18-1170

United States Court of Appeals for the Second Circuit

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

v.

MAURA TRACY HEALEY, in her official capacity as Attorney General of the State of Massachusetts, BARBARA D. UNDERWOOD, Attorney General of New York, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICI CURIAE
FORMER MASSACHUSETTS ATTORNEYS GENERAL
IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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STATEMENT OF INTEREST OF AMICI CURIAE[1, 2]

The Constitution of the Commonwealth of Massachusetts establishes the Attorney General as the Commonwealth's chief law enforcement officer, and provides for her election by statewide ballot. *See* Mass. Const. Pt. II, c. 2, § 1, art. IX; Mass. Const. Articles of Amend., art. LXXXII; *see generally* Mass. Gen. Laws c. 12, §§ 1–11N. Among her many responsibilities, the Attorney General enforces the Commonwealth's consumer protection statute, Mass. Gen. Laws c. 93A, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws c. 93A, § 2(a); *see id.*, §§ 2(c), 4–8.

Amici are former Massachusetts Attorneys General Francis X. Bellotti, James M. Shannon, Scott Harshbarger, Thomas Reilly, and Martha Coakley (collectively, the "Former Attorneys General"). Together, the Former Attorneys General held office for the consecutive 40 years prior to the election of current Attorney General Maura T. Healey: Bellotti from 1975 to 1987; Shannon from 1987 to 1991; Harshbarger from 1991 to 1999; Reilly from 1999 to 2007; and Coakley from 2007 to 2015.

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[1] All parties have assented to the filing of this brief.

[2] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici state that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amici or their counsel, contributed money that was intended to fund preparing or submitting this brief.

During their respective tenures, the Former Attorneys General used civil investigative demands to determine whether, and the extent to which, businesses were engaging in "unfair or deceptive" acts, including deceptive advertising that "create[s] an over-all misleading impression through failure to disclose material information." *See* Mass. Gen. Laws c. 93A; *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 487 (Mass. 2004). Their experience enforcing the state's consumer protection laws provides insight into how those laws operate, how they are enforced, and historical context for the present dispute.

At issue in this case is a core state police power that the Former Attorneys General have used and hold dear, i.e., the authority to protect the people of Massachusetts from unfair and deceptive business practices. If a federal cause of action like this one may be used to interfere with that authority on the basis of threadbare constitutional claims, the scope of the authority — and the ability to use it to achieve and protect state interests — will be diminished significantly.

SUMMARY OF ARGUMENT

The state police power to protect consumers, businesses, and the market from unfair or deceptive trade practice is well-recognized. The linchpin of consumer protection in Massachusetts is the state's consumer protection law, codified at Mass. Gen. Laws c. 93A ("Chapter 93A"). Most pertinently, Chapter 93A forbids the deceptive marketing of products and securities. The Attorney General is charged

with the responsibility of enforcing that prohibition and investigating whether violations have occurred. A central component of her enforcement power is the civil investigative demand ("CID"), which allows the Attorney General to obtain documents and testimony from those most likely to have evidence of deceptive practices, i.e., the entities potentially engaged in such practices.

This brief addresses how Chapter 93A operates, as a matter of substance and procedure. It details how the Former Attorneys General have used CIDs under Chapter 93A to protect consumers in the Commonwealth of Massachusetts and to ensure a fairer marketplace. Finally, it addresses why entities, like Exxon, that unsuccessfully challenge the enforcement of CIDs in state court are not — and must not be — permitted to recast the same claims as a federal action. Otherwise, the core state police power of consumer protection would be impeded by delay, procedural wrangling, and even discovery into ongoing state law enforcement investigations.

ARGUMENT

I. Consumer Protection Is a Core State Police Power of which Civil Investigative Demands Are an Integral Part

A primary state responsibility is protecting people and businesses operating within its borders from unfair or deceptive practices. The Supreme Court of the United States has so recognized. "Given the long history of state common law and statutory remedies against . . . unfair business practices, it is plain that this is an area traditionally regulated by the states." *California v. ARC America Corp.*, 490 U.S.

