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 FOR NEW YORK ATTORNEY GENERAL

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PRELIMINARY STATEMENT

The New York Attorney General is investigating whether Exxon Mobil Corp. misled New York investors and consumers about how governmental actions to address climate change would affect Exxon's business, and what Exxon was doing in response. In an attempt to shut down the investigation, Exxon brought this federal suit.[1] Exxon claims, among other things, that New York's investigation violates its constitutional rights to due process, freedom of speech, and freedom from unreasonable searches. The U.S. District Court for the Southern District of New York (Caproni, J.) dismissed Exxon's first amended complaint and denied Exxon leave to amend the complaint further. This Court should affirm.

First, Exxon has failed to allege a ripe controversy. The New York subpoena it challenges is non-self-executing, and Exxon has not alleged the existence of any court order with which it has failed to comply. In the

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[1] Exxon is also suing the Massachusetts Attorney General, who is conducting a similar investigation and has filed a separate brief in this appeal.

absence of some definite, concrete injury, the district court lacked subject-matter jurisdiction over this suit.

Second, as the district court correctly concluded, Exxon has not pleaded any viable claim for relief. Exxon's First Amendment claim fails because it has not identified the protected speech supposedly being targeted or any harm to its speech; nor has it plausibly alleged that the New York investigation is illegitimate. To the contrary, Exxon's complaint and attached documents show that the New York Attorney General is investigating it under the authority of New York antifraud statutes for potentially misleading New York investors and consumers.

Because the complaint does not plausibly allege the illegitimacy of New York's investigation, Exxon cannot pursue a Fourth Amendment challenge to New York's investigative subpoena, a claim that the investigation was irredeemably unfair in violation of Exxon's due-process rights, or a claim for conspiracy to violate its civil rights. And because the complaint demonstrates that the investigation is focused on potentially fraudulent representations to *New York* investors and consumers, Exxon cannot maintain its claim that the investigation violates the dormant

aspect of the Commerce Clause by targeting out-of-state speech and conduct.

Exxon's proposed amendments to the first amended complaint do not cure these defects. Instead, they merely repeat Exxon's existing allegations. Accordingly, the district court correctly held that the proposed amendments would be futile and properly denied Exxon's request for leave to amend.

JURISDICTIONAL STATEMENT

Exxon invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1367 and 42 U.S.C. §§ 1983 and 1985. The district court dismissed its suit in a final judgment entered on March 30, 2018. (Joint Appendix (J.A.) 3137.) This Court has appellate jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Is Exxon's complaint subject to dismissal for lack of ripeness, because Exxon challenges a non-self-executing subpoena and has not alleged that it will face automatic sanctions for noncompliance?

2. Did the district court properly dismiss the complaint for failure to state a claim and correctly conclude that Exxon's proposed amendments would have been futile?

STATEMENT OF THE CASE

A. The New York Attorney General's Authority to Enforce State Antifraud Laws

The New York Attorney General is "the State's chief law enforcement officer." *People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 204 (1st Dep't 2008) (quotation marks omitted). As head of the New York Office of the Attorney General (NYOAG), the Attorney General safeguards the public interest through investigations and enforcement actions to prevent and combat securities fraud, N.Y. General Business Law (G.B.L.) art. 23-A; fraud against consumers, *id.* § 349; and persistent fraud or illegality in conducting business, N.Y. Executive Law § 63(12).

In particular, New York's longstanding securities-fraud law—the Martin Act—vests the Attorney General with broad authority to investigate suspected fraud in the offer, sale, or purchase of securities. *See* G.B.L. art. 23-A. The Martin Act empowers the Attorney General "to prevent fraudulent securities practices by investigating and intervening

at the first indication of possible securities fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011) (quotation marks omitted). State law likewise authorizes the Attorney General to investigate possible fraud perpetrated against consumers, *see, e.g.*, G.B.L. § 349, and suspected fraud in the conduct of business, *see* N.Y. Executive Law § 63(12).

The Attorney General may subpoena documents and witnesses as part of any such investigation. *See id.*; G.B.L. §§ 349(f), 352(2)–(3). Yet these "statutes do not bestow judicial powers upon the Attorney-General." *Matter of Sigety v. Hynes*, 38 N.Y.2d 260, 267 (1975). Instead, state antifraud laws allow the Attorney General to seek judicial relief for substantive violations, and New York's Civil Practice Law and Rules (C.P.L.R.) authorize the Attorney General to "move in the supreme court to compel compliance" with an investigative subpoena, upon showing "that the subpoena was authorized." C.P.L.R. 2308(b)(1). The subpoena recipient may raise all available legal objections, C.P.L.R. 404(a), or may move to quash the subpoena in whole or in part, C.P.L.R. 2304. In a proceeding to compel compliance with or challenge a subpoena, the

Attorney General need not "disclose the details of [her] investigation" beyond those necessary to establish her "authority, the relevance of the items sought, and some factual basis for [the] investigation." *Matter of American Dental Coop., Inc. v. Attorney-Gen.*, 127 A.D.2d 274, 280 (1st Dep't 1987).

B. The New York Attorney General's Ongoing Investigation into the Truth of Exxon Mobil Corp.'s Statements to New York Investors and Consumers

In November 2015, NYOAG issued a subpoena to Exxon as part of an investigation into possible violations of New York's laws prohibiting securities, consumer, and business fraud. (J.A. 709–726.) That subpoena requested documents that would enable NYOAG to assess whether Exxon had made false or misleading statements to investors and consumers about the impact of governmental efforts to address climate change on Exxon's business—including Exxon's operations, financial reporting, and accounting—and Exxon's response to those efforts. (*See* J.A. 716–717.)

Most details of NYOAG's ongoing investigation appropriately remain confidential. Some details, however, are in the public record, and are set forth here for context.

In the years preceding the 2015 subpoena, Exxon made many public statements about the company's understanding of the risks that climate change and government responses to climate change might pose to Exxon's business, and the company's efforts to address those risks. (*See* J.A. 356 (Affirmation of Katherine Milgram ¶¶ 5–7).) For instance, a 2014 report titled *Energy and Carbon—Managing the Risks* assured investors that Exxon was "confident that none of its hydrocarbon reserves are now or will become 'stranded'"—that is, not economically recoverable. (J.A. 2569.) The report also stated that Exxon calculates the likely costs of future global carbon regulations and "incorporate[s] them as a factor in [Exxon's] specific investment decisions." (J.A. 2586.)

Apparent contradictions between some of Exxon's public statements and internal company documents, along with apparent inconsistencies in Exxon's own public reporting, suggest that Exxon may not have accurately disclosed the company's practices in this important area. (*See, e.g.*, J.A. 356–357 (Milgram Affirmation ¶ 7).) And some statements in the *Managing the Risks* report appear to be premised on unsupported assumptions, possibly making them misleading. (*See* J.A. 356–357 (Milgram Affirmation ¶ 7).)

In August 2016, the Attorney General issued a separate subpoena to PricewaterhouseCoopers LLP (PwC), Exxon's outside auditor. (J.A. 1274–1292; *see also* J.A. 358 (Milgram Affirmation ¶ 11).) The PwC subpoena sought documents relating to the accuracy of Exxon's public statements about the impact of climate change and related policies on Exxon's reserves, impairments, and capital expenditures. (J.A. 1282–1283.)

