COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2021-P-0860

EXXON MOBIL CORPORATION,

Defendant-Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 1984-03333-BLS1

APPELLANT'S BRIEF

EXXON MOBIL CORPORATION

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Dated: November 8, 2021

RULE 1:21 CORPORATE DISCLOSURE STATEMENT ON POSSIBLE JUDICIAL CONFLICT OF INTEREST

Pursuant to Supreme Judicial Court Rule 1:21, Exxon Mobil Corporation hereby states that it is a publicly-held corporation, shares of which are traded on the New York Stock Exchange under the symbol XOM. Exxon Mobil Corporation has no parent corporation, and no entity owns more than 10 percent of its stock.

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I. STATEMENT OF THE ISSUES

1. The Massachusetts anti-SLAPP statute, G.L. c. 231, § 59H protects petitioning activity, which is defined broadly to include all statements made to influence, inform, or reach governmental bodies, directly or indirectly. Did the trial court err by holding that the anti-SLAPP statute does not protect speech designed to foster public participation and encourage action on important public policy issues when the speaker (a) has a commercial motive for speaking or (b) is accused of omitting contrary viewpoints?

2. The trial court determined that a number of ExxonMobil's statements constitute petitioning activity, but nonetheless denied dismissal under the anti-SLAPP statute. Did the trial court err by refusing to dismiss in whole or in part claims that were based on petitioning activity?

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal asks whether the Massachusetts anti-SLAPP statute, G.L. c. 231, § 59H, bars civil actions based on a defendant's advocacy for public policy that the plaintiff opposes. In the Superior Court, Exxon Mobil Corporation ("ExxonMobil") filed a special motion to dismiss the Commonwealth's amended complaint under the anti-

SLAPP statute. J.A. I-224. The Superior Court (Green, J.) denied ExxonMobil's special motion to dismiss despite finding that several statements challenged in the complaint qualified as petitioning activity within the meaning of the anti-SLAPP statute. J.A. IV-171-75. In this appeal, ExxonMobil seeks reversal or, alternatively, vacatur of the Superior Court's decision.

B. Course of Proceedings

On October 24, 2019, the Commonwealth filed a civil action against ExxonMobil under G.L. c. 93A. ExxonMobil subsequently removed the action to federal court. The case was remanded to state court on March 18, 2020.

After the case returned to state court, the Commonwealth filed an amended complaint on June 5, 2020.[1] The complaint alleges a series of misleading statements and omissions under chapter 93A across three categories of ExxonMobil's public communications: **(i)** corporate investor reports, such as the *Energy Outlook*, *Energy and Carbon Summary*, and *Managing the Risks*, all of which are published by ExxonMobil and discuss the company's forward-looking projections

[1] For ease of reference, ExxonMobil refers to the Commonwealth's "amended complaint" as the "complaint." J.A. I-17.

and assessments of energy policy and demand; **(ii)** promotions on ExxonMobil's website highlighting the emissions-reducing qualities of Synergy gasoline and Mobil 1 motor oil; and **(iii)** public messaging campaigns concerning the actions ExxonMobil is taking to address climate change, such as its "Protect Tomorrow. Today" campaign. J.A. I-84-88, I-113-19, I-126, I-145-61, I-168-212, I-215, I-218-19.

ExxonMobil filed two motions to dismiss on July 30, 2020, one under Massachusetts Rule of Civil Procedure 12(b) and one under the anti-SLAPP statute. The court's denial of the latter is the subject of this interlocutory appeal. In its anti-SLAPP motion, ExxonMobil argued that the Commonwealth's claims expressly and improperly target its public advocacy on energy policy and climate change. J.A. I-229. The Commonwealth filed its opposition to the anti-SLAPP motion on October 30, 2020 (J.A. IV-4), and ExxonMobil filed its reply on December 15, 2020 (J.A. IV-54).

C. Disposition in Superior Court

The Superior Court heard oral argument on March 12, 2021. On June 23, 2021, the Superior Court denied ExxonMobil's anti-SLAPP motion. J.A. IV-167. Although the motion was denied, the court determined that "some Exxon statements referenced in the complaint

constitute protected petitioning within the scope of § 59H because they were made in connection with an issue under consideration or review by a legislative, executive, or judicial body and/or to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding." J.A. IV-173 (emphasis added) (internal quotation marks omitted). The court further recognized that this petitioning implicates "[c]limate change" which "indisputably is a topic that has attracted governmental attention." J.A. IV-173.

The court nonetheless held that ExxonMobil's challenged statements were not protected because it failed to show "that it made any of these statements solely, or even primarily, to influence, inform, or reach any governmental body, direct or indirectly." J.A. IV-174-75. In so holding, the court focused on the commercial nature of the statements, which were communicated to investors and consumers in the first instance. J.A. IV-175. And the court further held that ExxonMobil's alleged omissions were not entitled to anti-SLAPP protection because the statute applies only to affirmative "statements" and not the omission of contrary viewpoints, as alleged by the

Commonwealth. J.A. IV-171-72.

The court refused to partially dismiss the claims to the extent they were based on the petitioning activity it identified. Rather, the court held that "the anti-SLAPP inquiry produces an all or nothing result as to each count of the complaint." J.A. IV-173 n.5. In other words, ExxonMobil could not "obtain dismissal" of claims even if "the allegations in the complaint are directed at conduct . . . that constitutes petitioning activity." J.A. IV-173. So long as a purported basis for the claim existed in non-petitioning activity, the court concluded that petitioning activity was fair game.

ExxonMobil timely filed a notice of appeal of the denial of its anti-SLAPP motion on August 17, 2021. J.A. IV-176.

III. STATEMENT OF FACTS

A. ExxonMobil Engages in Public Advocacy on Energy Policy.

Meeting the energy needs of the planet's nearly eight billion people, while simultaneously limiting greenhouse gas emissions, is a complex policy challenge. As one of the world's largest energy companies, ExxonMobil actively engages in public discourse on energy policy by expressing positions on issues such as potential regulatory measures to mitigate environmental impacts, risks associated with

climate change, and projected energy demand. J.A. I-148-49. As the Commonwealth acknowledges, ExxonMobil shares its perspective with policymakers, regulators, and the public. J.A. I-71, I-86-87, I-148-49, I-169-70, I-198-200.

For example, ExxonMobil routinely expresses its "policy positions" in annual corporate reports for investors like its *Energy Outlook*, *Energy and Carbon Summary*, and *Corporate Citizenship Report*. J.A. I-148-49. These reports explain ExxonMobil's view that "sound policy should reduce the risks of climate change at the lowest societal cost, while balancing increased demand for affordable energy and the need to address poverty, education, health and energy security." J.A. II-228. In these reports, ExxonMobil has endorsed regulations, such as a revenue-neutral tax on carbon emissions, J.A. III-123, III-145, and has urged public support for the Paris Agreement, J.A. II-228.