93, 101 (1989); *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (describing the "traditional power" of States to enforce "regulations designed for the protection of consumers"). As this Circuit has held, "consumer protection law" is "a field traditionally regulated by the states." *General Motors Corp. v. Abrams*, 897 F.2d 34, 41 (2d Cir. 1991); *cf. Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995) ("There are few state interests that are more important or more clearly within the proper control of the state than consumer protection"). The inherent state power to "regulate the business of selling" products includes "the advertising connected therewith." *Packer Corp. v. Utah*, 285 U.S. 105, 108 (1932). *Accord Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001) (regulation of advertising is a "'historic police power[] of the States'") (internal citation omitted).

All 50 states and the District of Columbia have chosen to exercise that power expressly. They each have consumer protection statutes, in addition to a variety of common law protections against unfair or deceptive practices. Emily Myers & Lynne Ross, eds., National Association of Attorneys General, *State Attorneys General: Powers and Responsibilities* 233–34 (2d ed. 2007); *see generally* Anthony P. Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 Tul. L. Rev. 427 (1984). By and large, these statutes were enacted during the 1960s and 1970s, when the "widespread existence of consumer abuse," indicated that effective enforcement "could only be accomplished

on the state and local level." J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive,* 32 Santa Clara L. Rev. 347, 357 (1992) (emphasis added) (summarizing the history of state consumer protection legislation); *see* John A. Sebert, Jr., *Enforcement of State Deceptive Trade Practice Statutes*, 42 Tenn. L. Rev. 689, 692 (1975) (by 1975, every state had "some state level office (usually the attorney general) that ha[d] . . . consumer protection responsibilities"). The states were driven by a recognition that for local economies to work, people and businesses must be empowered to make rational choices; to the "extent that businesses engage in deceptive or unfair acts or practices, they . . . interefer[e] with the operations of the market." Franke & Ballam, 32 Santa Clara L. Rev. at 358.

In nearly every state, including Massachusetts, the attorney general is charged with the responsibility of enforcing the state's consumer protection laws. *State Attorneys General*, *supra*, at 233–34; *see* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts*, 52 Ohio St. L. J. 437, 446 and note 57 (1991) (collecting scholarship). To effectuate that considerable responsibility, most state attorneys general have the power to investigate potential violations by subpoenaing or demanding documents. Dunbar, 59 Tul. L. Rev. at 465; *see State Attorneys General*, *supra*, at 234–35 ("[O]ne of the most effective statutory tools available to most Attorneys General is the authority to serve subpoenas and obtain discovery

prior to the filing of any complaint . . . . CID power is available to Attorneys General in all jurisdictions except Connecticut, the District of Columbia, Nevada, and Utah"). Though obfuscated in this litigation, the basis for that investigatory power is clear: companies engaged trade or commerce often are in possession of the materials necessary to determine whether their sales and marketing practices are misleading. *Attorney General v. Bodimetric Profiles*, 533 N.E.2d 1364, 1368 (Mass. 1989) ("the requested information is often peculiarly within the province of the [entity] to wh[ich] the CID is addressed"); *see United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950) ("The only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so").

II. The Contours of the Massachusetts Consumer Protection Act Are Well-Established and the Attorney General is Charged with Its Enforcement

The primary source of consumer protection in Massachusetts is Mass. Gen. Laws c. 93A ("Chapter 93A"). In the mid-1960s, when the state Legislature enacted Chapter 93A, Massachusetts became one of the first states to establish a comprehensive statutory consumer protection framework. The statute "regulate[s] 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." *Commonwealth v. DeCotis*, 316 N.E.2d 748, 752 (Mass. 1974); *Heller v. Silverbranch Const. Corp.*, 382 N.E.2d 1065, 1069 (Mass. 1978)

(describing the statute's core purpose as "ensur[ing] an equitable relationship between consumers and persons engaged in business"). [2]