Exxon did not serve objections to the 2015 subpoena or the PwC subpoena and has never moved to quash either subpoena in a New York court. Instead, Exxon has produced—and has allowed PwC to produce—responsive documents. (*See* J.A. 421 (First Am. Compl. ¶ 74).) The responses have been protracted and deficient, however, forcing NYOAG to seek judicial intervention to compel Exxon's and PwC's full compliance with their duties to assist NYOAG's authorized investigation. See *infra* at 11, 17. Exxon has also withheld a limited number of documents under a claim that disclosure would impinge on its First Amendment rights. (J.A. 397, 418 (First Am. Compl. ¶¶ 11, 67).)

NYOAG is not alone in investigating the accuracy of Exxon's financial disclosures about the risks that climate change and government

responses to climate change might pose to Exxon's business, and Exxon's efforts to address those risks. The Massachusetts Attorney General is also investigating this issue.

C. Procedural History

1. Exxon's commencement of this federal lawsuit

In April 2016, the Massachusetts Attorney General's Office issued a civil investigative demand (CID) to Exxon for company documents that might shed light on the accuracy of Exxon's public statements about its business. In July 2016, Exxon filed a federal complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 and state law against Massachusetts Attorney General Maura Healey, in her official capacity, in the U.S. District Court for the Northern District of Texas. (J.A. 54–85.) Exxon also sought to preliminarily enjoin AG Healey from enforcing the CID. (*See* J.A. 13.)

AG Healey moved to dismiss the case on threshold grounds including lack of personal jurisdiction, lack of ripeness, and improper venue. In addition, AG Healey contended that the court should decline to exercise jurisdiction based on the abstention doctrine set forth in *Younger*

v. Harris, 401 U.S. 37 (1971), in deference to a parallel proceeding in Massachusetts state court where Exxon was also challenging the CID.

Rather than decide Massachusetts's motion on any of the dispositive threshold grounds raised by AG Healey, the Texas district court ordered "jurisdictional discovery" to determine the applicability of the narrow bad-faith exception to the *Younger* doctrine.[2] (J.A. 347.) On the heels of that order, Exxon served the New York Attorney General—who was not yet a party to the case—nearly one hundred total interrogatories, requests for admission, and document demands. (J.A. 1296–1340.) Exxon also noticed the personal deposition of AG Schneiderman, plus those of the Chief and Deputy Chief of NYOAG's Environmental Protection Bureau. (J.A. 1341–1346.) In November 2016, the Texas district court ordered AG Healey to travel to Dallas for a deposition, and directed AG Schneiderman to make himself available for a deposition in Dallas. (J.A. 936–937.) After Massachusetts petitioned

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[2] The court apparently—and erroneously—assumed that it needed "to examine its subject matter jurisdiction" in this fashion before addressing any other defenses. (J.A. 346); *see also Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003) ("*Younger* is not a jurisdictional bar based on Article III requirements.").

the Fifth Circuit for a writ of mandamus, the court withdrew that order and stayed all discovery. (J.A. 938–942, 947.)

While these events were occurring, various deficiencies in Exxon's responses to the November 2015 subpoena and the subpoena to PwC forced NYOAG to seek judicial relief to hasten Exxon's full compliance. In October 2016, NYOAG moved in New York Supreme Court to enforce the PwC subpoena in full. (J.A. 1348–1350.) Exxon did not cross-move to quash the PwC subpoena or in any way challenge NYOAG's investigative authority in the New York forum.[3] Instead, the next business day after the subpoena enforcement proceeding began, Exxon moved for leave to amend its federal complaint to add AG Schneiderman as a defendant. (*See* J.A. 21.)

Exxon's first amended complaint alleges that the November 2015 subpoena issued to it by NYOAG was impermissibly motivated, constituted an abuse of process under state law, violated Exxon's rights

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[3] New York Supreme Court (Ostrager, J.) granted the Attorney General's motion to compel compliance with the PwC subpoena (J.A. 1423–1427), and the New York Appellate Division affirmed that decision. *See Matter of People v. PricewaterhouseCoopers, LLP*, 150 A.D.3d 578, 578–79 (1st Dep't 2017). The New York Court of Appeals then declined discretionary review. 29 N.Y.3d 1117 (2017).

under the U.S. Constitution's First, Fourth, and Fourteenth Amendments and the Commerce Clause, and was preempted by federal law. (J.A. 432–438.) Exxon also alleges, among other things, that AGs "Schneiderman and Healey have agreed with each other, and with others known and unknown, to deprive ExxonMobil of rights." (J.A. 432 (¶ 106).) According to the complaint, AG Schneiderman and AG Healey revealed these improper motives during a press conference in New York City in March 2016. (J.A. 402 (¶ 27).) Exxon requests declaratory and injunctive relief invalidating New York's 2015 investigative subpoena and Massachusetts's CID. (*See* J.A. 398 (¶ 14).)

2. Exxon's representations of compliance with the New York Attorney General's November 2015 subpoena

In November 2016, NYOAG moved in New York Supreme Court to compel full compliance with the November 2015 subpoena in light of a variety of deficiencies in Exxon's document production. (*See* J.A. 1429–1430.) Exxon opposed NYOAG's request for the production of certain general accounting documents, successfully contending that those were beyond the subpoena's scope. (J.A. 1452–1455, 1481.) Exxon did not raise any constitutional objections to the subpoena or to NYOAG's document

requests. (J.A. 1438.) Instead, Exxon represented—both at the hearing on NYOAG's motion to compel and in a follow-up letter to the New York court—that it was "fully complying with its obligations" under the subpoena. (J.A. 1486 (Letter); *see* J.A. 1479–1480 (Hr'g Tr.).) In addition, Exxon "agreed to complete a reasonable production of documents responsive to" the subpoena by January 31, 2017. (J.A. 1487.) Exxon failed to meet the agreed-on January 31 deadline, however. At the next hearing, the court (Ostrager, J.) reaffirmed that NYOAG "is entitled to documents relevant to its outstanding subpoena" and set a deadline for completion of Exxon's production. (J.A. 1555, 1576, 1579.) One month after the deadline set by the court, on May 3, an attorney for Exxon certified compliance with the November 2015 subpoena. *See* Supp. Affirmation of Michele Hirschman ¶¶ 20–21, *Matter of People v. PricewaterhouseCoopers, LLP*, No. 451962/16 (N.Y. Sup. Ct. May 3, 2017), NYSCEF No. 155 (internet).[4]

[4] For sources available on the internet, full URLs appear in the table of authorities. All sites were last visited on October 5, 2018.

3. The district court's dismissal of Exxon's federal complaint and denial of leave to amend

In March 2017, the Texas district court, in response to the showing of AGs Schneiderman and Healey that they were not subject to personal jurisdiction in Texas, transferred this suit to the Southern District of New York under 28 U.S.C. § 1406(a). (J.A. 988–999.) The U.S. District Court for the Southern District of New York (Caproni, J.), upon receiving the case, stated an intention to stage the litigation "in a way that is respectful of federalism concerns." (J.A. 2984–2985.) Judge Caproni requested initial briefing on personal jurisdiction, ripeness, preclusion, and abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)—grounds NYOAG had raised in its dismissal briefing in the Northern District of Texas. (*See* J.A. 2985–2986); N.Y. Att'y Gen's Mem. of Law in Supp. of Mot. to Dismiss First Am. Compl. at 14 n.7 (Dec. 5, 2016), ECF No. 134. Judge Caproni later requested briefing on whether the first amended complaint states a claim for relief. (J.A. 3086.)

