violations of its rights under the First, Fourth, and Fourteenth Amendments, the Commerce Clause, and Texas common law. (JA-54–85.) The action was filed in the United States District Court for the Northern District of Texas, where ExxonMobil is headquartered, and assigned to Judge Ed Kinkeade. (JA-13.)

Attorney General Healey filed a motion to dismiss, arguing that abstention was required under *Younger v. Harris*, 401 U.S. 37 (1971), because of a later-filed action pending in Massachusetts state court.⁵ (ECF No. 42.) Following oral argument, Judge Kinkeade concluded that ExxonMobil’s allegations were sufficiently plausible to warrant jurisdictional discovery on the “bad faith” exception to *Younger*. (JA-345–50.) He wrote that discovery “needs to be conducted” because “Attorney General Healey’s actions leading up to the issuance of the CID causes the

⁵ Attorney General Healey also challenged personal jurisdiction, ripeness, and venue. (ECF No. 42.)

Court concern and presents the Court with the question of whether Attorney General Healey issued the CID with bias or prejudgment about what the investigation of Exxon would discover.” (JA-347–48.) The Court held that ExxonMobil’s allegations, “if true, may constitute bad faith in issuing the CID.” (JA-350.)

Judge Kinkeade also granted ExxonMobil’s motion to file the First Amended Complaint (“FAC”), which joined Attorney General Schneiderman as a defendant and added additional claims. (JA-392.) The Attorneys General then moved to dismiss the FAC on multiple grounds. (ECF Nos. 124, 133.) They also initiated mandamus proceedings in the Fifth Circuit over the discovery order. (JA-939, 946; ECF No. 156.)

Before any discovery was obtained, Judge Kinkeade stayed all discovery, rendering the mandamus petition moot, and ordered the parties to provide further briefing on personal jurisdiction. (JA-945–47.) After receiving those briefs, Judge Kinkeade transferred the case to the Southern District of New York, where the Attorneys General had held the “AGs United for Clean Power” press conference discussed above. (JA-988.) In his transfer order, Judge Kinkeade observed that “[t]he merits of each of Exxon’s claims involve important issues that should be determined by a court” and expressed concern that the Attorneys General’s investigations were means “to further their personal agendas by using the vast power of the government to silence the voices of all those who disagree with them.” (JA-

989, 992.) Judge Kinkeade explained that the Attorneys General’s efforts to conceal their conduct “causes the Court to further question if the attorneys general are trying to hide something,” and recommended that “[d]iscovery regarding this refusal [to disclose information] would seem in order.” (JA-995–96.)

2. Proceedings in Massachusetts State Court

To preserve its rights under Massachusetts law, ExxonMobil moved to quash the CID in state court one day after filing its case in the Northern District of Texas and asked for a stay until its federal case was resolved. (JA-1048–50.) ExxonMobil filed its motion pursuant to a special appearance objecting to personal jurisdiction in Massachusetts and, in the alternative, raised substantive objections to the CID only under state law. (*Id.*) Attorney General Healey cross-moved to compel compliance. The summary proceedings that followed were limited to evaluating the CID’s validity under the authorizing statute, Mass. Gen. Laws ch. 93A, § 6, and did not afford an opportunity for discovery, injunctive or declaratory relief, or joinder of necessary parties, such as Attorney General Schneiderman. More fundamentally, the state proceedings concerned solely the CID, not constitutional infirmities of the broader investigations.

The Massachusetts Superior Court denied ExxonMobil’s motion and granted Attorney General Healey’s cross-motion. The Superior Court based its decision on Massachusetts state law and expressly did “not address Exxon’s arguments

regarding free speech.” (JA-1017.) In its April 13, 2018 decision affirming the Superior Court’s ruling, the Massachusetts Supreme Judicial Court acknowledged that ExxonMobil’s federal action “challeng[es] the C.I.D. on constitutional grounds not raised in th[e] [state] action” and there was “only a partial overlap in the subject matter of two actions.” *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 328–29 (2018). The Supreme Judicial Court did not consider whether “the Attorney General issued the C.I.D. solely as a pretext” or “the reasonableness of the Attorney General’s reasons for issuing it,” *id.* at 327, because Massachusetts law requires consideration only of specificity, relevance, and burden when a CID is challenged, *id.* at 325.

3. Proceedings in the Southern District of New York

On April 21, 2017, the parties in this case appeared in the Southern District of New York for an initial conference. Shortly after taking the bench, Judge Caproni announced that she already had a “different view” of the case from Judge Kinkeade (JA-2977, 2981) or, as she later called him, “Mr. Texas Judge” (JA-3086). Judge Caproni explained she would “stage[] the briefing” to avoid the question of *Younger* abstention and leave the stay of discovery in place. (JA-2985, 3008–9.) Under that staging, the Attorneys General were directed to renew their motions to dismiss based on (i) personal jurisdiction, (ii) ripeness, and (iii) preclusion. (JA-1002.) Judge Caproni also invited the parties to brief abstention under *Colorado River Water*

Conservation District v. United States, 424 U.S. 800 (1976), a doctrine no party had raised previously in the litigation. (JA-1002.)

Judge Caproni heard oral argument on the renewed motions to dismiss, but ultimately declined to rule on any of the grounds briefed. Instead, she instructed the parties to brief yet another basis for dismissal: whether ExxonMobil had sufficiently stated a claim for relief under Rule 12(b)(6). (JA-3086.) Before any briefs had been filed, Judge Caproni voiced her skepticism that ExxonMobil would be able to meet that standard, stating that Attorney General Schneiderman was entitled to act as a “political animal,” and the Rockefeller Fund’s agenda to “delegitimize [ExxonMobil] as a political actor” was justified because they “care whether subsequent Rockefellers can breathe.” (JA-3032, 3066.)

The parties submitted further briefs supporting or opposing dismissal, and ExxonMobil requested leave to file the Second Amended Complaint (“SAC”) in light of additional evidence that had become available in the year since the FAC was filed. (ECF No. 251.)

Attorneys general from twelve states filed amicus briefs in support of ExxonMobil, arguing that Attorneys General Schneiderman and Healey engaged in “bad faith” by “embracing one side of a multi-faceted and robust policy debate, and simultaneously seeking to censor opposing viewpoints.” (ECF Nos. 192-3, 230-1.) They explained that subpoena power does “not include the right to engage in

unrestrained, pretextual investigative excursions to promote one side of an international public policy debate, or chill the expression of viewpoints in those debates.” (ECF No. 192-3 at 8.)

On March 29, 2018, Judge Caproni entered an Opinion and Order (the “Order”) dismissing the FAC with prejudice and denying leave to amend. (SPA-1.) While the District Court concluded that ExxonMobil’s action was ripe and the Massachusetts Attorney General was subject to personal jurisdiction, it held that ExxonMobil’s claims against Attorney General Healey were barred by res judicata and ExxonMobil failed to support any of its claims with plausible allegations. (SPA-32, 45.)

Judge Caproni’s view of ExxonMobil’s allegations stands in contrast to that of two other judges who reviewed them. First, Judge Kinkeade found the allegations sufficiently plausible to justify discovery and to warrant transfer so a court could determine “[t]he merits of each of Exxon’s claims.” (JA-989, 345–50.) Second, ExxonMobil’s allegations concerning the La Jolla playbook, Rockefeller agenda, and the Attorneys General’s coordination with private interests were recently addressed in proceedings against Pawa and California municipal officials arising from their efforts to suppress ExxonMobil’s speech about climate policy. In that action, ExxonMobil presented evidence reflecting the allegations in the FAC and SAC about a conspiracy among private interests and public officials, including the

Attorneys General, as a basis for exercising personal jurisdiction. Judge R. H. Wallace of the District Court of Tarrant County, Texas, found ExxonMobil's evidence sufficient to support exercising personal jurisdiction in the matter—a hurdle far higher than mere plausibility under Rule 12(b)(6). *See City of San Francisco v. Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1, at *14 (Tarrant Cty. Tex. Apr. 24, 2018).

V. STANDARD OF REVIEW

This Court reviews Judge Caproni's decision *de novo*. *See Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 156–57 (2d Cir. 2017) (dismissal under Rule 12(b)(6) and *res judicata*); *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011) (denial of leave to amend).

VI. ARGUMENT

A. Summary of the Argument

If ExxonMobil has not stated a plausible claim of viewpoint discrimination, neither could any other plaintiff absent an official's unambiguous admission of guilt. Such proof is not required to withstand a motion to dismiss. ExxonMobil pleaded that the Attorneys General (i) embraced a “clean energy” agenda they considered stymied by speech from those, like ExxonMobil, who are not aligned with that agenda; (ii) launched pretextual investigations of ExxonMobil because of its viewpoint, as urged by activists whose private meetings with the Attorneys General were actively (but unsuccessfully) concealed from the public; and (iii) issued

document requests targeting political speech and association, over a time period vastly disproportionate to any possible claim they could ever bring. Those allegations state a plausible claim of viewpoint discrimination.

While viewpoint discrimination is the centerpiece of ExxonMobil's complaint, Judge Caproni did not address that concept when dismissing ExxonMobil's constitutional claims. Her decision is riddled with additional errors of omission, such as omitting any reference to key allegations in the complaint and not accepting reasonable inferences urged by ExxonMobil. Errors of commission also abound, most notably Judge Caproni's acceptance of the Attorneys General's factual characterizations and representations of good faith, and her insistence that ExxonMobil disprove inferences favoring the Attorneys General. Those errors infected Judge Caproni's analysis of not just ExxonMobil's claim under the First Amendment, but its claims under the Fourth and Fourteenth Amendments and the Commerce Clause as well.

It was equally erroneous for Judge Caproni to hold that a limited-purpose state proceeding resolving a motion to quash barred the claims ExxonMobil presents here. Massachusetts' highest court recognized the two proceedings overlapped only partially, and the claims asserted here were not at issue in the state proceedings. The absence of a ruling on the merits or a full and fair opportunity to litigate in the state

proceedings further demonstrates the error in Judge Caproni's decision to apply res judicata.

Allowing this dismissal to stand will have consequences that extend beyond those who dissent from the Attorneys General's viewpoint on climate policy. It will limit the expressive options for dissenters across the political spectrum. As Justice Breyer recently cautioned, "what is sauce for the goose is normally sauce for the gander" when the First Amendment is concerned. *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2018 WL 3116336, at *23 (U.S. June 26, 2018) (Breyer, J., dissenting). When state officials insert themselves on one side of a policy question and take discriminatory action against those with contrary viewpoints, federal courts must be available to adjudicate challenges to those abuses of state power. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 n.28 (2018) ("[T]he very purpose of [the First Amendment] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). It is incumbent on this Court to ensure that they are.

B. ExxonMobil Stated Plausible Claims of Constitutional Violations.

1. Applicable Law

A complaint cannot be dismissed under Rule 12(b)(6) if it “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). When assessing a motion to dismiss, the court must “proceed ‘on the assumption that all the [factual] allegations in the complaint are true,’” and must “construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff.” *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) (emphasis omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The court is not permitted to resolve “[f]act-specific question[s],” nor may it dismiss a complaint based on its “disbelief of a complaint’s factual allegations . . . even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.” *Id.* (citations omitted).

2. The District Court Should Not Have Dismissed ExxonMobil’s First Amendment Claim.

(a) ExxonMobil’s Complaint States a Claim of Viewpoint Discrimination.

ExxonMobil’s complaint, which contains detailed allegations of fact well-supported by the public record, plausibly alleges that the Attorneys General took official action against the company because they disfavored its perspective on

climate policy.⁶ Those allegations state a claim of viewpoint discrimination under the First Amendment.

Viewpoint discrimination entails “the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). State officials engage in unlawful viewpoint discrimination when they “disfavor[] certain speech because of ‘the specific motivating ideology or the opinion or perspective of the speaker.’” *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 30–31 (2d Cir. 2018) (citation omitted); *see also Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (“The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”). Recognizing “how relentless authoritarian regimes are in their attempt to stifle free speech,” the Founders enacted the First Amendment to provide a bulwark against a state’s attempt “to impose its own message in the place of individual speech, thought, and expression.” *Nat’l Inst. of Family*, 2018 WL 3116336, at *16 (Kennedy, J., concurring). It is therefore “axiomatic” that a state may not “discriminate against

⁶ Allegations contained in both the FAC and SAC are indicated with a citation to the FAC. Allegations contained only in the SAC are indicated with a citation solely to the SAC.

speech on the basis of its viewpoint.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828–29 (1995).

As set out in ExxonMobil’s complaint, the Attorneys General have discriminated against speech in exactly that manner. The Attorneys General publicly embraced a “clean power” agenda and attributed that agenda’s lack of success to speech that caused political “gridlock.” (FAC ¶¶ 27–35.) To silence that speech and chill public discussion on matters they deemed no longer subject to debate, the Attorneys General launched pretextual investigations of ExxonMobil, probing its statements and association.⁷ The Attorneys General imposed those burdens to coerce ExxonMobil into embracing their agenda for a so-called “clean energy future.” (FAC ¶ 33.) Justice Kennedy recently rebuked similar “forward thinking” state officials for “forc[ing] individuals to ‘be an instrument for fostering public adherence to an ideological point of view they find unacceptable.’” *Nat’l Inst. of Family*, 2018 WL 3116336, at *16 (Kennedy, J., concurring) (original alternation omitted) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)). A similar danger is presented by the Attorneys General’s investigations of ExxonMobil.

The complaint contains three broad categories of factual allegations supporting a plausible inference of viewpoint discrimination. First, the Attorneys

⁷ The First Amendment applies to government investigations. *See, e.g., Watkins v. United States*, 354 U.S. 178, 188 (1957) (congressional investigation); *Sweezy v. State of New Hampshire by Wyman*, 354 U.S. 234, 245 (1957) (state attorney general investigation).

General expressed concern about the effect of ExxonMobil's speech on public perception and linked their investigations to that concern. Attorney General Healey complained that "certain companies," including ExxonMobil, have led "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." (FAC ¶ 32; JA-478.) Likewise, Attorney General Schneiderman decried "misperceptions in the eyes of the American public" about climate change created by those "with an interest in profiting from the [so-called] confusion." (FAC ¶ 31; JA-468.) They both blamed the public's "misapprehension" and "misperceptions," allegedly caused by speech they disfavored, for thwarting their preferred legislative agenda. (FAC ¶ 31–32; JA-468, 478.) Attorney General Healey pledged that those who have contributed to the "misapprehen[sion]" and "misunderstand[ing]" "should be, must be, held accountable." (FAC ¶ 32; JA-478.) Attorney General Schneiderman pledged to use his law enforcement power to "clear[] up" the "confusion" and "misperceptions." (FAC ¶ 31; JA-468.) They both identified ExxonMobil as a source of the so-called misinformation and used their investigations of ExxonMobil as a means to silence it.

Second, the Attorneys General's campaign against ExxonMobil was ripped from the pages of a playbook conceived by special interests to limit debate on climate change. Frumhoff, Pawa, Oreskes, and others who attended the 2012 La

Jolla conference and 2016 Rockefeller Fund meeting long plotted to use state power to “maintain[] pressure on the [energy] industry that could eventually lead to its support for legislative and regulatory responses to global warming,” including “converting to renewable energy.” (FAC ¶¶ 46–47 (emphasis omitted); SAC ¶ 45; JA-514–15.) They identified state attorneys general as the likely source of that pressure at both meetings (FAC ¶¶ 47–48) and personally lobbied the Attorneys General to adopt this agenda (SAC ¶¶ 46, 56–58). Most strikingly, Pawa and Frumhoff briefed the Attorneys General in a closed-door meeting mere hours before the “AGs United for Clean Power” press conference where the Attorneys General linked their investigations of ExxonMobil to public perception of climate policy. (FAC ¶¶ 42–45.) Recognizing the fallout that could follow from public disclosures about Pawa and Frumhoff’s influence on the investigation of ExxonMobil, a senior official in Attorney General Schneiderman’s office asked Pawa to conceal his involvement from the press. (FAC ¶ 50.)

Third, the complaint describes documents that expose the Attorneys General’s focus on speech and conduct protected by the First Amendment. Both document requests seek ExxonMobil’s communications with organizations that have been derided as “climate change deniers.” (FAC ¶¶ 22, 25, 73; JA-574–76, 716, 751–52.) The CID also specifically targets statements of pure opinion that run counter to the Attorneys General’s “clean power” agenda, including the suggestion that “[i]ssues

such as global poverty [are] more pressing than climate change.” (FAC ¶ 73; JA-758.) The Attorneys General’s focus on disfavored speech is consistent with their pledge to “ensur[e] the dissemination of accurate information about climate change” in their common interest agreement. (FAC ¶ 52; JA-654.)

Taken together, these three categories of factual allegations create a plausible inference that the Attorneys General launched investigations of ExxonMobil because they did not approve of its viewpoint on climate change or the effect that its viewpoint had on the public’s perception of climate policy. Nothing more is required at the pleading stage to state a claim of viewpoint discrimination.

(b) The District Court Failed to Address ExxonMobil’s Claim of Viewpoint Discrimination.

Notwithstanding the prominence of ExxonMobil’s viewpoint discrimination claim, Judge Caproni did not discuss the concept even once when assessing the plausibility of ExxonMobil’s First Amendment claim.⁸ Instead of construing the viewpoint discrimination claim ExxonMobil actually pleaded, the District Court analyzed a claim of retaliation lodged nowhere in ExxonMobil’s complaint or briefs. (SPA-34–35, 37, 42–43.) Judge Caproni’s failure to address ExxonMobil’s well-pleaded claim of viewpoint discrimination should result in reversal.

⁸ Viewpoint discrimination pervades the complaint (*see, e.g.*, FAC ¶¶ 10, 56, 59, 66, 73, 110–11; SAC ¶ 30), and ExxonMobil’s briefs in the District Court (ECF Nos. 9, 60, 167; JA-1870).

