

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,

Civ. No. 4:16-CV-469-K

Plaintiff,

-against-

ERIC TRADD SCHNEIDERMAN, Attorney
General of New York, in his official capacity, and
MAURA TRACY HEALEY, Attorney General of
Massachusetts, in her official capacity,

Defendant.

**350.ORG'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH NON-PARTY SUBPOENA
ISSUED BY EXXON MOBIL CORPORATION**

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Non-party 350.org (“350.org”), by its attorneys Chadbourne & Parke LLP, submits this memorandum of law in support of its motion, pursuant to Rule 45 of the Federal Rules of Civil Procedure, for an order quashing the Subpoena, dated November 9, 2016 (the “Subpoena”) (Ex¹. A), served by plaintiff Exxon Mobil Corporation (“Exxon”).

PRELIMINARY STATEMENT

350.org is a non-profit organization formed in 2007 that is dedicated to fighting climate change through public awareness campaigns and grassroots advocacy. Exxon is among the largest corporations and carbon producers in the world. For years, Exxon has been accused of denying the existence of climate change and its (and other carbon producers’) role in creating this environmental damage. 350.org has been and is one of the entities calling attention to Exxon’s denial of climate change.

The Attorneys General of New York and Massachusetts each have begun investigations into allegations that Exxon violated consumer protection and securities laws by making misstatements to the public about the existence of climate change and the damage that its products have caused to the global environment. Exxon responded to these investigations by trying to turn the tables and investigate the investigators. Among other tactics, it has filed a lawsuit against these two law enforcement agencies in the Northern District of Texas. Whatever the purpose of that lawsuit, and surely in an attempt to chill public debate about its conduct, Exxon is now using the lawsuit to burden non-party, environmental groups, like 350.org, with third-party discovery requests. Exxon has served 350.org (and *ten* other environmental advocacy groups and individuals) with a stunningly broad third-party subpoena seeking information about

¹ References herein to “Ex.__” are to the Exhibits to the Declaration of Michael A. Samalin (“Samalin Decl.”) submitted herewith.

anything that could be remotely relevant to its already odd lawsuit against the highest law enforcement officials of two states. Already, its tactic has caused 350.org and other environmental groups to expend needless resources, which may be the very reason for Exxon's conduct. The subpoena is an abuse of third-party discovery, and must be quashed to protect 350.org's First Amendment rights.

FACTUAL BACKGROUND

A. 350.org's Political Activism Combatting Climate Change and the Fossil Fuel Industry

Climate change is one of the greatest dangers confronting humanity today.² Increases in global temperatures stemming from fossil-fuel consumption threaten wide-reaching consequences for human societies, animal species, and the planet at large.³ Declines in health, particularly among poor populations most vulnerable to extreme weather events and heat-related illnesses, mass extinctions of existing animal species and the destruction of entire ecosystems represent only some of the potential consequences of the dramatic shift in the world's temperatures that is taking place.⁴

² See, e.g., Intercontinental Panel on Climate Change, *Climate Change 2014: Synthesis Report*, (2015), available at https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (Ex. __).

³ *Id.*

⁴ *Id.*

350.org⁵ is an environmental organization started in 2007 that is building a global grassroots movement to raise awareness about the dangers of climate change, and to encourage action to reduce greenhouse gas emissions.⁶ Declaration of Jamie Henn dated December __, 2016 (“Henn Decl.”) ¶__. Relying on a global network of organizers and volunteers, 350.org directs numerous advocacy campaigns in the United States and around the world that put it publicly at odds with Exxon. *Id.* __. For example, 350.org is organizing campaigns to stop all new fossil-fuel projects worldwide, to keep fossil fuels in the ground, and to encourage divestment from fossil fuel companies.⁷

B. News Reports Detail Exxon’s Deception on Climate Change

In 2015, a series of investigative articles reported on Exxon’s decades-long record of deception on climate change. In September 2015, *InsideClimate News* (“ICN”) detailed Exxon’s shifting away from initially investing in climate science research, its downplaying the findings of its own in-house climate scientists about the dangers of global warming, and its spending of millions to finance a public campaign promoting skepticism about the reality of planetary

⁵ 350.org’s name evokes its advocacy goals: The number “350” refers to reductions to carbon dioxide in the atmosphere, from 400 parts per million to below 350, that leading scientists believe are needed to stabilize the earth’s climate.

⁶ See *How We Work*, 350.org website, <https://350.org/how/>, (last visited Dec. 2, 2016) (Ex. __); 350.org 2015 Annual Report, 350.org website, available at <https://350.org/2015-annual-report/> (Ex. __).

⁷ See *Keep It In the Ground*, 350.org 2015 Annual Report, 350.org website, available at <https://350.org/2015-annual-report/> (Ex. __).

climate change.⁸ *ICN* also posted documents showing that as far back as 1977, Exxon's researchers had warned the company's management that, absent drastic reductions in fossil fuel use, the effects on the world's climate could be irreversible and catastrophic.⁹ The *Los Angeles Times* further revealed that rather than recognizing these concerns, Exxon privately exploited climate change projections to expand drilling operations in the Arctic, even as it fought to undermine the scientific consensus on climate change and to oppose regulations aimed at curbing carbon dioxide emissions from fossil fuels.¹⁰

C. **Attorneys General Investigate Exxon's Conduct on Climate Change**

Media accounts of Exxon's conduct on climate change generated widespread public criticism of the company, even inspiring the popular shorthand “#Exxonknew” on Twitter.¹¹ As a result, 350.org has participated in a grassroots campaign calling for the United States Department of Justice to investigate Exxon's conduct.¹²

⁸ See Neela Banerjee, Lisa Song, David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, *InsideClimate News*, Sep. 16, 2015, available at <https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming> (Ex. ____).

