No.

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER

v.

MAURA HEALEY,
ATTORNEY GENERAL OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may exercise personal jurisdiction over a nonresident corporation to compel its compliance with an investigatory document request where jurisdiction is based principally on third-party contacts that are unrelated to the subject matter being investigated.

CORPORATE DISCLOSURE STATEMENT

Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Cases—continued:

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Exxon Mobil Corporation respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court in this case.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (App., *infra*, 1a-26a) is reported at 94 N.E.3d 786. The trial court's opinion (App., *infra*, 27a-43a) is unreported.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on April 13, 2018. On May 31, 2018, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This case involves a breathtaking assertion of personal jurisdiction over a nonresident defendant. In the decision under review, the Massachusetts Supreme Judicial Court compelled compliance with sweeping investigatory requests by the State's attorney general for decades' worth of documents concerning petitioner's knowledge of, and the relationship of petitioner's products to, climate change. It justified that exercise of judicial power based principally on advertisements, despite the attorney general's admission that the ads at issue did not speak to the subject matter of the investigation and even though the corporation did not even create or approve the vast majority of the ads.

In so doing, the Massachusetts Supreme Judicial Court applied an approach to personal jurisdiction that is inconsistent with this Court's precedents and that flouts core notions of due process. In evaluating whether a proceeding arises out of or relates to the defendant's contacts with the State, the court asked only whether those contacts were a but-for cause of the claims (or, in this case, the investigation). That lax standard, which some other courts have also adopted, conflicts with the standards applied in other courts on a question that this Court has twice identified as unsettled. It also permits parties to be haled into court based on contacts that lack a "substantial" relationship to the underlying proceedings. See, *e.g.*, *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014). That is precisely what happened here, and the exercise of judicial

power in these circumstances offends due process. See, *e.g.*, *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474-475 (1985).

In this case, the Court is presented with the opportunity both to resolve an entrenched and recognized conflict among the courts of appeals and state courts of last resort and to reaffirm the centrality of foreseeability to the due process analysis in the context of personal jurisdiction. The question presented is whether a court can exercise personal jurisdiction over a nonresident corporation to compel its compliance with an investigatory document request where jurisdiction is based principally on third-party contacts that are unrelated to the subject matter being investigated. It cannot be seriously disputed that the question is an exceptionally important and recurring one, and it arises in a factual context that is important in its own right. This Court should grant certiorari to review and reverse the Massachusetts Supreme Judicial Court's misguided decision.

1. At issue in this case is a state court's exercise of personal jurisdiction over a defendant. Because the exercise of personal jurisdiction "exposes [the defendant] to the State's coercive power," it has long been understood to be "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 918 (2011); see *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878).

As the Court is well aware, there are two types of personal jurisdiction. General jurisdiction subjects a defendant to jurisdiction regardless of the claim at issue. *Goodyear*, 564 U.S. at 919. Specific jurisdiction, by contrast, subjects a defendant to jurisdiction only where the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (internal

quotation marks, citation, and alteration omitted). Put another way, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (quoting *Goodyear*, 564 U.S. at 919). Accordingly, the Court has emphasized that there must not only be a "relationship" between the defendant's contacts with the forum and the "suit-related conduct," but the relationship must be "substantial." *Walden*, 571 U.S. at 284; see *Bristol-Myers*, 137 S. Ct. at 1781.

2. a. Here, a Massachusetts state court exercised specific jurisdiction over petitioner, a corporation registered in New Jersey and headquartered in Texas. While petitioner has operations in many States and countries, it does not own or operate a single retail service station in the Commonwealth of Massachusetts. Service stations in Massachusetts that sell under the Exxon or Mobil brand names are owned and operated by independent third parties. Specifically, petitioner and the third parties enter into standardized brand fee agreements, under which the third parties license petitioner's trademarks for a fee and thereby gain access to petitioner's business programs and suppliers.

The brand fee agreement provides that "the parties will carry on their respective business pursuant to this [a]greement as independent contractors in pursuit of their independent callings and not as partners, fiduciaries, agents, or in any other capacity." Mass. S.J.C. App. 1540.[1] The agreement makes clear that it is "not a product sales or supply agreement": the licensee is "solely responsible" for procuring an adequate supply of fuel, and it

[1] Petitioner submitted to the trial court a sample brand fee agreement between it and a company that owns, operates, or supplies more than a hundred Massachusetts service stations. See Mass. S.J.C. App. 1504-1505, 1543-1546.

maintains "full responsibility" for the "sourcing of motor fuel product" that it sells to customers. *Id.* at 1508, 1510, 1516.

Although the brand fee agreement provides petitioner with the "authority to review and approve" marketing by its Massachusetts licensees, Mass. S.J.C. App. 1525, there is no evidence of petitioner's actually exercising that right. The only advertisements directed to the Massachusetts market that petitioner has itself created since 2011 (the beginning of the undisputed limitations period for any claims the Attorney General could bring) are a small number of radio and print ads for engine-lubrication products. *Id.* at 935. None of these advertisements discuss the subject matter of the Attorney General's investigation. *Id.* at 950.[2]

b. Respondent is the Massachusetts Attorney General. This case arises from respondent's decision to investigate petitioner for its knowledge of the potential causes and effects of climate change. In 2016, respondent and other state attorneys general, who identified themselves as "AGs United for Clean Power," held a press conference in New York. There, respondent expressed her opinion that "there's nothing we need to worry about more than climate change," and she warned about "the human and the economic consequences" of the issue. She promised to

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[2] Petitioner has also produced national advertising that has reached the Massachusetts market through, for example, television and radio. But the court below did not rely on that advertising to find personal jurisdiction, and for good reason. It is settled law that specific jurisdiction cannot be established through national advertisements that happen also to appear in the forum State. Compare *Bristol-Myers*, 137 S. Ct. at 1778, with *id.* at 1784 (Sotomayor, J., dissenting); see *Boschetto* v. *Hansing*, 539 F.3d 1011, 1018 n.4 (9th Cir. 2008), cert. denied, 555 U.S. 1171 (2009); *Federated Rural Electric Insurance Corp.* v. *Kootenai Electric Cooperative*, 17 F.3d 1302, 1305 (10th Cir. 1994).

"speed our transition to a clean energy future" through "quick, aggressive action." Mass. S.J.C. App. 82-83.

Shortly after the press conference, respondent issued a civil investigative demand to petitioner, purporting to investigate "potential violations" of Massachusetts' consumer protection law, see Mass. Gen. Laws ch. 93A, § 2, through "the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth of Massachusetts" and "the marketing and/or sale of securities * * * to investors in the Commonwealth." In the civil investigative demand, respondent sought all documents from 1976 to the present regarding petitioner's research related to climate change. Respondent also demanded documents relating to certain papers and reports, as well as petitioner's communications concerning climate change with twelve identified organizations, such as the American Enterprise Institute and the Heritage Foundation. And respondent requested materials concerning petitioner's securities, including its filings with the Securities and Exchange Commission and its efforts to address shareholder resolutions. Mass. S.J.C. App. 92, 103-104, 106-108, 110.

Although respondent sought documents pertaining to speeches that petitioner's executives made in Beijing and London and at shareholder meetings in Texas, she did not seek documents about any particular statements made by petitioner or its executives in Massachusetts (about climate change or about any other matter). Instead, respondent demanded just three categories of petitioner's communications with Massachusetts residents. One category was "[e]xemplars" of advertising by petitioner or its licensees to market Exxon- or Mobil-branded products in Massachusetts, without any reference to a connection to climate change. The other two categories were documents pertaining to any contracts between the State and

petitioner, and any complaints by Massachusetts residents regarding petitioner and climate change. Mass. S.J.C. App. 105-106, 109-111.[3]

3. Pursuant to Massachusetts law, Mass. Gen. Laws ch. 93A, § 6(7), petitioner sought to set aside the civil investigative demand in Massachusetts state court through a special appearance in which it asserted a lack of personal jurisdiction. Petitioner also challenged, *inter alia*, the breadth and scope of the civil investigative demand. Respondent cross-moved to compel compliance with the demand. Mass. S.J.C. App. 5, 47-60, 262; Pet. Mass. S.J.C. Br. 4.

The trial court denied petitioner's motion to set aside the civil investigative demand and granted respondent's cross-motion to compel. App., *infra*, 27a-43a. As is relevant here, the court determined that its exercise of specific personal jurisdiction was proper on the ground that the brand fee agreement provided petitioner with the "right to control" its licensees' advertising, which it described as the "specific policy or practice allegedly resulting in harm to Massachusetts customers." *Id.* at 33a-34a (internal quotation marks omitted).

Notably, the trial court did not make any findings about the content of the licensee's advertising; did not determine that petitioner had in fact exercised control over licensees' advertising; and did not find that petitioner was responsible for any advertisements concerning climate change. Indeed, the uncontroverted record established that none of the advertisements—either those created by

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[3] Another of the "AGs United for Clean Power," then-New York Attorney General Eric Schneiderman, served a similar subpoena on petitioner. Petitioner did not contest the existence of personal jurisdiction in New York; after disputing the scope of the subpoena, petitioner has produced documents in response. App., *infra*, 39a.

the licensees or those created by petitioner—said anything about climate change. See Mass. S.J.C. Oral Arg. Tr. 55:23-25 (respondent's counsel conceding that "[t]here's nothing in the record * * * that indicates a specific advertisement to consumers" concerning climate change). Nothing in the record established that petitioner had anything to do with advertisements created by the licensees; petitioner itself has created and run only a small number of ads in Massachusetts since 2011. See p. 5, *supra*. And none of those advertisements concerned fossil fuel itself, the product at the center of the debate on climate change.

4. Petitioner appealed to the Massachusetts Court of Appeals. The Massachusetts Supreme Judicial Court then transferred the case *sua sponte* to its own docket. In that court, respondent defended her pursuit of "documents and information relating to [petitioner's] knowledge of and activities related to climate change." See App., *infra*, 2a. She chose to focus on petitioner's statements, made outside Massachusetts, related to climate change and climate policy. See Resp. Mass. S.J.C. Br. 10-15. When pressed at oral argument for the most direct contact by petitioner with Massachusetts consumers, counsel for respondent acknowledged that petitioner's Massachusetts advertisements did not communicate directly or indirectly about climate change. Rather, according to counsel for respondent, the only way that petitioner could possibly have violated Massachusetts' consumer protection law was on the theory that, in unrelated advertising, petitioner somehow had an affirmative obligation to warn consumers about climate change. See Mass. S.J.C. Oral Arg. Tr. 54:14-56:4.

The Massachusetts Supreme Judicial Court nevertheless affirmed. App., *infra*, 1a-26a. As a preliminary matter, the Supreme Judicial Court stated that the exercise

of general personal jurisdiction would be inappropriate because petitioner is not resident in Massachusetts and does not maintain sufficiently general contacts with Massachusetts. *Id.* at 3a. As is relevant here, however, the Supreme Judicial Court held that the trial court could exercise specific personal jurisdiction over petitioner. *Id.* at 4a-17a.

The Supreme Judicial Court first determined that the exercise of personal jurisdiction over ExxonMobil was lawful under Massachusetts's long-arm statute, Mass. Gen. Laws ch. 223A, § 3. App., *infra*, 7a-12a. Acknowledging that the issue whether the civil investigative demand "arises from" the network of service stations was a "more difficult question," the court looked to the terms of the brand fee agreement. *Id.* at 9a (alteration omitted). The court reasoned that, because Section 15(a) of the brand fee agreement gives petitioner "the right to control the advertising of its fossil fuel products to Massachusetts consumers," the civil investigative demand "arises from the [brand fee agreement] and [petitioner's] network of branded fuel stations in Massachusetts." *Id.* at 10a-11a (internal quotation marks, citation, and alteration omitted). In response to petitioner's argument that its licensees' conduct was not connected to the subject matter under investigation regarding climate change, the court explained that, "[i]n order to determine whether [petitioner] engaged in deceptive advertising at its franchisee stations, by either giving a misleading impression or failing to disclose material information about climate change, [respondent] must first ascertain what [petitioner] knew about that topic." *Id.* at 12a.

The Supreme Judicial Court then turned to the question of whether the exercise of personal jurisdiction over petitioner comported with due process. App., *infra*, 12a-17a. The court concluded that petitioner had purposefully

availed itself of the privilege of conducting business in Massachusetts based on its status as the licensor of service stations throughout Massachusetts, as well as through its contract governing that relationship. *Id.* at 13a-14a, 15a.[4] The court also relied on petitioner's few Massachusetts-specific advertisements, which, as discussed above, related only to engine-lubrication products and in no way referenced climate change. *Id.* at 14a; see p. 5, *supra*.

