

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,
By LETITIA JAMES,
Attorney General of the State of New York,
Plaintiff,

- against -

EXXON MOBIL CORPORATION,
Defendant.

Index No. 452044/2018

IAS Part 61

Hon. Barry R. Ostrager

Motion Sequence No. 10

**MATTHEW PAWA'S BRIEF IN SUPPORT OF HIS CROSS-MOTION
TO APPEAR AS *AMICUS CURIAE***

Preliminary Statement

Attorney Matthew Pawa has moved this court to appear as *amicus curiae* for the purpose of opposing intervention in this matter by Energy Policy Advocates and its executive director Robert Schilling (collectively, “EP Advocates”).¹ EP Advocates has moved to intervene for the purpose of unsealing records related to Mr. Pawa’s communications with the Office of the Attorney General (“OAG”) related to its enforcement actions against Exxon Mobil Corporation (“Exxon”). Pawa has attached to the affirmation in support of his cross-motion a proposed brief by him opposing intervention. In the event EP Advocates is allowed to intervene, Pawa also requests leave to be heard as an *amicus* on EP Advocates’ anticipated motion to unseal the Pawa-OAG emails at issue.

Pawa’s cross-motion should be granted. As one of the principal targets of a national campaign against anyone seeking to hold Exxon liable for climate change, he can offer valuable information that might not otherwise be presented to the Court. It is unknown as of the time of this writing whether any party will oppose EP Advocates’ motion to intervene, so Pawa’s proposed brief in opposition to intervention may offer unique legal argument. Pawa’s proposed brief also includes details about prior litigation by groups affiliated with EP Advocates and by Exxon to obtain Pawa- and Exxon-related emails from the OAG. And in the event EP Advocates is allowed to intervene, Pawa should have an opportunity to be heard regarding this latest effort to target his communications with the OAG.

¹ To be clear, Pawa is asking to be heard merely as a “friend of the court,” and not as a party to this action.

Background²

Matt Pawa is an environmental lawyer who has represented state and municipal entities against Exxon, in climate cases and in cases involving groundwater contamination.³

Pawa's connection to this case is tangential—or at least it was until EP Advocates moved to intervene to obtain Pawa's emails with the OAG. This case concerned whether Exxon Mobil Corp. ("Exxon") committed securities fraud. At one point, Exxon defended itself against these claims by asserting affirmative defenses related to prosecutorial misconduct. Dkt. No. 241, at 35-46. Exxon's theory was based largely on statements made by former Attorney General Eric Schneiderman at a press conference held two years before the OAG filed this lawsuit against Exxon. *Id.* at 40, ¶¶ 40-42. It was also based on a 2012 conference attended by Matt Pawa in La Jolla, California, at which conference participants supposedly stated that a lawsuit against Exxon could bring "key internal [Exxon] documents to light." *Id.* at 36, ¶ 32. Exxon alleged that Pawa influenced the OAG's decision to bring this case, and that Pawa had an improper motive toward Exxon that could be attributed to the OAG. *Id.* at 37, ¶ 35. In March 2019, Exxon filed an amended answer incorporating these defenses and attaching redacted versions of the OAG-Pawa emails, Dkt. No. 119, but in June the Court dismissed Exxon's affirmative defenses and granted the AG's motion to keep the Pawa-OAG emails under seal. Dkt. Nos. 237, 298. After a 12-day

² A fuller description of the background facts (including a discussion of two attempts by entities tied to EP Advocates to obtain Exxon- and Pawa-related emails with the OAG via FOIL requests) is included in Pawa's proposed opposition to EP Advocates' motion to intervene. The proposed brief opposing intervention is an exhibit to the attached Affirmation of Wesley Kelman.

³ See, e.g., *State v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015) (sustaining \$236 million jury verdict for Pawa's client the State of New Hampshire against Exxon for groundwater contamination). Pawa is also counsel to New York City in its climate change lawsuit against Exxon and others, and is representing Rhode Island in groundwater contamination case in which Exxon is a defendant. See *City of New York v. BP P.L.C.*, No. 18-2188 (2d Cir.); *State of Rhode Island v. Atlantic Richfield*, No. 1:17-cv-00204-WES (D.R.I.).

bench trial, this Court dismissed the OAG's fraud claims on the merits, a judgment that is now final and unappealable.

A month later, EP Advocates filed its motion to intervene, seeking to unseal the Pawa-OAG emails that Exxon had filed the previous March. Dkt. No. 573.

