

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO. 16-1888F

\_\_\_\_\_  
)  
IN RE CIVIL INVESTIGATIVE )  
DEMAND NO. 2016-EPD-36, )  
ISSUED BY THE OFFICE OF THE )  
ATTORNEY GENERAL )  
\_\_\_\_\_ )



**PETITION OF EXXON MOBIL CORPORATION TO SET ASIDE OR MODIFY  
THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER**

Pursuant to G.L. c. 93A, § 6(7) and the standards set forth in Mass. R. Civ. P. 26(c), Petitioner Exxon Mobil Corporation (“ExxonMobil”), through this special appearance and without consenting to personal jurisdiction, respectfully requests that this Court set aside a civil investigative demand (the “CID”) served on ExxonMobil by the Office of the Attorney General of the Commonwealth of Massachusetts (the “Attorney General”). The Court should set aside the CID because this Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General’s investigation. Alternatively, should the Court determine that it can exercise personal jurisdiction, it should (1) exercise its inherent power to recuse the Massachusetts Attorney General’s Office from pursuing this investigation because it is impermissibly biased against ExxonMobil; and (2) set aside the CID because it violates ExxonMobil’s constitutional, statutory, and common law rights, as well as the standards of Mass. R. Civ. P. 26(c), which protect ExxonMobil from “annoyance, embarrassment, oppression, or undue burden or expense.” ExxonMobil also respectfully requests that the Court exercise its discretion to stay adjudication of this Petition pending the resolution of an earlier filed federal action in the Northern District of Texas, which seeks to enjoin the Attorney General’s investigation.

## INTRODUCTION

1. Frustrated by the federal government's perceived inaction, a coalition of state attorneys general with an agenda to end the world's reliance on fossil fuel announced its "collective efforts to deal with the problem of climate change" at a press conference, held on March 29, 2016, with private citizen and former Vice President Al Gore as the featured speaker.<sup>1</sup> The attorneys general declared that they planned to "creatively" and "aggressively" use the powers of their respective offices on behalf of the coalition to force ExxonMobil<sup>2</sup> and other energy companies to comply with the coalition's preferred policy responses to climate change.<sup>3</sup> As their statements made unmistakably clear, the attorneys general press conference was a politically motivated event, urged on by activists.

2. The press conference represented a major achievement for a small group of climate activists. Since at least 2012, these activists sought to influence the debate surrounding climate change by gaining access to ExxonMobil's internal documents with the hope of using those documents to discredit the company and other political opponents. They recognized that appropriating law enforcement tools provided the most viable means to accomplish that goal because "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."<sup>4</sup> To them, law enforcement was simply another means of advancing their political agenda, by "wresting potentially useful internal documents from the

---

<sup>1</sup> ExxonMobil has submitted an Appendix in Support of Petition and Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order. The Appendix contains affidavits and exhibits that are referenced in this Petition and in the Memorandum of Exxon Mobil Corporation in Support of its Emergency Motion to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order. 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>. The transcript is included in the Appendix as Exhibit A at App. 2-21.

<sup>2</sup> ExxonMobil was formed as a result of a merger between Exxon and Mobil on November 30, 1999. For ease of discussion, we refer to the predecessor entities as ExxonMobil throughout this Petition.

<sup>3</sup> Ex. A at App. 3.

<sup>4</sup> Ex. C at App. 63.



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.”<sup>5</sup>

3. Two climate activists, who have led the effort to access ExxonMobil’s records, gave private presentations to the attorneys general before the press conference commenced.<sup>6</sup> Those presentations were closed to the press, and the contents of the presentations have been kept secret from the public. The attorneys general recognized that the involvement of the climate activists—one of whom is a plaintiffs’ attorney likely to profit from any private litigation made possible by a government investigation of ExxonMobil—could expose the coordination between the attorneys general and the private, special interests that were advancing the investigation and the press conference announcing these investigative efforts. So, when that plaintiffs’ attorney asked the New York Attorney General’s Office what he should tell a reporter if asked about his involvement, a senior official with the office specifically requested that the plaintiffs’ attorney refrain from disclosing his presence at the meeting, thus concealing it from the press and public.<sup>7</sup>

4. The Attorney General’s statements at the press conference embraced the activists’ agenda. After announcing that “there’s nothing we need to worry about more than climate change,” the Attorney General pledged to undertake “quick, aggressive action” in furtherance of her “moral obligation” to alleviate the threat to “the very existence of our planet” by moving the country toward a “clean energy future.”<sup>8</sup>

5. The Attorney General pointed to her office’s investigation of ExxonMobil as a means of addressing climate change. Signaling that her investigation would work backward from a preordained conclusion, the Attorney General announced the findings in advance: the

---

<sup>5</sup> *Id.* at App. 78.

<sup>6</sup> *See* Ex. M at App. 132-33.