As to the requirement that the subject matter of the investigation arise out of or relate to petitioner's forum contacts, the Supreme Judicial Court relied on its earlier decision in *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549 (1994), which had established a but-for test for determining relatedness. App., *infra*, 15a. The court proceeded to identify two grounds for how the civil investigative demand arose from petitioner's forum contacts. The first was that respondent possessed the ability to investigate "deceptive advertising to consumers," seemingly referring to the unspecified advertisements by the licensees on which the court had focused in its discussion of Massachusetts' long-arm statute. *Ibid.*; see *id.* at 12a. The second was that the statute under which respondent was proceeding "also requires honest disclosures in transactions between businesses." *Id.* at 15a. Although it did not identify

[4] The court noted in passing that petitioner operates a website that is accessible in Massachusetts (and around the country) through which visitors can locate the closest Exxon- or Mobil-branded service station. App., *infra*, 14a. But similar to national advertisements, see p. 5 n.2, *supra*, such a website does not specifically target Massachusetts residents and is therefore irrelevant to the specific-jurisdiction analysis. See *NexLearn, LLC* v. *Allen Interactions, Inc.*, 859 F.3d 1371, 1379 (Fed. Cir. 2017); *Jennings* v. *AC Hydraulic A/S*, 383 F.3d 546, 549 (7th Cir. 2004); *Toys 'R' Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003).

any misrepresentations, the court suggested that respondent could investigate "[p]ossible misrepresentations or omissions about the threat that climate change poses to [petitioner's] business model." *Id.* at 16a. The court reasoned that any such statements would be "highly relevant to [petitioner's] contracts with" its licensees. *Ibid.* Notably, the court did not identify any requests in the civil investigative demand that would target communications between petitioner and its licensees, nor had respondent ever justified her investigation on that basis.[5]

REASONS FOR GRANTING THE PETITION

This case presents a foundational question regarding the constitutional limitations on courts' exercise of personal jurisdiction—a question that has divided the lower courts since this Court identified it as an open one in *Helicopteros Nacionales de Columbia, S.A.* v. *Hall*, 466 U.S. 408 (1984), and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991). That question is what type of relationship is required between a plaintiff's claims and a defendant's forum contacts in order to satisfy the constitutional requirement that the claims arise out of or relate to the contacts. This case presents an ideal opportunity to resolve the question and simultaneously to address a subsidiary question that is vexing the lower courts: specifically, whether an unexercised contractual power to be involved in another party's potential contact with a forum State has any relevance to the specific-jurisdiction inquiry (and, if so, in what way).

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[5] The court disclaimed any reliance on the Attorney General's asserted interest in investigating whether petitioner made misrepresentations to purchasers of its securities, noting that "very few of the [civil investigative demand's] requests even mention investors or securities" and that those requests could be deemed to relate to "the Attorney General's consumer deception theory." App., *infra*, 17a n.9.

The disarray in the lower courts provides reason enough for further review. What is more, the Massachusetts Supreme Judicial Court's decision is difficult to reconcile with this Court's decisions setting out the requirements for specific jurisdiction. If the decision below is allowed to stand, it will establish a high-water mark for the exercise of specific personal jurisdiction. Because this case satisfies all of criteria for this Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Under Review Squarely Implicates A Conflict Among The Courts Of Appeals And State Courts of Last Resort

In *Helicopteros*, *supra*, this Court explained that specific personal jurisdiction exists only when a controversy "is related to or 'arises out of' a defendant's contacts with the forum." 466 U.S. at 414. At the same time, however, the Court "decline[d] to reach" the question of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." *Id.* at 415 n.10. Seven years later, in *Carnival Cruise Lines*, *supra*, the Court observed that the lower court had applied a "but for" standard for determining whether the claims were sufficiently related to the defendant's contacts with the forum, but determined that it did not need to address the personal-jurisdiction question because an alternative ground was dispositive. See 499 U.S. at 588-589.

In the absence of further guidance from this Court, subsequent decisions from the lower courts have "lack[ed] any consensus" on this important issue. *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318 (3d Cir. 2007). As then-Judge Gorsuch observed, "[s]ome courts have interpreted the phrase 'arise out of' as endorsing a theory of 'but-for' causation, while other courts have required

proximate cause to support the exercise of specific jurisdiction." *Dudnikov* v. *Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (citations omitted). The decision below squarely implicates the conflict in the lower courts, and this Court should grant review to resolve it.

1. a. Like the Massachusetts Supreme Judicial Court, the Ninth Circuit and the Washington Supreme Court have applied a but-for test to determine the sufficiency of the nexus between the plaintiff's claims and the defendant's contacts with the forum. Under that test, the necessary relationship exists if the defendant's contacts could be "considered the first step in a train of events that results in the [plaintiff's] injury" such that, "[b]ut for" the defendant's contacts, "the plaintiff would not have been injured." *Tatro* v. *Manor Care, Inc.*, 625 N.E.2d 549, 553-554 (Mass. 1994); see *Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *Shute* v. *Carnival Cruise Lines*, 783 P.2d 78, 81-82 (Wash. 1989).

Those courts have reasoned that the but-for test "preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum" without imposing "unnecessar[y] limits" on the notion of relatedness. *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585 (1991). In those jurisdictions, "any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction." *Dudnikov*, 514 F.3d at 1078.

b. Other courts, however, have criticized the but-for standard as being "vastly overinclusive." *O'Connor*, 496 F.3d at 322. In the words of one such court, the but-for approach to relatedness has "no limiting principle"; it "embraces every event that hindsight can logically iden-

tify in the causative chain." *Nowak* v. *Tak How Investments, Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996), cert. denied, 520 U.S. 1155 (1997). As another court put it, "[t]he consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond." *O'Connor*, 496 F.3d at 322 n.12 (quoting William L. Prosser, *The Law of Torts* 236 (4th ed. 1971)).

For those reasons, the First, Third, Sixth, Seventh, and Eleventh Circuits, as well as the Oregon Supreme Court, have taken the position that "more than mere but-for causation is required to support a finding of personal jurisdiction." *Beydoun* v. *Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014); see *Nowak*, 94 F.3d at 715; *O'Connor*, 496 F.3d at 322; *uBID, Inc.* v. *GoDaddy Group, Inc.*, 623 F.3d 421, 430 (7th Cir. 2010); *Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1223-1224 (11th Cir. 2009); *Robinson* v. *Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013). Under that standard, a but-for causal connection between the plaintiff's claim and the defendant's contacts is insufficient; instead, the claim should be a foreseeable consequence of the contacts. As one court put it, "the plaintiff's cause of action must be proximately caused by the defendant's contacts with the forum [S]tate." *Beydoun*, 768 F.3d at 507-508.

The courts that have adopted that stricter standard have explained that it "better comports with the relatedness [requirement]" because foreseeability is a "significant component of the jurisdictional inquiry." *Nowak*, 94 F.3d at 715. After all, "[t]he animating principle behind the relatedness requirement is the notion of a tacit quid pro quo that makes litigation in the forum reasonably foreseeable." *O'Connor*, 496 F.3d at 322. "If but-for causation sufficed, then defendants' jurisdictional obligations would bear no meaningful relationship to the scope of the

'benefits and protection' received from the forum." *Ibid.* (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)).

The First Circuit's application of the standard is emblematic of the courts that have incorporated proximate cause and foreseeability in the personal-jurisdiction inquiry. That court requires that "[t]he evidence produced * * * show that the cause of action either arises directly out of, or is related to, the defendant's forum-based contacts." *Harlow* v. *Children's Hospital*, 432 F.3d 50, 60-61 (1st Cir. 2005). In other words, "the defendant's in-state conduct must form an important, or at least material, element of proof in the plaintiff's case." *Id.* at 61 (internal quotation marks, citation, and alterations omitted).

c. The conflict concerning the standard for relatedness is entrenched and has repeatedly been acknowledged by federal and state courts alike. See, *e.g.*, *Myers* v. *Casino Queen*, 689 F.3d 904, 912-913 (8th Cir. 2012); *Dudnikov*, 514 F.3d at 1078; *Chew* v. *Dietrich*, 143 F.3d 24, 29 (2d Cir.), cert. denied, 525 U.S. 948 (1998); *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 333-336 (D.C.) (en banc), cert. denied, 530 U.S. 1270 (2000). As the Texas Supreme Court observed over a decade ago, the lingering conflict stems in part from the "relatively little guidance" this Court has provided on the question. *Moki Mac River Expeditions* v. *Drugg*, 221 S.W.3d 569, 579-580 (2007).

Notably, in its recent decision in *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017), the Court largely sidestepped the question of the appropriate standard for relatedness. To be sure, the Court rejected the California Supreme Court's idiosyncratic "sliding scale" approach to relatedness, under which the requisite nexus between a plaintiff's claims and a defendant's contacts varied depending on how "wide ranging" the de-

fendant's contacts were (even if the contacts were unrelated to the suit). See *id.* at 1778, 1781. But the Court stopped short of "address[ing] exactly how a defendant's activities must be tied to the forum for a court to properly exercise specific personal jurisdiction." *SPV Osus Ltd.* v. *UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018). Because the Court did not address "the other sufficient minimum-contacts tests that different circuits employ," *Lawson* v. *Simmons Sporting Goods, Inc.*, Civ. No. 16-83, 2018 WL 2710708, at *6 (Ark. Ct. App. June 6, 2018) (Murphy, J., dissenting), the lower courts that had previously weighed in on the conflict have continued to apply the same standards after *Bristol-Myers*. See, *e.g.*, *Estate of Thompson ex rel. Thompson* v. *Phillips*, No. 16-4123, 2018 WL 3387218, at *4 (3d Cir. July 11, 2018); *Matus* v. *Premium Nutraceuticals, LLC*, 715 Fed. Appx. 662, 663 (9th Cir. 2018).

2. The decision below squarely implicates the conflict among the lower courts. When considering whether there is specific jurisdiction to compel compliance with an investigatory document request, a court focuses on the nexus between the document request or subject matter of the investigation and the defendant's forum contacts. See *Gucci America, Inc.* v. *Weixing Li*, 768 F.3d 122, 141-142 (2d Cir. 2014); see also App., *infra*, 4a. In holding that there was a sufficient connection between the civil investigative demand and petitioner's contacts with Massachusetts to comport with due process, the Supreme Judicial Court relied on its earlier decision in *Tatro*, which had adopted the but-for test for relatedness. See *id.* at 15a. Notably, the court rejected petitioner's contention that it should revisit the appropriate standard in light of this Court's decision in *Bristol-Myers*. See *id.* at 13a n.8.

The Supreme Judicial Court proceeded to engage in an analysis, and reached a result, that could be justified

only under its "more 'liberal approach'" to the relatedness inquiry. Resp. Mass. S.J.C. Br. 28 n.28. Respondent's civil investigative demand sought documents relating to petitioner's knowledge of climate change and the relationship between petitioner's products and climate change. See, *e.g.*, *id.* at 1; Mass. S.J.C. Oral Arg. Tr. 39:1-4. But the Supreme Judicial Court did not seriously consider the relationship between those topics and any of petitioner's actual contacts with Massachusetts, despite petitioner's arguments that such a relationship was lacking. Instead, the court summarily (and erroneously) concluded that the requirements of due process were satisfied. Compare Pet. Mass. S.J.C. Br. 22-30 with App., *infra*, 15a-16a.

In its brief analysis, the Supreme Judicial Court focused principally on potential "deceptive advertising to consumers." App., *infra*, 15a; see *id.* at 9a-12a. But counsel for respondent had been refreshingly candid on that score, acknowledging that there was "nothing in the record * * * that indicates a specific advertisement to consumers" concerning climate change, and thus nothing in the advertisements at issue that was itself deceptive. Mass. S.J.C. Oral Arg. Tr. 54:14-55:4, 55:23-25. Nor was there any contrary evidence in the record. Although petitioner's licensees are presumed to have created ads of their own, those ads are not in the record. And as for the limited Massachusetts-specific ads created by petitioner since 2011, those ads concerned engine-lubrication products (*i.e.*, motor oil) and did not in any way address climate change. See p. 5, *supra*.

The Supreme Judicial Court's other asserted basis for specific personal jurisdiction—the existence of "[p]ossible misrepresentations or omissions" made by petitioner to its licensees, App., *infra*, 15a-16a—is even further afield. Not only did the court fail to identify any such misrepresentations, but it failed to acknowledge either that the

civil investigative demand did not contain a single request targeting communications between petitioner and its licensees or that respondent never justified her investigation on that basis. *Ibid.*; see Mass. S.J.C. App. 103-112.

