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

EXXON MOBIL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 4:16-CV-00364-K
	§	
CLAUDE EARL WALKER, Attorney General of the United States Virgin Islands, in his official capacity, LINDA SINGER, and COHEN, MILSTEIN, SELLERS & TOLL PLLC,	§	
	§	
Defendants.	§	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF EXXON MOBIL CORPORATION'S MOTION TO REMAND

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Plaintiff Exxon Mobil Corporation ("ExxonMobil") respectfully requests that this action be remanded to the 17th District Court of Tarrant County, Texas. In light of the Fifth Circuit's recent decision in *Google, Inc.* v. *Hood*, No. 15-60205, 2016 WL 2909231 (5th Cir. Apr. 8, 2016, amended May 18, 2016), this Court lacks subject matter jurisdiction over ExxonMobil's petition for a declaratory judgment, which triggers the statutory requirement of a remand to state court, which has jurisdiction.

PRELIMINARY STATEMENT

On March 22, 2016, ExxonMobil received a subpoena issued by Defendant Claude Earl Walker, the Attorney General of the Virgin Islands.[1] It requested over 30 years of corporate documents concerning the issue of climate change and focused specifically on entities and individuals perceived to be on the "wrong" side of the climate change debate.[2] ExxonMobil responded by filing a petition in Texas state court on April 13, 2016, seeking a declaration that the issuance of the subpoena violated ExxonMobil's rights under the United States Constitution, the Texas Constitution, and Texas common law.[3] On May 18, 2016, Defendants filed a notice of removal, bringing this action before this Court.[4] By filing that notice, Defendants removed a declaratory judgment action from a state forum where it could be heard to a federal forum where it is not ripe for adjudication. Under such circumstances, 28 U.S.C. § 1447(c) requires a remand to state court.

ExxonMobil seeks a prompt remand, so that it may obtain relief from a court with jurisdiction to hear this matter. ExxonMobil's constitutional and common-law rights have been violated by Defendants' use of law enforcement tools to stifle perceived dissent. As part of a

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1 Ex. V at App. 144-62.
2 *Id.* at App. 154-57 (Request Nos. 6-8).
3 Ex. Z at App. 188-214.
4 Ex. EE at App. 237-44.

coordinated campaign by state attorneys general, Defendant Claude Earl Walker, the Attorney General of the Virgin Islands, enlisted plaintiffs' attorneys paid on a contingency fee basis to mail a government subpoena to ExxonMobil. That subpoena expressly, transparently, and impermissibly targets one side of the policy debate regarding the risks of climate change, purports to investigate an offense that ExxonMobil could not have committed during the relevant limitations period, and endows a biased and hostile law firm with the coercive investigative tools of government to pursue ExxonMobil for private profit. This misuse of law enforcement power violates fundamental precepts about the sound administration of justice and tramples ExxonMobil's rights in the process.

The subpoena was issued according to a plan devised by partisan state officials, climate-change activists, and plaintiffs' side environmental attorneys. The public officials made their intentions known at a joint press conference held on March 29, 2016, featuring the remarks of former Vice President and private citizen Al Gore.[5] During that press conference, a coalition of attorneys general announced their frustration with congressional inaction on climate change and pledged to use law enforcement tools "creatively" and "aggressively," not to investigate violations of law, but to impose their preferred policy response to climate change.[6] Defendant Walker, whose participation in the coalition was concededly motivated by a desire to identify "potential litigation targets"[7] declared his intent to do something "transformational" to end "rel[iance] on fossil fuel,"[8] beginning with "an investigation into a company" that manufactures

[5] A transcript of the AGs United For Clean Power Press Conference, held on March 29, 2016, was prepared by counsel based on a video recording of the event, which is available at http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across. A copy of this transcript is included in the accompanying appendix as Exhibit B.

[6] *Id.* at App. 10.

[7] Ex. S at App. 135.

[8] Ex. B at App. 24.

a "product" he claimed was "destroying this earth."[9] The other attorneys general expressed similar intentions to deploy these "creative" law enforcement tools in pursuit of claimed public policy objectives.[10]

This public announcement was the culmination of years of planning. Since at least 2012, climate-change activists and plaintiffs' attorneys have contemplated different means of obtaining the confidential records of fossil-fuel companies, including the use of law enforcement to obtain records that would be otherwise beyond their grasp.[11] At a 2012 conference entitled "Climate Accountability, Public Opinion, and Legal Strategies," the attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[12] They concluded that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[13] And those activists and plaintiffs' lawyers were on call at the press conference. During a private session with the attorneys general, a climate-change activist and a private environmental lawyer, who has previously sued ExxonMobil, made presentations on the "imperative of taking action now on climate change" and on "climate change litigation."[14]

The attorneys general recognized that the involvement of these individuals—especially a private attorney likely to earn fees from any private litigation made possible by a government investigation of ExxonMobil—could expose the special interests behind the Green 20's announcement. When that same attorney asked the New York Attorney General's office what he should tell a reporter if asked about his involvement, the chief of that office's environmental unit

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9 *Id.* at App. 23-24.
10 *See id.* at App. 9-28.
11 Ex. O at App. 97.
12 *Id.* at App. 91-92, 97, 117-21.
13 *Id.* at App. 97.
14 Ex. I at App. 53.

told him not to confirm his attendance at the conference.[15] This desire to shield from the public the origins of the attorneys general initiative speaks volumes about the state officials' own assessment of its propriety.

