COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13211

COMMONWEALTH OF MASSACHUSETTS

Plaintiff-Appellee.

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant.

ON APPEAL FROM AN INTERLOCUTORY DECISION OF
THE SUFFOLK SUPERIOR COURT

BRIEF OF AMICUS CURIAE FORMER MASSACHUSETTS ATTORNEYS GENERAL IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

EDWARD NOTIS-MCCONARTY (NO. 374380)
JENNIFER GRACE MILLER (NO. 636987)
M. PATRICK MOORE (NO. 670323)
CLINTON R. PROSPERE (NO. 703834)
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109
(617) 227-7940

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INTEREST OF AMICI[1]

The Massachusetts Constitution establishes the Attorney General as the Commonwealth's chief law enforcement officer, and provides for her election by statewide ballot. *See* Part II, c.2, § 1, art. 9, of the Constitution of the Commonwealth; art. 82, of the Amendments to the Massachusetts Constitution; *see generally* G.L. c. 12, §§ 1-11N. Her role is unique. Among other responsibilities, the Attorney General has "a common law duty to represent the public interest." *Secretary of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 163 (1975), citing *Attorney Gen. v. Trustees of Boston Elev. Ry*., 319 Mass. 642, 652 (1946). That is, her clients are the people of the Commonwealth. As a result, her responsibilities are wide-ranging and seek to protect the public from any number of harms. *See, e.g.,* G.L. c. 12, § 8 (Attorney General "shall enforce the due application of funds" given to charities and "prevent breaches of trust"); G.L. c. 12, § 10 (Attorney General required to "take cognizance of" all violations of law "affecting the general welfare of the people" with respect to restraint of trade);

[1] Pursuant to Mass. R. App. P. 17, amici state that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; no person, other than amici or their counsel, contributed money that was intended to fund preparing or submitting this brief; and none of the amici nor their counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

G.L. c. 12, § 11D (Attorney General "shall have the authority to prevent or remedy damage to the environment").

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

During their respective tenures, the Former Attorneys General brought dozens, if not hundreds, of enforcement actions in the people's name. Those actions have included Chapter 93A cases, like this one. *See, e.g., Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733 (2008) (alleging unfair and deceptive practices in subprime mortgage lending). But their efforts also extended well-beyond Chapter 93A, to include enforcement of the anti-trust and public charities laws, among other responsibilities. *See, e.g., See In re: Essential.com*, 2001 WL 34733193 (U.S. Bankr., D. Mass. 2001) (antitrust claims targeting improper sale of customer information). Amici's decades of experience in enforcing the Commonwealth's laws provides special insight into how those

efforts could be frustrated if the Massachusetts Anti-SLAPP statute, G.L. c. 231, § 59H, is construed as Exxon Mobil insists: as another litigation tactic used by large, corporate interests to delay and obstruct the Attorney General's enforcement actions.

SUMMARY OF THE ARGUMENT

Exxon Mobil's overly expansive reading of G.L. c. 231, § 59H, would turn the anti-SLAPP statute on its head, making it a weapon, rather than a shield. It would also encourage meritless arguments, rather than weed them out. That is not what the Legislature intended when it adopted the anti-SLAPP statute. Indeed, the Legislature has enacted another, exclusive remedy to address potential overreach by the government, one better calculated to avoid misuse. *See* G.L. c. 231, §§ 6E-6F.

Moreover, applying the statute to enforcement actions brought by the Attorney General—which protect the public from violations of the consumer protection, antitrust, public charities and other laws—would delay or frustrate important reforms and recoveries for the people of Massachusetts. Because Exxon Mobil's interpretation of § 59H defies standard rules of statutory construction and common sense, it should be rejected.

ARGUMENT

I. THE MASSACHUSETTS ANTI-SLAPP STATUTE IS INAPPLICABLE TO ENFORCEMENT ACTIONS BROUGHT BY THE ATTORNEY GENERAL.

Contrary to Exxon Mobil's assertions, nothing in G.L. c. 231, § 59H ("§ 59H"), supports its application to enforcement actions brought by the Attorney General. *See, e.g.*, Appellant's Reply Brief ("Reply Br.") at 19-24. Quite the opposite: the plain language of the statute, its legislative history and its purpose all make clear that the Legislature did not adopt § 59H to complicate or delay the Attorney General's law enforcement efforts.