A. Chapter 93A is a Broad, Remedial Statute Intended to Establish a Fair Public Marketplace

Chapter 93A recognized that "traditional tort and contract law" provided inadequate consumer protection, and broadly remediated that inadequacy by barring unfair and deceptive trade practices and granting the Attorney General the power to enforce that prohibition. *See Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 772 (Mass. 1975); *see also Kraft Power Corp. v. Merrill*, 981 N.E.2d 671, 683 (Mass. 2013) (Chapter 93A expanded consumer protection beyond the "narrow approach of what the common law regarded as unfair competition, and in effect to permit, by the gradual process of judicial inclusion and exclusion, a new definition of what is unfair") (internal quotation marks and citations omitted).

The heart of Chapter 93A is its prohibition of "unfair or deceptive acts or practices in the conduct of any trade or commerce . . ." that "directly or indirectly affect the people" of Massachusetts. Mass. Gen. Laws c. 93A, §§ 1(b), 2(a).[3] The

[2] Chapter 93A is modeled after the Federal Trade Commission Act ("FTC Act"). Since Chapter 93A's passage in 1967, the Legislature has expanded the scope of Chapter 93A on several occasions, including by expressly including the marketing and sale of securities in 1987. 1987 Mass. Acts 1249 (c. 664).

[3] The Massachusetts Legislature (the "Legislature") did not comprehensively define "unfair or deceptive acts or practices" under Chapter 93A, intentionally allowing the flexibility to apply to "future, as-yet-undevised business practices." *Purity Supreme*

statute defines "trade or commerce" to include "the advertising, offering for sale . . . [and] the sale . . . or distribution of any services, property, . . . [or] security." Mass. Gen. Laws c. 93A, § 1(b).

In the context of the marketing of consumer goods and services, "unfair or deceptive acts" include advertising or other communications that have "the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted." *E.g.*, *Aspinall v. Philip Morris Cos.*, 813 N.E. 2d 476, 488 (Mass. 2004); *id.*at 487 (misleading "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 disclosure material information"). In the context of marketing securities, "unfair and deceptive acts" include inaccurate, incomplete or otherwise misleading statements concerning a company's value, assets, or management. *E.g.*, *Stolzoff v. Waste Systems Int'l, Inc.*, 792 N.E.2d 1031, 1036-37, 1045 (Mass. App. Ct. 2003).

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v. Attorney General, 407 N.E.2d 297, 303-04 (Mass. 1980); *Nei v. Burley*, 446 N.E.2d 674, 677–78 (Mass. 1983). Massachusetts courts have effectuated that legislative intent, and have declined to provide a bright-line definition of unfair or deceptive conduct, noting that whether a practice is unfair or deceptive is determined on a case-by-case basis in consideration of all the circumstances. *See*, *e.g.*, *Martin v. Factory Research Corp.*, 518 N.E.2d 846, 847 (Mass. 1988); *Fraser Engineering Co. v. Desmond*, 524 N.E.2d 110, 112 (Mass. App. Ct. 1988).

B. Chapter 93A Grants the Attorney General Regulatory Authority to Define Conduct that is Per Se "Unfair or Deceptive"

The Legislature granted the Attorney General authority to promulgate regulations that define unfair or deceptive conduct under Chapter 93A. Mass. Gen. Laws c. 93A, § 2(c); *see Purity Supreme v. Attorney General*, 407 N.E.2d 297, 306 (Mass. 1980). These regulations establish *per se* violations of Chapter 93A and can be broken down into three categories. First, certain regulations prohibit deceptive, false, and misleading advertising, 940 Code Mass. Regs. §§ 3.02(2), 6.03, 6.04, and misrepresentations made in the sale of any product. 940 Code Mass. Regs. § 3.05. These prohibitions apply across all industries. Second, other regulations enumerate proscribed conduct in specific industries. *See, e.g.*, 940 Code Mass. Regs. § 3.18 (price gouging in petroleum-related business); §§ 5.01 – 5.07 (automobile sales and repair business); §§ 7.01 – 7.11 (debt collection industry). Third, the regulations describe broad categories of conduct violative of Chapter 93A, *i.e.*, an act or practice that: (1) is oppressive or otherwise unconscionable in any respect; (2) constitutes a nondisclosure of a material fact that "may have influenced the buyer or prospective buyer not to enter into the transaction"; (3) fails to comply with other Massachusetts statutes meant "for the protection of the public's health, safety, or welfare"; or (4) violates the FTC Act or other federal consumer protection statutes. 940 Code Mass Regs. § 3.16(1)-(4).