<sup>7</sup> *See* Ex. D at App. 89.

<sup>8</sup> Ex. A at App. 13-14.

investigation would reveal “the troubling disconnect between what Exxon knew” and what it “chose to share with investors and with the American public.”<sup>9</sup>

6. Three weeks later, the Attorney General’s Office commenced this investigation by serving a CID on ExxonMobil. The CID purports to investigate whether ExxonMobil’s statements about climate change violate G.L. c. 93A, § 2,<sup>10</sup> which prohibits “unfair or deceptive acts or practices” in “trade or commerce.”<sup>11</sup> According to the CID, the Attorney General’s Office is investigating ExxonMobil’s (1) “marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth,” and (2) “marketing and/or sale of securities . . . to investors in the Commonwealth, including . . . common stock, sold or offered to be sold in the Commonwealth.”<sup>12</sup>

7. The investigation is unwarranted, however, and constitutes an abuse of government power. Although the statute of limitations for a claim under G.L. c. 93A, § 2 is four years, *see* G.L. c. 260, § 5A, for more than a decade, ExxonMobil has widely and publicly confirmed that it “recognize[s] that the risk of climate change and its potential impacts on society and ecosystems may prove to be significant.”<sup>13</sup> The Attorney General has identified no contrary statement about climate change—nor is any identifiable—that could support ExxonMobil’s c. 93A liability during the relevant limitations period.

8. Moreover, ExxonMobil has engaged in no conduct in Massachusetts which could subject it to liability for the violations of law alleged in the CID. During the limitations period,

---

<sup>9</sup> *Id.* at App. 13.

<sup>10</sup> Ex. B at App. 23.

<sup>11</sup> G.L. c. 93A, § 2(a).

<sup>12</sup> Ex. B at App. 23.

<sup>13</sup> Ex. E at App. 94; *see also* Ex. F at App. 104 (“Because the risk to society and ecosystems from rising greenhouse gas emissions could prove to be significant, strategies that address the risk need to be developed and implemented.”).



ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts.<sup>14</sup> Nor has it marketed or sold any security for sale to the general public in Massachusetts in the last five years.<sup>15</sup>

9. In the absence of any misleading statements *or* any relevant commercial transactions, there is no *bona fide* basis for the CID, much less a reason to believe that ExxonMobil violated G.L. c. 93A, § 2, as required to authorize the issuance of a CID under the statute.<sup>16</sup>

10. This Court also lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation because ExxonMobil, a New Jersey corporation, headquartered in Texas, has not engaged in suit-related conduct in Massachusetts.

11. The CID nevertheless demands that ExxonMobil produce virtually every document it has generated about climate change during the last 40 years, thereby imposing a breathtaking burden on ExxonMobil. Complying with the CID's demands would require ExxonMobil to collect, review, and produce several millions of pages of documents, and would cost millions of dollars.<sup>17</sup>

12. Worse still, the CID targets ExxonMobil's communications with the Attorney General's political opponents in the climate change debate—i.e., organizations that hold views

---

<sup>14</sup> Service stations in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner are owned and operated independently. See Affidavit of Geoffrey Grant Doescher, dated June 10, 2016 ("Doescher Aff.") ¶ 4. In addition, distribution facilities in Massachusetts, including Everett Terminal, have not sold products to consumers during the limitations period.

<sup>15</sup> During the limitations period, ExxonMobil has sold short-term, fixed-rate notes in Massachusetts in specially exempted commercial paper transactions. See G.L. c. 110A, § 402(a)(10); see also 15 U.S.C. § 77c(a)(3). These notes, which mature in 270 days or less, were sold to institutional investors, not individual consumers. See Affidavit of Robert Luetgen, dated June 14, 2016 ("Luetgen Aff.") ¶¶ 7-10.

<sup>16</sup> G.L. c. 93A, § 6(1) (noting that the Attorney General can conduct an investigation whenever she "believes a person has engaged in or is engaging in" an act in violation of G.L. c. 93A).

<sup>17</sup> Affidavit of Justin Anderson, dated June 14, 2016 ("Anderson Aff.") ¶¶ 4-5.

about climate change and the proper policy responses to it with which the Attorney General disagrees.<sup>18</sup> The organizations identified by the CID are exclusively ones that have been derided by climate activists as so-called “climate deniers,” meaning that they or some of their employees have expressed skepticism about the science of climate change or the Attorney General’s preferred responses to the problem.<sup>19</sup>

13. The Attorney General’s statements at the press conference and the remarkably broad scope of the CID unmask this investigation for what it is: a pretextual use of law enforcement power to deter ExxonMobil from participating in ongoing public deliberations about climate change and by fishing through decades of ExxonMobil’s documents in the hope of finding some ammunition to enhance the Attorney General’s position in the policy debate concerning how to respond to climate change. This effort to deter ExxonMobil from engaging in public discussions of policy issues related to climate change amounts to an abuse of government power.