While the parties were briefing these issues, Exxon moved to amend its complaint once again. (*See* J.A. 46–47.) Exxon claimed to have discovered "additional documentary evidence" supporting its "claim that

the Attorneys General are engaged in a conspiracy to violate ExxonMobil's constitutional rights." Exxon Mobil Corp.'s Mem. of Law in Supp. of Mot. for Leave to File a Second Am. Compl. (Exxon Leave Mem.) at 2, 8–9, ECF No. 251. With its motion papers, Exxon included a proposed second amended complaint. (J.A. 1924–1985.) The Attorneys General opposed Exxon's motion, arguing that amendment would be futile, unduly prejudicial, and untimely. *See* Opp'n of N.Y. Att'y Gen. to Exxon's Mot. for Leave to File a Second Am. Compl. at 1–4, ECF No. 256; Opp'n of Att'y Gen. Maura Healey to Exxon Mobil Corp.'s Mot. for Leave to File a Second Am. Compl. at 2–6, ECF No. 255.

In March 2018, the district court dismissed the complaint and denied leave to amend. The court concluded that Exxon had pleaded a ripe injury but had failed to state any viable claims for relief through its existing allegations or its proposed additional allegations.[5] (Special Appendix (SPA) 1–48.)

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[5] The court expressly declined to consider whether *Colorado River* abstention would be appropriate. (Special Appendix 48 n.36.) That argument thus remains preserved for review in the district court should this Court remand any portion of this case. *See, e.g.*, *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012).

The district court first observed that although "allegations of an improper motive are essential to" Exxon's claims for violation of the First, Fourth, and Fourteenth Amendments, Exxon had not plausibly alleged such an improper motive. (SPA 34.) As the court noted, the March 2016 press conference was "[t]he centerpiece of Exxon's allegations," yet the statements made by AG Schneiderman and AG Healey at the conference demonstrated a legitimate basis for their investigations: their concern that Exxon may have deliberately made misleading statements to consumers and investors about its efforts to account for the risks that climate change and government responses to climate change might pose to its business. (SPA 35–38; *see* SPA 38 (same for AG Healey).) The court recognized that this concern was sufficient grounds to commence a fraud investigation. (SPA 37.) The court also noted Exxon's failure to allege that the Attorneys General did not actually believe Exxon might have committed fraud. (SPA 38.)

The failure to plead bad faith, the court ruled, was similarly "fatal" to Exxon's conspiracy and state-law claims. (SPA 45.) As the court noted, Exxon's conspiracy claim also failed because "Exxon has not alleged that it is a member of a 'class' against which the AGs discriminated." (SPA 45

n.35.) And the court dismissed Exxon's Commerce Clause claim because Exxon had not alleged an impermissible regulation of interstate commerce.[6] (SPA 45–46.)

In the months following the district court's dismissal of this suit, the New York state court overseeing Exxon's subpoena compliance has ordered Exxon to produce additional documents and targeted interrogatories that should have been produced in response to NYOAG's subpoenas, including the 2015 subpoena. *See* So-Ordered Transcript (Aug. Tr.) at 19–20, *PricewaterhouseCoopers*, No. 451962/16 (N.Y. Sup. Ct. Aug. 29, 2018), NYSCEF No. 433 (internet). In accordance with that order, Exxon has responded to NYOAG's interrogatories and produced additional documents.

[6] The court also dismissed, as inadequately pleaded, a preemption claim that Exxon raised to the district court (*see* SPA 47–48) but has not renewed on appeal (*see* Br. for Plaintiff-Appellant at 3–5).

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6), accepting all factual allegations as true and drawing all inferences in the plaintiff's favor. *See, e.g.*, *Trustees of the Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2279 (2017). The Court likewise reviews de novo denials of leave to amend "based on a legal interpretation, such as a determination that amendment would be futile." *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011).

SUMMARY OF ARGUMENT

Exxon's failure to allege a ripe dispute bars this suit against the New York Attorney General at the threshold. A challenge to an administrative subpoena—such as the one Exxon has brought here—is ripe only if the recipient will face automatic consequences for refusing to comply. New York's investigative subpoenas, however, are not self-executing. Thus, Exxon will experience no legally cognizable injury unless it knowingly flouts a state-court order compelling compliance. Because Exxon's complaint does not allege the existence of any such court

order with which it has failed to comply, the district court lacked subject-matter jurisdiction over its suit.

The complaint also cannot proceed because, as the district court correctly concluded, Exxon has failed to state any viable claim for relief against the New York Attorney General. Exxon alleges that the Attorney General's investigation violates its constitutional rights to freedom of speech, freedom from unreasonable searches, and due process, as well as 42 U.S.C. § 1985's statutory prohibition on conspiracies to violate civil rights. But these challenges to the investigation require some plausible factual showing that the investigation is illegitimate. And Exxon's complaint and attachments show instead that the Attorney General is investigating Exxon in accordance with New York's antifraud statutes for potentially misleading investors and consumers in New York. The district court therefore properly dismissed Exxon's claims under the First, Fourth, and Fourteenth Amendments, as well as Exxon's claim that the investigation is the result of a conspiracy to violate its civil rights.

Exxon cannot cure these pleading defects in its first amended complaint by adding cumulative allegations about the New York Attorney General's supposed improper motive in investigating. These

allegations do not meet the high bar for alleging that a prosecutor's investigatory action was illegitimate. Accordingly, the district court correctly denied as futile Exxon's motion for leave to further amend its complaint. Granting Exxon leave to amend would also unduly prejudice the Attorney General by prolonging a meritless case that has burdened the time and resources of the Attorney General's Office for almost three years.

ARGUMENT

POINT I

EXXON'S FAILURE TO ALLEGE A RIPE INJURY BARS ITS SUIT AGAINST THE NEW YORK ATTORNEY GENERAL

Article III of the Constitution grants federal courts jurisdiction over "Cases" and "Controversies," U.S. Const. art. III, § 2, which means, among other things, that a complaint must present a *ripe* case or controversy, *see, e.g.*, *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 807–08 (2003). Federal courts thus lack jurisdiction to entertain an unripe claim. *See, e.g.*, *National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013). To satisfy the ripeness requirement, a plaintiff's alleged injury "may not be speculative

or abstract, but must be distinct and definite." *Schulz v. IRS*, 395 F.3d 463, 464 (2d Cir.) (per curiam), *clarified on reh'g*, 413 F.3d 297 (2d Cir. 2005). The ripeness prerequisite serves the important aim of preventing federal courts from "becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues." *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (quotation marks omitted).