If the Supreme Judicial Court had applied the more stringent proximate-cause standard for relatedness, there can be no doubt that the outcome would have been different, because the identified contacts could not possibly have been sufficient to establish specific jurisdiction.[6] Under the proximate-cause standard, the defendant's "in-state conduct must form an important, or at least material, element of proof in the plaintiff's case." *Harlow*, 432 F.3d at 61 (internal quotation marks, citation, and alterations omitted). Because the identified contacts between petitioner and Massachusetts did not concern climate change, they could not have been either "important" or "material" to the subject matter of the civil investigative demand.

The civil investigative demand itself proves as much. In the demand, respondent sought documents regarding all aspects of petitioner's knowledge or research regarding climate change issues dating back forty years. Respondent specifically sought communications with think tanks and policy groups and documents pertaining to speeches made around the world. Advertisements for engine-lubrication products and local service stations—ads that do not address climate change—self-evidently do not fall within, or materially relate to, either those requests or the subject matter of the investigation. And the same is true for hypothetical misrepresentations or omissions to petitioner's licensees, especially given respondent's fail-

[6] Indeed, petitioner maintains that the identified contacts were insufficient under any standard.

ure even to request any communications that could contain such misstatements. Under the more stringent proximate-cause standard, therefore, it would be impossible to conclude that the subject matter of the civil investigative demand is sufficiently related to petitioner's limited Massachusetts contacts.

3. The conflict concerning the standard for relatedness is particularly significant here because the Massachusetts Supreme Judicial Court and the First Circuit have taken opposite sides of the conflict. Compare App., *infra*, 15a, and *Tatro*, 625 N.E.2d at 553-554, with *Harlow*, 432 F.3d at 60-61. Without this Court's intervention, nonresident defendants in Massachusetts will be subject to substantively different standards for personal jurisdiction, depending on the availability of a federal forum. In most cases, a savvy plaintiff will seek to hale a nonresident defendant into Massachusetts state court, where the standard is less demanding.[7] The "discouragement" of such forum-shopping has been a concern of this Court at least as far back as *Erie Railway Co.* v. *Tompkins*, 304 U.S. 64 (1938). See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). And the risk of such forum-shopping underscores why this Court's review is so urgently needed.

B. The Decision Under Review Also Deepens Confusion Among The Courts Of Appeals And State Courts of Last Resort

This case warrants the Court's review for an additional reason. In considering which contacts could serve as a basis for specific jurisdiction, the Supreme Judicial Court focused on the fact that petitioner had a contractual

[7] The same problem exists in inverse form in Oregon, where federal courts apply the but-for standard but state courts apply the more rigorous proximate-cause standard. See pp. 13-14, *supra*.

right to review and approve advertising by its Massachusetts licensees, thereby allowing the court to take the licensees' advertising into account. App., *infra*, 15a; see *id.* at 9a-11a. But the record contains no evidence that petitioner actually exercised that right. And the question whether the existence of such a contractual right, without evidence that the right was acted upon, can support specific jurisdiction has itself created confusion in the lower courts. Above and beyond the conflict on the standard for relatedness, therefore, this case presents the Court with an opportunity to clarify whether an unexercised contractual right regarding a third-party's in-forum behavior constitutes a contact for purposes of the specific-jurisdiction inquiry.

1. The Ninth Circuit, as well as the courts of last resort of Alabama and the District of Columbia, has suggested that the bare right to control the in-forum activity of a third party, without more, could be sufficient to attribute the third party's conduct to the controlling party for purposes of personal jurisdiction. In *Williams* v. *Yamaha Motor Co.*, 851 F.3d 1015 (2017), the Ninth Circuit held that consumers failed to establish specific jurisdiction over a Japanese manufacturer based on the activities of its American subsidiary. See *id.* at 1024-1025. Relying on this Court's observation that "[a]gency relationships * * * may be relevant to the existence of *specific* jurisdiction," *Daimler AG* v. *Bauman*, 571 U.S. 117, 135 & n.13 (2014), the Ninth Circuit stated that, "under any standard for finding an agency relationship, the parent company must have the right to substantially control its subsidiary's activities." 851 F.3d at 1024-1025. The court ultimately concluded, however, that the substantial-control standard had not been met. See *id.* at 1025.

The circumstances in *Jackson* v. *Loews Washington Cinemas, Inc.*, 944 A.2d 1088 (D.C. 2008), and *Worthy* v.

Cyberworks Technologies, Inc., 835 So. 2d 972 (Ala. 2002), were similar. In *Jackson*, the District of Columbia Court of Appeals affirmed a lower court's holding that it lacked specific jurisdiction over a movie theater operator. See 944 A.2d at 1091. The court rejected the plaintiff's contention that advertisements placed by the operator's parent established contacts sufficient to create jurisdiction over the operator. See *id.* at 1094. The court observed that "the right to control, rather than its actual exercise, is usually dispositive of whether there is an agency relationship," but it ultimately concluded that evidence of the existence of such a right was lacking. *Id.* at 1097 (citation omitted). Similarly, in *Worthy*, the Alabama Supreme Court determined that a lower court had lacked personal jurisdiction over a nonresident defendant because the plaintiffs had "failed to produce substantial evidence that [the defendant] had a right of control" over the alleged in-state agents. 835 So. 2d at 981.

2. By contrast, the Fifth and Federal Circuits, as well as the Iowa and Tennessee Supreme Courts, have seemingly adopted the rule that a defendant must actually exercise control over an in-state actor for its actions to be imputed to the defendant for personal-jurisdiction purposes. For example, in *Celgard, LLC* v. *SK Innovation Co.*, 792 F.3d 1373 (2015), the Federal Circuit held that a patentee had failed to make a prima facie showing of personal jurisdiction in North Carolina over its competitor battery-part manufacturer. See *id.* at 1380. Although the court recognized that the contacts of a third party may be imputed to a defendant under an agency theory, it observed that, "in order to establish jurisdiction under the agency theory, the plaintiff must show that the defendant *exercises control* over the activities of the third-party." *Id.* at 1379 (emphasis added). Because the record did not

show any attempt by the defendant "purposefully [to] direct or control the activities of the dealers in North Carolina," the court held that the plaintiff had "not shown the requisite control for jurisdiction to be premised on the acts of agents." *Ibid.* Similarly, in *In re Chinese-Manufactured Drywall Product Liability Litigation*, 753 F.3d 521 (2014), the Fifth Circuit held that a lower court had properly exercised personal jurisdiction over a foreign parent company given proof of control over a domestic subsidiary. See *id.* at 530-532, 534.

The Tennessee and Iowa Supreme Courts have engaged in similar analyses. In *Gordon* v. *Greenview Hospital, Inc.*, 300 S.W.3d 635 (2009), the Tennessee Supreme Court determined that an agency analysis "hinges on the right to control the agent's actions, and, ultimately, the fact of actual control over the agent." *Id.* at 653 (citation omitted). It therefore declined to impute the activities of two parent companies to a subsidiary for personal-jurisdiction purposes where the plaintiff did not present evidence "regarding the extent to which [the parents] exercised control over the day-to-day operation of [the subsidiary]." *Id.* at 653-654. Likewise, in *Ross* v. *First Savings Bank*, 675 N.W.2d 812 (2004), the Iowa Supreme Court explained that, "for jurisdictional purposes, the agent must act in the forum state under the control of the nonresident principal." *Id.* at 819. The court determined that, in that case, the in-state actor had "tremendous discretion" to act as it wished, rendering the exercise of personal jurisdiction over the nonresident defendant inappropriate. *Ibid.*

3. The Supreme Judicial Court based personal jurisdiction principally on the ground that petitioner retained the right to review and approve licensee advertising. App., *infra*, 15a; see *id.* at 9a-11a. The court did not discuss whether petitioner actually exercised such control

over the licensees' ads, much less over ads relating to climate change. Accordingly, the Supreme Judicial Court's decision is inconsistent with the decisions requiring the actual exercise of control over a third party for purposes of determining whether the contacts of that party can properly be imputed to the defendant. Indeed, the Supreme Judicial Court's decision goes further than any of the foregoing decisions, insofar as it *upholds* the exercise of personal jurisdiction based on a mere right to control.

This case presents an excellent opportunity for the Court to resolve the resulting confusion. In answering the question presented, the Court should make clear that an unexercised contractual right regarding a third-party's in-forum behavior does not constitute a contact for purposes of the specific-jurisdiction inquiry.

C. The Decision Under Review Is Erroneous

The Massachusetts Supreme Judicial Court's reasoning is profoundly flawed and inconsistent with settled due process limitations on a court's exercise of personal jurisdiction. Further review is warranted for that reason as well.

1. a. In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court first identified the broad contours of the doctrine of specific personal jurisdiction—specifically, that the defendant must have "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotation marks and citation omitted). To establish the existence of minimum contacts, a plaintiff must show, first, that the defendant has purposefully directed his activities toward the forum, and, second, that the litigation arises out of or relates to those activities. See, *e.g.*, *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985).

The second of those two requirements, the relatedness requirement, can be traced back to *International Shoe* itself. There, the Court observed that personal jurisdiction may be exercised over a defendant when its activities in a State "give rise to the liabilities sued on," but not when the "causes of action [are] unconnected with the activities" in the State. 326 U.S. at 317. Accordingly, ever since *International Shoe*, "the relationship among the defendant, the forum, and the litigation * * * became the central concern of the inquiry into [specific] personal jurisdiction." *Daimler*, 571 U.S. at 126.

b. While this Court has not articulated a definitive test for relatedness, it has sought to "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475 (internal quotation marks and citations omitted). Rather, "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *Id.* at 474 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)). Such "foreseeability," moreover, is "critical to due process analysis." *Ibid.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297). In the context of the purposeful-availment requirement, the Court has explained that "[j]urisdiction is proper * * * where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State." *Id.* at 475 (internal quotation marks, citation, and emphasis omitted).

In its most recent personal-jurisdiction cases, the Court has emphasized the need to delineate appropriate exercises of specific jurisdiction from those that are "loose and spurious form[s] of general jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1781. Accordingly, it has increasingly

focused on the necessity of an "affiliation between the forum and the underlying controversy." *Goodyear*, 564 U.S. at 919 (citation and alteration omitted). The Court has observed that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks and citation omitted). That is, not only must there be a "connection" between the defendant's suit-related conduct and the forum State, but that "connection" must itself be "substantial." *Walden*, 571 U.S. at 284. The Court has emphasized that a defendant foreign to a State is "not answerable in that State with respect to * * * matters unrelated to the forum connections." *Goodyear*, 564 U.S. at 923.

c. The but-for standard for relatedness applied by the Supreme Judicial Court and other courts cannot be reconciled with the due process limitations on the exercise of personal jurisdiction. A but-for standard can be satisfied by the loosest of connections between a plaintiff's claims and a defendant's forum contacts, and it thus lacks the element of foreseeability that is "critical to due process analysis." *Burger King*, 471 U.S. at 474 (internal quotation marks and citation omitted). Instead, the but-for standard amounts to an impermissible "mechanical or quantitative" approach, *International Shoe*, 326 U.S. at 317, under which a State can subject a foreign corporation to the jurisdiction of its courts based on contacts that are irrelevant to the suit or investigation as long as they form a part in the "train of events that results in the [plaintiff's] injury." *Tatro*, 625 N.E.2d at 553.

The decision under review neatly illustrates the problem. Respondent has never explained how advertisements in Massachusetts that indisputably do not address climate change are connected to expansive requests for all documents about climate change stretching back forty

years. See Mass. S.J.C. Oral Arg. Tr. 55:16-25 (acknowledging the lack of references to climate change in the ads at issue). Nor has respondent explained why those ads have any relation to statements made to international audiences about the issue of climate change. And the same is true for the Supreme Judicial Court's additional notion that petitioner's communications with its licensees could form relevant contacts: any such communications cannot be a substantial or material basis for the civil investigative demand, for the simple reason that the demand does not request any documents relating to them.

2. In addition, the Supreme Judicial Court's apparent reliance on petitioner's unexercised right to review and approve ads that petitioner played no role in creating similarly runs afoul of the longstanding principle, based in due process, that the personal-jurisdiction inquiry focuses on "actions by the defendant [*it*]*self*." *Burger King*, 471 U.S. at 475; accord *Walden*, 571 U.S. at 284. A corollary of that principle is that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U.S. at 286.