14. The Attorney General’s investigation violates ExxonMobil’s rights. That is why ExxonMobil has filed a federal action in the United States District Court for the Northern District of Texas, seeking to enjoin the enforcement of the CID because it violates ExxonMobil’s constitutional right to free speech, freedom from unreasonable searches and seizures, and guarantee of due process of law.<sup>20</sup> ExxonMobil respectfully requests that this Court permit the federal action to proceed before adjudicating this Petition.

15. ExxonMobil asks this Court to conclude that it lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General’s investigation. In addition, and solely to preserve its rights, ExxonMobil also requests that (i) the

---

<sup>18</sup> Ex. B at App. 35 (Request No. 5).

<sup>19</sup> Anderson Aff. ¶ 3.

<sup>20</sup> Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.



Attorney General and her office be recused; and (ii) the CID be set aside in its entirety or, in the alternative, modified or made subject to a protective order pursuant to G.L. c. 93A, § 6(7) and Mass. R. Civ. P. 26(c) in the event the Court determines that it can exercise personal jurisdiction over ExxonMobil.

## FACTS

### A. The Attorney General's Misuse of Law Enforcement Tools

16. The CID issued by the Attorney General's Office 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 New York Attorney General hosted a press conference in New York City with certain other attorneys general as the self-proclaimed "AGs United For Clean Power." Private citizen and former Vice President Al Gore was the event's featured speaker. The Attorney General, along with attorneys general or staff members from over a dozen other states, attended and participated in the conference.

17. 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" that they claim were "being flouted by the fossil fuel industry."<sup>21</sup> Expressing dissatisfaction with the perceived "gridlock in Washington" regarding climate-change legislation, the New York Attorney General said that the coalition had to work "creatively" and "aggressively" to advance that agenda."<sup>22</sup>

---

<sup>21</sup> Ex. A at App. 3.

<sup>22</sup> *Id.* at App. 3-4.

18. The New York Attorney General announced that the assembled “group of state actors [intended] to send the message that [it was] prepared to step into this [legislative] breach.”<sup>23</sup> 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.<sup>24</sup>

19. In an effort to legitimize the Green 20’s investigations, private citizen and Vice President Gore cited perceived inaction by the federal government, 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.”<sup>25</sup>

20. Gore went on to condemn those who question the sufficiency of renewable energy sources to power modern economies, faulting them for “slow[ing] down this renewable revolution” by “trying to convince people that renewable energy is not a viable option.”<sup>26</sup> 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.”<sup>27</sup>

21. During her turn at the podium, the Attorney General began by thanking Gore “who, today, I think, put most eloquently just how important this is, this commitment that we make.”<sup>28</sup> The Attorney General then articulated her view that “there’s nothing we need to worry

---

<sup>23</sup> *Id.* at App. 4.

<sup>24</sup> *Id.* at App. 5.

<sup>25</sup> *Id.* at App. 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at App. 8, 10.

<sup>28</sup> *Id.* at App. 13.



about more than climate change,” and that the attorneys general “have a moral obligation to act” to alleviate the threat to “the very existence of our planet.”<sup>29</sup>

22. To advance this shared agenda on climate change policy, the Attorney General pledged to take “quick, aggressive action” to “address climate change and to work for a better future”<sup>30</sup>—namely, by investigating ExxonMobil. She also announced, in advance, the findings of her recently launched investigation:

Part of the problem has been one of public perception, and it appears, certainly, that certain companies, certain industries, may not have told the whole story, leading many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts. Fossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable. That’s why I, too, have joined in investigating the practices of ExxonMobil. We can all see today the troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.<sup>31</sup>

The Attorney General’s comments unambiguously reflected her prejudicial determination that ExxonMobil had engaged in deception in connection with the debate over climate change policy.

**B. The Green 20 Press Conference Is Criticized by Other Attorneys General and Legal Commentators**

23. The results-oriented approach to investigating fossil fuel companies and ExxonMobil articulated by the Attorney General and her colleagues struck a discordant note with those who rightfully expect government attorneys to conduct themselves in a neutral and unbiased manner. The disconnect between the coalition’s stated desire to fill a perceived void in federal climate change policy, and its proposed solution—to investigate a single energy company for alleged fraud—was so clear that one reporter asked whether the press conference and the

---

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at App. 14.

<sup>31</sup> *Id.* at App. 13.

investigations launched by the Attorney General and other members of the coalition were nothing more than “publicity stunt[s].”<sup>32</sup>

24. The press conference also drew a swift and sharp rebuke from other state attorneys general who criticized the Attorney General and those joining her in using the power of law enforcement as a tool to limit free speech and the free exchange of viewpoints and ideas 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.”<sup>33</sup> 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.”<sup>34</sup>

25. 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.”<sup>35</sup> 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.”<sup>36</sup> The West Virginia Attorney General criticized the attorneys general for “abusing the powers of their office” and

---

<sup>32</sup> *Id.* at App. 18.