Defendant Walker's subpoena is a product of this misguided enterprise. It was mailed to ExxonMobil by Defendants Linda Singer and her law firm Cohen, Milstein, Sellers & Toll PLLC ("Cohen Milstein"), a plaintiff-side class action firm that markets itself as specializing in "lawsuits with a strong social and political component."[16] The subpoena purports to investigate whether ExxonMobil violated the Virgin Islands' racketeering statute by "misrepresenting [its] knowledge of the likelihood that [its] product and activities have contributed and are contributing to Climate Change in order to defraud" the government of and "consumers" in the Virgin Islands.[17]

The subpoena is a transparent abuse of power for at least three reasons. First, the offense that Attorney General Walker purportedly seeks to investigate through the subpoena has a five year statute of limitations. 14 V.I.C. § 604(j)(2)(B). For the last decade, however, ExxonMobil has publicly recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant" and that "strategies that address the risk need to be developed and implemented."[18] Second, ExxonMobil has engaged in no conduct in the Virgin Islands that could give rise to a violation of Virgin Islands law. ExxonMobil has no physical presence in the Virgin Islands; it owns no property, has no employees, and has conducted no business operations there in the last five years. Third, for similar reasons, no court in the Virgin Islands has jurisdiction over ExxonMobil, a New Jersey corporation with its principal place of

[15] Ex. R at App. 129.
[16] Ex. U at App. 142.
[17] Ex. V at App. 144.
[18] Ex. W at App. 167.

business in Texas. Attorney General Walker therefore has no jurisdiction over ExxonMobil and no ability to press any claims or charges against it arising under the laws of the Virgin Islands.

Seeking relief from this improper exercise of government power, ExxonMobil filed a petition in Texas state court for a declaration that Defendant Walker's issuance of the subpoena and the delegation to Defendants Singer and Cohen Milstein (i) violated ExxonMobil's rights under the United States and Texas Constitutions to engage in free speech, receive due process, and resist unreasonable searches and (ii) constituted an abuse of process under Texas common law.[19] In view of the injustice of Defendant Walker's subpoena and the merit in ExxonMobil's position, the attorneys general of Texas and Alabama intervened in the action to support ExxonMobil's efforts to vindicate its rights.[20] They pointed out that the investigation of ExxonMobil is "driven by ideology, and not law."[21] The Texas Attorney General rightly recognized that the true purpose of Defendant Walker's "fishing expedition" into almost four decades' worth of ExxonMobil records was to retaliate against ExxonMobil for "holding a point of view about climate change that the Virgin Islands Attorney General disagrees with."[22] The Alabama Attorney General likewise characterized the subpoena as a "witch hunt against [ExxonMobil] for its views on the environment."[23]

Defendants declined to defend their actions in state court. Ignoring their deadline to file an answer in that court, they filed instead a motion to remove the matter to federal court.[24] But their grounds for doing so are as lacking as their grounds for issuing the subpoena in the first place. Under a recent decision of the Fifth Circuit, federal courts lack subject matter jurisdiction over pre-enforcement challenges to subpoenas, such as the one issued by Defendant Walker, that

[19] Ex. Z at App. 192, 207-12, ¶¶ 12, 59-77.
[20] Ex. AA at App. 216-22.
[21] *Id.* at App. 217.
[22] Ex. FF at App. 246.
[23] Ex. CC at App. 227.
[24] Ex. EE at App. 237-44.

are not self-executing. *See Google, Inc.* v. *Hood*, No. 15-60205, 2016 WL 2909231 (5th Cir. Apr. 8, 2016, amended May 18, 2016). Defendants' decision to remove this action from state court—where the matter is ripe and justiciable—to a court lacking subject matter jurisdiction can serve no legitimate purpose. Under the relevant statute, a remand to state court is required. *See* 28 U.S.C. § 1447(c).