At the same time, in a variety of reports disseminated to the public at large, ExxonMobil has encouraged a constructive public dialogue about a "low carbon" regulatory response to climate change. J.A. II-213-14, III-218-19. ExxonMobil has cautioned that, even if such a scenario were achievable, it would "likely harm those least economically developed populations who are most in need of

affordable, reliable and accessible energy." J.A. III-221. And ExxonMobil has expressed its opinion that oil and natural gas will continue to supply a significant portion of the world's energy mix over the next several decades "to meet the energy needs of the world's growing population and increasing middle-class," even in a low carbon scenario. J.A. I-154.

In recent years, ExxonMobil has also publicly advocated that, to meet the dual challenge of meeting energy demand while reducing emissions, a balanced energy policy should promote lower-emission solutions like biofuels and carbon capture. To increase public awareness and support, ExxonMobil's public statements highlight its "research on lowering emissions, algae biofuel, climate change solutions, clean energy, and carbon capture." J.A. I-196. This includes investments in the research and development of algae-based biofuels which "could reduce greenhouse gases compared to traditional fossil fuels." J.A. I-192. None of these public statements about emerging technologies such as biofuels purport to sell or market any products that are commercially available for purchase by consumers. Rather, these statements are designed to inform the public about potential solutions that could one day help to lower emissions.

B. The Commonwealth Commenced This Action Based on ExxonMobil's Advocacy on Energy Policy.

The Commonwealth commenced this action against ExxonMobil on October 24, 2019, and subsequently filed an amended complaint on June 5, 2020. The complaint asserts three causes of actions under G.L. c. 93A. Each claim brought by the Commonwealth is based solely on ExxonMobil's exercise of its right to petition, as it relates to ExxonMobil's public advocacy on energy policy. That petitioning activity also necessarily includes ExxonMobil's constitutional right not to voice opposing political views about climate change and energy policy.

First Cause of Action. The first cause of action faults ExxonMobil for failing to disclose "the systemic risks from climate change" in its corporate reports and publications. J.A. I-145. The complaint asserts that ExxonMobil's forward-looking energy projections and assessment of climate regulations were misleading because they do not disclose the Commonwealth's viewpoint that climate change presents an existential threat to humanity. J.A. I-145-56. According to the complaint, this claim is based on public statements ExxonMobil prepared not only for investors, but also for the "global economy" at large. J.A. I-142. The Commonwealth even

acknowledges these communications were intended to "proactively engag[e] regulators," "the public and thought-leaders" and "policy makers" on climate change by sharing "policy positions." J.A. I-148.

Second Cause of Action. The second cause of action is based on ExxonMobil's statements about Synergy gasoline and Mobil 1 motor oil reducing emissions relative to standard gasoline and oil products. J.A. I-169. The Commonwealth admits that the statements are "technically true," J.A. I-169, but claims they are misleading because the statements do not petition for the Commonwealth's viewpoint that current levels of fossil fuel consumption "represent a direct threat to sustainability of human communities and ecosystems." J.A. I-180.

Third Cause of Action. The third cause of action challenges ExxonMobil's alleged "greenwashing," which is the complaint's characterization of the company's statements highlighting its efforts to address climate change, particularly through investments in lower-emissions solutions. J.A. I-34, I-167, I-169. For example, the Commonwealth targets ExxonMobil's statement in the *New York Times* that algae-based biofuels "could reduce greenhouse gases compared to traditional fossil fuels." J.A. I-192. According to the complaint, this statement is misleading because it does not include the

Commonwealth's viewpoint that "it would be prohibitively expensive to produce algae on a large scale" and ExxonMobil's investments in algae-based biofuels constitute "a small fraction" of its overall capital expenditures. J.A. I-194. The complaint further challenges such statements as misleading because they allegedly position ExxonMobil as a "technical expert" on "climate change solutions," J.A. I-198, without simultaneously disclosing the company's alleged lobbying—core petitioning activity—against fuel economy standards and emissions standards, J.A. I-169-70, I-199-200.

C. The Coordinated Efforts of State Attorneys General to Establish Energy Policy Through Litigation Draw Criticism from Multiple Courts.

ExxonMobil's viewpoints on climate change and energy policy have long been targeted by a coalition of public and private interests.

On March 29, 2016, the Attorney General[2] and a number of other state attorneys general attended closed-door meetings in New York City led by climate activists. One of the meetings was led by Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists, who addressed the "imperative of taking action

[2] The "Attorney General" refers to the Massachusetts Attorney General, which brought this lawsuit on behalf of the Commonwealth.

now on climate change." J.A. I-337. Another meeting was led by Matthew Pawa, who delivered a presentation on "climate change litigation." J.A. I-337. Years earlier, these individuals developed strategies for "maintaining pressure on the [fossil fuel] industry that could eventually lead to its support for legislative and regulatory responses to global warming." J.A. I-290. One of these strategies included recruiting "a single sympathetic state attorney general" who "might have substantial success in bringing key internal documents to light." J.A. I-274. The secret meetings with state attorneys general were intentionally kept hidden from reporters and the public.[3]

The very same day, the Attorney General and others convened a press conference called "AGs United for Clean Power." J.A. I-306. At the press conference, the Attorney General blamed fossil fuel companies for influencing "public perception" about energy policy. J.A. I-317. The Attorney General demanded that fossil fuel companies be "held accountable" and announced publicly for the first time that she had "joined in investigating the practices of ExxonMobil." J.A. I-317.

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[3] When a *Wall Street Journal* reporter contacted Matthew Pawa the very next day, the New York Attorney General's Office advised him to "not confirm" his attendance "or otherwise discuss the event." J.A. I-334.

On April 19, 2016, just a few weeks after the "AGs United for Clean Power" press conference, the Attorney General issued a Civil Investigation Demand ("CID") to ExxonMobil, seeking over 40 years of records pertaining to speech on climate change. Among other things, the CID requested ExxonMobil's documents and communications with a number of conservative think tanks, which have espoused different views on climate change than the Attorney General.[4]

In response, ExxonMobil moved to quash the CID in the Massachusetts Superior Court and challenged the constitutionality of the Attorney General's conduct in the U.S. District Court for the Northern District of Texas. Although the federal challenge was ultimately transferred to the Southern District of New York, the Northern District of Texas found "the anticipatory nature" of the Attorney General's "remarks about the outcome of the Exxon investigation to be concerning." *Exxon Mobil Corp.* v. *Healey*, 215 F. Supp. 3d 520, 523 (N.D. Tex. 2016). After the transfer, the Southern District of New York dismissed the action. ExxonMobil appealed to the United States Court of Appeals for the Second Circuit, which heard

[4] *See* ECF No. 227-3, *Exxon Mobil Corp.* v. *Schneiderman*, No. 17-CV-2301 (VEC), at 13 (S.D.N.Y. June 16, 2017).

oral argument on the case over a year and a half ago. That appeal is pending.

