NO. 16-11741

In the United States Court of Appeals for the Fifth Circuit

In re:

MAURA TRACY HEALEY, ATTORNEY GENERAL OF MASSACHUSETTS, IN HER OFFICIAL CAPACITY,

Petitioner.

Writ from the United States District Court
for the Northern District of Texas – Fort Worth Division
C.A. NO. 4:16-CV-469-K

RESPONSE TO PETITIONER'S EMERGENCY MOTION FOR STAY PENDING MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

Case No.: 16-11741

Case Style: *In re: Maura Tracy Healey, Attorney General of Massachusetts, in her official capacity*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

Attorney General Healey is improperly asking this Court to stay court-ordered discovery required for the adjudication of her own motion to dismiss. She moved to dismiss on the ground that the district court lacked subject matter jurisdiction based on *Younger* abstention. Exxon Mobil Corporation ("ExxonMobil") responded that Attorney General Healey's bad faith investigation makes *Younger* abstention unavailable. With that issue joined, the district court was well within its discretion to direct the parties to develop the factual record on this threshold question. When Attorney General Healey refused to comply with ExxonMobil's discovery requests that followed, the district court responded with the discovery orders now at issue. Attorney General Healey does not dispute that the requested discovery is relevant to her abstention claim; she instead simply disagrees with the way the district court is handling its docket. No stay is proper under these circumstances.

First, to be entitled to a stay pending mandamus, Healey must make a "strong showing" of a likelihood of success on the merits. *Texas v. United States*, 787 F.3d 733, 746-47 (5th Cir. 2015). That burden is heightened here by the rigorous standard for obtaining a writ of mandamus—a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). She cannot meet this burden.

One of the central arguments of her mandamus petition—that the district court was required to take up her personal jurisdiction, ripeness, and venue challenges before her *Younger* abstention argument—is particularly unsuitable for mandamus relief. The United States Supreme Court has held that a district court has discretion in choosing the sequence in which it addresses threshold grounds for dismissal, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425, 431 (2007), and that, where matters are committed to the district court's discretion, "it cannot be said that a litigant's right to a particular result is 'clear and indisputable,'" as required for mandamus relief. *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 36 (1980) (per curiam). It was well within the district court's discretion to order jurisdictional discovery on the disputed fact question of whether Attorney General Healey's investigation of ExxonMobil was undertaken in bad faith, which would preclude abstention under *Younger*.

Attorney General Healey's arguments for evading the December 13 deposition fare no better. In light of the compelling record of prosecutorial overreach, she cannot show that the district court clearly and indisputably erred by allowing ExxonMobil to test Healey's claims of good faith in a deposition. This is particularly true when she herself raised the *Younger* abstention argument, while fully aware of the "bad faith" exception implicated by her politically motivated investigation.

Attorney General Healey also has failed to establish irreparable injury. She does not identify any injury that would arise from having to respond to ExxonMobil's written discovery requests. And her busy schedule does not suffice as an irreparable injury stemming from the deposition, when she has ignored the district court's offer to schedule the deposition on a convenient day and has maintained a blanket refusal to respond to *any* of ExxonMobil's discovery requests. If she has pursued her investigation of ExxonMobil in good faith, as she claims, she should fear no injury from providing her testimony.

Finally, her claim that a lack of a stay would "chill law enforcement efforts" ignores a key distinction between the investigation at issue and other governmental investigations. From its beginning and throughout, Attorney General Healey's investigation improperly targeted ExxonMobil on a pretextual basis, revealing that its true motivation was political and nothing more. Attorney General Healey wants to argue otherwise, but she should not be allowed to make such a claim untested by discovery.