STATEMENT OF FACTS

I. Factual Background

A. The "Green 20" Coalition of Attorneys General Announces a Plan to Use Law Enforcement Tools to Achieve Political Goals

The subpoena issued by Defendant Walker and mailed by Defendants Singer and Cohen Milstein is the product of a coordinated campaign of partisan state officials urged on by climate-change activists and privately interested attorneys. This campaign first exposed itself to the public on March 29, 2016, when the Attorney General of New York hosted a press conference in New York City with certain other attorneys general as the self-proclaimed "AGs United For Clean Power."[25] Former Vice President Al Gore was the event's featured speaker. Defendant Walker, along with attorneys general or staff members from over a dozen other states, attended and participated in the conference.

The attorneys general, calling themselves "the Green 20" (a reference to the number of participating attorneys general), explained that their mission was to "com[e] up with creative ways to enforce laws being flouted by the fossil fuel industry."[26] Expressing dissatisfaction with the perceived "gridlock in Washington" regarding climate-change legislation, the New York

[25] Ex. B at App. 9-28.
[26] *Id.* at App. 10.

Attorney General said that the coalition had to work "creatively" and "aggressively" to advance that agenda.[27]

He announced that the assembled "group of state actors [intended] to send the message that [it was] prepared to step into this [legislative] breach."[28] He continued:

> We know that in Washington there are good people who want to do the right thing on climate change but everyone from President Obama on down is under a relentless assault from well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action. So today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination.[29]

In an effort to legitimize what Walker and other attorneys general were doing, Vice President Gore cited perceived inaction by the federal government to justify action by state attorneys general, observing that "our democracy's been hacked . . . but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level."[30] Vice President Gore went on to condemn those who question the viability of renewable energy sources, faulting them for "slow[ing] down this renewable revolution" by "trying to convince people that renewable energy is not a viable option."[31] He then accused the fossil fuel industry of "using [its] combined political and lobbying efforts to put taxes on solar panels and jigger with the laws" and said "[w]e do not have 40 years to continue suffering the consequences of the fraud."[32]

Shortly after Vice President Gore finished his remarks, Attorney General Walker took the stage. Hailing Vice President Gore as one of his "heroes," Attorney General Walker announced that his office had "launched an investigation into a company that we believe must provide us

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27 *Id.* at App. 10-11.
28 *Id.* at App. 11.
29 *Id.* at App. 12.
30 *Id.*
31 *Id.*
32 *Id.* at App. 15, 17.

with information about what they knew about climate change and when they knew it."[33] That thinly-veiled reference to ExxonMobil was later confirmed in a press release naming ExxonMobil as the target of his investigation.[34]

Continuing the theme of the press conference, Attorney General Walker admitted that his investigation of ExxonMobil was really aimed at changing public policy, not investigating actual violations of existing law:

> It could be David and Goliath, the Virgin Islands against a huge corporation, but we will not stop until we get to the bottom of this and make it clear to our residents as well as the American people that we have to do something transformational. We cannot continue to rely on fossil fuel. Vice President Gore has made that clear.[35]

For Attorney General Walker, the public policy debate on climate change is settled: "We have to look at renewable energy. That's the only solution."[36] As for the energy companies like ExxonMobil, Attorney General Walker accused them of producing a "product that is destroying this earth."[37] He complained that, "as the polar caps melt," those "companies . . . are looking at that as an opportunity to go and drill, to go and get more oil. Why? How selfish can you be?"[38]

The political motivations articulated by Attorney General Walker and his colleagues struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. As it was evident that the attorneys general had prejudged the very investigation they proposed to undertake, one reporter was prompted to ask whether the press conference and the investigations launched by Attorney General Walker and other members of the coalition were nothing more than "publicity stunt[s]."[39]

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[33] *Id.* at App. 23.
[34] Ex. C at App. 31.
[35] Ex. B at App. 24.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at App. 25.

The press conference also drew a swift and sharp rebuke from other state attorneys general who criticized Attorney General Walker and those joining him in using the power of law enforcement as a tool to muzzle dissent and discussions about climate change. The attorneys general of Alabama and Oklahoma stated that "scientific and political debate" "should not be silenced with threats of criminal prosecution by those who believe that their position is the only correct one and that all dissenting voices must therefore be intimidated and coerced into silence."[40] They emphasized that "[i]t is inappropriate for State Attorneys General to use the power of their office to attempt to silence core political speech on one of the major policy debates of our time."[41] The Louisiana Attorney General similarly observed that "[i]t is one thing to use the legal system to pursue public policy outcomes; but it is quite another to use prosecutorial weapons to intimidate critics, silence free speech, or chill the robust exchange of ideas."[42] Likewise, the Kansas Attorney General questioned the "unprecedented" and "strictly partisan nature of announcing state 'law enforcement' operations in the presence of a former vice president of the United State[s] who, presumably [as a private citizen], has no role in the enforcement of the 17 states' securities or consumer protection laws."[43] The West Virginia Attorney General criticized the attorneys general for "abusing the powers of their office" and stated that the desire to "eliminate fossil fuels . . . should not be driving any legal activity" and that it was improper to "use the power of the office of attorney general to silence . . . critics."[44]

More recently, the Committee on Science, Space, and Technology of the United States House of Representatives launched an inquiry into the investigations undertaken by the Green

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40 Ex. D at App. 34.
41 *Id.*
42 Ex. E at App. 36.
43 Ex. F at App. 38.
44 Ex. G at App. 41, 43.

