

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2017-P-0366

EXXON MOBIL CORPORATION
Petitioner-Appellant,

v.

OFFICE OF THE ATTORNEY GENERAL
OF THE COMMONWEALTH OF MASSACHUSETTS,
Respondent-Appellee.

ON APPEAL FROM SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 16-1888F

BRIEF OF *AMICI CURIAE*
FORMER MASSACHUSETTS ATTORNEYS GENERAL

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STATEMENT OF INTEREST OF AMICI

Amici are former Massachusetts Attorneys General Francis X. Bellotti, James M. Shannon, Scott Harshbarger, Thomas Reilly, and Martha Coakley (collectively, "the former AGs").¹ Francis X. Bellotti served as Massachusetts Attorney General from 1975 to 1987, James M. Shannon from 1987 to 1991, Scott Harshbarger from 1991 to 1999, Thomas Reilly from 1999 to 2007, and Martha Coakley from 2007 to 2015. *Amici* were thus the chief law officers of the Commonwealth during the 40 years prior to the current Attorney General taking office.

During their respective tenures, each of the former AGs regularly used Civil Investigative Demands ("CIDs") in their efforts to protect Massachusetts consumers and investors from various forms of fraud pursuant to G.L. c. 93A and other Massachusetts statutes. The former AGs are thus uniquely positioned to provide the Court with insight into the significance and historical use of CIDs by the Office of the Attorney General.

¹ The former AGs submit this brief as individuals and not as representatives of any firm or organization.

The importance of this case and its ramifications extend far beyond the specific issues and parties of record; at its essence, the Petitioner-Appellant's case challenges—and endeavors to undermine—the statutory authority of the Massachusetts Attorney General to protect the people of the Commonwealth. The Attorney General cannot do her job without investigatory tools, and CIDs are critical for obtaining relevant information possessed by the recipient of the CID. The former AGs, having committed much of their lives to public service in the Commonwealth, had and still have a strong interest in the preservation of this authority. They seek by this brief to share their unique perspective on the importance of CIDs with the Court.

SUMMARY OF THE ARGUMENT

As the chief law officer of Massachusetts, the Attorney General has a statutory duty to investigate and prosecute business practices that harm the Commonwealth and the people of the Commonwealth. One aspect of this duty is her responsibility to investigate “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” when she has reason to

believe that someone has violated or is violating chapter 93A. G.L. c. 93A, §§ 2(a), 6. CIDs are an essential tool for carrying out such investigations, particularly in the context of consumer and investor fraud, where key information about a company's intent, knowledge, marketing designs, and practices resides uniquely within the possession of the recipient of the CID.

The Attorney General's use of CIDs has played a critical role in protecting the Commonwealth and the people of Massachusetts from predatory lending and other mortgage industry abuses, from Medicaid/Medicare and other insurance abuses, from securities fraud, and from discriminatory health care practices. The Attorney General's investigations into these and other violations of Massachusetts laws have resulted in compensation for victims of unfair or deceptive acts or practices. They have also led to the Commonwealth being reimbursed for some of the costs it incurred as a result, for example, of the tobacco industry having misled the public about the adverse health impacts of cigarette smoking. Equally importantly, the Attorney General's use of CIDs has resulted in systematic

changes in business practices across entire industries to prevent the recurrence of such harms.

The Massachusetts Attorney General's use of CIDs builds on and is consistent with the practice of both the federal government and the attorneys general of virtually every other state. In addition, since first authorizing the Attorney General to use CIDs 50 years ago, the Massachusetts General Court has repeatedly amended chapter 93A to expand its substantive reach as well as the Attorney General's CID and enforcement authority.

Recognizing the importance of the CID to the Attorney General's fulfillment of her statutory duties, the Massachusetts courts have for decades emphasized that their review of both her decision to issue a CID and of the scope of that CID is narrow and deferential. The position asserted by the Petitioner-Appellant, Exxon, would undermine these decisions as well as the Attorney General's ability to investigate and remedy unfair and deceptive acts and practices that harm the citizens of the Commonwealth.