<sup>33</sup> Ex. G at App. 109.

<sup>34</sup> *Id.*

<sup>35</sup> Ex. H at App. 111.

<sup>36</sup> Ex. I at App. 113 (internal quotation marks omitted).



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.”<sup>37</sup>

26. Two state attorneys general went a step further and filed a motion to intervene in an action pending in Texas in which ExxonMobil challenged a subpoena issued by the Virgin Islands Attorney General that, like the Massachusetts CID, seeks almost four-decades’ worth of ExxonMobil’s documents and communications related to climate change. The Attorneys General of Texas and Alabama criticized the investigation for being “driven by ideology, and not law.”<sup>38</sup> The Texas Attorney General called the 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.”<sup>39</sup> The Alabama Attorney General echoed those sentiments, stating that the pending action in Texas “is more than 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.”<sup>40</sup> He further stated that the investigation was an “abus[e] of power” used to “intimidate a company for its climate change views which run counter to that of his own.”<sup>41</sup>

**C. In Closed-Door Meetings, the Green 20 Plots with Climate Activists and Plaintiffs’ Lawyers**

27. The impropriety of the statements made by the Attorney General and the other attorneys general at the press conference are surpassed only by what they said behind closed doors. In advance of the conference, the chief of the Energy & Environment Bureau in the Massachusetts Attorney General’s Office indicated, in response to a questionnaire from the New

---

<sup>37</sup> Ex. J at App. 116, 118.

<sup>38</sup> Plea in Intervention of the States of Texas and Alabama, *Exxon Mobil Corp. v. Walker et al.*, No. 017-284890-16 (Tex. Dist. Ct. Tarrant Cty., May 16, 2016).

<sup>39</sup> Ex. K at App. 120.

<sup>40</sup> Ex. L at App. 123.

<sup>41</sup> *Id.*

York Attorney General's Office, that the Massachusetts Attorney General's Office was hoping to "learn the status of states' investigations/plans" and explore avenues for "coordination."<sup>42</sup> She also noted that the office was taking actions to "advance[e] clean energy."<sup>43</sup>

28. In addition, during the morning of the press conference, the attorneys general attended two presentations.<sup>44</sup> Those presentations were not announced publicly, and they were not open to the press or general public. 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.<sup>45</sup>

29. The first presenter was Peter Frumhoff, the director of science and policy for the Union of Concerned Scientists.<sup>46</sup> His subject was the "imperative of taking action now on climate change."<sup>47</sup>

30. 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."<sup>48</sup> It accuses "[m]edia pundits, partisan think tanks, and special interest groups" 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."<sup>49</sup>

31. Matthew Pawa of Pawa Law Group, P.C.,<sup>50</sup> hosted the second presentation on the topic of "climate change litigation."<sup>51</sup> The Pawa Law Group, which boasts of its "role in

---

<sup>42</sup> Ex. Z at App. 201.

<sup>43</sup> *Id.* at App. 202.

<sup>44</sup> See Ex. M at App. 132-33.

<sup>45</sup> See Ex. N at App. 145-46.

<sup>46</sup> Ex. O at App. 150.

<sup>47</sup> Ex. M at App. 132-33.

<sup>48</sup> Ex. P at App. 154.

<sup>49</sup> *Id.* at App. 154-55.

<sup>50</sup> Ex. Q at App. 164.



launching global warming litigation,” previously sued ExxonMobil and sought to hold it liable for negatively impacting climate change.<sup>52</sup> 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.”<sup>53</sup>

32. 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. As early as 2007, Frumhoff contributed to a report issued by the Union of Concerned Scientists, titled “Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco’s Tactics to Manufacture Uncertainty on Climate Science,” which brainstormed strategies for “putting the brakes” on ExxonMobil’s alleged “disinformation campaign.”<sup>54</sup> And, in 2012, Frumhoff hosted and Pawa presented at a conference entitled “Climate Accountability, Public Opinion, and Legal Strategies.”<sup>55</sup> 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.”<sup>56</sup> The 2012 conference’s attendees discussed at considerable length “Strategies to Win Access to Internal Documents” of companies like ExxonMobil.<sup>57</sup> Even then, Frumhoff and Pawa suggested that “a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.”<sup>58</sup> Indeed, that conference’s attendees were “nearly unanimous” regarding “the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, in maintaining pressure on

---

<sup>51</sup> Ex. M at App. 132-33.

<sup>52</sup> Ex. R at App. 166.

<sup>53</sup> Ex. F at App. 64; *see also Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857-58 (9th Cir. 2012).

<sup>54</sup> Ex. S at App. 169-75.