Other courts have also addressed politically motivated efforts to silence ExxonMobil's public advocacy on climate change. The Texas Court of Appeals has observed that state attorneys general, including the Attorney General, have "promoted regulating the speech of energy companies like Exxon—companies that they perceived as hostile to AGs' policy responses to climate change." *City of San Francisco* v. *Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at *3 (Tex. App. June 18, 2020). Although the court determined it could not exercise jurisdiction, the court admonished public officials that "[l]awfare is an ugly tool" to seek "environmental policy changes," because it enlists "the judiciary to do the work that the other two branches of government cannot or will not do." *Id.* at *20.

Similarly, in the only case to go to trial against ExxonMobil concerning climate change, Justice Ostrager of the New York Supreme Court ruled in favor of ExxonMobil. *See People* v. *Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771 (Sup. Ct. N.Y. Cty. Dec. 10, 2019). After a multi-week bench trial, Justice Ostrager found the allegations against ExxonMobil to be "without merit." *Id.* at *1. He

characterized the New York Attorney General's complaint (from which the Commonwealth's complaint heavily borrows here) as "hyperbolic" and the "result of an ill-conceived initiative of the Office of the [New York] Attorney General." *Id.* at *2, 26. He also explained that the lawsuit originated in "politically motivated statements by former New York Attorney General Eric Schneiderman," a reference to the "AGs United for Clean Power Press Conference" that the Attorney General also attended. *Id.* at *1.

IV. SUMMARY OF THE ARGUMENT

The First Amendment reflects the principle that when the government objects to speech, "the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The anti-SLAPP statute is a mechanism to enforce and protect that principle. Despite recognizing that a number of the challenged statements constitute petitioning activity, the trial court denied ExxonMobil's anti-SLAPP motion. That decision, which jeopardizes foundational First-Amendment protections, is based on several errors of law that warrant reversal.

The trial court first erred by holding that ExxonMobil's statements are not protected by the anti-SLAPP statute. Those

statements were made to influence policymakers and the public on energy policy, and therefore fall within the broad statutory definition of "petitioning." For example, the Commonwealth alleges that ExxonMobil engages in "greenwashing" whenever it fails to disclose that it has allegedly petitioned against "fuel economy and emission standards for passenger vehicles." J.A. I-169-70, I-199-200. But this claim is based on core petitioning activity. Indeed, the complaint targets many statements precisely because ExxonMobil "attempted to influence" energy policy and "urg[ed] delay in regulatory action." J.A. I-62, I-200. By premising its claims on ExxonMobil's advocacy and alleged omissions regarding climate change, the Commonwealth seeks to curtail ExxonMobil's exercise of its right of petition on this issue.

The trial court also improperly focused on ExxonMobil's motive for speaking rather than on the basis of the Commonwealth's claims. Specifically, the court found that the statements "appear to be directed at influencing investors" and "inducing customers to purchase Exxon's products." J.A. IV-175. But motive is not relevant at the threshold stage of the anti-SLAPP inquiry and, even if it were, petitioning activity does not lose its protected status simply because it happens to advance the speaker's commercial interests. As the Supreme Judicial Court has

explained, "the fact that the speech involves a commercial motive does not mean it is not petitioning." *N. Am. Expositions Co.* v. *Corcoran*, 452 Mass. 852, 863 (2009).

The trial court further erred by holding that only statements, not omissions, are entitled to anti-SLAPP protection. J.A. IV-171-72. The alleged "omissions" here reflect ExxonMobil's refusal to adopt the Commonwealth's preferred viewpoints on climate change. A speaker's choice not to advocate for a particular policy is entitled to the same protection as its decision to advocate for that (or another) policy. ExxonMobil cannot be compelled, through a lawsuit like this one, to publicly advocate for the Commonwealth's views on the exigency of climate change or the merits of energy policy it does not support.

Even if the trial court correctly applied the anti-SLAPP statute, it nonetheless erred in refusing to order at least a partial dismissal of the Commonwealth's claims. Despite recognizing that a number of ExxonMobil's challenged statements constitute petitioning activity, the court declined to dismiss the claims insofar as they are based on that petitioning activity in contravention of the anti-SLAPP statute. Relying on an abrogated standard, the court instead adopted a categorical, "all-or-nothing" approach to evaluating the claims, concluding that only a

cause of action based *entirely* on petitioning activity is subject to dismissal. J.A. IV-173 n.5. That was error because it would allow plaintiffs to artfully plead around the anti-SLAPP statute and target protected statements so long as they include a fig leaf unrelated to petitioning activity.

V. ARGUMENT

A. Standard of Review

"The standard of review of a denial of an anti-SLAPP motion to dismiss for failure to meet the threshold element is de novo." *Haverhill Stem LLC* v. *Jennings*, 99 Mass. App. Ct. 626, 631 (2021). This is because the threshold stage of the anti-SLAPP inquiry is directed only at examining the allegations in the complaint. *See Reichenbach* v. *Haydock*, 92 Mass. App. Ct. 567, 572 (2017).

B. The Complaint Is Based on Statements Protected by the Anti-SLAPP Statute.

The anti-SLAPP statute requires dismissal of civil claims where, as here, they are "based on" a party's "exercise of its right of petition under the constitution of the United States or of the commonwealth." G.L. c. 231, § 59H. The statute defines "petitioning" broadly to include "any written or oral statement" that:

> (i) is made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding;

> (ii) is made in connection with an issue under consideration or review by any governmental proceeding;
>
> (iii) is reasonably likely to encourage consideration or review of an issue by a governmental proceeding;
>
> (iv) is reasonably likely to enlist public participation in an effort to effect such consideration; or
>
> (v) falls within constitutional protection of the right to petition government.

Id. Consistent with the statute's plain language, and "expressed legislative intent," Massachusetts courts have construed "petitioning" to "encompass a 'very broad' range of activities . . . [that] include all statements made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly." *Corcoran*, 452 Mass. at 861-62 (quoting *Global NAPS, Inc.* v. *Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (2005)).

When determining whether statements constitute petitioning, courts do not consider them in isolation, but rather "in the over-all context in which they are made." *Corcoran*, 452 Mass. at 862. Once a statement fits within one of these five categories, the protections of the anti-SLAPP statute have been triggered. The burden then shifts to the plaintiff to demonstrate that the petitioning activity is devoid of legal or factual support, or that the underlying claims have merit. *See 477*

Harrison Ave., LLC v. *JACE Boston, LLC*, 483 Mass. 514, 518-19 (2019) ("*Harrison II*").

Here, ExxonMobil's statements satisfy the definition of "petitioning" because they were also "reasonably likely" to encourage consideration of issues of climate change, and enlist public participation to that effect. The statements also address issues of climate change under consideration by government. The complaint expressly recognizes that these statements "proactively engag[e] regulators," "the public and thought-leaders" and "policy makers" on climate change by sharing "policy positions." J.A. I-148. As the trial court acknowledged, "[c]limate change indisputably is a topic that has attracted governmental attention." J.A. IV-173. Placed in context, both the statements and omissions identified by the Commonwealth as the basis of its claims represent "ongoing efforts to influence governmental bodies" regarding climate change and energy policy. *Cardno ChemRisk, LLC* v. *Foytlin*, 476 Mass. 479, 485-86 (2017).