C. The Attorney General Has the Responsibility and the Authority Necessary to Enforce Chapter 93A

The Attorney General is charged with enforcing Massachusetts' consumer protection law. *Commonwealth v. Mass. CRINC*, 466 N.E.2d 792, 798 (Mass. 1984) ("[T]he Attorney General has a general statutory mandate . . . to protect the public interest," and a "specific statutory mandate . . . to enforce . . . the Consumer Protection Act"). She has the responsibility to investigate business practices that she "believes may be unfair or deceptive, and may bring an action in the name of the Commonwealth against any person [s]he believes is using such practices." *Lowell Gas Co. v. Attorney General*, 385 N.E.2d 240, 249 (Mass. 1979). Her investigatory and enforcement authority is intended to "to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong." *DeCotis*, 316 N.E.2d at 756. Because Chapter 93A serves the remedial purpose of consumer protection, the scope of the Attorney General's authority is to be "construed liberally in favor of the government." Mass. Gen. Laws c. 93A, §§ 4 – 8; *Matter of Yankee Milk, Inc.*, 362 N.E.2d 207, 213-14 (Mass. 1977).

1. The Crucial Role of Civil Investigative Demands

To facilitate the enforcement of Chapter 93A, the Attorney General is empowered to investigate the conduct of a business whenever she believes that that an unfair or deceptive act or practice has been committed. Mass. Gen. Laws c. 93A, § 6. The Attorney General may develop her belief from any number of sources, e.g.,

from consumer complaints, substantive media reports (which frequently identify matters of public interest that warrant further investigation), or other criminal or civil investigations (particularly given that state and local law enforcement officers and prosecutors are required by law to notify her of evidence of deceptive business practices). Mass. Gen. Laws c. 93A, § 4; See Thomas B. Merritt, *Consumer Law*, 35 Mass. Prac. § 4:79 (3d ed., 2017).

As part of her investigation, the Attorney General may serve a CID upon any person or entity thought to have information relevant to the investigation. Mass. Gen. Laws c. 93A, § 6. A CID may require the production of documents, sworn testimony, or both. *Id.* § 6(1).

The CID is the principal investigative tool granted the Attorney General by Chapter 93A. *See State Attorneys General*, *supra*, at 235 ("CIDs "allow . . . [t]he Attorney General . . . to examine the available evidence, determine whether a violation has occurred and evaluate the strengths of the case, before taking any formal court action"). The information sought by a CID is often uniquely in the possession of the entity to whom the CID is directed. *See Bodimetric Profiles*, 533 N.E.2d at 1368. Particularly in cases of consumer or securities fraud, issuance of a CID may be the primary way to obtain internal company documentation that reveals a company's public misrepresentations. *Cf.* United States Attorneys' Manual §9-28.70 (observing that in the corporate context, "[a] corporation is an artificial

construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records").[4]

The issuance of a CID also may facilitate resolution of an investigation short of a formal enforcement action — conserving the resources of the parties and more expeditiously protecting the public. For example, the CID affords the potential target of an enforcement action the opportunity to provide information (and arguments) indicating that no wrongdoing occurred. Or the materials produced in response to a CID may indicate areas for potential agreement. Chapter 93A expressly empowers the Attorney General to seek an "assurance of discontinuance" of an unfair or deceptive practice, which can provide a resolution that does not require judicial intervention. Mass. Gen. Laws c. 93A § 5.