A. The Plain Language of § 59H and the Structure of Chapter 231 Preclude the Use of Special Motions to Dismiss Against the Commonwealth's Enforcement Actions.

The anti-SLAPP statute permits a "party" in "any case" to bring a special motion to dismiss if that party believes the claims brought against it are "based on said party's exercise of its right of petition." G.L. c. 231, § 59H. Exxon Mobil argues that these terms—being general and broad—should apply to enforcement actions brought on behalf of the Commonwealth by the Attorney General. *See, e.g.*, Appellant's Reply Brief ("Reply Br.") at 19-21. Exxon Mobil's argument ignores both standard rules of statutory construction and the Legislature's choice of a different accountability mechanism for the Commonwealth elsewhere in chapter 231.

It is a well-established rule of statutory construction—here in Massachusetts and throughout the country—that general words used in a statute, like "person," "party" or "action," do not include "the State or political subdivisions thereof." *Kilbane v. Secretary of Human Svcs.*, 14 Mass. App. Ct. 286, 287 (1982), quoting *Hansen v. Commonwealth*, 344 Mass. 214, 219 (1962); *see also Commonwealth v. Dowd*, 37 Mass. App. Ct. 164, 166 (1994) ("This canon of construction is scarcely limited to Massachusetts"); 3 Sutherland Statutory Construction § 62:1 & n.6 (8th ed.) (presumption that "statute's general language does not include the government or its agencies," collecting cases).

But the presumption is more than a well-accepted rule of construction: it serves to protect the state's sovereignty. If the Legislature does not explicitly include the Commonwealth within the ambit of a statute, then it is presumed that the statute does not reach the Commonwealth. *See, e.g.*, 3 Sutherland Statutory Construction § 62:1 ("The point simply is that the sovereign remains unaffected absent an express statutory declaration to the contrary."). Contrary to Exxon Mobil's assertion, this is true even where a statute is meant to be construed liberally. Reply Br. at 23-24; s*ee Commonwealth v. ELM Medical Labs, Inc.*, 33 Mass. App. Ct. 71, 76-79 (1992) (liberal construction of remedial statute "not enough to overcome the absence of *any* manifestation of the intention of the Legislature to waive sovereign immunity") (emphasis in original).

Given this well-understood and universally applied rule, silence in a statute is a legislative choice: that is, silence excludes the Commonwealth. Here, § 59H is silent on whether the Attorney General's enforcement actions are subject to special motions to dismiss. Therefore, those actions are not included in the statute's reach.

The Legislature, however, was not silent elsewhere in the same chapter. In G.L. c. 231, § 6E, the Legislature explicitly defined the term "party" to include "any officer or agency of the commonwealth or subdivision thereof." Significantly, the Legislature confined that definition to just three sections of chapter 231: §§ 6E through 6G, which impose attorney's fees and other costs for claims determined to be "wholly insubstantial, frivolous and not advanced in good faith." G.L. c. 231, § 6F; *see* G.L. c. 231, § 6E ("*As used in sections 6E to 6G inclusive*, the following words shall have the following meanings") (emphasis added). Thus, the Legislature was clear: it included the Commonwealth in the definition of "party" only for purposes of §§ 6E through 6G. It did not include the Commonwealth as a "party" in § 59H.[2] This was a deliberate choice. *See, e.g.,*

[2] Indeed, if the Commonwealth were included as a "party" under § 59H, logic would require that it be authorized to *bring* special motions to dismiss. That would be incongruous, at best. Does the Commonwealth have a protected right to petition itself? Could someone else bring a claim that was "based on" the Commonwealth's petitioning of itself? That seems unlikely given that the right to petition is vested in the "people." U.S. Const. amend. 1, cl. 3 (protecting "right of the people" to petition government for redress of grievances); art. 19 of the Declaration of Rights to the Massachusetts Constitution ("people have the right" to

Philips v. Equity Residential Management, LLC, 478 Mass. 251, 258 (2017), citing *Brady v. Brady*, 380 Mass. 480, 484 (1980), quoting *Harborview Residents' Comm., Inc. v. Quincy Hous. Auth.*, 368 Mass. 425, 432 (1975) ("a statutory expression of one thing is an implied exclusion of other things omitted from the statute").