<sup>55</sup> Ex. C at App. 56, 83-86.

<sup>56</sup> *Id.* at App. 82.

<sup>57</sup> *Id.* at App. 63.

<sup>58</sup> *Id.*

the industry that could eventually lead to its support for legislative and regulatory responses to global warming.”<sup>59</sup>

33. As recently as January 2016, Pawa and a group of climate activists met to discuss the “Goals of an Exxon campaign.”<sup>60</sup> 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.<sup>61</sup>

34. 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. In an apparent attempt to improperly shield their communications from public scrutiny, the attorneys general drafted—and may have executed—a common interest agreement in connection with the Green 20 conference.<sup>62</sup> In addition, the day after the conference, a reporter from *The Wall Street Journal* called Pawa.<sup>63</sup> In response, Pawa asked the New York Attorney General’s Office “[w]hat should I say if she asks if I attended?”<sup>64</sup> 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.”<sup>65</sup>

35. The CID represents the culmination of Frumhoff’s and Pawa’s collective efforts to enlist state law enforcement officers in their quest to enact their preferred policy responses to climate change and obtain documents for private lawsuits.

---

<sup>59</sup> *Id.* at App. 78.

<sup>60</sup> Ex. T at App. 177.

<sup>61</sup> *Id.*; *see also* Ex. U at App. 179-80.

<sup>62</sup> Ex. AA at App. 208.

<sup>63</sup> Ex. D at App. 89.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



36. The press conference, the earlier closed-door meetings with those on one side of the debate, and those private activists' long-standing desire to expose ExxonMobil's "internal documents" as part of a campaign to put "pressure on the industry," inducing it to support "legislative and regulatory responses to global warming"<sup>66</sup> form the partisan backdrop against which the CID must be read. The thoroughly partisan goals of these individuals—which the Attorney General and her attorneys general coalition partners adopted as their own at the press conference—are reflected in the CID itself.

**D. The CID's Baseless Investigation, Burdensome Demands, and Viewpoint Bias**

37. Three weeks after the press conference, on April 19, 2016, the Attorney General served the CID on ExxonMobil's registered agent in Suffolk County, Massachusetts.

38. According to the CID, there is "a pending investigation concerning [ExxonMobil's] potential violations of G.L. c. 93A, § 2."<sup>67</sup> That statute prohibits "unfair or deceptive acts or practices" in "trade or commerce"<sup>68</sup> and has a four-year statute of limitations.<sup>69</sup> The CID specifies two types of transactions under investigation: ExxonMobil's (1) "marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth," and (2) "marketing and/or sale of securities" to Massachusetts investors.<sup>70</sup> The requested documents pertain largely to information related to climate change in the possession of ExxonMobil and located at its principal place of business in Texas.

39. ExxonMobil could not have committed the possible offenses that the CID purports to investigate for two reasons.

---

<sup>66</sup> Ex. C at App. 78.

<sup>67</sup> Ex. B at App. 23.

<sup>68</sup> G.L. c. 93A, § 2(a).

<sup>69</sup> G.L. c. 260, § 5A.

<sup>70</sup> Ex. B at App. 23.

40. First, at no point during the past five years—more than one year before the limitations period began—has ExxonMobil (1) sold fossil fuel derived products to consumers in Massachusetts, or (2) owned or operated a single retail store or station in the Commonwealth.<sup>71</sup>

41. Second, ExxonMobil has not sold any form of equity for sale to the general public in Massachusetts in the last five years, which is also well beyond the limitations period.<sup>72</sup> Furthermore, ExxonMobil's only sale of debt in the past decade has been to underwriters *outside* the Commonwealth, and ExxonMobil did not market that debt to Massachusetts consumers.<sup>73</sup>

42. The CID's focus on events, activities, and records outside of Massachusetts is demonstrated by the items it seeks. For example, the CID demands documents that relate to or support 11 specific statements.<sup>74</sup> None of those statements were made in Massachusetts.<sup>75</sup> The CID also seeks ExxonMobil's communications with 12 named organizations,<sup>76</sup> but only one of these organizations has an office in Massachusetts and ExxonMobil's communications with the other 11 organizations likely occurred outside of Massachusetts. Finally, the CID requests all documents and communications related to ExxonMobil's publicly issued reports, press releases, and Securities and Exchange Commission ("SEC") filings, which were likely issued in Texas, ExxonMobil's headquarters,<sup>77</sup> and all documents and communications related to ExxonMobil's climate change research, which also occurred outside of Massachusetts.<sup>78</sup>

43. Even if ExxonMobil had engaged in relevant conduct in Massachusetts, ExxonMobil has made no statements in the past four years that could give rise to fraud as alleged

---

<sup>71</sup> Doescher Aff. ¶ 3.

<sup>72</sup> Luetgen Aff. ¶ 8.