The substitution of an un-pleaded retaliation claim in place of ExxonMobil's viewpoint discrimination claim was highly prejudicial. Under the retaliation rubric, the District Court focused its analysis on whether the complaint sufficiently alleged that "the AGs know their investigations lack merit but have nonetheless proceeded against Exxon for ulterior reasons." (SPA-32–33.) That standard has no application here.⁹ *See Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Wash. Indus. Dev. Agency*, 77 F.3d 26, 31 (2d Cir. 1996) ("There is a crucial distinction between retaliatory First Amendment claims and affirmative First Amendment claims."). Indeed, whether government action is justified or unjustified in its own right "is beside the point" in a viewpoint discrimination case. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396–97 (1993). By evaluating the justifications for the investigations, Judge Caproni read ExxonMobil's viewpoint discrimination claim out of its complaint.¹⁰

Viewpoint discrimination arises from the exercise of government power, including the otherwise lawful exercise of power, to disfavor certain voices because of the views they express. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*,

⁹ There is reason to question whether a retaliation claim would be defeated by evidence that government action could be justified on viewpoint-neutral grounds. *See Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018); *Blue v. Koren*, 72 F.3d 1075, 1085 n.5 (2d Cir. 1995).

¹⁰ Likewise, if government action is unjustified, such as when a state official knowingly pursues a meritless investigation, it is wrongful regardless of whether it also violates the First Amendment by discriminating based on viewpoint. *See, e.g., In re McVane*, 44 F.3d 1127, 1139 (2d Cir. 1995) (declining to enforce groundless subpoenas even though they "were not issued for an improper purpose").

426 F.3d 617, 633 (2d Cir. 2005) (holding a “viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests”); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) (Even “valid[] and reasonable[]” justifications “cannot save” government action “that is in fact based on a desire to suppress a particular point of view.”). Once government action is found to be viewpoint discriminatory, it violates the First Amendment, regardless of whether it is also unreasonable on its own terms or for other reasons. Although ExxonMobil did allege facts supporting a plausible inference that the Attorneys General knew their “investigations lack merit,” it need not have done so in its complaint to state a claim of viewpoint discrimination.

(c) The District Court Improperly Imposed an Evidentiary Burden, Rejected Plausible Inferences, and Overlooked Important Allegations.

The District Court also erred by imposing an evidentiary burden on ExxonMobil alien to Rule 12(b)(6). In lieu of plausible allegations, Judge Caproni repeatedly demanded “evidence” from ExxonMobil to avoid dismissal, faulting ExxonMobil for failing to present “any direct evidence of an improper motive,” and rejecting as insufficiently persuasive “the circumstantial evidence” showing that the Attorneys General adopted the unconstitutional objectives developed by Pawa, Frumhoff, and the Rockefeller Fund. (SPA-45.) It should be common ground that

no evidence is required to withstand a motion to dismiss under Rule 12(b)(6). *See Walker v. Schult*, 717 F.3d 119, 130 (2d Cir. 2013) (“[A] plaintiff’s ability to prove facts such as subjective intent is an issue for summary judgment.” (citing *Phelps v. Kapnolas*, 308 F.3d 180, 186–87 (2d Cir. 2002))); *Greenwich Citizens Comm.*, 77 F.3d at 32 (“Whether the impermissible reason had a causative effect on the adverse state action . . . is decided by asking the trier-of-fact . . .”).

Judge Caproni further demanded that ExxonMobil disprove all inferences other than the one alleged in its complaint. Adopting a divide-and-conquer approach, the District Court improperly assessed each allegation “in isolation,” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007), and rejected it as implausible merely upon articulating an alternative, benign explanation of the facts pleaded. But a court “may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.” *Anderson News*, 680 F.3d at 185.

This error was evident in the District Court’s assessment of the Attorneys General’s public statements. As members of the “AGs United for Clean Power” coalition, the Attorneys General publicly dedicated themselves to a clean energy policy they believed was derailed by the public’s “misapprehension” and “misperceptions” on the issue. (FAC ¶¶ 31–32; JA-468, 478.) In their public statements, the Attorneys General blamed ExxonMobil’s speech for influencing

public perception and pledged to use their investigative powers against ExxonMobil because of its speech. (FAC ¶¶ 31–32, 35.) Those allegations support a reasonable inference that the investigations were motivated by a disagreement about viewpoint. But Judge Caproni refused to credit that inference, finding instead that the Attorneys General must have been speaking in “hyperbole” and must have believed that ExxonMobil “may have made false statements to its investors and the public.” (SPA-38.) That conclusion is improper at the pleading stage, where district judges must accept the plaintiff’s plausible inferences, including that the Attorneys General were speaking deliberately—and not hyperbolically—when they linked their investigations to ExxonMobil’s viewpoint on climate policy.

Passages of the complaint omitted from the District Court’s decision further support that inference, including Attorney General Schneiderman’s references to his investigation as a solution to the “gridlock in Washington” and the Attorneys General’s statements linking their investigations to the need to transition “towards renewables” and a “clean energy future.” (FAC ¶¶ 28, 32–33; JA-469, 479, 486.) Those allegations further support the plausible inference that the Attorneys General launched their investigations because of a disagreement with ExxonMobil over climate policy. The District Court should have considered those allegations, not ignored them.

Judge Caproni further erred by positing that Attorney General Schneiderman might have reasons to investigate ExxonMobil that are independent of his “advoca[cy] for particular policy responses” at the press conference. (SPA-37.) ExxonMobil was not required to disprove the possibility that the investigations were independently motivated by a legitimate law enforcement concern. *See Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 297 (3d Cir. 2011) (quoting *Ridley v. Mass. Bay Transp. Autho.*, 390 F.3d 65, 86 (1st Cir. 2004)) (Because “[t]he government rarely flatly admits it is engaging in viewpoint discrimination,” such a claim is not defeated by “the recitation of a nondiscriminatory rationale.”). ExxonMobil’s burden was simply to plead facts that supported its claim for relief. It was improper for the District Court to base its dismissal of “plaintiff[’s] Free Speech Clause claim” on its “conclusions about the intent” of the defendants, rather than ExxonMobil’s well-pleaded allegations of their intent. *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

It was equally wrong for Judge Caproni to have omitted any discussion of the Attorneys General’s document requests, which were directed at ExxonMobil’s speech on climate policy. Judge Caproni did not perceive any significance in Attorney General Healey’s demand that ExxonMobil produce any and all documents supporting the rhetorical question “What good is it to save the planet if humanity suffers” or any of the other statements of opinion targeted by Attorney General

Healey's investigation. (FAC ¶ 73; JA-757–58.) The presence of these statements in the CID creates a plausible inference that Attorney General Healey's investigation arises from a disagreement about the policy preferences reflected in those statements.

Likewise, the Attorneys General's request for ExxonMobil's communications with a list of think tanks and other organizations derided as "climate deniers" supported a plausible inference that the Attorneys General were hostile to one side of the climate policy debate. Refusing to credit that plausible inference, Judge Caproni inferred that ExxonMobil might have communicated with those organizations about its "political desire to avoid regulations harmful to its economic interests," which she presumably deemed fair game for the Attorneys General. (SPA-44.) That inference was far from the only one supported by ExxonMobil's allegations. But even if it was, the inference ultimately supports ExxonMobil's claims because petitioning the government is itself protected by the First Amendment, *see Singh v. NYCTL 2009-A Tr.*, 683 F. App'x 76, 77 (2d Cir. 2017), and it highlights the error in both the Attorneys General's investigations and the District Court's reasoning.

The District Court also found nothing untoward in the Attorneys General's "common interest" in "ensuring the dissemination of accurate information about climate change." (FAC ¶ 52; JA-654.) To the contrary, Judge Caproni endorsed it

as “an admirable goal of a public official with which few would quarrel.” (SPA-42 (“‘Accurate information’ is the lifeblood of our democracy—not a goal that suggests skullduggery.”).) That assertion is at a minimum questionable. Where speech about matters of public policy is concerned, standards of “accuracy” will depend on the standard-setter’s position on the political spectrum. Imagine government officials pledging to patrol the accuracy of speech about supply-side economics, affirmative action, or immigration and border security. Climate policy is no different. That is why government officials may not assume the role of “arbiter of truth,” *United States v. Alvarez*, 567 U.S. 709, 752 (2012), or fairness and honesty in political discourse, see *Husain v. Springer*, 494 F.3d 108, 127 (2d Cir. 2007). Regulating opinions based on a “negative normative ‘evaluation’” of whether the belief is “legitimate or illegitimate” is unlawful, not admirable. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted).

Attorney General Schneiderman’s request that Pawa conceal his role in closed-door meetings about investigating ExxonMobil likewise supported a plausible inference of wrongdoing, but Judge Caproni disregarded this allegation of fact as nothing more than “interesting.” (SPA-45.) As this Court has repeatedly recognized, attempts to conceal acts alleged to be in furtherance of a conspiracy raise an “inference[] of impropriety.” *Victory v. Pataki*, 814 F.3d 47, 68 (2d Cir. 2016) (quoting *Scotto v. Almenas*, 143 F.3d 105, 115 (2d Cir. 1998)); see also *United States*

v. *Sureff*, 15 F.3d 225, 229 (2d Cir. 1994) (finding a co-conspirator’s “attempt to conceal his recent presence” at a certain location “was evidence of his consciousness of guilt concerning his activities there”). This effort to conceal permits a plausible inference that the Attorneys General knew it was improper to consult about their investigations of ExxonMobil with special interests like Pawa who had long advocated the use of government power to restrict the company’s speech.

It also undermines Judge Caproni’s assertion of a “missing link between the [La Jolla and Rockefeller] activists and the AGs.” (SPA-40.) The meeting Pawa was asked to conceal was part of a series of communications between the Attorneys General and Pawa or the other activists, including:

- Communications between the Rockefeller Fund and Attorney General Schneiderman in February 2015.¹¹ (SAC ¶¶ 56, 58.)
- A meeting between Oreskes and Attorney General Schneiderman in June 2015. (SAC ¶ 46.)
- Frumhoff’s expression of optimism in mid-2015 that state attorneys general would embrace his agenda. (SAC ¶ 47.)
- Pawa’s creation of an email list of “AG Folks” to “pass along information that may be of interest to AGs on the issue of our time: climate change.” (SAC ¶ 68; JA-2358.)

¹¹ Judge Caproni faults ExxonMobil for not providing “other information” about the content of these communications (SPA-40), but a plaintiff cannot reasonably be expected to come forward with more prior to discovery.

Those communications furthered an objective of the La Jolla activists that Judge Caproni also did not acknowledge in her opinion: their hope to recruit “a single sympathetic attorney general [who] might have substantial success in bringing key internal documents [of energy companies] to light.” (FAC ¶ 45; SAC ¶ 47.) The District Court also failed to reference the activists’ agenda “[t]o delegitimize [ExxonMobil] as a political actor” and their expectation that “pressure from the courts offers the best current hope for gaining the energy industry’s cooperation in converting to renewable energy.” (FAC ¶¶ 47–48; JA-514, 525.) Those allegations supported a reasonable inference that the La Jolla and Rockefeller Fund activists advised the Attorneys General on restricting speech to attain their shared climate policy objectives.

(d) The District Court Improperly Drew Inferences in Favor of the Attorneys General and Credited Their Defenses.

In contrast to her constricted view of ExxonMobil’s allegations, Judge Caproni accepted the Attorneys General’s assurances of good faith uncritically and improperly. Prior to receiving any briefs on dismissal under Rule 12(b)(6), Judge Caproni informed ExxonMobil that, contrary to the allegations in its complaint, the Attorneys General “don’t care about your view of the world. They care whether you have correctly and accurately and honestly disclosed your financial situation when you were issuing securities.” (JA-3035.) That perspective carried over into the

Order, which opened with Judge Caproni characterizing the Attorneys General's investigations as "duly-authorized" (SPA-1), rather than unauthorized by the Constitution as ExxonMobil alleged.

The District Court's reversal of the presumption favoring the party opposing dismissal is evident throughout its recitation of the facts, which repeatedly accepts the Attorneys General's factual assertions, while prefacing ExxonMobil's allegations with cautionary language. (*See, e.g., id.* ("The AGs are investigating whether Exxon misled investors and the public about its knowledge of climate change and the potential effects that climate change may have on Exxon's business. *Exxon contends* the investigations are being conducted to retaliate against Exxon for its views on climate change" (emphasis added))). The presumption's reversal is also evident in Judge Caproni's decision to quote extensively from passages in Attorney General Schneiderman's public statements that ExxonMobil did not reference in its complaint. Those passages do not provide context for and were not inextricably linked to the statements that supported ExxonMobil's claims. Instead, they contain the Attorney General's self-serving denials of infringing First Amendment rights and deflections of a press inquiry about whether his investigation is a mere "publicity stunt." (SPA-36–37.) Those passages might bear on the Attorneys General's potential defenses, but they are irrelevant to whether ExxonMobil adequately stated a claim.

By drawing inferences in favor of the Attorneys General, Judge Caproni created a strong presumption that the Attorneys General acted in good faith and required ExxonMobil to rebut that presumption. This presumption was so strong that, even though Judge Caproni acknowledged that Attorney General Schneiderman viewed ExxonMobil as a “political opponent” whom he accused of “sowing ‘confusion,’” those allegations would be ignored because the Attorney General’s accusation was “rather tame” and “he is a politician after all.” (SPA-38.) In a similar manner, Judge Caproni repeatedly found ExxonMobil’s allegations insufficient to rebut an invented and legally irrelevant presumption that the Attorneys General had acted based on their good faith beliefs. (SPA-32, 37 (“The fact that Schneiderman . . . advocates for particular policy responses does not mean the NYAG does not also have reason to believe that Exxon may have committed fraud.”).)

Worse still, the District Court appears to have accepted the Attorneys General’s unfounded accusation that ExxonMobil spoke falsely about climate change or climate policy. In Judge Caproni’s view, ExxonMobil had the burden of pleading that the Attorneys General “know[] or believe[] that *Exxon was itself confused* about the causes or risks of climate change,” presumably as a means of negating ExxonMobil’s intent to make false statements. (SPA-38 (emphasis added).) But that requirement presupposes ExxonMobil’s public statements on climate change were indeed false—which was the Attorneys General’s position and

surely not ExxonMobil's. ExxonMobil alleged that its public statements were true, and the Attorneys General had no legitimate basis to believe otherwise. (FAC ¶¶ 74, 79–80.) Judge Caproni also appears to agree with the policy goals and tactics of the special interests targeting ExxonMobil's speech. When ExxonMobil emphasized that the Rockefeller Fund aimed to “delegitimize [ExxonMobil] as a political actor” (JA-3004), Judge Caproni invented a justification for the tactic, observing that the Rockefellers must “care whether subsequent Rockefellers can breathe” (JA-3066). None of this was consistent with the appropriate standard under Rule 12(b)(6).

3. The District Court Should Not Have Dismissed ExxonMobil's Other Constitutional Claims.

The District Court dismissed ExxonMobil's claims under the Fourth and Fourteenth Amendments and the Commerce Clause based on its conclusion that ExxonMobil failed to plausibly allege that the Attorneys General were “motivated by an improper purpose.” (SPA-45–46.) Dismissal on that basis was error for the reasons discussed above. ExxonMobil plausibly alleged that the Attorneys General used law enforcement tools to discriminate based on viewpoint, and that allegation was sufficient to establish improper purpose. Because Judge Caproni offered no other basis to dismiss those claims, the existence of allegations showing an improper purpose is sufficient for reversal. But even if ExxonMobil had not adequately pleaded improper purpose, its claims should not have been dismissed. Viewed under

the appropriate standard, ExxonMobil adequately pleaded violations of the Fourth and Fourteenth Amendments and the Commerce Clause.

(a) ExxonMobil Stated a Claim under the Fourth Amendment.

The Fourth Amendment guarantees corporations and individuals alike the right to be secure in their “papers[] and effects against unreasonable searches and seizures.” U.S. Const. amend. IV. This protection includes the right to be free from baseless “fishing expeditions.” *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924); *see also Major League Baseball v. Crist*, 331 F.3d 1177, 1187 (11th Cir. 2003). While executive agencies may have broad powers of inquisition, “[t]his is not to say that an agency may conduct any investigation it may conjure up; the disclosure sought must always be reasonable.” *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996) (citing *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 208–09 (1946) (additional citation omitted)). Accordingly, it is “well settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *In re Horowitz*, 482 F.2d 72, 78 (2d Cir. 1973) (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). Where, as here, a subpoena “implicates first amendment concerns,” a court must apply “more exacting scrutiny of the justification offered” to protect “the constitutional liberties of the target of the

subpoena.” *FEC v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (holding in such circumstances the Fourth Amendment must be applied with “scrupulous exactitude”).

ExxonMobil plausibly pleaded that the Attorneys General lack a factual basis for their investigations, which amount to nothing more than fishing expeditions “in the hope that something will turn up.” *Am. Tobacco Co.*, 264 U.S. at 306. The Attorneys General pointed to a shifting series of justifications for their investigations, and ExxonMobil has rebutted every one of them. First, the Attorneys General relied on press accounts underwritten by the Rockefeller Fund alleging a disconnect between ExxonMobil’s historical understanding of climate change and its public statements on the topic. (SAC ¶ 57.) ExxonMobil examined the basis of those press accounts and refuted them as manipulative and inaccurate. (*Id.*; JA-269–75, 1887–89; ECF No. 57.) The Attorneys General then pursued a theory that ExxonMobil’s reserves would be “stranded” by potential future climate regulations. (FAC ¶¶ 74–76.) But regulations issued by the Securities and Exchange Commission prohibit ExxonMobil from considering future regulations when reporting proved reserves. (FAC ¶¶ 77–78.) These shifting justifications, which most recently have focused on how climate policies influence ExxonMobil’s investments and asset impairments (FAC ¶¶ 74–76; SAC ¶¶ 7, 94), show just how far the Attorneys General have travelled from their original justification that

ExxonMobil's historical research on climate change was not aligned with its public statements. They also support a plausible inference that the Attorneys General lack a factual basis for their investigations and are conducting an unlawful fishing expedition.

