UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,	:	
	:	No. 17-CV-2301 (VEC) (SN)
Plaintiff,	:	
	:	
-against-	:	ECF Case
	:	
ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,	:	
	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE NEW YORK ATTORNEY GENERAL'S MOTION TO DISMISS THE ACTION BASED ON CERTAIN THRESHOLD DEFENSES

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PRELIMINARY STATEMENT

At this Court's invitation, the NYOAG showed how Exxon's failure to allege a ripe injury or, alternatively, principles of *Colorado River* abstention demand the dismissal of this duplicative and wasteful federal action to quash an investigative subpoena by a State Attorney General.[1]

Exxon's opposition brief neglects to mention, let alone to grapple with, the fact that Exxon purports to have *fully* and *voluntarily* complied with the very document subpoena challenged here. These representations by Exxon in the parallel New York Supreme Court proceeding fatally undermine any claim of a ripe injury from the 2015 Subpoena, which this federal action seeks to enjoin. Indeed, in that related proceeding, Exxon affirmatively touted its own history of producing documents to forestall a court order enforcing a subsequent subpoena.

Likewise absent from Exxon's opposition brief is any reference to Exxon's admitted destruction of potentially responsive documents, a topic on which the New York State court has ordered further discovery. At this belated stage, the only conceivable effect of *prospective* federal relief relating to the 2015 Subpoena—which is all that *Ex parte Young* permits—would be to interfere with the NYOAG's inquiry into Exxon's spoliation or withholding of relevant evidence.

Nor has Exxon justified the vexatious manner in which it has proceeded here. Despite insisting that the NYOAG's fraud investigation is a pretext for unlawful viewpoint discrimination, Exxon is unable to identify any allegedly protected corporate speech that has been targeted, much less inhibited. This Court should not allow Exxon to spin off its conclusory constitutional claims in a separate lawsuit, used as a vehicle for demanding exorbitant discovery into the NYOAG's investigation. Instead, this Court should remit Exxon to the comprehensive and parallel state remedy that Exxon has invoked for some, but not all, of its subpoena objections.

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[1] Undefined capitalized terms have the meanings given in the NYOAG's opening brief on ripeness and *Colorado River* abstention. That brief is referred to as "Mem." and Exxon's opposition brief as "Opp."

ARGUMENT

I. Exxon's Complaint Against the NYOAG Fails to Present a Ripe Controversy.

Exxon's amended federal complaint challenging the 2015 Subpoena does not present a ripe controversy. *See* Mem. at 13–18. Federal equitable review of a non-self-executing administrative subpoena—whether state or federal—is unavailable where an adequate procedure exists at law for resolving objections before compliance may be compelled. *See Google, Inc. v. Hood*, 822 F.3d 212, 226 (5th Cir. 2016) (investigative subpoena issued by State Attorney General); *Schulz v. IRS*, 395 F.3d 463, 464 (2d Cir.) (per curiam), *clarified on reh'g*, 413 F.3d 297 (2d Cir. 2005) (summons issued by federal agency).

Exxon does not contest the existence or adequacy of the procedures under New York law to test the validity of investigative subpoenas. *See* Mem. at 3. Those procedures afford a right to challenge such subpoenas "on First Amendment grounds," among others. *Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 607 (1980). And where, as here, the "same challenges raised in the federal suit could be litigated in state court," a non-self-executing state subpoena does not inflict cognizable injury. *Google*, 822 F.3d at 226.

Taking Exxon at its word, its federal complaint against the 2015 Subpoena will *never* present a ripe controversy. As recently as two weeks ago, Exxon told the New York Supreme Court Justice (the Honorable Barry R. Ostrager) presiding over the parallel state proceeding that Exxon has "completed" its production in response to the 2015 Subpoena. App. 416; *see* App. 461, 521 (representing that Exxon has "complied fully with" the 2015 Subpoena, "finish[ed] the document production," and "certif[ied] that the process was over"). As Justice Ostrager thus recounted, Exxon had (i) sworn to "the production of all responsive documents" located using agreed-upon search parameters, and (ii) promised to produce any responsive documents that later came to

Exxon's attention.[2] App. 478–479.