Because Attorney General Healey has not shown that the extraordinary remedy of a stay pending mandamus is warranted, her motion for stay should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the effort by a coalition of state attorneys general, political activists, and plaintiffs' attorneys to target ExxonMobil, using law enforcement powers to promote a shared political agenda. That effort—outlined in detail in ExxonMobil's First Amended Complaint below (Dkt. 100, Petitioner's Addendum "Add.", at 274-322)—culminated in sweeping document requests from the Attorneys General of Massachusetts and New York demanding nearly every document ExxonMobil possesses concerning global warming or climate change. The requests seek records dating back four decades.

The coalition first publicly surfaced when New York Attorney General Schneiderman hosted a press conference in New York City on March 29, 2016. Attorney General Healey was a participant, as was former Vice President and private citizen Al Gore, who was the featured speaker. Attorney General Schneiderman pledged that the coalition would "deal with the problem of climate change" by using law enforcement powers "creatively" and "aggressively" to force ExxonMobil and other energy companies to support the coalition's preferred policy responses to climate change. (Dkt. 101-1, pp. 9-11.) Considering climate change to be the "most pressing issue of our time," Attorney General Schneiderman said the coalition was "prepared to step into this [legislative] breach." (Dkt. 101-1, p. 11.)

At the press conference, Attorney General Healey similarly pledged "quick, aggressive action" by her office to "address climate change and to work for a better future." (Dkt. 101-1, p. 21.) In a clear example of viewpoint bias, she announced an investigation of ExxonMobil to remedy a "problem" in "public perception" by "holding accountable" those who disagree with her views on climate change. (Dkt. 101-1, pp. 20-21.) Further demonstrating that her investigation had a preordained result, Attorney General Healey reported that she already knew—before receipt of a single document from ExxonMobil—that there was a "troubling disconnect between what Exxon knew" and what it "chose to share with investors and with the American public." (Dkt. 101-1, p. 21.) The statements of Schneiderman, Healey, Mr. Gore and others made clear that the purpose of the press conference was to launch and promote a policy-driven political agenda.

The shifting theories offered by the Attorneys General for targeting ExxonMobil over the past year—starting with ExxonMobil's historical scientific research and most recently shifting to its calculation and reporting of its oil and gas reserves—have only confirmed the pretextual nature of their investigations. (Add. at 303-07.)

To defend against these constitutional deprivations, ExxonMobil filed the underlying lawsuit against Attorney General Healey (later adding Attorney General Schneiderman in the First Amended Complaint), seeking (1) a declaration that the

Massachusetts and New York investigations violate its federal and state constitutional rights and constitute an abuse of process, and (2) an injunction against enforcement of the New York subpoena and the Massachusetts civil investigative demand ("CID"). (Add. at 274-322.)

Attorney General Healey moved to dismiss ExxonMobil's complaint for lack of personal jurisdiction, lack of subject matter jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), lack of subject matter jurisdiction under a ripeness theory, and improper venue. (Dkt. 41.) The memorandum of law in support of that motion devoted five of its twenty pages (25%) to arguing that the district court must abstain from hearing this case under *Younger*. (Dkt. 42, Add. at 112-16.) On September 8, 2016, ExxonMobil opposed the Attorney General's motion to dismiss, arguing, among other things, that *Younger* abstention was unwarranted because the Attorney General's investigation of ExxonMobil was undertaken in bad faith. (Dkt. 60, Add. at 192-94.)

On October 13, 2016, the district court entered a six-page order (the "Discovery Order") directing the parties to develop a record on which to assess Attorney General Healey's request for abstention under *Younger*. (Dkt. 73, Add. at 1-6.) The district court found that further discovery was appropriate in light of ExxonMobil's factual allegations supporting the bad faith exception to *Younger* abstention, including the Attorney General's (1) public statements suggesting bias

and a predetermination of ExxonMobil's guilt and (2) participation in a closed-door meeting with climate activists and plaintiffs' attorneys that was intentionally concealed from the press and public. (Dkt. 73, Add. at 4–6.)