Judge Caproni disagreed, “presum[ing]” that Attorney General Schneiderman shifted justifications for his investigation “in response to facts learned as [he] receives material from Exxon.” (SPA-44–45.) But that plainly was not the only permissible inference that could be drawn from ExxonMobil's allegations. Controlling authority in this Circuit establishes that shifting justifications can unmask those explanations as mere pretext for improper conduct. *See, e.g., Schmitz v. St. Regis Paper Co.*, 811 F.2d 131, 132–33 (2d Cir. 1987) (finding an employer's shifting explanations for an adverse action supplied evidence of pretext). That presumption was plausible here, and ExxonMobil should have received the benefit of it under Rule 12(b)(6).

The Attorneys General also violated the Fourth Amendment by seeking a quantity of documents from ExxonMobil wildly disproportionate to the needs of any legitimate investigation. Attorney General Schneiderman's subpoena purports to investigate potential violations of New York Executive Law § 63(12), and General Business Law Article 22-A or 23-A (JA-709)—statutes which, at most, have six-

year limitations periods. N.Y. C.P.L.R. 213(8).¹² Yet the subpoena seeks 40 years’ worth of documents from exceedingly broad categories, including “all Documents and Communications” since 1977 “[c]oncerning any research, analysis, assessment, evaluation, modelling or other consideration . . . [c]oncerning the causes of [c]limate [c]hange.” (JA-715–16.) Attorney General Healey’s CID is even worse. Despite being issued in April 2016 to investigate potential unfair trade practices under Mass. Gen. Laws ch. 93A, § 2, a statute with a four-year limitations period, Mass. Gen. Laws ch. 260, § 5A, the CID asks for essentially every climate-related document in ExxonMobil’s files dating back forty years to 1976. (JA-744, 755–56.) The burdens imposed by these requests cannot be squared with the Fourth Amendment’s reasonableness requirement. These allegations are sufficient to state a claim under the Fourth Amendment that the document requests are an unreasonable exercise of state power.

(b) ExxonMobil Stated a Claim under the Due Process Clause.

The Due Process Clause prohibits a prosecutor from “injecting a personal interest,” political, financial, or otherwise, into “prosecutorial decision[s].” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980). It also requires a prosecutor to “respect the presumption of innocence” and “refrain[] from speaking in public

¹² The New York Court of Appeals recently held that the Martin Act, as relevant here, has a three-year limitations period. *People by Schneiderman v. Credit Suisse Sec. (USA) LLC*, No. 40, 2018 WL 2899299, at *5 (N.Y. June 12, 2018).

about pending and impending cases except in very limited circumstances.” *United States v. Bowen*, 799 F.3d 336, 353–54 (5th Cir. 2015). Conduct demonstrating that a prosecutor has “an axe to grind against” the subject of an investigation violates due process. *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984). The ultimate merit of the prosecution is beside the point because even the “appearance of impropriety” on behalf of a prosecutor “diminishes faith in the fairness” of our judicial system. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987); *see also Wright*, 732 F.2d at 1056 n.7.

The Attorneys General have created such an appearance of impropriety by declaring presumptively that ExxonMobil has engaged in unlawful conduct, even though neither has completed their fact gathering. After complaining that “certain companies” have led “many to doubt whether climate change is real,” Attorney General Healey stated that she had already found a “troubling disconnect between what Exxon knew . . . and what the company . . . chose to share with investors and with the American public.” (FAC ¶ 37; JA-478.) Attorney General Schneiderman similarly faulted ExxonMobil for “know[ing] how fast ice sheets are receding,” while supposedly simultaneously telling “the public for years there were ‘no competent models.’” (FAC ¶ 36; JA-469.) He later reported to *The New York Times*, without offering any supporting evidence, that there “may be massive securities fraud” at ExxonMobil. (FAC ¶ 75; JA-809.)

These public statements demonstrate the Attorneys General's personal bias and prejudice, "call[] into question the[ir] objectivity," and support a reasonable inference of a due process violation. *Young*, 481 U.S. at 806, 810 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)); *Aversa v. United States*, 99 F.3d 1200, 1216 (1st Cir. 1996) (a prosecutor's public statements must be "strictly limited by the prosecutor's overarching duty to do justice"). It was improper for Judge Caproni to trivialize the significance of these statements by excusing them as "hyperbole" that must be expected and tolerated from a "political animal" like Attorney General Schneiderman. (SPA-38; JA-3032.) Precedent does not countenance treating public officials with such indulgence, particularly on a motion to dismiss.

(c) ExxonMobil Stated a Claim under the Commerce Clause.

ExxonMobil's allegations support a claim under the Commerce Clause that the Attorneys General, through their investigations, seek to regulate out-of-state speech about climate policy. State action targeting speech can violate the Commerce Clause just as much as state action concerning the sale of goods. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (striking down Vermont law attempting to regulate out-of-state speech). Where, as here, state officials attempt to use their authority to limit, restrict, or otherwise regulate speech occurring beyond state borders, their conduct "is invalid under the Commerce Clause because it 'exceeds the inherent limits of the enacting State's authority.'" *SPGGC*

Ltd. v. Blumenthal, 505 F.3d 183, 193 (2d Cir. 2007) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336, 491 (1989) (“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”)).

As alleged, the Attorneys General violated the Commerce Clause by using their law enforcement power to target a speaker for statements made and viewpoints expressed outside of New York and Massachusetts. The Attorneys General viewed certain speech about climate change as a barrier to achieving their policy objectives and sought to suppress it. That speech, however, emanates from outside New York and Massachusetts. That fact is well-illustrated by the subpoena and CID themselves, which collectively seek ExxonMobil’s communications with 16 organizations, only two of which are located in New York or Massachusetts. (FAC ¶¶ 68, 71; JA-716, 756.) The specific statements identified by the CID for further investigation were made by ExxonMobil largely in Dallas, Texas, as well as in England and China—but not in Massachusetts. (FAC ¶ 71; JA-757–58.) This is not surprising. As a Texas-based corporation, ExxonMobil engages in public discourse about climate change and climate policy from its corporate headquarters in Texas, and not New York or Massachusetts. (FAC ¶¶ 9, 15; JA-774.) After reviewing allegations and evidence regarding this same conduct in discovery proceedings in Tarrant County, Texas, Judge Wallace concluded that the Attorneys General’s document requests “target[] ExxonMobil’s speech and associational activities in

Texas.” *Exxon Mobil Corp.*, 2018 Tex. Dist. LEXIS 1, at *14. Those allegations provide sufficient support at the pleading stage for a claim under the Commerce Clause.

Judge Caproni concluded otherwise because she considered the Attorneys General’s “improper purpose” an essential element that ExxonMobil had not adequately pleaded. (SPA-46.) That ruling is premised on two errors. First, a Commerce Clause violation depends on extraterritorial effect, not improper purpose. *See SPGGC*, 505 F.3d at 193; *Healy*, 491 U.S. at 336. Second, insofar as an improper purpose is relevant here, ExxonMobil adequately pleaded it for the reasons discussed above. *See supra* Section VI.B.2.

Judge Caproni also faulted ExxonMobil for not adequately explaining how the Attorneys General’ investigations “unduly burden interstate political speech” or “have the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.” (SPA-46 (internal quotation marks omitted).) But that explanation is clearly presented in ExxonMobil’s complaint. (FAC ¶¶ 68, 71, 93, 120–21.) The Attorneys General used their investigations to limit ExxonMobil’s ability to speak and associate freely about climate change, and ExxonMobil engages in that expressive conduct outside the boundaries of New York and Massachusetts. (FAC ¶¶ 19, 68–69, 71.) ExxonMobil’s Commerce Clause claim should not have been dismissed.

* * *

Accordingly, the District Court erred when it dismissed ExxonMobil's claims under the First, Fourth, and Fourteenth Amendments and under the Commerce Clause. ExxonMobil's state and federal conspiracy claims are supported by the same allegations as its substantive claims and likewise should not have been dismissed. *See Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005); *see also Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015). Contrary to Judge Caproni's view (SPA-45 n.35), a federal conspiracy claim under 42 U.S.C. § 1985 "covers classes beyond race," such as political affiliations. *Dolan*, 794 F.3d at 296; *see also N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989). For the same reasons that ExxonMobil's substantive and conspiracy claims should not have been dismissed, leave to amend should not have been denied as futile. *See Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 115–16 (2d Cir. 2012). ExxonMobil should be allowed to proceed in this litigation with its SAC.

C. Res Judicata Did Not Bar ExxonMobil's Claims Against Attorney General Healey.

ExxonMobil's claims against Attorney General Healey were not precluded by limited-purpose state court proceedings that were incapable of entertaining and did not reach any of ExxonMobil's constitutional challenges. Under Massachusetts law, res judicata (claim preclusion) bars relitigating "a right, question, or fact distinctly put in issue and directly determined by a court" in a prior "suit between the same

parties.” *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 538 (1985) (internal quotation marks omitted); *see also Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 843 (2005) (res judicata requires (1) “identity or privity of the parties,” (2) “identity of the cause of action,” and (3) a “prior final judgment on the merits.”).¹³ Res judicata is inapplicable unless the party asserting the defense can establish “that the claim was actually and necessarily decided in a prior action or that there was a full and fair opportunity to have done so that was not taken.” *Bernier v. Bernier*, 449 Mass. 774, 797 (2007). Attorney General Healey failed to establish res judicata because the claims raised here were not raised or decided in the state proceedings, and the proceedings did not provide a “full and fair opportunity” to adjudicate ExxonMobil’s constitutional claims. *Id.* It was error for Judge Caproni to hold otherwise on this question of first impression under Massachusetts law.

1. ExxonMobil’s Claims Were Not Raised or Decided in the Massachusetts State Proceeding.

Res judicata does not apply here because the claims asserted in this action were not raised in or decided by the Massachusetts state court. The state proceedings concerned only the validity under Massachusetts law of the CID that Attorney General Healey issued. ExxonMobil did not raise causes of action in state court, and the state proceedings did not entertain ExxonMobil’s broader challenges to Attorney

¹³ The preclusive effect of the Massachusetts proceedings is determined by “the law of that state,” and federal courts “should not give the state-court decision any greater preclusive effect than the courts of that state would give it.” *Anderson News*, 680 F.3d at 191.

General Healey's investigation. No less an authority than Massachusetts' highest court perceived "only a partial overlap in the subject matter of [the] two actions" when affirming the denial of a stay. *Exxon Mobil Corp.*, 479 Mass. at 329. That holding should be conclusive here. If the two matters were not sufficiently similar to support a stay of one in deference to the other, their overlap cannot satisfy the far higher standard of "identity" necessary to support res judicata.

Judge Caproni misapplied this standard when she determined that overlapping facts raised in the two proceedings were sufficient to establish an identity of claims. Massachusetts precedent instructs otherwise. In *Heacock v. Heacock*, the Supreme Judicial Court held that a prior divorce action did not bar a subsequent tort action between former spouses, notwithstanding overlapping facts, because the actions (i) did not share "the same underlying claim," (ii) did not afford the same relief, and (iii) "the purpose" of each action was different. 402 Mass. 21, 24 (1988). So too here. ExxonMobil did not raise in Massachusetts state court the claims pending here, nor did it seek the relief it seeks here. The state proceedings pertained to the enforcement of a specific CID, while this action seeks an injunction of Attorney General Healey's investigation. Those differences cannot be glossed over with a generic reference to overlapping facts.

The absence of a final judgment on the merits independently forecloses res judicata. The District Court misapplied this standard by focusing on the quantity of

briefing in the Superior Court and whether that court issued a “reasoned decision.” (SPA-27.) While those factors might also be necessary, they are not sufficient. Res judicata requires that claims be “actually and necessarily decided,” *Bernier*, 449 Mass. at 797, not decided by implication or, as here, deliberately set aside until an investigation uncovers their merits, *see Leahy v. Local 1526, Am. Fed’n of State, Cty. & Mun. Emps.*, 399 Mass. 341, 352 (1987); *Foster v. Evans*, 384 Mass. 687, 695 (1981) (rejecting defendants’ argument that plaintiff’s claim must have necessarily been decided in prior “summary . . . proceedings”). Further, any “ambiguity concerning the issues, the basis of decision, and what was deliberately left open by the judge” will preclude res judicata. *Day v. Kerkorian*, 61 Mass. App. Ct. 804, 809 (2004); *Kirker v. Bd. of App. of Raynham*, 33 Mass. App. Ct. 111, 113 (1992). Far from speaking ambiguously, the Superior Court expressly stated that it would “not address Exxon’s arguments regarding free speech at this time” (JA-1017 n.2), and the Supreme Judicial Court disclaimed any obligation to consider whether Attorney General Healey’s stated grounds for her investigation were “reasonable” or mere “pretext,” *Exxon Mobil Corp.*, 479 Mass. at 324 n.9. These statements conclusively demonstrate that ExxonMobil’s constitutional claims were not decided in the state proceedings, making res judicata unavailable here.

2. ExxonMobil Lacked a Full and Fair Opportunity to Raise Constitutional Claims in the Summary State Court Proceedings.

The record also does not support Judge Caproni's finding that the summary proceedings in state court provided ExxonMobil a "full and fair" opportunity to litigate its federal claims. Before this Court, ExxonMobil seeks injunctive and declaratory relief on affirmative claims for violations of its rights under the Constitution. Had ExxonMobil attempted to press those claims and seek that relief in the state proceedings, its request for affirmative relief would have extended beyond the four corners of the CID. In so doing, ExxonMobil would have been forced to waive its objection to personal jurisdiction, which was its principal argument for quashing the CID. *See Lamarche v. Lussier*, 65 Mass. App. Ct. 887, 889 n.8 (2006) ("[A] defendant who files a special appearance, but seeks relief beyond the narrow field covered by that appearance, brings himself within the jurisdiction of the court."). Res judicata does not compel litigants to choose between waiving personal jurisdiction and waiving claims.

ExxonMobil would have also faced substantial procedural limitations if it attempted to raise its federal claims in the state proceeding. Proceedings to set aside a CID are summary "discovery proceedings," serving the narrow function of testing the CID's validity under the authorizing state law. *See Exxon Mobil Corp.*, 429 Mass. at 324 (quoting *In re Yankee Milk, Inc.*, 372 Mass. 353, 356 (1977)). In those

narrow, summary proceedings, the recipient of a CID may challenge under a “heavy burden” whether the CID complied with Massachusetts law. (JA-1010.) A civil action under Section 1983 serves the far broader purpose of adjudicating rights and claims under the Constitution, in a full court proceeding, with a wide range of judicial remedies available to redress official wrongdoing. The plaintiff in such proceedings needs to prove his case only by a preponderance of the evidence.

Preclusion based on an earlier subpoena enforcement proceeding is inappropriate under the Due Process Clause where, as here, the opportunity to litigate was “narrower than the opportunity available in a plenary civil action” due to the (i) “summary in nature” of the proceeding, (ii) lack “of discovery,” and (iii) “heavy burden” to obtain relief.¹⁴ *Sprecher v. Graber*, 716 F.2d 968, 972 (2d Cir. 1983); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–81 (1982). Likewise, Massachusetts courts have declined to apply res judicata based on “a motion judge’s decision” in “summary” proceedings that “deprive a litigant of such procedural safeguards as an evidentiary hearing, discovery, and cross-examination.” *Foster*, 384 Mass. at 695.

The limited proceedings in Massachusetts did not provide an opportunity to seek declaratory or injunctive relief, as ExxonMobil does here. *See, e.g., West v.*

¹⁴ Judge Caproni erroneously held that these “considerations do not apply to claim preclusion” (SPA-31), but this Court’s precedents say no such thing. *See Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 439 (2d Cir. 2000).

Ruff, 961 F.2d 1064, 1065 (2d Cir. 1992) (refusing to apply res judicata where “the first court lacked the power to grant all the relief sought in the later action”). Nor did they afford the aid of discovery, which is available only in a “pending *action*,” not on a motion to quash. Mass. R. Civ. P. 26(b)(1) (emphasis added). That ExxonMobil could have raised federal objections as part of its state court challenge to the CID (SPA-29) is of no moment where, as here, the two actions serve a markedly different “purpose” and afford different relief. *Heacock*, 402 Mass. at 24; *see Beals v. Commercial Union Ins. Co.*, 61 Mass. App. Ct. 189, 194 (2004) (refusing to apply res judicata to bar a consumer’s “bad faith” claims where factually related claims had been adjudicated under a “statutory mandate [that was] narrow in scope”). Moreover, ExxonMobil’s burden here is only a preponderance of the evidence, but in the state court it faced a far more demanding standard to invalidate the CID.

Judge Caproni concluded otherwise by requiring ExxonMobil to disprove the adequacy of its opportunity to litigate in state court. (SPA-30–31.) That was improper, as the burden of establishing res judicata falls on the party invoking the affirmative defense. *See Longval v. Comm’r of Corr.*, 448 Mass. 412, 416–17 (2007). Nothing in the record supports the assertion that, in proceedings challenging a CID, the Superior Court could have entertained a challenge to the Attorney General’s investigation, issued declaratory and injunctive relief as to that

investigation, or authorized discovery in support of ExxonMobil's claims. The Attorney General of Massachusetts, who is presumably well-positioned to supply information about the scope of proceedings in her home courts, provided no such information, leaving Judge Caproni able to conclude only that she "cannot say that discovery would not have been available" in the state proceedings. (SPA-31.) That concession and Attorney General Healey's failure to build an adequate record to support her affirmative defense weigh decisively against a determination that the narrow state proceedings provided a full and fair opportunity to litigate.