The mere existence of contractual relations between a foreign defendant and an in-state third party thus cannot be a basis for personal jurisdiction. See *Bristol-Myers*, 137 S. Ct. at 1783; *Burger King*, 471 U.S. at 478. That is because a contract, in and of itself, is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Burger King*, 471 U.S. at 479 (citation omitted).

To be sure, how a foreign corporation *acts* on its contractual rights is often of great significance to whether personal jurisdiction is appropriate. As the Court recently noted, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take

action there." *Daimler*, 571 U.S. at 135 n.13. But personal jurisdiction cannot be based on contractual rights that are never exercised—here, petitioner's right to review and approve advertising by its Massachusetts licensees.

By failing to analyze petitioner's actual conduct, the Supreme Judicial Court effectively relied on the mere existence of the contract between petitioner and its licensees, which this Court has indicated is impermissible. Without any showing that petitioner actually exercised control over the advertisements of its licensees, it cannot be said that petitioner had suit-related contacts with Massachusetts that satisfied the relatedness requirement. Like the but-for standard, a standard that considers only the existence of contractual rights and not their actual exercise is impermissibly "mechanical or quantitative," *International Shoe*, 326 U.S. at 317; *Burger King*, 471 U.S. at 478-479, and could easily lead to a defendant's being haled into a forum that it could not reasonably anticipate, see *Burger King*, 471 U.S. at 474. In that respect, too, the Massachusetts Supreme Judicial Court's reasoning conflicts with this Court's due process jurisprudence. Further review is warranted to correct that reasoning.

D. The Question Presented Is An Important One, And This Case Is An Ideal Vehicle To Address It

1. The question presented is an exceptionally important one that warrants the Court's immediate review. This Court has established due process limits on the circumstances in which defendants can be subject to specific jurisdiction. By upholding the exercise of personal jurisdiction based on an insufficient connection between the suit-related conduct and the defendant's in-state activities, the decision below eviscerates the fairness and certainty that those limits are meant to provide.

The fundamental premise of the specific-jurisdiction inquiry is that specific jurisdiction is a "limited form of submission to a State's authority," subjecting a nonresident defendant to the State's judicial power only "to the extent that power is exercised in connection with the defendant's activities touching on the State." *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion). Put another way, "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter." *Ibid.*

Those due process concerns are only heightened in the particular context in which this case arises—a government investigation that seeks to coopt the power of the state courts. As has been demonstrated by the New York Attorney General's subpoena for similar materials, a State can compel the production of millions of pages of documents regarding conduct dating back decades, in the name of investigating potential claims under state law. See App., *infra*, 39a (noting that 1.4 million pages of documents had already been produced to the New York Attorney General as of December 2016). Such investigations can disrupt company operations and cost tens of millions of dollars.

A State can accomplish all of this without any independent judicial oversight of the merits of the inquiry and with only minimal oversight of the scope of its document requests. Indeed, in many cases (as here), the statute under which the State is proceeding does not pose significant limits, whether geographic or otherwise, on the investigation's reach. Accordingly, it is especially important for this Court to enforce the few constitutional protections afforded to a subject of such an investigation—here, the protections of the Due Process Clause that are implicated

when a State foreign to the relevant conduct seeks to invoke the judicial power to enforce its investigative demands.

2. This case is an ideal vehicle to address the question presented. Because the Supreme Judicial Court determined that petitioner was not subject to general jurisdiction in Massachusetts, the existence of specific jurisdiction is outcome-determinative. App., *infra*, 3a-4a. And the Supreme Judicial Court's decision starkly presents the choice between the but-for and proximate-cause standards for relatedness. Relying on the more lenient but-for standard, the Supreme Judicial Court affirmed an order compelling petitioner to produce materials to a Massachusetts state official despite the thinnest of connections between petitioner and Massachusetts and the utter irrelevance of those connections to the subject matter of the investigation. There can be no serious doubt that, under any form of proximate-cause standard, the identified contacts—advertisements that do not discuss climate change and theoretical misrepresentations or omissions to licensees—could not provide the requisite connection to requests for decades' worth of documents regarding climate change.

In light of the clean factual record, the decision under review gives the Court an ideal opportunity to answer the question it posed in *Helicopteros* as to "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary" in order to establish specific personal jurisdiction. 466 U.S. at 415 n.10. The Court should grant review, and answer that question, in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2018

APPENDIX

TABLE OF CONTENTS

APPENDIX A

SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. SJC - 12376

EXXON MOBIL CORPORATION

v.

ATTORNEY GENERAL.

Argued December 5, 2017
Decided April 13, 2018

Present: Gants, C.J., Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

OPINION

CYPHER, J.

In 2015, news reporters released internal documents from Exxon Mobil Corporation (Exxon) purporting to show that the company knew, long before the general public, that emissions from fossil fuels—Exxon's principal product—contributed to global warming and climate change, and that in order to avoid the consequences of climate change it would be necessary to reduce drastically global fossil fuel consumption. The documents also purported to establish that despite Exxon's knowledge of climate risks, the company failed to disclose that knowledge

to the public, and instead sought to undermine the evidence of climate change altogether, in order to preserve its value as a company.

Upon reviewing this information, the Attorney General believed that Exxon's marketing or sale of fossil fuel products in Massachusetts may have violated the State's primary consumer protection law, G. L. c. 93A. Based on her authority under G. L. c. 93A, § 6, the Attorney General issued a civil investigative demand (C.I.D.) to Exxon, seeking documents and information relating to Exxon's knowledge of and activities related to climate change.

Exxon responded by filing a motion in the Superior Court, pursuant to G. L. c. 93A, § 6(7), seeking to set aside or modify the C.I.D. Exxon argued that (1) Exxon is not subject to personal jurisdiction in Massachusetts; (2) the Attorney General is biased against Exxon and should be disqualified; (3) the C.I.D. violates Exxon's statutory and constitutional rights; and (4) Exxon's Superior Court case should be stayed pending a ruling on Exxon's request for relief in Federal court.[1] The Attorney General cross-moved to compel Exxon to comply with the C.I.D. A Superior Court judge denied Exxon's motion and allowed the Attorney General's cross motion to compel. Exxon appealed, and we transferred the case from the Appeals Court on our own motion. We conclude that there is personal jurisdiction over Exxon with respect to the Attorney General's investigation, and that the judge did not abuse

[1] One day before filing its instant Superior Court motion, Exxon filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Texas, challenging the C.I.D. on constitutional grounds not raised in this action. Exxon Mobil Corp. *vs.* Healey, U.S. Dist. Ct., No. 4:16-CV-469, (N.D. Tex. June 15, 2016).

her discretion in denying Exxon's requests to set aside the C.I.D., disqualify the Attorney General, and issue a stay. We affirm the judge's order in its entirety.[2]

1. *Personal jurisdiction.* Exxon's primary argument is that, as a nonresident corporation, it is not subject to personal jurisdiction in Massachusetts. For a nonresident to be subject to the authority of a Massachusetts court, the exercise of jurisdiction must satisfy both Massachusetts's long-arm statute, G. L. c. 223A, § 3, and the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. *SCVNGR, Inc.* v. *Punchh, Inc.*, 478 Mass. 324, 325 (2017). The Attorney General "has the burden of establishing the facts upon which the question of personal jurisdiction over [Exxon] is to be determined." *Droukas* v. *Divers Training Academy, Inc.,* 375 Mass. 149, 151 (1978), quoting *Nichols Assocs.* v. *Starr,* 4 Mass. App. Ct. 91, 93 (1976).

A business is a "resident," and therefore subject to the forum's general jurisdiction, if the business is domiciled or incorporated or has its principal place of business in the forum State. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown,* 564 U.S. 915, 924, 131 (2011). Exxon is incorporated in New Jersey and headquartered in Texas. Because "[t]he total of [Exxon's] activities in Massachusetts does not approach the volume required for an assertion of general jurisdiction," *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 772 (1994), citing *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 413-416 (1984), our inquiry in this case concerns the exercise of specific jurisdiction. This requires an "affiliatio[n] between the forum

[2] We acknowledge the amicus briefs submitted by five former Massachusetts Attorneys General and the Chamber of Commerce of the United States of America.

and the underlying controversy" (citation omitted). *Goodyear Dunlop Tires Operations, S.A.*, *supra* at 919, 131 S. Ct. 2846. See G. L. c. 223A, § 3 (granting jurisdiction over claims "arising from" certain enumerated grounds occurring within Massachusetts); *Tatro*, *supra* at 772, 625 N.E.2d 549, citing *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174 (1985) ("The plaintiff's claim must arise out of, or relate to, the defendant's forum contacts").

Exxon denies any such affiliation in this case, contending that it "engages in no suit-related conduct" in Massachusetts. Here there is no "suit," however, as this matter involves an investigation—a precursor to any formal legal action by the Attorney General. So while our typical inquiry asks whether there is a nexus between the defendant's in-State activities and the plaintiff's legal *claim(s)*, the investigatory context requires that we broaden our analysis to consider the relationship between Exxon's Massachusetts activities and the "central areas of inquiry covered by the [Attorney General's] investigation, regardless of whether that investigation has yet to indicate [any] . . . wrongdoing." Securities & Exch. Comm'n *vs.* Lines Overseas Mgt., Ltd., U.S. Dist. Ct., No. Civ. A. 04-302 RWR/AK, (D.D.C. Jan. 7, 2005). Cf. *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 141-142 (2d Cir. 2014) (personal jurisdiction in nonparty discovery dispute "focus[es] on the connection between the nonparty's contacts with the forum and the discovery order at issue"); *Matter of an Application to Enforce Admin. Subpoenas Duces Tecum of the Secs. Exch. Comm'n* v. *Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (personal jurisdiction over nonresident in subpoena enforcement action, which was part of investigation into potential violation of Federal securities laws, where "[t]he underlying investigation and th[e] subpoena . . . ar[o]se out of [nonresident's] contacts with the United

States"). At this stage, the Attorney General is statutorily authorized to investigate whatever conduct she believes may constitute a violation of G. L. c. 93A. G. L. c. 93A, § 6(1). We therefore must construe the C.I.D. broadly, and in connection with what G. L. c. 93A protects.

General Laws c. 93A "is a statute of broad impact" that prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney* v. *Westwood Auto, Inc.*, 366 Mass. 688, 693-694 (1975). See G. L. c. 93A, § 2(*a*). "Under [G. L. c.] 93A, an act or practice is unfair if it falls 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness'; 'is immoral, unethical, oppressive, or unscrupulous'; and 'causes substantial injury to consumers.' " *Walsh* v. *TelTech Sys., Inc.*, 821 F.3d 155, 160 (1st Cir. 2016), quoting *PMP Assocs., Inc.* v. *Globe Newspaper Co.*, 366 Mass. 593, 596 (1975). The same protection also applies in the commercial context, as G. L. c. 93A extends "to persons engaged in trade or commerce in business transactions with other persons also engaged in trade or commerce." *Kraft Power Corp.* v. *Merrill*, 464 Mass. 145, 155 (2013), quoting *Manning* v. *Zuckerman*, 388 Mass. 8, 12 (1983). See *Kraft Power Corp.*, *supra*, citing G. L. c. 93A, § 11 ("The development of the statute . . . suggests that the unfair or deceptive acts or practices prohibited are those that may arise in dealings between discrete, independent business entities").