⁹ *Id.*

¹⁰ See Sara Jerving, Katie Jennings, Masako Melissa Hirsch, Susanne Rust, *What Exxon Knew About the Earth's Melting Arctic*, *Los Angeles Times*, Oct. 9, 2015, available at <http://graphics.latimes.com/exxon-arctic/> (Ex. ____); Katie Jennings, Dini Grandoni, Susanne Rust, *How Exxon Went From Leader to Skeptic on Climate Change Research*, *Los Angeles Times*, Oct. 23, 2015, available at <http://graphics.latimes.com/exxon-research/> (Ex. ____).

¹¹ See John Schwartz, *Pressure on Exxon Over Climate Change Intensifies With New Documents*, *New York Times*, Apr. 14, 2016, available at <http://www.nytimes.com/2016/04/14/science/pressure-on-exxon-over-climate-change-intensifies-with-new-documents.html> (Ex. ____).

¹² See <https://act.350.org/sign/exxon DOJ>.

Media accounts of Exxon’s behavior also prompted the Attorneys General of New York and Massachusetts to open consumer and securities fraud investigations of the company.¹³ In November 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon following allegations that it lied to its investors about the risks of carbon emissions and climate change. *See* Compl. ¶ 20. In April 2016, Massachusetts Attorney General Maura Healey served Exxon with a civil investigative demand (“CID”) to investigate whether Exxon committed consumer and securities fraud. *See* Compl. ¶ 69. The subpoena and the CID sought documents from Exxon related to its internal research on climate change and its funding of groups promoting doubt about climate science. *See* (Dkt. 1) Compl. ¶¶ 20, 22.

D. SEC Launches Climate Change Investigation of Exxon

In August 2016, the Securities and Exchange Commission (“SEC”) began its own climate change related investigation of Exxon.¹⁴ Similar to the Attorneys General, the SEC in its investigation sought documents from Exxon and its auditor, PricewaterhouseCoopers, related to how the company calculated the impact on its business from the growing global regulatory response to climate change.¹⁵ This included documents related to the company’s method of

¹³ See David Hasemyer, *Climate Fraud Investigation of Exxon Draws Attention of 17 Attorneys General*, InsideClimate News, Mar. 30, 2016, <https://insideclimatenews.org/news/30032016-climate-change-fraud-investigation-exxon-eric-shneiderman-18-attorneys-general> (Ex. ____).

¹⁴ See Bradley Olson, Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, Wall Street Journal, Sep. 20, 2016, at <http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593>.

¹⁵ *Id.*

accounting for the costs of future compliance with climate change regulations in valuing its fossil fuel assets.¹⁶

E. The United Nations Climate Conference and 350.org's Political Activism Against Exxon

As the scientific consensus around climate change has solidified, leading international organizations have worked to achieve global agreements to minimize its impact. In pursuit of that goal, the United Nations between November 30, 2015 and December 13, 2015 held a Climate Change Conference in Paris, France.¹⁷ At the conclusion of the conference, representatives from 195 countries approved an agreement committing to dramatically reduce greenhouse gas emissions in an effort to mitigate the effects of climate change (the “Paris Agreement”).¹⁸ In addition, as of November 30, 2016, 115 countries have ratified the agreement, including the United States and China.

To coincide with the conference, 350.org planned a series of events across the world to raise awareness about the impacts of climate change and to mobilize political support for moving the world away from fossil fuel consumption.¹⁹ One such advocacy event was called a “mock

¹⁶ *Id.*

¹⁷ See *United Nations Framework Convention on Climate Change, Paris Agreement: Status of Ratification*, available at http://unfccc.int/paris_agreement/items/9444.php, (last visited Dec. 2, 2016) (Ex. ____).

¹⁸ *Id.*

¹⁹ See *350 Campaign Update: UN Climate Talks in Paris*, 350.org website, available at <https://350.org/350-campaign-un-climate-talks-in-paris/> (Ex. ____).

trial” of Exxon, and took place in Montreuil, France, on December 5, 2015.²⁰ Headlined “Exxon vs. The People,” the mock trial was intended to highlight Exxon’s role in escalating and then denying the threat of climate change.²¹ 350.org co-founder Bill McKibben and journalist Naomi Klein acted as “prosecutors” during the event, detailing Exxon’s campaign of misinformation on climate change.²² Climate scientists and environmental activists from geographic areas threatened by climate change “testified” about the risks.²³ In a symbolic verdict, a tribunal of “judges” concluded that Exxon had the burden of showing that it did not demonstrate a “profound disregard for the safety of the planet and its people” by suppressing documents that might have spurred an earlier governmental response to address climate change.²⁴ To 350.org’s knowledge, no Attorneys General participated in the mock trial. Henn. Decl. __

F. **Exxon Confronted with Shareholder Resolutions On Climate Change**

²⁰ See, e.g., Alex Pashley, *Exxon Put on Mock Trial in Paris for “Climate Crimes”*, Climatechangenews.com, Dec. 6, 2015, available at <http://www.climatechangenews.com/2015/12/06/exxon-put-on-mock-trial-in-paris-for-climate-crimes/> (Ex. __); *The People vs. Exxon: As Fossil Fuel Cover-Up Exposed, Activists Try Oil Giant for “Climate Crimes,”* Democracynow.org, available at https://www.democracynow.org/2015/12/31/the_people_vs_exxon_as_fossil (last accessed Dec. 5, 2016) (Ex. __).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See *The People vs. Exxon: As Fossil Fuel Cover-Up Exposed, Activists Try Oil Giant for ‘Climate Crimes,’* Dec. 31, 2015, available at https://www.democracynow.org/2015/12/31/the_people_vs_exxon_as_fossil (Ex. __).