After Attorney General Healey repeatedly declared that she would not cooperate with the Discovery Order or comply with ExxonMobil's discovery requests,[1] ExxonMobil requested, and the district court granted, a telephonic status conference, at which her counsel again unequivocally confirmed her unwillingness to comply.[2] Faced with Attorney General Healey's intransigence, the district court issued a second discovery order requiring Attorney General Healey to respond to written discovery in a timely manner and to appear for deposition on December 13, 2016, at the courthouse in Dallas, Texas, while offering flexibility as to the date on account of her "busy schedule" (the "Deposition Order," Dkt. 117, Add. at 7-8.) After filing two unsuccessful motions for reconsideration (*see* Dkt. 131, Add. at 432) and defiantly refusing to respond to *any* of ExxonMobil's discovery requests

[1] ExxonMobil's jurisdictional discovery requests to Attorney General Healey, served pursuant to the district court's Discovery Order, consist of interrogatories, request for admissions and document requests, as well as deposition notices to Healey and two members of her staff.

[2] Contrary to Attorney General Healey's allegation, the district court did not state during the status conference it would only consider any motions to stay discovery submitted by Attorney General Healey or Attorney General Schneiderman if they would agree to the appointment of a special master. In fact, the court expressly concluded the conference by stating "[i]f you want to stay, file something and ask me for it, okay?" (Add. at 561.)

(including her refusal to suggest a deposition date convenient to her), Attorney General Healey has now turned to this Court for relief.[3]

ARGUMENT AND AUTHORITIES

I. The applicable legal standard.

A stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685-86 (5th Cir. 1968). It is "an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted).

This Court considers the following factors in evaluating a motion for stay pending appeal: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 425-26; *Texas v. United States*, 787 F.3d 733, 746-47 (5th Cir. 2015).

The movant bears the burden of proof on all four factors. *Nken*, 556 U.S. at 433-34; *Moore v. Tangipahoa Parish Sch. Bd.*, 507 F. App'x 389, 392 (5th Cir. 2013) (citing *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982)). "The first two factors . . . are the most critical." *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir.

[3] The district court denied Attorney General Healey's motion for stay pending mandamus on December 9, 2016, just before this response was filed. (Dkt. 152.)

2014) (quoting *Nken*, 556 U.S. at 434); *see also Moore*, 507 F. App'x at 399 (explaining that the first two factors "are the most important" and the last two factors "are less significant").

II. Attorney General Healey has not demonstrated a likelihood of success on the merits of her mandamus petition.

Establishing "a strong showing" of a likelihood of success on the merits is challenging enough in a standard appeal. It is far more challenging in the mandamus context because of the demanding legal requirements for mandamus relief, as evidenced by the infrequency with which such relief is granted by this Court.

A writ of mandamus is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes,'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004), and will issue only to correct "clear abuses of discretion that produce patently erroneous results." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015), *cert. denied sub nom. Pearl Seas Cruises, LLC v. Lloyd's Register N. Am., Inc.*, 136 S. Ct. 64 (2015) (citation omitted). The petition must show not just that the district court erred, but that such error was "clear and indisputable." *In re Am. Lebanese Syrian Associated Charities, Inc.*, 815 F.3d 204, 206 (5th Cir. 2016). In light of this rigorous standard, it is not surprising that this Court reports a zero percent reversal rate in original proceedings for the year ended June 30, 2016. *See* Fifth Circuit Statistical Snapshot, available at

http://www.ca5.uscourts.gov/docs/default-source/default-document-library/statistical-snapshot-6-30-16.pdf?sfvrsn=4.

Attorney General Healey does not come close to showing a strong likelihood of success on the merits of her mandamus petition.

A. Attorney General Healey is not likely to succeed on her claim that the district court committed clear and indisputable error in ordering her to appear for deposition.

The Attorney General contends that ExxonMobil is barred from taking her deposition under *In re Office of Inspector General*, 933 F.2d 276 (5th Cir. 1991). It goes without saying that this argument does not support her *blanket refusal* to provide *any* discovery. Moreover, her reliance on *Inspector General* is wrong.