2. Chapter 93A Enforcement Actions

Where the Attorney General has reason to believe that a Chapter 93A violation has occurred and determines that a proceeding would further the public interest, she may bring an action in state court for injunctive relief, penalties, damages, and restitution. Mass. Gen. Laws c. 93A, § 4; 1969 Mass. Acts 780 (c. 814, § 3)

[4] Chapter 93A recognizes the sensitivity of internal documents, and provides that they will remain confidential unless an enforcement action is brought (or a judicial order is entered requiring their release). Mass. Gen. Laws c. 93A, § 6(6).

(inserting restitution); 1985 Mass. Acts 709 (c. 468) (inserting civil penalties, investigation and litigation costs, attorneys' fees).[5]

D. Massachusetts Attorneys General Have Issued CIDs to Investigate and Enforce Chapter 93A Violations by Out-of-State Companies to Protect the Commonwealth for Decades

As Former Attorneys General, each of the amici has used CIDs extensively to investigate potential violations of Chapter 93A. Many of those investigations probed the conduct of out-of-state companies that engaged in commerce within the Commonwealth.

For example, Attorney General Bellotti investigated potential Chapter 93A violations committed by a multi-state dairy cooperative, and used a CID to discover documents that likely would not have been available otherwise. *Matter of Yankee Milk, Inc.*, 362 N.E.2d 207 (Mass. 1977). Attorney General Shannon investigated allegations of discrimination in the healthcare industry against individuals with HIV, including whether individuals' blood was tested for HIV without their consent. In that investigation, Attorney General Shannon issued a CID to Bodimetric Profiles, a division of an Illinois corporation. *Bodimetric Profiles*, 533 N.E.2d at 1364.[6]

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[5] Except in cases where she seeks a temporary restraining order, the Attorney General must give the subject at least five days' notice of the intended enforcement action and provide an opportunity to confer. Mass. Gen. Laws c. 93A, § 4.

[6] Attorney General Shannon also investigated liability insurance practices that gave rise to a premium crisis in the 1980's. The investigation ultimately led to a federal

Attorney General Harshbarger used CIDs to investigate and ultimately sue out-of-state tobacco companies for healthcare costs caused by the use of tobacco, because the companies had misrepresented the addictive and harmful nature of their products. Internal tobacco company documents provided pursuant to the CID demonstrated that tobacco companies knew of and concealed the risks their products posed. *See* "Massachusetts Files Suit Against Tobacco Industry," *N.Y. Times*, A16 (Dec. 19, 1995).

Attorney General Reilly used CIDs to investigate privacy and antitrust violations by out-of-state technology companies including Microsoft, Google, and Essential.com, the last of which attempted to sell customer data without customer consent in a bankruptcy proceeding. *In re Essential.com*, No. 01-15339-WCH, 2001 WL 34733193 (U.S. Bankr. D. Mass. Aug. 1, 2001).

Attorney General Coakley investigated a subsidiary of Fremont General Corporation – a California state-chartered bank that originated mortgage loans to Massachusetts residents – for unfair and deceptive subprime mortgage lending practices in the aftermath of the financial crisis. *See Commonwealth v. Fremont Investment & Loan*, 897 N.E.2d 548 (Mass. 2008).

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antitrust suit brought by nineteen states (including Massachusetts). *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769–770 and n.2 (1993).

In each of the above investigations, the Former Attorneys General issued CIDs to determine whether Chapter 93A violations had occurred or were ongoing. The answers the CIDs revealed — and the enforcement actions taken or resolutions reached as a result — altered the practices of entire industries to better protect the public.