A complete and voluntary production would negate Exxon's assertion of a ripe injury from the 2015 Subpoena. Exxon cannot plausibly claim a "current consequence for resisting [a] subpoena" that Exxon simultaneously claims not to have resisted one iota. *Google*, 822 F.3d at 226. Exxon attempts to brush aside Justice Ostrager's various orders about the 2015 Subpoena as matters of "technical compliance," rather than orders compelling Exxon to comply over objection. Opp. at 25. If that is so, then "no force has been applied" to coax Exxon's alleged full compliance with the 2015 Subpoena. *Schulz*, 395 F.3d at 465; *see Texas v. United States*, 523 U.S. 296, 300 (1998) (holding claim unripe where circumstances, as here, left entirely speculative whether plaintiff would face complained-of sanction).

Exxon's depictions of full and voluntary subpoena compliance also bar any claim of injury from penalties for *noncompliance* with a Martin Act subpoena. *See* Opp. at 15–16 & n.51. Those hypothetical penalties cannot cause a ripe injury anyway. Failure to obey a Martin Act subpoena is a misdemeanor only if done "without reasonable cause," GBL § 352(4), an exception that permits the interposition of valid legal defenses to compliance, *People v. D'Amato*, 12 A.D.2d 439, 443 (1st Dep't 1961). Moreover, as the recent round of motion practice in state court demonstrates, a subpoena recipient need not remain "on the defensive" (Opp. at 16), but can file a preemptive motion to quash, *see* C.P.L.R. 2304. The recipient of an investigative subpoena therefore "has an opportunity to seek judicial review" before facing any "risk of punishment." *Schulz*, 413 F.3d at 301. And the NYOAG cannot "*itself* sanction non-compliance," *Google*, 822

[2] As the NYOAG informed Justice Ostrager, the general absence of documentation reflecting Exxon's integration of the expected effects of climate change and related policies into the company's decisions and valuations casts doubt on Exxon's representations of full subpoena compliance. App. 381, 482–483. In response to these concerns, Justice Ostrager invited the NYOAG, after taking witness testimony, "to make a showing" that Exxon failed to produce responsive material or search the files of all appropriate custodians. App. 481, 484. The NYOAG will continue to pursue these matters.

F.3d at 224 (emphasis added), when the NYOAG lacks the power to adjudicate "'question[s] of civil violation or of criminal guilt,'" *Matter of Sigety v. Hynes*, 38 N.Y.2d 260, 267 (1975) (quotation marks omitted). Thus, even putting questions of compliance aside, the non-self-executing 2015 Subpoena is unripe for federal review. *Google*, 822 F.3d at 224.[3]

Nor does Exxon independently allege the required injury to establish a ripe First Amendment controversy. *See* Opp. at 15. For that purpose, "[a] plaintiff must allege something more than an abstract, subjective fear that his rights are chilled." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). Without "some other concrete harm," a § 1983 First Amendment plaintiff must plead and prove "that his speech has been adversely affected by the government." *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013); *see also Williams v. Town of Greenburgh*, 535 F.3d 71, 78 (2d Cir. 2008). Despite Exxon's conclusory claims of a First Amendment "assault" (Opp. at 14), the NYOAG's document requests "do not directly regulate the content, time, place, or manner of expression," *SEC v. McGoff*, 647 F.2d 185, 187–88 (D.C. Cir. 1981), as Exxon has conceded (ECF No. 167, at 19). Moreover, Exxon does not suggest that it has self-censored out of an objective fear of imminent adverse consequences for engaging in protected corporate speech. To the contrary, Exxon has maintained that its First Amendment claim does not "require that a curtailment of speech be established." ECF No. 57, at 10. After several rounds of briefing, the precise nature of Exxon's claimed First Amendment injury remains a mystery.[4]

[3] Although Exxon contends that *Google*'s holding may deprive state subpoena recipients of a federal forum (Opp. at 2, 13), this concern properly failed to sway the Fifth Circuit, which applied standard ripeness principles while declining to "presume" that a state court could not adequately adjudicate subpoena objections, 822 F.3d at 225 n.10. At any rate, "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *CFTC v. Schor*, 478 U.S. 833, 848 (1986). Indeed, federal court review of ongoing state enforcement activity is the exception, rather than the rule. *See, e.g., Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 586 (2013).