Contrary to Exxon Mobil's assertion, the Legislature did not "immunize" the Commonwealth from accountability. Reply Br. at 19. Instead, it chose a different mechanism to address the rare circumstances in which the Attorney General may have overreached. Section 6F permits "any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made" to bring a motion asserting that "all or substantially all of the claims" brought by an opponent "were wholly insubstantial, frivolous and not advanced in good faith." G.L. c. 231, § 6F. Following a hearing, the court is required to make a "separate and distinct finding" as to the frivolousness of the claims and, if appropriate, award "an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims." *Id*. Thus, costs and attorney's fees *are* potentially available against the Commonwealth: but only if it brings a truly meritless suit,

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"request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them").

and only at the end of a proceeding.[3] Thus, the Legislature anticipated the possibility of overreach by the Commonwealth and provided a remedy, but a remedy that would be less likely to be abused or cause undue delay than the anti-SLAPP statute. G.L. c. 231, §§ 6E-6G. Exxon Mobil cannot ignore the Legislature's explicit choice.[4]

B. The Legislative History of § 59H Does Not Support the Use of Special Motions to Dismiss Against the Attorney General's Enforcement Actions.

The legislative history of G.L. c. 231, 59H, supports the same conclusion: in enacting the statute, the Legislature was not targeting the Commonwealth; it was seeking to curb an abusive litigation practice among *private* litigants. While the

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[3] Amici are unaware, however, of any reported case interpreting G.L. c. 231, §§ 6E-6F, as applied to enforcement actions brought by the Attorney General. Thus, the precise contours of the statute's application to the Commonwealth are still to be determined.

[4] Section 6E is also instructive with respect to the definition of "civil action." In § 6E, where the Legislature chose to include the Commonwealth in the definition of "party," it also chose to exclude from the definition of "civil action" certain proceedings in which the Commonwealth was likely to be a party. For example, § 6E excludes care and protection proceedings, mental health commitments, sexually dangerous person proceedings and adoption proceedings. G.L. c. 231, § 6E. Thus, the Commonwealth can bring these often difficult and complex proceedings, in the exercise of its statutory authority, without fear of later being accused of bad faith or having to pay attorney's fees and other costs. Here, it stands to reason that, if the Legislature had actually intended § 59H to include the Commonwealth, it would also have made clear whether the statute applied to actions in which the Commonwealth was likely to be a party, like this enforcement action.

statute may be broad, it was never meant to interfere with public enforcement actions brought by the Commonwealth's chief law enforcement officer. *See Conservation Commission of Norton v. Pesa*, 488 Mass. 325, 331 (2021) (statute must be interpreted according to Legislature's intent, "ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and main object to be accomplished"), quoting *Commissioner of Revenue v. Dupee,* 423 Mass. 617, 620 (1996).

As this Court stated in *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 161 (1998)—which was this Court's first opportunity to construe § 59H—the "typical mischief" the Legislature intended the statute to remedy was meritless lawsuits brought by well-financed real estate developers, "directed at individual citizens of modest means speaking publicly against development projects." That is, the Legislature sought to curb private parties from using expensive, time-consuming and ultimately pointless litigation to intimidate private citizens from exercising their First Amendment petitioning rights.

One lawsuit, in particular, is usually cited as the impetus for legislative action. *Id*. In 1991, fifteen residents of Rehoboth, concerned about wetlands, signed a petition opposing a residential development. *Id*. The developer sued, and

the residents incurred more than $30,000 in legal fees before the suit was eventually dismissed. *Id*.

But that Rehoboth suit was not the only example legislators provided to illustrate the need for the broad protections of the law. On the floor of the House, Representative David Cohen expressed his support of the bill, stating:

> Many of our laws require public participation—zoning laws especially. Unfortunately many individuals who have gone before a body and spoken their minds have found themselves sued. Current laws do not protect them and they often have to incur thousands of dollars in legal bills.

