# 18-1170

## United States Court of Appeals for the Second Circuit

EXXON MOBIL CORPORATION,

*Plaintiff-Appellant*,

v.

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 FOR APPELLEE ATTORNEY GENERAL OF MASSACHUSETTS**


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## PRELIMINARY STATEMENT

Exxon asks the federal courts to stop two state Attorneys General from investigating whether Exxon violated state laws that protect consumers and investors from fraud. It presses ahead with this case despite Exxon's production of millions of document pages and numerous witnesses in response to the New York Attorney General's subpoenas, and Massachusetts' Supreme Judicial Court's decision that the Massachusetts Attorney General's investigation is lawful. To support this extraordinary request for relief, Exxon contends that the First Amendment bars New York's investigative subpoenas and Massachusetts' civil investigative demand (CID), even though they seek to ascertain whether Exxon made statements that the First Amendment does not protect: false and misleading statements to consumers and investors, in this case about the impact of Exxon's products on climate change and the effects of climate change on Exxon's business and the value of its assets.

The Massachusetts Attorney General is investigating Exxon for potentially misleading Massachusetts consumers and investors about what Exxon knew about climate change, when it obtained that knowledge, and whether the information it provided to consumers and investors about climate change's effects, including on Exxon's business, conflict with its own internal knowledge. This investigation, like New York's, followed public revelation of Exxon's internal documents suggesting that the company knew for decades that combustion of its chief product—fossil

fuels—would cause climate change, and that Exxon may have misled consumers and investors about that knowledge. Others, too, have taken note; Exxon's shareholders have sued it in Texas federal district court, which recently allowed the case to proceed, over Exxon's objection, because the plaintiffs pleaded facts sufficient to maintain their climate-change-related securities fraud claims.[1]

Massachusetts' investigation into Exxon's possible fraud serves obvious state interests. The greenhouse gas emissions from the extraction and combustion of fossil fuels are driving and intensifying unprecedented storms, floods, sea level rise, forest fires, and droughts across the country. These impacts endanger our residents and Exxon's business model and may cost billions of dollars to address.[2] Given these now manifest risks and harms caused by climate change and fossil fuels' role in causing them, "[i]t should come as no surprise" that following the revelation of Exxon's own suggestive internal documents, it is now facing this inquiry into its potential role in misrepresenting those risks to Massachusetts consumers and investors. *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009).

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[1] *Ramirez v. Exxon Mobil Corp*., 2018 WL 3862083, *14 (N.D. Tex. Aug. 14, 2018) (facts alleged in plaintiffs' complaint satisfied heightened scienter pleading standard for their climate-change-related securities-fraud-claims as to Exxon's management, including former CEO Tillerson).

[2] *See* U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 379 (2014), https://tinyurl.com/y9mc4zj7 (estimating cumulative costs from sea level rise in Boston alone as high as $94 billion through 2100).

Exxon nevertheless asks this Court to infer from what amount to no more than three facts that the Attorney General's investigation constitutes a deliberate effort to suppress Exxon's speech *solely because of* its climate change policy viewpoint. Those facts are: (i) a single 2016 New York-based event, including a meeting attended by attorneys general and climate change experts and a press conference where the Attorney General announced her Exxon fraud investigation; (ii) a routine common interest agreement among investigating states; and (iii) the CID itself. Rather than Exxon's implausible narrative of a multi-state conspiracy to violate its constitutional rights, however, only one plausible explanation presents itself, *see Iqbal*, 556 U.S. at 682: the Attorney General is exercising her state-law authority to investigate whether Exxon violated Massachusetts law.

As the Massachusetts courts and the District Court have found, the Attorney General exercised her authority for a self-evidently legitimate investigatory purpose. Government "can," the Supreme Court made clear long-ago, "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). "The only power that is involved [in issuing a CID] is the power to get information from those who best can give it and who are most interested in not doing so." *Id.* at 642. And to ensure that CIDs serve their essential investigatory function, state and federal courts employ an appropriately deferential framework for reviewing their propriety

and prohibit targets from challenging them to litigate the merits of the "very subject" the government "desires to investigate," or to investigate the investigators. *United States v. Powell*, 379 U.S. 48, 54 (1964). Consistent with this framework (one that also applies here), Massachusetts' Superior and Supreme Judicial Courts already rejected Exxon's claims and concluded that the CID serves a lawful anti-fraud investigatory purpose. Add-77-78, *cert. pet. filed*, No. 18-311

Exxon's continued pursuit of this federal litigation is now all the more intolerable, because it asks this Court to re-adjudicate the very issues of fact and law that formed the basis for the Massachusetts Superior and Supreme Judicial Courts' decisions. Exxon's invitation runs afoul of settled preclusion law and federalism principles that require this Court to respect the final outcome of state court proceedings and to prevent parties like Exxon from filing duplicative and harassing federal court actions that raise federal constitutional claims they could have raised in their state-court actions. A contrary conclusion "would," as the District Court noted, "seriously compromise[]" "the role of the states in our federal system," Add-44, and turn the "*presumption* that the state courts will ... safeguard federal constitutional rights" on its head. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

## JURISDICTIONAL STATEMENT

The District Court asserted jurisdiction over Exxon's First Amended Complaint under 28 U.S.C. § 1331. This Court has jurisdiction over Exxon's timely appeal of the District Court's judgment under 28 U.S.C. § 1291.

## QUESTIONS PRESENTED

1. Did the District Court conclude correctly that Exxon failed to plead plausible allegations that the Attorney General violated the First, Fourth, and Fourteenth Amendments and the Dormant Commerce Clause or engaged in a conspiracy under federal or Texas state law, where (i) the CID does not regulate or suppress Exxon's speech or implicate First Amendment protected speech, and (ii) the alleged facts show that the Attorney General is pursuing a lawful fraud investigation?

2. Did the District Court conclude correctly that Exxon's claims against the Attorney General are barred under Massachusetts law because they were litigated or could have been litigated in Exxon's parallel state court action?

3. Did the District Court abuse its discretion by denying Exxon's motion to amend its complaint a second time where the new "facts" in Exxon's proposed amended complaint—none of which is specific to Attorney General Healey—could not transform Exxon's claims into plausible ones?

## STATEMENT OF THE CASE

### I. The Attorney General Serves a Civil Investigative Demand on Exxon for Information Related to Exxon's Marketing and Sale of Fossil-Fuel Products and Securities.

#### A. The Attorney General's Broad Authority to Investigate Potential Consumer and Securities Fraud.

The Attorney General is Massachusetts' "chief law officer," with a "common law duty to represent the public interest," *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 159, 163 (1975) (quotation omitted), and a statutory duty to protect the environment, Mass. Gen. Laws ch. 12, § 11D. She is also empowered to enforce the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, §§ 4, 6, an anti-fraud statute, which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," *id.* § 2(a), and applies broadly to "the advertising, the offering for sale ... [and] the sale ... or distribution of any services," "property," or "security," *id.* § 1(b). Liability depends on the "circumstances" of each case and the "context" in which they occur, *see Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 743 (2008), and can arise from fraudulent statements, half-truths, and omissions. *Commonwealth v. AmCan Enter.*, 47 Mass. App. Ct. 330, 334 (1999). A statement that is "true as a literal matter," for example, can violate the Act, if a "failure to disclose material information" creates "an over-all misleading impression." *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 395 (2004).

The Attorney General has "broad investigatory" and enforcement powers to secure the Act's purposes. *Attorney Gen. v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989). An "effective [Chapter 93A] investigation requires broad access to sources of information ... because evidence of the alleged violations is within the control of the investigated party." *In re Yankee Milk, Inc.*, 372 Mass. 353, 364-65 (1977). The Act thus authorizes the Attorney General to issue CIDs to ascertain whether unlawful conduct has occurred "whenever she believes a person has engaged in any conduct in violation of the statute." *Harmon Law Offices v. Attorney Gen.*, 83 Mass. App. Ct. 830, 834 (2013) (citation omitted). In other words, the Attorney General need not "have probable cause to believe that a violation of [the Act] has occurred" or "be confident in the probable result of the investigation." *CUNA Mut. Ins. Soc'y v. Attorney Gen.*, 380 Mass. 539, 542 n.9 (1980).

The Act, in turn, allows a CID recipient to challenge the CID in Massachusetts court. Mass. Gen. Laws ch. 93A, § 6(7). In such a challenge, Massachusetts courts evaluate whether the Attorney General acted "arbitrarily or in excess of [her] ... authority" and whether the CID's document requests seek relevant information and are not unduly burdensome. Add-56 (citations omitted). While a CID recipient may not preemptively litigate its potential liability, *Harmon*, 83 Mass. App. Ct. at 836, a party may contest the CID and its specific requests on any other ground, including state and federal constitutional ones. *E.g.*, *Attorney Gen. v. Colleton*, 387 Mass. 790,

791-92 (1982) (affirming trial court's denial, on state constitutional grounds, of motion to compel compliance with CID). The Act also prohibits the Attorney General from disclosing documents obtained under a CID without the party's consent unless they are part of a court filing. *See* Mass. Gen. Laws ch. 93A, § 6(6).

### B. The Attorney General's April 2016 Civil Investigative Demand.

Approximately six months after New York began its Exxon investigation, JA-708, in April 2016, the Attorney General served Exxon's Massachusetts registered agent with a CID under Chapter 93A, § 6(1) seeking documents related to Exxon's marketing and sale of fossil-fuel products and securities to Massachusetts consumers and investors, including statements about its products' contribution to climate change and how it considers the economic and regulatory risks of climate change in valuing its assets. *See* JA-744. The CID includes detailed definitions and thirty-eight specific document requests, including requests for, among other things, Exxon documents concerning how it "address[ed] investor perceptions regarding Climate Change ... in connection with Exxon's offering and selling Securities in Massachusetts." JA-760.

The CID was served "as part of a pending investigation concerning [Exxon's] potential violations of ... ch. 93A, § 2," *id.*, which the Attorney General first announced publicly at a March 29, 2016 New York-based press conference, alongside several other attorneys general. *See* JA-478. There she stated that there

exists a "troubling disconnect between what Exxon knew ... and what the company ... chose to share with investors and the American public" about "climate change" and "the catastrophic nature of its impacts." *See* JA-478. Later, her office entered into a routine common interest agreement with other attorneys general to better protect privileged communications and work-product to facilitate collaboration regarding climate-change-related legal matters, including potential investigations. JA-654.[3]

### C. The Bases for the Attorney General's Investigation.

The Attorney General's belief that Exxon may have violated Chapter 93A was based on a series of independent investigative journalism reports by the *L.A. Times* and *Inside Climate News* that publicly disclosed internal Exxon documents suggesting that Exxon has long been aware of how its products contribute to climate change and how climate change and related actions could adversely affect the value of the company's assets and businesses. JA-816-21. That information shows that Exxon had "a robust climate change scientific research program in the late 1970s into the 1980s that documented the serious potential for climate change" and a sophisticated understanding of how fossil-fuel-combustion contributed to climate

[3] The Exxon CID was one of several hundred CIDs that the Attorney General issued between 2013 and 2016. JA-814. More than fifty of those CIDs were issued in connection with investigations with other states or the federal government. JA-814.

change and the risks to Exxon's business of potential regulation of greenhouse gases. JA-817. According to one internal memorandum from 1984, for example, one of Exxon's own scientists warned the company that it was "'distinctly possible' that the effects of climate change over time will 'indeed be catastrophic (at least for a substantial fraction of the earth's population)'" and that the means to "avoid the problem" involved "sharply curtailing the use of fossil fuels"—Exxon's chief product. *See* JA-817 (quotation omitted). And Exxon also appears to have known when those effects could begin to occur absent a reduction in predicted future combustion of fossil fuels. *See* JA-817-18.

Yet, despite its own research and knowledge, public documents suggest that Exxon joined "with other fossil fuel interests in a campaign from at least the 1990s onward to prevent government action to reduce greenhouse gas emissions" and to sway public opinion. JA-819. In 1998, for example, Exxon participated as a member of the "Global Climate Science Communications Team," JA-819, which sought to undermine "the scientific underpinning the global climate change theory" by publicizing a position—one directly contrary to Exxon's management's apparent internal knowledge—that "it [is] *not* known for sure whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it." JA-819 (emphasis added). "[V]ictory," the team's draft plan notes, would be

achieved only if they stopped all "initiatives to thwart the threat of climate change." JA-819 (quotation omitted).

In sharp contrast with its own earlier research and internal knowledge, Exxon recently informed investors in its 2014 *Energy and Carbon: Managing the Risks* report that "we are confident that none of our hydrocarbon reserves are now or will become 'stranded.'" JA-2569.[4] Based on these and other publicly disclosed documents and statements, the Attorney General formed a belief that Exxon may have violated Chapter 93A by misleading consumers and investors about the risk of climate change, its products' contribution to climate change, and the likely impacts on Exxon's business of efforts to mitigate the threat of climate change by reducing greenhouse gas emissions.

## II. Exxon Asks the Massachusetts State Courts to Quash the CID and Is Rebuffed.

Exxon did not comply with the CID and still has not produced to the Attorney General a single document in response to it, despite producing over 2.8 million document pages to New York. *See* JA-1630. Instead, Exxon challenged the CID by filing near-simultaneous lawsuits in two venues—a federal District Court in Texas

[4] "Stranded" assets refer to coal, oil, and natural gas that become uneconomical to extract because of external factors like regulatory changes (e.g., stricter greenhouse gas emissions limits) or the introduction of cheaper non-fossil fuel sources or means of transportation.

and, the following day, a state Superior Court in Massachusetts—alleging in both that the CID should be voided for bias and constitutional violations.

On June 16, 2016 Exxon filed a petition in Massachusetts Superior Court to set aside or modify the CID or for a protective order. JA-1023. The action asked the Superior Court to vacate the CID based on an alleged lack of personal jurisdiction, as well as other legal grounds. JA-1023. Exxon's petition was premised on three facts: (i) the 2016 New York event, including the Attorney General's announcement of her office's Exxon investigation and the participation of a climate scientist and attorney with climate-change legal expertise, (ii) a common interest agreement among states, and (iii) the CID itself. JA-1023-41. The petition alleged that these three facts somehow "unmask[ed] th[e] investigation" as "a pretextual use of law enforcement to deter Exxon[] from participating in ongoing public deliberations about climate change ...." JA-1028. Based on those same three facts, Exxon asked the court to disqualify the Attorney General's Office from the investigation, JA-1042, and alleged: (i) a due process violation; (ii) a free speech violation; (iii) unreasonable search and seizure; and (iv) abuse of process and harassment. JA-1043-45. Exxon asked the state court, both in its petition and a separately filed "emergency" motion, to stay the case pending resolution of its parallel federal court action, filed the day before, *infra* pp.15-16, to avoid the

"possibility of duplicative or inconsistent rulings on Exxon['s] constitutional challenges to the CID." *See* JA-1045-46, *see also* JA-1048-50, 1077-78.

The Attorney General opposed Exxon's petition and cross-moved to compel Exxon to comply with the CID. JA-1088. In the course of litigating Exxon's petition and the Attorney General's cross-motion, the parties submitted extensive legal memoranda and supporting materials to support their positions, including more than one hundred pages of legal briefing and correspondence and more than a thousand pages of affidavits and exhibits. Add-27. On December 7, 2016, the Massachusetts Superior Court heard two hours of oral argument on Exxon's challenge to the CID and the Attorney General's cross-motion to compel, as well as Exxon's request to stay the Massachusetts action. JA-1115. During that hearing, Exxon made clear that its central claims regarding the CID were "bad faith," "viewpoint discrimination," and the use of "law enforcement power" to attack "those who simply are on the other side of a political debate." JA-1158.

On January 11, 2017, the Superior Court issued its decision. Add-62. After concluding that it had personal jurisdiction to enforce the CID against Exxon, Add-50-56, the court rejected all of Exxon's other claims, including its parallel Massachusetts constitutional claims, Add-56-62. Having reviewed a voluminous record, the court found that the Attorney General had "assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts

consumers—upon which to issue the CID." Add-57. Because, as the court noted, the First Amendment does not protect false and misleading statements, the court did not address Exxon's First Amendment claim. *See* Add-57 & n.2. The court next rejected Exxon's remaining claims, finding that the CID was not unreasonably burdensome, Add-58-59, and that the Attorney General's remarks announcing the investigation showed no "actionable bias." Add-60. Instead, the court recognized that the Attorney General has a statutory "duty to investigate Exxon if she believes it has violated" the Massachusetts Consumer Protection Act. Add-61.

Exxon's appeal of the Superior Court decision was transferred to the Supreme Judicial Court, and, on April 13, 2018, that court affirmed the Superior Court's decision in all respects. Add-67. While Exxon had argued in the Superior Court that the CID's most "egregious[]" problem was its impingement on speech rights, JA-1126, Exxon failed to raise on appeal and thus waived that claim and its other non-personal jurisdiction constitutional claims.[5] Instead, Exxon pressed only its personal jurisdiction, CID burdensomeness and relevance, and bias claims.[6] The Court rejected those claims, agreeing that the Attorney General had formed a "belief that Exxon's conduct may violate [Chapter] 93A" and finding that this belief refuted

[5] Br. of Exxon, *Exxon Mobil Corp. v.* Healey, 479 Mass. 312 (2018) (SJC-12376), https://tinyurl.com/y8ug9st3.

[6] *Id.* at 1-2 (statement of issues).

Exxon's claim that the CID was issued "solely as a pretext." Add-77. The Court also rejected Exxon's improper bias claim, finding that the Attorney General's press statements "were intended only to inform the public of the basis for the investigation into Exxon." Add-78. On September 10, 2018, Exxon asked the Supreme Court to review the Court's personal jurisdiction holding. S. Ct. No. 18-311.