This Court should therefore affirm the decision of the court below and uphold the ability of the

Attorney General to issue CIDs in accordance with G.L. c. 93A, section 6.

ARGUMENT

I. The Attorney General Employs CIDs to Carry Out Her Mandate to Investigate Fraud and Deception.

The authority to investigate wrongdoing is one of the "most common and important functions identified with the office of Attorney General."² Numerous Massachusetts statutes prohibit fraud and deception and protect consumers from misleading business practices. Chief among these is chapter 93A, which imbues the Attorney General with authority to investigate and protect the citizens of the Commonwealth from "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." G.L. c. 93A, § 2(a). Under the statute, "trade or commerce" includes "the advertising, the offering for sale . . . [and] the sale . . . or distribution of any services . . . property, . . . [or] security." *Id.* § 1(b).

The Legislature's goal in enacting chapter 93A was to promote "a more equitable balance in the

² Nat'l Ass'n of Att'ys Gen., *State Attorneys General: Powers and Responsibilities* 12, 14 (Emily Myers & Lynne Ross eds., 2d ed. 2007) [hereinafter "*State Attorneys General*"].

relationship of consumers to persons conducting business activities.”³ *Commonwealth v. DeCotis*, 366 Mass. 234, 238 (1974). To ensure the effectiveness of the statute in achieving this goal, the Legislature provided the Attorney General with “broad investigatory powers to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation of the statute.” *Harmon Law Offices, P.C. v. Attorney General*, 83 Mass. App. Ct. 830, 834 (2013).

The CID is an essential tool in carrying out these investigations. Pursuant to a CID, the Attorney General may “(a) take testimony under oath concerning [the alleged violation]; (b) examine . . . any documentary material and take testimony under oath or

³ “The relief available under c. 93A is sui generis. It is neither wholly tortious nor wholly contractual in nature, and is not subject to the traditional limitations of preexisting causes of action. It makes conduct unlawful which was not unlawful under the common law or any prior statute. Thus, a cause of action under c. 93A is not dependent on traditional tort or contract law concepts for its definition.” *Kattar v. Demoulas*, 433 Mass. 1, 12-13 (2000) (citations, internal quotation marks, and alterations omitted).

acknowledgment in respect of any such documentary material." G.L. c. 93A, § 6.⁴

For the Attorney General, using a CID provides several advantages compared to other investigatory options. First, it allows the Attorney General to gain access to information that resides uniquely within the knowledge or possession of the company she is investigating. See *Attorney General v. Bodimetric Profiles*, 404 Mass. 152, 159 (1989) (observing that "the requested information is often peculiarly within the province of the person to whom the C.I.D. is addressed"). This is particularly important in cases involving potential fraud or deception because the investigated entity will often be the only entity with the information demonstrating whether it violated the statute.

Second, it allows the Attorney General to obtain this information in an efficient manner, avoiding the cost of litigation to the Commonwealth and the entity under investigation. When the Attorney General receives a complaint about a business practice from a member of the public, she can use a CID to investigate

⁴ Other statutes bestowing CID authority on the Attorney General include G.L. c. 93, § 8, and G.L. c. 12, § 5N.

the allegations before filing suit, thereby conserving both public and private resources and ensuring that the suit is in the public interest. This also allows the recipient of the CID to be put on notice of the subject of the Attorney General's investigation and to provide her with relevant information that may refute the allegation. Moreover, the CID is an effective tool for enabling the Attorney General to distinguish among those members of an industry that are systematically violating the law, those that may be doing so only occasionally or inadvertently, and those that are not violating the law at all. Indeed, many chapter 93A investigations are resolved without ever resulting in the filing of a complaint.

Third, the information obtained through a CID typically remains confidential. The Attorney General may not disclose the information she receives pursuant to a CID without the CID recipient's consent except upon the order of "a court of the commonwealth for good cause shown" or in "court pleadings or other papers filed in court." G.L. c. 93A, § 6(6).