III. Core Federalism Principles Dictate that Where a Challenge to a Massachusetts CID Is Finally Adjudicated in State Court, the Result Should Not Be Subject to Collateral Attack in Federal Court

Underlying each legal issue in this case is the fundamental question of whether the subject of a state investigation, the propriety of which a state supreme court already has determined conclusively, may use a federal court to attack the investigation collaterally. The answer is and must be no, regardless of whether the case is resolved on grounds of claim preclusion, abstention, or implausibility. Core state investigative powers cannot be undercut or delayed substantially by conclusory allegations of viewpoint discrimination already rejected in state court. Otherwise, any subject of a state investigation with the means to do so will turn the federal forum into a venue for discovery into its investigator. That is not now and cannot become the law.

A. Massachusetts Has a Well-Established Legal Mechanism to Challenge CIDs and the Basis for the Disputed CID Here Has Been Fully Litigated

Massachusetts' consumer protection law expressly provides the subject of a CID with a process to challenge it. Mass. Gen. Laws c. 93A, § 6(7). The entity receiving a CID may bring suit in the state's court of general jurisdiction — the Massachusetts Superior Court — to "modify or set aside [a] demand or grant a protective order." *Id.* If the Superior Court refuses to grant the sought-after relief and dismisses the suit, its determination is subject to appellate review. *E.g.*, *Exxon Mobil Corp. v. Attorney General*, 94 N.E.3d 786, 790 (Mass. 2018).

As the foregoing citation illustrates, Exxon already has availed itself of that process. *See Exxon Mobil Corp.*, 94 N.E. 3d at 790. Exxon filed suit against the Attorney General in state court, alleging that the CID was improper and should not be enforced. *Id.* One claimed impropriety was that the CID was "politically motivated" and violated constitutional free speech protections because it constituted "impermissible viewpoint discrimination." *See In re Civil Investigative Demand No. 2016–EPD–36 (Exxon Mobil)*, Dkt. No. SUCV 2016–1888F, 34 Mass. L. Rptr. 104 (Mass. Super. Ct. Jan. 11, 2017).[7] The Massachusetts Superior Court rejected that claim, and Exxon did not press it on appeal. *See U.S. Bank Nat'l Ass'n v.*

[7] The Massachusetts Superior Court decision is included in the Addendum to the Brief of Maura Healey at Add-49.

Schumacher, 5 N.E. 3d 882, 887 n. 10 (Mass. 2014) (claim not raised by appellant "is deemed waived") (citing Mass. R. App. P. 16(a)(4)).[8] The appeal did, however, proceed on other grounds, and the Massachusetts Supreme Judicial Court concluded that the CID was properly issued and compelled Exxon to provide its response. *Exxon Mobil Corp.*, 94 N.E. 3d at 801.[9]

Had Exxon responded to the Supreme Judicial Court's decision by charging into state court, arguing again that the CID violated the First Amendment and demanding discovery into the investigatory decision-making of the Attorney General, its claim would be precluded. *See Heacock v. Heacock*, 520 N.E. 2d 151, 152 (Mass. 1988) ("The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been litigated in the action. This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies"). *Accord Kobrin v. Bd. of*

[8] *See* Brief of Petitioner-Appellant Exxon Mobil Corp., Massachusetts Supreme Judicial Court Docket No. SJC-12376, available at http://www.ma-appellatecourts.org/search_number.php?dno=SJC-12376&get=Search.

[9] Exxon has filed a petition for certiorari, asking the Supreme Court of the United States to review that decision. The pendency of a certiorari petition has no effect on the finality of the Massachusetts Supreme Judicial Court decision. *See Tausevich v. Bd. of Appeals of Stoughton*, 521 N.E.2d 385, 387 (Mass. 1988) ("Finality in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again") (internal quotation marks and citations omitted).

Registration in Med., 832 N.E.2d 628, 634 (Mass. 2005). Federal law demands the same result in this federal forum. *Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178, 183 (2d Cir. 1991) (quoting *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)) (Federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered"); *see* 28 U.S.C. § 1738 ("judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken").