Indeed, the Commonwealth itself characterizes the challenged statements as part of an effort to enlist public support for energy policies with which it disagrees. For example, the complaint describes how ExxonMobil takes "numerous opportunities . . . to articulate policy

positions" through its various corporate reports. J.A. I-148; *see also* J.A. I-62-63, I-145, I-148-49, I-167. The Commonwealth targets quintessential petitioning activity including political lobbying and ExxonMobil's statements to regulators, policymakers, and the press on energy policy. In fact, the complaint accuses ExxonMobil of "secretively participating in a Facebook campaign to roll back federal fuel economy and vehicle emissions standards." J.A. I-200; *see also* J.A. I-69-71, I-197-200, I-204. It takes issue with ExxonMobil's public messaging—both what ExxonMobil communicates and what it does not—precisely because, through these communications, ExxonMobil responded to "increasing calls on governments to declare a climate emergency" by allegedly "downplaying the need for any immediate action to mitigate climate change." J.A. I-36; *see also* J.A. I-31, I-46, I-158-59, I-197-98, I-205, I-212. The complaint also takes issue with what ExxonMobil does not say in its public messaging, framing the activity as a matter of misrepresentation by omission. But such artful pleading should be rejected.

Alleged Investor Statements. The Commonwealth's claims are based on ExxonMobil's statements in corporate reports and investor communications that purportedly fail to disclose climate risks. J.A. I-

84-88, I-113-119, I-145-56, I-743-44. In these statements, which are publicly available to anyone on the internet, ExxonMobil shares, among other things, its views on energy demand projections, risks associated with climate change, and regulatory responses to climate change. *Id.*

ExxonMobil's communications were reasonably likely to reach the public (including current and prospective ExxonMobil investors), and were closely related to an ongoing public policy debate at many levels of government about climate change. Indeed, the Commonwealth expressly acknowledges that these communications were intended not only to provide information to investors, but also to "proactively engag[e] regulators," "the public and thought-leaders" and "policy makers" on climate change by sharing "policy positions." J.A. I-148. It also concedes that these communications were "at bottom, a continuation of [ExxonMobil's] other public-facing campaigns" on climate change. J.A. I-145. The statements were therefore "issued in a manner that was likely to influence or, at the very least, reach" regulators and "members of the public wishing to weigh in" on energy policy. *Blanchard* v. *Steward Carney Hospital, Inc.*, 477 Mass. 141,

151 (2017). This is particularly true given ExxonMobil's uniquely public role in the climate change debate.

The Commonwealth's claims make clear that ExxonMobil's statements are not attacked for a failure to disclose climate risks, but rather for disagreeing with the Commonwealth's policy assessment of those risks. For example, the Commonwealth faults ExxonMobil for failing to disclose that climate change may decrease demand for fossil fuel products, and increase the availability of renewable energy sources, causing harm to its business. J.A. I-147, I-150. ExxonMobil takes a different view: "renewable sources, such as solar and wind, despite very rapid growth rates, cannot scale up quickly enough to meet global demand growth while at the same time displacing more traditional sources of energy." J.A. I-147. The Commonwealth may believe that renewable energy sources will be able to satisfy near-term energy demand, but that is a policy disagreement that the anti-SLAPP statute is designed to dispose of when presented in litigation.

Because ExxonMobil's statements meet the broad definition of petitioning under the anti-SLAPP statute's plain language, it does not matter that they were "communicated to other private citizens rather than directly to the government." *Plante* v. *Wylie*, 63 Mass. App. Ct.

151, 159 (2005). Indeed, Massachusetts courts have repeatedly found conduct to qualify as "petitioning" where, as here, a lawsuit was premised on statements made to the press or to the public, *see Blanchard*, 477 Mass. at 150-51, or published on the defendant's website, *see MacDonald* v. *Paton*, 57 Mass. App. Ct. 290, 293-94 (2003).

For example, in *Plante*, developers who failed to win approval from a town planning board for a subdivision brought a chapter 93A action against a conservation trust's attorney for allegedly deceptive statements in a settlement letter. 63 Mass. App. Ct. at 152-55. Even though those statements were "communicated to other private citizens rather than directly to the government," the court held that they were "closely and rationally related to" the proceedings before the planning board and therefore were made "in connection with an issue under consideration" by government. *Id.* at 159. ExxonMobil's communications were likewise "closely and rationally related" to an ongoing public policy debate about how best to address the risks of climate change.

Similarly, in *Cardno ChemRisk, LLC* v. *Foytlin*, an online blog post constituted petitioning where an "environmental activist" accused

BP and its environmental experts of "deceptive tactics" relating to the Deepwater Horizon oil spill. 476 Mass. at 481, 485. The environmental experts brought claims for defamation against the activists. The court ruled that the statements in the blog post were protected because they were part of an "ongoing effort[] to influence governmental bodies by increasing the amount and tenor of coverage" around an environmental issue. *Id*. at 485. ExxonMobil's challenged statements are based on the same form of petitioning activity, concerning similar subjects. They are entitled to the same protection.

Alleged Consumer Statements. The Commonwealth next targets what it characterizes as "technically true" statements promoting ExxonMobil products Synergy and Mobil 1 as reducing emissions relative to standard gasoline and motor oil products. J.A. I-160-61, I-168-86, I-218-19. For example, in these statements, ExxonMobil explains that Synergy and Mobil 1 "deliver improved vehicle efficiency," "burn cleaner," "reduce emissions," and are "engineered" for "better gas mileage," all of which are not disputed. J.A. I-172-74. These statements appear in a variety of public communications, including through ExxonMobil's website, print media, social media, signage, and corporate partnerships. J.A. I-163-64, I-166-68.

ExxonMobil's communications represent more than just an attempt to market specific products to consumers. They are a direct reflection and extension of ExxonMobil's positions on energy policy: here, the importance of incorporating relatively more efficient fossil fuels as one tool to reduce emissions. ExxonMobil's statements regarding Synergy and Mobil 1 actively promote the relative environmental benefits of "cleaner" fossil fuel products as an option to balance the rising demand for affordable, reliable energy with the need to reduce greenhouse gas emissions. These statements are therefore "reasonably likely" to "enlist public participation" in the policy debate at the heart of the Commonwealth's lawsuit, and fall within the protection of the anti-SLAPP statute. *See Corcoran*, 452 Mass. at 861; *Town of Hanover* v. *New England Reg'l Council of Carpenters*, 467 Mass. 587, 592 (2014).

The Commonwealth challenges these statements not because the specific claims about the relative benefits of these products are false or misleading, but because it contends that *any* fossil fuel use "represent[s] a direct threat to sustainability of human communities and ecosystems." J.A. I-180; *see also* J.A. I-169, J.A. I-182-83, I-186. The claim is premised on the Commonwealth's view that the only acceptable

response to climate change is to abate all fossil fuel use by transitioning to renewable energy. J.A. I-31, I-181, I-210, I-218.