At its core, the District Court's res judicata ruling appears influenced by an unfounded accusation of claim splitting. (SPA-32 n.22.) That was inaccurate and unfair. ExxonMobil raised all of its claims in this first-filed federal action, which unlike the state proceedings in Massachusetts could be brought against both Attorney General Schneiderman and Attorney General Healey. (JA-54, 392.) It then filed a protective motion in state court to comply with state law, on pain of forfeiture, and asked the state court to stay its proceedings. (JA-1048–50.) That orderly and appropriate sequence of events renders particularly unfounded the attribution of an improper purpose to ExxonMobil's challenge to the CID.

Nevertheless, Judge Caproni faulted ExxonMobil for "not explain[ing] why it was forced to bring its federal claims in Texas." (SPA-30.) ExxonMobil was not forced to do anything in Texas. It chose to commence this lawsuit, as was its

prerogative, in the district where it resides and exercises its First Amendment rights. *See Woodford v. Cmty. Action Agency of Greene Cty., Inc.*, 239 F.3d 517, 525 (2d Cir. 2001). While ExxonMobil could have also commenced a plenary action in Massachusetts federal or state court, it was under no obligation to do so. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 250 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (“When federal claims are premised on 42 U.S.C. § 1983, a plaintiff is not required to exhaust state judicial or administrative remedies” or to bring their “federal constitutional challenge[s] in state court before resorting to this Court.” (alterations omitted)). Judge Caproni’s criticism of ExxonMobil for commencing this action in Texas is just as erroneous as her decision to apply res judicata. The litigation in Massachusetts state court has no preclusive effect here.

CONCLUSION

ExxonMobil has alleged facts in its complaint that are sufficient to state a claim for relief. Drawing specific factual allegations from the public record, ExxonMobil presented a coherent and plausible account of the Attorneys General’s use of state power to engage in viewpoint discrimination and target ExxonMobil’s speech about climate change. If ExxonMobil’s allegations are insufficient to state a claim under the First Amendment, then those improperly targeted by the “forward thinkers” in government, about whom Justice Kennedy recently warned, will be

deprived of a forum to prove their claims and seek redress. No valid principle of law requires that result. It was similarly erroneous for the District Court to dismiss ExxonMobil's claims under the Fourth and Fourteenth Amendments, the Commerce Clause, and the conspiracy statute. The District Court's judgment should be vacated and the cause remanded with instructions to accept the SAC and proceed to discovery.

Dated: August 3, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4). It contains 13,983 words, excluding the parts of this document exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Date: August 3, 2018

/s/ Justin Anderson
Justin Anderson

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EXXON MOBIL CORPORATION,	:	
	:	
Plaintiff,	:	17-CV-2301 (VEC)
	:	
-against-	:	
	:	<u>OPINION AND ORDER</u>
ERIC TRADD SCHNEIDERMAN, Attorney	:	
General of New York, in his official capacity,	:	
and MAURA TRACY HEALEY, Attorney	:	
General of Massachusetts, in her official	:	
capacity,	:	
Defendants.	:	
-----	X	

VALERIE CAPRONI, United States District Judge:

Running roughshod over the adage that the best defense is a good offense, Exxon Mobil Corporation (“Exxon”) has sued the Attorneys General of Massachusetts and New York (collectively “the AGs”),¹ each of whom has an open investigation of Exxon. The AGs are investigating whether Exxon misled investors and the public about its knowledge of climate change and the potential effects that climate change may have on Exxon’s business. Exxon contends the investigations are being conducted to retaliate against Exxon for its views on climate change and thus violate Exxon’s constitutional rights. The relief requested by Exxon in this case is extraordinary: Exxon has asked two federal courts—first in Texas, now in New York—to stop state officials from conducting duly-authorized investigations into potential fraud.

¹ The Attorney General of Massachusetts is Maura Tracy Healey (“Healey” and with her office, the “MAG”); Eric Tradd Schneiderman is the Attorney General of New York (“Schneiderman” and with his office, the “NYAG”).

Claude Walker, the Attorney General of the Virgin Islands had also opened an investigation of Exxon and served it with a subpoena. *See* Declaration of Justin Anderson in Support of Motion for Leave to Amend (“Anderson SAC Decl.”) (Dkt. 252) Ex. A (proposed Second Amended Complaint or “SAC”) ¶ 101. Exxon brought a separate lawsuit against Walker in Texas state court. *See* SAC ¶ 10. That lawsuit was dismissed after Walker withdrew his subpoena.

It has done so on the basis of extremely thin allegations and speculative inferences. The factual allegations against the AGs boil down to statements made at a single press conference and a collection of meetings with climate-change activists. Some statements made at the press conference were perhaps hyperbolic, but nothing that was said can fairly be read to constitute declaration of a political vendetta against Exxon.

Healey and Schneiderman have moved to dismiss Exxon's First Amended Complaint (the "Complaint") (Dkt. 100) on numerous grounds: personal jurisdiction, ripeness, *res judicata*, abstention pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and that the Complaint fails to state a claim. The AGs have reserved their other defenses, including abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and qualified immunity, for subsequent motion practice, if necessary. Exxon has opposed the AGs' motions and cross-moved for leave to amend in order to file the SAC. The AGs argue that leave to amend should be denied as futile because the SAC also fails to state a claim.

For the reasons given below, the Court concludes that Healey is subject to this Court's jurisdiction and that Exxon's claims against the AGs are ripe for adjudication. The Complaint and SAC suffer from a more fundamental flaw, however: Exxon's allegations that the AGs are pursuing bad faith investigations in order to violate Exxon's constitutional rights are implausible and therefore must be dismissed for failure to state a claim. For the same reason, amendment and filing of the SAC would be futile. Additionally, Exxon's lawsuit against Healey is precluded by *res judicata*. The Court does not reach whether abstention would be appropriate pursuant to *Colorado River*. The motions to dismiss are GRANTED, leave to amend is DENIED, and the Complaint is DISMISSED WITH PREJUDICE.

BACKGROUND

1. The New York Subpoenas and Massachusetts CID

In November 2015, the NYAG served Exxon with a subpoena seeking documents related to its historical knowledge of climate change and its communications with interest groups and shareholders regarding the same. Compl. ¶¶ 20, 65-68. The subpoena was issued in connection with an investigation into deceptive and fraudulent acts in violation of New York Executive Law Art. 5 § 63(12) and New York General Business Law Art. 22-A, and the Martin Act, New York General Business Law Art. 23-A, which prohibits fraudulent practices in connection with securities issued or sold in New York. Declaration of Justin Anderson (“Anderson Decl.”) (Dkt. 227) Ex. B (the “Subpoena”) at 1; Compl. ¶ 62. As Schneiderman explained at a press conference discussed in detail below, the NYAG was investigating whether Exxon’s historical securities filings were misleading because they failed to disclose Exxon’s internal projections regarding the potential costs to Exxon of climate change and likely climate change-related regulations. Compl. ¶ 36. Among other things, the Subpoena demanded that Exxon produce documents relevant to: Exxon’s research and internal deliberations concerning climate change since 1977, Exxon’s communications concerning climate change with certain oil and gas interests since 2005, Exxon’s support for outside organizations regarding climate change since 1977, and Exxon’s marketing, advertising, and public relations materials concerning climate change since 1977. Subpoena at 8-9; Compl. ¶¶ 65-66. The Subpoena was followed by an August 2016 subpoena served on PricewaterhouseCoopers (“PwC”), Exxon’s outside auditor. Opp’n (Dkt. 228) at 12. In response, and after some disputes over the scope of the Subpoena, Exxon produced at least 1.4 million pages of documents to the NYAG. *See infra* at 12.

Approximately one year later, in fall 2016, the NYAG requested additional documents relevant to what Exxon calls the “stranded assets theory.” Compl. ¶¶ 75-76. Under this theory, Exxon’s past disclosures of the value of its oil and gas reserves may have been overstated because Exxon did not account for the potential impact of new regulations designed to reduce harmful emissions on the economics and feasibility of extracting certain oil and gas reserves. Compl. ¶ 75. These reserves would be “stranded” because it would no longer be economically feasible for Exxon to extract them. If Exxon’s internal models showed that certain reserves were likely to be stranded, Exxon might have been required to disclose those facts to the market. Relatedly, according to Exxon, the NYAG is also investigating the possibility that certain of Exxon’s assets may be impaired and that Exxon’s public disclosures do not account for that impairment.² Compl. ¶ 79. Exxon has engaged in a “dialogue” with the NYAG regarding these demands. Compl. ¶ 76. In May and July, 2017, the NYAG served Exxon with subpoenas for testimony and documents relative to these theories. SAC ¶ 86.

About six months after the NYAG served its first subpoena on Exxon, the MAG served Exxon with a Civil Investigative Demand (the “CID”) to pursue a similar fraud theory. Compl. ¶ 69. The CID was issued as part of an investigation into potential violations of Massachusetts General Law ch. 93A § 2, which prohibits “unfair or deceptive acts or practices” in “trade or commerce.” Compl. ¶ 69. Like the Subpoena, the CID demands internal Exxon documents regarding climate change since the 1970s, Compl. ¶ 72; Anderson Decl. Ex. C (Civil Investigative Demand or the “CID”) at 12, and records of communications between Exxon and other energy companies, affiliated interest groups, and conservative policy organizations, CID at

² According to Exxon, the NYAG is no longer investigating Exxon’s historical knowledge of climate change. SAC ¶ 92.

13, 18; Compl. ¶ 73. The CID also demands records related to specific reports prepared by Exxon and statements by Exxon officers regarding climate change. CID at 14-16.³ For example, the CID demands any documents and communications concerning a paper entitled “*CO₂ Greenhouse Effect A Technical Review*,” which was prepared by Exxon researchers in 1982, and a 2014 report to shareholders entitled “*Energy and Carbon – Managing the Risks*.” CID at 13, 16. Broadly, the CID demands “Documents and Communications concerning any public statement [former CEO Rex W. Tillerson]⁴ has made about Climate Change or Global Warming from 2012 to present.” CID at 15. Like the Subpoena, the CID also demands documents relevant to Exxon’s discussion of climate change in marketing materials and securities filings. *See* CID at 17-19.

2. Exxon’s Lawsuit⁵

Exxon brought this lawsuit on June 15, 2016, two months after receiving the CID and eight months after receiving the Subpoena. The Complaint alleges that the CID and the Subpoena are part of a conspiracy to “silence and intimidate one side of the public policy debate on how to address climate change.” Compl. at 1. The overt portion of this campaign is a coalition of state attorneys general, including Healey and Schneiderman, called the “AGs United for Clean Power” or “Green 20.” Compl. ¶ 27. The AGs United for Clean Power held a conference and press event with former Vice President Al Gore in New York on March 29, 2016, to announce a plan to take “progressive action to address climate change.” Compl. ¶ 27.

³ The Court has only summarized the demands in the CID and Subpoena. Both document demands are attached to the Complaint.

⁴ Mr. Tillerson left Exxon to serve as Secretary of State of the United States in December 2016.

⁵ At this stage, the Court assumes as true the factual allegations in the Complaint and the SAC.

Schneiderman spoke at the March 29, 2016, press event and said that the conference's purpose was to "com[e] up with creative ways to enforce laws being flouted by the fossil fuel industry and their allies" Anderson Decl. Ex. A (Tr. of March 29, 2016, press conference) at 1. He described climate change as the "most important issue facing all of us," and described the conference as a "collective of states working as creatively, collaboratively and aggressively as possible."⁶ Anderson Decl. Ex. A at 2. Schneiderman also linked the AGs United for Clean Power conference to inaction at the federal level to address climate change: "[W]e know that in Washington there are good people who want to do the right thing on climate change but everyone . . . is under a relentless assault from well-funded, highly aggressive and morally vacant forces"⁷ Anderson Decl. Ex. A at 4.

Healey also spoke at the March 29, 2016, press conference and said that "[c]limate change is and has been for many years a matter of extreme urgency. . . . 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." Anderson

⁶ Schneiderman went on to explain that his office had recently reached a settlement with Peabody Energy, a coal company, which agreed to restate its financial disclosures to provide clarification regarding Peabody's internal modeling of the cost to its business of government regulation of emissions. Anderson Decl. Ex. A at 3. Schneiderman said that the NYAG was pursuing a similar theory against Exxon. Anderson Decl. Ex. A at 3. Seemingly anticipating this lawsuit, Schneiderman stated:

There have been those who have raised the question: aren't you interfering with people's First Amendment rights? The First Amendment, ladies and gentlemen, does not give you the right to commit fraud. And we are law enforcement officers, all of us do work, every attorney general does work on fraud cases. And we are pursuing this as we would any other fraud matter. You have to tell the truth. You can't make misrepresentations of the kinds we've seen here.

Anderson Decl. Ex. A at 3-4. The transcript of the March 29, 2016 conference is quoted extensively in the Complaint.

⁷ According to the SAC, Schneiderman has previously made public statements regarding the "importance of 'challenging those who refuse to acknowledge that climate change is real.'" SAC ¶ 28 (quoting Anderson SAC Decl. Ex. S5 at 7).

Decl. Ex. A at 12; Compl. ¶ 32. Referencing Schneiderman’s earlier comments regarding Exxon’s disclosures (quoted *supra* n. 6), Healey said “[t]hat’s why I, too, have joined in investigating the practices of [Exxon]. 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.” Anderson Decl. Ex. A at 12; Compl. ¶ 37.

In a wild stretch of logic, Exxon contends that the AGs’ “overtly political tone,” Compl. ¶ 38, and comments on public “confusion” relative to climate change show that their intent is to chill dissenting speech, Compl. ¶ 31; *see also id.* ¶ 31 (“To [Schneiderman], 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 . . .’”). And, Exxon alleges, the AGs’ comments demonstrate that they have prejudged the outcome of their investigations, presuming Exxon’s guilt from the get-go. Compl. ¶¶ 36- 37.⁸

The Complaint alleges that the March 29, 2016, conference was the culmination of a behind-the-scenes push by climate change activists. Among the activists allegedly involved are Peter Frumhoff, Director of Science and Policy for the Union of Concerned Scientists, Compl. ¶ 42, who previously contributed to a report titled “Smoke, Mirrors, and Hot Air: how ExxonMobil Uses Big Tobacco’s Tactics to Manufacture Uncertainty on Climate Science,” Compl. ¶ 44. Also allegedly involved is Matthew Pawa, a self-described specialist in “climate change litigation.” Compl. ¶ 45. The Complaint describes the development by Pawa, Frumhoff, and the private Rockefeller Family Fund of a strategy to promote litigation against fossil fuel producers, including, in particular, Exxon. Compl. ¶¶ 46-49. Pawa and Frumhoff allegedly

⁸ The Attorneys General involved in the AGs United for Clean Power coalition have entered into a common interest agreement, which includes a confidentiality provision. Compl. ¶¶ 52-53. Exxon contends, *ipse dixit*, that the AGs’ interest in confidentiality is evidence of the coalition’s intent to chill protected speech. Compl. ¶ 53.

made presentations to the AGs United for Clean Power at the March 29, 2016, conference, Compl. ¶¶ 44-45, but when Pawa was asked for comment by a *Wall Street Journal* reporter, a member of the NYAG's office requested that he "not confirm" his attendance at the conference. Compl. ¶ 50.

The SAC adds detail to the Complaint's allegations regarding Pawa and Frumhoff and the Rockefeller Family Fund. According to the SAC, Pawa, Frumhoff, and others hatched a scheme to promote litigation against Exxon at a June 2012 conference in La Jolla, California. SAC ¶ 44. These activists saw litigation as a means to uncover internal Exxon documents regarding climate change and to pressure fossil fuel companies like Exxon to change their stance on climate change. SAC ¶ 45. In January 2016, at a conference at the offices of the Rockefeller Family Fund, the activists discussed the "the main avenues for legal actions & related campaigns," including 'AGs,' 'DOJ,' and 'Torts,'" and which options "had the 'best prospects' for (i) 'successful action,' (ii) 'getting discovery,' and (iii) 'creating scandal.'" SAC ¶ 53 (quoting Anderson SAC Decl. Ex. S1 at 1-2). Exxon connects this strategy to a few meetings attended by staff from various state attorneys general, SAC ¶¶ 39, 46, 48, and records of communications and information-sharing between the activists, the NYAG, and other state attorneys general, SAC ¶¶ 48, 56-58, 67-69. For example, there was a conference at Harvard Law School in April 2016 entitled "Potential State Causes of Action Against Major Carbon Producers: Scientific, Legal and Historical Perspectives," which included an hour-long session on "state causes of action" such as "consumer protection claims" and "public nuisance claims." Anderson SAC Decl. Ex. S47 at 1-2.⁹

⁹ The other two meetings at which Exxon alleges there was commingling of environmental activists and staff from the AGs occurred in June 2015 and on the day of the March 29, 2016, conference.

The Complaint also alleges the document requests themselves demonstrate that the investigations are politically motivated. Exxon contends that the AGs' legal theories are so flawed—in terms of a factual or jurisdictional basis—that the only rational explanation is that the AGs are motivated by animus towards Exxon, rather than by a good faith belief that Exxon may have violated state law. It argues, for example, that the statutes cited by the NYAG have six-year statutes of limitations at most, but the Subpoena requests documents dating to 1977. This is evidence, according to Exxon, of an intent to harass rather than to conduct a good faith investigation of potential violations of law. Compl. ¶¶ 62-63. And, according to Exxon, with limited and irrelevant exceptions, it has not sold any products or securities in Massachusetts during the applicable limitations period. Compl. ¶ 70; *see also* Compl. ¶¶ 68, 71 (alleging the Subpoena and CID seek documents with no connection to Exxon's activities in New York and Massachusetts). Both the Subpoena and CID demand Exxon's communications with oil and gas interest groups, which, according to Exxon, demonstrates the AGs' political bias because communications with private parties have no relevance to Exxon's public disclosures. Compl. ¶¶ 66, 73. Exxon believes that the NYAG's shift in theories—from whether Exxon made misleading disclosures regarding its knowledge of climate change to whether it appropriately disclosed the value of assets likely to be stranded or impaired because of climate change—is evidence of an investigation in search of a crime, further demonstrating the NYAG's improper purpose. Compl. ¶ 76. According to Exxon, the stranded assets theory is also inconsistent with SEC guidance regarding disclosure of proved reserves. Compl. ¶¶ 77-81.