## III. Exxon Asks a Federal District Court to Enjoin the Massachusetts Investigation and Is Again Rebuffed.

On June 15, 2016, the day before Exxon filed its Massachusetts action, Exxon began this action by filing a complaint against the Attorney General in the Northern District of Texas, seeking to enjoin enforcement of the CID. JA-54. That lawsuit was premised on the same three facts: the 2016 New York event, the common interest agreement, and the CID, *e.g.*, JA-60-61, 70-71 (¶¶ 17, 52-53); JA-399, 411-12 (FAC ¶¶ 18, 52-53); *see also* Add-10-11 (District Court finding complaint "relied on substantially the same," and in some cases verbatim, factual allegations as Massachusetts action). With 42 U.S.C. § 1983 as its vehicle, the federal lawsuit alleged five federal and pendent Texas state-law claims based on: (1) free speech; (2) unreasonable search and seizure; (3) Due Process; (4) Dormant Commerce Clause; and (5) state and federal abuse of process, JA-81-84. Exxon's First Amended Complaint (FAC) added civil conspiracy and federal preemption claims. JA-432, 436. These claims are all premised on the same three facts as the claims in its state court action, *compare supra* p.12, *with e.g.*, JA-58-59 (¶ 13), and, indeed

presented virtually identical causes of action as in state court.[7] On that basis, Exxon informed the state court that it should stay the state action because the relief requested in its federal action would moot its state case. *E.g.*, JA-1077; *see also* JA-1045-46, 1048-50.

Exxon also filed a motion for preliminary injunction. JA-13. The Attorney General opposed that motion, and simultaneously filed what would be the first of her three motions to dismiss. JA-17. The court heard argument on September 19, 2016 on Exxon's preliminary injunction motion but did not issue any injunctive relief. JA-20. After mediation efforts ordered by the court following that hearing failed to result in Exxon's agreement to produce any of the documents it had already provided to New York, JA-2931-32; *see also* JA-20, 2956-57, the court, on October 13, 2016, authorized Exxon to conduct discovery on whether the Attorney General issued the CID in bad faith, ostensibly so the court could decide whether to dismiss the case under *Younger v. Harris*, 401 U.S. 37 (1971), JA-345, 2957.[8]

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[7] *Compare* JA-433-34 (FAC ¶¶ 109-111) (First Amendment), *with* JA-1044 (Petition ¶ 63) (free speech); JA-434-35 (FAC ¶¶ 112-114) (Fourth Amendment), *with* JA-1044-45 (Petition ¶ 64) (search and seizure); JA-435 (FAC ¶¶ 115-117) (Fourteenth Amendment), *with* JA-1044 (Petition ¶ 62) (due process); JA-437-38 (FAC ¶¶ 127-128) (common law abuse of process), *with* JA-1045 (Petition ¶ 66) (common law abuse of process).

[8] Exxon served on the Attorney General over 100 written discovery requests, noticed depositions of her and two of her staff in Boston, noticed the depositions of the New York Attorney General and two staff members in New York, and subpoenaed eleven third parties. *See* JA-2957-61. On October 24, 2016, Exxon's

A day after Attorney General Healey objected to Exxon's discovery requests and did not consent to the appointment of a particular mediator to oversee discovery disputes, JA-2957-59,[9] the court ordered, *sua sponte*, the Attorney General to appear for a deposition in the judge's Dallas courtroom on December 13, 2016, JA-936. On December 8, 2016, the Attorney General filed petition for a writ of mandamus with the U.S. Court of Appeals for the Fifth Circuit, JA-30, and, on December 12, 2016, the District Court issued orders cancelling the Attorney General's deposition and instructing the parties to submit briefs on whether the court had personal jurisdiction over the Attorney General, JA-944, 945.[10]

On March 29, 2017, the District Court transferred the case to the Southern District of New York, citing venue grounds. JA-989. The New York court established a schedule for the Attorneys General to file renewed motions to dismiss on (i) personal jurisdiction, (ii) ripeness, (iii) abstention pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and (iv) collateral

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counsel informed New York Supreme Court Justice Ostrager that Exxon intended to use the Texas discovery order to depose everyone who attended the 2016 New York event, including all of the attorneys general present. JA-1409.

[9] The court made the Attorney General's acceptance of the mediator and his $725 hourly rate a pre-condition to the court's consideration of her motion to stay discovery. JA-2966, 2969-70, 2972. The Attorney General indicated that she would, instead, consent to the appointment of a magistrate judge, due in large part to that very high hourly rate, ECF Nos. 113, 116.

[10] In response to these orders, the Fifth Circuit denied the Attorney General's mandamus petition as moot. JA-946.

estoppel and res judicata. JA-1002. The Attorney General filed her renewed motion to dismiss on May 19, 2017, JA-1004, and following the November 30, 2017 argument on that motion, JA-45, a supplemental memorandum requested by the court during argument addressing whether Exxon had alleged sufficient facts to state a plausible claim for relief. JA-3086; *see* JA-46-47.

On March 29, 2018, the District Court dismissed Exxon's claims. Add-1.[11] After noting the "extraordinary" relief requested, Add-1, the court first held that the Massachusetts Superior Court's decision barred all of Exxon's federal claims. Add-25-32. In support of that holding, the court found "that the parties were fully heard" in state court, Exxon's state and federal court claims were based on "the same" "alleged 'facts,'" Add-28, and "Exxon could have raised its federal claims in the Massachusetts proceeding." Add-29. The holding, the court noted, was a product of Exxon's "gamesmanship and claim splitting"—strategies "[t]he principles of *res judicata* are intended to prevent." Add-32 n.22.

The District Court also held that Exxon failed to allege sufficient facts to state any plausible claim for relief. Add-32-48. The court assessed the three principal facts on which Exxon premised its claims: the 2016 New York event, the common interest agreement, and the CID itself. Add-32-48; *see also supra* p.12. In regard

[11] The court found that it had personal jurisdiction over the Attorney General. Add-18-22.

to Exxon's First, Fourth, and Fourteenth Amendment claims, the court noted that Exxon had conceded that "improper motive" was an essential element of each of those claims. Add-34. Because Exxon's claims are based on "pure speculation," Add-40, and "wild stretch[es] of logic," Add-7, the court held that "Exxon's allegations fall well short of plausibly alleging that the [New York and Massachusetts Attorneys General] are motivated by an improper purpose," Add-45. On the press conference, for example, the court noted that the Attorney General's statements "suggest[] that she believes Exxon may have ... committed fraud." Add-38. The court also noted the inconsistency between Exxon's decision not to dispute New York's similar subpoena in New York state court and its attempt to claim in federal court that the subpoena and CID "are so frivolous that they are evidence of pretext." Add-43. The court also dismissed Exxon's Dormant Commerce Clause claim and its now-abandoned preemption claim,[12] and denied as futile Exxon's motion for leave to serve a second amended complaint, Add-48.

## STANDARD OF REVIEW

This Court reviews the District Court's decision to grant a motion to dismiss *de novo*. *Soules v. Connecticut, Dep't of Emergency Servs. & Pub. Prot.*, 882 F.3d 52, 55 (2d Cir. 2018). This Court reviews the District Court's denial of Exxon's

[12] The court did not reach abstention. Add-48. For that reason, the Attorney General does not press that claim here but reserves her right to raise it again if necessary.

motion for leave to amend its complaint for abuse of discretion. *Kim v. Kimm*, 884 F.3d 98, 105 (2d Cir. 2018).

## SUMMARY OF ARGUMENT

1. Exxon failed to allege facts that establish a plausible claim to avoid compliance with Massachusetts' CID. Exxon's First Amendment claim falters immediately, because the CID neither regulates Exxon's speech nor targets First Amendment protected speech. And, as regards all of its claims, Exxon also failed to allege facts that plausibly suggest the requisite absence of any objectively reasonable rationale for the CID. To the contrary, and as the District Court found (and the Massachusetts Supreme Judicial Court later agreed), the alleged "facts," as opposed to the speculative conclusions Exxon unreasonably draws from them, are not plausibly inconsistent with the Attorney General's service of a CID in aid of a legitimate fraud investigation. As Massachusetts' chief law officer, the Attorney General has the right to ascertain whether a violation occurred and to inform the public about the investigation, and Exxon has failed to allege any facts that would justify disregarding the presumption of regularity that attaches to her actions here.

2. Massachusetts law precludes litigation, in this action, of claims that were or could have been adjudicated in Exxon's state court action. Exxon's claims here are identical to its state court claims because they grow from the same

transaction—a fact that Exxon does not (and cannot) contest. Settled claim-preclusion rules do not, as Exxon wrongly claims, require the Massachusetts court to have actually decided its federal claims. And while Exxon faces the same "heavy burden" in this action that it faced in state court, a higher burden of proof in Exxon's state court action would not in any event have altered the application of ordinary claim preclusion rules. Consistent with Due Process, Exxon had a full and fair opportunity to litigate all of its claims in state court, and Exxon must now accept the claim-preclusive consequences of its strategic decision to split them.

3. The District Court did not abuse its discretion in denying Exxon's motion for leave to file its second amended complaint. Indeed, the District Court correctly found that Exxon's supposed new "facts"—none of which is specific to the Attorney General and many of which predate her taking office—would not alter the court's reasons for dismissing the First Amended Complaint. Where, as here, Exxon's proposed amendments are futile, denial of its motion was warranted.

## ARGUMENT

### I. Exxon Has Failed to State A Plausible Claim to Justify Its Drastic Request to Enjoin the Massachusetts Attorney General from Pursuing a Duly-Authorized Fraud Investigation.

Exxon's claims spring from the same three facts: (i) the Attorney General's participation in the 2016 New York event; (ii) the common interest agreement; and (iii) the CID. *Supra* p.12. These facts cannot support the extraordinary relief that

Exxon requests. Indeed, Exxon's claims stumble on the numerous barriers established to prevent targets from instigating no-holds-barred litigation about investigatory decisions. Those obstacles include the presumption that the Attorney General discharges her duties in good faith absent clear, contrary evidence, *United States v. Armstrong*, 517 U.S. 456, 463 (1996), and the deferential framework employed to evaluate constitutional and other CID challenges, *Powell*, 379 U.S. at 57-58. Those are obstacles Exxon cannot overcome here, because, among other reasons, Massachusetts courts have determined with finality that the Attorney General served the CID for a proper investigatory purpose. Add-62, 81.

### A. *Iqbal* and *Bell* Required Exxon to Allege Actual Facts, Understood in Their Context, That Establish a Plausible Claim for Relief.

Exxon may not defeat the Attorney General's motion to dismiss unless its "complaint . . . contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is "plausible on its face" when "the plaintiff pleads factual content that allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged," *id.* at 678 (emphasis added)—mere "suspicion" is not enough, *Bell*, 550 U.S. at 555 (citation omitted). The plausibility standard is animated by "[t]wo working principles." *Iqbal*, 550 U.S. at 678. "First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' is inapplicable to legal

conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quotation omitted). "Second, '[d]etermining whether a complaint states a plausible claim for relief'" is "a *context-specific task* that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quotation omitted, emphasis added).

Here, just like in *Iqbal*, the District Court found that Exxon's claims are based on speculative and implausible inferences, Add-2, and thus "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (citation omitted). Indeed, Exxon's allegations are notably similar in this regard to the conclusory allegations found lacking in *Iqbal*. There, the plaintiff alleged that former Attorney General Ashcroft and former FBI Director Mueller "'each knew of, condoned, and willfully and maliciously agreed to subject' [him] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,'" naming "Ashcroft as the 'principal architect' of the policy" and "Mueller as 'instrumental in [its] adoption, promulgation, and implementation.'" *Id.* at 669. Like the District Court here, the Court disregarded the plaintiff's conclusory allegations, *id.* at 681-82, and found that the plaintiff's alleged facts suggested that the conduct was "likely lawful and justified," not the result of "purposeful, invidious discrimination" the plaintiff

"ask[ed] the [Court] to infer," *id*. at 682; *see also* Add-38. Likewise, the context for this action reinforces the District Court's findings.

### B. The Universal Framework for CID Challenges Supplies the Context For this Case.

The context here includes, first, the Attorney General's authority to ascertain through investigation "whether in fact" a person "has engaged in or is engaging in any" "unfair or deceptive acts or practices" "whenever [s]he believes a person" may be doing so, Mass. Gen. Laws ch. 93A, §§ 2, 6, and, second, the Massachusetts state courts' decisions that such a reasonable belief underpins the Attorney General's CID, Add-8-9, 76-77. In this context, the "systemic costs" of judicial inquiry are "of particular concern," *see Wayte v. United States*, 470 U.S. 598, 607 (1985), both because federal court examination of a state-authorized (and now judicially validated) investigations risks "unnecessarily impair[ing] the performance of a core [state] executive function," *see Armstrong*, 517 U.S. at 456, and because an improper motive is "easy to allege and hard to disprove," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004) (quotation omitted). Indeed, requiring the Attorney General to fully litigate her investigatory rationale "would make a shambles of the investigation and stifle" her "gathering of facts," *Hannah v. Larche*, 363 U.S. 420, 444 (1960), "turning prosecutor into defendant" before judicial review is even warranted, *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980).

Based on these concerns, the Supreme Court has established a deferential framework to review CID challenges, which eschews a showing of cause and prevents CID recipients from "forcing" the government to "litigate ... on the very subject [it] desires to investigate." *Powell*, 379 U.S. at 53-54. Instead, the government must show only "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, [and] that the information sought is not already within" its "possession." *Id.* at 57-58. A CID recipient may "challenge the" CID "on any appropriate ground," but the recipient bears a "heavy burden" to prove bad faith or improper purpose. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 306, 316 (1978). The recipient must "disprove the actual existence of a valid" investigative purpose. *Id.* at 316. This is the standard that the recipient of a federal subpoena must face in federal court, *id.*, and the standard a recipient of a state subpoena must face in state court, Add-56-57, 75. This Court should reject Exxon's attempt to evade this framework simply by pursuing the unorthodox path of challenging a *state* subpoena in *federal* court.

This context demands a particularly faithful application of the plausibility standard to foreclose Exxon's efforts to use federal courts and fanciful constitutional torts to delay, burden, and otherwise attempt to thwart a lawful state consumer and investor protection investigation. *See Mollison v. United States*, 481 F.3d 119, 124 (2d Cir. 2007); *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998) (noting adverse

consequences of federal court actions to stop state investigations). Given investigatory targets' tendency to "transform [their] resentment at being [investigated] into the ascription of improper and malicious actions to the State[]," *see Imbler v. Pachtman*, 424 U.S. 409, 425 (1976), courts should scrutinize whether the plaintiff-target has alleged a viable claim both, as a matter of law, and, if so, as a matter of fact that "allows the court to draw the *reasonable* inference that the [state-investigator] defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678 (emphasis added). Here, Exxon cannot not do so because, among other reasons, Massachusetts' Supreme Judicial Court rejected Exxon's claims. *Infra* Pt.II.

### C. Exxon Failed to State a Plausible First Amendment Claim.

Exxon's First Amendment claim is meritless. First, administrative subpoenas, like the CID at issue here, do not regulate speech. Second, the First Amendment does not protect the subject of the investigation: fraudulent statements. Third, the three principal facts on which Exxon bases its claims are not plausibly inconsistent with the obvious alternative explanation that the Attorney General is conducting a good faith anti-fraud investigation. *See Bell*, 550 U.S. at 557.

### 1. The CID Does Not Regulate Exxon's Speech.

A CID is not a regulation of speech, and Exxon cites not a single case refusing enforcement of an *entire* CID based on a viewpoint discrimination claim.[13] By its own terms, the CID "requires [Exxon] to *produce* documents" requested to ascertain whether Exxon violated Massachusetts' anti-fraud statute in "the marketing and/or sale of [(i)] energy and other fossil fuel derived products to consumers in ... Massachusetts" or (ii) "securities ... to investors in" Massachusetts. JA-744 (emphasis added); *see also supra* pp.6-8 (describing statute). For these reasons, courts have made clear that CIDs "do not directly regulate the content, time, place, or manner of expression" or "directly regulate political associations." *SEC v. McGoff*, 647 F.2d 185, 187-88, 190 (D.C. Cir. 1981) (rejecting objection to administrative subpoena on First Amendment grounds even though the subpoena "may affect [recipient's] ability to gather and circulate information").[14] The

[13] In other contexts, specific CID document requests can raise a First Amendment question. *E.g.*, *FEC v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987) (agency must make "some showing of need ... beyond its mere relevance" to obtain specific documents that "will compromise the privacy of individual political associations, and hence risk[] a chilling of unencumbered associational choices"). But Exxon has chosen to attack the entire CID on viewpoint discrimination grounds, *see* Br. 27-32, and has waived specific challenges to particular document requests, *see* Br. 1-61. Nor has Exxon plausibly alleged any chilling of speech here. *Infra* p.29 & n.16.

[14] *See also FTC v. Invention Submission Corp.*, 1991 WL 47104, at *3 n.26 (D.D.C. 1991) ("no formal government-imposed speech restrictions are at issue" in subpoena enforcement case).

Supreme Court has been blunt: "merely investigating the circumstances" of potentially unlawful conduct "violates no constitutional rights." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986); *cf. Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) (questioning whether retaliatory investigation could ever cause a distinct constitutional violation).

This Court reached a similar conclusion in *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (2d Cir. 1970), *overruled on other grounds*, *Lowe v. SEC*, 472 U.S. 181 (1985). There, the SEC sought enforcement in the district court of an administrative subpoena that requested the production of "certain advertising materials and correspondence with subscribers, prospective subscribers, and suppliers of securities reports published" in a weekly newspaper. 422 F.2d at 1374. The district court denied the SEC's enforcement request as violating the First Amendment, *id.*, and, on appeal, the paper argued that "the First Amendment ... bars enforcement of the subpoena," *id.* at 1376, because "the investigation contemplated would chill its exercise of constitutionally protected rights of expression while in progress," *id.* at 1380.[15] Accepting as true the plaintiff-paper's assertion that its speech would be chilled if the subpoena was enforced, this Court rejected the paper's

[15] In *Wall St.*, even the plaintiff-paper "concede[d]," however, "that it would be entirely proper for the [agency] to investigate the commercial practices of any type of newspaper in connection with specific activities thought to violate anti-fraud provisions." 422 F.2d at 1381 n.15.

argument, holding that "the fact that a demand for disclosure may have some deterrent effect upon speech does not automatically invalidate it." *Id.* at 1380-81; *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 184, 201 (1990) (administrative subpoena seeking disclosure of materials relevant to discrimination claim "does not infringe any First Amendment right").