[4] This vagueness easily distinguishes this case from those cited by Exxon. *See Nat'l Org. for Marriage*, 714 F.3d at 688–91 (nonprofit organization feared that continuing to run certain commercials might lead to

Finally, Exxon fails to demonstrate the ripeness of its federal preemption defense, which Exxon also has raised in the concurrent New York State proceeding. *See* Mem. at 17–18; *see also* App. 193–194, 340–344. As alleged in the amended complaint, this claim posits that States cannot enforce "disclosure requirements concerning oil and gas reserves and asset valuations beyond those imposed by the SEC." Compl. ¶ 125. Even if such a defense applied to a specific claim raised in a future enforcement action, a merits defense against an as-yet unfiled complaint cannot "be accepted as a defense against [a] subpoena" for records. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *accord FTC v. Texaco, Inc.*, 555 F.2d 862, 873–74 (D.C. Cir. 1977).[5]

Contrary to Exxon's argument (Opp. at 14–15), a subpoena recipient is not entitled to instant review of any preemption challenge touching on the underlying investigation. As support, Exxon cites *Cuomo v. Clearing House Association LLC*, which entertained a claim that federal law totally preempted state regulators' ability to request *any* information from national banks, by eliminating States' visitorial powers over such entities. 557 U.S. 519, 536 (2009). By contrast, Exxon here does not assert blanket immunity from state subpoenas, but rather contests the *extent* of the NYOAG's undisputed regulatory authority over Exxon's financial reporting. "[I]t has long been settled that such issues are not to be decided in subpoena enforcement actions." *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973).

II. In the Alternative, *Colorado River* Abstention is Appropriate.

As explained in the NYOAG's opening brief, the exceptional—if not unprecedented—circumstances surrounding this lawsuit warrant abstention in favor of the parallel and farther-along subpoena compliance proceedings in New York Supreme Court. *See* Mem. at 18–24 (citing *Colo.*

financial reporting requirements under New York's Election Law); *Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003) (plaintiffs alleged that billboard advertisements were removed at official's direction).

[5] Justice Ostrager did not address preemption at the June 16, 2017 state hearing, while confirming that the merits of any possible fraud claims were not properly at issue at the subpoena stage. App. 472, 476.

River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), and ensuing decisions). Exxon's arguments in opposition do not justify the continued wasting of public resources on duplicative subpoena litigation on multiple fronts.

A. The Substantially Advanced State Proceeding Affords Exxon a Full Remedy.

In each of the parallel federal and state judicial proceedings arising out of the NYOAG's fraud investigation, Exxon has lodged a smattering of objections to the NYOAG's document requests, including to the 2015 Subpoena. *See* Mem. at. 10–11. Where a party splits related claims—or, as here, objections—between state and federal litigation against a single opponent, "*Colorado River* sets out the appropriate standard" for determining whether to dismiss the "allegedly duplicative federal claims." *Kanciper v. Suffolk County Soc'y for Prevention of Cruelty to Animals, Inc.*, 722 F.3d 88, 93 (2d Cir. 2013).

Exxon's attempt to portray these two proceedings as anything less than parallel is absurd. In particular, Exxon repeatedly emphasizes that this case "is the only action" claiming federal constitutional violations (Opp. at 20), which Exxon "has never" alleged in New York State court during the many months of ongoing proceedings there (*id.* at 23). Yet if the alleged constitutional violations here are "serious" (*id.* at 29), one would expect Exxon to have sought immediate relief from this putative invasion of rights in the state tribunal actively overseeing Exxon's subpoena compliance. Exxon's abject refusal to do so "cannot be allowed to frustrate the policies underlying the doctrine of abstention." *Reid v. Bd. of Ed.*, 453 F.2d 238, 243 n.7 (2d Cir. 1971).

Indeed, the specter of abstention looms over dueling proceedings that, as here, contain the same "essential" claims, "regardless of theory or pleadings." *Telesco v. Telesco Fuel & Masons' Materials, Inc.*, 765 F.2d 356, 362 (2d Cir. 1985); *accord Bernstein v. Hosiery Mfg. Corp. of Morganton*, 850 F. Supp. 176, 184 (E.D.N.Y. 1994) (holding actions parallel where "state

proceeding would permit adjudication of the claims asserted in the federal proceeding").[6] The same basic question—the extent of Exxon's duty to comply with the NYOAG's investigative process—pervades the two proceedings at issue here. Exxon's assertion that its constitutional objections "could not be litigated" in state court (Opp. at 19) is belied by its own filings, which have injected its core federal allegations into the state proceeding.[7] *See, e.g.*, *Am. Disposal Servs., Inc. v. O'Brien*, 839 F.2d 84, 88 (2d Cir. 1988) (affirming *Colorado River* abstention where "no issues in the federal claim [were] not also present in the state court proceedings"). In addition, a New York State court is capable of affording Exxon complete relief, by refusing to enforce a subpoena that "unduly infringe[s] upon fundamental rights such as those guaranteed by the First Amendment." *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991); *see Matter of Parkhouse v. Stringer*, 12 N.Y.3d 660, 668 (2009) (reiterating that New York courts will guard against alleged investigatory "trespass" into protected speech); *Nicholson*, 50 N.Y.2d at 606.