The policies of promoting finality and discouraging piecemeal litigation that undergird that federal law — which has been in place since 1790, *see* 1 Stat. 122 — apply more strongly here than in the traditional context of litigation between private parties. The Attorney General is charged with protecting the public from unfair and deceptive business practices. *See* Mass. Gen. Laws c. 93A, §§ 4, 6(1). In Massachusetts, as in most states, investigatory powers are the keystone of that charge. *See CUNA Mut. Ins. Soc'y v. Attorney Gen.*, 404 N.E.2d 1219, 1221–22 (1980); *State Attorneys General*, *supra* at 233–34. Procedural gamesmanship should not be permitted to thwart or delay indefinitely the exercise of those powers while potentially deceptive conduct continues. *See FTC v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (describing the "strong public interest in having administrative

investigations proceed expeditiously and without impediment"). As the D.C. Circuit has stated, "the 'very backbone of an . . . agency's effectiveness in carrying out the [legislatively] mandated duties of industry regulation is the rapid exercise of the power to investigate.'" *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (en banc) (internal citation omitted).

B. In the Analogous Context of Federal Civil Investigations, Federal Courts Traditionally Have Rejected Efforts by Subjects of an Investigation to Bring Suit to Stifle the Investigation

Though in our experience resort to federal court to challenge a CID issued by a state attorney general is aberrational, on occasion federal suits challenging similar investigative demands by federal agencies have been brought. The judicial reception has been frosty. Agencies charged with civil enforcement, like the Attorney General, require investigative leeway to accomplish their statutory missions expeditiously.

As the Supreme Court has held in the context of a challenge to initial allegations by the Federal Trade Commission, no federal action should be a "means of turning prosecutor into defendant before [the investigation] concludes." *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980). If specious and threadbare claims of wrongdoing made by the subject of an investigation were sufficient to open "exhaustive inquisitions into the practices of regulatory agencies," civil enforcement would become near impossible. *SEC v. Dresser Industries*, 628 F.2d 1368, 1383

(D.C. Cir. 19980); *see University of Medicine and Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) ("In the ordinary course, judicial proceedings are appropriate only after the investigation has led to enforcement, because 'judicial supervision of agency decisions to investigate might hopelessly entangle the courts in areas that would prove to be unmanageable and would certainly throw great amounts of sand into the gears of the administrative process'") (internal citation omitted). As the Fifth Circuit aptly stated in response to a suit by the subject of an investigation: "[A]llowing the person under investigation to bring suit in district court any time he felt aggrieved by the investigation could compromise the ability of the agency to investigate and enforce the [statute it has the responsibility to enforce]." *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 154 (5th Cir. 1998). So too here.[10]

These concerns are perhaps even more acute when the investigating entity is not a federal agency, but a separate sovereign. *Cf. Alden v. Maine*, 527 U.S. 706, 748 (1999) ("[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the

[10] These principles also course through other, related areas of law. Naturally, the federal Freedom of Information Act precludes the discovery of investigatory materials. *See* 5 U.S.C. § 552(b)(7); *Rugiero v. Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (exclusion applies not only to criminal enforcement actions but to "records compiled for civil enforcement purposes as well"). *Accord Vento v. Internal Rev. Serv.*, 714 F. Supp. 2d 137, 148 (D.D.C. 2010. Massachusetts law is in accord. *See* Mass. Gen. Laws c. 4, § 7 cl. 26(f).

governance of the Nation"). And the facts of this case illustrate the danger of using the federal forum to turn the investigator into the investigated. The Massachusetts Attorney General issued a CID to Exxon in April 2016. Though the Attorney General successfully litigated the propriety of that demand to the state's highest court, she is now in her second federal Court of Appeals (after proceedings in two separate district courts). All the while, not one document has been produced. Consumer protection must be nimble and responsive to potential wrongdoing. *See generally FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (describing "[t]h[e] important governmental interest in the *expeditious* investigation of possible unlawful activity") (emphasis added).; *cf. In re EEOC*, 709 F.2d 392, 398 (5th Cir. 1983) ("In a [civil enforcement] case, time is not just money. It is the welfare of those very citizens whom [the legislature] directed the [responsible agency] to protect"). Were Exxon's approach to be rewarded, every investigation into possible wrongdoing would yield protracted federal litigation.