House Session, State House News Service (Dec. 19, 1994). Representative Marie J. Parente, agreed, citing the example of Joan Brown, a woman who voiced concern to her local selectperson board about potential flooding resulting from a new development. *Id*. The developer sued Mrs. Brown and her husband, who were of extremely modest means. *Id*. According to Rep. Parente, the couple "were forced to spend $4,000 defending themselves. They spent their savings. They won their case eventually but they had no savings left to press one more time for damages." *Id*.

Time and again in the floor debate, legislators spoke of a burgeoning litigation tactic used against individual citizens by deep-pocketed corporations to further private interests.[5] They spoke of individuals, couples, families, all subject

[5] *See, e.g.*, House Session, State House News Service (Dec. 29, 1994) (Considering override of Governor's veto of § 59H, Rep. Cohen stated, "The bill is to protect

to meritless claims brought by private litigants, in support of private projects, to punish these individuals for speaking up before local government bodies. The debate demonstrates that the Legislature was focused exclusively on curbing abuses and levelling the playing field between *private litigants*. There is no mention anywhere in the record—and certainly no examples given—of abusive litigation tactics used by government or the Attorney General. That omission is significant, and makes abundantly clear that government conduct was not even part of the conversation when §59H was enacted. *See Pesa*, 488 Mass. at 332 ("Ultimately, we must avoid any construction of statutory language which . . . would frustrate the Legislature's intent"), quoting *Bellalta v. Zoning Bd. of Appeals of Brookline*, 481 Mass. 372, 378 (2019). Indeed, there was likely no need because, as discussed above, Section 6F, already existed to address any abuses by the Commonwealth. *Compare* G.L. c. 231, § 6E (statute providing remedy for "frivolous" actions and including Commonwealth as a "party" adopted in 1976) *with* G.L. c. 231, § 59H (adopted in 1994); *see also Jancey v. Sch. Comm. of Everett*, 421 Mass. 482, 496 (1995) ("we assume, as we must, that the Legislature was aware of existing statutes") (citations omitted).

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ordinary citizens participating in the process"; Rep. Parente stated, "Families should not be subjected to frivolous suits"; and Rep. Philip Travis stated, "This gives a level playing field. People in Rehoboth signed a petition relating to the issuing of a permit. They were threatened with a multi-million [dollar] suit and they spent thousands of dollars in legal fees.").

Nonetheless, Exxon Mobil points to the Governor Weld's 1994 veto message as supporting its overly expansive interpretation of § 59H. Reply Br. at 23-24. Of course, this Court has already noted that, "rather than being perceived as constructive criticism offered to tighten the legislation, the Governor's opposition . . . was viewed as protecting developers' and real estate interest, the typical targets of the bill's proponents." *Duracraft*, 427 Mass. at 163 n.11. But even taking the Governor's objection at face value, he in no way intimated that § 59H extended beyond private litigation to reach public enforcement actions.

Indeed, Exxon Mobil provides only a portion of the Governor's statement. Reply Br. at 23-24. In his letter returning the bill to the Legislature with an amendment, for example, the Governor stated that the bill "covers any statement on a policy issue and thus would completely change the law of *libel, slander and abuse of process*." House No. 5570 (1994) (emphasis added). His veto message was the same. House No. 5604 (1994) ("the bill threatens to alter substantially the balanced and long settled law in such areas as *libel, slander and abuse of process*") (emphasis added). Thus, the Governor's concern was centered on cases generally litigated by private parties, not the government.

The debate on the House floor was similar. Opponents of the bill were focused on libel and slander. Representative David Peters, for example, argued that the statute would discourage accountability and contended that "[h]earings

will become places where people intent on stopping projects make ludicrous statements." House Session, State House News Service (Dec. 29, 1994). Representative Walter DeFilippi was concerned about the bill's effect on the economy:

> We've worked hard in the past few years to revitalize our economy. This bill says forget all that because any citizen can file an action and keep you tied up until your project or factory no longer makes economic sense. The shopping center or whatever doesn't get built and all those jobs go down the drain.