Finally, the Attorney General has the opportunity to determine whether litigation is a fair and proper use of the Commonwealth's resources, necessary to

protect the public. The use of CIDs therefore preserves the resources of the Attorney General's office, of the recipients of CIDs, and of the courts.

In all of these regards, CIDs are to the civil enforcement process what grand jury subpoenas and proceedings are to criminal enforcement. Both investigatory tools serve the crucial enforcement function of providing the Attorney General access to information essential to the protection of the Commonwealth and the people of the Commonwealth, which it would otherwise be difficult, if not impossible, to obtain. Both tools allow the Attorney General to conduct an investigation and thereby avoid exposing the subject of the investigation to the cost of a court action if not warranted. Thus, they serve as a sword and a shield.

II. The Attorney General's Use of CIDs Protects the Commonwealth and the People of the Commonwealth.

For decades, the Attorney General's office has used CIDs as part of its investigations into matters both transformative and routine. In an average year, the Attorney General's office may issue more than 100 CIDs. Many of these investigations involve small and local matters that are quickly resolved, but which are

nevertheless important to a wronged consumer or investor.

In other cases, however, the Attorney General is engaged in major investigations that may last years, frequently involving out-of-state corporations and carried out in collaboration with the attorneys general from other states. For example, Attorney General Bellotti led an investigation into price-fixing by a dairy cooperative that harmed Massachusetts consumers in violation of chapters 93 and 93A. See *In re Yankee Milk*, 372 Mass. 353 (1977). The Attorney General's office was able to obtain the key information in this case efficiently by using CIDs. During his tenure, the office also litigated another seminal case on the use of CIDs *CUNA Mutual Insurance Society v. Attorney General*, 380 Mass. 539 (1980), which related to an investigation into premiums for credit life or credit accident and health insurance.

Attorney General Shannon used CIDs to investigate allegations of discrimination against people with HIV by the healthcare industry. One aspect of this investigation involved determining whether companies were testing blood for HIV without the consent of the

person whose blood was being tested. See *Bodimetric Profiles*, 404 Mass. at 153. His office also collaborated with other state attorneys general to investigate the causes of the liability insurance crisis that occurred during the mid-1980s. This investigation resulted in an antitrust suit brought by nineteen states. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

Attorney General Harshbarger was one of the first state attorneys general to investigate and bring suit against tobacco companies for their fraudulent and deceptive practices.⁵ It was the revelations contained in internal company documents obtained through CIDs that led to the 46-state Master Settlement Agreement with tobacco companies in 1998.⁶ Under this settlement, the tobacco companies agreed to pay

⁵ See *Massachusetts Files Suit against Tobacco Industry*, N.Y. Times, Dec. 19, 1995, available at <http://www.nytimes.com/1995/12/20/us/massachusetts-files-suit-against-tobacco-industry.html>.

⁶ See, e.g., Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 Wm. Mitchell L. Rev. 477 (1999).

billions of dollars to the states to compensate them for their tobacco-related healthcare costs.⁷

Attorney General Reilly used CIDs to investigate antitrust violations by Microsoft, *cf. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004), violations of the Commonwealth's handgun safety regulations by gun manufacturers and distributors, *cf. American Shooting Sports Council, Inc. v. Attorney General*, 429 Mass. 871 (1999), and privacy violations by internet companies such as Doubleclick, Google, and Essential.com. The latter, for example, tried to sell its customer database during its bankruptcy proceeding, but eventually reached a settlement with the Attorney General in which customers' data could not be given to a purchaser without the customer's consent. *In re Essential.com*, No. 01-15339-WCH (U.S. Bankr. D. Mass. Aug. 1, 2001) (Limited Objection of the Commonwealth of Massachusetts to Debtor's

⁷ Prior to his service as Attorney General, Harshbarger served as Chief of the Public Protection Bureau, participating in one of the seminal cases involving the use of Civil Investigative Demands, *In re Yankee Milk*, 372 Mass. 353 (1977).