Argument

Matt Pawa should be granted leave to appear as an *amicus curiae*

The leading decision on amicus appearances in New York Supreme Court is *Kruger v. Bloomberg*, 1 Misc. 3d 192 (Sup. Ct. N.Y. Co. 2003). According to *Kruger*, the factors to consider in evaluating a proposed amicus appearance are:

- (1) whether the movant seeking amicus curiae status moves by order to show cause; a motion by order to show cause seeking amicus is the preferable procedure as the trial court can then set an expeditious return date and procedure for providing notice by specifying how the parties are to be served, so as not to interfere with the main action;
- (2) whether the affidavit/affirmation in support indicates the movant's interest in the issues to be briefed and sets forth the issues, with a proposed brief attached;
- (3) whether the affidavit/affirmation in support indicates:
 - (a) a showing that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; or
 - (b) that movant would invite the court's attention to the law or arguments which might otherwise escape its consideration; or
 - (c) that its amicus curiae brief would otherwise be of special assistance to the court; and
- (4) whether the amicus curiae application or status would substantially prejudice the rights of the parties, including delaying the original action/proceeding; and
- (5) whether the case concerns questions of important public interest.

Id. at 198.

Pawa's cross-motion to appear as an amicus meets these standards. **First**, Pawa has filed a cross-motion instead of an order to show cause, but motions and cross-motions with proposed amicus briefs have been specifically approved in several cases since *Kruger*. *See, e.g., Steglich v. Bd. of Educ.*, 32 Misc. 3d 1203(A), at *7 (Sup. Ct. N.Y. Co. 2011); *MacArthur Properties*,

LLC v. Metro. Transportation Auth., 61 Misc. 3d 1204(A), at *2 (Sup. Ct. N.Y. Co. 2017); *cf.* Commercial Division Rule 19 (orders to show cause only in cases of “genuine urgency”). To avoid delay, Pawa’s cross-motion papers include a proposed brief opposing intervention, which was served in advance of the deadline for the parties to submit their oppositions to the intervention motion.

Second, Pawa’s application includes an affirmation describing the arguments that “might otherwise escape the Court’s attention,” and that may “be of special assistance to the Court.” *See* Affirmation of Wesley Kelman (attached). For example, at this writing it is unknown whether the OAG or Exxon will oppose EP Advocates’ motion to intervene; the proposed amicus brief may turn out to be the *only* papers submitted addressing potential deficiencies in EP Advocates’ motion. *See* Kelman Affirm. ¶ 4. And even if other parties do oppose EP Advocates’ motion, they may not call attention to certain important facts described in the proposed amicus brief. For example, it is unclear whether other parties plan to tell the Court about: (a) EP Advocates’ ties to other groups that have filed prior (mostly unsuccessful) Article 78 petitions to obtain Pawa- and/or Exxon-related documents from the OAG; (b) EP Advocates’ ties to the fossil fuel industry; and (c) Exxon’s attempts to obtain Pawa’s emails to the OAG in two other proceedings. *See* Kelman Aff. ¶ 5. And, perhaps most importantly, in the event EP Advocates’ intervention is granted, Pawa may provide valuable argument to the Court on that issue, *e.g.*, about the prejudice involved in unsealing his communications with the OAG. Kelman Aff. ¶ 6. It seems clear that this information is likely to be of special assistance to the Court.

Third, Pawa is not aware of any “substantial” prejudice to the parties or delay that would be caused by accepting his amicus brief(s). EP Advocates is now in possession of the proposed

amicus brief on intervention, which was served in advance of the deadline for party oppositions to intervention. And EP Advocates has not yet served its motion to unseal the redacted the emails, so disposition of Pawa's motion to appear as an amicus is unlikely to delay matters.

Finally, the disclosure of the Pawa-OAG communications is a question of at least some "public interest." As the proposed amicus brief shows, EP Advocates is part of a nationwide effort to "expose" an environmental lawyer's communications with government officials. Kelman Aff. ¶ 5. Whether this campaign will chill the right to petition government by Pawa and other environmentalists seems clearly to be a question of real public interest.

Conclusion

Pawa's motion for leave to appear as *amicus curiae* should be granted, so that Pawa can be heard on the issues of EP Advocates' intervention and on any future motion to unseal Pawa's communications with the OAG.

January 25, 2020

Respectfully submitted,

MATTHEW PAWA

By his attorney,

/s/ Wesley Kelman

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Certificate of Compliance

I certify that, according to the word count feature of Microsoft Word, this proposed brief contains 1,471 words, in compliance with the word limits in Rule 17 of the Commercial Division of the Supreme Court.

January 25, 2020

/s/ Wesley Kelman
Wesley Kelman