In *Inspector General*, this Court recognized that discovery should go forward where there has been a presentation of "meaningful evidence that the agency is attempting to abuse its investigative authority." *Id.* at 278 (quotation marks and citation omitted). And the *Inspector General* court's treatment of the question of deposing government officials simply confirms that such depositions are appropriate in "extraordinary circumstances." *Id.*

The compelling record of prosecutorial overreach outlined by ExxonMobil below satisfies this standard, and certainly supports further inquiry by means of a deposition. As the district court set forth in the Discovery Order, "[p]rior to the issuance of the CID, Attorney General Healey and several other attorneys general

participated in the AGs United for Clean Power Press Conference on March 29, 2016 in New York." (Dkt. 73 at 4.) "At the meeting, Attorney General Healey and the other attorneys general listened to presentations from a global warming activist and an environmental attorney that has a well-known global warming litigation practice. Both presenters allegedly discussed the importance of taking action in the fight against climate change and engaging in global warming litigation." (*Id.*)

"One of the presenters, Matthew Pawa of Pawa Law Group, P.C., has [] previously sued Exxon for being a [purported] cause of global warming. After the closed door meeting, Pawa emailed the New York Attorney General's office to ask how he should respond if asked by a Wall Street Journal reporter whether he attended the meeting with the attorneys general. The New York Attorney General's office responded by instructing Pawa 'to not confirm that [he] attended or otherwise discuss' the meeting he had with the attorneys general the morning before the press conference." (*Id.*)

During the press conference itself, Attorney General Healey "stated that '[f]ossil fuel companies that deceived investors and consumers about the dangers of climate change should be, must be, held accountable.' Attorney General Healey then went on to state that, '[t]hat'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.' The speech ended with Attorney General Healey reiterating the Commonwealth of Massachusetts's commitment to combating climate change and that the fight against climate change needs to be taken '[b]y quick, aggressive action, educating the public, holding accountable those who have needed to be held accountable for far too long.'" (*Id.* at 5.) As the district court rightly observed in the Discovery Order, the "anticipatory" nature of Attorney General Healey's comments bespeak bias, suggest an "investigation" with an impermissibly pre-ordained outcome, and present strong evidence of improper purpose. (*Id*. at 5-6.)

The Attorney General's actions following the March 29 press conference have only confirmed the improper motive underlying her investigation. On April 29, 2016—ten days after serving the CID—a representative of Attorney General Healey's office signed a common interest agreement with other attorneys general seeking to conceal their activities from the public. (Dkt. 101-5, Am. Compl., App. 202.) The stated purposes of this agreement were "limiting climate change and ensuring the dissemination of accurate information about climate change"—removing any doubt that Attorney General Healey and other signatories intended to use their investigative powers to regulate speech on a matter of public debate and concern if the speech deviated from what they believe to be "accurate." (Dkt. 101-5, Am. Compl. Add. at 196.)

In sum, as the district court recognized in the Discovery Order and the Deposition Order flowing from it, the comments at the March 29 press conference, together with the steps taken thereafter to shield the activities of the Attorney General and her co-conspirators from public view, provide exceptionally strong bases to require Attorney General Healey to explain, if she can, why her "investigation" is not, as the facts suggest, a results-oriented exercise designed to deter ExxonMobil from exercising its constitutional rights.

B. Attorney General Healey is not likely to succeed on her claim that the district court's jurisdictional discovery orders constituted clear and indisputable error.

Attorney General Healey's broader challenge to both the Discovery Order and Deposition Order rests on two flawed propositions: (1) that the district court was *required* to resolve her personal jurisdiction, venue, and ripeness challenges before considering her *Younger* abstention challenge; and (2) that even if the district court had the discretion to consider *Younger* first, ordering jurisdictional discovery relating to that inquiry somehow turned *Younger* on its head. Because both propositions are incorrect, Attorney General Healey cannot show that the district court erred, much less that such error was "clear and indisputable." *In re Times Picayune, L.L.C.*, 561 F. App'x 402, 403 (5th Cir. 2014) (per curiam).