The same is true here: Massachusetts' CID does not regulate Exxon's speech, and no First Amendment scrutiny is required. *McGoff*, 647 F.2d at 187-88, 190; *see also Dayton Christian*, 477 U.S. at 628. Indeed, Exxon conceded that the CID is not a "direct regulation of speech," JA-1899, and that it does not directly or indirectly prohibit it from expressing its climate change viewpoint. Exxon stated, for example, that it "intends ... to continue to advance its perspective in the national discussions over how best to respond to climate change." JA-431 (FAC ¶ 98).[16] "Allegations in a complaint are," of course, "binding admissions ... and admissions can ... admit the admitter to the exit from the federal courthouse." *Gutierrez v. Peters*, 111 F.3d 1364, 1374 (7th Cir. 1997). And while Exxon also alleges in general, conclusory terms that the CID was served in "an apparent effort to silence, intimidate, and deter" it

[16] Other allegations also demonstrate the CID has not affected Exxon's speech. Exxon admits, for example, that it has "widely and publicly confirmed that [Exxon] 'recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant,'" JA-396 (FAC ¶ 9), "that climate change presents significant risks that could affect its business," JA-416 (FAC ¶ 63), and that it has "publicly advocated for a carbon tax ... to regulate carbon emissions," JA-430 (FAC ¶ 98); *see also* Br. 6.

from participating in the climate change policy debate, *e.g.*, JA-433 (FAC ¶¶ 110), this Court need not accept those allegations because they are conclusory, *Iqbal*, 556 U.S. at 678, and because they "are contradicted by" Exxon's "more specific" admissions in its complaint, *see DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 151-52 (2d Cir. 2014).

### 2. The CID Targets Potential Fraud, Speech That the First Amendment Does Not Protect.

In addition to the fact that the CID does not restrict Exxon's speech, the CID also does not target First-Amendment-protected speech. A long line of cases makes clear that "the First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003), and, for that reason, the government has the "firmly established" power "to protect people against" false, deceptive, and misleading speech, *id.* (quoting *Donaldson v. Read Magazine, Inc.*, 333 U. S. 178, 190 (1948)); *see also Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (government "can regulate or punish ... fraud"); *Citizens United v. Schneiderman*, 882 F.3d 374, 385 n.4 (2d Cir. 2018) ("the First Amendment does not prevent anti-fraud enforcement"). This rule applies regardless of whether the speech consists of statements to "persuade the legislature or the executive to take particular action," *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009), advertising, *In re R.M.J.*, 455 U.S. 191, 202-03 (1982), or statements regarding securities, *U.S. SEC v. Pirate Investor LLC*, 580 F.3d

233, 255 (7th Cir. 2009). In short, the First Amendment does not bar "fraud actions trained on representations made in individual cases." *Illinois*, 538 U.S. at 617; *see also* Add-42 (Exxon conceding "the [Attorneys General's] ability to conduct [fraud] investigation[s]").

Imagine what a contrary rule would have meant in, for example, government fraud actions against the tobacco industry for concealing risks of cancer from cigarettes. There, the tobacco companies and two tobacco-related trade organizations leveled a similar First Amendment claim. *Philip Morris*, 566 F.3d at 1123-24. Those companies and organizations, too, argued that, among other things, their statements aimed at the general public were protected by the First Amendment. *Id.* at 1123. The court recognized that fraud "may be inferred where ... there is a pattern of corporate research revealing a particular proposition ...; an ensuing pattern of memoranda within the corporation acknowledging" that proposition; "and the corporate CEO or other official of high corporate status then makes a public statement stating" a contrary proposition. *Id.* at 1121; *compare supra* pp.9-11 (investigation's bases). The D.C. Circuit rejected the First Amendment arguments, relying on the settled rule, *id.* at 1123-24, and this Court should reject Exxon's similar claims, too, for the very same reason: the CID targets potential fraud, and fraud does not constitute protected speech.

### 3. Exxon's Conclusory Allegations and Implausible Inferences Cannot, In Any Event, State a Plausible First Amendment Claim.

#### (a) Exxon Has Failed to Allege Facts that Plausibly Suggest that the CID is Objectively Unjustifiable.

Exxon argues that it was "highly prejudicial" for the District Court to treat what Exxon labels a viewpoint discrimination claim as a retaliation claim, Br. 33, but both claims required it to plausibly allege that the Attorney General issued the CID *solely because of* Exxon's viewpoint.[17] In *Rosenberger v. Rector & Visitors of Univ. of Va.*, a viewpoint discrimination case, the Court made clear that "[t]he government must abstain from regulating speech when the specific motivating ... opinion or perspective of the speaker *is the rationale* for the restriction." 515 U.S. 819, 829 (1994) (emphasis added); *see also Wood v. Moss*, 134 S. Ct. 2056, 2069 (2014) ("viewpoint discrimination" must be the "sole reason for the" government speech restriction).[18] Likewise, to plead a viable retaliation claim, Exxon must show

[17] Although the distinction is irrelevant here, it is not clear that the District Court treated Exxon's claim as a retaliation claim. The court cited a retaliation case, Add-34-35, but also clearly acknowledged viewpoint discrimination as Exxon's "core" theory. Add-12; *see also* Add-24, 28, 35, 48 n.36. Exxon's allegations, in any event, track a First Amendment retaliation claim, and there would have been no error if the court had treated it as one. *See Jarbough v. Attorney Gen. of U.S.*, 483 F.3d 184, 189 (3d Cir. 2007) (failing to "look beyond the label to analyze the substance of a claim ... would elevate form over substance and would put a premium on artful labeling.").

[18] This element was undisputed in *Rosenberger*. 515 U.S. at 822 (plaintiffs' viewpoint was "the sole reason" the University refused to pay printing costs); *see*

that the Attorney General's CID was "*motivated or substantially caused by*" Exxon's "exercise of that right." *Smith v. Campbell*, 782 F.3d 93, 100 (2d Cir. 2015) (emphasis added). At this stage, Exxon was thus required to plead facts that demonstrated the absence of an "objectively reasonable" non-viewpoint-based rationale for the Attorney General's CID, a standard that manifests the presumption of regularity that attaches to government law enforcement decisions like the decision to investigate here. *Compare LaSalle*, 437 U.S. at 316 (party challenging CID must be able to "disprove the actual existence of a valid [consumer or investor fraud-prevention] ... purpose by [the Attorney General."), *with United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 136 (2d Cir. 2017) (absent "clear evidence to the contrary, courts presume that" the government "properly discharged [its] official duties") *and S. Boston Betterment Trust v. Boston Redev. Auth.*, 438 Mass. 57, 69 (2002) (in assessing allegation of bad faith "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare[]").[19]

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*also Byrne v. Rutledge*, 623 F.3d 46, 55 (2d Cir. 2010) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses" (quotation omitted)).

[19] Exxon's reliance on cases like *Lamb's Chapel v. Ctr. for Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Wash. Indus. Dev. Agency*, 77 F.3d 26 (2d Cir. 1996), and *Pittsburgh League of Young Votes Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290 (3d Cir. 2011), is misplaced; they do not contradict this basic aspect of viewpoint

Exxon has not satisfied this element because it has not alleged facts that plausibly suggest that the CID is objectively unjustifiable on a non-viewpoint based ground. *See Wood*, 134 S. Ct. at 2069-70 (reversing denial of motion to dismiss where, among other things, plaintiffs failed to plausibly allege the government action was not taken for a non-viewpoint-based reason).[20] That, as *LaSalle* makes clear, is a "heavy burden," 437 U.S. at 316, because the potential fraud the Attorney General is investigating falls within the heartland of her fraud prevention duties. *Supra* pp.6-11 (authority and bases for CID). The Massachusetts Supreme Judicial Court—in the face of Exxon's same allegations—has already reached this conclusion, finding the Attorney General's decision to issue the CID was supported by a "belief that Exxon's conduct may violate" Massachusetts law. Add-77; *see also infra* Pt.II. Because, as detailed below, Exxon has not plausibly alleged that the Attorney

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discrimination. Br. 33, 37. *Rosenberger*, for example, makes clear that in *Lamb's Chapel* "[t]here was no indication in the record ... that the request ... was 'denied[] for any reason other than the fact that the presentation would have been from a religious perspective." 515 U.S. at 830. *Greenwich* is even farther afield, since that case did not involve a viewpoint discrimination claim and, for that reason, the court expressly declined to decide whether the government's state of mind "is relevant to *all* First Amendment claims." 77 F.3d at 31-32. And in *Pittsburgh*, the Third Circuit employed the employment discrimination burden-shifting framework to test whether the government's viewpoint-neutral explanation was pretextual. 653 F.3d at 297-98. But the court engaged in that analysis only because, unlike here, the plaintiff had identified specific evidence that the government had treated similarly situated advertisers differently. *Id.* at 298-99.

[20] Below, Exxon conceded this standard applies, though it resists this standard on appeal. *Compare* JA-1901 & Add-34 n.24, *with* Br. 33, 37.

General lacked that belief, "the case ends." *See Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1952 (2015); *McBeth v Himes*, 598 F.3d 708, 720 (10th Cir. 2010) (plaintiff could not prevail on a First Amendment retaliation claim where it could not establish defendants lacked cause to suspend her license).

**(b) Exxon's Conclusory Allegations Cannot Overcome the Obvious Alternative Explanation.**

Exxon also has failed to plead non-conclusory facts that support a "reasonable inference" that the Attorney General violated Exxon's rights. *Iqbal*, 556 U.S. at 678. The three facts on which Exxon relies to support its claims—the 2016 New York event, the common interest agreement, and the CID, *supra* p.12—do not support an inference that Attorney General Healey issued the CID "in an apparent effort to silence, intimidate, and deter" Exxon's climate change viewpoint. JA-433 (FAC ¶ 110). Again, *Iqbal* required Exxon to plead facts that plausibly suggest the Attorney General issued the CID in a deliberate effort to restrict its speech *solely because of* its viewpoint. *See* 556 U.S. at 676-77; *Rosenberger*, 515 U.S. at 829. These facts do not satisfy that standard.

As regards the 2016 New York event, Exxon points in its brief to a single paragraph in its First Amended Complaint where it selectively quotes from the Attorney General's remarks at the press conference. *Compare* Br. 29-30 (referencing FAC ¶ 32), *with* Add-38 (Attorney General's un-edited remarks). Exxon alleges that the Attorney General "promised that those who 'deceived' the

public—by disagreeing with her about climate change—'should be, must be, held accountable.'" JA-404 (FAC ¶ 32). This allegation—far from revealing an intent to discriminate based on viewpoint—instead reveals only that the Attorney General was duly performing one of her Office's core functions: protecting consumers and investors from false and misleading conduct in any trade or commerce. *Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 663-64 (7th Cir. 2007) (recognizing significant state interest in protecting citizens against "fraudulent, dishonest and incompetent" business practices). That the Attorney General announced publicly that she planned to do her job is not even "consistent with" unlawful conduct, let alone suggestive of it. *See Iqbal*, 556 U.S. at 678, 680. And, for that reason, the District Court refused to accept the inference Exxon sought, Add-42 & n.29, and the Massachusetts Supreme Judicial Court rejected it outright on the merits, Add-78; *see infra* pp.44-45 (describing Attorney General's authority to speak publicly about matters of public concern).

Exxon's reliance on the common interest agreement among seventeen attorneys general also fails to offer non-conclusory facts supporting Exxon's claim that the Attorney General intended to discriminate against Exxon based solely on its viewpoint. Br. 38 (quoting FAC ¶ 52). The agreement does not mention Exxon and covers four topics, including "potentially taking legal actions to compel or defend federal measures to limit greenhouse gas emissions" and "potentially conducting

investigations of representations made by companies to investors, consumers and the public regarding fossil fuels, renewable energy and climate change." JA-654. Exxon argues that the parties' shared interest in "ensuring the dissemination of accurate information about climate change" (Br. 38) evidences an unlawful intent to "[r]egulat[e] opinions" in a public policy debate. Br. 39. Not so. Again, this aspect of the agreement flows directly from the Attorney General's obligation to enforce Chapter 93A and to redress violations where persons or entities seek to defraud or mislead consumers and investors. And the fact that a statement of Exxon's may be expressed as an opinion does not immunize it. *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus.*, 135 S. Ct. 1318, 1328 (2015) (holding that a misleading statement of opinion is actionable); *Philip Morris*, 566 F.3d at 1126 (finding tobacco companies liable despite claim "statements disputing the health hazards of secondhand smoke were merely good-faith expressions of opinion"). As the District Court found, "Exxon's attempt to transform a mine-run common-interest agreement into evidence of improper motive is not plausible." Add-41.

Exxon fares no better in its assertion that two of the CID's thirty-eight requests themselves support an inference that the Attorney General served the CID with the sole purpose and intent to discriminate against Exxon's viewpoint. Br. 31-32, 37-38. Exxon, for example, contends that the CID's request for Exxon'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." Br. 38. But the Attorney General's CID concerns whether Exxon misled consumers and investors by making statements it knew to be false, not "the climate policy debate." *See* Br. 14. And, as the District Court held, Exxon's communications to organizations that counted Exxon as a member or were funded by Exxon are necessary to discern whether Exxon enlisted them to disseminate information that Exxon knew to be false. *See* Add-44. Indeed, internal Exxon and other documents suggest that Exxon participated in a large, coordinated effort, including funding third parties, to spread disinformation casting doubt on climate science that was inconsistent with analysis and conclusions of Exxon's own scientists. *Supra* pp.9-11. Exxon's resort to the *Noerr-Pennington* doctrine does not make the inference it requests any more reasonable, *see* Br. 38, because, even to the extent such efforts could be construed as lobbying, the First Amendment does not "protect [lobbying] predicated on fraud or deliberate misrepresentations." *Philip Morris*, 566 F.3d at 1123 (citation omitted) (rejecting similar claim by tobacco companies and tobacco-related organizations).

Nor can Exxon prevail with its further argument that the Court should infer an improper motive from the fact that a climate scientist employed by the Union of Concerns Scientists and a lawyer specializing in climate change litigation participated in parts of a meeting before the press conference. Br. 30-31. That leap

requires *two* inferences, as the District Court noted: "first, that the activists have an improper purpose," and, "second," that "the AGs share the activists' improper purpose" based on "meetings between the AGs and the activists." Add-39. The complaint, however, is devoid of any factual allegation that would support either inference. Add-39-41. In fact, accepting the latter would be deeply troubling, because attorneys general—most of whom are elected officials—meet with people daily to hear about the issues that concern them and consult with subject matter experts to enhance their understanding of issues. Investigative targets would wield a powerful new weapon to stymie investigations if the hypothesized motives of the people with whom attorneys general meet were attributed to them every time they subsequently began an investigation or initiated an enforcement action that coincided with, or sought to address, a constituent's concern or an expert's area of expertise. Accordingly, courts have, as the District Court did here, declined to draw such inferences. *See Wood*, 134 S. Ct. at 2070 ("declin[ing] to infer from alleged instances of misconduct on the part of particular agents an unwritten policy ... to suppress disfavored expression, and then to attribute that supposed policy to all field-level operatives").

The District Court thus neither improperly imposed an evidentiary burden on Exxon nor improperly drew inferences in favor of the Attorney General when it evaluated whether Exxon had alleged a plausible claim that the Attorney General

violated its rights. Exxon Br. 34, 41. As *Iqbal* makes clear, to support an inference of unlawful intent to discriminate sufficient to defeat the Attorney General's motion to dismiss, Exxon had to plead facts that, taken as true, refuted any "obvious alternative explanation" for the Attorney General's CID. 556 U.S. at 682 (citation omitted). Exxon may quarrel with *Iqbal*, but in following *Iqbal*'s teachings, the District Court placed no improper burden on Exxon. Pleading facts that, while possibly "consistent with" an inference of unlawful conduct, are vastly "more likely explained[] by lawful" conduct, 556 U.S. at 680, is simply insufficient. Indeed, as the District Court noted, allowing such actions to go forward would embolden investigative targets to seek to enjoin state investigations on pretext grounds in federal court and "compromise[]" the "role of the states in our federal system." Add-44.

### D. Exxon's Other Claims also Fail to State Plausible Claims for Relief.

#### 1. Exxon Failed to State a Fourth Amendment Claim.

Exxon leads its attack on the District Court's decision dismissing its Fourth Amendment claim with *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924), Br. 45-46—a case that this Court has recognized was "decisively abandoned" by the Supreme Court in 1946. *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995). By 1950, it was clearly established that the government "can investigate merely on the suspicion that the law is being violated, or even just because it wants assurance that

it is not." *Morton*, 338 U.S. at 642-43. Thus, today, the question whether an administrative subpoena comports with the Fourth Amendment "is ultimately one of reasonableness," *In re Gimbel*, 77 F.3d 593, 599 (2d Cir. 1996), which asks only if (i) the subpoena was served for a legitimate purpose; (ii) the information it seeks is reasonably relevant to that purpose; and (iii) the amount of information it seeks is not unreasonably burdensome. *See Morton*, 338 U.S. at 652. The circumstances that may give rise to an improper purpose are "somewhat extreme," *PAA Mgmt. Ltd. v. United States*, 962 F.2d 212, 216 (2d Cir. 1992), and, even then, courts will enforce the subpoena if "other, proper purposes exist," *In re McVane*, 44 F.3d at 1139 (citation omitted). That is, the improper purpose must be "the sole object of the investigation." *Id.* Such is plainly not the case here.