Indeed, the Commonwealth's targeting of Synergy and Mobil 1, as opposed to any other advertisements of ExxonMobil's products, confirms that its disagreement centers on the fact that these statements encourage debate about options for affordable, cleaner fossil fuels as a response to climate change. J.A. I-181-82, I-186. The Commonwealth targets these statements only because it does not believe that relatively more efficient fuels go far enough in combating climate change. Yet the disclosures the Commonwealth seeks to punish ExxonMobil for failing to include are analogous to the sort of compelled disclosures the government cannot impose on private citizens through regulation due to the chilling effect on speech. *See Pac. Gas & Elec. Co.* v. *Pub. Utilities Comm'n*, 475 U.S. 1, 15 n.12 (1986) (noting that *Zauderer* does not suggest the State is "free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views."). The anti-SLAPP statute prohibits resorting to civil litigation to settle policy disagreements of this nature.

Alleged Greenwashing Statements. Finally, the Commonwealth takes aim at ExxonMobil's public statements in its corporate reports, media campaigns, and social media regarding its extensive efforts to address climate change. J.A. I-84-88, I-113-19, I-145-61, I-168-212, I-215, I-218-19. For example, these statements address ExxonMobil's "research on lowering emissions, biofuels, climate change solutions, clean energy, and carbon capture." J.A. I-196. ExxonMobil publishes such statements in newspapers, on YouTube, and on social media. J.A. I-192-94, I-196-97. ExxonMobil's *Corporate Citizenship* and *Sustainability* reports also discuss at length the company's longstanding commitment to, and progress on, lowering emissions. J.A. I-200-02.

The Commonwealth derisively labels as "greenwashing" statements that represent ExxonMobil's public advocacy for lower-emission solutions to climate change under consideration by various levels of government. As a result, these statements were "reasonably likely" to both "encourage consideration of" certain lower-emission solutions by government, and "enlist public participation" to that end. G.L. c. 231, § 59H. They fall within the broad definition of petitioning under the anti-SLAPP statute, and the trial court erred in concluding otherwise.

In *MacDonald*, for example, the court recognized that the defendant's efforts to set up "a space where concerned individuals could come together to share information, express political opinions, and rally on town issues of concern," undeniably satisfied the definition of "petitioning activities." 57 Mass. App. Ct. at 295. The Commonwealth's greenwashing claims here are materially indistinguishable. They are based on nothing more than a disagreement with ExxonMobil's advocacy for certain lower-emission solutions, and would snuff out ExxonMobil's efforts to foment public support for various technologies that ExxonMobil believes the country should embrace.

For example, the Commonwealth targets ExxonMobil's statement in the *New York Times* expressing support for algae-based biofuels as a potential solution because they "could reduce greenhouse gases compared to traditional fossil fuels." J.A. I-192. According to the complaint, this statement is misleading because "it would be prohibitively expensive to produce algae on a large scale" and there are "serious technological hurdles to commercialization." J.A. I-194. But taking issue with the viability of biofuels targets ExxonMobil's

communications to the public attempting to galvanize public support for a particular lower-emission solution.

The Commonwealth also claims that ExxonMobil engages in greenwashing whenever it fails to disclose that it is allegedly petitioning against "fuel economy and emission standards for passenger vehicles." J.A. I-169-70, I-198-200. But this alleged omission is expressly premised on ExxonMobil's lobbying activity.

By premising its claims on ExxonMobil's advocacy and alleged omissions regarding preferred policies on climate change, the Commonwealth seeks to curtail ExxonMobil's exercise of its right of petition by punishing ExxonMobil, through litigation, for not propounding a particular message. *See Pac. Gas & Elec. Co.*, 475 U.S. at 6 ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say. . . . Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this [First Amendment] protection would be empty." (citations omitted)). Thus, whether the claims here are characterized as being based on ExxonMobil's statements of its own preferred policies or its omissions of the Commonwealth's, the

allegations rest solely on "protected petitioning activity" and directly implicate the anti-SLAPP statute.

C. The Trial Court Erred by Focusing on ExxonMobil's Motivation for Speaking Rather than the Basis for the Claims.

The trial court held that ExxonMobil's statements were not protected because they were not motivated "solely, or even primarily" by a desire to influence public policy. J.A. IV-174.

But a defendant's "motivation for engaging in petitioning activity does not factor into whether it has met its threshold burden." *477 Harrison Ave., LLC* v. *Jace Boston, LLC*, 477 Mass. 162, 168 (2017) ("*Harrison I*"). The fact that "speech involves a commercial motive does not mean it is not petitioning." *Blanchard*, 477 Mass. at 151 (quoting *Corcoran*, 452 Mass. at 863). Nor is it "necessary that the challenged activity be motivated by a matter of public concern." *Office One, Inc.* v. *Lopez*, 437 Mass. 113, 122 (2002). Rather, "the motive behind the petitioning activity is irrelevant at this initial stage." *Id*.

The Supreme Judicial Court's analysis in *Blanchard* v. *Steward Carney Hospital, Inc.*, 477 Mass. 141 (2017), is instructive. There, the Court held that statements made to a newspaper by a hospital qualified as "petitioning activity." *Id.* at 151. The defendant hospital had fired

nurses and mental health counsellors from a particular unit after a state agency's inquiry revealed a pattern of abuse at the unit. *Id.* at 144-45. The hospital's president issued statements to the *Boston Globe* suggesting that the nurses had been fired based in part on their culpability for the incidents that took place. *Id.* at 145. The statements also indicated that the hospital was following an internal investigation's recommendation to "start over on the unit" and that the hospital's new goal was to become "the best unit in the state." *Id.*

The nurses then sued the hospital for defamation, arguing that the statements defamed them by falsely suggesting that they had failed to report misconduct and "had been derelict in their duties." *Id.* at 146. The nurses further argued that the statements fell outside the scope of the anti-SLAPP statute because the statements were commercially motivated and issued "primarily to defend the unit's reputation to the public." *Id*. at 151.

The Supreme Judicial Court rejected plaintiffs' invitation to focus on the defendant's motive. The Court held that the hospital president's statements were protected speech under the anti-SLAPP statute. It found the statements were likely to reach "decision makers" at the Department of Mental Health ("DMH"), which was considering

revoking the unit's license, and "members of the public wishing to weigh in" on the controversy. *Id.* at 150, 151. "By making clear that the hospital was following [the investigation's] recommendations," the court reasoned, "the statements communicated to readers, likely including some of the licensing decision makers at DMH, that progress was occurring at the hospital, and that its license to operate the unit should not be revoked." *Id.* at 150.