Emergency Motion to Sell Assets by Private Sale Free and Clear of Liens, Claims and Encumbrances).⁸

More recently, Attorney General Coakley relied on CIDs to investigate, among other things, unfair and deceptive practices in the mortgage industry, see, e.g., *Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733 (2008), foreclosure and eviction practices, see, e.g., *Harmon Law Offices*, 83 Mass. App. Ct. 830, and landlords' violations of lead paint disclosure requirements, see, e.g., *Commonwealth v. Miller*, No. 11-0573-B, 30 Mass. L. Rptr. 355 (Suffolk Super. Ct. Nov. 1, 2012).

As demonstrated by these brief descriptions, many of the key investigations carried out by the Attorney General's office over the past 40 years have involved out-of-state businesses engaged in interstate commerce. A ruling by this Court narrowly construing Massachusetts courts' personal jurisdiction over out-of-state corporations could hinder the Attorney General's ability to pursue such investigations and protect the people of the Commonwealth.

⁸ See *Privacy Law in Q1 2002*, FindLaw, <http://corporate.findlaw.com/law-library/privacy-law-in-q1-2002.html>.

III. Chapter 93A and the CID Are the Types of Crucial Anti-Fraud Tools Provided by Legislatures across the United States.

The United States has empowered federal agencies to enforce anti-fraud laws through the use of CIDs or similar tools for over a century. In 1914, Congress passed the Federal Trade Commission Act, which prohibited "unfair methods of competition in commerce." Federal Trade Commission Act, 38 Stat. 717, § 5 (1914). The act also empowered the newly-created Federal Trade Commission ("FTC") "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." *Id.* § 9. As the United States Supreme Court explained in *United States v. Morton Salt*, the FTC may "exercise powers of original inquiry." 338 U.S. 632, 642 (1950). In carrying out this authority, the agency "may take steps to inform itself as to whether there is probable violation of the law." *Id.* at 643. Unlike a court, an executive official "can investigate merely on suspicion that the law is being violated, or even just

because it wants assurance that it is not." *Id.* at 642-43.⁹

Congress broadened its anti-deception efforts in 1933 and 1934 with the Securities Acts. Specifically, the Securities Exchange Act of 1934 bars the use of "any manipulative or deceptive device or contrivance [in connection with the purchase or sale of a security] in contravention of such rules and regulations as the [Securities and Exchange Commission ("SEC")] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j. The SEC has the power to compel the attendance of witnesses or the production of documents in the course of its investigations. 15 U.S.C. § 78u(b). Referring to the reasonableness of the SEC's investigation, the U.S. Court of Appeals for the District of Columbia Circuit in *Sec. & Exch. Comm'n v. Arthur Young & Co.* said,

⁹ Chapter 93A was explicitly modeled on the Federal Trade Commission Act, providing that "[i]t is the intent of the legislature that in construing paragraph (a) of this section [which prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce] . . . , the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1))." G.L. c. 93A, § 2(b).

"[r]esultantly, it has long been clear that 'it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" 584 F.2d 1018, 1024 (D.C. Cir. 1978) (quoting *Morton Salt*, 338 U.S. at 652).¹⁰

The Antitrust Division of the Department of Justice also has CID-issuing authority. See 15 U.S.C. § 1312. As one author explains, "in 1962 Congress created the [CID], a procedural device that allows the Department's Antitrust Division to obtain information needed to pursue possible antitrust violators. In the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress further enhanced the Antitrust Division's investigatory powers by substantially increasing its authority to issue CIDs."¹¹

At the state level, "every state and the District of Columbia have enacted at least one statute aimed at providing the consumer with some degree of protection

¹⁰ More recently, Congress has provided similar investigative authority to the Consumer Financial Protection Bureau. 12 U.S.C. § 5562(d).