Exxon's lawsuit seeks to invalidate an administrative subpoena that is not self-executing, and such a challenge does not present a ripe controversy that satisfies the requirements of Article III.[7] *See, e.g.*, *Schulz*, 395 F.3d at 464–65; *see also Reisman v. Caplin*, 375 U.S. 440, 447–50 (1964). Unlike a self-executing subpoena for which the issuer could "itself sanction non-compliance," *Google, Inc. v. Hood*, 822 F.3d 212, 224 (5th Cir. 2016), a non-self-executing subpoena like the one at issue here does not impose any legally cognizable harm on the recipient until

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[7] Although the district court rejected the Attorney General's arguments that this dispute is not ripe, this Court can affirm the dismissal on the grounds that ripeness is lacking. *See, e.g.*, *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 205 (2d Cir. 2006) (Court "may affirm on any basis for which there is sufficient support in the record").

the agency successfully enforces the demand in court. Consequently, the recipient may raise any objections to the subpoena only through the subpoena's procedures for judicial review. *See Schulz*, 395 F.3d at 464; *see also In re Colton*, 291 F.2d 487, 490 (2d Cir. 1961), *abrogated on other grounds by Schulz*, 395 F.3d 463. This is as true of "a state's non-self-executing subpoena" as of the "federal equivalent." *Google*, 822 F.3d at 226. Indeed, respect for coequal state sovereigns makes federal courts even "less willing to intervene" in a state investigation "when there is no current consequence for resisting the subpoena and the same challenges raised in the federal suit could be litigated in state court." *Id.*

These principles bar the current challenge to the legality of NYOAG's 2015 subpoena, which is not self-executing; and the same principles would bar a challenge to any other investigative process issued by NYOAG in the course of this fraud investigation. In conducting fraud investigations, the "Attorney-General acts as an executive official performing an administrative duty." *Carlisle v. Bennett*, 268 N.Y. 212, 217 (1935). The G.B.L. and Executive Law "do not bestow judicial powers upon the Attorney-General," who "passes upon no question of civil violation or of criminal guilt." *Matter of Sigety*, 38 N.Y.2d at 267

(quotation marks omitted). Rather, to enforce an investigative subpoena, NYOAG must "move in the supreme court to compel compliance" and demonstrate "that the subpoena was authorized." C.P.L.R. 2308(b)(1). Moreover, "no contempt punishment can be sought until compliance has been judicially ordered but not forthcoming." *Dias v. Consolidated Edison Co. of N.Y.*, 116 A.D.2d 453, 454 (1st Dep't 1986) (quotation marks omitted).

The respondent in a New York subpoena-enforcement proceeding may raise legal objections, *see* C.P.L.R. 404(a)—including constitutional objections, *see State v. Mobil Oil Corp.*, 40 A.D.2d 369, 370 (1st Dep't), *aff'd*, 33 N.Y.2d 627 (1973)—or contend that the subpoena is "an instrument of harassment," *Matter of Hynes v. Moskowitz*, 44 N.Y.2d 383, 393 (1978). Indeed, in the New York state-court proceedings on Exxon's subpoena compliance, Exxon has acknowledged that "New York law protects subpoena recipients, like ExxonMobil, against the 'abuse of subpoena power' by providing for judicial review." (J.A. 1454.) New York's subpoena-compliance procedures thus afford Exxon a "full opportunity for judicial review" before it would face any penalties for noncompliance. *See Reisman*, 375 U.S. at 443, 450.

New York law also allows a recipient to move (or cross-move) to quash an investigative subpoena or to impose "[r]easonable conditions" on compliance. C.P.L.R. 2304. Such a motion to quash is the "proper and exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority." *Matter of Brunswick Hosp. Ctr. Inc. v. Hynes*, 52 N.Y.2d 333, 339 (1981). And it is well settled that a motion to quash adequately protects the rights of an investigatory-subpoena recipient. *See Roe v. United States (In re Grand Jury Subpoena Served upon Doe)*, 781 F.2d 238, 243 (2d Cir. 1986) (en banc); *see also*, *e.g.*, *Matter of McGinley v. Hynes*, 51 N.Y.2d 116, 126 n.3 (1980).

In short, Exxon "can adequately raise" in a New York state court any "constitutional challenges to the Attorney General's conduct," even a claim that "the Attorney General was engaged in a conspiracy to deprive" Exxon of rights "guaranteed by the First Amendment." *See Temple of the Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991) (quotation marks omitted).

The district court correctly recognized that NYOAG's 2015 subpoena is not self-executing (SPA 18), yet ruled that Exxon had alleged a ripe dispute. Specifically, the court concluded that because Justice Ostrager

had compelled Exxon's compliance with the subpoena, "Exxon could be subject to contempt sanctions for failing to comply with Justice Ostrager's orders." (SPA 18.)

That conclusion was incorrect on this record, in light of Exxon's prior certification of compliance with the 2015 subpoena.[8] See *supra* at 13. Having certified compliance, Exxon cannot plausibly claim a "current consequence for resisting the subpoena." *Google*, 822 F.3d at 226. To be sure, Exxon may at some future point refuse to produce documents based on a good-faith belief that those documents fall outside of the subpoena's scope or are shielded by law from disclosure. But withholding such documents would not subject Exxon to civil contempt, which attaches only upon a showing that the party to be sanctioned knew there was no legal basis for its actions. *See El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 35 (2015). Indeed, in ruling on NYOAG's most recent motion to compel, the New York court granted the motion in part and simply ordered the

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[8] This Court may consider evidence outside the pleadings in determining whether it has subject-matter jurisdiction over this case. *See Katz v. Donna Karan Co.*, 872 F.3d 114, 119 (2d Cir. 2017). And in any event, this Court may take judicial notice of the fact that Exxon has certified compliance in a document filed in another court. *See, e.g.*, *Global Network Commc'ns v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

production of documents, rather than holding Exxon in contempt—or even mentioning contempt. *See* Aug. Tr. at 2–20.

The district court also erred in concluding that Exxon's obligation "to comply with the [NYOAG's] subsequent subpoenas for documents and testimony"—that is, subpoenas issued after 2015—makes this dispute ripe. (SPA 18.) Exxon's first amended complaint challenges only the 2015 subpoena, not any subsequent subpoenas. (*See* J.A. 400 (¶ 20), 438.) And at any rate, Exxon has not alleged that there exists any current court order with which Exxon has not complied. Because Exxon has not plausibly alleged that it currently faces any risk of penalty from the 2015 subpoena, this dispute is unripe for federal resolution. *See Google*, 822 F.3d at 226. And the claim will remain unripe so long as Exxon continues to certify compliance with the subpoena.

POINT II

IN ANY EVENT, THE DISTRICT COURT PROPERLY DISMISSED EXXON'S FIRST AMENDED COMPLAINT AND DENIED LEAVE TO AMEND

A. Exxon Fails to State a First Amendment Claim.

As the district court held, Exxon's failure to plausibly allege that NYOAG lacked legitimate grounds to investigate requires dismissal of Exxon's First Amendment claim. Exxon's own complaint and attached documents acknowledge NYOAG's belief that Exxon may have defrauded New York investors and consumers. Moreover, even if Exxon had adequately pleaded a lack of a legitimate basis to investigate, its First Amendment claim suffers from other pleading defects requiring dismissal, including the failure to identify Exxon's purportedly protected speech and the failure to allege a First Amendment injury. Any one of these defects warrants affirming the district court's dismissal of Exxon's First Amendment claim.