In recent years, some of Exxon's shareholders have presented shareholder resolutions related to climate change for votes at Exxon's annual meeting.²⁵ For example, during Exxon's annual shareholder meeting in May 2016, Exxon shareholders presented nonbinding resolutions that would have committed the company to work to limit global warming to 2 degrees Celsius, required at least one board member to be an expert on climate change, and forced the company to issue an annual report on how climate change, government regulations and the demand for fossil fuels could affect its business.²⁶ Another shareholder resolution would have committed Exxon to disclosing its political lobbying activities, including disclosing payments to any tax-exempt organization that publically endorses legislation.²⁷ This kind of climate change related shareholder activism is a growing trend.²⁸ 350.org is not involved in pressing for Exxon shareholder resolutions.²⁹ Instead, 350.org has advocated a strategy of complete divestment from fossil fuel companies like Exxon.³⁰ During Exxon's last annual shareholder meeting in Dallas, Texas, 350.org partnered with local climate change activists to stage a protest outside the

²⁵ See Jim Zarroli, *Exxon Mobil, Chevron Shareholders Reject Resolutions Aimed At Battling Climate Change*, May 25, 2016, NPR, <http://www.npr.org/sections/thetwo-way/2016/05/25/479491919/exxonmobil-chevron-shareholders-reject-resolutions-aimed-at-battling-climate-cha> (Ex. ____).

²⁶ *Id.*

²⁷ See David Hasemyer, *As Exxon Faces Investigation, Investors Renew Pressure for Stronger Climate Stance*, InsideClimate News, Jan. 12, 2016, <https://insideclimatenews.org/news/12012016/exxon-mobil-under-investigation-climate-change-science-shareholder-resolutions-investors> (Ex. ____).

²⁸ See Ross Kerber, *More company climate votes ahead, as Trump may loosen energy rules*, <http://uk.reuters.com/article/us-usa-climatechange-shareholders-idUKKBN13K18F?type=companyNews> (Ex. ____).

²⁹ See 350.org Press Release, *Exxon's Board Recommends Rejection of All Climate Resolutions, Reinigorating the Call to Divest From Exxon's Deception*, 350.org website, May 25, 2016, <https://350.org/press-release/divest-from-exxons-deception/> (Ex. ____).

³⁰ *Id.*

meeting.³¹ The protestors condemned Exxon's deception on climate change and warned that shareholder resolutions would fail to change Exxon's fossil-fuel reliant business model.³²

G. “Green 20” Conference Commits Law Enforcement to Combating Climate Change

On March 29, 2016, Attorney General Schneiderman held a press conference in New York City, along with Attorney General Healey and other state attorneys general. *See Compl.* ¶ 27. Former Vice President Al Gore also attended the conference. *Id.* Calling themselves the “Green 20,” the attorneys general pledged to pursue a variety of climate-change related initiatives, including investigating whether fossil fuel companies like Exxon had misled investors and the public about the impact of climate change on their business. *Id.*³³ Attorney General Healey stated during the press conference that her investigation of Exxon was motivated by the “troubling disconnect” between what Exxon appears to have known privately about the risks of climate change and what it chose to share about those risks with its shareholders and the public. (Dkt. 43, “Healey Opp. To Exxon Mot. for Prelim. Inj.” at 6-7). 350.org did not plan or participate in the press conference. Henn. Decl. __

H. Exxon Sues Attorney Generals

On June 15, 2016, Exxon filed a complaint against Attorney General Healey in the District Court for the North District of Texas, alleging violations of its rights under the First,

³¹ See Jeffrey Weiss, *One Exxon Mobil Shareholder Meeting Climate Change Proposal Passes*, Dallas Morning News, <http://www.dallasnews.com/business/business/2016/05/25/most-climate-change-resolutions-lose-at-exxon-mobils-annual-shareholder-meeting>, (last visited Dec. 2, 2016) (Ex. __).

³² *Id.*

³³ See also Press Release, A.G. Schneiderman, Former Vice President Al Gore And A Coalition Of Attorneys General From Across The Country Announce Historic State-Based Effort To Combat Climate Change, <http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across>, (last accessed Dec. 2, 2016) (Ex. __).

Fourth and Fourteenth Amendments, the dormant commerce clause, and abuse of process. *Exxon Mobil Corporation v. Healey*, No. 4:16-cv-00469-K (N.D. Tex.) (the “Action”). Exxon also moved for a preliminary injunction prohibiting the enforcement of the CID and a declaration that the CID violates Exxon’s rights on grounds similar to those alleged in its complaint. (Dkt. 8, “Exxon Mot. for Prelim. Inj.”)³⁴ As to the First Amendment claim, Exxon asserted that the CID constituted “a direct assault on Exxon Mobil’s First Amendment right to participate in the public debate over climate change policy,” and further, that its “communications regarding climate change are an indispensable part of its informed participation in the ongoing national debate” and therefore “fall comfortably within the protections of the First Amendment.” *Id.* at 1, 11, 15. Exxon repeatedly alleged that the investigations of the attorneys general and the subpoena and CID were in part a result of political pressure brought to bear against the company by “climate change activists,” *id.* at 4, although it did not mention non-party 350.org. Exxon also sued to enjoin the CID in Massachusetts state court but moved to stay that action so it could pursue its federal case in Texas. *In re Civil Investigative Demand No. 2916-EPD-36*, No. 16-1888F (Mass. Super. Ct., Suffolk County).