20.[45] That committee was "concerned that these efforts [of the Green 20] to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve as the guardian of the legal rights of the citizens and to assert, protect, and defend the rights of the people."[46] Perceiving a need to provide "oversight" of what it described as "a coordinated attempt to attack the First Amendment rights of American citizens," the Committee demanded the production of certain records and information from the attorneys general.[47]

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

The impropriety of the attorneys general statements at the press conference are surpassed only by what they said behind closed doors. During the morning of the press conference, the attorneys general attended two presentations.[48] Those presentations were not announced publicly, and they were not open to the press. The identity of the presenters and the titles of the presentations, however, were later released by the state of Vermont in response to a request under that state's Freedom of Information Act.[49]

The first presenter was Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists.[50] His subject was the "imperative of taking action now on climate change."[51] According to the Union of Concerned Scientists, those who do not share its views about climate change and responsive policy make it "difficult to achieve meaningful solutions to global warming."[52] It accuses "[m]edia pundits, partisan think tanks, and special interest groups"

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45 Ex. H at App. 45.
46 *Id.* (internal quotation marks omitted).
47 *Id.* at App. 48.
48 Ex. I at App. 52-53.
49 Ex. J at App. 65-66.
50 Ex. K at App. 69.
51 Ex. I at App. 53.
52 Ex. L at App. 73.

of being "contrarians," who "downplay and distort the evidence of climate change, demand policies that allow industries to continue polluting, and attempt to undercut existing pollution standards."[53]

Matthew Pawa of Pawa Law Group, P.C.[54] hosted the second presentation on the topic of "climate change litigation."[55] The Pawa Law Group, which boasts of its "role in launching global warming litigation," previously sued ExxonMobil and sought to hold it liable for causing global warming.[56] That suit was dismissed because, as the court properly held, "regulating global warming emissions is a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[57]

Frumhoff and Pawa have sought for years to initiate legal actions against fossil-fuel companies in the service of their political agenda and for private profit. In 2012, for example, Frumhoff hosted and Pawa presented at a conference entitled "Climate Accountability, Public Opinion, and Legal Strategies."[58] The conference's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[59] The 2012 conference's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of companies like ExxonMobil.[60] Even then, Frumhoff and Pawa suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[61] Indeed, that conference's attendees were "nearly unanimous" regarding "the importance of legal

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53 *Id.* at App. 73-74.
54 Ex. M at App. 82.
55 Ex. I at App. 53.
56 Ex. N at App. 84.
57 Ex. O at App. 98; *see also Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012).
58 Ex. O at App. 91-92, 117-21.
59 *Id.* at App. 89-90.
60 *Id.* at App. 97.
61 *Id.*

actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming."[62]

As recently as January 2016, Pawa and a group of climate activists met to discuss the "Goals of an Exxon campaign."[63] The goals included:

> To establish in public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm. To delegitimize them as a political actor. To force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc. To call into question climate advantages of fracking, compared to coal. To drive divestment from Exxon. To drive Exxon & climate into center of 2016 election cycle.[64]

The Walker/Cohen Milstein subpoena represented the culmination of Frumhoff and Pawa's collective efforts to enlist state law enforcement officers in their quest to enact their preferred policy responses to global warming.

The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the investigations. The day after the conference, a reporter from *The Wall Street Journal* called Pawa.[65] In response, Pawa asked the New York Attorney General's Office "[w]hat should I say if she asks if I attended?" The environmental bureau chief at the office responded, "[m]y ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[66]

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62 *Id.* at App. 113.
63 Ex. P at App. 124.
64 *Id.*; *see also* Ex. Q at App. 126.
65 Ex. R at App. 129.
66 *Id.*

C. Attorney General Walker Seeks Out "Litigation Targets"

The newly released documents also revealed Attorney General Walker's written responses to a questionnaire circulated by the New York Attorney General's Office to the attorneys general whom it expected to attend the conference.[67] When asked what he hoped to get out of the conference, Attorney General Walker responded that he was looking for "potential litigation targets" and for "concrete ways to work together on litigation to increase our leverage."[68]

Walker's response boasted of his recent victory in procuring an $800 million settlement from Hess Oil.[69] It is an understatement to call Walker's positions with respect to Hess and ExxonMobil inconsistent. Walker sued Hess not because of its perceived resistance to Walker's preferred policy responses to climate change, but because Hess decided to close its oil refinery in the Virgin Islands, purportedly in violation of an obligation not to do so.[70] Months after extracting a financial settlement from Hess for *ceasing* its operations, Walker launched a legal assault on ExxonMobil for *continuing* to make a product that he claims is "destroying this earth."[71] This shifting position is hard to explain without noting that the Hess refinery employed citizens of the Virgin Islands to refine oil, unlike ExxonMobil, which operates principally in the State of Texas and has no operations or employees in the Virgin Islands, and is therefore presumably an even more attractive "litigation target[]."[72] The obvious financial interests furthered by this inconsistent litigation position—for Defendant Walker, as well as Defendants Singer and Cohen Milstein—need little elaboration.