1. The district court correctly dismissed Exxon's First Amendment claim for failure to adequately allege bad faith.

Exxon's free-speech claim rests on the faulty notion that a State can violate the First Amendment by investigating a party for fraud. The law recognizes no such claim. Indeed, a State "violates no constitutional rights by merely investigating." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986). And subpoenas requesting documents, such as NYOAG's 2015 subpoena, "do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political associations,"[9] *SEC v. McGoff*, 647 F.2d 185, 187–88 (D.C. Cir. 1981). While Exxon notes that the First Amendment "applies to government investigations" (Br. for Plaintiff-Appellant (Br.) at 29 n.7),

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[9] The Ninth Circuit did not hold otherwise in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000). *See* Br. for Texas et al. as Amici Curiae at 7. *White* concerned a federal investigation into the plaintiffs' advocacy against the construction of affordable housing in their neighborhood. *See* 227 F.3d at 1220. During its investigation, the government went well beyond merely requesting documents; it instructed the plaintiffs "to cease publication of discriminatory statements . . . and fliers," thereby trenching on their First Amendment rights. *Id.* at 1238 (quotation marks omitted). And unlike here, where NYOAG is investigating whether Exxon uttered fraudulent statements—speech excepted from First Amendment protection (see *infra* at 34–35)—the speech the federal government was investigating in *White* was indisputably protected, *see* 227 F.3d at 1230.

the cases it cites show only that subjects of an investigation remain free to raise constitutional objections to *specific* information sought by a subpoena while otherwise complying. *See, e.g.*, *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234, 238–40 (1957); *see also FEC v. Larouche Campaign*, 817 F.2d 233, 234–35 (2d Cir. 1987) (per curiam). Exxon has done just that. (*See* J.A. 418 (¶ 67).)

Under the "presumption of regularity accorded to prosecutorial decisionmaking," moreover, courts assume that a prosecutor generally "has legitimate grounds for the action he takes" unless shown otherwise. *Hartman v. Moore*, 547 U.S. 250, 263 (2006).[10] Far from overcoming that presumption, Exxon's complaint and the nearly 500 pages of attached documents[11] (*see* J.A. 392–935) show that NYOAG is investigating for

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[10] Exxon is wrong to suggest (Br. at 33 n.9) that the Supreme Court, in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), questioned *Hartman*'s vitality. To the contrary, *Lozman* reaffirmed "the 'presumption of regularity accorded to prosecutorial decisionmaking,'" but observed that it "does not apply" to retaliatory arrests. *Id.* at 1953 (quoting *Hartman*, 547 U.S. at 263). Exxon does not allege a retaliatory arrest.

[11] On a motion to dismiss, the court takes as true the factual allegations found on the face of the complaint and the documents attached to it, which the "complaint is deemed to include." *E.g.*, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (quotation marks omitted).

legitimate purposes, based on legitimate grounds. And as a matter of law, allegations of an improper motive cannot raise a plausible claim of bad faith when the complaint also alleges an "obvious alternative explanation" for the conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (quotation marks omitted). Thus, the district court correctly concluded that the complaint's "extremely thin allegations and speculative inferences" cannot make up for the complaint's factual allegations showing that NYOAG had a legitimate basis to investigate Exxon for potentially defrauding New York investors and consumers. (SPA 2; *see* SPA 35–45.)

As the complaint acknowledges, AG Schneiderman stated that he "'had served a subpoena on ExxonMobil' to investigate 'theories relating to consumer and securities fraud.'" (J.A. 406 (¶ 36).) In addition, the subpoena itself—with which a state court has compelled compliance and accordingly found to be duly authorized, *see* C.P.L.R. 2308(b)(1)—explains that it was issued "in connection with an investigation to determine whether" Exxon had defrauded consumers and investors. (J.A. 709.) Other documents attached to Exxon's complaint further elaborate on NYOAG's legitimate grounds for investigating Exxon. For instance, AG Schneiderman is alleged to have told a gathering sponsored

by *Politico* that NYOAG was investigating whether Exxon Mobil misled investors and the public by concealing the risks that climate change might pose to the oil and gas industry. (J.A. 581.)

Exxon is thus incorrect in contending (Br. at 41–44) that the district court improperly credited NYOAG's factual assertions or drew inferences against Exxon when evaluating the motion to dismiss. As the court's analysis shows, the court simply accepted the facts that Exxon's pleading alleged.

Exxon is also wrong in arguing that the district court ignored Exxon's allegations that NYOAG acted in bad faith. *See id.* at 25, 36–40. The district court in fact assessed these allegations and held that they did not meet Exxon's pleading burden. (*See* SPA 35–45.) As the court explained, the allegations do not support a reasonable inference that the investigations, when placed in the context of Exxon's other pleaded facts, lacked a valid investigatory basis. (SPA 35–36.)

In other words, the district court properly required Exxon to allege plausible factual content, *see Iqbal*, 556 U.S. at 678, showing a lack of a legitimate basis to investigate, *see Hartman*, 547 U.S. at 252. Exxon is thus mistaken in its claim that the district court required it "to *disprove*

the possibility that the investigations were independently motivated by a legitimate law enforcement concern."[12] Br. at 37 (emphasis added). Instead, the court, applying the presumption of regularity attaching to prosecutorial action, correctly held that a lack of legitimate grounds to investigate "must be *alleged*." *See Hartman*, 547 U.S. at 252, 263 (emphasis added).

Contrary to Exxon's arguments (Br. at 36–39), the district court did not need to individually dispose of each of Exxon's allegations of supposed bad faith. In assessing the sufficiency of Exxon's complaint, the district court was entitled to "consider the complaint in its entirety," *Slayton v. American Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010), and was not required to catalog each of its 128 paragraphs. Exxon thus misses the point in observing that the court did not expressly address Exxon's

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[12] Exxon is not aided by its reliance (Br. at 37) on *Pittsburgh League of Young Voters Education Fund v. Port Authority of Allegheny County*, 653 F.3d 290, 297 (3d Cir. 2011). That case did not concern any allegations of retaliation, much less allegations of a retaliatory investigation. *Pittsburgh League* instead held that a county engaged in viewpoint discrimination by banning advertisements "informing ex-prisoners that they have the right to vote and encouraging them to exercise it." *Id.* at 292–93. As explained later (*infra* 37–38), Exxon has not adequately pleaded a claim for viewpoint discrimination.

allegation that NYOAG investigated Exxon's statements of opinion. *See* Br. at 37–39. The complaint as a whole failed to plausibly plead that NYOAG lacked a valid basis to investigate (*see, e.g.*, SPA 2), and the additional allegation that NYOAG investigated Exxon's opinions would not change that conclusion.

2. Dismissal of Exxon's First Amendment claim is also warranted in light of other pleading defects that NYOAG raised below.

Exxon fails to plead a First Amendment claim for several additional reasons, any one of which can serve as an alternative basis for affirmance, *see, e.g.*, *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 205 (2d Cir. 2006).

First, Exxon fails to allege any *protected* speech that NYOAG's investigation is "targeting" (J.A. 428 (¶ 88)). A plaintiff pleading a retaliation claim, like the one Exxon asserts here, must allege "that the speech or conduct at issue was protected." *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003) (quotation marks omitted). Here, however, the complaint suggests that NYOAG's concerns about climate change (*e.g.*, J.A. 403 (¶ 28)) align with Exxon's own "longstanding public recognition of the risks associated with climate change" (J.A. 396–397 (¶ 9)). As the

complaint explains, "[f]or more than a decade, ExxonMobil has publicly acknowledged that climate change presents significant risks that could affect its business." (J.A. 416 (¶ 63).) Thus, even a liberal reading of the complaint does not reveal what protected speech NYOAG allegedly had "the ulterior motive" of squelching with a document subpoena aimed at investigating potential fraud. (*See* J.A. 433 (¶ 107).)