On August 8, 2016, Attorney General Healey moved to dismiss the federal complaint on numerous grounds, including lack of personal jurisdiction, abstention under *Younger v. Harris*, 401 U.S. 37 (1971), ripeness and improper venue. (Dkt. 42, “Healey MOL in Support of Mot. to Dismiss”). Healey also contended that personal jurisdiction over her did not exist because Texas’s long-arm statute does not reach a “nonresident” state official acting in her official capacity. *Id.* at

³⁴ Unless otherwise specified, all docket references are to *Exxon Mobil Corporation v. Healey*, No. 4:16-cv-00469-K (N.D. Tex.).

4. Instead, the “proper and reasonable place to challenge the official actions of out-of-state officials is in their states -- not in Texas.” *Id.* at 6.

Before ruling on the injunction or on the motion to dismiss, the Northern District of Texas court issued an order *sua sponte* permitting limited jurisdictional discovery as it relates to *Younger* abstention, and ordering Attorney General Healey to be deposed in Texas. (Dkt. 73 Order, dated Oct. 13, 2016) (Ex. __). Pursuant to the Order, discovery is limited to “Attorney General Healey’s comments and actions before she issued the CID,” and in particular to whether Attorney General Healey issued the CID in bad faith, thus allegedly precluding *Younger* abstention. *Id.* at 3, 6. Nothing in the Order indicates that the Northern District of Texas court contemplated discovery of non-parties such as 350.org.

On October 17, 2016 Exxon filed an amended complaint adding Attorney General Schneiderman as a defendant in the action and asserting additional grounds for relief. On October 20, 2016, Attorney General Healey moved the Northern District of Texas court to reconsider its jurisdictional discovery order. (Dkt. 79, “Healey Mot. to Recons. Jurisdictional Disc. Order,” Oct. 20. 2016) (Ex. __) The Attorney General observed that allowing Exxon to conduct discovery into the Attorney General’s motives in issuing the CID would, in effect, permit an “investigation of the investigators” and allow Exxon to frustrate her investigation before she was “even able to receive a single document from Exxon or depose even a single Exxon witness.” *Id.* at 8. Attorney General Healey pointed to the substantial record of facts supporting her good faith basis for issuing the CID. (Dkt. 91, “Healey Reply to Exxon Opp. to Healey Mot. to Recons. Jurisdictional Disc. Order”) Prominent among these facts was “substantial evidence, in the form of Exxon’s own documents, which credibly illustrates that

Exxon’s top-tier scientists, reporting to Exxon management, had advanced knowledge of climate change decades ago.” *Id.* at 4. These documents also showed that Exxon knew that fossil fuels were increasing the risks of climate change and that “likely policy responses would include efforts to shift away from reliance on fossil fuels.” *Id.*

On December 5, 2016, the Northern District of Texas court denied Attorney General Healey’s motion to reconsider the jurisdictional discovery order. (Dkt. __, Order). On December 6, 2016, Attorney General Schneiderman filed a motion to dismiss the First Amended Complaint and a motion to quash discovery directed against him. Also on December 6, 2016, Attorney General Healey filed a motion to stay discovery pending appeal, and stated that she will soon file a petition for a writ of mandamus vacating the jurisdictional discovery order with the Fifth Circuit Court of Appeals. (Dkt. __).

I. Exxon’s Vexatious Discovery Demands

On October 24, 2016, Exxon served discovery requests on Attorney General Healey, including 33 requests for production, 74 requests for admission, and 24 interrogatories. (Dkt. 94 “Healey Opp. Exxon’s Mot. to File Amend. Compl.,” at 5). In November 2016, Exxon issued subpoenas to at eleven non-party environmental organizations and activists, demanding broad discovery into their efforts to raise the issue of climate change, including any of their activities critical of Exxon. Non-parties served with subpoenas include 350.org, as well as two Rockefeller family funds, the Union of Concerned Scientists, the Climate Accountability Institute, the Pawa Law Group P.C., and its principal Matthew Pawa. Exxon is also seeking discovery from Michael Northrop, a program director at the Rockefeller Brothers Fund, and Dr. Peter Frumhoff, a director of science and policy at the Union of Concerned Scientists. Exxon

has also stepped up attacks on advocacy and non-profit organizations critical of its record on climate change, such as the Rockefeller funds, alleging that they are part of a “conspiracy” to delegitimize the company.³⁵

J. The Subpoena to 350.org

With its subpoena to 350.org, Exxon seeks to broadly inquire into 350.org’s advocacy, including demands for plans, strategies, internal communications and collaboration with other environmental activists. Exxon seeks 12 categories of documents, only a few of which have even a patina of relevance to the Action against the Attorneys General, let alone to jurisdictional discovery related to *Younger* abstention in that matter. (*See Ex. ___.*) In addition, it seeks documents it could get from its own files and public sources. Among its requests, Exxon seeks documents about a climate activists’ conference held by the Union of Concerned Scientists in 2012 that was not attended by any Attorney General or 350.org (Request No. 5); documents about Exxon’s participation in the Paris Climate Change Conference in December 2015 (Request No. 6); documents about shareholder resolutions presented at Exxon’s annual meeting (Request No. 7); documents concerning fundraising for candidates for political office (Request No. 8); and documents concerning an activist event that 350.org held in December 2015 that was not attended by any Attorney General (Request Nos. 9 and 10).