While Exxon argues that it "plausibly pleaded that the Attorneys General lack a factual basis for their investigations," Br. 46, that conclusory allegation is foreclosed by the analysis in Parts I.B & C. Undeterred, Exxon now asserts that the Attorneys General have provided a "shifting series of justifications for" their investigations. Br. 46. But even if such an averment could support an inference of improper purpose (it cannot),[21] Exxon has not alleged any fact suggesting that

[21] The Attorneys General are under "no obligation to propound a narrowly focused theory of a possible future case," *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977), or to air publicly the details of their investigatory strategies, *see Wayte*, 470 U.S. at 607.

Attorney General Healey has herself engaged in any such justification shifting. *See* JA-396 (FAC ¶ 8). And while it is true that the Attorney General did rely, in part, on Exxon's internal documents unearthed by the investigative reporting of the *L.A. Times* and the Pulitzer-Prize-winning *Inside Climate News*, the fact that extensive reporting was "underwritten by the Rockefeller Fund" does nothing to undermine the documents themselves or her investigation, Br. 46, because, again, the Attorney General is entitled to "investigate merely on suspicion that the law is being violated, or even just because [she] wants assurance that it is not." *Morton*, 338 U.S. at 642-43.[22]

Nor does the Attorney General's request for documents that were created or dated outside Chapter 93A's limitation's period make it unreasonably burdensome or demonstrate an improper purpose. Br. 47-48. Indeed, Exxon's production of 2.8 million pages in response to New York's similar subpoena refutes any burdensomeness claim. JA-1630, *see also* Add-43, 76-77. And *Powell* makes clear that the expiration of a statute of limitations cannot demonstrate an improper investigatory purpose. 379 U.S. at 58. Like the District Court here, Add-43-44, the Massachusetts Supreme Judicial Court rejected this argument, finding it lacked

[22] Exxon, relying largely and improperly on materials outside its complaint and the exhibits attached to it, claims to have "refuted" the bases for the Attorney General's investigation, Br. 46, but Exxon may not "litigate" the "very subject" of the investigation. *Powell*, 379 U.S. at 54; *see also Oklahoma Press Publ'n Co. v. Walling*, 327 U.S. 186, 201 (1946).

support "in law ... or logic," because "[a] document created more than four years ago is ... still probative of Exxon's present knowledge on the issue of climate change, and whether Exxon disclosed that knowledge to the public." Add-76. *Philip Morris* shows why that is true. There, the United States relied on documents from the 1950s to show that tobacco companies and related groups had engaged in an ongoing "conspiracy to deceive the American public." 566 F.3d at 1106-08. This Court should thus reject Exxon's invitation to "lose sight of the fact that the [Attorney General] is merely exercising [her] legitimate right to determine the facts." *Texaco*, 555 F.2d at 874.

**2. Exxon Failed to State a Due Process Claim.**

Exxon's Due Process claim rests on its contention that the Attorney General's decision to announce publicly her decision to investigate Exxon creates an appearance of impropriety so egregious that the federal judiciary must intervene to terminate the investigation. Br. 49. But the Attorney General merely announced, based on publicly available Exxon documents, that there existed a "troubling disconnect between what Exxon knew ... and what the company ... chose to share with investors and with the American public," JA-478—a belief Massachusetts law requires her to have to initiate an investigation. Add-60-61. The Attorney General's remarks themselves thus belie Exxon's conclusory assertion that the Attorney

General "declar[ed] presumptively that Exxon[] has engaged in unlawful conduct." Br. 49.

The Attorney General's decision to announce her investigation publicly does not make Exxon's conclusory allegation any more plausible. The Attorney General "need not be entirely 'neutral and detached.'" *Marchall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (quotation omitted). Instead, as an elected official and Massachusetts' chief law officer, she, too, has "free speech rights," and her position carries with it the authority and "the obligation to speak out about matters of public concern." *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013); *see also* Add-60-61, 79. That "the world's largest public energy company," Br. 5, may have made fraudulent statements or material nondisclosures to Massachusetts consumers and investors about the impacts of its products and the value of its assets is unquestionably a matter of public concern.[23] And the fact that they involve climate change, which poses "grave threats ... to the health, economy, and natural resources of" Massachusetts, *New England Power Generators Ass'n v. Dep't of Envtl. Prot.*, 480 Mass. 398, 399 (2018), amplifies that concern. As the Supreme Court has made clear, statements like the Attorney General's here are not just an "integral part of"

[23] *See Stroman*, 505 F.3d at 663-64 (significant state interest in protecting citizens against fraud).

her "job," but also "may serve a vital public function." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993).

Exxon's Due Process claim also "runs headlong into the presumption of regularity," which requires this Court to "presume," absent "clear evidence to the contrary," that the Attorney General "properly discharged [her] official duties." *HSBC Bank*, 863 F.3d at 136 (citation omitted); *see also United States v. Morgan*, 313 U.S. 409, 421 (1941).[24] Here, where the Attorney General's public remarks do not connote even a scintilla of impropriety, let alone plausibly establish that she was not "objective" or "capable of judging" the matter "fairly on the basis of" the information before her, Exxon clearly cannot "displace" the presumption of regularity based on the statements it points to here. *See United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980); *Favish*, 541 U.S. at 174. A contrary ruling would, as the District Court noted, "put elected attorneys general in a straight-jacket relative to their public comments." Add-42 n.29.

### 3. Exxon Failed to State a Commerce Clause Claim.

Exxon's claim that the CID runs afoul of the Commerce Clause because it "seek[s] to regulate out-of-state speech about climate policy," Br. 50, also fails as a matter of law. As Exxon has conceded, administrative subpoenas like the

[24] *See United States v. Davis*, 531 Fed. Appx. 65, 71 (2d Cir. 2013) (stating that "assertions and generalized allegations of improper motives" cannot overcome "the presumption of regularity").

Massachusetts CID "do not directly regulate the content, time, place, or manner of expression." *Compare McGoff*, 647 F.2d at 187-88, *with* JA-1899 (Exxon conceding that the CID is not "an instrument of direct regulation of speech."). And, as the District Court noted, "it has been established [for over a century] that state Blue Sky laws do not violate the Dormant Commerce Clause because they 'only regulate [] transactions occurring within the regulating States.'" Add-45 (quoting *Fed. Housing Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 598 (S.D.N.Y. 2015) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982)).

Any claim that Exxon's obligation "to collect, review, and produce" responsive documents, JA-432 (FAC ¶ 103), incidentally burdens interstate commerce is similarly unfounded. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003). The "burden of compliance" alone "is not a sufficient basis on which to establish a dormant Commerce Clause claim where the state law at issue does not otherwise interfere with interstate commerce." *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 196 (2d Cir. 2007) (Connecticut consumer protection law restricting gift card fees neither is "projected into other states" nor "operates as a form of economic protectionism in favor of Connecticut consumers"). Thus, because the CID does regulate or otherwise plausibly burden out-of-state commerce, the Dormant Commerce Clause "is [simply] irrelevant." *See SPGGC*, 505 F.3d at 196.

### 4. Exxon Failed to State a Conspiracy Claim.

Exxon has waived its state and federal conspiracy claims by dedicating only two sentences to them in its brief. *See Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) ("We consider abandoned any claims not adequately presented in an appellant's brief."). Both claims are also meritless.

The Eleventh Amendment bars Exxon's pendent Texas state-law claims, because it prohibits "federal suits against state officials on the basis of state law." *Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996). Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).[25] Accordingly, the District Court properly dismissed them. Add-45 n.34.

Exxon's federal conspiracy claim is similarly unfounded. Exxon's inability to state a viable constitutional claim precludes its 42 U.S.C. § 1985 conspiracy claim. *Gray v. Town of Darien*, 927 F.2d 69, 73 (2d Cir. 1991). While the Court need not go further, Exxon also has failed to "alleg[e] a deprivation of [its] rights on account

[25] Exxon has also failed to allege facts—nor could it—that would bring these claims within the Eleventh Amendment's narrow and rarely-invoked "*ultra vires*" exception, *see Pennhurst*, 465 U.S. at 101 n.11, which applies only when a state official acts "without any authority whatever." *See Minotti v. Lensink*, 798 F.2d 607, 609 (2d Cir. 1986). Here, the Attorney General's CID was authorized by the Massachusetts Consumer Protection Act. *See* Mass. Gen. Laws ch. 93A, § 6(1); *see also supra* pp.6-11 (describing authority and bases for investigation).

of [its] membership in a particular class of individuals." *Zemsky v. City of New York*, 821 F.2d 148, 151 (2d Cir. 1987).[26] Accordingly, the District Court properly dismissed this claim too. Add-45 n.35.

## II. Exxon's Claims Are Independently Precluded by the Massachusetts State Court Decisions.

The District Court correctly held that claim preclusion also bars all of Exxon's claims against the Attorney General. Add-25-32. Exxon's arguments to the contrary flow from an erroneous and distorted application of well-settled principles of the governing Massachusetts claim preclusion law. *See Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 87 (2d Cir. 2000). Those principles preclude this federal action, regardless of whether Exxon (i) raised its specific claims here in the parallel state court action or (ii) sought through its federal action a different remedy than it sought in state court.

Federal courts are required to "give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Doing so "promote[s] the comity between

[26] While "political affiliation" can constitute a protected class for the purposes of a § 1985(3) claim, *Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015), Exxon has "not claim[ed] discrimination based on [its] political party affiliation." *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989); *see also* JA-432-33 (FAC ¶¶ 105-08). Where plaintiffs are merely "political opponent[s] of the defendants … or "outspoken in their criticism of the defendants' political and governmental attitudes and activities," they "do not constitute a cognizable class under section 1985." *Gleason*, 869 F.2d at 695.

state and federal courts that has long been recognized as a bulwark of the federal system," *id.*, and prevents federal court action that "can readily be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (quotation omitted). "This remains true even when the new case poses a quintessentially federal question." *Goldstein*, 719 F.3d at 22. In Massachusetts, a decision may have claim preclusive effect when three elements are present: "(1) identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) [a] prior final judgment on the merits." *Kobrin v. Board of Registration. in Med.*, 444 Mass. 837, 843 (2005) (quotation omitted). Wrongly, Exxon denies the existence of identity and asserts that its claims must have been "actually" decided in state court to be claim-barred. Br. 53-54.

Exxon proceeds on the false premise that claim preclusion does not bar claims that "were not raised in or decided by the Massachusetts state court." Br. 54. But that is wrong. As the District Court recognized, Massachusetts law "prevents relitigation of all matters that were *or could have been adjudicated* in the action." *Kobrin*, 444 Mass. at 843 (emphasis added); Add-25-26. And Massachusetts law treats two claims as identical where they "grow[] out of the same transaction, act, or agreement, and seek[] redress for the same wrong." *Brunson v. Wall*, 405 Mass. 446, 451 n.9 (1989) (citation omitted). Claims are transactionally related when they

grow from "a common nucleus of operative facts." *Boyd v. Jamaica Plain Co-Operative* Bank, 7 Mass. App. Ct. 153, 164 (1979). For that reason, a party cannot evade claim preclusion "by seeking an alternative remedy or by raising the claim from a different posture or in a different procedural form." *Wright Mach. Corp. v. Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974); *see also Charlette v. Charlette Bros. Foundry, Inc.*, 59 Mass. App. Ct. 34, 44-45 (2003) ("statement of a different form of liability is not a different cause of action" (citations omitted)).[27]

Here, as the District Court found, and Exxon does not (and cannot) dispute, "[t]he alleged 'facts' in this [federal] lawsuit are the same as were alleged in the Massachusetts proceeding." Add-28. Exxon's state-court petition and its federal-court complaint include the same allegations: regarding "statements by Attorney[] General ... Healey at the press conference," "issuance of the ... CID, the demands made therein, and [her] intention to muzzle Exxon[]'s speech in Texas." JA-399 (FAC ¶ 18); *compare* JA-1028-29 (¶¶ 13, 16). These allegations do not just "overlap[]," Exxon Br. 55; rather, they "closely" "track" each other, as the District Court found, Add-28; *see also supra* pp.11-13, 15-16 (describing state petition and federal complaint). Indeed, precisely because the two actions are the same, Exxon

[27] *See also Bird v. SEC*, 1980 WL 1406, *3-4 (D.P.R. 1980) (holding that plaintiffs' action seeking to enjoin enforcement of administrative subpoenas was claim-barred by decision in SEC subpoena enforcement action where allowing plaintiffs to proceed in their "action, rather than defend a subpoena enforcement action, would seriously threaten to delay the Commission's investigation").

filed an "emergency" motion asking the state court judge to stay the state court action to avoid the "possibility of duplicative and inconsistent rulings on Exxon[]'s *constitutional* challenges to the CID," JA-1046, and informed the state court that obtaining its requested federal court relief would "moot" the state court action. JA-1077. Exxon cannot, therefore, evade the preclusive effect of the state court's final decision.

Exxon's assertion that the Massachusetts courts must have "actually and necessarily decided" its claims is similarly misplaced. Br. 56. Again, "claim preclusion ... prevents relitigation of all matters that were or *could have been* adjudicated in the action." *Kobrin*, 444 Mass. at 843 (emphasis added, citation omitted). And "actually decided" is an element of issue preclusion, not claim preclusion. *Jarosz v. Palmer*, 436 Mass. 526, 530-31 (2002) ("doctrine of issue preclusion" bars relitigation of "an issue [that] has been 'actually litigated and determined'" in the other action (citation omitted)). Thus, unsurprisingly, all but one of the cases Exxon cites addressed issue preclusion, not claim preclusion.[28] The

[28] The pages Exxon cites in *Foster v. Evans*, 384 Mass. 687, 694 (1981), *Day v. Kerkorian*, 61 Mass. App. Ct. 804, 808-09 (2004), and *Kirker v. Bd. of App. of Raynham*, 33 Mass. App. Ct. 111, 113 (1992), all either refer to or apply issue preclusion. *Cf.* Br. 56. While *Leahy v. Local 1526, Amer. Fed'n of State, Cty. & Mun. Emps.* 399 Mass. 341, 352 (1987), refers to res judicata, that term covers both issue and claim preclusion in Massachusetts, *Kobrin*, 444 Mass. at 843, and it is clear from the *Leahy* court's citation of *Almeida v. Travelers Ins.*, 383 Mass. 226, 229 (1981), *see Leahy*, 399 Mass. at 352, that the court was referring to issue preclusion. *See also Almeida*, 383 Mass. at 229.

only claim preclusion case that Exxon cites—*Bernier v. Bernier*, 449 Mass. 774, 797 (2007)—does not help Exxon either, because it refers both to claims that were decided "or" that could have been decided. 449 Mass. at 797.[29]

Exxon fares no better with its argument that claim preclusion cannot bar its federal claims because they were brought under 42 U.S.C. § 1983 and sought "injunctive and declaratory relief on affirmative claims for rights under the Constitution." Br. 57. Section 1983 is merely a vehicle for raising federal constitutional claims against state officials for prospective injunctive relief, *see Gaby v. Board of Tr. of Cmty. Tech. Colls.*, 348 F.3d 62, 62-63 (2d Cir. 2003) (per curiam); *see also Chapman*, 441 U.S. at 618 ("§ 1983 does not provide any substantive rights"), and Exxon could have lodged those same claims against the Attorney General in the state court proceedings through § 1983 or otherwise. *See In re Yankee Milk*, 372 Mass. at 361 n.8 (CIDs "which invade any constitutional rights of the investigated party are unreasonable"). And, in fact, parties have done so in the past. *See Colleton*, 387 Mass. at 791-92 (affirming trial court's denial, on state constitutional grounds, of Attorney General's motion to compel compliance with

[29] While Exxon also asserts that the Supreme Judicial Court "disclaimed any obligation to consider whether ... [the] stated grounds for the investigation were 'reasonable' or mere 'pretext,'" Br. 56, the court said no such thing; rather, the court upheld the CID based on the Attorney General's demonstrated "belief that Exxon may have misled Massachusetts residents about the impact of fossil fuels on both the Earth's climate and the value of the company, in violation of c. 93A." Add-69; 77.

CID).[30] Exxon's tactical decision to file a federal complaint presenting its claims "in a different procedural form" and purportedly "seeking an alternative remedy" is not a basis for circumventing the application of ordinary claim preclusion rules. *See Wright*, 364 Mass. at 688.

Nor is there merit to Exxon's focus on the alleged burden of proof differences between the two actions.[31] Different burdens of proof or opportunities to develop evidence may, in some circumstances, preclude application of *issue preclusion*, *Sprecher v. Graber*, 716 F.2d 968, 972 (2d Cir. 1983),[32] but that principle "does not translate to the realm of claim preclusion." *O'Shea v. Amoco Oil. Co.*, 886 F.2d 584, 594 (3d Cir. 1989).[33] This principle makes sense, as *O'Shea* explains, because issue preclusion seeks to prevent relitigation of already decided issues whereas claim

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[30] *In re Bob Brest Buick, Inc.*, 5 Mass. App. Ct. 717, 719-20 (1977) (rejecting in dictum constitutional challenge to CID but noting that the Superior Court had narrowed the CID's scope in response to claim).

[31] As explained *supra* pp.24-26, Exxon's burden here is the same as it was in state court. *Compare e.g.*, *LaSalle*, 437 U.S. at 316 ("heavy" burden), and *Powell*, 379 U.S. at 57-58, *with* Add-75 ("heavy burden"). Because the court below appears not to have been clear about this fact, Add-24, this Court can affirm on issue preclusion as well because the standards are in fact the same. *See Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178, 184-85 (2d Cir. 1991).