Based on these allegations, Exxon alleges the NYAG and MAG are retaliating against Exxon for its speech relative to climate change and the “policy tradeoffs of certain climate initiatives.” SAC ¶ 123; *see also* SAC ¶¶ 120-124 (elaborating on Exxon's current position

regarding climate change). Exxon asserts seven causes of action: for conspiracy to deprive Exxon of its constitutional rights pursuant to 42 U.S.C. § 1985, Compl. ¶¶ 105-08; for violations of Exxon's free speech rights pursuant to the First Amendment, and right to be free from unreasonable searches pursuant to the Fourth Amendment, Compl. ¶¶ 109-11, 112-14; for violations of Exxon's right to due process pursuant to the Fourteenth Amendment, Compl. ¶¶ 115-17; for violations of the Dormant Commerce Clause, Compl. ¶¶ 118-21; preemption of Massachusetts and New York law to the extent they conflict with applicable SEC regulations, Compl. ¶¶ 122-26; and common law abuse of process, Compl. ¶¶ 127-28. As revised in the SAC, Exxon demands broad relief, including a declaratory judgment that the AGs' investigations violate Exxon's constitutional rights, SAC at 58, and an injunction "halting or appropriately limiting the investigations," SAC at 59.¹⁰

3. Litigation in Massachusetts and New York

One day after filing its federal lawsuit against Healey (but not Schneiderman) in Texas, Exxon petitioned a Massachusetts Superior Court to set aside the CID and to disqualify Healey from the investigation. Opp'n at 10. Exxon's petition alleged that the CID violates the Massachusetts constitution's protections for free speech and against unreasonable searches and seizures, is arbitrary and capricious, and that Exxon is not subject to personal jurisdiction in Massachusetts. Declaration of Christophe G. Courchesne ("Courchesne Decl.") (Dkt. 218) Ex. 2 (the "Petition") ¶¶ 16-22. The Petition relied on substantially the same factual allegations as the Complaint. Citing the March 29, 2016, conference and the AGs United for Clean Power coalition, the Petition alleged that the CID is intended to chill Exxon's free speech. *See* Petition

¹⁰ The Complaint requested only an injunction prohibiting enforcement of the CID and Subpoena. *See* Compl. at 47. In response to the Court's inquiry at oral argument, Exxon has revised its prayer for relief.

¶¶ 13-14, 61-63; *see also id.* ¶¶ 16-22 (among other things, quoting the same statements by Healey and Schneiderman at the March 29, 2016, press conference as are quoted in the Complaint). The Petition included, *verbatim* (or nearly *verbatim*), the same allegations regarding Pawa and Frumhoff. Petition ¶¶ 28-35. Like the Complaint (and in nearly identical language), the Petition also alleged that the CID’s demand for communications between Exxon and other oil and gas interests and affiliated organizations demonstrates that the MAG investigation is politically motivated, and it alleged that Exxon could not have violated Massachusetts law because it has not sold fuel or securities in Massachusetts during the applicable limitations period. Petition ¶¶ 40-48. Noting the potential overlap between the Petition and Complaint, Exxon requested that the Massachusetts Superior Court stay proceedings pending the outcome of the federal litigation it had commenced the day before in Texas. *See* Petition ¶ 71 (“Staying the adjudication of this Petition would avoid the possibility of duplication or inconsistent rulings . . . , and will serve the interests of judicial economy and efficiency and the principles of comity.”). The MAG cross-moved to compel Exxon to comply with the CID. Opp’n at 11.

On January 11, 2017, the Massachusetts Superior Court denied Exxon’s petition to set aside the CID and granted the MAG’s petition to compel. Anderson Decl. Ex. OO (the “Massachusetts Decision”).¹¹ The Superior Court found that Exxon was subject to personal jurisdiction in Massachusetts by virtue of its control over franchisees operating Exxon-branded gas stations in the Commonwealth. Mass. Decision at 8. The Superior Court also rejected Exxon’s argument that the CID was arbitrary and capricious because the MAG did not have a

¹¹ The Court may take judicial notice of the Massachusetts Decision and transcripts of the proceedings before the Massachusetts Superior Court and the New York Supreme Court. *See Bentley v. Dennison*, 852 F. Supp. 2d 379, 382 n.5 (S.D.N.Y. 2012) (“Judicial notice of public records is appropriate—and does not convert a motion to dismiss into a motion for summary judgment—because the facts noticed are not subject to reasonable dispute and are capable of being verified by sources whose accuracy cannot be reasonably questioned.”).

“‘reasonable belief’ of wrongdoing.” Mass. Decision at 8-9. Turning to the viewpoint discrimination theory that is the core of the Complaint, the Court wrote:

Exxon also argues that the CID is politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming. As discussed above, however, the court finds that the Attorney General [Healey] has assayed sufficient grounds – her concerns about Exxon’s possible misrepresentations to Massachusetts consumers – upon which to issue the CID. In light of these concerns, the court concludes that Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it.

Mass. Decision at 9. The Superior Court also denied Exxon’s motion to disqualify Healey holding that her comments at the AGs United for Clean Power conference did not show any bias:

“In the Attorney General’s comments at the press conference, she identified the basis for her belief that Exxon failed to disclose relevant information to Massachusetts consumers. These remarks do not evidence any actionable bias on the part of the Attorney General: instead it seems logical that the Attorney General inform her constituents about the basis for her investigations.”

Mass. Decision at 12. Although the Superior Court said it would not consider Exxon’s free speech claim because any misleading or deceptive speech by Exxon “is not entitled to any free speech protection,” it effectively rejected the claim when it found the CID was not issued in bad faith to chill Exxon’s free speech rights. Mass. Decision at 9 n.2.

Exxon appealed the Superior Court’s order on February 8, 2017. Opp’n at 11 n.42. Exxon’s appeal was transferred to the Massachusetts Supreme Judicial Court, where it remains pending as of the date of this opinion. Dkt. 236.

In contrast to its strategy in Massachusetts, Exxon initially complied with both New York subpoenas and had, by November 2016, produced over 1.4 million pages of responsive documents. Compl. ¶¶ 26, 74; Mass. Decision at 11. Nonetheless, in November 2016, Schneiderman’s office moved to compel compliance with the Subpoena in New York Supreme

Court.¹² Memorandum of Law in Support of the NYAG’s Motion to Dismiss (“NY Mem.”) (Dkt. 220) at 10. The parties have taken inconsistent positions on whether Exxon has been compelled to produce documents by the New York Supreme Court. Until recently, the parties took the position that Exxon’s compliance with the Subpoena was consensual, based on a compromise refereed by the assigned Supreme Court justice, Barry Ostrager. *See* NY Mem. at 10-11 (Exxon and the NYAG have appeared four times before the Supreme Court to discuss the parameters of Exxon’s productions); Opp’n at 12, 25 (characterizing the proceedings before Justice Ostrager as an “unsuccessful attempt to compel ExxonMobil to produce documents outside the scope of the November 2015 subpoena” and “discovery conferences and letter writing related to ExxonMobil’s technical compliance); *see also* Opp’n at 25 (“Not a single opinion has issued from the New York state court, other than a ruling on whether the accountant-client privilege protects materials responsive to the PwC subpoena . . .”). At oral argument, however, the NYAG took the position that Justice Ostrager did require Exxon to comply with the NYAG’s initial subpoena and its subsequent requests for documents and testimony. *See* November 30, 2017 Hr’g Tr. (Dkt. 244) (“Hr’g Tr.”) at 64-65. The record before Justice Ostrager supports that position. For example, at a hearing on November 21, 2016, Justice Ostrager ordered the parties to agree to a schedule for productions or he would enter a formal order. *See* Declaration of Leslie B. Dubeck (“Dubeck Decl.”) (Dkt. 221) Ex. 10 (Nov. 21, 2016 Hr’g Tr.) at 24-26. Justice Ostrager and the parties contemporaneously described the resolution of the parties’ dispute as a court order. *See* Dubeck Decl. Ex. 13 (Jan. 9, 2017 Hr’g Tr.) at 17-18 (“What I’ve ordered in my judgment will assure that along with a lot of false positives you are

¹² The NYAG also moved to compel compliance with the PwC subpoena. PwC and Exxon resisted compliance with the PwC subpoena on the grounds of “accountant-client” privilege. Justice Ostrager rejected that argument and ordered PwC to comply. NY Mem. at 9-10. That decision is currently pending on appeal before the New York Supreme Court Appellate Division, First Department. NY Mem. at 10.

going to get the documents that you really want.”). Follow-on directions were issued by the court at subsequent hearings. *See* Dubeck Decl. Ex. 15 (March 22, 2017 Hr’g Tr.) at 27-29. In its supplemental brief in opposition to the motions to dismiss, Exxon has echoed the NYAG’s position that its compliance with the Subpoena has been compelled. *See* Supp. Opp’n (Dkt. 249) at 21. Although the shifting of positions on a fairly straightforward issue is curious, the Court takes the NYAG’s position at oral argument as a concession that Exxon has been compelled by the New York Supreme Court to provide documents and testimony in connection with the Exxon investigation.¹³

4. Proceedings in Texas

This case was initially filed on June 15, 2016, in the Northern District of Texas against Healey. Exxon moved for a preliminary injunction, Dkt. 8, and Healey cross-moved to dismiss on the grounds that she was not subject to the Texas court’s personal jurisdiction, that the case was not ripe, that *Younger* abstention was appropriate, and for improper venue. Dkts. 41, 42. Although Exxon did not request discovery, the district judge *sua sponte* ordered jurisdictional discovery to address whether the “bad faith” exception to *Younger* abstention should apply. Dkt. 73 at 5-6. On October 17, 2016, Exxon successfully moved to file an amended complaint that added Schneiderman and the New York investigation to the Texas litigation. Dkt. 74. As to discovery, the court reversed course on December 12th and 15th, 2016, stayed its prior discovery order, and directed the parties to brief whether the court had personal jurisdiction over the AGs.¹⁴

¹³ Because the SAC (unlike the Complaint) seeks to enjoin the NYAG’s investigation writ large—as opposed to only enforcement of the Subpoena—this issue has less significance than it did previously. There is no dispute that Exxon, and its auditor, PwC, have been compelled to produce documents and testimony in response to the NYAG’s other subpoenas.

¹⁴ In the meantime, the AGs had moved to stay the court’s orders while they sought mandamus relief in the Fifth Circuit. Dkts. 151, 156.

Dkts. 158, 162, 163, 164. Although no party proposed transferring the case, on March 29, 2017, Judge Kinkeade *sua sponte* transferred the case to this court on the theory that personal jurisdiction might be proper in this District.¹⁵ Dkt. 180.

After a conference with the parties, the Court entered an order requiring the parties to re-brief the motions to dismiss under Second Circuit law. Dkts. 216, 219. At oral argument on November 30, 2017, the Court ordered the parties to provide supplemental briefing on whether the Complaint states a claim. Exxon cross-moved for leave to amend on January 12, 2018. Dkt. 250.

DISCUSSION

1. Ripeness

“The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130 (2d Cir. 2008) (Sotomayor, J.) (quoting *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003)). The constitutional aspect of ripeness concerns whether a case presents a case and controversy within the meaning of Article III of the Constitution. *See Am. Savings Bank, FSB v. UBS Fin. Servs., Inc.*, 347 F.3d 436, 439 (2d Cir. 2003) (per curiam) (citing *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003)). The prudential aspect of ripeness “is a more flexible doctrine of jurisprudence, and constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it.” *Simmonds*, 326 F.3d at 357. Prudential ripeness is concerned with whether a case will be better decided in the future, such that the Court may “enhance the accuracy of [its] decisions and []

¹⁵ Despite transferring this case, Judge Kinkeade believed it was appropriate to express his views on the merits of Exxon’s allegations. *See, e.g.*, Dkt. 180 at 9-11. Although Exxon seizes on these comments, they are entirely *dicta* and are irrelevant to the motions before this court.

avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination, of, especially, constitutional issues that time may make easier or less controversial.” *Id.*

The AGs have moved to dismiss pursuant to the prudential ripeness doctrine. “To determine whether a challenge . . . is ripe for judicial review, we proceed with a two-step inquiry, ‘requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Grandeau*, 528 F.3d at 131–32 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The fitness inquiry asks whether the issues for decision will be further clarified over time or “are contingent on future events or may never occur.” *Am. Savings Bank, FSB*, 347 F.3d at 440 (quoting *Simmonds*, 326 F.3d at 359) (additional citations omitted). The hardship analysis asks “whether and to what extent the parties will endure hardship if [a] decision is withheld.” *Grandeau*, 528 F.3d at 134 (quoting *Simmonds*, 326 F.3d at 359). “Assessing the possible hardship to the parties” requires the Court to “ask whether the challenged action creates a direct and immediate dilemma for the parties,” *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478 (2d Cir. 1999) (citing *Abbott Labs.*, 387 U.S. at 152-53); that is, whether there is “some present detriment” rather than the “mere possibility of future injury,” *Simmonds*, 326 F.3d at 360.

The Second Circuit has had occasion to apply the prudential ripeness doctrine to an executive subpoena for documents. In *Schulz v. IRS*, a taxpayer sued in federal court to quash a “series of administrative summonses seeking testimony and documents in connection with an IRS investigation.” 395 F.3d 463, 463 (2d Cir. 2005) (per curiam). At the time of the suit, the IRS had not sought to compel production of the documents. *Id.* Because IRS summonses are not self-executing—that is, the IRS must seek judicial intervention to compel production—a

magistrate judge, and then the District Court, concluded that the suit was not ripe. *Id.* at 463-64. The Second Circuit affirmed. The Circuit explained that Schulz's lawsuit was not ripe because "[t]he IRS has not initiated any enforcement procedure against Schulz and, therefore, what amounts to requests do not threaten any injury to [him]. . . . [I]f the IRS should, at a later time, seek to enforce these summonses, then the procedures set forth in [the Internal Revenue Code] will afford Schulz ample opportunity to seek protection from the federal courts." *Id.* at 464. Schulz's lawsuit was unfit for decision (because Schulz might never be compelled to produce documents) and lacking in hardship (because Schulz was not subject to any penalties for non-compliance).¹⁶

The reasoning in *Schulz* applies equally to review of state action. In *Google, Inc. v. Hood*, the Fifth Circuit concluded that a federal challenge to a Mississippi state subpoena was not ripe because the state's subpoena was not self-executing and required judicial intervention before the recipient could be compelled to produce documents. 822 F.3d 212, 224-25 (5th Cir. 2016). Relying on the same body of law cited in *Schulz*, the Fifth Circuit explained:

The only real difference is that we have before us a state, not federal, subpoena. But we see no reason why a state's non-self-executing subpoena should be ripe for review when a federal equivalent would not be. If anything, comity should make us less willing to intervene when there is no current consequence for resisting the subpoena and the same challenges raised in the federal suit could be litigated in state court.

Id. at 226. This Court agrees that a state's non-self-executing subpoena is not legally distinguishable for these purposes from the federal equivalent.

Unlike in *Schulz* and *Hood*, Exxon has been compelled to comply with the CID, the Subpoena, and other subpoenas issued by the NYAG. *See supra* at 13-14. The Court recognizes

¹⁶ *Schulz* recognized that, under *Ex Parte Young*, a litigant is not required to risk an enforcement action in order to challenge executive action. *See Schulz*, 395 F.3d at 465. An exception exists, however, where executive action is not self-enforcing and an individual may not be penalized for non-compliance until after there has been judicial review. *See id.* at 465 (citing *Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964)).

that the record before Justice Ostrager is open to interpretation, but the NYAG conceded at oral argument that Exxon has been ordered to produce documents and give testimony. *See* Hr’g Tr. at 64-65. While the Subpoena was not self-executing, *see* N.Y. C.P.L.R. § 2308(b)(1) (“if a person fails to comply with a subpoena which is not returnable in a court, the issuer . . . may move in the supreme court to compel compliance”), Exxon could be subject to contempt sanctions for failing to comply with Justice Ostrager’s orders. *See* N.Y. Jud. L. § 753(A)(1), (5); *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983) (a person or party may be held in contempt for violating “a lawful order of the court, clearly expressing an unequivocal mandate” if it is shown the party “had knowledge of the court’s order” and the other party has been prejudiced). Even if Exxon has not been compelled to comply with the Subpoena itself, the parties have never questioned that Exxon has been required to comply with the NYAG’s subsequent subpoenas for documents and testimony. *See* Hr’g Tr. at 6; Declaration of Leslie B. Dubeck (“Dubeck Reply Decl.”) (Dkt. 235) Ex. 6 (June 16, 2017 Hr’g Tr.) at 77. Likewise, the Superior Court in Massachusetts denied Exxon’s motion to quash the CID and ordered Exxon to produce documents, meaning Exxon is currently subject to a court order to produce responsive documents. Exxon faces an immediate sanction for failure to comply with the Superior Court’s order, which was not stayed pending appeal. *See* Mass. Decision at 13. It is only because of a stipulation between Healey and Exxon that Exxon has not been forced to comply with the CID.

Because Exxon cannot refuse to respond to the document demands without consequence, Exxon’s claims are ripe.