C. If Threadbare Allegations that a State Investigation Constitutes Viewpoint Discrimination Are Actionable, then Exxon's Approach Will Be Replicated to the Public's Detriment

The ease and circumstances under which Exxon's approach will be replicated if it is successful in delaying the production of responsive documents —or, worse, if it is successful in obtaining discovery into the investigative practices of the Attorney General —should be of considerable concern to this Court. Subjects of

state investigations into deceptive marketing practices will use the federal forum as a shield from their state law obligations as a matter of course. Such cases would multiply rapidly, at high cost to scarce judicial resources, as subjects of state investigations would hasten to seek refuge on federal dockets.

That will be particularly true for companies like Exxon that market to large populations for widely used products, such that the accuracy of their marketing becomes not just a legal issue but also a policy one. A company should not become immunized from investigation because it seeks to influence public policy on issues that relate to that investigation; nor should such attempted influence provide a ticket to federal court to interfere with such an investigation. *Cf. United States v. Target American Advertising, Inc.*, 257 F.3d 348, 356 (4th Cir. 2001) ("When presented with evidence of unlawful conduct, the Government is not bound to investigate only those potential wrongdoers who support its policies"); *U.S. v. Judicial Watch, Inc.*, 266 F. Supp. 2d 1, 19 (D.D.C. 2002), ("Without substantial[] [and plausible factual allegations], we cannot immunize respondent from [IRS] audit based on its criticisms and suits against the government"), *aff'd by* 371 F.3d 824 (D.C. Cir. 2004).[11]

[11] The Former Attorneys General address Exxon's First Amendment claim because it is the focus of Exxon's briefing; its other claims suffer from the defects set forth in the Brief of Maura Healey at 40–47.

Deceptive marketing practices are barred by federal law and the law of each and every state. *See State Attorneys General*, *supra*, at 234. The First Amendment affords no protection to such practices. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"). Nor does the First Amendment provide a means to interfere with an investigation into whether such deceptive practices have occurred — at least without specific, detailed, and plausible factual allegations of impropriety. *See SEC v. McGoff*, 647 F.2d 185, 194 (D.C. Cir. 1981) (Ginsburg, J.) ("Most Americans criticize their government at one time or another and many in a position to be heard do so regularly and harshly. If strong criticism of administration policy on the part of a target of an agency investigation were sufficient to authorize inquiry into the agency's motives, little would remain of the general rule that 'except in extraordinary circumstances discovery is improper in a summary subpoena enforcement proceeding'").[12]

[12] For the reasons set forth in the Attorney General's Brief, *see* Brief of Maura Healey at 26–39, no factual, detailed, and plausible allegations have been made against the Attorney General here. It bears emphasis that the Attorney General, as an elected official, meets with private parties, advocates, and concerned citizens on a regular basis. Exxon's attempts to impute to the Attorney General the motives of certain individuals or groups with which she has met must fail. The Supreme Court's guidance that the views of advocates should not be engrafted onto legislators is equally applicable in the present context. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001) ("Legislative history is problematic even when the attempt is

CONCLUSION

A Massachusetts court already has conclusively and finally determined that the CID issued by the Attorney General is lawful. That determination should not be subject to collateral attack in federal court; if it is, longstanding state power to expeditiously respond to potentially unlawful business conduct will be constrained significantly. For these reasons, the District Court's dismissal of Exxon's claims should be affirmed.

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to draw inferences from [officeholders]. It becomes far more so when we consult sources still more steps removed from [the office] and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 5,792 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2016 (the same program used to calculate the word count).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 12, 2018, and that parties or their counsel of record are registered as ECF Filers and that they will be served via the CM/ECF system.

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