[32] Exxon reliance on *Foster* (Br. 58), is similarly misplaced, because, again, *Foster* involved issue preclusion. 384 Mass. at 694-96. *Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428 (2d Cir. 2000), also cited by Exxon (Br. 58 n.14), is inapposite because there, unlike here, the party's attempt to assert the claim in the prior proceeding was denied. 239 F.3d at 439.

[33] 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4422, at 631 (3d ed. 2016).

preclusion seeks to preclude "piecemeal litigation of claims." *Id.* Likewise, Exxon's lack of discovery, Br. 59-60, is not germane; even if it were, Exxon simply cannot complain about the absence of discovery it never requested. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 485 (1982) ("fail[ure] to avail [oneself] of the full procedures provided by state law does not constitute a sign of their inadequacy").[34]

Due process does not require more. Indeed, *Kremer* makes clear that the "full and fair opportunity" to litigate means only that the state court proceedings "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause ... to qualify for the full faith and credit guaranteed by federal law." 456 U.S. at 481. After *Kremer*, a "prior judgment [may only] be denied preclusive effect" "where there was a denial of due process." *Pactiv Corp. v Dow Chem. Co.*, 449 F.3d 1227, 1233 (Fed. Cir. 2006) (citation omitted). That test, "as it pertains to prior state court judgments," "is quite permissive," *Mass. Sch. of L. at Andover Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 39 (1st Cir. 1998) (affording preclusive effect to prior judgment despite discovery restrictions), because "all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction." *Pactiv Corp.*, 449 F.3d at 1233 (citation omitted).

[34] Exxon's arguments in this regard also ignore that the Massachusetts Rules of Civil Procedure provide for only "one form of action to be known as [a] 'civil action,'" and those rules "govern procedure before ... the Superior Court ... in all suits of a civil nature," including Exxon's Petition. Mass. R. Civ. P. 1, 2.

Notwithstanding any wrongly-claimed differences between the state and federal proceedings here, Exxon received due process before the Massachusetts courts, and those courts were, of course, fully capable of adjudicating federal constitutional claims alongside its parallel state constitutional claims. *Middlesex Cty. Ethics Comm.*, 457 U.S. at 431.[35]

In sum, Exxon now must bear the consequences of its strategic decision to sue Massachusetts in two forums at once over the same dispute: the other forum has now reached a final, conclusive decision, which bars Exxon from further litigating here.

## III. Exxon's Motion for Leave to File a Second Amended Complaint is Futile.

Exxon's single-sentence argument that "leave to amend should not have been denied as futile" is meritless. Br. 53. "'Proposed amendments are futile,' and thus must be denied, 'if they would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6).'" *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 252 (2d Cir. 2017) (internal quotation marks and citation omitted). Here, as the District Court found, Add-45, Exxon's proposed Second Amended Complaint is futile because the proposed revisions "contain[] the same deficient, conclusory

[35] *E.g.*, *1A Auto Inc. v. Dir. of Office of Campaign & Political Fin.*, 480 Mass. 423, 428 (2018) (noting in First Amendment case that "we are of course bound by the decisions of the ... Supreme Court, and we can neither add to nor subtract from the mandates of the United States Constitution" (quotation omitted)).

allegations that led the district court to dismiss the [first amended] complaint." *See Sanders v. Grenadier Realty, Inc.*, 367 Fed. Appx. 173, 177 (2d Cir. 2010).

In fact, the proposed additions provide no new "facts" about Attorney General Healey, concern the conduct of persons and entities that are not parties to this litigation, and include events that took place before the Attorney General was even elected. *See, e.g.*, JA-1942-44 (SAC ¶¶ 44-47); JA-1945-49 (SAC ¶¶ 51-57); JA-1951-52 (SAC ¶¶ 63-66). Because "the proposed amendments would have no impact on the basis for the ... dismissal and would consequently be futile," *Kim*, 884 F.3d at 105, the District Court did not abuse its discretion when it denied Exxon's motion for leave to amend.

## CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's decision to dismiss Exxon's First Amended Complaint and to deny Exxon's motion for leave to file its proposed Second Amended Complaint.

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Respectfully submitted,

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Dated: October 5, 2018
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## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a), as modified by Circuit Rule 32.1, because this brief contains 13,860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman-style font.

Dated: October 5, 2018
Boston, Mass.

/s/ Seth Schofield
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*Counsel of Record for the Massachusetts Attorney General*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 5, 2018, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: October 5, 2018
Boston, Mass.

/s/ Seth Schofield
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# ADDENDUM

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### DISTRICT COURT OPINION AND ORDER



### MASSACHUSETTS STATE COURT DECISIONS

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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 "*$CO_2$ 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 Lawsuit[5]**

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.

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[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

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[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]

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[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 Schiffarhtsgesellschaft 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'cns 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, s*ee* 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 []forum 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 inquires. *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

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[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

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[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

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[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 fairs 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.").

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.** **SUPERIOR COURT**
**CIVIL ACTION**
**NO. 2016-1888-F**

**IN RE CIVIL INVESTIGATIVE DEMAND 2016-EPD-36,**
**ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL**

**ORDER ON EMERGENCY MOTION OF EXXONMOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER AND THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXONMOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36**

On April 19, 2016, the Massachusetts Attorney General issued a Civil Investigative Demand ("CID") to Exxon Mobil Corporation ("Exxon") pursuant to G. L. c. 93A, § 6. The CID stated that it was issued as:

> [P]art of a pending investigation concerning potential violations of M.G. L. c. 93A, § 2, and the regulations promulgated thereunder arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth ...; and (2) the marketing and/or sale of securities, as defined in M.G.L. c. 110A, §401(k), to investors in the Commonwealth, including, without limitation, fixed and floating-rate notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, Exhibit B. The CID requests documents generally related to Exxon's study of $CO^2$ emissions and the effects of these emissions on the climate from January 1, 1976 through the date of production.

On June 16, 2016, Exxon commenced the instant action to set aside the CID. The Attorney General has cross-moved pursuant to G. L. c. 93A, § 7 to compel Exxon to comply with the CID. After a hearing and careful review of the parties' submissions, and for the reasons that follow, Exxon's motion to set aside the CID is **DENIED** and the Commonwealth's motion to

compel is **ALLOWED**, subject to this Order.

## DISCUSSION

General Laws c. 93A, § 6 authorizes the Attorney General to obtain and examine documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by chapter 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G. L. c. 93A, § 2(a). General Laws c. 93A, § 6 "should be construed liberally in favor of the government," see Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 364 (1977), and the party moving to set aside a CID "bears a heavy burden to show good cause why it should not be compelled to respond," see CUNA Mutual Ins. Soc. v. Attorney Gen., 380 Mass. 539, 544 (1980). There is no requirement that the Attorney General have probable cause to believe that a violation of G. L. c. 93A has occurred; she need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G. L. c. 93A. Id. at 542 n.5. While the Attorney General must not act arbitrarily or in excess of her statutory authority, she need not be confident of the probable result of her investigation. Id. (citations omitted).

### I. Exxon's Motion to Set Aside the CID

#### A. Personal Jurisdiction

Exxon contends that this court does not have personal jurisdiction over it in connection with any violation of law contemplated by the Attorney General's investigation. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 2. Exxon is incorporated in New

Jersey and headquartered in Texas. All of its central operations are in Texas.

Determining whether the court has personal jurisdiction over a nonresident defendant involves a familiar two-pronged inquiry: (1) is the assertion of jurisdiction authorized by the longarm statute, G. L. c. 223A, § 3, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? Good Hope Indus.,Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979). Jurisdiction is permissible only when both questions draw affirmative responses. Id. As the party claiming that the court has the power to grant relief, the Commonwealth has the burden of persuasion on the issue of personal jurisdiction. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612 n.28 (1979).

The Commonwealth invokes jurisdiction under G. L. c. 223A, § 3(a), which permits the court to assert jurisdiction over a defendant if the defendant "either directly or through an agent transacted any business in the Commonwealth, and if the alleged cause of action arose from such transaction of business." Good Hope Indus., Inc., 378 Mass. at 6. The "transacting any business" language is to be construed broadly. See Tatro v. Manor Care, Inc., 416 Mass. 763, 767 (1994). "Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient, generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." Id. Whether the alleged injury "arose from" a defendant's transaction of business in Massachusetts is determined by a "but for" test. Id. at 771-72 (jurisdiction only proper if, *but for* defendant's solicitation of business in Massachusetts, plaintiff would not have been injured).

The CID says that the Attorney General is investigating potential violations arising from

Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers. The Commonwealth argues that Exxon's distribution of fossil fuel to Massachusetts consumers "through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products" satisfies the transaction of business requirement. Exxon objects because it contends that for the past five years, it has neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a retail store or gas station in Massachusetts. According to the affidavit of Geoffrey Grant Doescher ("Doescher"), the U.S. Branded Wholesale Manager, ExxonMobil Fuels, Lubricants and Specialties Marketing Company at Exxon, any service station or wholesaler in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner is independently owned and operated pursuant to a Brand Fee Agreement ("BFA"). Doescher says that branded service stations purchase gasoline from wholesalers who create ExxonMobil-branded gasoline by combining unbranded gasoline with ExxonMobil-approved additives obtained from a third-party supplier. The BFA also provides that Exxon agrees to allow motor fuel sold from these outlets to be branded as Exxon or Mobil-branded motor fuel.

Exxon provided to the court and the Commonwealth a sample BFA. By letter dated December 19, 2016, the Commonwealth argued that many provisions of the BFA properly give rise to this court's jurisdiction. The Commonwealth contends that the BFA provides many instances in which Exxon retains the right to control both the BFA Holder and the BFA Holder's franchisees.[1] For example, Section 15(a) of the BFA states:

[1] The BFA mandates that all BFA Holders require their outlets to meet minimum facility, product, and service requirements, Section 13, and provide a certain level of customer service. Section 16. Moreover, Exxon requires that the BFA Holder enter into written agreements with

> BFA Holder agrees to diligently promote and cause its Franchise Dealers to diligently promote the sales of Products, including through advertisements, all in accordance with the terms of this Agreement. BFA Holder hereby acknowledges and agrees that, notwithstanding anything set forth herein to the contrary, to insure the integrity of ExxonMobil trademarks, products and reputation, ExxonMobil shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions that will use media vehicles for the promotion and sale of any product, merchandise or services, in each case that (i) uses or incorporates and Proprietary Mark or (ii) relates to any Business operated at a BFA Holder Branded outlet. ... BFA Holder shall expressly require all Franchise Dealers to (a) agree to such review and control by ExxonMobil. ...

By letter dated December 27, 2016, Exxon disputes that any of the BFA's provisions establish the level of control necessary to attribute the conduct of a BFA Holder to Exxon. See Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 617 (2013) (citation omitted) ("[T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter"); Lind v. Domino's Pizza LLC, 87 Mass. App. Ct. 650, 654-655 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that franchisors have undertaken an agency relationship with the franchisee such that vicarious liability should apply"); Theos & Sons, Inc. v. Mack Trucks, Inc., 1999 Mass. App. Div. 14, 17 (1999)

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each of its Franchise Dealers and in the agreement, the Franchise Dealer must commit to Exxon's "Core Values." Section 19. "Core Values" is defined on page one of the BFA:

> BHA Holder acknowledges that ExxonMobil has established the following core values ("Core Values") to build and maintain a lasting relationship with its customers, the motoring public:
> (1) To deliver quality products that consumers can trust.
> (2) To employ friendly, helpful people.
> (3) To provide speedy, reliable service.
> (4) To provide clean and attractive retail facilities.
> (5) To be a responsible, environmentally-conscious neighbor.

(obligations to render prompt and efficient service in accordance with licensor's policies and standards and to satisfy other warranty related service requirements did not constitute evidence of agency relationship because they were unrelated to licensee's day-to-day operations and specific manner in which they were conducted).

Here, though, Section 15 of the BFA evidences a retention of more control than necessary simply to protect the integrity of the Exxon brand. By Section 15, Exxon directly controls the very conduct at issue in this investigation – the marketing of Exxon products to consumers. See Depianti, 465 Mass. at 617 ("right to control test" should be applied to franchisor-franchisee relationship in such a way as to ensure that liability will be imposed only where conduct at issue properly may be imputed to franchisor). This is especially true because the Attorney General's investigation focuses on Exxon's marketing and/or sale of energy and other fossil fuel derived products to Massachusetts consumers. Section 15(a) makes it evident to the court that Exxon has retained the right to control the "specific policy or practice" allegedly resulting in harm to Massachusetts consumers. See id. (franchisor vicariously liable for conduct of franchisee only where franchisor controls or has right to control specific policy or practice resulting in harm to plaintiff). The quantum of control Exxon retains over its BFA Holders and the BFA Holders' franchisees as to marketing means that Exxon retains sufficient control over the entities actually marketing and selling fossil fuel derived products to consumers in the Commonwealth such that the court may assert personal jurisdiction over Exxon under G. L. c. 223A, § 3(a).

To determine whether such an exercise of personal jurisdiction satisfies – or does not satisfy – due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 471 U.S.

462, 474 (1985). The plaintiff must demonstrate (1) purposeful availment of commercial activity in the forum State by the defendant; (2) the relation of the claim to the defendant's forum contacts; and (3) the compliance of the exercise of jurisdiction with "traditional notions of fair play and substantial justice." Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 457 Mass. 210, 217 (2010) (citations omitted). Due process requires that a nonresident defendant may be subjected to suit in Massachusetts only where "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." Good Hope Indus., Inc., 378 Mass. at 7 (citation omitted). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief." Tatro, 416 Mass. at 773.

The court concludes that in the context of this CID, Exxon's due process rights are not offended by requiring it to comply in Massachusetts. If the court does not assert its jurisdiction in this situation, then G. L. c. 93A would be "de-fanged," and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants. Compare Bulldog Investors Gen. Partnership, 457 Mass. at 218 (Massachusetts has strong interest in adjudicating violations of Massachusetts securities law; although there may be some inconvenience to non-resident plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh Commonwealth's interest in enforcing its laws in Massachusetts forum). Also, insofar as Exxon delivers its products into the stream of

commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-298 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State).

For all of these reasons, the court concludes that it has personal jurisdiction over Exxon with respect to this CID.

**B. Arbitrary and Capricious**

Exxon next contends that the CID is not supported by the Attorney General's "reasonable belief" of wrongdoing. General Laws c. 93A, § 6 gives the Attorney General broad investigatory powers to conduct investigations whenever she *believes* a person has engaged in or is engaging in any conduct in violation of the statute. Attorney Gen. v. Bodimetric Profiles, 404 Mass. 152, 157 (1989); see Harmon Law Offices P.C. v. Attorney Gen., 83 Mass. App. Ct. 830, 834 (2013). General Laws c. 93A does not contain a "reasonable" standard, but the Attorney General "must not act arbitrarily or in excess of his statutory authority." See CUNA Mut. Ins. Soc., 380 Mass. at 542 n.5 (probable cause not required; Attorney General "need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G. L. c. 93A").

Here, Exxon has not met its burden of persuading the court that the Attorney General acted arbitrarily or capriciously in issuing the CID. See Bodimetric Profiles, 404 Mass. at 157 (challenger of CID has burden to show that Attorney General acted arbitrarily or capriciously). If Exxon presented to consumers "potentially misleading information about the risks of climate

change, the viability of alternative energy sources, and the environmental attributes of its products and services," see CID Demand Nos. 9, 10, and 11, the Attorney General may conclude that there was a 93A violation. See Aspinall v. Philip Morris Cos., 442 Mass. 381, 395 (2004) (advertising is deceptive in context of G. L. c. 93A if it consists of "a half truth, or even may be true as a literal matter; but still create an over-all misleading impression through failure to disclose material information"); Commonwealth v. DeCotis, 366 Mass. 234, 238 (1974) (G. L. c. 93A is legislative attempt to "regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities"). The Attorney General is authorized to investigate such potential violations of G. L. c. 93A.

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 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.[2]

[2] The court does not address Exxon's arguments regarding free speech at this time because misleading or deceptive advertising is not protected by the First Amendment. In re Willis Furniture Co., 980 F.2d 721, 1992 U.S. App, LEXIS 32373 * 2 (1992), citing Friedman v. Rogers, 440 U.S. 1, 13-16 (1979). The Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.

**C. Unreasonable Burden and Unspecific**

A CID complies with G. L. c. 93A, §§ 6(4)(c) & 6(5) if it "describes with reasonable particularity the material required, if the material required is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits." Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. at 360-361; see G. L. c. 93A, § 6(4)(c) (requiring that CID describe documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate material demanded); G. L. c. 93A, § 6(5) (CID shall not "contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth").

Exxon argues that the CID lacks the required specificity and furthermore imposes an unreasonable burden on it. With respect to specificity, Exxon takes issue with the CID's request for "essentially all documents related to climate change," and with the vagueness of some of the demands. Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, page 18. In particular, Exxon objects to producing documents that relate to its "awareness," "internal considerations," and "decision making" on climate change issues and its "information exchange" with other companies.

The court has reviewed the CID and disagrees that it lacks the requisite specificity. The CID seeks information related to what (and when) Exxon knew about the impacts of burning

fossil fuels on climate change and what Exxon told consumers about climate change over the years. Some of the words used to further describe that information – awareness and internal considerations – simply modify the "what" and "when" nature of the requests.

With respect to the CID being unreasonably burdensome, an effective investigation requires broad access to sources of information. See Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. at 364. Documentary demands exceed reasonable limits only when they "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." Id. at 361 n.8. That is not the case here. At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request. It would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General.

Whether there should be reasonable limitations on the documents requested for other reasons, such as based upon confidentiality or other privileges, should be discussed by the parties in a conference guided by Superior Court Rule 9C. After such a meeting, counsel should submit to the court a joint status report outlining disagreements, if any, for the court to resolve.