2. Personal Jurisdiction

Healey has moved to dismiss arguing that this court lacks personal jurisdiction over her. Exxon bears the burden of establishing personal jurisdiction. “Prior to trial, [] when a motion to

dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a *prima facie* showing.” *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir. 2012) (quoting *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993)). The Court engages in a familiar two-step analysis, first determining whether plaintiffs have made a *prima facie* showing that the defendants would be subject to personal jurisdiction under the laws of the forum state and, if so, then determining whether exercise of jurisdiction would comport with the Due Process Clause of the Fourteenth Amendment. *Id.* The Court will construe “all pleadings and affidavits in the light most favorable to the plaintiff” and resolve “all doubts in the plaintiff’s favor.” *Penguin Group (USA) Inc. v. American Buddha*, 609 F.3d 30, 34 (2d Cir. 2010) (citations omitted). On the other hand, the Court need not accept either party’s legal conclusions as true, nor will it draw “argumentative inferences” in either party’s favor. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012).

Exxon alleges that the Court has specific personal jurisdiction over Healey pursuant to N.Y. C.P.L.R. § 302(a)(1) and (a)(2). That statute confers personal jurisdiction “over any non-domiciliary . . . who in person or through an agent[] transacts any business within the state or contracts anywhere to supply goods or services in the state.” “[T]o invoke jurisdiction under section 302(a)(1), plaintiff must demonstrate that defendant transacted business within New York State, and that that business had some nexus with this cause of action.” *Philipp Bros., Inc. v. Schoen*, 661 F. Supp. 39, 41 (S.D.N.Y. 1987). Jurisdiction under C.P.L.R. § 302(a)(1) is proper “so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007) (quoting *Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs.*, 7 N.Y.3d 65, 71

(2006)). “No single event or contact connecting defendant[s] to the forum state need be demonstrated; rather, the totality of all defendants’ contacts with the forum state must indicate that the exercise of jurisdiction would be proper.” *CutCo Indus, Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986). Although this “is an objective inquiry, it always requires a court to closely examine the defendant[s’] contacts for their quality.” *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 338 (2012).

Exxon bases personal jurisdiction in this forum on Healey’s attendance at the kickoff conference and press event for the AGs United for Clean Power on March 29, 2016, in New York.¹⁷ Whether a single meeting in New York is sufficient to establish personal jurisdiction under Section 302(a)(1) depends on the significance of the meeting to the claim and the relationship between the meeting and the wrongful act. *See Gates v. Pinnance Comm’ns Corp.*, 623 F. Supp. 38, 41-42 (S.D.N.Y. 1985) (whether a single meeting is adequate to establish jurisdiction depends on the circumstances). Jurisdiction is potentially appropriate on the basis of a single meeting when the meeting plays a “significant role in establishing or substantially furthering the relationship of the parties.” *Posven, C.A. v. Liberty Mut. Ins. Co.*, 303 F. Supp. 2d 391, 398 (S.D.N.Y. 2004).

Read charitably, the Complaint alleges that Healey and several other attorneys general formalized their conspiracy against Exxon at the March 29, 2016, conference, which they then announced as the AGs United for Clean Power. *See* Compl. ¶ 39 (discussing statement of principles for a coalition of attorneys general circulated in advance of the March 29, 2016, meeting); Anderson Decl. Ex. A at 1 (quoting Schneiderman as describing the March 29, 2016,

¹⁷ The Complaint made no effort to specifically plead personal jurisdiction in New York because it was originally filed in Texas. Nonetheless, the allegations are sufficient as currently drafted to plead personal jurisdiction in this forum.

meeting as a “first of its kind conference of attorneys general dedicated to coming up with creative ways to enforce laws being flouted by the fossil fuel industry”). Email traffic among staffers in advance of the conference and attached to the Complaint confirms that the March 29, 2016, meeting was a kickoff event for the coalition, *see* Anderson SAC Decl. Exs. M, N, and the conference included meetings and presentations, allegedly regarding a campaign against Exxon, *see also* Anderson Decl. Ex. F (agenda for March 29, 2016, conference). Accepted as true, these allegations establish personal jurisdiction under Section 302(a)(1), even on the basis of a single meeting.

The same allegations satisfy the Due Process Clause. Cases in which jurisdiction is proper under Section 302(a) but minimum contacts are inadequate under the Due Process Clause are “rare.” *Licci ex rel. Licci*, 732 F.3d at 170. A single in-forum meeting that is part of a conspiracy may be sufficient to establish jurisdiction. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003) (personal jurisdiction “arguably” established by defendant’s attendance at a meeting at which an antitrust conspiracy was discussed). Exxon alleges that the AGs formed a conspiracy to chill Exxon’s speech at a meeting in New York, which Healey attended; these allegations satisfy the minimum contacts analysis.

Jurisdiction over Healey is also “reasonable” under the circumstances. Courts in this Circuit consider five factors to determine whether jurisdiction is reasonable: “(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.” *Met. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996) (quoting *Asahi*

Metal Indus. Co., Ltd. v. Superior Court of California, 480 U.S. 102, 113-14 (1987)). Defending this action in New York, rather than Massachusetts, is undoubtedly a burden for Healey. The litigation could, however, be tailored to minimize disruption to Healey and her staff by, for example, conducting depositions in Massachusetts. Moreover, “the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.” *Foot Locker Retail, Inc. v. SBH, Inc.*, No. 03-CV-5050 (DAB), 2005 WL 91306, at *6 (S.D.N.Y. Jan. 18, 2005) (quoting *Met. Life Ins. Co.*, 84 F.3d at 574). The other *Asahi* factors weigh in favor of jurisdiction. New York is a convenient forum for Exxon and a significant aspect of the wrongful conduct alleged in the Complaint occurred in New York. The Court is mindful of the affront to state sovereignty posed by haling a state official into federal court, and a federal court in another state in particular. But the cases Healey cites for the proposition that it is unreasonable to exercise jurisdiction over an out-of-state official involved attempts to base jurisdiction on acts taken in order to enforce court orders. *See Adams v. Horton*, No. 13-CV-10, 2015 WL 1015339, at *7 (D. Vt. Mar. 6, 2015). And courts in this district have recognized that an out-of-state law enforcement officer’s “established relationship with [f]orum state officials” and close coordination of activities can be sufficient to establish personal jurisdiction. *Doe v. Del. State Police*, 939 F. Supp. 2d 313, 335 (S.D.N.Y. 2013).

Because Exxon has demonstrated that Healey is subject to personal jurisdiction under New York’s long arm statute and that exercising jurisdiction does not offend due process, Healey’s motion to dismiss for lack of personal jurisdiction is denied.

3. Preclusion

Healey contends that the Massachusetts Superior Court's decision to enforce the CID precludes relitigation of the issues and claims in this case. *See* Mass. Mem. (Dkt. 217) at 8-13. The parties made voluminous submissions to the Superior Court, which heard argument on the motions to compel and to set aside the CID, and Exxon is raising here essentially the same arguments it raised before that court.

a. Issue Preclusion

The Full Faith and Credit Act requires the Court to give the Massachusetts Decision the same preclusive effect it would have under Massachusetts law. *See* 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Massachusetts law “prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies.” *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). “Before precluding the party from relitigating an issue, ‘a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party . . . to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication.’”¹⁸ *Petrillo v. Zoning Bd. of Appeals of Cohasset*, 65 Mass. App. Ct. 453, 457-58 (Mass. App. Ct. 2006) (quoting *Kobrin v. Bd. of Registration in Med.*, 44 Mass. 837, 843 (2005)) (internal citations omitted).

Healey contends the Massachusetts Decision is a final decision that the CID was not issued in bad faith or motivated by bias and that the CID is not overbroad or unreasonable. *See* Mass. Mem. at 8-9. These issues were litigated in the Superior Court. For example, as Healey notes, Exxon explained to the Superior Court that: “Our position is that this is all about bad faith.

¹⁸ There is no dispute that the parties to this case and the Massachusetts proceeding are the same.

This is about regulating speech. It's about viewpoint discrimination." Mass. Reply (Dkt. 233) at 4 (quoting Courchesne Decl. (Dkt. 218) Ex. 6 (Dec. 7, 2016 Hr'g Tr.) at 44). These issues are also at the heart of Exxon's complaint in this action. *See* Compl. ¶¶ 109-11.

Despite the factual overlap between Exxon's arguments in this proceeding and the Massachusetts proceeding, the Court is not persuaded that Healey is entitled to issue preclusion. Issue preclusion does not bar relitigation of the same issue if the second proceeding involves a different or lower standard or burden of proof. *See Jarosz v. Palmer*, 436 Mass. 526, 531 (2002) ("The determination of an issue in a prior proceeding has no preclusive effect where 'the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action.'" (quoting Restatement (Second) of Judgments § 28(4) (1982))); *see also Tuper v. N. Adams Ambulance Serv., Inc.*, 428 Mass. 132, 135-36 (1998) (issue preclusion inapplicable to redetermination of factual issues applying a different standard). Applying this rule, the Second Circuit has held that a subpoena enforcement proceeding does not preclude relitigation of the same issues in a subsequent civil action. *See Sprecher v. Graber*, 716 F.2d 968, 972 (2d Cir. 1983).

The Superior Court was empowered to set aside the CID for "good cause." *See* Mass. Gen. L. ch. 93A § 6(7); *In re Yankee Milk, Inc.*, 372 Mass. 353, 358-59 (1977) (movant has the burden of showing "good cause" to modify or set aside a CID). The good cause standard vests considerable discretion in the superior court. A motion to set aside a CID is "analogous to a motion for a protective order pursuant to Mass. R. Civ. P. 26(c)." *Atty. Gen. v. Bodimetric Profiles*, 404 Mass. 152, 154 (1989). Massachusetts Rule 26(c), in turn, affords a "broad measure of discretion" to a trial judge. *Kimball v. Liberty Mut. Ins. Co.*, 1999 Mass. App. Div. 298, 1999 WL 1260846, at *3 (Mass App. Ct. Dec. 22, 1999); James W. Smith & Hiller B.

Zobel, Mass. Practice Series Rules Practice § 26.7 (2d ed.) (noting the “equity-oriented cast of a protective order”). And Massachusetts courts have made clear that a party seeking to set aside a CID has a “heavy burden” to do so. *See CUNA Mut. Ins. Soc. v. Atty. Gen.*, 380 Mass. 539, 544 (1980); *see also* Smith & Zobel, Mass. Practice Series L. of ch. 93A § 5.9 (“the trial judge’s discretion is limited by the policy that the provisions of 93A are to be construed liberally in favor of the government”). A deferential abuse of discretion standard of review applies on appeal. *See Hudson v. Comm’nr of Corr.*, 46 Mass. App. Ct. 538, 549 (Mass. App. Ct. 1999).¹⁹ This discretionary standard is more difficult to meet than the preponderance standard that applies to this action. This case is indistinguishable from *Sprecher*, and the Court finds that issue preclusion does not apply.

b. Claim Preclusion

Alternatively, Healey contends that each of Exxon’s claims is precluded under the doctrine of *res judicata*. According to Healey, the Massachusetts Decision is a “final” judgment under Massachusetts law, and each of Exxon’s claims is either the “same” claim as presented in Massachusetts, or could have been litigated in that forum: Exxon’s claims under the First, Fourth, and Fourteenth Amendments are federal analogs to state constitutional claims that were litigated in the Superior Court, and Exxon’s remaining claims (for common law abuse of process, preemption, and violations of the dormant commerce clause) each could have been raised by Exxon in Massachusetts. Memorandum of Law in Support of the MAG’s Motion to Dismiss (“Mass. Mem.”) (Dkt. 217) at 11-13.

¹⁹ Healey relies heavily on *Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178 (2d Cir. 1991), in which the Second Circuit held that a state court’s adjudication of state constitutional claims precluded relitigation of the same issues in a subsequent civil rights action in federal court. *Id.* at 184-85. *Temple of the Lost Sheep* is factually similar to this case, but there does not appear to have been any dispute in that case that the burden and standard of proof were the same in both proceedings. That is not the case here.

Res judicata, or claim preclusion, bars re-litigation of claims that were or could have been litigated in a previous proceeding. There are three requirements under Massachusetts law:²⁰ ““(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits.”” *Petrillo*, 65 Mass. App. Ct. at 457 (quoting *Kobrin*, 444 Mass. at 843) (additional citations omitted). Unlike issue preclusion, claim preclusion does not require that the parties have actually litigated the claim in question so long as the claim could have been litigated in the first proceeding. *See U.S. Nat’l Ass’n v. McDermott*, 87 Mass. App. Ct. 1103, 2015 WL 539311, at *2 (Mass. App. Ct. Jan. 30, 2015). This reflects the purpose of claim preclusion, which is to ensure that “all legal theories supporting a claim be presented when the opportunity is available, not preserved for presentation through piecemeal litigation.” *Day v. Kerkorian*, 61 Mass. App. Ct. 804, 811 (Mass. App. Ct. 2004); *see also Heacock*, 402 Mass. at 23 (“The doctrine is a ramification of the policy considerations that underlie the rule against splitting a cause of action.”).

The *res judicata* effect of a decision declining to set aside and compelling compliance with a CID is apparently a novel question under Massachusetts law. Neither party has cited any Massachusetts decision (or federal decision, for that matter) that addresses the *claim* preclusive effect of a CID enforcement proceeding on a subsequent civil action to prohibit enforcement of the CID and to declare the CID unlawful, and the Court’s independent research has revealed none. Nonetheless, applying basic principles of claim preclusion, the Court concludes that the claims in this case could have and should have been raised in the Massachusetts proceeding; accordingly, claim preclusion applies.

²⁰ “To determine the effect of a state court judgment, federal courts . . . are required to apply the preclusion law of the rendering state.” *Conopco, Inc. v. Roll Int’l*, 231 F.3d 82, 87 (2d Cir. 2000); *see also supra* at 23.

The parties agree that the parties to this case are the same as the parties to the Massachusetts proceeding, satisfying the first requirement of claim preclusion. The Court finds that the second requirement (a final judgment) and the third requirement (identity of claims) are also satisfied.

Massachusetts law does not require “a final judgment in the ‘strict sense.’” *Jarosz*, 436 Mass. at 533. Rather, following the approach of the Restatement (Second) of Judgments, Massachusetts courts evaluate whether a decision is final by considering whether “the parties were fully heard, the judge’s decision is supported by a reasoned opinion, and the earlier opinion was subject to review or was in fact reviewed.” *Tausevich v. Bd. of Appeals of Stoughton*, 402 Mass. 146, 149 (1988) (citing Restatement (Second) of Judgments § 13 cmt. g (1982)).

The Massachusetts Decision satisfies each of these prerequisites. There is no serious question that the parties were fully heard. The briefing in the Superior Court ran over two hundred pages (not including exhibits), and Exxon alleged in its petition substantially the same facts that it alleges in this action, including that Healey’s comments at the March 29, 2016, press conference demonstrated bias, that the AGs United for Clean Power have adopted the playbook of several left-wing activists, and that the CID’s demands are so overreaching in relation to any legitimate investigatory purpose that they must be politically motivated. *See supra* at 8-9. The Massachusetts Decision is a reasoned decision rejecting these claims on the grounds that the “the Attorney General [Healey] has assayed sufficient grounds – her concerns about Exxon’s possible misrepresentations to Massachusetts consumers – upon which to issue the CID.” Mass. Decision at 9. Because the Superior Court also granted the MAG’s cross-petition to enforce the CID, the Massachusetts Decision was appealable (and is, in fact, pending on appeal). *See CUNA Mut. Ins. Soc.*, 380 Mass. at 540-41.

The Court also agrees with Healey that this case and the Massachusetts proceeding involve the same “claim” for purposes of *res judicata*. A claim is the same for purposes of *res judicata* if it is transactionally related to the claims in the prior proceeding. *Boyd v. Jamaica Plain Coop. Bank*, 7 Mass. App. Ct. 153, 163 (Mass. App. Ct. 1979). The Second Circuit has explained that claims are “transactionally related” if the “transaction or connected series of transactions at issue in both suits is the same, that is where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first.” *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369 (2d Cir. 1997) (quoting *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997)) (additional citations omitted); *see also Boyd*, 7 Mass. App. Ct. at 163. The alleged “facts” in this lawsuit are the same as were alleged in the Massachusetts proceeding. In both proceedings Exxon argues that Healey’s investigation is not a good faith investigation but is an overt act in a conspiracy to chill its ability to exercise its First Amendment rights. In both proceedings Exxon points to the CID, which it alleges was served in bad faith, and to Healey’s attendance at the March 29, 2016 presentations, the AGs United for Clean Power, and Healey’s participation in the March 29, 2016 press conference. As the Court has noted, the allegations in the Petition track closely the complaint in this proceeding. Exxon itself acknowledged the overlap at argument before the Superior Court: “as we’ve argued [in the Texas district court]. . . . Our position is that this is all about bad faith. This is about regulating speech. It’s about viewpoint discrimination.” Courchesne Decl. Ex. 6 at 43-44.

It is irrelevant that the precise causes of action asserted in this proceeding were not raised in the Massachusetts proceeding. Claim preclusion applies to transactionally-related claims that could have been raised but were not: “A judgment in the first action ‘extinguishes . . . all rights

of a plaintiff to remedies against the defendant with respect to all or any part of the transactions out of which the action arose.” *McDermott*, 2015 WL 5399311, at *2 (quoting *Massaro v. Walsh*, 71 Mass. App. Ct. 562, 565 (Mass. App. Ct. 2008)) (additional citations omitted). Thus, it is not necessary for purposes of claim preclusion that a claim have the same (or similar) elements or even that it arise under the same body of law; what is required is satisfaction of the transactional-relationship standard. *See Commonwealth Dev., LLC v. HNW Digital, Inc.*, No. 20054055F, 2007 WL 1056801, at *2 (Mass. Super. March 21, 2007) (“The statement of a different form of liability is not a different cause of action, provided it grows out of the same transaction, act or agreement, and seeks redress for the same wrong.” (quoting *Mackintosh v. Chambers*, 285 Mass. 594, 596 (1934))); *Wright Mach. Corp. v. Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974) (“a party cannot avoid this rule by seeking an alternative remedy or by raising the claim from a different posture or in a different procedural form”); Restatement (Second) of Judgments § 24 cmt. c (claims may be the same even where “several legal theories . . . would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief”). And there is no dispute that Exxon could have raised its federal constitutional claims in the Massachusetts proceeding. *See In re Yankee Milk, Inc.*, 372 Mass. at 361 n.8 (“demands which invade any constitutional rights of the investigated party are unreasonable”).