House Session, State House News Service (Dec. 19, 1994). Again, while the opponents of the bill may have cited its breadth, they were concerned only about its broad application in the context of private litigation. There was absolutely no concern raised—either among opponents or proponents of the bill—about the statute reaching government action. The best explanation for that: none of them thought it did.

C. The Attorney General's Enforcement Actions Are Not SLAPPs.

"SLAPPs are by definition meritless suits." *Duracraft*, 427 Mass. at 164. The objective of SLAPP suits "is not to win them, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech." *Id.* at 161; *see also Blanchard v. Stewart Carney Hosp., Inc.*, 477 Mass. 141, 147 (2017) (same). Enforcement actions brought by the Attorney General, however, emphatically do not fit this mold. They exist to enforce the law. They are carefully vetted

exercises of the Attorney General's common law and statutory authority to protect the public interest, supported by the presumption of regularity that applies to all prosecutorial decisions. *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006) (presumption that a prosecutor has legitimate grounds for the action [s]he takes is one we do not lightly discard"); *Commonwealth v. Bernardo B.*, 453 Mass. 158, 167 (2009) (**"**Deference to prosecutorial decision-making is borne of the recognition that decisions whether and how to prosecute entail policy considerations, such as deterrence value and prosecuting priorities, that are ill suited to judicial review"). In short, the Attorney General's enforcement actions are not SLAPPs.

Chapter 93A cases—like this one—provide a good example. Chapter 93A, of course, prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce" that "directly or indirectly affect the people of this commonwealth." G.L. c. 93A, §§ 1(b), 2(a). And protecting people and businesses from unfair business practices within its borders is one of the Commonwealth's core police powers. *See, e.g., California v. ARC America*, 490 U.S. 93, 101 (1989) ("Given the long history of state common law and statutory remedies against . . . unfair business practices, it is plain this is an area traditionally regulated by the states."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001) (regulation of advertising is an "historic police power[] of the state").

Chapter 93A grants the Attorney General authority to exercise that core police power on behalf of Massachusetts consumers. G.L. c. 93A, § 4 ("Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, [s]he may bring an action in the name of the commonwealth"). She is expressly required to exercise that authority in the public interest. *Id*.; *see Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984) (acknowledging Attorney General's common law duty and statutory mandate to protect the public interest). It is highly unlikely that actions required to be brought in the public interest could ever be equated with the kind of meritless, oppressive lawsuits that the Legislature targeted in § 59H. Nor is it likely that the Legislature meant to create a mechanism that would impede the enforcement of consumer protection and other laws.

Moreover, 93A actions—like the Attorney General's decision to pursue other affirmative litigation on behalf of the Commonwealth—are not lightly brought. As stated above, the Attorney General must start by making the weighty determination that the "proceedings would be in the public interest." G.L. c. 93A, §4. But there are other considerations, as well. Enforcement actions generally require a significant commitment of the Attorney General's limited resources. They often take years and result in multiple rounds of litigation in state and federal

court, as has already occurred in this case. *See Exxon Mobil v. Attorney General*, 479 Mass. 312, 324-27 (2018); *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3de 679 (S.D.N.Y. 2018). And they are usually carefully monitored by the media and the public. *See, e.g.*, Fox, Judge Denies ExxonMobil Requests to Dismiss AG's Lawsuit, Boston Globe (June 23, 2021). As a result, enforcement actions are typically approved through a multi-layered process, starting with the relevant division chief, moving through the bureau chief, senior executive staff and all the way to the Attorney General, herself.

This kind of thoughtful, carefully vetted decision-making process is simply not indicative of the kind of lawsuits the Legislature was seeking to curb with § 59H. The Attorney General's enforcement actions seek significant reforms on behalf of the Commonwealth's people. They are far from "meritless." And the Attorneys General who invest considerable institutional and political capital in them, certainly expect to win.