Our analysis of what constitutes an unfair or deceptive act or practice requires a case-by-case analysis, see *Kattar* v. *Demoulas*, 433 Mass. 1, 14 (2000), and is neither dependent on traditional concepts nor limited by preexisting rights or remedies. *Travis* v. *McDonald*, 397 Mass. 230, 232 (1986). "This flexible set of guidelines as to what

should be considered lawful or unlawful under c. 93A suggests that the Legislature intended the terms 'unfair and deceptive' to grow and change with the times." *Nei* v. *Burley*, 388 Mass. 307, 313 (1983). The Attorney General's investigation concerns climate change caused by manmade greenhouse gas emissions—a distinctly modern threat that grows more serious with time, and the effects of which are already being felt in Massachusetts. See, e.g., *Massachusetts* v. *Environmental Protection Agency*, 549 U.S. 497, 521-523, 127 S. Ct. 1438 (2007) (describing current and future harms from climate change affecting Massachusetts). More particularly, the investigation is premised on the Attorney General's belief that Exxon may have misled Massachusetts residents about the impact of fossil fuels on both the Earth's climate and the value of the company, in violation of c. 93A. "Despite [Exxon's] sophisticated internal knowledge" about that impact, the Attorney General states, "it appears that . . . Exxon failed to disclose what it knew to either the consumers who purchased its fossil fuel products or investors who purchased its securities." Because the crux of a failure to disclose theory is knowledge, the C.I.D. seeks "information related to . . . what Exxon knew about (a) how combustion of fossil fuels (its primary product) contributes to climate change and (b) the risk that climate change creates for the value of Exxon's businesses and assets." The C.I.D. also seeks information about "when Exxon learned those facts" and "what Exxon told Massachusetts consumers and investors, among others, about [them]." The primary question for us is whether there is a sufficient connection between those inquiries and Exxon's Massachusetts-based activities.

a. *Long-arm analysis*.[3] Massachusetts's long-arm statute, G. L. c. 223A, § 3, "sets out a list of specific instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." *Tatro*, 416 Mass. at 767. "A plaintiff has the burden of establishing facts to show that the ground relied on under § 3 is present." *Id.* In the Superior Court, the Attorney General invoked the "transacting any business" clause of § 3, so we focus our inquiry on that subsection. See G. L. c. 223A, § 3(a) ("[a] court may exercise personal jurisdiction over a person . . . as to a cause of action in law or equity arising from the person's . . . transacting any business in this commonwealth"). "For jurisdiction to exist under § 3(a), the facts must satisfy two requirements—the defendant must have transacted business in Massachusetts, and the plaintiff's claim must have arisen from the transaction of business by the defendant." *Tatro*, *supra* at 767. We construe these dual requirements "broadly," *id.* at 771, and conclude that they are satisfied here.

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[3] The parties' arguments on the jurisdictional issues focus exclusively on the due process question, forgoing any analysis under Massachusetts's long-arm statute, G. L. c. 223A, § 3. We recently clarified, however, that Massachusetts courts cannot "streamline" the personal jurisdiction inquiry by focusing solely on due process considerations, under the theory that the limits imposed by the long-arm statute and due process are coextensive. See *SCVNGR, Inc.* v. *Punchh, Inc.*, 478 Mass. 324, 329-330 (2017). They are not. *Id.* "The long-arm statute 'asserts jurisdiction over [a nonresident] to the constitutional limit only when some basis for jurisdiction enumerated in the statute has been established." *Id.* at 329, 85 N.E.3d 50, quoting *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 6 (1979). We analyze the long-arm statute's requirement first "in order to avoid unnecessary consideration of constitutional questions." *SCVNGR, Inc.*, *supra* at 325.

In Massachusetts, Exxon operates a franchise network of more than 300 retail service stations under the Exxon and Mobil brands that sell gasoline and other fossil fuel products to Massachusetts consumers. The Attorney General contends that this network establishes an independent basis for personal jurisdiction over Exxon in this matter.[4] The franchise system is governed by a Brand Fee Agreement (BFA). Under section 7 of the BFA, the "BFA Holder" pays Exxon a monthly fee for the use of Exxon's trademarks and to participate in Exxon's business services and programs at the BFA Holder's gasoline stations. Under section 5 of the BFA, Exxon prescribes a method for converting unbranded fuel to Exxon- and Mobil-branded gasoline by injecting certain fuel additives; these additives are to be obtained exclusively from suppliers identified by Exxon, and are inserted according to Exxon's specifications. Under section 7(a)(ii) of the BFA, the dollar amount of a BFA Holder's monthly fee is determined in part by the total amount of Exxon- and Mobil-branded fuel sold at the BFA Holder's stations. Specifically, the monthly fee for the final five years of BFA shall equal the amount agreed to between the parties or an amount determined by "Recalculated Total Volume," which is the function of "the total volume of [Exxon- and Mobil-branded fuel] sold in the aggregate by all Direct Served Outlets" during a given period.

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[4] The Attorney General also cites additional Massachusetts contacts besides Exxon's franchise network as grounds for our exercise of personal jurisdiction over Exxon. We address those contacts in our discussion of due process, given our conclusion that the "literal requirements of the [long-arm] statute are satisfied" through Exxon's franchise system. *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 767 (1994).

The sample BFA submitted to the Superior Court was struck between Exxon and a Massachusetts-based limited liability company; it states that it shall be in effect for a period of fifteen years, with possible extensions, and governs the operation of over 300 Exxon- and Mobil-branded "retail motor fuel outlets" located throughout the State. This network represents Exxon's "purposeful and successful solicitation of business from residents of the Commonwealth," *Tatro*, 416 Mass. at 767, such that it satisfies the "transacting any business" prong of § 3(*a*).

The more difficult question is whether the C.I.D. "aris[es] from" this network of Exxon- or Mobil-branded fuel stations. G. L. c. 223A, § 3(*a*). Exxon argues that it does not, because while the Attorney General's investigation is concerned primarily with Exxon's marketing and advertising of its fossil fuel products to Massachusetts consumers, Exxon does not control its franchisees' advertising, and hence those communications cannot be attributed to Exxon for purposes of personal jurisdiction. The judge determined that Exxon's assertion of a lack of control over franchisees' advertising conflicts with the terms of the BFA. We agree. Section 15(a) requires the BFA Holder and "its Franchise Dealers to diligently promote the sale of [Exxon- or Mobil-branded fuel], including through advertisements," and states that "Exxon[ ] shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions . . . for the promotion and sale of any product, merchandise or services" that "(i) uses or incorporates any [Exxon trademark] or (ii) relates to any Business operated at a BFA Holder Branded Outlet." This section also obligates the

BFA Holder to "expressly require all Franchise Dealers to . . . agree to such review and control by Exxon[ ]."[5]

In *Depianti* v. *Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 617 (2013), we applied the "right to control" test to the franchisor-franchisee relationship, holding that "a franchisor is vicariously liable for the conduct of its franchisee only where the franchisor controls or has a right to control the specific policy or practice resulting in harm to the plaintiff." This test is a useful measure for determining when the conduct of a franchisee may be properly attributed to a franchisor, and we believe that it is equally well suited to our analysis of personal jurisdiction in this case. By virtue of section 15(a) of the BFA, Exxon has the right to control the advertising of its fossil fuel products to Massachusetts consumers.[6]

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[5] Exxon says that it proffered evidence below that "BFA holders control their own marketing," citing to certain provisions of the BFA and to an affidavit from Exxon's United States Branded Wholesale Manager, Geoffrey Doescher. The cited-to provisions of the BFA (sections 2[e][6] and 3[a], [h]) address the establishment of the franchise relationship and the use of Exxon's trademarks, and do not clarify control over advertising. Similarly, while the Doescher affidavit states in conclusory fashion that Exxon does not control the "marketing of" or "advertisements by BFA-holders," this is belied by section 15(a) of the BFA.

[6] We are not persuaded by Exxon's argument that its control over franchisee advertising is solely to protect its trademarks under Federal law. See *Depianti* v. *Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 615 (2013) ("Under Federal law, a franchisor is required to maintain control and supervision over a franchisee's use of its mark, or else the franchisor will be deemed to have abandoned its mark under the abandonment provisions of the Lanham Act"). Section 15(a) expressly states that Exxon's exclusive authority to review and approve such advertising extends not only to advertisements that incorporate

This leads to our conclusion that the C.I.D. "aris[es] from" the BFA and Exxon's network of branded fuel stations in Massachusetts. G. L. c. 223A, § 3(*a*). Through its control over franchisee advertising, Exxon communicates directly with Massachusetts consumers about its fossil fuel products (and hence we reject Exxon's assertion that it "has no direct contact with any consumers in Massachusetts"). This control comports with one of Exxon's "primary business purpose[s]" as expressed in section 13(a) of the BFA: "to optimize effective and efficient . . . representation of [Exxon- and Mobil-branded fuel] through planned market and image development." The C.I.D. seeks information about the nature and extent of Exxon's Massachusetts advertisements, including those disseminated through Exxon's franchisees.

More broadly, the C.I.D. seeks information concerning Exxon's internal knowledge about climate change. Many of the requests in the C.I.D. seek documents to substantiate public statements made by Exxon in recent years on the topic of climate change. Exxon protests that its franchisees have nothing to do with climate change and have played no part in disseminating those statements, so the Attorney General's requests cannot "arise from" Exxon's franchise system. Bearing in mind the basis for the C.I.D. and the Attorney General's investigation, G. L. c. 93A, we disagree.

The statute authorizes the Attorney General to initiate an investigation "whenever [s]he believes a person has engaged in or is engaging in" a violation of G. L. c. 93A, in order "to ascertain whether in fact [that] person" is doing

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Exxon's trademarks, but also, more broadly, to advertising that "relates to *any Business* operated at a BFA Holder Branded Outlet" (emphasis added).

so. G. L. c. 93A, § 6(1). A person may violate G. L. c. 93A through false or misleading advertising. "Our cases . . . establish that advertising need not be totally false in order to be deemed deceptive in the context of G. L. c. 93A. . . . The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Aspinall* v. *Philip Morris Cos.*, 442 Mass. 381, 394-395 (2004).[7] In order to determine whether Exxon engaged in deceptive advertising at its franchisee stations, by either giving a misleading impression or failing to disclose material information about climate change, the Attorney General must first ascertain what Exxon knew about that topic.

b. *Due process*. We must also determine whether the exercise of personal jurisdiction over Exxon comports with the requirements of due process. The "touchstone" of this inquiry remains "whether the defendant purposefully established 'minimum contacts' in the forum state." *Tatro*, 416 Mass. at 772, quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174 (1985). "The due process analysis entails three requirements. First, minimum contacts must arise from some act by which the

[7] See 940 Code Mass. Regs. § 3.02(2) (2014) ("No statement or illustration shall be used in any advertisement . . . which may . . . misrepresent the product in such a manner that later, on disclosure of the true facts, there is a likelihood that the buyer may be switched from the advertised product to another"); 940 Code Mass. Regs. § 3.05(1)-(2) (1993) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect").

defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws . . . . Second, the claim must arise out of or relate to the defendant's contacts with the forum . . . . Third, the assertion of jurisdiction over the defendant must not offend traditional notions of fair play and substantial justice" (citations and quotations omitted). *Bulldog Investors Gen. Partnership* v. *Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010).[8]

First, Exxon has purposefully availed itself of the privilege of conducting business activities in Massachusetts,

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[8] Following the Superior Court judge's decision and the parties' submission of their appellate briefs, the United States Supreme Court decided *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco County*, ___ U.S. ___, 137 S. Ct. 1773 (2017) (*Bristol-Myers*), which addresses the exercise of specific personal jurisdiction. Exxon argues that *Bristol-Myers* controls our decision, but we are not persuaded. *Bristol-Myers* concerned whether the California Supreme Court properly exercised personal jurisdiction over the claims of nonresident plaintiffs, despite the lack of any identifiable connection between those plaintiffs' claims and the nonresident defendant's activities in California. *Id.* at 1778. In concluding that there was personal jurisdiction over the nonresident plaintiffs' claims, the California Supreme Court applied a "sliding scale approach," under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." *Id.* at 1781. The Supreme Court reversed, criticizing the "sliding scale approach" and reiterating the need for "a connection between the forum and the specific claims at issue." *Id.* Unlike in *Bristol-Myers*, the Attorney General's investigation is brought on behalf of Massachusetts residents, for potential violations occurring within Massachusetts. Moreover, our conclusion that there is personal jurisdiction over Exxon here rests not on Exxon's general Massachusetts-based activities, but on the nexus between certain of Exxon's Massachusetts-based activities and the Attorney General's investigation.

with both consumers and other businesses. As mentioned, Exxon is the franchisor of over 300 Exxon- and Mobil-branded service stations located throughout Massachusetts, and through that arrangement Exxon controls the marketing of its products to Massachusetts consumers. In addition, Exxon admits that it created Massachusetts-specific advertisements for its products in print and radio. Such "advertising in the forum State," especially when coupled with its extensive franchise network, is indicative of Exxon's "intent or purpose to serve the market in the forum State." *Asahi Metal Indus. Co., Ltd.* v. *Superior Court of Cal., Solano County*, 480 U.S. 102, 112 (1987). See *Workgroup Tech. Corp.* v. *MGM Grand Hotel, LLC*, 246 F. Supp. 2d 102, 114 (D. Mass. 2003) (purposeful availment where defendant "had advertisements in publications that circulated in Massachusetts" and "purposefully derived economic benefits from its forum-[S]tate activities"); *Gunner* v. *Elmwood Dodge, Inc.*, 24 Mass. App. Ct. 96, 99-101 (1987) (out-of-State company's advertisements "aimed squarely at Massachusetts targets," which were directed "at establishing ongoing relationships with Massachusetts consumers," supported jurisdiction). Exxon also operates a Web site that is accessible in Massachusetts and enables visitors to locate the nearest Exxon- and Mobil-branded service station or retailer. See *Hilsinger Co.* v. *FBW Invs.*, 109 F. Supp. 3d 409, 428-429 (D. Mass. 2015) (purposeful availment where nonresident defendant's Web site enabled visitors to contact company to learn where they can buy its products); *Bulldog Investors Gen. Partnership*, 457 Mass. at 217, 929 N.E.2d 293 (solicitation sent to Massachusetts resident, coupled with Web site accessible in Massachusetts, made it "reasonable for the [nonresident] to anticipate being held responsible in Massachusetts").