**II. Disqualification of Attorney General**

Exxon requests the court to disqualify the Attorney General and appoint an independent investigator because her "public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil." Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative

Demand or Issue a Protective Order, page 8. In making this request, Exxon relies on a speech made by the Attorney General on March 29, 2016, during an "AGs United for Clean Power" press conference with other Attorneys Generals. The relevant portion of Attorney General Healey's comments were:

> Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That's why I, too, have joined in investigating the practices of Exxon Mobil. 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.

General Laws c. 93A, § 6 gives the Attorney General power to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation of G.L. c. 93A. Bodimetric Profiles, 404 Mass. at 157. In the Attorney General's comments at the press conference, she identified the basis for her belief that Exxon may have violated G. L. c. 93A. 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 the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations. Cf. Buckley v. Fitzsimmons, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job ... and they may serve a vital public function"); Goldstein v. Galvin, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern"); see also Commonwealth v. Ellis, 429 Mass. 362, 372 (1999) (due process provisions require that prosecutor be disinterested in sense that prosecutor must not be – nor

appear to be – influenced in exercise of discretion by personal interests). It is the Attorney General's duty to investigate Exxon if she believes it has violated G. L. c. 93A, § 6. See also G. L. c. 12, § 11D (attorney general shall have authority to prevent or remedy damage to the environment caused by any person or corporation). Nothing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents. See generally Ellis, 429 Mass. at 378 ("That in the performance of their duties [the Attorney General has] zealously pursued the defendants, as is [his or her] duty within ethical limits, does not make [his or her] involvement improper, in fact or in appearance").

**III. Stay**

On June 15, 2016, Exxon filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Texas alleging that the CID violates its federal constitutional rights. Exxon Mobil requests this court to stay its adjudication of the instant motion pending resolution of the Texas federal action. See G. L. c. 223A, § 5 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just"); see WR Grace & Co. v. Hartford Accident & Indemnity Co., 407 Mass. 572, 577 (1990) (decision whether to stay action involves discretion of motion judge and depends greatly on specific facts of proceeding before court). The court determines that the interests of substantial justice dictate that the matter be heard in Massachusetts.

This matter involves the Massachusetts consumer protection statute and Massachusetts case law arising under it, about which the Massachusetts Superior Court is certainly more

familiar than would be a federal court in Texas. See New Amsterdam Casualty Co. v. Estes, 353 Mass. 90, 95-96 (1967) (factors to consider include administrative burdens caused by litigation that has its origins elsewhere and desirability of trial in forum that is at home with governing law). Further, the plain language of the statute itself directs a party seeking relief from the Attorney General's demand to the courts of the commonwealth. See G. L. c. 93A, § 6(7) (motion to set aside "may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"); see also G. L. c. 93A, § 7 ("A person upon whom notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth"). The court declines to stay this proceeding.

**ORDER**

For the reasons discussed above, it is hereby **ORDERED** that the Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order is **DENIED** and the Commonwealth's Cross Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36 is **ALLOWED** consistent with the terms of this Order. The parties are **ORDERED** to submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C Conference.

/s/ Heidi E. Brieger
Heidi E. Brieger
Associate Justice of the Superior Court

Dated at Lowell, Massachusetts, this 11th day of January, 2017.

479 Mass. 312

**EXXON MOBIL CORPORATION**

**v.**

**ATTORNEY GENERAL.**

**SJC–12376**

Supreme Judicial Court of Massachusetts, Suffolk.

Argued December 5, 2017.

Decided April 13, 2018.

**Background:** Fossil fuel company moved to set aside Attorney General's civil investigative demand for documents and information relating to company's knowledge and activities related to climate change, and Attorney General cross-moved to compel compliance with demand. The Superior Court Department, Suffolk County, Heidi E. Brieger, J., denied company's motion and allowed Attorney General's motion. Company appealed. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**Holdings:** The Supreme Judicial Court, Cypher, J., held that:

(1) demand satisfied "transacting any business" clause of long-arm statute;

(2) exercise of specific personal jurisdiction comported with requirements of due process;

(3) there was no good cause to set aside demand;

(4) allegedly prejudicial comments did not require disqualification of Attorney General from investigation; and

(5) company was not entitled to stay of state court action in light of different federal action.

Affirmed.

**1. Constitutional Law ⚿3964**
**Courts ⚿13.2**

For a nonresident to be subject to the authority of a state court, the exercise of jurisdiction must satisfy both the state's long-arm statute and the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. Amend. 14; Mass. Gen. Laws Ann. ch. 223A, § 3.

**2. Courts ⚿13.3(7)**

State Attorney General that issued civil investigative demand did not establish general personal jurisdiction over fossil fuel company, where company was incorporated and headquartered out of state, and total of company's activities in state did not approach volume required for assertion of general jurisdiction.

**3. Courts ⚿13.4(3)**

A business is a resident, and therefore subject to the forum's general jurisdiction, if the business is domiciled or incorporated or has its principal place of business in the forum state.

**4. Courts ⚿13.3(8)**

While the typical inquiry in specific personal jurisdiction asks whether there is a nexus between the defendant's in-state activities and the plaintiff's legal claims, the investigatory context requires that a court broaden its analysis to consider the relationship between the subject's activities and the central areas of inquiry covered by the investigation, regardless of whether that investigation has yet to indicate any wrongdoing.

**5. Antitrust and Trade Regulation ⚿128**

The consumer protection statute is a statute of broad impact that prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mass. Gen. Laws Ann. ch. 93A, § 2(a).

**6. Antitrust and Trade Regulation ⚿135(1)**

Under the consumer protection statute, an act or practice is unfair if it falls within at least the penumbra of some common-law, statutory, or other established concept of unfairness, is immoral, unethical, oppressive, or unscrupulous, and causes substantial injury to consumers. Mass. Gen. Laws Ann. ch. 93A, § 2(a).

**7. Antitrust and Trade Regulation ⚿146(1)**

The consumer protection statute extends to persons engaged in trade or commerce in business transactions with other persons also engaged in trade or commerce. Mass. Gen. Laws Ann. ch. 93A, § 11.

**8. Antitrust and Trade Regulation ⚿135(1), 136**

The analysis of what constitutes an unfair or deceptive act or practice requires a case-by-case analysis and is neither dependent on traditional concepts nor limited by preexisting rights or remedies. Mass. Gen. Laws Ann. ch. 93A, § 2(a).

**9. Courts ⚿13.5(10)**

Attorney General's civil investigative demand for information relating to fossil fuel company's knowledge and activities regarding climate change arose out of company's in-state network of fuel stations, as required to satisfy "transacting any business" clause of long-arm statute, in specific personal jurisdiction analysis; company operated more than 300 retail service stations in state, company had right to control advertising of its fossil fuel products to in-state consumers, and demand sought information as to whether company engaged in deceptive advertising regarding climate change. Mass. Gen. Laws Ann. ch. 93A, § 6(1); Mass. Gen. Laws Ann. ch. 223A, § 3(a).

**10. Constitutional Law ⚿3964**
**Courts ⚿13.2**

The limits imposed by the long-arm statute and due process are not coextensive. U.S. Const. Amend. 14; Mass. Gen. Laws Ann. ch. 223A, § 3.

**11. Constitutional Law ⚿3964**
**Courts ⚿13.2**

The long-arm statute asserts jurisdiction over a nonresident to the due process limit only when some basis for jurisdiction enumerated in the statute has been established. U.S. Const. Amend. 14; Mass. Gen. Laws Ann. ch. 223A, § 3.

**12. Constitutional Law ⚿3964**

Courts analyze the long-arm statute's requirement first in order to avoid unnecessary consideration of constitutional questions under the due process clause. U.S. Const. Amend. 14; Mass. Gen. Laws Ann. ch. 223A, § 3.

**13. Courts ⚿13.3(1)**

The long-arm statute sets out a list of specific instances in which a court may acquire personal jurisdiction over a nonresident defendant. Mass. Gen. Laws Ann. ch. 223A, § 3.

**14. Courts ⚿35**

A plaintiff has the burden of establishing facts to show that the ground relied on under the long-arm statute is present. Mass. Gen. Laws Ann. ch. 223A, § 3.

**15. Courts ⚿13.3(11)**

For jurisdiction to exist under the "transacting any business" clause of the long-arm statute, the facts must satisfy two requirements, which are broadly construed: the defendant must have transacted business in the state, and the plaintiff's claim must have arisen from the transaction of business by the defendant. Mass. Gen. Laws Ann. ch. 223A, § 3(a).

**16. Antitrust and Trade Regulation ⚿163**

A person may violate the consumer protection statute through false or misleading advertising. Mass. Gen. Laws Ann. ch. 93A, § 1 et seq.

**17. Antitrust and Trade Regulation ⚿163**

Advertising need not be totally false in order to be deemed deceptive in the context of the consumer protection statute; the criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information. Mass. Gen. Laws Ann. ch. 93A, § 1 et seq.; 940 Mass. Code Regs. 3.02(2), 3.05(1)-(2).

**18. Constitutional Law ⚿3965(3)**
**Courts ⚿13.5(10)**

Exercise of specific personal jurisdiction over fossil fuel company, for purposes of Attorney General's civil investigative demand for information relating to company's knowledge and activities related to climate change, comported with requirements of due process; company purposefully availed itself of privilege of conducting business in state by franchising more than 300 service stations and creating state-specific advertisements, investigation related to possible deceptive advertising and disclosures, and responding to demand would not have been unreasonable. U.S. Const. Amend. 14; Mass. Gen. Laws Ann. ch. 93A, §§ 2(c), 4, 5, 6, 11.

**19. Constitutional Law ⚿3964**

The touchstone of the inquiry into whether the exercise of specific personal jurisdiction comports with the requirements of due process remains whether the defendant purposefully established minimum contacts in the forum state. U.S. Const. Amend. 14.

**20. Constitutional Law ⚿3964**

The due process analysis of a specific personal jurisdiction question entails three requirements: first, minimum contacts must arise from some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws, second, the claim must arise out of or relate to the defendant's contacts with the forum, and third, the assertion of jurisdiction over the defendant must not offend traditional notions of fair play and substantial justice. U.S. Const. Amend. 14.

**21. Antitrust and Trade Regulation ⚿339**

Court lacked good cause to set aside Attorney General's civil investigative demand for documents and information relating to fossil fuel company's knowledge and activities related to climate change; demand described with reasonable particularity material requested, company already complied with other state's request for similar documents, and Attorney General's concerns about possible misrepresentations to consumers was sufficient to issue demand. Mass. Gen. Laws Ann. ch. 93A, § 6(7).

**22. Antitrust and Trade Regulation ⚿339**

The party moving to set aside a civil investigative demand under the consumer protection statute bears a heavy burden to show good cause why it should not be compelled to respond. Mass. Gen. Laws Ann. ch. 93A, § 6(7).

**23. Antitrust and Trade Regulation ⚿339**

The consumer protection statute grants the Attorney General broad investigatory powers. Mass. Gen. Laws Ann. ch. 93A, § 6.

**24. Antitrust and Trade Regulation ⚿339**

The consumer protection statute sets forth a relevance test to define the documents the Attorney General may examine during her investigation. Mass. Gen. Laws Ann. ch. 93A, § 6(1)(b).

**25. Antitrust and Trade Regulation ⚿339**

Under the consumer protection statute, a court must consider (1) whether a civil investigative demand describes with reasonable particularity the material required, (2) whether the material required is not plainly irrelevant to the authorized investigation, and (3) whether the quantum of material required does not exceed reasonable limits; violation of one of these standards constitutes good cause allowing the court to modify or set aside a demand. Mass. Gen. Laws Ann. ch. 93A, § 6(5, 7).

**26. Attorney General ⚿6**

Allegedly prejudicial statements to public concerning investigation did not require that Attorney General be disqualified from investigation into fossil fuel company; Attorney General's comments regarding possible disconnect between company's knowledge and its public statements regarding climate change did not contain actionable bias, Attorney General was authorized to investigate possible violations of consumer protection statute, and it was reasonable for elected official to routinely inform constituents of nature of investigations. Mass. Gen. Laws Ann. ch. 93A, § 6(1); S.J.C.Rule 3:07, Rules of Prof.Conduct, Rule 3.6.

**27. Attorney and Client ⚿19**

Where a violation of the professional conduct rule prohibiting prejudicial statements to the public concerning an ongoing investigation has occurred, a judge may disqualify the violator. S.J.C.Rule 3:07, Rules of Prof.Conduct, Rule 3.6.

**28. Abatement and Revival ⚿12**

Fossil fuel company was not entitled to stay of state court action regarding Attorney General's civil investigative demand, even though company filed complaint for declaratory and injunctive relief challenging demand in federal court one day before state court filing, where state court was better equipped to oversee cases brought under consumer protection statute, and federal action challenged investigation on constitutional grounds not raised in state action. Mass. Gen. Laws Ann. ch. 93A, §§ 6(7), 9, 11.

**29. Action ⚿69(4)**

Where there is only a partial overlap in the subject matter of two actions, a judge has considerable discretion when deciding whether to grant a stay.

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Attorney General. Consumer Protection Act, Investigative demand. Jurisdiction, Personal, Foreign corporation, Long-arm statute. Due Process of Law, Jurisdiction over nonresident.

MOTION filed in the Superior Court Department on June 16, 2016.

The proceeding was heard by Heidi E. Brieger, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Justin Anderson, of the District of Columbia (Jamie D. Brooks & Theodore V. Wells, Jr., of New York, Thomas C. Frongillo, & Caroline K. Simons, Boston, also present) for the plaintiff.

Richard A. Johnston, Assistant Attorney General (Melissa A. Hoffer, I. Andrew Goldberg, Christopher G. Courchesne, Peter C. Mulcahy, & Seth Schofield, Assistant Attorneys General, also present) for the defendant.

Wendy B. Jacobs & Shaun A. Goho, for Francis X. Bellotti & others, amici curiae, submitted a brief.

Archis A. Parasharami, of the District of Columbia, & Steven P. Lehotsky, for Chamber of Commerce of the United States of America, amicus curiae, submitted a brief.

Present: Gants, C.J., Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

CYPHER, J.

|313 In 2015, news reporters released internal documents from Exxon Mobil Corporation (Exxon) purporting to show that the company knew, long before the general public, that emissions from fossil fuels—Exxon's principal product—contributed to global warming and climate change, and that in order to avoid the consequences of climate change it would be necessary to reduce drastically global fossil fuel consumption. The documents also purported to establish that despite Exxon's knowledge of climate risks, the company failed to disclose that knowledge to the public, and instead sought to undermine the evidence of climate change altogether, in order to preserve its value as a company.

Upon reviewing this information, the Attorney General believed that Exxon's marketing or sale of fossil fuel products in Massachusetts may have violated the State's primary consumer protection law, G. L. c. 93A. Based on her authority under G. L. c. 93A, § 6, the Attorney General issued a civil investigative demand (C.I.D.) to Exxon, seeking documents and information relating to Exxon's knowledge of and activities related to climate change.

Exxon responded by filing a motion in the Superior Court, pursuant to G. L. c. 93A, § 6 (7), seeking to set aside or modify |314 the C.I.D. Exxon argued that (1) Exxon is not subject to personal jurisdiction in Massachusetts; (2) the Attorney General is biased against Exxon and should be disqualified; (3) the C.I.D. violates Exxon's statutory and constitutional rights; and (4) Exxon's Superior Court case should be stayed pending a ruling on Exxon's request for relief in Federal court.[1] The Attorney General cross-moved to compel Exxon to comply with the C.I.D. A Superior Court judge denied Exxon's motion and allowed the Attorney General's cross motion to compel. Exxon appealed, and we transferred the case from the Appeals Court on our own motion. We conclude that there is personal jurisdiction over Exxon with respect to the Attorney General's investigation, and that the judge did not abuse her discretion in denying Exxon's requests to set aside the C.I.D., disqualify the Attorney General, and issue a stay. We affirm the judge's order in its entirety.[2]

**[1]** 1. Personal jurisdiction. Exxon's primary argument is that, as a nonresident corporation, it is not subject to personal jurisdiction in Massachusetts. For a nonresident to be subject to the authority of a Massachusetts court, the exercise of jurisdiction must satisfy both Massachusetts's long-arm statute, G. L. c. 223A, § 3, and the requirements of the due process clause of the Fourteenth Amendment to the Unit-

1. One day before filing its instant Superior Court motion, Exxon filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Texas, challenging the C.I.D. on constitutional grounds not raised in this action. Exxon Mobil Corp. vs. Healey, U.S. Dist. Ct., No. 4:16–CV–469, 2016 WL 6460407 (N.D. Tex. June 15, 2016).

2. We acknowledge the amicus briefs submitted by five former Massachusetts Attorneys General and the Chamber of Commerce of the United States of America.

ed States Constitution. SCVNGR, Inc. v. Punchh, Inc., 478 Mass. 324, 325, 85 N.E.3d 50 (2017). The Attorney General "has the burden of establishing the facts upon which the question of personal jurisdiction over [Exxon] is to be determined." Droukas v. Divers Training Academy, Inc., 375 Mass. 149, 151, 376 N.E.2d 548 (1978), quoting Nichols Assocs. v. Starr, 4 Mass. App. Ct. 91, 93, 341 N.E.2d 909 (1976).

**[2, 3]** A business is a "resident," and therefore subject to the forum's general jurisdiction, if the business is domiciled or incorporated or has its principal place of business in the forum State. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011). Exxon is incorporated in New Jersey and headquartered in Texas. Because "[t]he total of [Exxon's] activities in Massachusetts does not approach the volume required for an assertion of general jurisdiction," |315 Tatro v. Manor Care, Inc., 416 Mass. 763, 772 n.6, 625 N.E.2d 549 (1994), citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413–416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), our inquiry in this case concerns the exercise of specific jurisdiction. This requires an "affiliatio[n] between the forum and the underlying controversy" (citation omitted). Goodyear Dunlop Tires Operations, S.A., supra at 919, 131 S.Ct. 2846. See G. L. c. 223A, § 3 (granting jurisdiction over claims "arising from" certain enumerated grounds occurring within Massachusetts); Tatro, supra at 772, 625 N.E.2d 549, citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) ("The plaintiff's claim must arise out of, or relate to, the defendant's forum contacts").