D. Exxon Mobil's Reliance on *Town of Hanover* is Misplaced.

Exxon Mobil relies heavily on *Town of Hanover v. New England Regional Council of Carpenters*, 467 Mass. 587 (2014). Reply Br. at 24-26. But that reliance is misplaced. To begin with, the *Hanover* court never explicitly discussed whether § 59H could be used against a government entity. *Compare In re Discipline of an Attorney*, 442 Mass. 660, 673-74 & n.27 (explicitly assuming

without deciding that special motions to dismiss could be brought in context of bar discipline cases). And it certainly did not address any of the special circumstances implicated when a party asserts a right of recovery against the Commonwealth, or whether the Legislature intended G.L. c. 231, §§ 6E-6F, as the exclusive remedy for overreach by the government. Rather, the Court's decision focused on whether the moving party—an association that had supported unsuccessful litigation against the town, but had not actually been a party to the underlying suit—had engaged in protected petitioning activity under the statute. *Id*. at 589-90. Without discussion and analysis, the case has little to no precedential value. *See Correllas v. Viveros,* 410 Mass. 314, 323 n.6 (without discussion of relevant issue, case had "little precedential value"); *Ram v. Town of Charlton*, 409 Mass. 481, 486 (1991) (case had "little useful precedential value" where its rationale was based on separate issue, rather than construction of relevant term).

Moreover, the facts are easily distinguishable. Essentially, the Town filed a classic SLAPP: an abuse of process action against the association for supporting an unsuccessful ten taxpayer suit, challenging the Town's choice of contractor for its new high school. *Id.* at 589. Abuse of process claims are, of course, traditional fodder for SLAPP suits. *See, e.g., Fabre v. Walton,* 436 Mass. 517 (2002) (husband's abuse of process claim based on wife's seeking domestic violence restraining order). Not so, of course, enforcement actions brought in the public

interest under explicit statutory authority by the Commonwealth's chief law enforcement officer. *See, e.g., Town of Madakawska v. Cayer*, 103 A.3d 547, 552 (Me. 2014) (town's enforcement action for a land use violation was not "an appropriate occasion for application of the anti-SLAPP statute"); *see also* Cal. Civ. Proc., § 425.16(d) (like several states, California explicitly exempts enforcement actions from its anti-SLAPP statute). The Attorney General's enforcement actions are simply not comparable to a municipality's retaliatory abuse of process claim.

In addition, the Town's claims were limited exclusively to the association's support of the litigation. *Town of Hanover*, 467 Mass. at 596 ("The record presents nothing to suggest that there is any substantial basis for the town's claims other than the protected petitioning activity"). That is certainly not the case here, as both this Court and the federal District Court have already found. *See Exxon Mobil*, 479 Mass. at 324-27; *Exxon Mobil*, 316 F. Supp. 3d 679. At most, therefore, *Town of Hanover*—where the Court was not even focused on the issue—might provide some small support to allow special motions to dismiss against municipalities in extraordinary circumstances: when the municipality has acted truly egregiously, like the large, private interests the statute was originally created to combat.[6] But

[6] Of course, should the Court travel this path, it would have to be very careful and clear in describing what extraordinary circumstances might be sufficient to apply § 59H in the very different context of the Attorney General's enforcement actions. Otherwise, every enforcement action will be described as "extraordinary," giving rise to serial misuse by subjects of the enforcement action.

no such circumstances exist here. Nor would they in typical enforcement actions brought by the Commonwealth, as sovereign, under explicit statutory authority and in the public interest. *See, e.g., Feeney v. Commonwealth*, 373 Mass. 359, 366 (1977) (Legislature consolidated "responsibility for all legal matters involving the Commonwealth in the office of the Attorney General," and thereby "empowered, and perhaps required, the Attorney General to set a unified and consistent legal policy for the Commonwealth"). The exceptional behavior of the Town of Hanover, therefore, should not make the rule.

II. EXXON MOBIL'S OVERLY EXPANSIVE INTERPRETATION OF § 59H WOULD FRUSTRATE AND DELAY SIGNIFICANT LITIGATION TO ENFORCE THE LAW AND PROTECT THE PUBLIC INTEREST.

Applying the anti-SLAPP statute to the Attorney General's enforcement actions would frustrate and delay significant cases brought to enforce the law and protect the public interest. It would become yet another meritless litigation tactic in an arsenal that does not lack for tactics. Indeed, if Exxon Mobil's overly expansive interpretation of § 59H had been applicable during amici's tenures, it could have delayed or thwarted significant reforms and recoveries for the people of Massachusetts.