It did not matter that the statements were made "primarily to defend the unit's reputation to the public." *Id.* at 151. Although such statements may have been in the hospital's commercial interests, the Supreme Judicial Court reasoned that, "[t]he greater the public's confidence in and support for the hospital, the more complex any decision to revoke the hospital's license to operate the unit would become." *Id.* "Ulterior motives," the Court concluded, "do not bear on the petitioning nature of the statements." *Id.*

Applying these principles here, the trial court erred in holding that ExxonMobil's statements were not made to influence public policy or participation because they appeared to be commercially motivated. J.A. IV-174-75. The trial court's reasoning improperly rests on its subjective view of ExxonMobil's purported motives. But the test at the

threshold stage is an objective one; motives for the petitioning activity are irrelevant.

By placing dispositive emphasis on the commercial nature of the statements, the court discounted the larger context of the public policy debate in which ExxonMobil makes those statements. Like the hospital president's comments indirectly aimed at state regulators in *Blanchard*, ExxonMobil made public statements that were intended to influence "decision makers" and other public officials on broader issues of climate change. J.A. I-59, I-62-63, I-69-72, I-148-49, I-167, I-169-70, I-199-200, I-204. Indeed, as the Commonwealth admits, many of the statements were issued in the context of "increasing calls on governments to declare a climate emergency." J.A. I-36. The challenged statements were thus "made in connection with" the climate emergency, and were "reasonably likely to encourage consideration of a governmental body" and "enlist public participation." G.L. c. 231, § 59H.

Such activity is protected even if it is made to defend ExxonMobil's reputation or happens to advance the company's commercial interests. And it does not lose that protection simply because the statements "are communicated to other private citizens

rather than directly to the government." *Plante*, 63 Mass. App. Ct. at 159. The trial court's contrary conclusion that applied a definition of "petitioning" narrower than what is protected under the anti-SLAPP statute should be reversed.

There is good reason for this well-established principle that commercial motivations cannot be dispositive at the threshold stage of the anti-SLAPP inquiry. A subjective motive standard is unworkable because individuals and entities regularly engage in commercially motivated petitioning activity. As the U.S. Supreme Court has recognized, speech is not "necessarily commercial whenever it relates to that person's financial motivation for speaking" and does not retain "its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley* v. *Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795-96 (1988). The trial court's focus on subjective motives would lead to an underinclusive standard, exempting from coverage any statement that conceivably promotes a speaker's business or financial interests, even if it is made in the context of a larger public policy debate.

The cases cited by the trial court do not hold otherwise. For example, the trial court relied on *Cadle Co.* v. *Schlichtmann*, 448 Mass.

242 (2007), where an attorney's publication of statements about a company's allegedly unlawful business practices "to generate more litigation to profit himself and his law firm," *id.* at 248, constituted speech "intended to achieve a purely commercial result," J.A. IV-172. The statements were posted to a website describing the company as "a collection arm of a fraudulent enterprise," and containing the attorney's advertising disclaimer and phone number. *Id.* at 245-46. The attorney published the statements "not as a member of the public who had been injured by these alleged practices, but as an attorney advertising his legal services." *Id.* at 250. The court concluded that the website was designed "to attract clients to his law practice." *Id.*

By contrast, many of ExxonMobil's statements—particularly those about lower-emission investments—do not purport to sell or market any products or services that are commercially available for purchase by consumers. To the contrary, as the Commonwealth recognizes, the challenged statements were intended to "proactively engag[e] regulators," "the public and thought-leaders" and "policy makers" on climate change by sharing "policy positions." J.A. I-148; *see also Corcoran*, 452 Mass. at 864 (distinguishing *Cadle* as

"involv[ing] very different circumstances" from where the defendant was engaging with governmental entities).

The trial court also cited *Fustolo* v. *Hollander*, 455 Mass. 861 (2010), for the proposition that a commercial motive "may provide *evidence* that particular statements do not constitute petitioning activity." J.A. IV-172 (citing *Fustolo*, 455 Mass. at 870 n.11). But there, the court recognized that a reporter receiving an external "financial benefit" for publishing certain articles did not disqualify those articles from protected status as petitioning activity. *Id.* at 869-70. As part of this analysis, the court expressly held that "speech may constitute protected petitioning activity even if it involves a commercial motive." *Id*. at 870 (quoting *Corcoran*, 452 Mass. at 863). Here, the trial court erred by concluding that ExxonMobil's purported commercial motivations foreclosed application of the anti-SLAPP statute.

D. The Trial Court Erred by Holding that ExxonMobil's Decision Not to Include Contrary Viewpoints in Its Petitioning Constituted "Omissions" Unprotected by the Anti-SLAPP Statute.

The Commonwealth's claims are based in part on so-called omissions where ExxonMobil elected not to espouse viewpoints contrary to its own. Those "omissions" are protected by the anti-

SLAPP statute because the decision not to petition for certain policies is inherent in all petitioning activity. Petitioning, by definition, means advocating for certain policies and opposing others. To hold otherwise would leave unprotected all petitioning activity for failing to give equal air time to contrary viewpoints.

The alleged "omissions" here cannot be viewed in isolation from the overall context of ExxonMobil's petitioning activity. The "omissions" reflect ExxonMobil's refusal to adopt the Commonwealth's preferred viewpoints on climate change. For example, the complaint alleges that "technically true" statements about Synergy and Mobil 1 are misleading because ExxonMobil omits the Commonwealth's view that "any continued large scale use of such fossil fuels is extremely harmful" and "represents a direct threat to sustainability of human communities and ecosystems." J.A. I-169, I-180, I-182-83. This claim turns on the Commonwealth's position that the only acceptable policy choice in response to climate change is to "sharply curtail[] the use of fossil fuels" by transitioning to renewable energy and "seek[ing] transportation alternatives." J.A. I-31, I-181, I-210, I-218.

Indeed, the Commonwealth seeks injunctive relief that would have essentially the same effect as legislation requiring "climate change warning labels on gas pumps," even though no such legislation governs ExxonMobil's advertising. J.A. I-207.[5] While the Commonwealth may believe that all fossil fuel use is dangerous, it may not compel ExxonMobil to support its subjective views on the exigency of climate change and the need to transition away from fossil fuels, particularly where the compelled disclosures it effectively seeks are neither "purely factual" nor "uncontroversial." *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

Similarly, the complaint alleges that ExxonMobil's public support for lower-emission biofuels is misleading because the company omits the Commonwealth's view that biofuels are insufficient to offset traditional fossil fuels and inferior to other sources of renewable energy. The complaint faults ExxonMobil for failing to disclose that its investments in biofuels represent "a small fraction" of its investments

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[5] Such a disclaimer would be constitutionally suspect. The First Amendment prohibits compelled speech on issues of public concern. As the Supreme Court has explained, "climate change" is one of several "controversial" and "sensitive political topics" which "are undoubtedly matters of profound value and concern to the public." *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018) (citation omitted).

in traditional fossil fuels, and that its future production "would equate to only 0.2 percent of its current [fossil fuel] refinery capacity." J.A. I-194, I-195. It further attacks ExxonMobil for omitting "that other proven, cost-effective alternatives to fossil fuels, including wind and solar power are already in widespread use in the United States and providing competitively priced power." J.A. I-195.