1. Under clear Supreme Court precedent, district courts have the leeway to resolve threshold grounds for dismissal in the sequence they prefer.

Attorney General Healey's mandamus petition invites this Court to adjudicate her motion to dismiss before the district court does. But the issue here is not whether her dismissal grounds are viable (and they are not), it is whether the district court is required to address them in a particular sequence and whether it clearly and indisputably erred by ordering jurisdictional discovery relating to one of those grounds before resolving another ground.

As the Supreme Court has held unequivocally, "there is no mandatory 'sequencing of jurisdictional issues'" or other threshold, non-merits issues that dictates the order in which a district court must take up challenges raised in a motion to dismiss. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574, 584 (1999)). Rather, when considering threshold, non-merits grounds for dismissal, it is the district court's discretion—not Attorney General Healey's preference—that controls the order of consideration. *See id.* at 425, 431 (holding that "a federal court has **leeway** 'to choose among threshold grounds'" when considering whether to dismiss a complaint, and that "a district court has **discretion** to respond at once to a [threshold ground] and need not take up first any other threshold objection" (emphases added)); *Ruhrgas*, 526 U.S. at 588 (holding the district court did not

abuse its discretion by turning to one jurisdictional ground before another jurisdictional ground); *Wellogix, Inc. v. SAP Am., Inc.*, 648 F. App'x 398, 400 (5th Cir. 2016) (holding the district court did not abuse its discretion by dismissing based on one threshold ground without first resolving a jurisdiction issue).

The fact that district courts have this "leeway" and "discretion" in resolving multiple threshold grounds for dismissal makes Attorney General Healey's argument particularly unsuitable for mandamus review. As a general rule, mandamus relief is not available to control an exercise of discretion, because "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 36 (1980) (per curiam). The only exception to this principle is where there is a *clear* abuse of discretion leading to patently erroneous results. *In re Lloyd's*, 780 F.3d at 290.

Attorney General Healey does not clear this high bar. She has not identified a single instance in which an appellate court has granted mandamus relief in analogous circumstances. She did not cite, and ExxonMobil could not find, a single decision since *Ruhrgas* where an appellate court held that a district court had abused its discretion by failing to adjudicate threshold grounds for dismissal in a particular order. Given this complete lack of precedent for her position, Attorney

General Healey cannot demonstrate a likelihood of success on the merits of her mandamus petition.

2. The district court correctly concluded that jurisdictional discovery was necessary to resolve Attorney General Healey's *Younger* challenge.

Attorney General Healey next argues that, even if the district court had the discretion to take up her *Younger* challenge first (and it does), the district court was *required* to adjudicate it on the existing record and clearly and indisputably erred by ordering jurisdictional discovery.

But the district court was on firm legal ground in ordering jurisdictional discovery to assist it in resolving the *Younger* challenge. This Court has long recognized that "jurisdictional discovery may be warranted if the issue of subject matter jurisdiction turns on a disputed fact." *In re MPF Holdings US LLC*, 701 F.3d 449, 457 (5th Cir. 2012) (citing *In re Eckstein Marine Serv. LLC*, 672 F.3d 310, 319-20 (5th Cir. 2012)). And when the district court must resolve a factual dispute that is "decisive of a motion to dismiss for lack of jurisdiction, it must give plaintiffs an opportunity for discovery and a hearing that is appropriate to the nature of the motion to dismiss." *McAllister v. FDIC*, 87 F.3d 762, 766 (5th Cir. 1996); *see also Box v. Dallas Mexican Consulate Gen.*, 487 F. App'x 880, 884 (5th Cir. 2012) (per curiam) (dismissal for lack of subject matter jurisdiction vacated because plaintiff had not been afforded discovery).

