SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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| PEOPLE OF THE STATE OF NEW YORK,<br>by LETITIA JAMES,<br>Attorney General of the State of New York,<br><br>Plaintiff,<br><br>- against -<br><br>EXXON MOBIL CORPORATION,<br><br>Defendant. | Index No. 452044/2018<br><br>IAS Part 61<br><br>Hon. Barry R. Ostrager<br><br>Motion Sequence No. 3 |

**EXXON MOBIL CORPORATION'S BRIEF IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION TO SEAL**

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Exxon Mobil Corporation ("ExxonMobil") submits this brief opposing the motion of the Office of the New York Attorney General ("OAG") to seal five exhibits submitted in connection with ExxonMobil's Amended Answer.

**PRELIMINARY STATEMENT**

OAG insists that five emails ExxonMobil filed with this Court will "embarrass[]" the attorney Matthew Pawa and chill potential "whistleblowers" like him if they are unsealed. Dkt. No. 159 at 6 ("Br."). These claims are divorced from reality. Pawa is a self-interested contingency-fee lawyer who has waged a scorched-earth campaign against ExxonMobil.[1] He has aggressively courted publicity and routinely seeks out the press and public attention on these issues. To the extent Pawa has concealed his relationship with OAG in the past, he has done so only at the direction of an OAG lawyer who asked Pawa to deny participating in a clandestine meeting so the public would not know about Pawa's role in precipitating the OAG's investigation of ExxonMobil. By now, however, Pawa's relationship with OAG is no secret, as it is the subject of public litigation in multiple jurisdictions.[2] The emails ExxonMobil filed under seal simply confirm the influence that Pawa exercised within OAG's office. As a result, the only embarrassment OAG seeks to prevent here is its own.

Considered against this backdrop, OAG's arguments in favor of sealing its emails with Pawa crumble. *First*, OAG is wrong to contend that its emails are not subject to a presumption of public access. New York law, unlike its federal counterpart, grants a presumption of public access to *all* documents filed with a court. And even under federal law—which OAG cites exclusively—

[1] Pawa's participation in a conspiracy against ExxonMobil is well-documented in the Findings of Fact and Conclusions of Law issued by the Honorable R.H. Wallace, Jr., District Judge for the 96th District Court in Tarrant County, Texas. *See* Ex. A (Order, *Exxon Mobil Corp.*, No. 096-297222-18 (Tarrant Cty. Apr. 24, 2018)).

[2] *See Exxon Mobil Corp.* v. *Healey*, No. 18-1170 (2d. Cir.); *Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1 (Tarrant Cty.).

the emails are still entitled to a presumption of public access because they are key components of ExxonMobil's defenses. *Second*, OAG lacks good cause to request that the Court seal the emails. OAG fails to meet its heavy burden because **(i)** Pawa, who has never worked for ExxonMobil, is not by any stretch of the imagination a "whistleblower"; **(ii)** courts may not seal documents to spare litigants embarrassment; and **(iii)** there is a substantial public interest in the disclosure of these emails. *Finally*, the Court should not delay ruling on OAG's motion because of the importance of affording the public prompt access to information showing how elected officials exercise and abuse their authority.

When the State's chief legal officer coordinates with well-funded private interests on law enforcement priorities, the people of New York have a right to know. The Court should deny OAG's motion.

## STATEMENT OF FACTS

At issue are five email exchanges between OAG and Pawa, an environmental activist who has long targeted ExxonMobil. Dkt. No. 119, Exs. 8–12. After much delay, OAG produced these emails to ExxonMobil on March 15, 2019, and designated them confidential pursuant to the parties' Stipulation and Order for the Production and Exchange of Confidential Information (the "Protective Order"). Dkt. No. 46. In substance, the emails document **(i)** [redacted] Dkt. No. 119, Ex. 8; **(ii)** [redacted] Dkt. No. 119, Ex. 9; **(iii)** [redacted] Dkt. No. 119, Ex. 10; **(iv)** [redacted] Dkt. No. 119, Ex. 11; and **(v)** [redacted] Dkt. No. 119, Ex. 12.