<sup>73</sup> *Id.* ¶¶ 5-6. This is subject to the one exception discussed above—*i.e.*, short-term fixed-rate notes, which ExxonMobil has sold to a handful of sophisticated institutions in the Commonwealth. *See supra* n.14.

<sup>74</sup> Ex. B at App. 36-37 (Request Nos. 8-11).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at App. 35 (Request No. 5).

<sup>77</sup> *Id.* at App. 38-40 (Request Nos. 15-16, 19, 22).

<sup>78</sup> *Id.* at App. 34-35, 37-40 (Request Nos. 1-4, 14, 17, 22).



in the CID. For more than a decade, 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" and reasoned that "strategies that address the risk need to be developed and implemented."<sup>79</sup> In addition, in 2002, ExxonMobil, along with three other companies, helped launch the Global Climate and Energy Project at Stanford University, which has a mission of "conduct[ing] fundamental research on technologies that will permit the development of global energy systems with significantly lower greenhouse gas emissions."<sup>80</sup>

44. ExxonMobil has also discussed these risks in its public SEC filings. For example, 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 operations.<sup>81</sup> Similarly, in its 2015 10-K, ExxonMobil noted that the "risk of climate change" and "pending greenhouse gas regulations" may increase its "compliance costs."<sup>82</sup>

45. Long before the limitations period governing G.L. c. 93A, § 2, ExxonMobil disclosed and acknowledged the risks that supposedly give rise to the Attorney General's investigation.

46. In stark contrast to the absence of any factual basis for investigating ExxonMobil's alleged fraud is the heavy burden imposed by the CID. Spanning 25 pages and containing 38 broadly worded document requests, the CID unreasonably demands production of essentially any and all communications and documents relating to climate change that

---

<sup>79</sup> Ex. F at App. 104.

<sup>80</sup> Ex. V at App. 182.

<sup>81</sup> Ex. W at App. 188-89.

<sup>82</sup> Ex. X at App. 195.

ExxonMobil has produced or received over the last 40 years. For example, the CID requests all documents and communications “concerning Exxon’s development, planning, implementation, review, and analysis of research efforts to study CO<sub>2</sub> emissions . . . and the effects of these emissions on the Climate” since 1976 and all documents and communications concerning “any research, study, and/or evaluation by ExxonMobil and/or any other fossil fuel company regarding” methane since 2010.<sup>83</sup> It also requests all documents and communications concerning papers and presentations given by ExxonMobil scientists since 1976<sup>84</sup> and demands production of ExxonMobil’s climate change related speeches, public reports, press releases, and SEC filings over the last 6 to 20 years.<sup>85</sup> Moreover, it fails to reasonably describe several categories of documents by, for example, requesting documents related to ExxonMobil’s “awareness,” “internal consideration[s],” and “decision making” with respect to certain climate change matters.<sup>86</sup>

47. The CID’s narrower requests, however, are in some instances more troubling than its overly broad ones, because they appear to target groups that hold views with which the Attorney General disagrees. All 12 of the organizations that ExxonMobil is directed to produce its communications with have been accused by advocacy groups of holding views with respect to climate change science or climate change policy with which those advocacy groups disagree.<sup>87</sup> Curiously, the CID does not request the production of ExxonMobil’s communications with organizations that have expressed views on climate change with which the Attorney General agrees.

<sup>83</sup> Ex. B at App. 34, 39 (Request Nos. 1, 17).

<sup>84</sup> *Id.* at App. 34-35 (Request Nos. 2-4).

<sup>85</sup> *Id.* at App. 36 (Request No. 8 (all documents since 1997)); *id.* at App. 39-40 (Request No. 22 (all documents since 2006)); *id.* at App. 36-39 (Request Nos. 9-12, 14-16, 19 (all documents since 2010)). The CID also demands the testimony of ExxonMobil officers, directors, or managing agents who can testify about a variety of subjects, including “[a]ll the topics covered” in the CID. *Id.* at App. 43 (Schedule B).

<sup>86</sup> *See id.* at App. 35-36, 39 (Request Nos. 7-8, 18).

<sup>87</sup> Anderson Aff. ¶ 3.



48. The return date for the CID was initially set at May 19, 2016. To facilitate discussions between the parties regarding the legality of the CID, the parties agreed to extend the CID's return date to June 29, 2016 and the date for filing objections to the CID to June 16, 2016. While the parties have been actively engaged in these discussions without court intervention, we have not reached a resolution. Through this special appearance, ExxonMobil therefore files this Petition of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, pursuant to Superior Court Rule 9A(e), to contest the Court's jurisdiction and avoid the waiver of its right to object to the CID.