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67 Ex. S at App. 132-37.
68 *Id.* at App. 132, 135.
69 *Id.* at App. 134.
70 *See id.*
71 Ex. B at App. 24.
72 Ex. S at App. 135.

D. ExxonMobil Receives Walker's Baseless Subpoena

Two weeks before the "Green 20" press conference, on March 15, 2016, Cohen Milstein, a Washington, D.C. law firm that promotes itself as "a pioneer in plaintiff class action lawsuits"[73] and "[t]he most effective law firm in the United States for lawsuits with a strong social and political component,"[74] mailed a subpoena that appears to have been signed by the Deputy Attorney General of the Virgin Islands Attorney General's Office to ExxonMobil's headquarters in Texas. ExxonMobil received the subpoena on March 22, 2016.

The purported basis for the issuance of the subpoena is an investigation under the Virgin Islands' Criminally Influenced and Corrupt Organizations Act ("CICO") 14 V.I.C. § 605.[75] According to the subpoena, the Attorney General's office is investigating ExxonMobil for violating CICO "by having engaged or engaging in conduct misrepresenting [its] knowledge of the likelihood that [its] products and activities have contributed and are continuing to contribute to Climate Change in order to defraud the Government of the United States Virgin Islands . . . and consumers in the Virgin Islands."[76]

To that end, the 17-page subpoena demands that ExxonMobil produce every document it has sent or received since January 1, 1977—a nearly 40-year period—that is responsive to 16 broadly-worded document requests. Among the materials demanded by the subpoena are essentially any and all of ExxonMobil's communications and documents related to the subject of climate change, including all documents related to research that ExxonMobil conducted or funded.[77]

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73 Ex. T at App. 139.
74 Ex. U at App. 142.
75 Ex. V at App. 144.
76 *Id.*
77 *See, e.g.*, *id.* at App. 154 (Request No. 1).

The subpoena's remarkably broad scope is particularly striking when contrasted with the offense it purports to investigate and the dearth of any relationship between ExxonMobil and the Virgin Islands. To issue a subpoena investigating an alleged CICO violation, the Attorney General must "reasonably suspect[]" that a CICO violation has occurred. 14 V.I.C. § 612(a). Under CICO, at least one of the two required predicate acts must have been committed within five years of the filing of any case by the Attorney General. 14 V.I.C. § 604(j)(2)(B). The subpoena identifies two purported predicate offenses: obtaining money by false pretenses, in violation of 14 V.I.C. § 834, and conspiracy to obtain money by false pretenses, in violation of 14 V.I.C. § 551.[78]

During the limitations period, however, ExxonMobil has maintained no business operations, staff, or assets in the Virgin Islands. Accordingly, it could not have violated Virgin Islands law, and is not even subject to jurisdiction there. And for far longer than the five-year limitations period, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business. For example, ExxonMobil's 2006 Corporate Citizenship Report recognized that "the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant."[79] Despite noting that "[c]limate remains an extraordinarily complex area of scientific study," it reasoned that "strategies that address the risk need to be developed and implemented."[80] ExxonMobil has also discussed these risks in its public Securities and Exchange Commission filings. In its 2006 10-K, ExxonMobil stated that the "risks of global climate change" "have been, and may in the future" continue to impact its

[78] *Id.* at App. 144.
[79] Ex. W at App. 167.
[80] *Id.*

operations.[81] Similarly, in its 2009 10-K, ExxonMobil noted that the "risk of climate change" and "pending greenhouse gas regulations" may increase its "compliance costs."[82]

The subpoena's more targeted requests are in some instances more troubling than its extraordinary breadth. The subpoena evinces a particular interest in ExxonMobil's communications with individuals and organizations perceived to be on one side of the climate change debate. For example, the subpoena demands "[a]ll Documents or Communications concerning research, advocacy, strategy, reports, studies, reviews or public opinions regarding Climate Change sent to or received from" 88 named organizations, three-quarters of which have been identified by policy groups as opposing policies in favor of addressing climate change or disputing the science in support of climate change.[83] The subpoena also seeks similar documents and communications from 54 named scientists, professors, and other professionals.[84] Finally, the subpoena seeks the same documents from any unnamed organizations or individuals with which ExxonMobil has communicated about climate change.[85]