Consistent with the Protective Order, ExxonMobil initially filed OAG's emails with Pawa under seal and redacted relevant portions of the proposed Amended Answer. Dkt. No. 46

at ¶ 12(a). The Protective Order entitled ExxonMobil to replace its "Redacted Filing[s]" with unredacted versions if OAG failed to move to seal within seven days—*i.e.*, April 3, 2019. *Id.* When OAG did not file a motion to seal within its allotted time, ExxonMobil inquired into OAG's intentions. OAG responded that, notwithstanding the terms of the Protective Order, it still wished to seal the Pawa emails. Multiple meet-and-confers ensued, and the parties each submitted letters to the Court concerning whether it was appropriate to permanently seal the Pawa emails. *See* Dkt. Nos. 141, 142. The Court informed the parties that OAG could file a motion to seal, which it did on April 24, 2019. Dkt. No. 159.

**LEGAL STANDARD**

There is "a broad presumption that the public is entitled to access to judicial proceedings and court records." *Mosallem* v. *Berenson*, 76 A.D. 3d 345, 348 (1st Dep't 2010); *see also* J. Ostrager Prac. R. 31 (revised Jan. 2, 2018) (sealing documents is "discouraged"). The public's right of access to court records is derived from state common law as well as the First and Sixth Amendments. *Danco Labs.* v. *Chem. Works of Gedeon Richter, Ltd.*, 274 A.D. 2d 1, 6 (1st Dep't 2000). It is also enshrined in 22 NYCRR § 216.1(a), which bars courts from sealing "court records" except "upon a written finding of good cause."

Because "[c]onfidentiality is clearly the exception, not the rule," the party seeking to seal court records has the burden to demonstrate there is good cause to justify restricting public access. *Mosallem*, 76 A.D. 3d at 349. This burden is "substantial." *Id.* The movant must show "that public access to the documents at issue will likely result in harm to a compelling interest of the movant." *Id.* "[E]mbarrassment, damage to reputation and the general desire for privacy" are all insufficient bases for sealing. *Doe* v. *New York Univ.*, 6 Misc. 3d 866, 878 (Super. Ct. N.Y. Cty. 2004). Even in the rare circumstances where "good cause" exists, "any order denying access must be narrowly tailored to serve compelling objectives." *Danco Labs.*, 274 A.D. 2d at 5–6.

Accordingly, courts must consider "on a document by document basis" whether there is a "compelling reason to justify sealing." *Maxim, Inc.* v. *Feifer*, 145 A.D. 3d 516, 518 (1st Dep't 2016). Courts must "also consider less drastic alternatives to sealing the records which would adequately serve the competing interests." *People* v. *Burton*, 189 A.D. 2d 532, 536 (3d Dep't 1993); *see also L.K. Station Grp., LLC* v. *Quantek Media, LLC*, 20 Misc. 3d 1142(A) (Super. Ct. N.Y. Cty. 2008).

## ARGUMENT

### I. OAG's Motion to Seal Should Be Denied

OAG has failed to demonstrate good cause to seal ExxonMobil's Amended Answer and the Pawa emails. These documents are court records that will aid both the Court and the public in evaluating OAG's pending motion to dismiss. OAG's purported interests in preventing "chilling effects" and "embarrassment" are irrelevant here and do not outweigh the substantial presumption of public access. OAG's motion should be denied.

#### A. The Pawa Emails Are "Court Records" Entitled to a Presumption of Public Access

Citing a purported "dearth of New York cases," OAG argues that *federal* law does not grant the public a presumption of access to the Pawa emails. Br. at 3. OAG asserts the emails are not "judicial documents" because **(i)** they purportedly are "irrelevant to the Court's determination of the pending motion to dismiss," and **(ii)** ExxonMobil's claims are supposedly "legally deficient." *Id.* at 4–5. These arguments not only misrepresent New York law, but also fail under the stated (but inapplicable) standard.

As an initial matter, there is no shortage of New York law on the presumption of public access to court records.[3] OAG itself quotes a decision observing that New York courts depart from their federal counterparts on the presumption of access. *See People* v. *Sullivan*, 168 Misc. 2d 803, 808–11 (Saratoga Cty. Ct. 1996). Unlike the federal system, New York courts do not distinguish between **(i)** "judicial[] record[s]," necessary to reach a decision, which are entitled to the presumption of public access under federal law; and **(ii)** extraneous documents, which receive no such presumption. *Id.* New York courts instead apply the presumption of access to all "court records," which encompasses "all documents and records of any nature filed with the clerk in connection with the action." 22 NYCRR Rule 216.1(b).[4] Under this expansive definition, there is no question that ExxonMobil's Amended Answer and the Pawa emails—which are "documents and records of any nature filed with the clerk"—qualify as "court records" subject to a presumption of public access.