**[4]** Exxon denies any such affiliation in this case, contending that it "engages in no suit-related conduct" in Massachusetts. Here there is no "suit," however, as this matter involves an investigation—a precursor to any formal legal action by the Attorney General. So while our typical inquiry asks whether there is a nexus between the defendant's in-State activities and the plaintiff's legal claim(s), the investigatory context requires that we broaden our analysis to consider the relationship between Exxon's Massachusetts activities and the "central areas of inquiry covered by the [Attorney General's] investigation, regardless of whether that investigation has yet to indicate [any] ... wrongdoing." Securities & Exch. Comm'n vs. Lines Overseas Mgt., Ltd., U.S. Dist. Ct., No. Civ.A. 04–302 RWR/AK, 2005 WL 3627141 (D.D.C. Jan. 7, 2005). Cf. Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 141–142 (2d Cir. 2014) (personal jurisdiction in nonparty discovery dispute "focus[es] on the connection between the nonparty's contacts with the forum and the discovery order at issue"); Matter of an Application to Enforce Admin. Subpoenas Duces Tecum of the Secs. Exch. Comm'n v. Knowles, 87 F.3d 413, 418 (10th Cir. 1996) (personal jurisdiction over nonresident in subpoena enforcement action, which was part of investigation into potential violation of Federal securities laws, where "[t]he underlying investigation and th[e] subpoena ... ar[o]se out of [nonresident's] contacts with the United States"). At this stage, the Attorney General is statutorily authorized to investigate whatever conduct she believes may constitute a violation of G. L. c. 93A. G. L. c. 93A, § 6 (1). We therefore must construe the C.I.D. broadly, and in connection with what G. L. c. 93A protects.

**[5–7]** General Laws c. 93A "is a statute of broad impact" that prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." |316 Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693–694, 322 N.E.2d 768 (1975). See G. L. c.

93A, § 2 (a). "Under [G. L. c.] 93A, an act or practice is unfair if it falls 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness'; 'is immoral, unethical, oppressive, or unscrupulous'; and 'causes substantial injury to consumers.' " Walsh v. TelTech Sys., Inc., 821 F.3d 155, 160 (1st Cir. 2016), quoting PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915 (1975). The same protection also applies in the commercial context, as G. L. c. 93A extends "to persons engaged in trade or commerce in business transactions with other persons also engaged in trade or commerce." Kraft Power Corp. v. Merrill, 464 Mass. 145, 155, 981 N.E.2d 671 (2013), quoting Manning v. Zuckerman, 388 Mass. 8, 12, 444 N.E.2d 1262 (1983). See Kraft Power Corp., supra, citing G. L. c. 93A, § 11 ("The development of the statute ... suggests that the unfair or deceptive acts or practices prohibited are those that may arise in dealings between discrete, independent business entities").

[8] Our analysis of what constitutes an unfair or deceptive act or practice requires a case-by-case analysis, see Kattar v. Demoulas, 433 Mass. 1, 14, 739 N.E.2d 246 (2000), and is neither dependent on traditional concepts nor limited by preexisting rights or remedies. Travis v. McDonald, 397 Mass. 230, 232, 490 N.E.2d 1169 (1986). "This flexible set of guidelines as to what should be considered lawful or unlawful under c. 93A suggests that the Legislature intended the terms 'unfair and deceptive' to grow and change with the times." Nei v. Burley, 388 Mass. 307, 313, 446 N.E.2d 674 (1983). The Attorney General's investigation concerns climate change caused by manmade greenhouse gas emissions—a distinctly modern threat that grows more serious with time, and the effects of which are already being felt in Massachusetts. See, e.g., Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 521–523, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (describing current and future harms from climate change affecting Massachusetts). More particularly, the investigation is premised on the Attorney General's belief that Exxon may have misled Massachusetts residents about the impact of fossil fuels on both the Earth's climate and the value of the company, in violation of c. 93A. "Despite [Exxon's] sophisticated internal knowledge" about that impact, the Attorney General states, "it appears that ... Exxon failed to disclose what it knew to either the consumers who purchased its fossil fuel products or investors who purchased its securities." Because the crux of a failure to disclose theory is knowledge, the C.I.D. seeks [317] "information related to ... what Exxon knew about (a) how combustion of fossil fuels (its primary product) contributes to climate change and (b) the risk that climate change creates for the value of Exxon's businesses and assets." The C.I.D. also seeks information about "when Exxon learned those facts" and "what Exxon told Massachusetts consumers and investors, among others, about [them]." The primary question for us is whether there is a sufficient connection between those inquiries and Exxon's Massachusetts-based activities.

[9–15] a. Long-arm analysis.[3] Massachusetts's long-arm statute, G. L. c. 223A,

3. The parties' arguments on the jurisdictional issues focus exclusively on the due process question, forgoing any analysis under Massachusetts's long-arm statute, G. L. c. 223A, § 3. We recently clarified, however, that Massachusetts courts cannot "streamline" the personal jurisdiction inquiry by focusing solely on due process considerations, under the theory that the limits imposed by the long-arm statute and due process are coextensive. See

§ 3, "sets out a list of specific instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." Tatro, 416 Mass. at 767, 625 N.E.2d 549. "A plaintiff has the burden of establishing facts to show that the ground relied on under § 3 is present." Id. In the Superior Court, the Attorney General invoked the "transacting any business" clause of § 3, so we focus our inquiry on that subsection. See G. L. c. 223A, § 3 (a) ("[a] court may exercise personal jurisdiction over a person ... as to a cause of action in law or equity arising from the person's ... transacting any business in this commonwealth"). "For jurisdiction to exist under § 3 (a), the facts must satisfy two requirements—the defendant must have transacted business in Massachusetts, and the plaintiff's claim must have arisen from the transaction of business by the defendant." Tatro, supra at 767, 625 N.E.2d 549. We construe these dual requirements "broadly," id. at 771, 625 N.E.2d 549, and conclude that they are satisfied here.

In Massachusetts, Exxon operates a franchise network of more than 300 retail service stations under the Exxon and Mobil brands that sell gasoline and other fossil fuel products to Massachusetts consumers. The Attorney General contends that this network establishes an independent basis for personal jurisdiction over 318 Exxon in this matter.[4] The franchise system is governed by a Brand Fee Agreement (BFA). Under section 7 of the BFA, the "BFA Holder" pays Exxon a monthly fee for the use of Exxon's trademarks and to participate in Exxon's business services and programs at the BFA Holder's gasoline stations. Under section 5 of the BFA, Exxon prescribes a method for converting unbranded fuel to Exxon- and Mobil-branded gasoline by injecting certain fuel additives; these additives are to be obtained exclusively from suppliers identified by Exxon, and are inserted according to Exxon's specifications. Under section 7(a)(ii) of the BFA, the dollar amount of a BFA Holder's monthly fee is determined in part by the total amount of Exxon- and Mobil-branded fuel sold at the BFA Holder's stations. Specifically, the monthly fee for the final five years of BFA shall equal the amount agreed to between the parties or an amount determined by "Recalculated Total Volume," which is the function of "the total volume of [Exxon- and Mobil-branded fuel] sold in the aggregate by all Direct Served Outlets" during a given period.

The sample BFA submitted to the Superior Court was struck between Exxon and a Massachusetts-based limited liability company; it states that it shall be in effect for a period of fifteen years, with possible extensions, and governs the operation of over 300 Exxon- and Mobil-branded "retail motor fuel outlets" located throughout the

SCVNGR, Inc. v. Punchh, Inc., 478 Mass. 324, 329–330 & n.9, 85 N.E.3d 50 (2017). They are not. Id. "The long-arm statute 'asserts jurisdiction over [a nonresident] to the constitutional limit only when some basis for jurisdiction enumerated in the statute has been established.'' Id. at 329, 85 N.E.3d 50, quoting Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 6, 389 N.E.2d 76 (1979). We analyze the long-arm statute's requirement first "in order to avoid unnecessary consideration of constitutional questions.'' SCVNGR, Inc., supra at 325, 85 N.E.3d 50.

4. The Attorney General also cites additional Massachusetts contacts besides Exxon's franchise network as grounds for our exercise of personal jurisdiction over Exxon. We address those contacts in our discussion of due process, given our conclusion that the "literal requirements of the [long-arm] statute are satisfied'' through Exxon's franchise system. Tatro v. Manor Care, Inc., 416 Mass. 763, 767, 625 N.E.2d 549 (1994).

State. This network represents Exxon's "purposeful and successful solicitation of business from residents of the Commonwealth," Tatro, 416 Mass. at 767, 625 N.E.2d 549, such that it satisfies the "transacting any business" prong of § 3 (a).

The more difficult question is whether the C.I.D. "aris[es] from" this network of Exxon- or Mobil-branded fuel stations. G. L. c. 223A, § 3 (a). Exxon argues that it does not, because while the Attorney General's investigation is concerned primarily with Exxon's marketing and advertising of its fossil fuel products to Massachusetts consumers, Exxon does not control its franchisees' advertising, and hence those communications cannot be attributed to Exxon for purposes of personal jurisdiction. The judge determined that Exxon's assertion of a lack of control over [319] franchisees' advertising conflicts with the terms of the BFA. We agree. Section 15(a) requires the BFA Holder and "its Franchise Dealers to diligently promote the sale of [Exxon- or Mobil-branded fuel], including through advertisements," and states that "Exxon[ ] shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions ... for the promotion and sale of any product, merchandise or services" that "(i) uses or incorporates any [Exxon trademark] or (ii) relates to any Business operated at a BFA Holder Branded Outlet." This section also obligates the BFA Holder to "expressly require all Franchise Dealers to ... agree to such review and control by Exxon[ ]." [5]

In Depianti v. Jan–Pro Franchising Int'l, Inc., 465 Mass. 607, 617, 990 N.E.2d 1054 (2013), we applied the "right to control" test to the franchisor-franchisee relationship, holding that "a franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff." This test is a useful measure for determining when the conduct of a franchisee may be properly attributed to a franchisor, and we believe that it is equally well suited to our analysis of personal jurisdiction in this case. By virtue of section 15(a) of the BFA, Exxon has the right to control the advertising of its fossil fuel products to Massachusetts consumers.[6]

This leads to our conclusion that the C.I.D. "aris[es] from" the BFA and Exxon's network of branded fuel stations in [320] Massachusetts. G. L. c. 223A, § 3 (a).

**5.** Exxon says that it proffered evidence below that "BFA holders control their own marketing," citing to certain provisions of the BFA and to an affidavit from Exxon's United States Branded Wholesale Manager, Geoffrey Doescher. The cited-to provisions of the BFA (sections 2[e][6] and 3[a], [h]) address the establishment of the franchise relationship and the use of Exxon's trademarks, and do not clarify control over advertising. Similarly, while the Doescher affidavit states in conclusory fashion that Exxon does not control the "marketing of" or "advertisements by BFA-holders," this is belied by section 15(a) of the BFA.

**6.** We are not persuaded by Exxon's argument that its control over franchisee advertising is solely to protect its trademarks under Federal law. See Depianti v. Jan–Pro Franchising Int'l, Inc., 465 Mass. 607, 615, 990 N.E.2d 1054 (2013) ("Under Federal law, a franchisor is required to maintain control and supervision over a franchisee's use of its mark, or else the franchisor will be deemed to have abandoned its mark under the abandonment provisions of the Lanham Act"). Section 15(a) expressly states that Exxon's exclusive authority to review and approve such advertising extends not only to advertisements that incorporate Exxon's trademarks, but also, more broadly, to advertising that "relates to any Business operated at a BFA Holder Branded Outlet" (emphasis added).

Through its control over franchisee advertising, Exxon communicates directly with Massachusetts consumers about its fossil fuel products (and hence we reject Exxon's assertion that it "has no direct contact with any consumers in Massachusetts"). This control comports with one of Exxon's "primary business purpose[s]" as expressed in section 13(a) of the BFA: "to optimize effective and efficient ... representation of [Exxon- and Mobil-branded fuel] through planned market and image development." The C.I.D. seeks information about the nature and extent of Exxon's Massachusetts advertisements, including those disseminated through Exxon's franchisees.

More broadly, the C.I.D. seeks information concerning Exxon's internal knowledge about climate change. Many of the requests in the C.I.D. seek documents to substantiate public statements made by Exxon in recent years on the topic of climate change. Exxon protests that its franchisees have nothing to do with climate change and have played no part in disseminating those statements, so the Attorney General's requests cannot "arise from" Exxon's franchise system. Bearing in mind the basis for the C.I.D. and the Attorney General's investigation, G. L. c. 93A, we disagree.

**[16, 17]** The statute authorizes the Attorney General to initiate an investigation "whenever [s]he believes a person has engaged in or is engaging in" a violation of G. L. c. 93A, in order "to ascertain whether in fact [that] person" is doing so. G. L. c. 93A, § 6 (1). A person may violate G. L. c. 93A through false or misleading advertising. "Our cases ... establish that advertising need not be totally false in order to be deemed deceptive in the context of G. L. c. 93A.... The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." Aspinall v. Philip Morris Cos., 442 Mass. 381, 394–395, 813 N.E.2d 476 (2004).[7] In order to determine whether Exxon engaged in deceptive advertising at its franchisee stations, by [321] either giving a misleading impression or failing to disclose material information about climate change, the Attorney General must first ascertain what Exxon knew about that topic.

**[18–20]** b. Due process. We must also determine whether the exercise of personal jurisdiction over Exxon comports with the requirements of due process. The "touchstone" of this inquiry remains "whether the defendant purposefully established 'minimum contacts' in the forum state." Tatro, 416 Mass. at 772, 625 N.E.2d 549, quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). "The due process analysis entails three requirements. First, minimum contacts must arise from some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.... Second, the claim must arise out of or relate to the defendant's contacts

**7.** See 940 Code Mass. Regs. § 3.02(2) (2014) ("No statement or illustration shall be used in any advertisement ... which may ... misrepresent the product in such a manner that later, on disclosure of the true facts, there is a likelihood that the buyer may be switched from the advertised product to another"); 940 Code Mass. Regs. § 3.05(1)–(2) (1993) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect").

with the forum.... Third, the assertion of jurisdiction over the defendant must not offend traditional notions of fair play and substantial justice" (citations and quotations omitted). Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 457 Mass. 210, 217, 929 N.E.2d 293 (2010).[8]

First, Exxon has purposefully availed itself of the privilege of conducting business activities in Massachusetts, with both consumers and other businesses. As mentioned, Exxon is the franchisor of over 300 Exxon- and Mobil-branded service stations located [322]throughout Massachusetts, and through that arrangement Exxon controls the marketing of its products to Massachusetts consumers. In addition, Exxon admits that it created Massachusetts-specific advertisements for its products in print and radio. Such "advertising in the forum State," especially when coupled with its extensive franchise network, is indicative of Exxon's "intent or purpose to serve the market in the forum State." Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., Solano County, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). See Workgroup Tech. Corp. v. MGM Grand Hotel, LLC, 246 F.Supp.2d 102, 114 (D. Mass. 2003) (purposeful availment where defendant "had advertisements in publications that circulated in Massachusetts" and "purposefully derived economic benefits from its forum-[S]tate activities"); Gunner v. Elmwood Dodge, Inc., 24 Mass. App. Ct. 96, 99–101, 506 N.E.2d 175 (1987) (out-of-State company's advertisements "aimed squarely at Massachusetts targets," which were directed "at establishing ongoing relationships with Massachusetts consumers," supported jurisdiction). Exxon also operates a Web site that is accessible in Massachusetts and enables visitors to locate the nearest Exxon- and Mobil-branded service station or retailer. See Hilsinger Co. v. FBW Invs., 109 F.Supp.3d 409, 428–429 (D. Mass. 2015) (purposeful availment where nonresident defendant's Web site enabled visitors to contact company to learn where they can buy its products); Bulldog Investors Gen. Partnership, 457 Mass. at 217, 929 N.E.2d 293 (solicitation sent to Massachusetts resident, coupled with Web site accessible in Massachusetts, made it "reasonable for the [nonresident] to anticipate being held responsible in Massachusetts").

Further, Exxon's franchise system in Massachusetts is governed by a contract,

**8.** Following the Superior Court judge's decision and the parties' submission of their appellate briefs, the United States Supreme Court decided Bristol–Myers Squibb Co. v. Superior Court of Cal., San Francisco County, —— U.S. ——, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017) (Bristol–Myers), which addresses the exercise of specific personal jurisdiction. Exxon argues that Bristol–Myers controls our decision, but we are not persuaded. Bristol–Myers concerned whether the California Supreme Court properly exercised personal jurisdiction over the claims of nonresident plaintiffs, despite the lack of any identifiable connection between those plaintiffs' claims and the nonresident defendant's activities in California. Id. at 1778. In concluding that there was personal jurisdiction over the nonresident plaintiffs' claims, the California Supreme Court applied a "sliding scale approach," under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." Id. at 1781. The Supreme Court reversed, criticizing the "sliding scale approach" and reiterating the need for "a connection between the forum and the specific claims at issue." Id. Unlike in Bristol–Myers, the Attorney General's investigation is brought on behalf of Massachusetts residents, for potential violations occurring within Massachusetts. Moreover, our conclusion that there is personal jurisdiction over Exxon here rests not on Exxon's general Massachusetts-based activities, but on the nexus between certain of Exxon's Massachusetts-based activities and the Attorney General's investigation.

the BFA. While such a contractual relationship is not necessarily a "contact," Burger King Corp., 471 U.S. at 478, 105 S.Ct. 2174, when that relationship "reach[es] out beyond one [S]tate and create[s] continuing relationships and obligations with citizens of another [S]tate," the nonresident subjects itself to that other State's jurisdiction for claims related to the contract. Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643, 647, 70 S.Ct. 927, 94 L.Ed. 1154 (1950). See Baskin–Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28, 38 (1st Cir. 2016) (purposeful availment where, among other things, defendant received monthly payments from plaintiff's Massachusetts headquarters). Under the BFA, the BFA Holder pays Exxon a monthly fee in exchange for the use of Exxon's trademarks, as well as various Exxon business [323]services and programs, including training and uniforms; Exxon also assists the BFA Holder in procuring the additives necessary to create and sell Exxon- and Mobil-branded fuel. Through this agreement Exxon has "deliberately targeted the Massachusetts economy and reasonably should have foreseen that, if a controversy developed, it might be haled into a Massachusetts court." Baskin–Robbins Franchising LLC, supra at 39.