**E. ExxonMobil's Motion for Preliminary Injunction in Texas to Enjoin Enforcement of the CID**

49. Because the Attorney General's investigation and the CID has infringed, is infringing, and will continue to infringe upon ExxonMobil's federal constitutional rights, ExxonMobil recently filed an action in the United States District Court for the Northern District of Texas and a motion to enjoin the enforcement of the CID.<sup>88</sup>

50. That court has jurisdiction over the constitutional claims raised in the federal action because a substantial part of the events giving rise to ExxonMobil's federal constitutional claims occurred in the Northern District of Texas. Massachusetts courts, by contrast, lack general jurisdiction over ExxonMobil and, in the absence of suit-related conduct, also lack specific jurisdiction.

51. In view of these many infirmities of the CID and the investigation, ExxonMobil hereby seeks relief based on the following grounds:

---

<sup>88</sup> Ex. BB at App. 212-45; Ex. CC at App. 246-51; Ex. DD at App. 252-84.

## GROUND ONE

### **THERE IS NO PERSONAL JURISDICTION OVER EXXONMOBIL**

52. ExxonMobil, through this special appearance and without consenting to jurisdiction, requests that this Court set aside the CID because this Court lacks personal jurisdiction over ExxonMobil in connection with any violation contemplated by the Attorney General's investigation.

53. ExxonMobil is not subject to general jurisdiction in Massachusetts. Because ExxonMobil is incorporated in New Jersey and headquartered in Texas, it cannot be regarded as "at home" in Massachusetts for purposes of general jurisdiction.

54. ExxonMobil is not subject to specific jurisdiction in Massachusetts because it has engaged in no suit-related conduct in Massachusetts within the limitations period. The CID seeks documents that do not reflect, relate to, or concern, in any way, ExxonMobil's trade or commerce in Massachusetts. During the last five years, ExxonMobil has not sold fossil fuel derived products to Massachusetts consumers, nor has it sold or marketed any securities to the general public in Massachusetts.<sup>89</sup>

## GROUND TWO

### **DISQUALIFICATION OF THE ATTORNEY GENERAL FOR BIAS AND APPOINTMENT OF AN INDEPENDENT COUNSEL**

55. If the Court determines that it can exercise personal jurisdiction over ExxonMobil, then, in order to protect its rights and preserve its objections against claims of waiver, ExxonMobil seeks the following relief.

56. ExxonMobil requests that the Court exercise its inherent authority to disqualify the Attorney General and the Office of the Attorney General of the Commonwealth of

---

<sup>89</sup> See *supra* n.14.



Massachusetts, and appoint an independent investigator not compensated on a contingency-fee basis.

57. ExxonMobil is entitled to an inquiry conducted by an impartial and even-handed investigator, but the Attorney General cannot conduct an inquiry in that manner. Her public extrajudicial statements disparaging ExxonMobil and prejudging the outcome of any investigation preclude her from serving as a disinterested prosecutor in any investigation of ExxonMobil. The Attorney General's partisan statements also undermine the public's confidence in any investigation of ExxonMobil conducted by her office.

58. In light of the Attorney General's comments about ExxonMobil and her investigation, there is little chance that the effects of this bias could be isolated. Any subordinate working in the Attorney General's Office would be hard-pressed to ignore the stated objectives of the Attorney General and her senior advisors. The bias, therefore, affects the integrity of the investigation by the entire Attorney General's Office.

59. The Court should disqualify the Attorney General and her office, and appoint an independent counsel, who is not compensated on a contingency-fee basis, to determine whether an investigation is warranted and, if so, to conduct that investigation.

### **GROUND THREE**

#### **THE CID VIOLATES EXXONMOBIL'S CONSTITUTIONAL, STATUTORY, AND COMMON LAW RIGHTS**

60. If the Court determines that it can exercise personal jurisdiction over ExxonMobil, to protect its rights, and preserve its objections against claims of waiver, then ExxonMobil seeks the following additional relief.

61. Pursuant to G.L. c. 93A, § 6(7), the CID should be set aside because it significantly infringes on several of ExxonMobil's rights under the Massachusetts Constitution,

Massachusetts statutes, and Massachusetts common law. If the CID is not set aside in its entirety, it should, at a minimum, be modified to at least the relevant statute of limitations period or made subject to a protective order.

62. First, the CID should be set aside in light of the previously described bias harbored by the Massachusetts Attorney General's Office against ExxonMobil, in violation of ExxonMobil's due process right under Article XII of the Massachusetts Constitution to a disinterested prosecutor.

63. Second, in violation of Article XVI of the Massachusetts Constitution, the CID constitutes impermissible viewpoint discrimination by targeting ExxonMobil's climate change speech with those perceived to be on the wrong side of the climate change debate. It also impermissibly burdens ExxonMobil's right to engage in the public debate on climate change by requesting essentially all of its documents related to climate change over the past 40 years. Article XVI prohibits the Attorney General from issuing a CID to prescribe what shall be orthodox in matters of public concern.