Even under federal law, however, the presumption of public access would apply here. To begin, OAG's motion discusses only the Pawa emails, conceding through silence that the Amended Answer itself should not remain sealed. The Pawa emails, too, are not merely documents "passed between the parties in discovery," which "lie entirely beyond the [federal] presumption's reach." *U.S.* v. *Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). To the contrary, the emails—documenting OAG's improper coordination with private interests—play a crucial role in this Court's exercise of judicial power because they help ExxonMobil satisfy its burden to plausibly plead its affirmative defenses. *See Ello* v. *Singh*, 531 F. Supp. 2d 552, 584 (S.D.N.Y. 2007);

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[3] *See, e.g.*, *Mosallem*, 76 A.D. 3d at 348; *Danco Labs.*, 274 A.D. 2d at 6; *Mancheski* v. *Gabelli Grp. Capital Partners*, 39 A.D. 3d 499, 501 (2d Dep't 2007); *Gryphon Dom. VI, LLC* v. *APP Int'l Fin. Co., B.V.*, 28 A.D. 3d 322, 324 (1st Dep't 2006).

[4] *See also Mosallem*, 76 A.D. 3d at 348; *Mancheski*, 39 A.D. 3d at 502; *Matter of Hayes*, 59 Misc. 3d 543, 547 (Sur. Ct. Essex Cty. 2018); *Visentin* v. *DiNatale*, 2004 WL 1900407, at *2 (Sup. Ct. Putnam Cty. 2004); *Doe* v. *New York Univ.*, 6 Misc. 3d 866, 878 (Sup. Ct. N.Y. Cty. Dec. 08, 2004).

*see also Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (holding that "mere conclusory statements" do not suffice to establish plausibility). Accordingly, just like the Amended Answer itself, the Pawa emails are entitled to the presumption of access because they are integral to the Court's exercise of judicial power.

### B. OAG Failed to Establish the "Good Cause" Necessary to Overcome the Presumption of Public Access

OAG claims that the potential for embarrassment and deterring whistleblowers establishes "good cause" for sealing the Pawa emails. Br. at 6. But no such concerns exist here. The emails reveal only OAG's collusion with a contingency-fee lawyer who consistently seeks public attention and possesses no confidential information to disclose to law enforcement. And even if OAG had legitimate interests in concealing these documents, the substantial public interest in disclosure would outweigh OAG's concerns.

*First*, New York courts do not accept conclusory allegations of "chilling effects" as a valid basis to seal court records. *See Matter of Hofmann*, 284 A.D. 2d 92, 94 (1st Dep't 2001). Where the information sought to be protected "is already a matter of public record," even genuine allegations of "chilling effects" are irrelevant. *Doe*, 6 Misc. 3d at 878; *see also Doe* v. *Bellmore-Merrick Cent. High Sch. Dist.*, 1 Misc. 3d 697, 700 (Sup. Ct. Nassau Cty. 2003). Here, OAG seeks to seal communications with Matthew Pawa—a contingency-fee lawyer whose efforts to delegitimize ExxonMobil and coordinate with OAG are well-documented in the public domain.[5] It is well-known that Pawa aggressively marketed his services to California power brokers and politicians prior to filing public nuisance claims against ExxonMobil on behalf of New York City, San Francisco, and Oakland. Both of those lawsuits were dismissed pursuant to Rule 12(b)(6) of

[5] *See, e.g.*, *Is Eric Schneiderman Colluding with Other AGs in an Illicit War on Exxon?*, N.Y. Post (Apr. 19, 2016), https://nypost.com/2016/04/19/is-eric-schneiderman-colluding-with-other-ags-in-an-illicit-war-on-exxon/.

the Federal Rules of Civil Procedure for failure to state a plausible claim. *City of Oakland* v. *BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal., 2018) (appeal pending); *City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y., 2018) (appeal pending).