II. PROCEDURAL HISTORY

A. ExxonMobil Seeks a Declaratory Judgment to Vindicate its Constitutional Rights

ExxonMobil commenced this suit in Tarrant County, Texas District Court on April 13, 2016.[86] The Petition alleges that Defendants violated ExxonMobil's rights under the United States Constitution, the Texas Constitution, and Texas common law by (i) impermissibly targeting one side of a policy debate about a matter of public concern; (ii) conducting a baseless fishing expedition and issuing an overly burdensome subpoena; (iii) allowing Cohen Milstein

81 Ex. X at App. 176-77.
82 Ex. Y at App. 185.
83 Ex. V at App. 155-57 (Request No. 6).
84 *Id.* at App. 157-58 (Request Nos. 7-8).
85 *Id.* at App. 155-58 (Request Nos. 6-8).
86 Ex. Z at App. 214.

and Singer to enforce the subpoena and carry out the investigation even though they are working for a contingent fee and cannot serve as disinterested prosecutors; and (iv) committing an abuse of process.[87] ExxonMobil seeks a declaration that the issuance and mailing of the subpoena were illegal and that any effort to enforce the subpoena would violate ExxonMobil's rights.[88]

B. The Alabama and Texas Attorneys General Intervene

In the wake of the revelations about the Green 20's meetings with climate activists and Walker's "search for potential litigation targets," the Attorneys General of Texas and Alabama intervened in this action in an effort to protect the constitutional rights of their citizens.[89] On May 16, 2016, the Texas and Alabama Attorneys General jointly filed a plea in intervention, criticizing Walker's investigation for being "driven by ideology, and not law."[90] The Texas Attorney General called Defendant Walker's purported investigation "a fishing expedition of the worst kind" and recognized it as "an effort to punish Exxon for daring to hold an opinion on climate change that differs from that of radical environmentalists."[91] The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas "is more than just a free speech case. It is a battle over whether a government official has a right to launch a criminal investigation against anyone who doesn't share his radical views."[92]

Attorney General Walker reacted to the intervention by defending his actions in the press, asserting that "investigating fraud is something that attorneys general do every day and that Exxon may be continuing to misrepresent the risks of climate change to investors."[93] His

87 *Id.* at App. 192, 207-12, ¶¶ 12, 59-77.
88 *Id.* at App. 192, 212, ¶¶ 12, 76-77; *id.* at App. 213 ¶¶ 1-2.
89 Ex. AA at App. 216-22.
90 *Id.* at App. 217.
91 Ex. BB at App. 224.
92 Ex. CC at App. 227.
93 Ex. DD at App. 231.

statements confirm his intention to continue using the powers of his office against ExxonMobil, including compelling its response to the subpoena.

C. Defendants Ignore Their Answer Deadline in State Court and Remove this Case to Federal Court

Defendants' answer to ExxonMobil's Petition was due on May 9, 2016. Instead of filing a timely answer, Defendants waited an additional nine days before removing this case to the United States District Court for the Northern District of Texas on May 18, 2016.

ARGUMENT

ExxonMobil filed this case in Tarrant County District Court, and it is ripe for decision there. A Texas state court may entertain a declaratory judgment action even if "the differences between the parties as to their legal rights have not reached the state of an actual controversy." *Tex. Dep't of Pub. Safety* v. *Moore*, 985 S.W.2d 149, 154 (Tex. App.—Austin 1998, no pet.) (internal quotation marks omitted); *see Patel* v. *Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 78 (Tex. 2015). So long as there are "the ripening seeds of a controversy," a Texas court may declare the rights of the parties. *Unauthorized Practice of Law Comm.* v. *Nationwide Mut. Ins. Co.*, 155 S.W.3d 590, 595 (Tex. App.—San Antonio 2004, pet. denied). Those "ripening seeds" are firmly planted here in light of Attorney General Walker's issuance of a chilling and burdensome subpoena on ExxonMobil and his recent statements affirming his intention to pursue enforcement. The subpoena and Attorney General Walker's statements have placed ExxonMobil's rights—under federal and state law—in jeopardy, and ExxonMobil may pursue declaratory relief in Texas court, even though Attorney General Walker has not yet asked a court to issue an order compelling ExxonMobil to comply with his subpoena. *See Patel*, 469 S.W.3d at 78 (holding that claims were ripe even though plaintiffs had "not yet faced administrative enforcement").

Although Texas's state courts can adjudicate this case, a federal court cannot. Unlike the State of Texas, the Fifth Circuit treats pre-enforcement challenges to agency action—and to non-self-executing subpoenas generally—as unripe until the relevant official commences an enforcement action. That is so even where a federal question is presented by the challenge. Because ExxonMobil's federal claims all challenge Attorney General Walker's subpoena, process for which Defendants have not yet sought a compulsion order, a federal district court may not yet exercise jurisdiction over ExxonMobil's claims and therefore should remand the action to state court.