A. Massachusetts Attorneys General Have Brought Enforcement Actions for Decades, Resulting in Important Protections for the People of Massachusetts.

For decades, the Attorney General's Office has been bringing affirmative civil litigation to protect the health, safety and welfare of its constituents. The scope of the office's litigation is broad and regularly focused on protecting the Commonwealth's interests against large, well-funded organizations. The litigation often touches on issues of wide public interest and challenges highly-regulated industries, which is exactly the context that could encourage abuse of special motions to dismiss under § 59H.

A handful of examples is instructive. In a case with many parallels to this one, Attorney General Harshbarger took on the tobacco industry, alleging that tobacco manufacturers had engaged in a decades-long effort to mislead the American public about the health effects of smoking and the addictive nature of nicotine. *See, e.g., Commonwealth v. Philip Morris, Inc.*, No. 95-7378 (Mass. Super., Middlesex Cty. 1995) (tobacco litigation). Among other things, that effort resulted in billions of dollars being returned to Massachusetts to help mitigate the

effects of smoking on Massachusetts consumers.[7] Indeed, the Commonwealth is still benefitting from that settlement.[8]

The pharmaceutical industry, another high-profile, highly-regulated business, has often been the focus of Massachusetts' consumer protection efforts. Attorney General Coakley recovered tens of millions of dollars for the Massachusetts Medicaid Program from industry giant GlaxoSmithKline, which settled with the Attorney General's Office to resolve civil and criminal allegations that it had engaged in a pattern of unlawfully marketing certain drugs for uses not approved by the federal Food and Drug Administration.[9] Similarly, Attorney General Healy obtained a settlement from Purdue Pharma and its owners, the Sackler family, in which the OxyContin manufacturer agreed to pay about $90 million to benefit the Commonwealth's opioid abuse prevention, treatment and recovery programs.[10]

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[7] *See* Attorney General's Description of Tobacco Master Settlement Agreement, https://www.mass.gov/service-details/the-tobacco-master-settlement-agreement.

[8] *Id*.

[9] Report of the Attorney General for Fiscal Year 2013 at 16, https://www.mass.gov/files/documents/2016/08/uo/fy13-annual-report_80436_91790.pdf

[10] Office of Attorney General Healey, AG Healey Announces Resolution with Purdue Pharma and Sackler Family for Their Role in Opioid Crisis (July 8, 2021), https://www.mass.gov/news/ag-healey-announces-resolution-with-purdue-pharma-and-the-sackler-family-for-their-role-in-the-opioid-crisis. It should be noted that

The Attorney General also polices the sale and marketing of ordinary products, household items that are of significant public interest and often manufactured in highly-regulated industries. Attorney General Reilly obtained a settlement from grocery store chain, Stop & Shop Supermarket Co., which agreed to refrain from falsely using the USDA shield in its circulars and advertisements.[11] Attorney General Shannon investigated Campbell Soup Co. for using misleading health and nutrition claims in its advertising and labelling.[12] Attorney General Bellotti investigated alleged price fixing and attempts to monopolize milk. *Matter of Yankee Milk, Inc.*, 372 Mass. 353 (1977).

Consumer protection can, of course, take many forms. Enforcing the state's public charities law is just one of them. Attorney General Bellotti obtained a series of injunctions against fraudulent charities, including one that claimed it was soliciting funds to hold a Christmas party for needy children.[13] And Attorney General Shannon sued a for-profit fundraising group using the name "Citizens

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the settlement is currently the subject of an appeal pending before the United States Court of Appeals for the Second Circuit.

[11] Report of the Attorney General for the Year Ending June 30, 2004 at 149, https://archives.lib.state.ma.us/handle/2452/43694.

[12] Report of the Attorney General for the Year Ending June 30, 1989, at 79, https://archives.lib.state.ma.us/handle/2452/43679.

[13] Report of the Attorney General for the Year Ending June 30, 1978, at 61, https://archives.lib.state.ma.us/handle/2452/43668.