Exxon cannot cure this deficiency by pointing to speech that is not alleged in the complaint.[13] And there is no merit to Exxon's suggestion below (J.A. 1897) that the targeted speech could consist of the statements that are "the subject of" NYOAG's anti-fraud investigation. Because "the First Amendment does not prevent anti-fraud enforcement," *Citizens United v. Schneiderman*, 882 F.3d 374, 385 n.4 (2d Cir. 2018), NYOAG may investigate potentially fraudulent statements without violating Exxon's free-speech rights, *see, e.g.*, *id.*; *see also Illinois ex rel. Madigan*

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[13] For example, in opposing the Attorneys General's motions to dismiss, Exxon speculated that the investigations were retaliation for Exxon's questioning whether "existing or reasonably anticipated climate policies and technology" could satisfy the Paris Accords' goal to "limit global temperature increase to two-degrees Celsius by 2100." (J.A. 1896.) An inadequately pleaded claim cannot be saved by factual allegations made for the first time in opposition to a motion to dismiss. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998).

v. Telemarketing Assocs., Inc., 538 U.S. 600, 617 (2003); *supra* at 28. Exxon cites no support for the contrary view (*see* J.A. 1897), which would apparently require NYOAG to justify its investigation by *proving* that Exxon committed fraud—an entirely backward outcome.

Second, Exxon has also failed to allege a First Amendment injury—an independent ground for dismissal. As this Court has recognized, a plaintiff claiming retaliation for free speech must allege that government action "adversely affected" the plaintiff's speech or that the plaintiff "has suffered some other concrete harm." *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) (per curiam). Yet the complaint alleges no such harm. It does not claim that NYOAG's document requests have hindered Exxon's corporate messaging in any way. Nor does it claim other harms of the type that this Court has found sufficient to plead First Amendment injury. *See Zherka v. Amicone*, 634 F.3d 642, 644 (2d Cir. 2011). At most, Exxon claims, in conclusory fashion, that NYOAG's investigation may "silence and intimidate" it (*e.g.*, J.A. 392) at some undetermined time in the future, not that Exxon has actually been intimidated into not speaking. Those allegations, which merely express

"an abstract, subjective fear," do not suffice under settled legal standards. *See National Org. for Marriage*, 714 F.3d at 689.

3. Exxon's claim that it is challenging viewpoint discrimination does not alter the analysis.

In an effort to bypass its obligation to allege that the investigation lacked a legitimate basis, *see Hartman*, 547 U.S. at 252, Exxon contends that its First Amendment challenge is actually a viewpoint-discrimination claim. *See* Br. at 27–34. That argument does not aid Exxon, however, because courts need not accept a plaintiff's "labels and conclusions," *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Indeed, this Court has warned against "placing too much significance on the labels [plaintiffs] attach to their complaints, lest they circumvent" adverse case law through artful pleading. *Marshall v. Picard (In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81, 91–92 (2d Cir. 2014).

Here, the complaint alleges that the New York Attorney General is investigating Exxon in an "attempt to deter or silence" Exxon's views on climate change. *See Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012) (quotation marks omitted). For example, the complaint describes the New York and Massachusetts investigations as "a coordinated effort to

silence and intimidate one side of the public policy debate on how to address climate change." (J.A. 392; *see also* J.A. 410 (¶ 49), 412 (¶ 54), 413 (¶ 55), 414 (¶ 57), 415 (¶ 59), 429 (¶ 92), 431 (¶ 98), 433 (¶ 110).) And Exxon adhered to that theory at oral argument before the district court, claiming that the New York Attorney General subpoenaed Exxon "to silence" a "political opponent[]." (J.A. 3036.)

These allegations do not amount to a viable claim for viewpoint discrimination. Viewpoint discrimination occurs when the government denies a speaker a forum based on viewpoint, *see Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), not when the government punishes a speaker for past speech, as Exxon claims the Attorney General has done here.[14] In *Rosenberger*, for example, the plaintiff successfully asserted a viewpoint-discrimination claim by showing that a state university had refused to fund his student newsletter because it did not want to sponsor newsletters with a

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[14] For instance, in *Tobey v. Jones*, the Fourth Circuit applied the First Amendment retaliation framework to plaintiff's claim that law enforcement officers seized him because they disagreed with a message conveyed by his shirt, even though the plaintiff alleged that the officers had engaged in "viewpoint discrimination." 706 F.3d 379, 387, 391 (4th Cir. 2013).

"religious editorial viewpoint." *Id.* at 827. And in *Wandering Dago, Inc. v. Destito*, the plaintiff's successful viewpoint-discrimination claim rested on the State's refusal to let a vendor with "ethnic-slur branding" sell food on state property, because it wished to prevent the vendor from conveying its offensive message. 879 F.3d 20, 24–29 (2d Cir. 2018); *see id.* at 32 ("[g]iving offense is a viewpoint when it comes to ethnic slurs" (alteration in original; quotation marks omitted)).[15] Unlike the government conduct in those cases, the conduct that Exxon alleges NYOAG took—investigating Exxon for potential fraud—does not regulate speech at all (see *supra* at 28), let alone protected speech based on a particular viewpoint (see *supra* at 34–35).

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[15] *See also, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389, 393–94 (1993) (regulating speech by refusing to screen a film with "a Christian perspective" (quotation marks omitted)); *Pittsburgh League*, 653 F.3d at 292–93 (regulating speech by banning advertisement encouraging ex-prisoners to vote); *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 620 (2d Cir. 2005) (regulating speech by censoring school assignments "to exclude religious content").

B. Exxon Has Not Stated Any Other Viable Claims.

1. Exxon fails to state a Fourth Amendment claim.

There is no merit to Exxon's claim that the 2015 subpoena issued by NYOAG requires an unreasonable search. (*See* J.A. 432 (¶ 103), 434–435 (¶¶ 113–114).) That Fourth Amendment claim is inadequately pleaded and also suffers from two antecedent defects supporting dismissal. *First*, the only relief a § 1983 plaintiff may pursue against the State is prospective—a bedrock principle that the State may raise "at any time during the course of proceedings," even if the defense "did not exist at the outset." *McGinty v. New York*, 251 F.3d 84, 94, 101 (2d Cir. 2001). And here, it is too late for Exxon to seek prospective relief because Exxon has already certified compliance with the subpoena it challenges. See *supra* at 13. While some residual production may be required to maintain compliance, Exxon cannot credibly claim that any such production constitutes a disproportionate, and thus unreasonable, search subject to prospective Fourth Amendment protection.

Second, because Exxon challenges a state subpoena that requires a state-court order to be enforceable, *see* C.P.L.R. 2308(b), its claim that the subpoena is unconstitutionally overbroad is almost impossible for a

federal court to resolve. If the claim had been made in state court, that court would have had to determine the scope of state investigative authority, and the relationship of this exercise of state authority to the public interest. *See, e.g.*, *Matter of American Dental Coop.*, 127 A.D.2d at 280. Such a ruling that should be made in the first instance by a state court. *Cf. Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) ("The scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts."). Exxon had ample opportunity to raise this claim in state court, but has never done so, instead maintaining that it is fully complying with the subpoena.

Moreover, even if properly before the Court, Exxon's Fourth Amendment claim would still fail because Exxon does not plausibly allege bad faith, as the district court recognized (*see* SPA 35–45). Administrative subpoenas satisfy the Fourth Amendment if they serve "a legitimate purpose."[16] *United States v. Construction Prods. Research, Inc.*, 73 F.3d

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[16] Despite Exxon's claim to the contrary (Br. at 45–46), this broad authority does not fall away when the subpoena touches on First Amendment rights. Instead, the recipient may object to the *specific* "disclosure sought," *Larouche Campaign*, 817 F.2d at 234—as Exxon has done (see *supra* at 29).