This claim is based on nothing more than a policy disagreement about the potential scale and efficacy of biofuels when it comes to offsetting fossil fuels and competing with established renewable energy sources. No longer could ExxonMobil highlight the potential of biofuels unless it simultaneously disclosed that biofuels are, in the Commonwealth's view, a poor energy policy choice. In seeking to enjoin such omissions, the Commonwealth would essentially require ExxonMobil to disseminate an opposing viewpoint or subject itself to liability for deceptive advertising. That would result in precisely the type of chilling effect on petitioning activity the anti-SLAPP statute is designed to remedy and would be antithetical to the statute's purpose.

Massachusetts appellate courts have not yet addressed whether a defendant's omission of a contrary viewpoint merits protection under the anti-SLAPP statute. In the absence of controlling precedent,

Massachusetts courts have looked to California's interpretation of its analogous statute when determining how the Massachusetts statute should be interpreted. *See, e.g.*, *Polay* v. *McMahon*, 468 Mass. 379, 389 (2014) (relying on California case law to construe anti-SLAPP statute's fee-shifting provision); *Margolis* v. *Gosselin*, No. CIV. A. 95-03837-A, 1996 WL 293481 (Mass. Super. Ct. May 22, 1996) (relying on California case law to conclude that commercial motivation for petitioning activity does not preclude application of anti-SLAPP statute).[6]

California courts have long held that omissions made in the context of petitioning fall squarely within the ambit of California's anti-SLAPP statute. *See, e.g.*, *Navallier* v. *Sletten*, 29 Cal. 4th 82, 89-90 (2002); *Crossroads Investors, L.P.* v. *Fed. Nat'l Mortg. Ass'n*, 13 Cal.

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[6] Although the California anti-SLAPP statute is broader than its Massachusetts counterpart, it defines the right to petition in nearly identical terms. *Compare* G.L. c. 231, § 59H, *with* Cal. Code Civ. Proc. § 425.16(e) (defining an "act in furtherance of a person's right of petition" as "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law").

App. 5th 757, 779 n.9 (2017); *Suarez* v. *Trigg Laboratories, Inc.*, 3 Cal. App. 5th 118, 124 (2016).

For example, in *Suarez*, a business consultant entered into an oral agreement with Trigg Laboratories and its principal owner with the goal of increasing growth to prepare the company for an eventual sale. 3 Cal. App. 5th at 120. Under the terms of that agreement, the consultant would receive seven percent of any sale of Trigg Laboratories. *Id.* Two years later, Trigg Laboratories terminated the consulting arrangement, and the consultant filed suit against the company for the fair value of the services he had rendered. *Id.* at 121. The parties eventually settled the case for $175,000. The consultant subsequently learned, however, that Trigg Laboratories had been evaluating a potential sale at the time of settlement and failed to disclose that information to him. *Id.* at 121-22. The consultant filed a new action seeking rescission of the settlement agreement based on the company's fraudulent concealment of its prospects for sale. *Id.*

Trigg Laboratories filed an anti-SLAPP motion asserting that the consultant's claims arose out of communications that occurred during settlement negotiations in the initial action and therefore constituted "petitioning activity." *Id.* at 122, 123. In response, the consultant

argued that his action for rescission was not based on the company's affirmative "statements," but its "active concealment and nondisclosure" of the anticipated sale. *Id.*

On appeal, the court affirmed the order of dismissal, holding that the "failure to disclose can be protected petitioning activity for purposes of [the California anti-SLAPP statute]." *Id.* at 124. "This is consistent with established free speech jurisprudence," the court reasoned, because the First Amendment "encompasses what a speaker chooses to say, and what a speaker chooses not to say; it is a right to speak freely and also a right to refrain from doing so at all." *Id.* The court concluded that omissions made in connection with a judicial proceeding are protected petitioning activity. *Id.* at 125.

The trial court's holding that the anti-SLAPP statute reaches only affirmative "statements," not omissions, J.A. 1216-17, has been rejected by the California courts that have reached the issue. That is because petitioning entails advocating for certain viewpoints while opposing or altogether omitting others. ExxonMobil's decision to advocate for certain energy policies necessarily includes the omission of certain views with which it disagrees, or on which it takes no position. And ExxonMobil's decision to omit the Commonwealth's

viewpoint from its statements does not automatically strip them of protection under the anti-SLAPP statute.

E. The Trial Court Should Have at Least Dismissed the Commonwealth's Claims Insofar as They Were Based on ExxonMobil's Petitioning Activity.

Because the trial court concluded that the Commonwealth's claims are based partially on ExxonMobil's petitioning, those claims should have been dismissed. Even if a complete dismissal is not warranted, the trial court erred by refusing to grant a partial dismissal of the Commonwealth's claims.

Despite recognizing that a number of ExxonMobil's challenged statements qualify as petitioning activity, the trial court declined to dismiss the claims insofar as they are based on that petitioning activity, which would have allowed the claims to proceed only on the basis of non-petitioning activity. It instead adopted a categorical, "all-or-nothing" approach, concluding that only a cause of action based *entirely* on petitioning activity is subject to dismissal. J.A. IV-173 n.5. That was error because it immunizes artful pleading whenever a plaintiff combines both petitioning activity and non-petitioning activity in the same cause of action.

Courts applying the anti-SLAPP statute must look beyond the cause of action to determine whether underlying statements giving rise to the claims for relief warrant protection. Plaintiffs attempting to circumvent the statute certainly would not label their claims as attacks on protected speech. "When ascertaining whether petitioning activity is the sole basis of a claim, the structure of the nonmoving party's complaint ordinarily cannot be dispositive." *Blanchard*, 477 Mass. at 155. "[W]ere the opposite rule to apply, plaintiffs could easily avoid the consequences of the anti-SLAPP statute by 'combining into a single count claims that are based on both petitioning and non-petitioning activities.'" *Reichenbach*, 92 Mass. App. Ct. at 573 (quoting *Blanchard*, 477 Mass. at 155).

Where a cause of action combining both petitioning and non-petitioning activity "readily could have been pleaded as separate counts, a special movant can meet its threshold burden with respect to the portion of that count based on petitioning activity." *Blanchard*, 477 Mass. at 155. Because a number of the Commonwealth's claims are

based on ExxonMobil's petitioning activity, the trial court should have dismissed those claims insofar as they are based on petitioning activity.[7]

For example, the Commonwealth alleges that ExxonMobil engages in "greenwashing" by promoting its sustainability efforts without simultaneously disclosing its continued investment in fossil fuels. J.A. I-160-161. According to the complaint, these statements are deceptive precisely because ExxonMobil has engaged in petitioning activity such as "waging a secretive campaign" against "fuel economy and emissions standards." J.A. I-169, I-199-200.