The Pawa emails hardly contain the type of information provided by a "whistleblower." To the contrary, they reflect Pawa's role as a political operative attempting to cause harm to a perceived political opponent. *See* Dkt. No. 119, Exs. 9, 12. In one email, for example, Pawa writes the following: [redacted]

Dkt. No. 119, Ex. 9. OAG's attempt to characterize this direction to law enforcement and self-interest as "whistleblow[ing]" is disingenuous at best. *See* Br. at 6 (citing *United States* v. *Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

*Second*, OAG's invocation of Pawa's privacy interests are similarly illusory. New York law is clear that "embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records." *Doe*, 6 Misc. 3d at 878. And even if Pawa's embarrassment were a legitimate basis for sealing, it certainly would not provide good cause here. In fact, publicly available documents show that Pawa was prepared to speak with a *Wall Street Journal* reporter about his role in preparing state attorneys general for a press conference about ExxonMobil. Dkt. No. 119, Ex. 4. But OAG's Environmental Protection Bureau chief urged Pawa instead to deceive the reporter and conceal his connections with OAG: "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event." *Id.* Accordingly, OAG's claim that Pawa will be "embarrass[ed]" is not only irrelevant, but also false. Br. at 6.

*Third*, there is a significant public interest in access to OAG's communications with Pawa. The people of New York have a right to know the extent to which private interests, including the plaintiffs' bar, are influencing and potentially dictating OAG's exercise of law enforcement authority.[6] And "when issues of major public importance are involved," the interests of the public and the press in access to court records "weigh heavily in favor of release—even when privacy concerns are present." *Danco Labs*, 274 A.D. 2d at 8 (quotations omitted).

## II. The Court Should Not Delay Issuing a Decision

In a last ditch effort to shield the Pawa emails from public scrutiny, OAG asks this Court to delay a ruling until after it has resolved OAG's motion to dismiss ExxonMobil's affirmative defenses. Br. at 7. Gambling on a favorable ruling, OAG argues that if ExxonMobil's affirmative defenses are ultimately dismissed, the emails will become irrelevant and establish *nunc pro tunc* that sealing was appropriate. *Id.* at 1.

This argument is contrary to New York law. As a preliminary matter, "neither rule 216.1(a), nor the case law addressing it, allows for sealing of part of a court file simply because a document may be irrelevant. Nor does the fact that the action was ultimately dismissed provide a basis to restrict public access." *Mosallem*, 76 A.D. 3d at 353. "[T]aken to its logical extreme," this argument "would allow for sealing of any case that was dismissed." *Id.* It would also preclude the public from evaluating the basis for a decision to dismiss ExxonMobil's defenses because the support for those defenses will have been shielded from public view. Such an outcome would undermine the public explanation of judicial rulings that is a pillar of judicial legitimacy.

[6] Pawa is not the only private interest influencing OAG. To this day, OAG improperly coordinates with New York University's State Energy and Environmental Impact Center, which is funded by Bloomberg Philanthropies. *See* Thomas Kassahun, *DOJ Urges Appeals Court to Throw Out NYC's Global Warming Lawsuit*, Legal NewsLine (Mar. 15, 2019), https://legalnewsline.com/stories/512294396-doj-urges-appeals-court-to-throw-out-nyc-s-globalwarming-lawsuit; *see also* Ex. B (e-mail from Legal Recruitment Bureau, New York Attorney General, to Monica Wagner, et al. (Jan. 25, 2018, 2:12 PM)).

Accordingly, "[s]ealing motions should be decided expeditiously because undue delays in ruling on such motions implicate the public's right of access to court records." *Id*. That imperative is all the more urgent when evidence of government misconduct is at issue. This Court should reject OAG's latest attempt to avoid public scrutiny of its improper coordination with private interests.

**CONCLUSION**

OAG has no legitimate interest in shielding its office from embarrassment and public accountability. The real interest at stake here is that of the public. When public officials use their power to advance the private interests and partisan agendas of powerful and well-funded groups, there is no legitimate basis to conceal that information from public scrutiny. OAG's motion to seal, as well as its request for a delayed ruling, should be denied.

Dated: May 8, 2019

New York, New York

Respectfully submitted,

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**Certification of Compliance with Word Count**

Pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court, I certify that this affirmation complies with that rule because it contains 2,779 words, exclusive of the caption, table of contents, table of authorities, and signature block. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: May 8, 2019
New York, New York

By: /s/ *Theodore V. Wells, Jr.*
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