464, 471 (2d Cir. 1996) (quotation marks omitted). In addition, as explained above, the Attorney General is presumed to have "legitimate grounds for the action he takes." *Hartman*, 547 U.S. at 263; *accord Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988). That presumption is more than a mere "permissible inference" (Br. at 47); it can be overcome only by allegations that the Attorney General lacked legitimate grounds to investigate, *see Hartman*, 547 U.S. at 252; *Fabrikant*, 691 F.3d at 215.

Against this backdrop, Exxon's arguments fall short. Exxon's main charge is that NYOAG's investigative theory has shifted over time. *See* Br. at 46–47. But the documents that Exxon attached to its complaint refute its claim of shifting theories. While Exxon asserts (*id.* at 46) that the investigation's focus changed midstream to Exxon's reserves, the subpoena shows that, from the outset, NYOAG sought to investigate the "impact" of "Climate Change-related issues" on Exxon's "Fossil Fuel reserves" (J.A. 716). And Exxon's allegation that a "spokesman for Attorney General Schneiderman stated that ExxonMobil's 'historic climate change research' was no longer 'the focus of this investigation'" (J.A. 422 (¶ 74)) alters the quotation so much as to change its meaning.

What the spokesman actually said was that "the company's financial disclosures—and not the accuracy of its historic climate change research—are the focus of this investigation." (J.A. 779.) Put differently, the investigation concerned whether Exxon misrepresented the financial impact of climate change and governmental efforts to combat it, not whether the company's climate-change research was correct or had been misrepresented. That has been the investigation's focus from the start.[17]

At any rate, investigations by their nature are fluid, with the goal being to "discover and procure evidence, not to prove a pending charge or complaint." *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 201

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[17] Although Exxon disparages NYOAG's theories as "pretextual" (Br. at 24), those theories have been held to state a claim for securities fraud in a class action alleging fraudulent conduct that overlaps what NYOAG is investigating here, *see Ramirez v. Exxon Mobil Corp.*, No. 16-cv-3111, 2018 WL 3862083 (N.D. Tex. Aug. 14, 2018). In *Ramirez*, Judge Kinkeade—the same federal judge who presided over this case before it was transferred from the Northern District of Texas to the Southern District of New York—declined to dismiss a claim that Exxon allegedly "misled the public" about the costs of carbon by using different numbers "in internal documents than the value disclosed to the public." *Id.* at *7. NYOAG's 2015 subpoena sought to uncover precisely that information, requesting information on "the integration of Climate Change-related issues"—including "future demand for Fossil Fuels" and "future emissions of Greenhouse Gases from Fossil Fuel extraction, production and use"—into Exxon's "business decisions." (J.A. 716.)

(1946). Attorneys General must therefore be able to refine their theories in response to the evidence they receive—a common practice in litigation, *see, e.g.*, *SCO Grp., Inc. v. International Bus. Machs. Corp.*, 879 F.3d 1062, 1079 n.15 (10th Cir. 2018). Given these realities, Exxon's claim of shifting theories suggests "neutral" rather than nefarious conduct. *Twombly*, 550 U.S. at 557. And it comes nowhere close to pleading that NYOAG lacked a valid basis to issue the subpoena. *See Hartman*, 547 U.S. at 252.

Exxon likewise errs in suggesting (Br. at 47–48) that NYOAG acted in bad faith by requesting documents outside the limitations period for the statutes Exxon potentially violated. Such documents may support "a single continuing pattern of unlawful conduct" that would extend the limitations period. *See Ferraro v. New York City Dep't of Educ.*, 115 A.D.3d 497, 497–98 (1st Dep't 2014); *see also Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609, 614–15 (1st Dep't 1984) (documents from outside the limitations period may be relevant to NYOAG investigations because they may reveal "continuing conduct" in violation of the law).

2. Exxon fails to state a due-process claim.

Exxon's due-process claim is now moot. Exxon lodges its claims of bias against AG Schneiderman (*e.g.*, J.A. 435 (¶ 117)), who in May 2018 resigned his post as Attorney General, *see* Press Release, NYOAG, Statement by Attorney General Eric Schneiderman (May 7, 2018) (internet). Exxon does not allege that AG Schneiderman's disqualifying bias was so pervasive that no one else in NYOAG could oversee the matter. And Exxon does not allege that other attorneys working on the investigation hold any disqualifying bias. Thus, even if Exxon had plausibly alleged that AG Schneiderman exhibited bias and prejudgment in the investigation (*see* J.A. 429 (¶ 92))—and it has not (see *supra* at 29–33)—that claim became moot when AG Schneiderman left office, *see, e.g.*, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013).

Exxon fails to state a due-process claim in any event. It offers no support for the idea that NYOAG cannot be a "disinterested" prosecutor in this enforcement action. (*See* J.A. 435 (¶ 117).) Due process merely restricts a prosecutor from having a "financial or personal interest" in any enforcement case. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980). The complaint does not allege that AG Schneiderman had such a stake

in Exxon's subpoena compliance. Quite the contrary, the complaint alleges that the investigation was driven by a desire to "preserve our planet." (J.A. 403 (¶ 28) (quotation marks omitted).)

Moreover, the statements of AG Schneiderman set forth in the complaint and attachments simply fail to show that he had prejudged the investigation's outcome. Law-enforcement agencies ordinarily have some reason to believe an investigation will be fruitful before they commence the investigation. That is not the same as prejudging the outcome of the investigation. Thus, there is absolutely no inconsistency between AG Schneiderman's statements that "there may be massive securities fraud here" (J.A. 809) and his statements that NYOAG was "not pre-judging anything" and that he thought it "too early to say what we're going to find" (J.A. 483).

3. Exxon fails to state a claim under the Commerce Clause.

Congress's power "[t]o regulate Commerce . . . among the several states," U.S. Const. art I, § 8, impliedly prevents States from regulating in a way that "discriminate[s] against interstate commerce," *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192, 194 (2d Cir. 2007). Exxon claims

(Br. at 51) that the Attorney General violated those limits by "target[ing] a speaker for statements made and viewpoints expressed outside of New York." (*See also* J.A. 432–433 (¶¶ 105–108).) Exxon's entire theory thus rests on its assertion (Br. at 50) that NYOAG's subpoena "regulate[s] out-of-state speech about climate policy."

But a subpoena does not regulate speech at all.[18] *See McGoff*, 647 F.2d at 187–88; see also *supra* at 28. Moreover, the subpoena here requests information about potential fraud that Exxon perpetrated on its New York–based investors and consumers. (*See* J.A. 709.) The Commerce Clause permits efforts "to prevent fraud or deception" in transactions "*within* the state." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557–58 (1917).[19] And "at the subpoena enforcement stage," a court cannot assume

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[18] Contrary to Exxon's claim, a Texas state-court judge did not "conclude[] that the Attorneys General's document requests 'target[] ExxonMobil's speech and associational activities in Texas" (Br. at 51–52 (second alteration Exxon's; quoting *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1, at *14 (Tex. Dist. Ct. Apr. 24, 2018)). What the court held was that California municipalities and officials had targeted Exxon's Texas-based speech by *suing* Exxon. *Exxon Mobil Corp.*, 2018 Tex. Dist. LEXIS 1, at *13–14.