This Court has also made clear that district courts have "broad discretion in all discovery matters," including discovery addressing a defendant's assertion that jurisdiction is improper. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006) (quoting *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982)); *see also Box*, 487 F. App'x at 884 (observing that district courts have broad discretion with respect to discovery, including into the exercise of subject matter jurisdiction).

Further, courts have long recognized that the exceptions to the *Younger* doctrine present issues of fact that often cannot be resolved on pleadings and papers alone. *See, e.g.*, *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 517 (5th Cir. 2004) (district court held an evidentiary hearing before determining whether *Younger* applied). That is why when, as here, a complaint contains allegations that "would, if proven, be sufficient to merit federal intervention, the court has the discretion to allow discovery, and to take testimony at a hearing on a motion for a preliminary injunction and/or a motion to dismiss on *Younger* grounds." *Cobb v. Supreme Judicial Court of Mass.*, 334 F. Supp. 2d 50, 54 (D. Mass. 2004). In fact, numerous courts have held that discovery should be conducted when a bona fide factual dispute must be resolved before abstaining or declining to abstain under *Younger*. *See, e.g.*, *Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) (holding that "the district court erred by concluding, without holding an evidentiary hearing" that no

Younger exception applied); *Sica v. Connecticut*, 331 F. Supp. 2d 82, 87 (D. Conn. 2004) ("[W]hen a plaintiff seeks to avail herself of the *Younger* exceptions, a district court ordinarily should hold an evidentiary hearing.").

Assembly of a full record through discovery is especially proper where, as here, a plaintiff invokes the bad faith exception to *Younger*, which presents an inherently factual question. *See, e.g.*, *Trower v. Maple*, 774 F.2d 673, 674 (5th Cir. 1985) (describing an earlier order in the litigation vacating grant of dismissal on *Younger* grounds and remanding for evidentiary hearing on bad faith); *Wilson v. Thompson*, 593 F.2d 1375, 1387-89 (5th Cir. 1979) (district court took evidence to determine applicability of bad faith exception). Indeed, this Court has vacated an order issued without a proper evidentiary hearing and directed the district court to conduct "the appropriate evidentiary hearing required [by *Younger*], in which [the] plaintiff shall be allowed to introduce evidence regarding his allegations of bad faith prosecution and harassment." *Stewart v. Dameron*, 448 F.2d 396, 397 (5th Cir. 1971).

Attorney General Healey argues that allowing the district court's order to stand would turn *Younger* into a weapon *against* state interests. But, as this Court has recognized, the Commonwealth of Massachusetts has no legitimate interest in enabling state officials to commit constitutional torts against citizens of other states. *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (holding that

"[w]ith respect to the interests of the State, it by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights."). Against the legal and factual backdrop presented here, Attorney General Healey cannot show error, much less "clear and indisputable error," and thus has not made a "strong showing" of a likelihood of success on the merits of her challenge to the authorized jurisdictional discovery.

III. Attorney General Healey failed to demonstrate irreparable injury.

Attorney General Healey contends that she will be irreparably injured if she is "forced to set aside her job as chief law officer of Massachusetts to prepare for and travel to Texas" for a deposition. (Mot. 13.) As a threshold matter, her claim of irreparable injury relates only to the deposition—she does not and cannot explain how she would be irreparably injured by complying with the district court's order that she respond to ExxonMobil's written discovery requests. Furthermore, her "busy schedule" is merely an excuse, because what is really at issue is her blanket refusal to respond to *any* discovery, a complete lack of cooperation that cannot be blamed on her busy schedule.[4]

[4] Attorney General Healey has pulled out all stops to avoid responding to any discovery in this case. First, she moved for reconsideration of the Discovery Order on October 20, 2016. Second, on November 23, 2016, she filed "responses" to ExxonMobil's discovery, relying on general objections to avoid answering or meaningfully responding to a single interrogatory, request for admission, or request for production. Third, on November 25, 2016 (as subsequently corrected on November 26), she filed a motion to (1) vacate and reconsider the Deposition Order; (2) stay