Recognizing that the elements of claim preclusion appear satisfied, Exxon argues that the procedural differences between the Massachusetts proceeding and this civil case are so substantial that preclusion should not apply. As the Court explained above, issue preclusion does not apply because Exxon faces a less demanding burden in this case than it faced in the

Massachusetts proceeding. But Exxon cites to no case applying the same reasoning to claim preclusion. To the contrary:

This principle does not translate to the realm of claim preclusion. . . . The purpose of claim preclusion, unlike issue preclusion, is to prevent the waste of resources and the harassment to the defendant that stem from the piecemeal litigation of claims. . . . And applying claim preclusion when there are varying burdens of proof does not raise any problem analogous to the problem of applying issue preclusion

O'Shea v. Amoco Oil. Co., 886 F.2d 584, 594 (3d Cir. 1989); *see also United States v. Cunan*, 156 F.3d 110, 116 (1st Cir. 1998) (“The relevant test simply asks whether the same parties pursued a remedy that arose from the same ‘transaction’ . . . [m]inor variations in the proceedings . . . are insufficient to establish separate causes of action.”).

The cases cited by Exxon are distinguishable because they involve proceedings in which a party sought relief that was not available in a prior proceeding. Under those circumstances Massachusetts law (like the Restatement) permits relitigation. *See Heacock*, 402 Mass. at 24; *see also Kelso v. Kelso*, 86 Mass. App. Ct. 226, 233-33 (2014). For example, in *Heacock*, the court concluded that a divorce proceeding was not preclusive of a subsequent tort claim for damages because the divorce court lacked authority to hear the tort action or award damages. The tort plaintiff in *Heacock* filed her claims before the divorce proceedings were initiated and could not have sought a divorce in the superior court or brought her tort claims in probate court; she did not choose to split her claims. Even assuming, as Exxon argues, that the Massachusetts proceeding was a limited one, Exxon has not explained why it was forced to bring its federal claims in Texas and its state claims in Massachusetts. There is no dispute that the Superior Court could have considered Exxon’s federal constitutional claims (unlike the probate court in *Heacock*) and the relief Exxon requests here is essentially identical to the relief it requested in state court—an injunction to quash the CID. Unlike the tort plaintiff in *Heacock*, Exxon made a

tactical choice to split its claims. Exxon cites no case that has applied *Heacock* to a situation analogous to this case, and the Court's independent research has revealed none.²¹

Muddying the differences between issue and claim preclusion, Exxon also argues that claim preclusion does not apply because the opportunity to litigate in this case is greater than the opportunity it had in the Massachusetts proceeding. *See* Opp'n at 35 (quoting *Sprecher*, 716 F.2d at 972). As discussed above, under *Sprecher*, issue preclusion may not apply where there are differences in the burden of proof or the opportunity to develop evidence. *See supra* at 24-25. The same considerations do not apply to claim preclusion. *See O'Shea*, 886 F.2d at 594; 18 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4422 (3d ed.) ("Issue preclusion, *although not claim preclusion*, may be defeated by shifts in the burden of persuasion or by changes in the degree of persuasion required.") (emphasis added). Claim preclusion is primarily concerned with whether a party has improperly split its claim, forcing the defendant to litigate twice a controversy that could have been litigated once. Exxon did not seek discovery in Massachusetts, so this Court cannot say that discovery would not have been available. Had discovery been Exxon's goal, it could have raised its Section 1983 claims in state court. Exxon's lack of discovery in state court was the result of its own tactical decisions; those tactical decisions do not render inapplicable established law of *res judicata*.

Exxon's remaining arguments are unpersuasive, and the Court rejects them.

Notwithstanding Exxon's desire for a federal forum, there is nothing unique about Section 1983 claims that requires a federal lawsuit. The federal courts system presumes that state courts are

²¹ The SAC also seeks an injunction against the entire Massachusetts investigation. Although Exxon argues that injunctive relief was not available in the Massachusetts proceeding, Opp'n at 28-29, in fact, Exxon asked for injunctive relief in that proceeding in the form of an order to disqualify Healey and her office and to appoint a new, independent investigator to oversee (and potentially discontinue) the Massachusetts investigation. *See* Petition at 24. Exxon has not cited to any case for the proposition that the Massachusetts court could have enjoined Healey from carrying out the investigation but could not have enjoined the investigation itself.

competent to adjudicate federal rights, and the potential for preclusion is a necessary consequence of that. *See, e.g., Temple of the Lost Sheep, Inc.*, 930 F.2d at 185. Finally, preclusion does not raise any due process concerns under the circumstances. As the Supreme Court has explained, the “full and fair opportunity” to litigate standard requires that a prior proceeding satisfy the constitutional minima of due process. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982); *Pactiv Corp. v. Dow Chem. Co.*, 449 F.3d 1227, 1233 (2d Cir. 2006) (“*Kremer* only requires that the prior judgment be denied preclusive effect when there has been a due process violation.” (citing 18 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4415 (3d ed.))). Exxon has not pointed to any limitation in the Massachusetts proceeding that falls below the constitutional standard. As Exxon’s briefing to that court demonstrates, it had a full opportunity to be heard.²²

The MAG’s motion to dismiss on claim preclusion grounds is GRANTED.

3. Failure to State a Claim

The NYAG and MAG have also moved to dismiss on the grounds that the Complaint fails to state a claim. The AGs argue that Exxon’s allegations that their investigations have an improper purpose are implausible. Improper motive is admittedly difficult to plead. Nevertheless, Exxon must allege facts from which the Court may plausibly infer that the AGs know their investigations lack merit but have nonetheless proceeded against Exxon for ulterior

²² If the result in this case seems harsh, it stems from Exxon’s strategic decision to litigate on multiple fronts. As explained above, Exxon’s premise is that it is entitled to a federal forum to hear its federal claims. But there is no such right; state courts are competent to hear federal claims. *See In re Yankee Milk, Inc.*, 372 Mass. at 361 (constitutional claims may be raised in a proceeding to quash a CID). Moreover, having chosen to avail itself of a state forum, and to litigate state law cognate claims in that forum, Exxon cannot now be heard to complain that it has lost the opportunity to raise transactionally-related federal claims. The principles of *res judicata* are intended to prevent exactly this sort of gamesmanship and claim splitting.

reasons.²³ But this issue is at the heart of Exxon’s case, and each of the constitutional torts it has asserted requires a plausible inference that the AGs acted not based on a good faith belief that Exxon may have violated state laws, but to retaliate against Exxon for, or to deter Exxon from, speech that is protected by the First Amendment. At oral argument on November 30, 2017, the Court directed the parties to brief whether the Complaint states a claim. For the reasons that follow, the Court finds that Exxon has not plausibly alleged that either attorney general is proceeding in bad faith, motivated by a desire to impinge on Exxon’s constitutional rights.

In evaluating a motion to dismiss for failure to state a claim, the Court must “‘accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.’” *Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 249 (2d Cir. 2014) (quoting *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013) (alterations omitted)). Nonetheless, in order to survive a motion to dismiss, “a complaint must contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Plausibility” is not certainty. *Iqbal* does not require the complaint to allege “facts which can have no conceivable other explanation, no matter how improbable that explanation may be.” *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 360 (2d Cir. 2013). But “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *Twombly*, 550 U.S. at 555, and “[courts] ‘are not bound to accept as true a legal conclusion couched as a factual allegation,’” *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014) (quoting *Twombly*, 550 U.S. at 555 (other internal quotations marks and citations omitted)).

²³ That is not to suggest that a special standard applies to Exxon’s claims. As discussed below, the familiar plausibility standard governs.

In the interest of efficiency and judicial economy, the Court has evaluated the allegations in the Complaint together with the allegations in the proposed SAC. Rule 15(a) of the Federal Rules of Civil Procedure provides that “[t]he court should freely give leave” to a party to amend its complaint “when justice so requires.” Fed. R. Civ. P. 15(a)(2). But “[l]eave may be denied ‘for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.’” *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (additional citations omitted)). And “a proposed amendment to a complaint is futile when it ‘could not withstand a motion to dismiss.’” *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 164-65 (2d Cir. 2015) (quoting *Lucente v. IBM Corp.*, 310 F.3d 243, 258 (2d Cir. 2002)).

a. Constitutional Torts

Although none of the parties has identified the elements of Exxon’s First, Fourth, and Fourteenth Amendment claims, or their state law cognates, they appear to agree that allegations of an improper motive are essential to each.²⁴ As to Exxon’s First Amendment claim, “[i]t has long been established that certain adverse governmental action taken in retaliation against the

²⁴ The parties appear to agree that Exxon must also plead that the Subpoena and CID are not supported by an objective, reasonable suspicion. See NY Supp. Mem. (Dkt. 247) at 7; Supp. Opp’n at 24 (“All ExxonMobil need do is plead that Attorney General Schneiderman’s investigation is objectively unjustifiable.”); see also *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006) (Section 1983 plaintiff must “plead and prove” absence of probable cause). Because *Hartman* and related Second Circuit cases address summary judgment and the qualified immunity analysis, they are not precisely on point, as Exxon points out. The Court need not resolve this dispute because the NYAG and MAG have not moved to dismiss on the grounds that the document demands are supported by reasonable suspicion (although they have argued just that in state court proceedings in both Massachusetts and New York). Nonetheless, the objective basis (or lack thereof) for the Subpoena and CID is relevant to whether Exxon’s allegations of improper purpose are plausible; the fact that a search (or subpoena) is supported by a flimsy justification makes it more likely that it was motivated by an improper purpose, and, conversely, solid justification for a search or subpoena makes it less likely law enforcement has an improper purpose. *Hartman* itself recognized the interplay between these two ostensibly separate inquiries. See *Hartman*, 547 U.S. at 260-61.

exercise of free speech violates the First Amendment.”²⁵ *Mozzochi v. Borden*, 959 F.2d 1174, 1179 (2d Cir. 1992). Exxon’s theory of a Fourth Amendment violation is also based on the AGs’ alleged improper purpose. *See* Supp. Opp’n at 30 (The NYAG and MAG investigations violate the Fourth Amendment because they “are not ‘conducted pursuant to a legitimate purpose.’” (quoting *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996)); *but see Blue v. Koren*, 72 F.3d 1075, 1081 (2d Cir. 1995) (“motive is irrelevant” to a Fourth Amendment claim, “because a Fourth Amendment claim must be based on a showing that the search in question was objectively unreasonable.”). Due process is also offended by “government harassment in retaliation for the exercise of a constitutional right.” *Blue*, 72 F.3d at 1081; *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (Fourteenth Amendment prohibits pursuing a criminal investigation “influenced by improper motives.”).²⁶

The centerpiece of Exxon’s allegations is the press conference held by the AGs, former Vice President Al Gore, and others in New York on March 29, 2016. According to Exxon, the AGs’ statements at the press conference evince their intent to discriminate against other viewpoints regarding climate change. *See* SAC ¶¶ 28 (“For the Green 20, the public policy debate on climate change was over and dissent was intolerable.”), 133 (“The investigations were commenced without a good faith basis and with the ulterior motive of coercing ExxonMobil to adopt climate change policies favored by the [AGs].”). And—according to Exxon—the AGs “linked” the CID and Subpoena to “the coalition’s political efforts.” SAC ¶ 34. Exxon’s

²⁵ These cases concern enforcement actions, but the Court assumes for purposes of the present motions that the same principles apply at the investigatory stage.

²⁶ The Court need not address the AGs’ argument that Exxon has failed to allege an actual impact from the investigations on its protected speech. *See* NY Supp. Mem. at 4-5. It is worth noting, however, that the Second Circuit has made clear that a plaintiff asserting a First Amendment retaliation claim may rely on a harm other than chilled speech. *See Dorsett v. Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). Here, Exxon contends it has been forced to expend significant time and money complying with the AGs’ allegedly pretextual document demands.

narrative of events is the result of cherry-picking snippets from the transcript of the press conference, a complete transcript of which is attached to the Complaint. Read in context, the NYAG's comments suggest only that he believes that an investigation is justified in light of news reports regarding Exxon's internal understanding of the science of climate change. The NYAG's statements regarding Exxon speak for themselves, and so the Court quotes them in full:

- After describing a settlement with Peabody Energy, Schneiderman said: "And the same week we announced [the Peabody settlement], we announced that we had served a subpoena on ExxonMobil pursuing that and other theories relating to consumer and securities fraud. So we know, because of what's already out there in the public, that there are companies using the best climate science. . . . And yet, they have told the public for years that there were no 'competent models,' was the specific term used by an Exxon executive not so long ago And we know that they paid millions of dollars to support 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." Anderson SAC Decl. Ex. B (Tr. of March 29, 2016, press conference) at 3.
- Next, Schneiderman said, "There have been those who have raised the question: aren't you interfering with people's First Amendment rights? The First Amendment, ladies and gentlemen, does not give you the right to commit fraud. And we are law enforcements [sic] officers And we are pursuing this as we would any other fraud matter. You have to tell the truth. You can't make misrepresentations of the kinds we've seen here." Anderson SAC Decl. Ex. B at 4.
- In response to a reporter's question whether the Exxon investigation was a publicity stunt, Schneiderman said "[i]t's certainly not a publicity stunt. I think the charges that have been thrown around – look, we know for many decades that there has been an effort to influence reporting in the media and public perception about this. . . . The specific reaction to our particular subpoena was that the public report that had come out, Exxon said were cherry picked documents and took things out of context. We believe they should welcome our investigation because, unlike journalists, we will get every document and we will be able to put them in context." Anderson SAC Decl. Ex. B at 17.
- Continuing, Schneiderman said, "It's too early to say. We started the investigation. We received a lot of documents already. We're reviewing them. We're not prejudging anything It's too early to say what we're going to find with Exxon but we intend to work as aggressively as possible, but also as carefully as possible." Anderson SAC Decl. Ex. B at 17-18.
- In a response to a question about possible damages, Schneiderman said: "Again, it's early to say but certainly financial damages are one important aspect of this but, and it is tremendously important and [sic] taxpayers – its been discussed by my colleagues –

we're already paying billions and billions of dollars to deal with the consequences of climate change and that will be one aspect of – early foreseeing, it's far too early to say.” Anderson SAC Decl. Ex. B at 19.

It is not possible to infer an improper purpose from any of these comments; none of which supports Exxon's allegation that the NYAG is pursuing an investigation even though the NYAG does not believe that Exxon may have committed fraud.

Perhaps recognizing this, Exxon relies instead on other portions of the press conference in which the NYAG described climate change as a settled issue and, in Exxon's words, “derided” arguments regarding the cause of climate change or the appropriate policy response. *See* Supp. Opp'n at 17; SAC ¶ 28 (Quoting Schneiderman as saying there is “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.”). The Complaint and the SAC set up a false equivalence between Schneiderman's belief that climate change is a settled issue and Exxon's inference that the NYAG is pursuing its investigation in order to retaliate against Exxon for its political speech. The fact that Schneiderman believes climate change is real—so does Exxon apparently—and advocates for particular policy responses does not mean the NYAG does not also have reason to believe that Exxon may have committed fraud. The latter depends on the separate question of what the NYAG believes Exxon knew, when it knew it, and whether what it knew differs from what it has publicly said. To the extent Schneiderman's statements regarding climate change generally are relevant at all,²⁷ they tend to suggest that he believes that Exxon has an “interest in profiting from confusion” and has created “misperceptions in the eyes of the American public,” i.e., that

²⁷ Schneiderman also discussed at the press conference opposition to the Obama Administration's Clean Power Plan and an amicus brief filed by the AGs in the then-recent Supreme Court case *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016).

Exxon has made false statements. Schneiderman can be accused of hyperbole—he is a politician, after all—but asserting that one’s political opponent is sowing “confusion” is a rather tame accusation in the present, overheated political climate. Moreover, pursuing an investigation because of a belief that a company has “sowed confusion” on an issue that is important to that company’s bottom line would only be in bad faith if the investigator had concluded that the company actually believed the facts it was using to sow confusion. Nowhere does the Complaint or SAC allege that the NYAG knows or believes that Exxon was itself confused about the causes or risks of climate change.

Healey said even less at the press conference, and the discussion above applies equally to her. Healey referenced Exxon only once in her relatively brief remarks (they occupy less than two pages of the appendix to the SAC, *see* Anderson SAC Decl. Ex. B at 12). Regarding Exxon, she said:

- “Climate change is and has been for many years a matter of extreme urgency, but, unfortunately, it is only recently that this problem has begun to be met with equally urgent action. 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 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.”

Anderson SAC Decl. Ex. B at 12. Like Schneiderman’s statements, Healey’s statement that Exxon “may not have told the whole story” in no way suggests that Healey knows or believes that Exxon, in fact, “told the whole story” but wants to retaliate against it for its truthful statements because it disagrees politically. To the contrary, Healey’s statement suggests that she believes Exxon may have made false statements to its investors and the public and may have committed fraud. *Cf.* Mass. Decision at 12 (“In [Healey’s] comments at the press conference,

she identified the basis for her belief that Exxon may have violated [Massachusetts law]. In particular, she expressed concern that Exxon failed to disclose relevant information to its Massachusetts consumers. These remarks do not evidence any actionable bias on the part of [Healy]: instead it seems logical that [Healey] inform her constituents about the basis for her investigations.”). The SAC appears to acknowledge as much by also alleging that the AGs have prejudged their investigation and concluded that Exxon is guilty. *See* SAC ¶¶ 34, 143.

The SAC presents this press conference as the culmination of a campaign by climate change activists to encourage elected officials to exert pressure on the fossil fuel industry. *See* SAC ¶¶ 38-61. The relevance of these allegations depends on two inferences: first, that the activists have an improper purpose—that is, that they know state investigations of Exxon will be frivolous, but they see such investigations as politically useful; and second, that this Court can infer from the existence of meetings between the AGs and the activists, that the AGs share the activists’ improper purpose. The Complaint and SAC do not plausibly allege facts to permit the Court to draw either inference.