The Subpoena, issued on November 9, 2016, provided a return date of November 23, 2016, a fourteen-day span. On November 17, 2016, counsel to 350.org spoke with counsel to Exxon by telephone, and requested a brief extension of the return date so that 350.org could

³⁵ See John Schwartz, *Exxon Mobil Accuses the Rockefellers of a Climate Conspiracy*, *New York Times*, Nov. 21, 2016 http://www.nytimes.com/2016/11/21/science/exxon-mobil-rockefellers-climate-change.html?_r=0 (Ex. ___).

evaluate the Subpoena and potentially avoid the need for blanket objections. Samalin Decl. ___. Exxon's counsel refused to grant any extension. *Id.* ___. On November 23, 2016, 350.org served timely objections to Exxon's subpoena, and offered to meet and confer with Exxon counsel to see whether an agreement could be reached that would permit 350.org to respond to appropriate, narrow requests that would be relevant to the Action and would not infringe upon 350.org's First Amendment rights. On December 8, 2016 counsel for 350.org met and conferred with counsel for Exxon by telephone and discussed the subpoena and its requests in detail. At the conclusion of the meet and confer, Exxon's counsel Justin Anderson said that he would consult with Exxon and get back to 350.org counsel with any further proposal Exxon may have. Samalin Decl. ___.

ARGUMENT

I. LEGAL STANDARD FOR FRCP RULE 45 SUBPOENA

Under Rule 26 of the Federal Rules of Civil Procedure, discovery is permissible only with respect to "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). Rule 45 provides that a subpoena must be quashed if it "requires disclosure of privileged or other protected matter" or if it "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). A court will deny disclosure when the probative value of proposed discovery is outweighed by the burden of production. *See Raza v. City of New York*, 998 F. Supp. 2d 70, 86 (E.D.N.Y. 2013). In evaluating probative value against burden, special weight is given to the concerns of non-parties. *See Fears v. Wilhelmina Model Agency, Inc.*, No. 02 CIV. 4911(HB)(HBP), 2004 WL 719185, at *1 (S.D.N.Y. Apr. 1, 2004).

First Amendment rights are “fundamental” to democracy and “need breathing space to survive.” *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). For this reason, court-ordered disclosure that may have the effect of curtailing First Amendment rights is subject to the closest scrutiny. See *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). In the case of third party discovery conducted by private parties such as Exxon Mobil, it is the power of the federal court to compel production that implicates First Amendment protections. See *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987). Where discovery seeks materials that are subject to First Amendment protection, the party seeking discovery must demonstrate “heightened relevance” or a “compelling need” for the discovery. *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1355 (2d. Cir.1989) (citing *United States v. Citizens State Bank*, 612 F.2d 1091, 1093–94 (8th Cir.1980); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010).

II. THE SUBPOENA PRIMARILY SEEKS INFORMATION THAT IS IRRELEVANT TO EXXON’S ACTION AGAINST THE ATTORNEYS GENERAL

The “threshold question” on this Motion to Quash is whether the discovery that Exxon seeks is relevant to its Action against the Attorneys General. See *Wyoming v. U.S. Dep’t of Agric.*, 208 F.R.D. 449, 454 (D.D.C. 2002) (granting non-party environmental groups’ motion to quash subpoena that sought discovery of their internal and strategic communications on policy issues, where most of the discovery was irrelevant, and what was relevant could be sought in party discovery). Exxon’s Subpoena fails that threshold test. The core of Exxon’s allegations is that the Attorneys General are investigating Exxon in bad faith. See Compl. at 1. The filter by which relevance can be determined for Exxon’s Subpoena is therefore whether information has

any bearing on the states of mind or activities of Attorneys General Healey and Schneiderman.

See Pebble Ltd. P'ship v. Envtl. Prot. Agency, 310 F.R.D. 575, 582 (D. Alaska 2015). Exxon's Subpoena, as further explained below, is not so limited.

A. Exxon Demands Information About Occurrences and Issues That Have No Relevance to Its Action Against the Attorneys General

As Exxon pursues whatever discovery it can from the State Attorneys General that might or might not be relevant to its actual lawsuit, its Subpoena to 350.org is after something different. The Subpoena reads like an Exxon grievance list, seeking discovery on a host of events and issues that Exxon may find troubling, like shareholder resolutions that seek to impose changes to Exxon's corporate governance, but that have no apparent nexus to the Attorneys General. The Subpoena largely seeks 350.org's internal communication on these irrelevant issues, as well as strategic communications with other environmental activists, and records of public events where Exxon was criticized, rather than anything communicated to Attorneys General Healey or Schneiderman. Indeed, most of Exxon's subpoena requests lack any apparent relevance to its action in the Northern District of Texas.

For example, Request No. 3 demands information about any payment or reimbursement that former Vice President Al Gore may have received in connection with the "Green 20" Press Conference. Whether Mr. Gore received any such reimbursements from anybody is not relevant to Exxon's action, as it would not tend to show anything about the state of mind of either Attorney General. With Request No. 3, it is readily apparent that Exxon merely wants to fish in 350.org's files for something it thinks would embarrass Mr. Gore, which is not permissible third-party discovery. *See Braxton v. Heritier*, 2015 WL 5123613, *2 (E.D. Mich Aug. 31, 2015) (third-party discovery not for exploring possible claims against non-parties).