Moreover, the deposition would be completed in a day—which is hardly the stuff of "irreparable injury." The district court indicated that it was "mindful of [her] busy schedule" and offered to adjust the date to accommodate her—an offer she ignored altogether. (Dkt. 117)

Finally, if, as she says, she has pursued this investigation of ExxonMobil in good faith, she should easily be able to answer questions relating to that contention. Attorney General Healey started this controversy when she sent ExxonMobil the sweeping civil investigative demand. She cannot now claim that she would be irreparably injured by being required to answer questions relating to a jurisdictional challenge that she herself raised.

IV. The remaining factors do not support a stay.

The foregoing explication of the first two stay factors—which are the most "critical"—alone defeats Attorney General Healey's request for a stay. A review of the last two stay factors (substantial injury to ExxonMobil and the public interest) leads to the same conclusion.

Attorney General Healey contends that ExxonMobil will not be substantially injured by a stay due to the pendency of a Massachusetts state action (vetting objections ExxonMobil was required to file to Healey's civil investigative demand,

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discovery until dispositive motions filed in response to the First Amended Complaint are decided; and (3) issue a protective order precluding ExxonMobil from taking her deposition. Even after her motion for reconsideration and motion to vacate were denied on December 5, 2016, she moved for another stay of discovery pending resolution of her mandamus petition.

to avoid waiver under state law) and ExxonMobil's document production in another state. But these proceedings do not vindicate Attorney General Healey's investigation or mitigate the harm suffered daily by the improper continuation of that investigation.

Further, Attorney General Healey's contention that there is no substantial injury to ExxonMobil because this case is not ripe under *Google* v. *Hood*, 822 F.3d 212 (5th Cir. 2016), is simply wrong. Unlike *Google*, the CID served on ExxonMobil is self-executing and carries an immediate penalty for non-compliance that does not, by its terms, require the intervention of a court. In fact, the CID served on ExxonMobil includes as an exhibit the provision of Massachusetts law stating that failure to comply is punishable by a civil penalty of $5,000. (Dkt. 10-1 at App. 044.) Even if the CID were not self-executing, the Attorney General has rendered this dispute ripe by seeking to enforce the CID in Massachusetts state court. *Google*, 822 F.3d at 225; *Lone Star Coll. Sys.* v. *EEOC*, No. H-14-529, 2015 WL 1120272, at *7 (S.D. Tex. Mar. 12, 2015). Attorney General Healey's actions have therefore made this matter ripe.

Attorney General Healey's final argument that the public interest favors a stay suffers from a false premise. She contends that a stay will result in judicial economy and preservation of resources, but just the opposite is true. It is the denial of a stay and the taking of discovery that will allow the district court to rule on

Attorney General Healey's own motion to dismiss and permit the underlying proceeding to move forward in an expeditious manner. The stay sought by Attorney General Healey will yield only unnecessary and costly delay and improperly interfere with the district court's handling of its own docket.

CONCLUSION AND PRAYER

Attorney General Healey has completely failed to meet her burden. She has not "made a strong showing that she is likely to succeed on the merits" or that she "will be irreparably injured absent a stay." On the other hand, the issuance of her requested stay would substantially injure ExxonMobil and improperly disrupt the district court's handling of its docket.

Respondent ExxonMobil respectfully requests that the Court deny Petitioner's motion for stay and permit discovery to proceed.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of December, 2016, a copy of the attached *Response to Motion for Stay* was electronically transmitted to the United States Court of Appeals for the Fifth Circuit using the Court's ECF filing system and was served on the following parties via (i) electronic notice pursuant to the Court's ECF filing system, or (ii) United States first class mail, postage prepaid, to the persons who do not receive electronic notice pursuant to the Court's ECF filing system:

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I further certify that on December 9, 2016, I have caused the foregoing document to be hand-delivered to the district court, as follows:

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/s/ Nina Cortell
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I hereby certify that (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

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