The Attorney General's investigation "arise[s] out of, or relate[s] to" these contacts. Tatro, 416 Mass. at 772, 625 N.E.2d 549. As mentioned, the Attorney General is authorized to investigate potential violations of G. L. c. 93A. G. L. c. 93A, § 6. In addition to prohibiting deceptive advertising to consumers, Aspinall, 442 Mass. at 395, 813 N.E.2d 476, c. 93A also requires honest disclosures in transactions between businesses. See Kraft Power Corp., 464 Mass. at 155, 981 N.E.2d 671; G. L. c. 93A, § 11. "A duty exists under c. 93A to disclose material facts known to a party at the time of a transaction." Underwood v. Risman, 414 Mass. 96, 99–100, 605 N.E.2d 832 (1993). The C.I.D. seeks information relating to Exxon's knowledge of "the risk that climate change creates for the value of [its] businesses and assets," and "what Exxon told Massachusetts consumers and investors, among others, about those facts." Possible misrepresentations or omissions about the threat that climate change poses to Exxon's business model are highly relevant to its contracts with BFA Holders, who agree, under section 1 of the BFA, to fifteen-year terms with Exxon and who are required, under section 21(b), to indemnify Exxon against all claims and liabilities based on State consumer protection and environmental laws, among others.

The exercise of personal jurisdiction over Exxon also does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945), quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940). See Burger King Corp., 471 U.S. at 477, 105 S.Ct. 2174 (where court has determined nonresident has requisite minimum contacts, party must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable"). Exxon has produced no evidence that responding to the Attorney General's investigation would be unreasonable. Even assuming that it had, we would balance that showing with "the Commonwealth's interest in enforcing its laws in a Massachusetts forum." Bulldog Investors Gen. Partnership, 457 Mass. at 218, 929 N.E.2d 293. As Massachusetts's chief law enforcement officer, the Attorney General has a manifest interest in enforcing G. L. c. 93A. See, e.g., G. L. c. 93A, § 6 [324](Attorney General may investigate "whenever [s]he believes" c. 93A violation has occurred); id. at § 4 (Attorney General

may file civil actions "in the name of the commonwealth"); id. at § 5 (Attorney General may seek assurances of discontinuance of unlawful acts or practices); id. at § 2 (c) (Attorney General "may make rules and regulations interpreting" what constitutes unlawful act or practice).[9]

**[21, 22]** 2. Exxon's challenge to the substance of the C.I.D. Exxon also challenges the C.I.D. based on its content, arguing that it is "overbroad and unduly burdensome," as well as "arbitrary and capricious." Exxon argues that these points constitute "good cause" warranting our modifying or setting aside the C.I.D. under G. L. c. 93A, § 6 (7) ("the court may, upon motion for good cause shown . . . modify or set aside such demand or grant a protective order"). As "[t]he party moving to set aside [the] C.I.D.[, Exxon] bears a heavy burden to show good cause why it should not be compelled to respond." CUNA Mut. Ins. Soc'y v. Attorney Gen., 380 Mass. 539, 544, 404 N.E.2d 1219 (1980). See Attorney Gen. v. Bodimetric Profiles, 404 Mass. 152, 155, 533 N.E.2d 1364 (1989). The judge concluded that Exxon had failed to sustain that burden, and we review her conclusion for an abuse of discretion. Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 356, 362 N.E.2d 207 (1977) (Yankee Milk) ("in C.I.D. matters there must be, as in all discovery proceedings, a broad area of discretion residing in the judge").

**[23]** By its terms, G. L. c. 93A, § 6, authorizes the Attorney General to initiate an investigation "whenever [s]he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." This grants the Attorney General "broad investigatory powers." Bodimetric Profiles, 404 Mass. at 157, 533 N.E.2d 1364. See Yankee Milk, 372 Mass. at 364, 362 N.E.2d 207 ("the Legislature [particularly [325] in providing that the interrogated party must show 'good cause' why demands should not be honored] has indicated that the statute should be construed liberally in favor of the government"). Still, the statute imposes certain limitations on the scope of the Attorney General's investigative authority that we must consider.

**[24, 25]** In pertinent part, § 6 (1) (b) authorizes the Attorney General to "examine . . . any documentary material . . . relevant to such alleged unlawful method, act or practice" that is the subject of the Attorney General's investigation. This "sets forth a relevance test to define the documents the Attorney General may examine." Yankee Milk, 372 Mass. at 357, 362 N.E.2d 207. See Bodimetric Profiles, 404 Mass. at 156, 533 N.E.2d 1364. Her power to examine such documents is further constrained by § 6 (5), in particular its provision prohibiting a C.I.D. from "contain[ing] any requirement [that] would be unreasonable or improper if contained in a subpoena duces tecum issued by a

**9.** Because we conclude that due process is satisfied by virtue of the nexus between the Attorney General's investigation and Exxon's franchise system, we need not reach the parties' arguments with respect to the Attorney General's alternative theory that Exxon may have deceived investors with respect to climate change. Although the cover letter of the C.I.D. states that the investigation concerns potential violations of G. L. c. 93A with respect to both consumers and investors, very few of the C.I.D.'s requests even mention investors or securities, and even then, those requests likewise concern Exxon's internal knowledge and discussions concerning climate change (in these requests, for the purpose of preparing securities filings or investor communications). Given the focus on Exxon's knowledge, these requests also relate sufficiently to the Attorney General's consumer deception theory.

court of the [C]ommonwealth." We have interpreted this particular provision to impose a "three-pronged test" intended to "balance the opposing interests of the investigator and the investigated." Yankee Milk, supra at 361 n.8, 362 N.E.2d 207. Here, a court must consider (1) whether the C.I.D. "describe[s] with reasonable particularity the material required," [10] (2) whether "the material required is not plainly irrelevant to the authorized investigation," [11] and (3) whether "the quantum of material required does not exceed reasonable limits." Id. at 360–361, 362 N.E.2d 207. See Matter of a Civil Investigative Demand Addressed to Bob Brest Buick, Inc., 5 Mass. App. Ct. 717, 719–720, 370 N.E.2d 449 (1977) ("It cannot now be said that the C.I.D., as modified, was too indefinite, exceeded reasonable limits, or was plainly irrelevant . . . to the public interest sought to be protected" [citations and quotations omitted] ). "Violation of one of these standards [under § 6 (5) ] constitutes 'good cause' allowing the court to modify or set aside a demand" pursuant to § 6 (7). Yankee Milk, supra at 359 n.7, 362 N.E.2d 207. See Harmon Law Offices, P.C. v. Attorney Gen., 83 Mass. App. Ct. 830, 834–835, 991 N.E.2d 1098 (2013) 326("Good cause is shown only if the moving party demonstrates that the Attorney General acted arbitrarily or capriciously or that the information sought is plainly irrelevant"). With these limitations in mind, we turn to the judge's conclusion that Exxon had not met its burden of showing "why it should not be compelled to respond" to the C.I.D. CUNA Mut. Ins. Soc'y, 380 Mass. at 544, 404 N.E.2d 1219.

First, we agree with the judge that the C.I.D. describes with reasonable particularity the material requested, G. L. c. 93A, § 6 (4) (c), (5), given its focus on Exxon's knowledge of the impacts of carbon dioxide and other fossil fuel emissions on the Earth's climate. With respect to the relevance of the materials sought, Exxon argues that the Attorney General's request for historic documents dating as far back as 1976 are not relevant to an investigation under c. 93A, which carries a four-year statute of limitations. G. L. c. 260, § 5A. We find no support for Exxon's position, either in law (Exxon fails to cite any case) or logic. A document created more than four years ago is, of course, still probative of Exxon's present knowledge on the issue of climate change, and whether Exxon disclosed that knowledge to the public. Because these materials are not "plainly irrelevant," Yankee Milk, 372 Mass. at 360, 362 N.E.2d 207, the requests are permissible under this factor.

We are also not persuaded that the C.I.D.'s requests "exceed reasonable limits." Id. at 361, 362 N.E.2d 207. Documentary demands do so "only when they 'seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records.' " Bodimetric Profiles, 404 Mass. at 159, 533 N.E.2d 1364, quoting Yankee Milk, supra at 361 n.8, 362 N.E.2d 207. In analyzing this point, the judge properly considered the fact that Exxon has already complied with a request for

**10.** This factor mirrors the particularity requirement of the previous section, G. L. c. 93A, § 6 (4) (c), which mandates that the notice of a C.I.D. "describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded." See Yankee Milk, 372 Mass. at 361, 362 N.E.2d 207 (observing that these two provisions "impose[ ] . . . an equivalent [specificity] standard").

**11.** Similarly, the relevance requirement of this second factor mirrors the relevance requirement of § 6 (1) (b), and we interpret the two to impose an identical standard.

similar documents from New York's Attorney General. The judge reasonably inferred that it would not be too burdensome for Exxon, having already complied with that request, to comply with the Massachusetts C.I.D., which is similar in nature.[12] Exxon does not cite to the record before us to support a contrary conclusion. Further, we have recognized that in cases such as this, where "the requested information is ... peculiarly within the province of the person to 327 whom the C.I.D. is addressed, broad discovery demands may be permitted even when such a demand 'imposes considerable expense and burden on the investigated party.' " Bodimetric Profiles, supra.

The remainder of Exxon's challenge to the substance of the C.I.D. concerns its assertion that the Attorney General issued the C.I.D. solely as a pretext, "rendering the [C.I.D.] an arbitrary and capricious exercise of executive power." Exxon cites to cases from other contexts to suggest that our analysis of the propriety of the C.I.D. must include an evaluation of the reasonableness of the Attorney General's reasons for issuing it. "There is no requirement that the Attorney General have probable cause to believe that a violation of ... c. 93A has occurred. [She] need only have a belief that a person has engaged in or is engaging in conduct declared by be unlawful by ... c. 93A. In these circumstances, the Attorney General must not act arbitrarily or in excess of [her] statutory authority, but [s]he need not be confident in the probable result of [her] investigation." CUNA Mut. Ins. Soc'y, 380 Mass. at 542 n.5, 404 N.E.2d 1219. The judge determined that the Attorney General has "assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the [C.I.D]." The Attorney General's belief that Exxon's conduct may violate c. 93A is all that is required under G. L. c. 93A, § 6 (1).

**[26]** 3. Disqualification of the Attorney General. Exxon also seeks the disqualification of the entire office of the Attorney General from this investigation. Exxon bases its request on comments made by the Attorney General in March, 2016, at the press conference where she announced the commencement of her investigation into Exxon. The judge denied Exxon's request, and we review the denial for an abuse of discretion. Commonwealth v. Reynolds, 16 Mass. App. Ct. 662, 664, 454 N.E.2d 512 (1983).

At the press conference, titled "AGs United for Clean Power," the Attorney General spoke about the basis for her investigation. The relevant portion of her comments were as follows:

> "Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers 328 about the dangers of climate change should be, must be, held accountable. That'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

12. The judge wrote: "At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request."

to share with investors and with the American public."

[27] Exxon argues that these comments violated Mass. R. Prof. C. 3.6, as appearing in 471 Mass. 1430 (2015), which prohibits any lawyer from making prejudicial statements to the public concerning an ongoing investigation. Where a violation has occurred, a judge may disqualify the violator. See Pisa v. Commonwealth, 378 Mass. 724, 728–730, 393 N.E.2d 386 (1979). The judge concluded that the Attorney General's comments contained no "actionable bias," and instead were intended only to inform the public of the basis for the investigation into Exxon. We discern no abuse of discretion in the judge's conclusion. The Attorney General is authorized to investigate what she believes to be violations of c. 93A. G. L. c. 93A, § 6 (1). As an elected official, it is reasonable that she routinely informs her constituents of the nature of her investigations. See Buckley v. Fitzsimmons, 509 U.S. 259, 278, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (statements to press by prosecutor serve vital public function); Commonwealth v. Ellis, 429 Mass. 362, 372–373, 378, 708 N.E.2d 644 (1999) (discussing prosecutor's duty to zealously advocate within ethical limits).

[28] 4. Exxon's request for a stay. The day before filing its request to modify or set aside the C.I.D., Exxon filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Texas challenging the C.I.D. on constitutional grounds not raised in this action.[13] Exxon requested that the Superior Court judge stay this matter pending the resolution of the Federal suit. The judge denied Exxon's request, and we review that denial for an abuse of discretion. Soe v. Sex Offender Registry Bd., 466 Mass. 381, 392, 995 N.E.2d 73 (2013).

In denying Exxon's request, the judge reasoned that the Superior [329] Court is better equipped than a Federal court in Texas to decide a matter pertaining to Massachusetts's primary consumer protection law, G. L. c. 93A.[14] Exxon argues that this constitutes an abuse of discretion, and contends, somewhat remarkably, that there "is good reason to question the premise" that Massachusetts courts are more capable than out-of-State courts to oversee cases arising under c. 93A. The Legislature designated the Superior Court as the forum for bringing a challenge to a C.I.D. issued under G. L. c. 93A, § 6. See G. L. c. 93A, § 6 (7) ("[t]he motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"). Likewise, the Legislature provided that civil actions under G. L. c. 93A, § 9 or 11, may be brought in the Superior Court, the Housing Court, or the District Court, see G. L. c. 93A, §§ 9 (1), (3A), 11, with the Superior Court retaining the broadest grant of jurisdiction over c. 93A claims.[15] It

13. The Federal action was transferred to the United States District Court for the Southern District of New York, and on March 29, 2018, the District Court dismissed Exxon's complaint with prejudice due to Exxon's failure to state a claim and the preclusive effect of the Superior Court decision in this matter. See Exxon Mobil Corp. vs. Healey & another, U.S. Dist. Ct., No. 1:17–cv–02301, 2018 WL 1605572 (S.D.N.Y. Mar. 29, 2018). Because Exxon may appeal from the Federal decision, we do not treat as moot Exxon's request to stay the Massachusetts proceedings.

14. The judge also determined that "the interests of substantial justice dictate that the matter be heard in Massachusetts," citing G. L. c. 223A, § 5. Exxon has not argued that it would be unfairly prejudiced by having to litigate in Massachusetts, and thus has not moved to dismiss under the doctrine of forum non conveniens.

15. Whereas the Housing Court's jurisdiction over c. 93A claims is restricted to those involving housing matters, see G. L. c. 93A, § 9 (1); G. L. c. 185C, § 3, and the District Court

should go without saying that Massachusetts courts, which routinely hear c. 93A claims, are better equipped than other courts in other jurisdictions to oversee such cases.

Exxon's contention that the lower court erred in failing to apply the "first-filed" rule is equally unavailing. The filing of a complaint in Federal court one day before a State court filing hardly triggers a mechanical application of the first-filed rule. See, e.g., EMC Corp. v. Parallel Iron, LLC, 914 F.Supp.2d 125, 127 (D. Mass. 2012) ("Exceptions to the [first-filed] rule are not rare.... [A court] has discretion to give preference to a later-filed action when that action will better serve the interests involved"); Bacardi Int'l Ltd. v. V. Suarez & Co., 719 F.3d 1, 15 (1st Cir.), cert. denied, 571 U.S. 1024, 134 S.Ct. 640, 187 L.Ed.2d 420 (2013) (discouragement of forum-shopping is consideration when ruling on motion to stay).

**[29]** Finally, where there is only a partial overlap in the subject matter of two actions, a judge has considerable discretion when [330] deciding whether to grant a stay. See In re Telebrands Corp., 824 F.3d 982, 984 (Fed. Cir. 2016); TPM Holdings, Inc. v. Intra–Gold Indus., Inc., 91 F.3d 1, 4 (1st Cir. 1996) ("where the overlap between two suits is less than complete, the judgment is made case by case"). Exxon acknowledges that the Federal action "challenges the investigation on constitutional grounds not raised in this action" (emphasis added).[16] The judge did not abuse her discretion in denying the stay. Compare Provanzano v. Parker, 796 F.Supp.2d 247, 257 (D. Mass. 2011) (declining to stay because first-filed action was in anticipation of lawsuit in question, claims in cases were not identical, current action had proceeded further in court, and case involved application of Massachusetts statute).

5. Conclusion. We affirm the order denying Exxon's motion to modify or set aside the C.I.D., Exxon's request to disqualify the Attorney General, and Exxon's motion to stay these proceedings. We further affirm the order granting the Attorney General's cross motion to compel Exxon's compliance with the C.I.D.

Judgment affirmed.

has jurisdiction over actions "for money damages only," G. L. c. 93A, §§ 9 (3A), 11, the Superior Court is not so limited, and may hear any case under c. 93A "for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." G. L. c. 93A, § 9 (1).

16. Exxon's Federal complaint for declaratory and injunctive relief is based on violations of Exxon's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as an alleged violation of the dormant commerce clause and an abuse of process claim.


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**DENTAL SERVICE OF MASSACHUSETTS, INC.**

**v.**

**COMMISSIONER OF REVENUE.**

**SJC–12346**

Supreme Judicial Court of Massachusetts, Suffolk.

Argued December 5, 2017

Decided April 13, 2018

**Background:** Taxpayer, an insurer providing dental coverage through preferred provider arrangements (PPA), filed appli-