The complaint similarly faults ExxonMobil for "attempt[ing] to influence the European Union Commission to abandon its strict carbon dioxide emissions standards," which the Commonwealth claims is "yet another example" of ExxonMobil "delaying meaningful policy responses to climate change." J.A. I-200. These statements are more than merely "incidental background" or "context" because they provide the elements of the Commonwealth's claims for investor and consumer

[7] To illustrate the point, courts will partially dismiss claims as time barred to the extent they are based on conduct outside the limitations period, while allowing the same claims to proceed based on conduct within the limitations period. *See, e.g.*, *NSTAR Elec. Co.* v. *Veolia Energy N.A. Holdings*, No. 1584CV00452BLS2, 2019 WL 939105, at *1 (Mass. Super. Ct. Jan. 30, 2019).

deception. *Bonni* v. *St. Joseph Health Sys.*, 491 P.3d 1058, 1067-68 (Cal. 2021). Indeed, they supply the very acts (or omissions) on which liability is based.

In light of these statements, the trial court correctly recognized that a number of ExxonMobil's "statements referenced in the complaint constitute protected petitioning within the scope of § 59H." J.A. IV-173. This petitioning activity included ExxonMobil's "lobbying efforts"—such as advocating against emissions standards—which were reasonably likely to influence public policy and participation. J.A. IV-173 n.5.

The trial court nonetheless held that ExxonMobil could not obtain even a partial dismissal of claims supported by allegations specifically targeting petitioning activity, so long as any of those claims were also supported by allegations not directed specifically at petitioning activity. According to the trial court, the threshold inquiry "produces an all or nothing result as to each count of the complaint" because "the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot." J.A. IV-173 n.5 (quoting *Ehrlich* v. *Stern*, 74 Mass. App. Ct. 531, 536 (2009)). This categorical approach allows plaintiffs to artfully plead

around the anti-SLAPP statute by basing claims on petitioning activity, provided they can identity some additional conduct that a judge will conclude is non-petitioning activity.

But the Supreme Judicial Court expressly rejected the trial court's categorical, "all-or-nothing" approach. *See Blanchard*, 477 Mass. at 155-56 (abrogating *Ehrlich*). At this threshold stage, the defendant need not "take the adverse complaint as it finds it" because otherwise plaintiffs "could undercut the anti-SLAPP statute and its salutary purpose by combining into a single count claims that are based on both petitioning and non-petitioning activities." *Id.* at 155.

While this Court has indicated that a cause of action based on a "course of conduct" does not require analysis of each of the challenged statements independently, that is inapplicable here. *Reichenbach*, 92 Mass. App. Ct. at 574;[8] *see also Haverhill Stem*, 99 Mass. App. Ct. at 633-34. For example, the course of conduct at issue in *Reichenbach*

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[8] In *Reichenbach*, this Court relied on *Harrison I*, which affirmed the denial of a special motion to dismiss where the conduct at issue included both petitioning and non-petitioning activity. Specifically, the Court held that the defendants met their threshold burden as to an abuse-of-process claim, but not as to a chapter 93A claim, which involved submitting false insurance claims that did "not bear any apparent relation" to the petitioning activity and therefore provided "a substantial nonpetitioning basis" for the chapter 93A claim. 477 Mass. at 170-71.

involved coercion and intimidation to block the construction of a new building. 92 Mass. App. Ct. at 575. And the conduct in *Haverhill* involved an effort to extort money from the plaintiffs, which was "not reasonably related" to the petitioning activity at issue. 99 Mass. App. Ct. at 633.

Here, by contrast, the Commonwealth's chapter 93A claims have nothing to do with extortion or coercion. The complaint never alleges that ExxonMobil employed a non-petitioning course of conduct to harass, threaten, or intimidate those on the opposite side of a public policy debate. To the contrary, the complaint implicates only quintessential petitioning activity such as ExxonMobil's lobbying against regulation and statements to regulators, policymakers, and the public on climate change. The claims here are not only "reasonably related" to ExxonMobil's petitioning activity, but are also predicated on that petitioning activity. *Haverhill*, 99 Mass. App. Ct. at 633. As explained above, the challenged statements and omissions (however characterized) form the very basis of the Commonwealth's theory of deception.

In any event, after concluding that a number of ExxonMobil's statements constitute petitioning activity, the trial court should have

proceeded to the second stage of the anti-SLAPP inquiry to consider a partial dismissal of the claims. Instead, the trial court immunized the Commonwealth's artfully pled course of action. Accordingly, even if this Court concludes that the trial court correctly applied the anti-SLAPP statute, it should nevertheless vacate and remand with instructions to consider dismissal of the claims insofar as they are based on ExxonMobil's petitioning activity.

VI. CONCLUSION

ExxonMobil's challenged statements fall within the broad definition of "petitioning" because they represent an ongoing effort to influence policymakers and the public on energy policy. The communication of those statements in the first instance to investors or consumers does not forfeit their protected status. They were closely and rationally related to an ongoing public policy debate about how best to address the risks of climate change.

The trial court nonetheless erred by holding that ExxonMobil's challenged statements were commercially motivated, and therefore not protected by the anti-SLAPP statute. Motive is irrelevant at the threshold state of the anti-SLAPP inquiry, and for good reason. Focusing on subjective motives would exempt from coverage any

statements that conceivably promote a speaker's commercial interests, even if they are made in the context of a larger public policy debate.

It was also error for the trial court to hold that ExxonMobil's alleged omissions are not entitled to anti-SLAPP protection where they are premised on ExxonMobil's failure to adopt the Commonwealth's preferred views on energy policy. Compelling ExxonMobil to advocate for the Commonwealth's viewpoints or otherwise expose itself to liability for "omissions" would have a chilling effect on protected petitioning activity.

Alternatively, even if the trial court correctly applied the anti-SLAPP statute, it nonetheless erred by failing to partially dismiss the Commonwealth's claims. Despite recognizing that a number of ExxonMobil's statements challenged in the complaint constitute petitioning activity, the trial court declined to dismiss the claims insofar as they are based on that petitioning activity. The Commonwealth is not permitted to artfully plead around the anti-SLAPP statute where a number of protected statements provide the very basis of its claims of investor and consumer deception.

For any or all of these reasons, the decision below should be reversed or, in the alternative, vacated and remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the rules of court that pertain to the filing of briefs, including Mass. R.A.P. 16(e) (references to the record), Mass. R.A.P. 18 (appendix to the brief), Mass R.A.P. 20 (form and length of briefs, appendices, and other documents), Mass R.A.P. 21 (redaction); and

2. This brief complies with Mass. R.A.P. 20 because the brief was prepared using Microsoft Word with 14-point, Times New Roman font, and this brief consists of 9,528 words, excluding the parts exempted by Mass. R.A.P. 20(a)(2)(D).

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CERTIFICATE OF SERVICE

I hereby certify that on, November 8, 2021, I served Appellant's Brief and Joint Appendix by the Electronic Filing System and electronic mail on:

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