According to the SAC, Exxon’s political opponents, led primarily by Matthew Pawa and Peter Frumhoff, have, since a 2012 meeting in La Jolla, California, sought to use litigation to gain access to Exxon’s internal documents regarding climate change and to “maintain[] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming.” SAC ¶¶ 45. The SAC alleges additional meetings among private actors in July 2015 and January 2016. SAC ¶¶ 47, 52. There are no allegations that either the NYAG or the MAG attended the La Jolla conference or the conferences in July 2015 and January 2016, so these allegations have limited relevance to the AGs’ motives in issuing the CID and Subpoena. Moreover, the SAC does not include any factual allegations to suggest that Pawa and Frumhoff

and their confederates do not believe that Exxon has committed fraud. At best (for Exxon) the meetings are evidence that the activists recognize that the discovery process could reveal documents that would benefit their public relations campaign by showing that Exxon has made public statements about climate change that are inconsistent with its internal documents on the subject. This evidence falls short of an inference that the activists—to say nothing of the AGs—do not believe that there is a reasonable basis to investigate Exxon for fraud.

Exxon attempts to provide the missing link between the activists and the AGs by pointing to a series of workshops, meetings, and communications between and among Pawa and Frumhoff and other climate change activists and the AGs or their staffs. For example, Exxon alleges that the NYAG has communicated with Tom Steyer, a billionaire and climate-change activist, regarding campaign contributions and Exxon. *See* SAC ¶ 51. The NYAG has discussed “the activities of specific companies regarding climate change” with the Rockefeller Family Fund, a private philanthropic organization that has funded investigative journalism regarding Exxon’s historical knowledge of climate change. SAC ¶¶ 52-57. And Frumhoff and Pawa made presentations to the AGs shortly before the press conference on March 29, 2016. SAC ¶¶ 40, 43. Frumhoff’s presentation was entitled the “imperative of taking action now on climate change” and Pawa’s presentation was on “climate change litigation.” SAC ¶¶ 39-43. The SAC includes no other information about these presentations or their content; the content of the NYAG’s communications with Tom Steyer; or the content of the NYAG’s discussions with the Rockefeller Family Fund. It is pure speculation to suggest that the content of the presentations was to encourage baseless investigations of Exxon. But even if the climate activists did encourage the AGs to investigate Exxon as a means to uncover internal documents or to pressure it to change its policy positions without a good faith belief that Exxon had engaged in

wrongdoing, another logical leap is required to infer the NYAG and MAG agreed to do so without having a good faith belief that their investigations of Exxon were justified.

Next, the SAC—but not the Complaint—alleges that the CID and Subpoena were precipitated by investigative journalism funded by the Rockefeller Family Fund. *See* SAC ¶ 57. According to Exxon these articles have been used “as pretextual support” for the AGs’ investigations. SAC ¶ 57. The only basis for Exxon’s allegation that these articles are a pretext is that, according to Exxon, the documents cited in the articles “demonstrate that [Exxon]’s climate research contained myriad uncertainties and was aligned with the research of scientists at leading institutions at the time.” SAC ¶ 57. Assuming the truth of Exxon’s characterization of the documents, they appear to support the AGs’ legal theory that Exxon’s internal research was consistent with the scientific consensus but that Exxon made statements to the market and the public that suggested otherwise. In any event, Exxon has included no *factual* allegations that tend to show that the AGs do not believe that the articles based on Exxon’s documents have raised legitimate concerns that should be run to ground. Absent such factual allegations, the Court is in no position to infer that duly authorized state investigations are pretextual.

The Complaint and SAC also allege that a common-interest agreement among the Green 20 is evidence of concealment of their “political agenda.”²⁸ SAC ¶ 62. Exxon’s attempt to transform a mine-run common-interest agreement into evidence of an improper motive is not plausible. The common-interest agreement covers a number of potential areas of litigation related to climate change, including: “conducting investigations of representations made by companies to investors, consumers, and the public regarding fossil fuels, renewable energy and

²⁸

The common interest agreement is attached to the SAC. *See* Anderson SAC Decl. Ex. V.

climate change,” “taking legal actions to compel or defend federal measures to limit greenhouse gas emissions,” and “taking legal action to obtain compliance with federal and state laws governing the construction and operation of fossil fuel and renewable energy infrastructure.”

Anderson SAC Decl. Ex. V at 19. The preamble to the agreement, quoted by Exxon, states that the AGs share an interest in “ensuring the dissemination of accurate information about climate change.” See SAC ¶ 62. Although that would appear to be an admirable goal of a public official with which few would quarrel,²⁹ according to Exxon, this statement confirms the “coalition’s willingness to violate First Amendment rights to carry out its agenda.” SAC ¶ 62. It is unclear how that is so. Nothing in the common interest agreement defines “accurate information about climate change” in a way that suggests that the AGs have agreed to punish protected speech.

Ensuring that “accurate information” reaches the market and the public is consistent with a *bona fide* investigation—not retaliation. As the Court has explained, and Exxon has agreed, false statements to the market or the public are not protected speech. See Hr’g Tr. at 34:16-35:1 (“[The COURT]: But you don’t have the right to lie in your securities filings. That’s what they are investigating. If they are wrong, then they don’t have a case. If they are right, then Exxon should be held to account. Do you agree with that? [EXXON]: I agree that that is the fact that . . . they can conduct an investigation into fraud. No one is disputing the ability to conduct an investigation into fraud.”). Alternatively, Exxon points to the reticence of the AGs (and the Vermont attorney general, also a signatory) to produce the common-interest agreement as

²⁹ As public officials the AGs “have an obligation to speak out about matters of public concern.” *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013). If Exxon’s inference were reasonable, it would put elected attorneys general in a straight-jacket relative to their public comments. For example, could a pharmaceutical company that sells opiate-based pain killers enjoin an investigation of it if the prosecutor stated publicly that the public should have accurate information about the risks of opiate use? “Accurate information” is the lifeblood of our democracy—not a goal that suggests skullduggery.

evidence they have something to hide. *See* SAC ¶¶ 63, 69. This inference is speculative. FOIA and FOIL disputes are commonplace, and they do not give rise to an inference that something sinister is afoot.³⁰

Exxon also points to the document requests themselves as circumstantial evidence of an improper motive. According to Exxon, the facts that the document requests seek documents from periods outside the statutes of limitations and demand communications between Exxon and outside groups demonstrate that the AGs' investigations are pretextual and retaliatory. *See* SAC ¶¶ 77-86 (the Subpoena), 87-91 (the CID). Despite arguing to this Court that the document requests are so frivolous that they are evidence of pretext, Exxon did not dispute the validity of the Subpoena requests in New York Supreme Court; it challenged only the extent to which the Subpoena required it to produce general accounting documents.³¹ *See* Dubeck Decl. Ex. 9 (Exxon's N.Y. Supreme Court brief) at 5-6 (disputing whether accounting related documents are called for by subpoena for climate change-related records); Dubeck Decl. Ex. 10 (Nov. 21, 2016 Hr'g Tr.) at 13 (arguing that accounting related documents are beyond the scope of the Subpoena). The Massachusetts Superior Court ruled on this issue and found that the CID was supported by a reasonable basis, and the CID demands substantially the same records as the Subpoena. *See* Mass. Decision at 8. The fact that the demands seek historical documents from

³⁰ The SAC also describes criticism of the AGs by another group of attorneys general and the House Committee on Science, Space, and Technology. *See* SAC ¶¶ 70-75. These allegations have no relevance to whether the AGs have acted with an improper motive. Indeed, if the fact that elected Republicans criticize investigations conducted by elected Democrats (and vice versa) were to be evidence that the criticized investigations are improperly motivated political hit jobs, law enforcement at the state level will be drawn to a screeching halt by what amounts to a heckler's veto.

³¹ Exxon's attempt to argue relevance in this Court but not in the New York Supreme Court reviewing the Subpoena smacks of a "have your cake and eat it too" approach. The legal jiu-jitsu necessary to pursue this strategy would be impressive had it not raised serious risks of federal meddling in state investigations and led to a sprawling litigation involving four different judges, at least three lawsuits, innumerable motions and a huge waste of the AGs' time and money.

periods outside the statutes of limitations is not evidence of pretext: if the AGs are investigating whether Exxon made material misrepresentations in the past six years (the statute of limitations applicable to the Martin Act and New York General Business Law Art. 22-A), Exxon's historic knowledge is relevant, whether it was gained five years ago or twenty-five years ago. Evidence that Exxon made material misrepresentations before the limitations period is relevant to Exxon's present-day intent and could be evidence of a continuing scheme that persisted into the limitations period. Exxon's communications with outside groups are also potentially relevant. It could be relevant, for example, if Exxon shared internal documents concerning climate-science or knowingly helped climate-change deniers craft a messaging strategy that was consistent with Exxon's political desire to avoid regulations harmful to its economic interests but inconsistent with its internal understanding of climate change.³²

Last, and along the same lines, Exxon argues that the NYAG's shifting investigative theory and attempt to explore a stranded-assets theory is evidence of pretext. It is to be expected that Exxon disagrees with the merits of the NYAG's investigation, and, more specifically, believes the NYAG's theory may be preempted. *See* SAC ¶¶ 95-97; Supp. Opp'n at 39-42. But if every time a questionable legal theory were pursued in an *investigation*—not even in an enforcement proceeding—the target could run into federal court and enjoin the state investigation on pretext grounds, the role of the states in our federal system would be seriously compromised. The fact that the NYAG's theories have shifted over time (presumably, at least in

³² Exxon also points to the fact that the Subpoena and CID appear untethered to bad acts in New York and Massachusetts. SAC ¶¶ 84, 89. But the Superior Court held that the CID was within the MAG's jurisdiction, *see* Mass. Decision at 4-5, and Exxon has not disputed the NYAG's jurisdiction in New York Supreme Court.

part, in response to facts learned as it receives material from Exxon) is too slim a reed to support Exxon's allegations of an improper motive.³³

In sum, whether viewed separately or in the aggregate, Exxon's allegations fall well short of plausibly alleging that the NYAG and MAG are motivated by an improper purpose. The Complaint and SAC do not allege any direct evidence of an improper motive, and the circumstantial evidence put forth by Exxon fails to tie the AGs to any improper motive, if it exists, harbored by activists like Pawa and Frumhoff. This issue is fatal to Exxon's claims for violations of the First, Fourth, and Fourteenth Amendments, its claims under Texas law,³⁴ and its claim for conspiracy pursuant to Section 1985.³⁵ Accordingly, Exxon's constitutional tort and state law cognate claims are DISMISSED and leave to amend is denied.

b. Dormant Commerce Clause

The Supreme Court has upheld state "blue sky" laws such as the Martin Act against challenges that they violate the dormant commerce clause. *See Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982); *Fed. Housing Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 598 (S.D.N.Y. 2015) ("For over a century it has been established that state Blue Sky laws do not

³³ Exxon also takes issue with the fact that someone in the NYAG's office asked Pawa not to confirm to the press that he had met with the NYAG prior to the March 29, 2016, press conference. SAC ¶ 60. While interesting, that fact, either alone or with the other facts alleged by Exxon, does not suggest that the AGs do not have a good faith basis for their investigations.

³⁴ For the same reason, Exxon has not plausibly alleged *ultra vires* action for purposes of the Eleventh Amendment. *See Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986). Accordingly, the Eleventh Amendment also bars Exxon's state law claims.

³⁵ Exxon's claim under Section 1985 fails for the additional reason that Exxon has not alleged that it is a member of a "class" against which the AGs have discriminated. *See Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015) ("[T]he term class 'unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with.'" (quoting *Town of W. Hartford v. Operation Rescue*, 991 F.2d 1039, 1046 (2d Cir. 1993))).

violate the Dormant Commerce Clause because they ‘only regulate [] transactions occurring within the regulating States.’” (quoting *Edgar*, 457 U.S. at 641)). The Martin Act regulates “the issuance, exchange, purchase, sale, promotion, negotiation, [or] advertisement” of securities “within or from” New York. N.Y. G.B.L. § 352(1). According to Exxon, the Subpoena and CID nonetheless impermissibly regulate interstate commerce because they are intended to “regulate” the market for political speech. *See* Supp. Opp’n at 37. As Exxon concedes, the Subpoena and CID do not, on their face, regulate speech. *See* Supp. Opp’n at 36-38. Thus, Exxon’s dormant commerce clause claim appears to rest on the theory that the Subpoena and CID are *sub silentio* regulations because they have an improper purpose. The Court rejects this argument for the reasons already given. Even if an improper purpose were not essential to Exxon’s dormant commerce clause claim, it has failed to allege plausibly essential elements of such a claim. Neither the Complaint nor the SAC explains how the document demands discriminate against out-of-state businesses, *see United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255-56 (2d Cir. 2001) (dormant commerce clause prohibits discrimination against out-of-state businesses), unduly burden interstate political speech in particular, *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (facially neutral regulations that unduly burden interstate commerce clause may violate the dormant commerce clause), or have the “practical effect of ‘extraterritorial control of commerce occurring entirely outside the boundaries of the state in question,’” *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) (quoting *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004)). Exxon’s dormant commerce clause claim is DISMISSED.

c. Preemption

Exxon's preemption claim fares no better. Ordinarily, an action to enforce or quash a subpoena is not the proper forum in which to assert a preemption defense. *See Constr. Prods. Research, Inc.*, 73 F.3d at 470 (“[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency’s jurisdiction or covered by the statute it administers.”); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (“Following *Endicott*, courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process.”). Agencies—and by extension, state officers like the AGs—are afforded latitude to conduct their investigations without interference and anticipatory jurisdictional challenges. A narrow exception has been recognized, however, when the subpoena “exceeds an express statutory limitation on the agency’s investigative powers,” *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir. 1983), or when there is a “patent lack of jurisdiction,” *Ken Roberts Co.*, 276 F.3d at 587. The cases cited by Exxon in support of its argument fall into this category, but they are inapposite. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (ERISA preempts entirely any state law regulating employee benefit plans); *Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 536 (2009) (state attorneys general may not enforce the federal Fair Housing Act).

Exxon contends that SEC regulations regarding the reporting of estimated and proved reserves preempts any inquiry into the AGs’ “stranded assets” theory. *See Supp. Opp’n* at 40-42. But Exxon has pointed to no provision of the SEC regulations that purports to prohibit the AGs from requesting documents that relate to the accounting for reserves. Unlike in *Gobeille* and *Cuomo*, Exxon has not argued that the AGs lack authority to inquire into anything to do with the

reporting of reserves. Moreover, Exxon's internal documents regarding reporting of reserves may be relevant to any number of theories, including, for example, whether Exxon understood the science of climate change in fundamentally different ways than it told its investors and the public. In short, Exxon's preemption claim is DISMISSED.

CONCLUSION

For the reasons given above, the motions to dismiss are GRANTED.³⁶ Exxon's motion for leave to amend is DENIED as futile. The Complaint is DISMISSED WITH PREJUDICE. The Clerk of the Court is directed to close the open motions at docket entries 196, 216, 219, 222, and 250 and terminate the case.

SO ORDERED.

Date: March 29, 2018
New York, NY


VALERIE CAPRONI
United States District Judge

³⁶ The Court does not reach whether abstention is appropriate pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *Colorado River* abstention applies when "parallel state-court litigation could result in 'comprehensive disposition of litigation' and abstention would conserve judicial resources." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 100 (2d Cir. 2012) (quoting *Colorado River*, 424 U.S. at 817-18). The proceedings in this Court, Massachusetts and the New York Supreme Court are plainly parallel. See *Niagara Mohawk Power Corp.*, 673 F.3d at 100 ("Suits are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." (quoting *Dittmer*, 146 F.3d at 118)). In Massachusetts in particular, Exxon has relied on substantially the same facts as are alleged in the Complaint to assert state-law analogs to the federal claims in this case. See Petition ¶ 63 (the CID is "impermissible viewpoint discrimination"); Courchesne Decl. Ex. 6 at 43-44 ("our position is that this is all about bad faith. This is about regulating speech. It's about viewpoint discrimination"); Compl. ¶ 111 ("The subpoena and the CID are impermissible viewpoint-based restrictions on speech, and they burden [Exxon's] political speech."). Nonetheless, the Second Circuit's more recent discussions of *Colorado River* abstention suggest that this case may not fall within the heartland of the doctrine. There is no other court in which all of Exxon's claims against the NYAG and MAG could be consolidated. See *Woodford*, 239 F.3d at 523-24 ("The classic example [of *Colorado River* abstention] arises where all of the potentially liable defendants are parties in one lawsuit but in the other lawsuit one defendant seeks a declaration of nonliability and the other liable defendants are not parties."). And, unlike in *Woodford*, there is no risk that a judgment in this action would not be preclusive in a subsequent proceeding; neither party has argued that they would not be bound by this court's determination. See *Woodford*, 239 F.3d at 525-26; *De Cisneros v. Younger*, 871 F.2d 205, 308 (2d Cir. 1989) (abstention appropriate where district court "feared a scenario under which [Plaintiff] would prove [Defendant's] liability in federal court—and then be able to use the judgment preclusively in state court—but that the inverse would not be true.").

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
EXXON MOBIL CORPORATION,
Plaintiff,

-against-

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

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 3/30/18
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17 CIVIL 2301 (VEC)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons
stated in the Court's Opinion and Order dated March 29, 2018, the motions to dismiss are
GRANTED. Exxon's motion for leave to amend is DENIED as futile. The Complaint is
DISMISSED WITH PREJUDICE; accordingly, the case is closed.

Dated: New York, New York
March 30, 2018

RUBY J. KRAJICK

Clerk of Court

BY:

Kmango
Deputy Clerk