Request No. 6 calls for “any and all” documents concerning Exxon’s participation in the United Nations Climate Conference in Paris in December 2015. 350.org opposed Exxon’s participation in the Paris Conference (Henn Decl. __). As there is nothing relevant about the Paris conference to Exxon’s case, 350.org is left to conclude that this request is made as some type of retribution. Exxon has not alleged that the Attorneys General (or 350.org) participated in the Paris conference. It has not even alleged that it itself participated. *See Sileo v. Schuck*, No. 08-CV-6424L, 2010 WL 811321, at *3 (W.D.N.Y. Feb. 26, 2010) (denying plaintiff’s document requests because they were “too attenuated from his claims to be discoverable”). Of course, if Exxon truly needs information about its own participation in the Paris Conference, its best source would be its own records. *See Wyoming*, 208 F.R.D. at 455 (party should not seek documents from third party before making reasonable attempts to obtain the information elsewhere).

In its Request No. 7, Exxon demands “any and all documents concerning any shareholder resolution relating to climate change” For the past several years, Exxon shareholders have presented resolutions related to climate change at Exxon’s annual meeting.³⁶ Some of these proposals, if enacted, could have a significant impact on the way that Exxon conducts its business. Exxon is fighting these resolutions, and working to convince shareholders to vote against them.³⁷ But there is no connection whatsoever between shareholder resolutions and Exxon’s action against the Attorneys General. Exxon wants to investigate 350.org’s involvement in or knowledge of a problem that is vexing Exxon separate from the Attorneys General investigations, and is using third-party discovery in a wholly-improper way to pursue that aim.

³⁶ See <https://www.zacks.com/stock/news/218670/exxonmobil-shareholders-reject-climate-change-resolutions>.

³⁷ See <http://www.reuters.com/article/us-exxon-mobil-shareholders-exclusive-idUSKCN0WP2TG>.

See Lambert v. Chase Manhattan Bank, N.A., No. 93 CIV. 5298LMMRLE, 1996 WL 252374, at *5 (S.D.N.Y. May 14, 1996) (“In the absence of a factual basis . . . [movant] may not walk through [one of the party’s] files . . .”).

Exxon’s Request No. 8 demands documents concerning any fundraising by anyone for political candidates “concerning ExxonMobil.” It is not limited or tied to fundraising for the two Attorneys General, and Exxon has not made any allegations in its lawsuit concerning “fundraising” activities of any sort. Of course, Exxon itself is a major contributor to political campaigns,³⁸ which it does to further its business interests. Request No. 8 appears to be a fishing expedition seeking information Exxon can use to its advantage in its own political “fundraising” activities.³⁹

Request Nos. 9 and 10 demand all documents concerning an activist event that 350.org held in France around the time of the Paris Conference. At the so-called “mock trial,” speakers “testified” about Exxon’s record on climate change. Henn Decl. ___. There is no reason to believe that any Attorney General attended, or that this event had any connection to the events at issue in Exxon’s lawsuit. *See Legg v. Conklin*, No. 04-CV-6549T, 2008 WL 2704348, at *2 (W.D.N.Y. July 2, 2008) (denying party’s motion to compel because “general allegations about the possible relevance of the requested records are too speculative to justify the intrusion” of discovery).

³⁸ See <http://www.corporate.exxonmobil.com/en/current-issues/accountability/political-contributions-and-lobbying/political-contributions-and-lobbying>. (Ex.))

³⁹ Exxon seems to have been able to call upon assistance from members of congress in trying to compel 350.org and other environmental organizations to produce much of the same material that Exxon seeks here with its Subpeona. See https://www.washingtonpost.com/news/powerpost/wp/2016/06/01/environmental-groups-reject-rep-smiths-request-for-information-on-exxon-mobil-climate-case/?utm_term=.5605c674cdca. (Ex. ___.)

These requests discussed above, seeking materials plainly irrelevant to Exxon’s action, demonstrate just how openly Exxon is misusing third-party discovery to try to investigate and intimidate 350.org.

B. Exxon Seeks Internal 350.org Discussions

Four of Exxon’s Requests do have an apparent nexus to Exxon’s allegations, but, still do not pass the threshold test of relevance. Exxon’s Request Nos. 1 and 2 seek any communication with any Attorney General about investigating Exxon. It is unlikely that 350.org’s communications with Attorneys General Healey or Schneiderman might contain anything relevant to Exxon’s case. *See Pebble*, 310 F.R.D. at 580-82 (in similar case, concluding that while it was “conceivable” that some communications from public to government agency could be relevant, the vast bulk would not be, as it was “what the EPA has done (or not done)--not the communicating or coordinating between interested members of the public--which is relevant to plaintiff’s . . . claim”). To the extent that they do contain any marginally relevant material, any such communications are subject to 350.org’s claim of First Amendment protection. More importantly, Request Nos. 1 and 2 are not limited to the two Attorneys General. They include 350.org’s communications with, or internal communications about, any Attorney General of any state or territory. Communications with non-party Attorneys General do not provide evidence of the states of mind of Generals Healey or Schneiderman, and such discovery is therefore not relevant. *See id.*

Request No. 4 seeks “any and all” documents concerning the “Common Interest Agreement.” The Common Interest Agreement was entered into only by Attorneys General. There is no allegation in Exxon’s Complaint that 350.org is a party to, or had anything at all to

do with that agreement. While the Common Interest Agreement itself is connected to Exxon's lawsuit, 350.org's internal and external discussions of it with other activists are not. Request No. 4 is a fishing expedition that fails to meet the basic Rule 26 relevance test. *See Surles v. Air France*, No. 00CIV5004RMBFM, 2001 WL 815522, at *4 (S.D.N.Y. July 19, 2001), *aff'd*, No. 00CIV5004(RMBFM), 2001 WL 1142231 (S.D.N.Y. Sept. 27, 2001) (Rule 26 discovery requests "could not be based on pure speculation or conjecture" and "courts faced with such requests would routinely decline to authorize fishing expeditions") (quoting *In re All. Pharm. Sec. Litig.*, No. M-8-85, 1995 WL 51189, at *1 (S.D.N.Y. Feb. 9, 1995)).