There is no support for Exxon's newfound suggestion that raising constitutional objections in a New York State court "would be futile." Opp. at 28. This argument contradicts the state proceeding's extensive history, where the court accepted Exxon's objection about the 2015 Subpoena's textual scope. *See* Opp. at 12; *see also Am. Disposal Servs.*, 839 F.2d at 88 (deeming it "noteworthy" under *Colorado River* that federal plaintiff had "obtained relief in th[e] matter

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[6] *Cf. Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 603 (2d Cir. 1988) (holding *Colorado River* abstention inapplicable to federal claims brought by *non*-parties to state proceeding) (cited Opp. at 20).

[7] *Compare, e.g.*, Compl. ¶ 38 (alleging to federal court that evidence will establish NYOAG's "political motivation"), *with* App. 405 (alleging to state court that "[n]o further evidence is required to establish" NYOAG's "political motivation"); Compl. ¶ 114 (alleging to federal court that NYOAG's document requests are "overbroad," impose an "undue burden," and constitute "an abusive fishing expedition"), *with* App. 419 (alleging to state court that NYOAG's document requests are "overbroad, burdensome and oppressive" and constitute the "proverbial 'fishing expedition'"); Compl. ¶ 120 (alleging to federal court that NYOAG's subpoena impermissibly "regulate[s] ExxonMobil's out-of-state" activity), *with* App. 194 (alleging to state court that NYOAG's document requests present "serious questions about jurisdiction and extraterritoriality"); Compl. ¶ 124 (alleging to federal court that NYOAG's possible enforcement theories are preempted by SEC rule), *with* App. 340 (alleging to state court that NYOAG is "attempting to pursue matters preempted by the SEC").

from the state courts under state law"). Likewise, Exxon must believe that raising its federal preemption claim in state court is not "futile," as Exxon has done just that. *See supra* at 5 & 7 n.7. If Exxon's constitutional objections are futile anywhere, that is because they lack merit: In particular, "mere utterance of First Amendment privileges" forms no barrier to "the scrutiny of the Attorney General." *Abrams v. N.Y. Found. for Homeless*, 190 A.D.2d 578, 578 (1st Dep't 1993); *see also Google*, 822 F.3d at 228 (holding that subpoena recipient's "invocation of the First Amendment" does not automatically generate concrete, imminent injury).

The relative progress of the state and federal proceedings further favors abstention. As Exxon now concedes (Opp. at 12), the state proceeding against PwC and Exxon had begun when Exxon filed this lawsuit against the NYOAG. At any rate, "a race to the courthouse" matters less for abstention than "how much progress has been made in each forum." *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 211 (2d Cir. 1985). While New York's courts just held an *eighth* hearing (including two appellate arguments) regarding Exxon's compliance duties, this federal action now trudges through its fourth round of briefing on procedural defenses at the motion-to-dismiss stage. *See* Mem. at 21. And although Judge Kinkeade "issued two opinions" (Opp. at 25), the first concerned discovery into *Younger* abstention, before the NYOAG was a party; and the second transferred the case, to remedy a defect in venue existing from the outset.

Two recent developments in the state proceeding cement abstention's appropriateness. *First*, the New York State court has ordered further inquiry into Exxon's admitted destruction of potentially responsive material, including emails to and from its former Chairman and CEO, Rex Tillerson, using the alias "Wayne Tracker." *See* App. 278, 479. As the state court learned, Exxon's outside counsel testified that she knew of the Wayne Tracker account in early 2016, but made *no* effort whatsoever to notify the NYOAG of that account or to ensure the preservation of those

emails.[8] *See* App. 385. *Second*, Exxon has wielded its purported subpoena compliance as a sword in state court, while trying to use this federal action as a shield. In filings and in open court, Exxon repeatedly trumpeted its past production of "2.8 million" pages of material to the NYOAG, as a basis for resisting *any* compliance with a subsequent document subpoena. App. 323, 346, 407, 411, 418, 420, 427, 534; *see* App. 349 (copy of subpoena). Justice Ostrager explicitly relied on this alleged history of compliance in declining to compel Exxon to produce more than these "millions of pages" of documents until after the NYOAG had pursued other investigative methods. App. 516–517.