64. Third, in violation of ExxonMobil's rights under Article XIV of the Massachusetts Constitution, the CID launches an unreasonable fishing expedition into 40-years' worth of ExxonMobil's records related to climate change. The CID purports to investigate ExxonMobil's deception of Massachusetts consumers and investors in trade or commerce. But, during the limitations period, ExxonMobil has not sold fossil fuel derived products to consumers in Massachusetts, nor has it marketed or sold any security to the general public in Massachusetts<sup>90</sup>—much less deceived these consumers and investors. Because ExxonMobil cannot be liable for the violations of law alleged in the CID, the CID should be aside for two additional reasons: (i) its issuance constitutes arbitrary and capricious conduct under

---

<sup>90</sup> See *supra* n.14.



Massachusetts law, and (ii) it seeks documents that are irrelevant to ExxonMobil's alleged violation of Massachusetts law.

65. Fourth, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the CID is unduly burdensome and impermissibly unspecific. The CID demands virtually all of ExxonMobil's documents and communications related to climate change over the past 40 years.

66. Fifth, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the issuance of the CID constitutes an abuse of process and harassment under Massachusetts common law because it was issued for the improper purposes described above, namely to burden ExxonMobil's right to engage in protected speech.

67. Finally, in violation of Massachusetts statutory limitations on civil investigative demands issued pursuant to G.L. c. 93A, § 6 as well as the standards of Mass. R. Civ. P. 26(c), the CID does not affirmatively state that ExxonMobil may withhold documents on the basis of privilege. ExxonMobil therefore requests that, if the CID is not set aside, it should be modified or a protective order should be issued to prevent the disclosure of privileged information.

#### **GROUND FOUR**

#### **ADJUDICATION OF THIS PETITION SHOULD BE STAYED PENDING THE FEDERAL COURT'S RULING ON EXXONMOBIL'S APPLICATION FOR A PRELIMINARY INJUNCTION**

68. ExxonMobil requests that this Court defer taking action on this matter until ExxonMobil's pending application in federal court for a preliminary injunction has been resolved.

69. On June 15, 2016, ExxonMobil filed a motion for a preliminary injunction seeking to enjoin the CID because it violates ExxonMobil's federal constitutional rights.

70. The United States District Court for the Northern District of Texas has jurisdiction over that matter and is capable of furnishing complete relief to the parties.

71. Staying the adjudication of this Petition would avoid the possibility of duplicative or inconsistent rulings on ExxonMobil's constitutional challenges to the CID, and will serve the interests of judicial economy and efficiency and the principles of comity.

WHEREFORE, Petitioner respectfully prays that this Court:

1. Determine that it lacks personal jurisdiction over ExxonMobil in connection with any violation of law contemplated by the Attorney General's investigation and therefore set aside the CID;
2. If the Court determines that it can exercise personal jurisdiction, provide the following relief:
  - a. Recuse the Massachusetts Attorney General's Office from investigating this matter, and appoint an independent counsel to determine if an investigation is warranted and, if so, conduct the investigation;
  - b. Pursuant to G.L. c. 93A, § 6(7) and Mass. R. Civ. P. 26(c), set aside or modify the CID, or issue a protective order; and
  - c. Stay adjudication of this Petition pending the resolution of the federal court litigation; and
3. Order such other or further relief to Petitioner as it may deem just and proper.

Respectfully Submitted,

EXXON MOBIL CORPORATION

By its attorneys,



EXXON MOBIL CORPORATION

By: /s/ Patrick J. Conlon  
Patrick J. Conlon  
(patrick.j.conlon@exxonmobil.com)  
(*pro hac vice* pending)  
Daniel E. Bolia  
(daniel.e.bolia@exxonmobil.com)  
(*pro hac vice* pending)  
1301 Fannin Street  
Houston, TX 77002  
(832) 624-6336

PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON, LLP

By: /s/ Justin Anderson  
Theodore V. Wells, Jr.  
(*pro hac vice* pending)  
Michele Hirshman  
(*pro hac vice* pending)  
Daniel J. Toal  
(*pro hac vice* pending)  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000  
Fax: (212) 757-3990

Justin Anderson  
(*pro hac vice* pending)  
2001 K Street, NW  
Washington, D.C. 20006-1047  
(202) 223-7300  
Fax: (202) 223-7420

Dated: June 16, 2016

FISH & RICHARDSON P.C.

By: /s/ Thomas C. Frongillo  
Thomas C. Frongillo  
(frongillo@fr.com)  
Caroline K. Simons  
(simons@fr.com)  
One Marina Park Drive  
Boston, MA 02210  
(617) 542-5070

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this document was served upon the Attorney General's Office for the Commonwealth of Massachusetts by hand delivery on June 16, 2016.

/s/ Caroline K. Simons  
Caroline K. Simons