I. Section 1447(c) Requires the Court to Remand this Case to State Court

A. Applicable Law

A state-court defendant may remove to federal court only those cases that are within the federal court's "original jurisdiction"—i.e., cases that could have been filed as an initial matter in federal court. *See* 28 U.S.C. § 1441(a); *Halmekangas* v. *State Farm Fire & Cas. Co*., 603 F.3d 290, 294 (5th Cir. 2010). The ripeness doctrine, which is "drawn both from Article III limitations on judicial power and from reasons for refusing to exercise jurisdiction," prohibits *federal* courts from entertaining suits that are not fit for federal judicial resolution. *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003). A federal court does not have jurisdiction over a case that is not ripe. *See, e.g.*, *Sandy Creek Investors, Ltd.* v. *City of Jonestown, Tex.*, 325 F.3d 623, 626 (5th Cir. 2003). Where a state-court defendant attempts to remove a case to federal court on the basis of a claim that is unripe under federal law, the federal court cannot entertain the case and should remand it to state court. *Dallas Indep. Sch. Dist.* v. *Calvary Hill Cemetery*, 318 F. Supp. 2d 429, 432 (N.D. Tex. 2004).

B. Discussion

Defendants assert that removal is proper because the Petition includes claims that arise under federal law.[94] ExxonMobil does not dispute that Defendants have violated its rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and those violations would fall within federal question jurisdiction. But that alone does not provide a federal court with subject matter jurisdiction over this matter. Among other jurisdictional requirements, a case must be ripe under federal law before it can be heard by a federal court. And here, while ExxonMobil's Petition satisfies state ripeness requirements, a recent decision of the Fifth Circuit holds that the federal claims in the Petition are not ripe under federal law. Unlike Texas's "ripening seeds of a controversy" standard, federal law demands a more mature demonstration of harm—that is, a "current consequence"—before there can be federal subject matter jurisdiction. The Fifth Circuit has recently held that a subpoena that is not self-enforcing does not present such a current consequence and therefore is not ripe for review in a federal court, regardless of it ripeness under state law.

In *Google, Inc.* v. *Hood*, the Fifth Circuit confronted a challenge to a subpoena issued by the Attorney General of Mississippi, which was brought by Google in federal court in the first instance. No. 15-60205, 2016 WL 2909231 (5th Cir. Apr. 8, 2016, amended May 18, 2016). The Mississippi subpoena was not self-executing, meaning that Google could not be sanctioned for noncompliance until the Attorney General obtained a court order to enforce the subpoena. *Id.* at *8. Because the Attorney General had not brought an enforcement action to compel compliance, Google faced "no current consequence for resisting the subpoena." *Id.* at *9. The Fifth Circuit therefore held that Google's attack on the subpoena was not ripe, and explained that

[94] Ex. EE at App. 238, ¶ 4.

it was similar to other cases in which a challenge to a subpoena "should have been dismissed for lack of subject matter jurisdiction." *Id.* (internal quotation marks omitted).

Each of the federal claims made by ExxonMobil here are parallel to those made by Google. As in *Google*, Defendants can enforce the subpoena at issue here only by petitioning a court for an order requiring ExxonMobil to comply with it. 14 V.I.C. § 612(k). And as in *Google*, Defendants have not yet filed any such action. Under the reasoning of the *Google* decision, under federal standards, ExxonMobil thus faces "no current consequence" for not complying with the subpoena. *Google*, 2016 WL 2909231, at *9. The federal claims are therefore not ripe under federal law and cannot support the removal of this case. *See Sandy Creek Investors*, 325 F.3d at 626.

If this case is not ripe under federal law, the removal statute requires remand. In a removed case, when "it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded*." 28 U.S.C. § 1447(c) (emphasis added). As the Supreme Court has observed, once a district court determines that it lacks jurisdiction over a removed case, § 1447's mandatory language gives the court "no discretion to dismiss rather than remand" the action. *Int'l Primate Protection League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991); *see Hexamer* v. *Foreness*, 981 F.2d 821, 824 (5th Cir. 1993) ("The plain language of section 1447(c) requires the district court to remand the case when it finds that subject matter jurisdiction is lacking."). Where, as here, a federal court lacks jurisdiction because a case is not ripe, the court must remand the case to state court. *See, e.g.*, *Calvary Hill Cemetery*, 318 F. Supp. 2d at 432 ("If, however, the federal claim upon which the removal is based is not ripe, the district court must remand the case to state court for lack of subject matter jurisdiction.").