[19] *See also Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality op.) ("[T]his Court has upheld the authority of States to enact 'blue-sky' laws against Commerce Clause challenges on several occasions.");

that the State will misapply these laws by targeting out-of-state conduct. *See Construction Prods.*, 73 F.3d at 470.

The cases on which Exxon seeks to rely (Br. at 50–51) concern regulatory action addressed to out-of-state conduct, and are therefore inapposite. In *American Booksellers Foundation v. Dean*, for instance, this Court held that a Vermont law banning the online distribution of indecent materials to minors could not be applied to prevent such materials from being posted on the website of a Connecticut-based corporation. 342 F.3d 96, 103 (2d Cir. 2003). Likewise, in *Healy v. Beer Institute*, the Supreme Court struck down a Connecticut law barring beer distributors from selling beer in neighboring States at a lower price than they charged in Connecticut. 491 U.S. 324, 326, 337 (1989).

Here, NYOAG is investigating Exxon's liability under laws addressed to in-state transactions.[20] Exxon can avoid the application of

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SPGGC, 505 F.3d at 194 (courts should be "particularly hesitant" to invalidate under the Commerce Clause laws for consumer protection, "a field traditionally subject to state regulation" (quotation marks omitted)).

[20] *See* G.B.L. § 349(a) (barring deceptive acts or practices "in the conduct of any business, trade or commerce or in the furnishing of any service *in this state*" (emphasis added)); *id.* § 352(1) (Martin Act applies to any "advertisement, investment advice, purchase or sale *within this state*" (emphasis added)).

those laws by refraining from securities and consumer transactions in the State. *See, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality op.). Exxon's dormant Commerce Clause challenge thus fails.

4. Exxon has abandoned its conspiracy claim, which is inadequately pleaded in any event.

Exxon has abandoned its claim for conspiracy under 42 U.S.C. § 1985(3) and Texas common law (J.A. 432–433 (¶¶ 106–108)) on appeal by presenting it "in a perfunctory manner, unaccompanied by some effort at developed argumentation," *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (quotation marks omitted). Exxon devotes just two sentences to this claim—one stating that the claim is supported by the same allegations as its substantive claims, and one claiming that the federal conspiracy statute "covers classes beyond race, such as political affiliations" (Br. at 53 (quotation marks omitted)).[21] Such a sparse discussion, with limited citation to supporting authority, does not suffice

[21] Exxon has also abandoned its preemption and abuse-of-process claims, both of which the district court dismissed (*see* SPA 45, 47–48), by failing to address them at all in its appellate brief. *See, e.g.*, *Hutchison*, 647 F.3d at 491 n.5.

to preserve Exxon's conspiracy claim for review. *See Cooper v. Parsky*, 140 F.3d 433, 441 (2d Cir. 1998).

Even if not abandoned, the conspiracy claim would fail. To state such a claim, Exxon had to plausibly allege a conspiracy "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," and "an act in furtherance of the conspiracy" that caused Exxon to be "injured in [its] person or property or deprived of any right or privilege of a citizen of the United States."[22] *Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015) (quotation marks omitted). Exxon also had to proffer plausible allegations that the conspiracy was "motivated by some racial or perhaps otherwise class-based invidious discriminatory animus." *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 791 (2d Cir. 2007) (quotation marks omitted).

As the district court held, Exxon failed to plead an unlawful objective or overt act (SPA 45; see *supra* at 27–48), thus requiring

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[22] Exxon has also alleged conspiracy under Texas law, which requires the same basic elements. *See Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005).

dismissal of its conspiracy claim under federal and state law, *see, e.g.*, *Dolan*, 794 F.3d at 290; *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). The district court also correctly held (SPA 45 n.35) that Exxon failed to allege that the Attorneys General possessed animus toward any legally cognizable class of which Exxon was a member. *See Dolan*, 794 F.3d at 296. Indeed, while Exxon claims discrimination based on "political affiliation[]" (Br. at 53), it does not claim to be a member of any political *party*, and thus it has not alleged that it is a member of a legally cognizable class against which the Attorneys General conspired. *See Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989).

C. The District Court Properly Denied Exxon Leave to Amend Its Complaint.

The district court properly denied Exxon's motion for leave to amend because amendment would have been futile. (*See* SPA 34, 45.) "An amendment to a complaint is futile when it could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)." *Lucente v. International Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). And Exxon's proposed amendments here would not cure the deficiencies in the first amended complaint.

The main addition in Exxon's proposed second amended complaint (J.A. 1924–1985) is a series of allegations offered to support Exxon's conspiracy claim (*see* Exxon Leave Mem. at 8–9) that private climate-change activists who purportedly harbored anti-Exxon animus tried to influence NYOAG to investigate Exxon. (*See* J.A. 1943–1949 (¶¶ 46–58).) But because Exxon has failed to plead an underlying constitutional violation as well as membership in a cognizable class under § 1985(3) (see *supra* at 49–50), Exxon would not state a conspiracy claim even with these new allegations.

In any event, an Attorney General does not become a coconspirator by simply following leads proposed by people whose motives may be questionable. Quite the contrary, "regulatory and law enforcement agencies routinely act on the basis of information provided by private parties who harbor a grudge or who hope to benefit personally from their complaints." *Osborne v. Grussing*, 477 F.3d 1002, 1007 (8th Cir. 2007). That information may well cause law enforcement to discover wrongdoing, *see, e.g.*, *Smith v. Edwards*, 175 F.3d 99, 103, 106 (2d Cir. 1999), and in such cases courts "do not impute the complainant's ulterior motive to the government enforcers," *Osborne*, 477 F.3d at 1007.

These new allegations thus cannot rescue Exxon's First Amendment claim. *See* Br. at 40–41. While Exxon claims that the allegations show "a missing link between the [third-party] activists and the AGs" (*id.* at 40 (quotation marks omitted)), the connection "to be alleged and shown" in support of Exxon's First Amendment claim is an absence of genuine grounds to investigate, *Hartman*, 547 U.S. at 263. *Hartman*'s rule avoids the "difficulty of divining" the effect of other people's motives "upon the prosecutor's mind," *id.*—a difficulty that Exxon's new allegations would squarely present. Those new allegations are therefore merely cumulative of Exxon's original allegations that NYOAG is improperly investigating Exxon; and absent accompanying allegations about a lack of a valid basis to investigate, the new allegations do not state a First Amendment claim. *See id.* at 264 n.10.

At any rate, this Court should affirm the denial of Exxon's motion for leave to amend because the filing of yet another complaint in this case would unduly prejudice the New York Attorney General by prolonging a meritless case that has burdened the time and resources of NYOAG for almost three years. *See* Fed. R. Civ. P. 15(a). Exxon should not be permitted to keep this litigation alive indefinitely at the pleading stage

by relying on post-filing media accounts and public-records requests by nonparties (*see* Exxon Leave Mem. at 2–3, 6–7)—especially when none of those sources has revealed information sufficient to state a viable claim to relief. "At some point, litigation must come to an end. That point has now been reached." *Facebook, Inc. v. Northwest Software, Inc.*, 640 F.3d 1034, 1042 (9th Cir. 2011).

CONCLUSION

For these reasons, this Court should affirm the district court's dismissal of Exxon's complaint and denial of leave to amend.

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October 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,456 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Will Sager