Exxon's Request No. 5 demands "any and all" documents about a June 2012 conference organized by the Union of Concerned Scientists, held more than three years before Attorney General Schneiderman began his investigation. Exxon alleges that attendees at the conference discussed the idea of attorneys general investigating Exxon, but makes no allegation that the Attorneys General knew about, attended, or were influenced by the conference. *See* Complaint at 3. Exxon already has a summary of the conference prepared by its organizers that discusses what occurred and includes a list of participants, none of whom appear to be connected to 350.org. *See* (Dkt. 1) Compl. Ex. C. With Request No. 5, Exxon seeks 350.org's internal discussions, or exchanges with other activists, for their own sake, to see what environmental activists said about this event. Exxon has provided nothing to suggest that 350.org's discussions of the conference, if any exist, could have any bearing on the good faith basis for the investigations conducted by the Attorneys General.

III. EXXON'S SUBPOENA INFRINGES UPON 350.ORG'S FIRST AMENDMENT RIGHTS.

A. 350.org's *Prima Facie* Showing of First Amendment Infringement

To the extremely limited extent that the Subpoena seeks information that is in any way relevant to Exxon’s action, discovery would infringe on 350.org’s First Amendment rights and should not be permitted. *See Wyoming*, 208 F.R.D. at 455 (quashing subpoena to environmental groups on First Amendment grounds where the discovery sought was irrelevant, did not go to the “heart of the lawsuit,” and could be sought from other sources).

A party opposing discovery on First Amendment grounds must make a *prima facie* showing that the disclosure sought would infringe upon protected rights. *Schiller*, 2006 WL 3592547, at *4. In making out a *prima facie* case of First Amendment harm “the burden is light,” as courts are “mindful of the crucial place speech and associational rights occupy under our constitution.” *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 139-40 (E.D.N.Y. 2013) (citing *N.Y. State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989)); *Schiller*, 2006 WL 3592547 at *6 (“[O]rganiizations resisting discovery on freedom of association grounds bear a minimal burden of proof.”).

350.org and Exxon are adversaries in a crucial public policy debate. Henn. Decl. ___. 350.org is a small non-profit. Exxon is one of the world’s wealthiest and most powerful corporations. The impact of Exxon’s attempts to invade the internal and external advocacy of an environmental protection organization or that organization’s rights to petition the government, to associate with others and to engage in free speech is obvious. *See Perry*, 591 F.3d at 1163 (holding that declaration submitted as evidence of First Amendment harm that would flow from disclosure of internal communications, although “lacking in particularity,” was sufficient to state *prima facie* case of infringement, because the harm was “self-evident”). In his Declaration, Jamie Henn, 350.org’s Strategy and Communications Director, explains how being forced to

search for, review and produce documents in response to Exxon's Subpoena would chill 350.org's exercise of its First Amendment rights. Henn Decl. ___. 350.org and its officers, members, associates, supporters, allies and potential allies engage in the full range of private deliberations that an advocacy group must to develop its messages and strategies, plan campaigns, draft public statements, evaluate facts and theories, and consider alternative approaches to its advocacy. *See Perry*, 591 F.3d at 1162-63 ("disclosure of internal campaign information can have deterrent effect on the free flow of information within campaigns."); *Wyoming*, 208 F.R.D. at 454 (the "threat to First Amendment rights may be more severe in discovery than in other areas because a party may try to gain advantage by probing into areas an individual or a group wants to keep confidential"). These deliberations do and must occur in private, without fear that Exxon will be able to use rejected ideas, draft statements, and internal disagreements to its advantage. *Perry*, 591 F.3d at 1147 ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private."). If 350.org knew that Exxon could subpoena its non-public communications, its members and supporters would be substantially less likely to engage in them at all, and would be much less likely to put them in writing, making these internal deliberations much more difficult. Henn Decl. ___. *See Perry*, 591 F.3d at 1162-64.

If the subpoena is enforced and until it is quashed, 350.org's members and its associated organizers and volunteers will be forced to wonder whether their non-public communications will be subject to a subpoena, and whether they will need (and be able to afford) legal counsel to defend themselves against their wealthy and litigious foe. Henn Decl. ___. *See Wyoming*, 208

F.R.D. at 454 (First Amendment's protection extends to staff, members, contributors and others who affiliate with an organization). These threats chill free speech.