A lack of federal ripeness does not impair a remand to state court. That this matter is not ripe for federal adjudication "has no bearing" on whether a Texas state court may hear it. *McAfee* v. *Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P.*, No. 4:08-cv-160, 2008 WL 3852704, at *4 (E.D. Tex. Aug. 14, 2008). Article III authorizes federal courts to exercise "the judicial power" only in certain categories of "cases" or "controversies." U.S. Const., art. III, § 2. The jurisdiction of Texas's courts, which are courts of general jurisdiction, is not so limited. "[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989). For this reason, federal courts have recognized that claims may be unripe in federal court, but justiciable in a state court: "While some consider it odd that a state court might have the authority to hear a federal constitutional claim in a setting where a federal court would not, it is clear that Article III's 'case or controversy' limitations apply only to the federal courts." *Smith* v. *Wis. Dep't of Agric. Trade & Consumer Protection*, 23 F.3d 1134, 1142 (7th Cir. 1994) (citation omitted) (ordering the district court to remand to state court federal constitutional claims that were unripe under federal law).

It therefore should come as no surprise that Texas's courts routinely part ways with federal courts regarding jurisdictional issues. For example, Texas's courts may entertain claims for declaratory relief that a federal court would be required to dismiss as unripe. Texas's courts may adjudicate a claim for declaratory relief even if "the differences between the parties as to their legal rights have not reached the state of an actual controversy." *Moore*, 985 S.W.2d at 154 (internal quotation marks omitted). Such a suit would lie beyond the jurisdictional reach of a federal court, which must determine in each case whether "an actual controversy exists." *Orix Credit All., Inc.* v. *Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000) (internal quotation marks omitted).

That difference follows from Texas's generally less stringent ripeness requirements in declaratory actions. Although a Texas court cannot entertain a purely hypothetical declaratory action, "[a] justiciable controversy . . . *does not necessarily equate with a fully ripened cause of action*." *Moore,* 985 S.W.2d at 153 (emphasis added). Texas courts can exercise jurisdiction over a declaratory claim so long as there are "the ripening seeds of a controversy," even if the controversy is not fully formed.[95] *Unauthorized Practice of Law Comm.*, 155 S.W.3d at 596. Federal courts, by contrast, may only entertain claims that are fully ripe. *See, e.g.*, *Cross* v. *Lucius*, 713 F.2d 153, 159 (5th Cir. 1983) (holding that a federal court lacks jurisdiction if a case "has not ripened into a definite and concrete dispute"). It would be particularly misguided to import the requirements of federal law here because ExxonMobil's petition also presents claims under the Texas Constitution and Texas common law that are governed by state, not federal, standards. Accordingly, remand to state court is not only required by statute but is also consistent with a holding that federal ripeness is lacking.

II. ExxonMobil Is Entitled to Costs and Attorney's Fees Incurred as a Result of Removal.

A. Applicable Law

A litigant who successfully obtains a remand to state court after removal is entitled to recover its attorney's fees and costs. 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal"). Courts may award attorney's fees under 28 U.S.C. § 1447(c) where "the removing party lacked an objectively reasonable basis for seeking removal." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). This standard holds a party accountable for causing an

[95] That is so even where the challenge concerns a threatened administrative action that the relevant official has not actually initiated: in Texas, "there is no requirement that an agency undertake an enforcement action before the potential subject of that action can file suit for declaratory judgment." *Tex. Dep't of Banking* v. *Mt. Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex. App.—Austin 2000, pet. denied).

improper removal, which "delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources." *Id.* at 140.

B. Discussion

In light of the Fifth Circuit's decision in *Google*, it was objectively unreasonable for Defendants to remove this action to federal court. As previously discussed, *Google* held that a challenge to a non-self-enforcing subpoena, which the issuing official had taken no steps to enforce, was unripe under federal law and could not be adjudicated in federal court. 2016 WL 2909231, at *8–9. *Google* is a published decision of the Fifth Circuit. Defendants nevertheless removed this case on the basis of federal-question jurisdiction,[96] after *Google* was issued, even though ExxonMobil's federal claims challenge a non-self-enforcing subpoena that the issuing official has taken no steps to enforce. Regardless of whether Defendants did so in good faith, the absence of any objectively reasonable legal basis to support the removal entitles ExxonMobil to fees and costs. *See Am. Airlines, Inc.* v. *Sabre*, 694 F.3d 539, 542 n.2 (5th Cir. 2012). Defendants therefore should have to bear the attorney's fees and costs associated with this motion.

CONCLUSION

For the foregoing reasons, ExxonMobil respectfully requests that the Court remand this action to state court and award ExxonMobil its costs and fees associated with this motion.

[96] Ex. EE at App. 238, ¶ 4.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, a true and correct copy of the foregoing was served on all counsel of record by ECF in accordance with the Federal Rules of Civil Procedure.

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