Against Drunk Driving," falsely associating itself with the better-known charitable organizations Mothers Against Drunk Driving and Students Against Drunk Driving.[14]

In short, Attorneys General tend to bring high-profile litigation against well-resourced defendants on controversial topics, seeking to enforce the law and protect the public interest. This is precisely the context in which Exxon Mobil's overly expansive interpretation of § 59H could do considerable mischief. These types of cases are not easy. They require commitment of significant resources and often take years of sustained effort to resolve. To add an unwarranted additional hurdle—not supported by the plain language, structure or legislative history of § 59H—would make a hard job even harder.

B. Exxon Mobil's Proposed Use of the Anti-SLAPP Statute Would Have Serious, Negative Consequences on Enforcement Actions, Never Contemplated by the Legislature.

It is easy to see how Exxon Mobil's overly expansive construction of §59H would quickly be abused: sophisticated defendants—like the industry leaders investigated and sued by the Former Attorney Generals—would file special motions to dismiss as a matter of course. Enforcement actions regularly arise in the context of some issue of critical public interest: the opioid crisis, global

[14] Report of the Attorney General for the Year Ending June 30, 1989, at 50, https://archives.lib.state.ma.us/handle/2452/43679.

warming, the mortgage lending collapse and other financial crises. They are often brought against highly-regulated businesses with significant interaction and engagement with public officials. Those businesses often participate in the formulation of public policy related to their industries. They write letters to the editor, issue press releases and conduct press conferences. They appear before public officials, comment on regulations and submit bills to legislatures. It would be easy to use this kind of policy engagement—which, of course, companies have every right to pursue—to insulate wrongful conduct from swift enforcement by the Attorney General. A company could commit fraud, issue a press release claiming that the fraud was all a part of a larger policy issue, and then avoid or delay accountability by filing a special motion to dismiss the Attorney General's enforcement action.

Like a traditional SLAPP, it would not matter that the special motion to dismiss might be meritless and easily defeated. The point would be to delay and obstruct. Merely filing the motion would have predictable results. The process would begin, of course, with the initial motion practice and hearing, accompanied by an automatic stay of discovery. G.L. c. 231, § 59H. That would delay the Attorney General's access to materials and testimony that could be dispositive of her claims. If the defendant loses, there is a right to an interlocutory appeal. *Fabre*, 436 Mass. at 521-22. Appellate briefing and argument take time, certainly

months. A decision from the court would also take time. If again unsuccessful, a deep-pocketed defendant could attempt to overturn that decision by seeking further appellate review by a court of last resort at the state or federal level. Additional time, money and effort would be spent. If all of this is still unsuccessful, the parties simply would return to the trial court and finally begin the litigation in earnest.

Thus, Section 59H would be transformed into a tool of delay and obstruction, used by subjects of enforcement actions in the hope they could outspend or outlast the Attorney General. This, effectively, would turn § 59H on its head, making it a procedural weapon in a manner never contemplated by the Legislature.

CONCLUSION

For all the reasons stated above, the Superior Court's decision should be affirmed.

Respectfully submitted,

AMICUS CURIAE
FORMER MASSACHUSETTS
ATTORNEYS GENERAL,

By their attorneys,

/s/ Jennifer Grace Miller
Edward Notis-McConarty (No. 374380)
Jennifer Grace Miller (No. 636987)
M. Patrick Moore (No. 670323)
Clinton R. Prospere (No. 703834)
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109
(617) 227-7940
jmiller@hembar.com

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CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

I, Jennifer Grace Miller hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16 (a)(13) (addendum); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 18 (appendix to the briefs); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the proportional font Times New Roman at size 14 point, and contains 5,744, total non-excluded words as counted using the word count feature of Microsoft Word.

/s/ Jennifer Grace Miller
Jennifer Grace Miller

CERTIFICATE OF SERVICE

I, Jennifer Grace Miller, counsel for Former Massachusetts Attorney Generals, hereby certify that I have served a copy of this Brief by causing it to be delivered to all parties through the E-File system.

/s/ Jennifer Grace Miller
Jennifer Grace Miller

DATED: February 16, 2022