B. Exxon's Requests Are Directed at Activities Explicitly Protected by the First Amendment

Exxon's Subpeona directly seeks 350.org's internal communications and deliberations on strategy and messaging for its public action campaigns, materials that implicate its First Amendment rights of freedom of speech and freedom of association. *See Perry*, 591 F.3d at 1147. Request No. 2 seeks documents revealing internal strategy, messaging, and coordination with other activists concerning advocating the investigation of Exxon. Request No. 4 seeks the same regarding the "Common Interest Agreement." Requests Nos. 5, 6, 9 and 10 seek internal strategic and messaging documents and coordination with other activists about environmental conferences. Request 7 seeks internal strategic and messaging documents and communciations with other activists concerning Exxon shareholder resolutions. Disclosure of such materials has the effect of chilling First Amendment Rights of freedom of speech and freedom of association. *See Perry*, 591 F.3d at 1162-64; *Heartland*, No. 05-2164-MLW-DWB, 2007 WL 852521 at *4 (finding attempt to require production of evaluations of possible legislation and strategy would interfere with internal organization and have a chilling effect on First Amendment rights (citing *Austl./E. USA Shipping Conference v. United States*, 537 F.Supp. 807, 809–10 (D.C.Cir.1982))).

Exxon's Request No. 8 demands documents concerning any fundraising by anyone at all for candidates for political office. The demand directly burdens the right to participate in political processes, regardless of whether 350.org directly fundraises for candidates or if it has information about the contribution activities of other environmental organizations. *See Buckley*,

424 U.S. at 68 (“It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”).

Exxon’s subpoena directly invades 350.org’s private planning and strategy documents on its key campaigns. It seeks the kind of materials that courts have unequivocally recognized implicate First Amendment rights of freedom of speech, freedom of association and freedom to petition. 350.org has undoubtedly met its “light burden” to present a *prima facie* case of First Amendment infringement.

C. Exxon Cannot Demonstrate a “Compelling Need” Sufficient to Outweigh the Infringement of First Amendment Rights

In order to overcome 350.org’s *prima facie* showing of First Amendment infringement, Exxon must demonstrate “heightened relevance,” or a “compelling need” for the discovery. *See Perry*, 591 F.3d at 1164. Exxon cannot do so, as the discovery Exxon seeks is highly speculative, attenuated, and unmoored from the issues in Exxon’s case.

In light of the important interests safeguarded by the First Amendment, courts have “consistently emphasized the strictness of the showing that the inquiring party must make.” *Int’l Soc’y for Krishna Consciousness, Inc.*, No. 75 CIV. 5388 (MJL), 1985 WL 315, at *8. Merely showing that documents are relevant to the issues in the case is not sufficient to permit discovery. Instead, to obtain discovery a party “must show that the information sought ‘is crucial to the party’s case,’ or that it goes to the ‘heart of the claims,’ or that it is ‘directly relevant to the [party’s] claim.’” *Id.* (internal citations omitted); *see also Int’l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (“As to the relevancy issue, it is crucial to remember that we are considering the essence of First Amendment freedoms—the freedom to protest policies and programs to which one is opposed, and the freedom to organize, raise money, and associate with

other like-minded persons so as to effectively convey the message of the protest.”). Exxon cannot meet its burden to show heightened relevance or any compelling need for the materials it seeks. Indeed, as discussed in detail above, very little of what Exxon seeks even meets the basic Rule 26 threshold of relevance. *See Heartland*, No. 05-2164-MLW-DWB, 2007 WL 852521, at *5 (“compulsory disclosure in the course of a ‘fishing expedition’ is ruled out in the First Amendment cases.” (quoting *Silkwood v. Kerr McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977))).

IV. THE SUBPOENA IS OVERBROAD AND FAILS TO TAKE REASONABLE STEPS TO AVOID IMPOSING UNDUE BURDEN OR EXPENSE ON A NON-PARTY

The Court “must” quash or modify a nonparty subpoena that “subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(iv). Similarly, under Rule 26, a court “must limit” the extent of discovery if it determines that the “discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(i). “[B]urden cannot be considered in the abstract without regard to the degree of relevance of and need for the information sought.” *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, No. 75 CIV. 5388 (MJL), 1985 WL 315, at *9 (S.D.N.Y. Feb. 28, 1985). For non-parties in particular, “even a modest burden may be unjustified where the discovery sought is only marginally relevant.” *Id.* (quoting *Fein v. Numex Corp.*, 92 F.R.D. 94, 96 (S.D.N.Y. 1981)). In such cases, parties seeking discovery also must demonstrate the “unavailability of alternative sources of information.” *Id.*

As discussed in detail above, Exxon’s subpoena is a calculated fishing expedition, seeking documents with little to no relevance to the allegations in Exxon’s Complaint, for which

a reader of the Subpeona could easily deduce that its purposes are for something other than information gathering. *See Heartland*, No. 05-2164-MLW-DWB, 2007 WL 852521, at *5.

To the extent that any of Exxon's requests do seek marginally relevant information, they are strikingly overbroad. For example, Request Nos. 1 and 2 seek communications with Attorneys General Healey and Schneiderman, but also communications with any other Attorney General, and with a host of unidentified "directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on [behalf of any Attorney General]." Such overbroad discovery should not be permitted.

The information that Exxon seeks that is arguably relevant includes communications with Attorneys General Healey and Schneiderman, and similar documents that they would have seen that could therefore bear on their states of mind or activities. This is information that Attorneys General Healey and Schneiderman would necessarily possess, and Exxon must seek that information from them, rather than from a non-party like 350.org. *See e.g., Wyoming*, 208 F.R.D at 455 (quashing subpoena where subpoenaing party had "not shown that it has made reasonable attempts to obtain the information elsewhere before asking for . . . extraordinarily broad discovery of the non-party witnesses").

CONCLUSION

For all the reasons set forth above, the Subpoena should be quashed in its entirety and 350.org should be granted its costs incurred in bringing this Motion to Quash.

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