In light of these undisputed developments, prospective relief relating to the 2015 Subpoena—which is all that *Ex parte Young* permits, *see, e.g.*, *McGinty v. New York*, 251 F.3d 84, 101 (2d Cir. 2001)—could affect little more than Exxon's ongoing obligations to account for spoliated or withheld evidence. And even if such relief could reach back in time and retrospectively excuse Exxon's past compliance, the result would be "inconsistent outcomes not preventable by principles of res judicata." *Woodford v. Cmty. Action Agency of Greene County Inc.*, 239 F.3d 517, 524 (2d Cir. 2001).[9] In one forum, Exxon has used its claimed compliance with the 2015 Subpoena to fend off further investigative requests; whereas in another, Exxon seeks a ruling voiding the 2015 Subpoena and, by extension, the very compliance obligations that Exxon previously exploited to its advantage. Abstention will thus protect the integrity of the judicial system by preventing Exxon from "deliberately changing positions according to the exigencies of the

[8] According to Exxon, this attorney "had oversight over the entire discovery process." App. 518. Incredibly, this attorney also testified that she viewed the issue as "an interesting test" of whether the NYOAG could divine the alias account's existence from other documents. App. 385. The NYOAG passed this "test."

[9] Exxon posits that federal review will prevent inconsistency in the treatment of Massachusetts' CID and the NYOAG's subpoena. *See* Opp. at 24. No inconsistency could arise if, as Exxon previously has said, its claims against one Attorney General have "[n]othing" to do with a "different demand issued by a different state agency under a different statute." ECF No. 57, at 9.

moment." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (quotation marks omitted).

B. This Lawsuit's Vexatious and Contrived Nature Compels Abstention.

As even Exxon's proffered authority acknowledges, "the purpose behind filing a second lawsuit could be useful in deciding whether to abstain." *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 514 n.20 (S.D.N.Y. 2006) (cited Opp. at 29). Exxon has yet to offer a credible justification for splitting subpoena defenses between a state forum and an improper federal venue more than a thousand miles away. Nor does Exxon offer any rejoinder to the other vexatious behavior catalogued in the NYOAG's opening brief: from Exxon's telling the Texas federal court that continued production of documents to the NYOAG was "fluid," while painting a vastly different picture in state court; to telling this Court that "Justice Ostrager had never been assigned to the case" when Exxon filed suit against the NYOAG, despite that Exxon had written specifically to Justice Ostrager hours before its federal filing; to representing that Exxon did not actually want the discovery it had sought into the NYOAG's investigative theories; to downplaying having demanded the *personal deposition* of AG Schneiderman. *See* Mem. at 22–25.

The history of this federal action thus exposes Exxon's claim of a public-private, speech-targeting conspiracy to be a manufactured tool of distraction and delay. Moreover, after multiple requests, Exxon *still* refuses to identify the protected corporate message allegedly being targeted for suppression, opting to rely instead on "a litany of general conclusions that shock but have no meaning." *Barr v. Abrams*, 810 F.2d 358, 362–63 (2d Cir. 1987). To the New York State court, however, Exxon has aptly summarized the NYOAG's factual basis for the investigation to include the possibility that Exxon had "two numbers"—one external, the other internal—to account for climate-change risks. App. 463. Publicly disseminating fraudulent misstatements "carries no First Amendment credentials." *Herbert v. Lando*, 441 U.S. 153, 171 (1979).

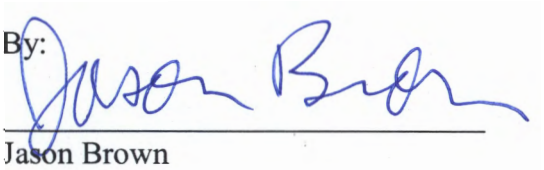
CONCLUSION

The Court should dismiss Exxon's First Amended Complaint for the failure to allege a ripe injury, or else abstain from hearing this duplicative federal action.

Dated: New York, New York
June 30, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: 

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