Further, Exxon's franchise system in Massachusetts is governed by a contract, the BFA. While such a contractual relationship is not necessarily a "contact," *Burger King Corp.*, 471 U.S. at 478, when that relationship "reach[es] out beyond one [S]tate and create[s] continuing relationships and obligations with citizens of another [S]tate," the nonresident subjects itself to that other State's jurisdiction for claims related to the contract. *Travelers Health Ass'n* v. *Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 647 (1950). See *Baskin-Robbins Franchising LLC* v. *Alpenrose Dairy, Inc.*, 825 F.3d 28, 38 (1st Cir. 2016) (purposeful availment where, among other things, defendant received monthly payments from plaintiff's Massachusetts headquarters). Under the BFA, the BFA Holder pays Exxon a monthly fee in exchange for the use of Exxon's trademarks, as well as various Exxon business services and programs, including training and uniforms; Exxon also assists the BFA Holder in procuring the additives necessary to create and sell Exxon- and Mobil-branded fuel. Through this agreement Exxon has "deliberately targeted the Massachusetts economy and reasonably should have foreseen that, if a controversy developed, it might be haled into a Massachusetts court." *Baskin-Robbins Franchising LLC*, *supra* at 39.

The Attorney General's investigation "arise[s] out of, or relate[s] to" these contacts. *Tatro*, 416 Mass. at 772. As mentioned, the Attorney General is authorized to investigate potential violations of G. L. c. 93A. G. L. c. 93A, § 6. In addition to prohibiting deceptive advertising to consumers, *Aspinall*, 442 Mass. at 395, c. 93A also requires honest disclosures in transactions between businesses. See *Kraft Power Corp.*, 464 Mass. at 155; G. L. c. 93A, § 11. "A duty exists under c. 93A to disclose material facts known to a party at the time of a transaction." *Underwood* v. *Risman*, 414 Mass. 96, 99-100 (1993). The C.I.D. seeks

information relating to Exxon's knowledge of "the risk that climate change creates for the value of [its] businesses and assets," and "what Exxon told Massachusetts consumers and investors, among others, about those facts." Possible misrepresentations or omissions about the threat that climate change poses to Exxon's business model are highly relevant to its contracts with BFA Holders, who agree, under section 1 of the BFA, to fifteen-year terms with Exxon and who are required, under section 21(b), to indemnify Exxon against all claims and liabilities based on State consumer protection and environmental laws, among others.

The exercise of personal jurisdiction over Exxon also does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940). See *Burger King Corp.*, 471 U.S. at 477, 105 S. Ct. 2174 (where court has determined nonresident has requisite minimum contacts, party must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable"). Exxon has produced no evidence that responding to the Attorney General's investigation would be unreasonable. Even assuming that it had, we would balance that showing with "the Commonwealth's interest in enforcing its laws in a Massachusetts forum." *Bulldog Investors Gen. Partnership*, 457 Mass. at 218. As Massachusetts's chief law enforcement officer, the Attorney General has a manifest interest in enforcing G. L. c. 93A. See, e.g., G. L. c. 93A, § 6 (Attorney General may investigate "whenever [s]he believes" c. 93A violation has occurred); *id.* at § 4 (Attorney General may file civil actions "in the name of the commonwealth"); *id.* at § 5 (Attorney General may seek assurances of discontinuance of unlawful acts or practices); *id.*

at § 2(c) (Attorney General "may make rules and regulations interpreting" what constitutes unlawful act or practice).[9]

2. *Exxon's challenge to the substance of the C.I.D.* Exxon also challenges the C.I.D. based on its content, arguing that it is "overbroad and unduly burdensome," as well as "arbitrary and capricious." Exxon argues that these points constitute "good cause" warranting our modifying or setting aside the C.I.D. under G. L. c. 93A, § 6(7) ("the court may, upon motion for good cause shown . . . modify or set aside such demand or grant a protective order"). As "[t]he party moving to set aside [the] C.I.D.[, Exxon] bears a heavy burden to show good cause why it should not be compelled to respond." *CUNA Mut. Ins. Soc'y* v. *Attorney Gen.*, 380 Mass. 539, 544 (1980). See *Attorney Gen.* v. *Bodimetric Profiles*, 404 Mass. 152, 155 (1989). The judge concluded that Exxon had failed to sustain that burden, and we review her conclusion for an abuse of discretion. *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 356 (1977) (*Yankee Milk*) ("in C.I.D. matters there must be,

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[9] Because we conclude that due process is satisfied by virtue of the nexus between the Attorney General's investigation and Exxon's franchise system, we need not reach the parties' arguments with respect to the Attorney General's alternative theory that Exxon may have deceived investors with respect to climate change. Although the cover letter of the C.I.D. states that the investigation concerns potential violations of G. L. c. 93A with respect to both consumers *and* investors, very few of the C.I.D.'s requests even mention investors or securities, and even then, those requests likewise concern Exxon's internal knowledge and discussions concerning climate change (in these requests, for the purpose of preparing securities filings or investor communications). Given the focus on Exxon's knowledge, these requests also relate sufficiently to the Attorney General's consumer deception theory.

as in all discovery proceedings, a broad area of discretion residing in the judge").

By its terms, G. L. c. 93A, § 6, authorizes the Attorney General to initiate an investigation "whenever [s]he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." This grants the Attorney General "broad investigatory powers." *Bodimetric Profiles*, 404 Mass. at 157. See *Yankee Milk*, 372 Mass. at 364, ("the Legislature [particularly in providing that the interrogated party must show 'good cause' why demands should not be honored] has indicated that the statute should be construed liberally in favor of the government"). Still, the statute imposes certain limitations on the scope of the Attorney General's investigative authority that we must consider.

In pertinent part, § 6(1)(*b*) authorizes the Attorney General to "examine . . . any documentary material . . . relevant to such alleged unlawful method, act or practice" that is the subject of the Attorney General's investigation. This "sets forth a relevance test to define the documents the Attorney General may examine." *Yankee Milk*, 372 Mass. at 357. See *Bodimetric Profiles*, 404 Mass. at 156. Her power to examine such documents is further constrained by § 6(5), in particular its provision prohibiting a C.I.D. from "contain[ing] any requirement [that] would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the [C]ommonwealth." We have interpreted this particular provision to impose a "three-pronged test" intended to "balance the opposing interests of the investigator and the investigated." *Yankee Milk*, *supra* at 361. Here, a court must consider (1)

whether the C.I.D. "describe[s] with reasonable particularity the material required,"[10] (2) whether "the material required is not plainly irrelevant to the authorized investigation,"[11] and (3) whether "the quantum of material required does not exceed reasonable limits." *Id.* at 360-361. See *Matter of a Civil Investigative Demand Addressed to Bob Brest Buick, Inc.*, 5 Mass. App. Ct. 717, 719-720 (1977) ("It cannot now be said that the C.I.D., as modified, was too indefinite, exceeded reasonable limits, or was plainly irrelevant . . . to the public interest sought to be protected" [citations and quotations omitted]). "Violation of one of these standards [under § 6(5)] constitutes 'good cause' allowing the court to modify or set aside a demand" pursuant to § 6(7). *Yankee Milk*, *supra* at 359 n.7. See *Harmon Law Offices, P.C.* v. *Attorney Gen.*, 83 Mass. App. Ct. 830, 834-835 (2013) ("Good cause is shown only if the moving party demonstrates that the Attorney General acted arbitrarily or capriciously or that the information sought is plainly irrelevant"). With these limitations in mind, we turn to the judge's conclusion that Exxon had not met its burden of showing "why it should not be compelled to respond" to the *C.I.D. CUNA Mut. Ins. Soc'y*, 380 Mass. at 544.

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[10] This factor mirrors the particularity requirement of the previous section, G. L. c. 93A, § 6(4)(*c*), which mandates that the notice of a C.I.D. "describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded." See *Yankee Milk*, 372 Mass. at 361 (observing that these two provisions "impose[ ] . . . an equivalent [specificity] standard").

[11] Similarly, the relevance requirement of this second factor mirrors the relevance requirement of § 6(1)(*b*), and we interpret the two to impose an identical standard.

First, we agree with the judge that the C.I.D. describes with reasonable particularity the material requested, G. L. c. 93A, § 6(4)(*c*), (5), given its focus on Exxon's knowledge of the impacts of carbon dioxide and other fossil fuel emissions on the Earth's climate. With respect to the relevance of the materials sought, Exxon argues that the Attorney General's request for historic documents dating as far back as 1976 are not relevant to an investigation under c. 93A, which carries a four-year statute of limitations. G. L. c. 260, § 5A. We find no support for Exxon's position, either in law (Exxon fails to cite any case) or logic. A document created more than four years ago is, of course, still probative of Exxon's present knowledge on the issue of climate change, and whether Exxon disclosed that knowledge to the public. Because these materials are not "plainly irrelevant," *Yankee Milk*, 372 Mass. at 360, the requests are permissible under this factor.

We are also not persuaded that the C.I.D.'s requests "exceed reasonable limits." *Id.* at 361. Documentary demands do so "only when they 'seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records.' " *Bodimetric Profiles*, 404 Mass. at 159, quoting *Yankee Milk*, *supra* at 361 n.8. In analyzing this point, the judge properly considered the fact that Exxon has already complied with a request for similar documents from New York's Attorney General. The judge reasonably inferred that it would not be too burdensome for Exxon, having already complied with that request, to comply with the Massachusetts C.I.D., which is similar in nature.[12] Exxon does

[12] The judge wrote: "At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar

not cite to the record before us to support a contrary conclusion. Further, we have recognized that in cases such as this, where "the requested information is . . . peculiarly within the province of the person to whom the C.I.D. is addressed, broad discovery demands may be permitted even when such a demand 'imposes considerable expense and burden on the investigated party.' " *Bodimetric Profiles*, *supra*.

The remainder of Exxon's challenge to the substance of the C.I.D. concerns its assertion that the Attorney General issued the C.I.D. solely as a pretext, "rendering the [C.I.D.] an arbitrary and capricious exercise of executive power." Exxon cites to cases from other contexts to suggest that our analysis of the propriety of the C.I.D. must include an evaluation of the reasonableness of the Attorney General's reasons for issuing it. "There is no requirement that the Attorney General have probable cause to believe that a violation of . . . c. 93A has occurred. [She] need only have a belief that a person has engaged in or is engaging in conduct declared by be unlawful by . . . c. 93A. In these circumstances, the Attorney General must not act arbitrarily or in excess of [her] statutory authority, but [s]he need not be confident in the probable result of [her] investigation." *CUNA Mut. Ins. Soc'y*, 380 Mass. at 542 n.5. The judge determined that the Attorney General has "assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the [C.I.D]." The Attorney General's belief that Exxon's conduct may violate c. 93A is all that is required under G. L. c. 93A, § 6(1).

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demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request."

3. *Disqualification of the Attorney General.* Exxon also seeks the disqualification of the entire office of the Attorney General from this investigation. Exxon bases its request on comments made by the Attorney General in March, 2016, at the press conference where she announced the commencement of her investigation into Exxon. The judge denied Exxon's request, and we review the denial for an abuse of discretion. *Commonwealth* v. *Reynolds*, 16 Mass. App. Ct. 662, 664 (1983).

At the press conference, titled "AGs United for Clean Power," the Attorney General spoke about the basis for her investigation. The relevant portion of her comments were as follows:

> "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 Exxon . . . . 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."

Exxon argues that these comments violated Mass. R. Prof. C. 3.6, as appearing in 471 Mass. 1430 (2015), which prohibits any lawyer from making prejudicial statements to the public concerning an ongoing investigation. Where

a violation has occurred, a judge may disqualify the violator. See *Pisa* v. *Commonwealth*, 378 Mass. 724, 728-730 (1979). The judge concluded that the Attorney General's comments contained no "actionable bias," and instead were intended only to inform the public of the basis for the investigation into Exxon. We discern no abuse of discretion in the judge's conclusion. The Attorney General is authorized to investigate what she believes to be violations of c. 93A. G. L. c. 93A, § 6(1). As an elected official, it is reasonable that she routinely informs her constituents of the nature of her investigations. See *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 278 (1993) (statements to press by prosecutor serve vital public function); *Commonwealth* v. *Ellis*, 429 Mass. 362, 372-373 (1999) (discussing prosecutor's duty to zealously advocate within ethical limits).

4. *Exxon's request for a stay*. The day before filing its request to modify or set aside the C.I.D., Exxon filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Texas challenging the C.I.D. on constitutional grounds not raised in this action.[13] Exxon requested that the Superior Court judge stay this matter pending the resolution of the Federal suit. The judge denied Exxon's request, and we review that denial for an abuse of discretion. *Soe* v. *Sex Offender Registry Bd.*, 466 Mass. 381, 392 (2013).

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[13] The Federal action was transferred to the United States District Court for the Southern District of New York, and on March 29, 2018, the District Court dismissed Exxon's complaint with prejudice due to Exxon's failure to state a claim and the preclusive effect of the Superior Court decision in this matter. See *Exxon Mobil Corp.* v. *Healey & another*, U.S. Dist. Ct., No. 1:17-cv-02301 (S.D.N.Y. Mar. 29, 2018). Because Exxon may appeal from the Federal decision, we do not treat as moot Exxon's request to stay the Massachusetts proceedings.

In denying Exxon's request, the judge reasoned that the Superior Court is better equipped than a Federal court in Texas to decide a matter pertaining to Massachusetts's primary consumer protection law, G. L. c. 93A.[14] Exxon argues that this constitutes an abuse of discretion, and contends, somewhat remarkably, that there "is good reason to question the premise" that Massachusetts courts are more capable than out-of-State courts to oversee cases arising under c. 93A. The Legislature designated the Superior Court as the forum for bringing a challenge to a C.I.D. issued under G. L. c. 93A, § 6. See G. L. c. 93A, § 6(7) ("[t]he motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"). Likewise, the Legislature provided that civil actions under G. L. c. 93A, § 9 or 11, may be brought in the Superior Court, the Housing Court, or the District Court, see G. L. c. 93A, §§ 9(1), (3A), 11, with the Superior Court retaining the broadest grant of jurisdiction over c. 93A claims.[15] It should go without saying that Massachusetts courts, which routinely hear c. 93A claims, are better equipped than other courts in other jurisdictions to oversee such cases.

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[14] The judge also determined that "the interests of substantial justice dictate that the matter be heard in Massachusetts," citing G. L. c. 223A, § 5. Exxon has not argued that it would be unfairly prejudiced by having to litigate in Massachusetts, and thus has not moved to dismiss under the doctrine of forum non conveniens.

[15] Whereas the Housing Court's jurisdiction over c. 93A claims is restricted to those involving housing matters, see G. L. c. 93A, § 9(1); G. L. c. 185C, § 3, and the District Court has jurisdiction over actions "for money damages only," G. L. c. 93A, §§ 9(3A), 11, the Superior Court is not so limited, and may hear any case under c. 93A "for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." G. L. c. 93A, § 9(1).

Exxon's contention that the lower court erred in failing to apply the "first-filed" rule is equally unavailing. The filing of a complaint in Federal court one day before a State court filing hardly triggers a mechanical application of the first-filed rule. See, e.g., *EMC Corp.* v. *Parallel Iron, LLC*, 914 F. Supp. 2d 125, 127 (D. Mass. 2012) ("Exceptions to the [first-filed] rule are not rare . . . . [A court] has discretion to give preference to a later-filed action when that action will better serve the interests involved"); *Bacardi Int'l Ltd.* v. *V. Suarez & Co.*, 719 F.3d 1, 15 (1st Cir.), cert. denied, 571 U.S. 1024 (2013) (discouragement of forum-shopping is consideration when ruling on motion to stay).

Finally, where there is only a partial overlap in the subject matter of two actions, a judge has considerable discretion when deciding whether to grant a stay. See *In re Telebrands Corp.*, 824 F.3d 982, 984 (Fed. Cir. 2016); *TPM Holdings, Inc.* v. *Intra-Gold Indus., Inc.*, 91 F.3d 1, 4 (1st Cir. 1996) ("where the overlap between two suits is less than complete, the judgment is made case by case"). Exxon acknowledges that the Federal action "challenges the investigation on constitutional grounds *not raised in this action*" (emphasis added).[16] The judge did not abuse her discretion in denying the stay. Compare *Provanzano* v. *Parker*, 796 F. Supp. 2d 247, 257 (D. Mass. 2011) (declining to stay because first-filed action was in anticipation of lawsuit in question, claims in cases were not identical, current action had proceeded further in court, and case involved application of Massachusetts statute).

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[16] Exxon's Federal complaint for declaratory and injunctive relief is based on violations of Exxon's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as an alleged violation of the dormant commerce clause and an abuse of process claim.

5. *Conclusion.* We affirm the order denying Exxon's motion to modify or set aside the C.I.D., Exxon's request to disqualify the Attorney General, and Exxon's motion to stay these proceedings. We further affirm the order granting the Attorney General's cross motion to compel Exxon's compliance with the C.I.D.

Judgment affirmed.

APPENDIX B

SUPERIOR COURT OF MASSACHUSETTS,
SUFFOLK COUNTY

SUPERIOR COURT CIVIL ACTION NO. 2016-1888-F

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

January 11, 2017

ORDER ON EMERGENCY MOTION OF EXXON MOBIL CORPORATION TO SET ASIDE OR MODIFY THE CIVIL INVESTIGATIVE DEMAND OR ISSUE A PROTECTIVE ORDER AND THE COMMONWEALTH'S CROSS-MOTION TO COMPEL EXXON MOBIL CORPORATION TO COMPLY WITH CIVIL INVESTIGATIVE DEMAND NO. 2016-EPD-36

BRIEGER, Associate Justice of the Superior Court.

On April 19, 2016, the Massachusetts Attorney General issued a Civil Investigative Demand ("CID") to Exxon Mobil Corporation ("Exxon") pursuant to G.L.c. 93A, § 6. The CID stated that it was issued as:

> [P]art of a pending investigation concerning potential violations of M.G.L.c. 93A, § 2, and the regulations promulgated thereunder

> arising both from (1) the marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth . . . ; and (2) the marketing and/or sale of securities, as defined in M.G.L.c. 110A, § 401(k), to investors in the Commonwealth, including, without limitation, fixed- and floating-rate notes, bonds, and common stock, sold or offered to be sold in the Commonwealth.

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, Exhibit B. The CID requests documents generally related to Exxon's study of CO2 emissions and the effects of these emissions on the climate from January 1, 1976 through the date of production.

On June 16, 2016, Exxon commenced the instant action to set aside the CID. The Attorney General has cross-moved pursuant to G.L.c. 93A, § 7 to compel Exxon to comply with the CID. After a hearing and careful review of the parties' submissions, and for the reasons that follow, Exxon's motion to set aside the CID is **DENIED** and the Commonwealth's motion to compel is **ALLOWED**, subject to this Order.

DISCUSSION

General Laws c. 93A, § 6 authorizes the Attorney General to obtain and examine documents "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter." Among the things declared to be unlawful by chapter 93A are unfair and deceptive acts or practices in the conduct of any trade or commerce. G.L.c. 93A, § 2(a).

General Laws c. 93A, § 6 "should be construed liberally in favor of the government," see *Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 364 (1977), and the party moving to set aside a CID "bears a heavy burden to show good cause why it should not be compelled to respond," see *CUNA Mutual Ins. Soc.* v. *Attorney Gen.*, 380 Mass. 539, 544 (1980). There is no requirement that the Attorney General have probable cause to believe that a violation of G.L.c. 93A has occurred; she need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G.L.c. 93A. *Id.* at 542 n.5. While the Attorney General must not act arbitrarily or in excess of her statutory authority, she need not be confident of the probable result of her investigation. *Id.* (Citations omitted.)

I. Exxon's Motion to Set Aside the CID

A. Personal Jurisdiction

Exxon contends that this court does not have personal jurisdiction over it in connection with any violation of law contemplated by the Attorney General's investigation. 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, page 2. Exxon is incorporated in New Jersey and headquartered in Texas. All of its central operations are in Texas.

Determining whether the court has personal jurisdiction over a nonresident defendant involves a familiar two-pronged inquiry: (2) is the assertion of jurisdiction authorized by the longarm statute, G.L.c. 223A, § 3, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? *Good Hope Indus.*,

Inc. v. *Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979). Jurisdiction is permissible only when both questions draw affirmative responses. *Id.* As the party claiming that the court has the power to grant relief, the Commonwealth has the burden of persuasion on the issue of personal jurisdiction. *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979).

The Commonwealth invokes jurisdiction under G.L.c. 223A, § 3(a), which permits the court to assert jurisdiction over a defendant if the defendant "either directly or through an agent transacted any business in the Commonwealth, and if the alleged cause of action arose from such transaction of business." *Good Hope Indus., Inc.*, 378 Mass. at 6. The "transacting any business" language is to be construed broadly. See *Tatro* v. *Manor Care, Inc.*, 416 Mass. 763, 767 (1994). "Although an isolated (and minor) transaction with a Massachusetts resident may be insufficient, generally the purposeful and successful solicitation of business from residents of the Commonwealth, by a defendant or its agent, will suffice to satisfy this requirement." *Id*. Whether the alleged injury "arose from" a defendant's transaction of business in Massachusetts is determined by a "but for" test. *Id.* at 771-72 (jurisdiction only proper if, *but for* defendant's solicitation of business in Massachusetts, plaintiff would not have been injured).

The CID says that the Attorney General is investigating potential violations arising from Exxon's marketing and/or sale of energy and other fossil fuel derived products to Commonwealth consumers. The Commonwealth argues that Exxon's distribution of fossil fuel to Massachusetts consumers "through more than 300 Exxon-branded retail service stations that sell Exxon gasoline and other fuel products" satisfies the transaction of business requirement. Exxon objects because it contends that

for the past five years, it has neither (1) sold fossil fuel derived products to consumers in Massachusetts, nor (2) owned or operated a retail store or gas station in Massachusetts. According to the affidavit of Geoffrey Grant Doescher ("Doescher"), the U.S. Branded Wholesale Manager, ExxonMobil Fuels, Lubricants and Specialties Marketing Company at Exxon, any service station or wholesaler in Massachusetts selling fossil fuel derived products under an "Exxon" or "Mobil" banner is independently owned and operated pursuant to a Brand Fee Agreement ("BFA"). Doescher says that branded service stations purchase gasoline from wholesalers who create ExxonMobil-branded gasoline by combining unbranded gasoline with ExxonMobil-approved additives obtained from a third-party supplier. The BFA also provides that Exxon agrees to allow motor fuel sold from these outlets to be branded as Exxon- or Mobil-branded motor fuel.

Exxon provided to the court and the Commonwealth a sample BFA. By letter dated December 19, 2016, the Commonwealth argued that many provisions of the BFA properly give rise to this court's jurisdiction. The Commonwealth contends that the BFA provides many instances in which Exxon retains the right to control both the BFA Holder and the BFA Holder's franchisees.[1] For example, Section 15(a) of the BFA states:

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[1] The BFA mandates that all BFA Holders require their outlets to meet minimum facility, product, and service requirements, Section 13, and provide a certain level of customer service, Section 16. Moreover, Exxon requires that the BFA Holder enter into written agreements with each of its Franchise Dealers and in the agreement, the Franchise Dealer must commit to Exxon's "Core Values." Section 19. "Core Values" is defined on page one of the BFA:

> BFA Holder agrees to diligently promote and cause its Franchise Dealers to diligently promote the sales of Products, including through advertisements, all in accordance with the terms of this Agreement. BFA Holder hereby acknowledges and agrees that, notwithstanding anything set forth herein to the contrary, to insure the integrity of ExxonMobil trademarks, products and reputation, ExxonMobil shall have the authority to review and approve, in its sole discretion, all forms of advertising and sales promotions that will use media vehicles for the promotion and sale of any product, merchandise or services, in each case that (i) uses or incorporates and Proprietary Mark, or (ii) relates to any Business operated at a BFA Holder Branded outlet . . . BFA Holder shall expressly require all Franchise Dealers to (a) agree to such review and control by ExxonMobil . . .

By letter dated December 27, 2016, Exxon disputes that any of the BFA's provisions establish the level of control necessary to attribute the conduct of a BFA Holder

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BHA Holder acknowledges that ExxonMobil has established the following core values ("Core Values") to build and maintain a lasting relationship with its customers, the motoring public:

(1) To deliver quality products that consumers can trust.

(2) To employ friendly, helpful people.

(3) To provide speedy, reliable service.

(4) To provide clean and attractive retail facilities.

(5) To be a responsible, environmentally-conscious neighbor.

to Exxon. See *Depianti* v. *Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 617 (2013) (citation omitted) ("[T]he marketing, quality, and operational standards commonly found in franchise agreements are insufficient to establish the close supervisory control or right of control necessary to demonstrate the existence of a master/servant relationship for all purposes or as a general matter"); *Lind* v. *Domino's Pizza, LLC*, 87 Mass. App. Ct. 650, 654-55 (2015) ("The mere fact that franchisors set baseline standards and regulations that franchisees must follow in an effort to protect the franchisor's trademarks and comply with Federal law, does not mean that franchisors have undertaken an agency relationship with the franchisee such that vicarious liability should apply"); *Theos & Sons, Inc.* v. *Mack Trucks, Inc.*, 1999 Mass. App. Div. 14, 17 (1999) (obligations to render prompt and efficient service in accordance with licensor's policies and standards and to satisfy other warranty related service requirements did not constitute evidence of agency relationship because they were unrelated to licensee's day-to-day operations and specific manner in which they were conducted).

Here, though, Section 15 of the BFA evidences a retention of more control than necessary simply to protect the integrity of the Exxon brand. By Section 15, Exxon directly controls the very conduct at issue in this investigation—the marketing of Exxon products to consumers. See *Depianti*, 465 Mass. at 617 ("right to control test" should be applied to franchisor-franchisee relationship in such a way as to ensure that liability will be imposed only where conduct at issue properly may be imputed to franchisor). This is especially true because the Attorney General's investigation focuses on Exxon's marketing and/or sale of energy and other fossil fuel derived products to Massachusetts consumers. Section 15(a) makes it evident to the court that Exxon has retained the right to control

the "specific policy or practice" allegedly resulting in harm to Massachusetts consumers. See *id.* (franchisor vicariously liable for conduct of franchisee only where franchisor controls or has right to control specific policy or practice resulting in harm to plaintiff). The quantum of control Exxon retains over its BFA Holders and the BFA Holders' franchisees as to marketing means that Exxon retains sufficient control over the entities actually marketing and selling fossil fuel derived products to consumers in the Commonwealth such that the court may assert personal jurisdiction over Exxon under G.L.c. 223A, § 3(a).

To determine whether such an exercise of personal jurisdiction satisfies—or does not satisfy—due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985). The plaintiff must demonstrate (1) purposeful availment of commercial activity in the forum State by the defendant; (2) the relation of the claim to the defendant's forum contacts; and (3) the compliance of the exercise of jurisdiction with "traditional notions of fair play and substantial justice." *Bulldog Investors Gen. Partnership* v. *Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations omitted). Due process requires that a nonresident defendant may be subjected to suit in Massachusetts only where "there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." *Good Hope Indus., Inc.*, 378 Mass. at 7 (citation omitted). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the

plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief." *Tatro*, 416 Mass. at 773.

The court concludes that in the context of this CID, Exxon's due process rights are not offended by requiring it to comply in Massachusetts. If the court does not assert its jurisdiction in this situation, then G.L.c. 93A would be "de-fanged," and consequently, a statute enacted to protect Massachusetts consumers would be reduced to providing hollow protection against non-resident defendants. Compare *Bulldog Investors Gen. Partnership*, 457 Mass. at 218 (Massachusetts has strong interest in adjudicating violations of Massachusetts securities law; although there may be some inconvenience to non-resident plaintiffs in litigating in Massachusetts, such inconvenience does not outweigh Commonwealth's interest in enforcing its laws in Massachusetts forum). Also, insofar as Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts, it is not overly burdened by being called into court in Massachusetts. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-98 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State).

For all of these reasons, the court concludes that it has personal jurisdiction over Exxon with respect to this CID.

B. Arbitrary and Capricious

Exxon next contends that the CID is not supported by the Attorney General's "reasonable belief" of wrongdoing. General Laws c. 93A, § 6 gives the Attorney General

broad investigatory powers to conduct investigations whenever she *believes* a person has engaged in or is engaging in any conduct in violation of the statute. *Attorney Gen.* v. *Bodimetric Profiles*, 404 Mass. 152, 157 (1989); see *Harmon Law Offices P.C.* v. *Attorney Gen.*, 83 Mass. App. Ct. 830, 834 (2013). General Laws c. 93A does not contain a "reasonable" standard, but the Attorney General "must not act arbitrarily or in excess of his statutory authority." See *CUNA Mut. Ins. Soc.*, 380 Mass. at 542 n.5 (probable cause not required; Attorney General "need only have a belief that a person has engaged in or is engaging in conduct declared to be unlawful by G.L.c. 93A").

Here, Exxon has not met its burden of persuading the court that the Attorney General acted arbitrarily or capriciously in issuing the CID. See *Bodimetric Profiles*, 404 Mass. at 157 (challenger of CID has burden to show that Attorney General acted arbitrarily or capriciously). If Exxon presented to consumers "potentially misleading information about the risks of climate change, the viability of alternative energy sources, and the environmental attributes of its products and services," see CID Demand Nos. 9, 10, and 11, the Attorney General may conclude that there was a 93A violation. See *Aspinall* v. *Philip Morris Cos.*, 442 Mass. 381, 395 (2004) (advertising is deceptive in context of G.L.c. 93A if it consists of "a half truth, or even may be true as a literal matter; but still create an over-all misleading impression through failure to disclose material information"); *Commonwealth* v. *DeCotis*, 366 Mass. 234, 238 (1974) (G.L.c. 93A is legislative attempt to "regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities"). The Attorney General is authorized to investigate such potential violations of G.L.c. 93A.

Exxon also argues that the CID is politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming. As discussed above, however, the court finds that the Attorney General has assayed sufficient grounds—her concerns about Exxon's possible misrepresentations to Massachusetts consumers—upon which to issue the CID. In light of these concerns, the court concludes that Exxon has not met its burden of showing that the Attorney General is acting arbitrarily or capriciously toward it.[2]

C. Unreasonable Burden and Unspecific

A CID complies with G.L.c. 93A, §§ 6(4)(c) & 6(5) if it "describes with reasonable particularity the material required, if the material required is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits." *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. at 360-61; see G.L.c. 93A, § 6(4)(c) (requiring that CID describe documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate material demanded); G.L.c. 93A, § 6(5) (CID shall not "contain any requirement which would be unreasonable or improper if contained in a subpoena du-

[2] The court does not address Exxon's arguments regarding free speech at this time because misleading or deceptive advertising is not protected by the First Amendment. *In re Willis Furniture Co.*, 980 F.2d 721 (1992), citing *Friedman* v. *Rogers*, 440 U.S. 1, 13-16 (1979). The Attorney General is investigating whether Exxon's statements to consumers, or lack thereof, were misleading or deceptive. If the Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.

ces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth").

Exxon argues that the CID lacks the required specificity and furthermore imposes an unreasonable burden on it. With respect to specificity, Exxon takes issue with the CID's request for "essentially all documents related to climate change," and with the vagueness of some of the demands. 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, page 18. In particular, Exxon objects to producing documents that relate to its "awareness," "internal considerations," and "decision making" on climate change issues and its "information exchange" with other companies.

The court has reviewed the CID and disagrees that it lacks the requisite specificity. The CID seeks information related to what (and when) Exxon knew about the impacts of burning fossil fuels on climate change and what Exxon told consumers about climate change over the years. Some of the words used to further describe that information—awareness and internal considerations—simply modify the "what" and "when" nature of the requests.

With respect to the CID being unreasonably burdensome, an effective investigation requires broad access to sources of information. See *Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. at 364. Documentary demands exceed reasonable limits only when they "seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records." *Id.* at 361

n.8. That is not the case here. At the hearing, both parties indicated that Exxon has already complied with its obligations regarding a similar demand for documents from the New York Attorney General. In fact, as of December 5, 2016, Exxon had produced 1.4 million pages of documents responsive to the New York Attorney General's request. It would not be overly burdensome for Exxon to produce these documents to the Massachusetts Attorney General.

Whether there should be reasonable limitations on the documents requested for other reasons, such as based upon confidentiality or other privileges, should be discussed by the parties in a conference guided by Superior Court Rule 9C. After such a meeting, counsel should submit to the court a joint status report outlining disagreements, if any, for the court to resolve.

II. Disqualification of Attorney General

Exxon requests the court to disqualify the Attorney General and appoint an independent investigator because her "public remarks demonstrate that she has predetermined the outcome of the investigation and is biased against ExxonMobil." 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, page 8. In making this request, Exxon relies on a speech made by the Attorney General on March 29, 2016, during an "AGs United for Clean Power" press conference with other Attorneys Generals. The relevant portion of Attorney General Healey's comments were:

> 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 Exxon Mobil. 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.

General Laws c. 93A, § 6 gives the Attorney General power to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation of G.L.c. 93A. *Bodimetric Profiles*, 404 Mass. at 157. In the Attorney General's comments at the press conference, she identified the basis for her belief that Exxon may have violated G.L.c. 93A. In particular, she expressed concern that Exxon failed to disclose relevant information to its Massachusetts consumers. These remarks do not evidence any actionable bias on the part of the Attorney General; instead it seems logical that the Attorney General inform her constituents about the basis for her investigations. Cf. *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job . . . and they may serve a vital public function"); *Goldstein* v. *Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern"); see also *Commonwealth* v. *Ellis*, 429 Mass. 362, 372 (1999) (due process provisions require that prosecutor be disinterested in sense that prosecutor must not be—nor appear to be—influenced in

exercise of discretion by personal interests). It is the Attorney General's duty to investigate Exxon if she believes it has violated G.L.c. 93A, § 6. See also G.L.c. 12, § 11D (attorney general shall have authority to prevent or remedy damage to the environment caused by any person or corporation). Nothing in the Attorney General's comments at the press conference indicates to the court that she is doing anything more than explaining reasons for her investigation to the Massachusetts consumers she represents. See generally *Ellis*, 429 Mass. at 378 ("That in the performance of their duties [the Attorney General has] zealously pursued the defendants, as is [his or her] duty within ethical limits, does not make [his or her] involvement improper, in fact or in appearance").

III. Stay

On June 15, 2016, Exxon filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Texas alleging that the CID violates its federal constitutional rights. Exxon Mobil requests this court to stay its adjudication of the instant motion pending resolution of the Texas federal action. See G.L.c. 223A, § 5 ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just"); see *WR Grace & Co.* v. *Hartford Accident & Indemnity Co.*, 407 Mass. 572, 577 (1990) (decision whether to stay action involves discretion of motion judge and depends greatly on specific facts of proceeding before court). The court determines that the interests of substantial justice dictate that the matter be heard in Massachusetts.

This matter involves the Massachusetts consumer protection statute and Massachusetts case law arising under it, about which the Massachusetts Superior Court is certainly more familiar than would be a federal court in Texas. See *New Amsterdam Casualty Co.* v. *Estes*, 353 Mass. 90, 95-96 (1967) (factors to consider include administrative burdens caused by litigation that has its origins elsewhere and desirability of trial in forum that is at home with governing law). Further, the plain language of the statute itself directs a party seeking relief from the Attorney General's demand to the courts of the commonwealth. See G.L.c. 93A, § 6(7) (motion to set aside "may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county"); see also G.L.c. 93A, § 7 ("A person upon whom notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth"). The court declines to stay this proceeding.

ORDER

For the reasons discussed above, it is hereby **ORDERED** that the Emergency Motion of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order is **DENIED** and the Commonwealth's Cross Motion to Compel ExxonMobil Corporation to Comply with Civil Investigative Demand No. 2016-EPD-36 is **ALLOWED** consistent with the terms of this Order. The parties are **ORDERED** to submit a joint status report to the court no later than February 15, 2017, outlining the results of a Rule 9C Conference.

/s/ Heidi E. Brieger
Heidi E. Brieger
Associate Justice of the Superior Court

Dated at Lowell, Massachusetts, this 11th day of January, 2017.