¹¹ Edward H. Rosenthal, *Government Use of the Civil Investigative Demand to Obtain Materials Discovered in Private Antitrust Litigation*, 79 Colum. L. Rev. 804, 804 (1979).

against a broad range of unscrupulous or misleading trade practices.”¹² In most states, the attorney general is empowered to enforce these statutes.¹³ Many states also authorize their attorneys general to enforce state statutes that, like chapter 93A, are directed at securities fraud.¹⁴

Nearly all state attorneys general have CID-issuing authority or its equivalent. As one scholar notes, the laws of every state “typically contain authorization for the enforcing authority to conduct investigations through the use of subpoenas or civil investigative demands.”¹⁵

IV. The Massachusetts Legislature Has Repeatedly Expanded the Reach of G.L. c. 93A and of the Attorney General’s Ability to Use CIDs.

In 1967, Massachusetts became the first state to enact a “little FTC Act”—chapter 93A,¹⁶ allowing the Attorney General to conduct investigations and bring

¹² Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 Tul. L. Rev. 427, 427 (1984).

¹³ *State Attorneys General*, *supra* note 2, at 234.

¹⁴ *Id.* at 249-50, 265-68.

¹⁵ Dunbar, *supra* note 12, at 465.

¹⁶ Matthew S. Furman, Note, *How Chapter 93A Consumers Lost their Day in Court: One Legislative Option to Level the Playing Field*, 15 Suffolk J. Trial & App. Advoc. 107, 114 (2010).

enforcement actions on behalf of Massachusetts consumers. St. 1967, c. 813, §§ 4, 6. Since then, the Legislature has repeatedly expanded both the substantive reach of chapter 93A and the Attorney General's enforcement and investigatory powers, both under chapter 93A itself and under other statutes.

With respect to the conduct prohibited by chapter 93A, in 1983 the Legislature removed an exception to the law that had made "Chapter 93A inapplicable when the defendant derived at least twenty percent of its revenues from interstate commerce unless the transaction upon which the complaint was based occurred 'primarily and substantially' in Massachusetts."¹⁷ Four years later, it amended the statute to explicitly cover securities and commodities transactions. St. 1987, c. 664.

The Legislature has also continually expanded the Attorney General's chapter 93A enforcement authority,

¹⁷ Jack Pirozzolo & Richard Binder, *Chapter 93A, §11: The Massachusetts Little F.T.C. Act—A Potent and Partially Clarified Remedy in Certain Business Disputes*, 70 Mass. L. Rev. 14, 23 (1985); see St. 1983, c. 242. The elimination of this limitation demonstrates the legislature's intention to expand the reach of chapter 93A to all out of state companies that harm the investors and consumers of the Commonwealth, consistent with the requirements of due process.

both in the timing of actions and in the remedies she may seek. The statute originally required that the Attorney General give notice to a defendant ten days before bringing an enforcement action. St. 1967, c. 813, § 4. The Legislature subsequently reduced this time to five days, St. 1971, c. 130, and then allowed the Attorney General to seek a temporary restraining order with no prior notice. St. 1972, c. 544.

Whereas the Attorney General could originally bring actions only for injunctive relief, in 1969 the Legislature granted the authority to seek restitution for consumers. St. 1969, c. 814, § 3. In 1985, the Legislature empowered the Attorney General to seek civil penalties and to recover "the reasonable costs of investigation and litigation of such violation, including reasonable attorneys fees." St. 1985, c. 468.

In 1988, the Legislature expanded the Attorney General's CID authority under chapter 93A by removing a provision that had previously allowed recipients of a CID to withhold documents that contained trade secrets. St. 1988, c. 289. The same amendment allowed the Attorney General to produce in court

filings otherwise confidential documents obtained through CIDs. *Id.*

The Legislature has also extended the Attorney General's CID authority, which was originally available only under chapter 93A, to other laws. Thus in 1978 it enacted the Massachusetts Antitrust Act, which included CID authority. St. 1978, c. 459, § 1 (codified at G.L. c. 93, § 8). The False Claims Act, enacted in 2000, also includes CID authority. St. 2000, c. 159, § 18 (codified at G.L. c. 12, § 5N).

This series of amendments demonstrates that the General Court has recognized the importance of the Attorney General's investigatory and enforcement authority under chapter 93A and other statutes. In particular, it confirms the central importance of her CID authority.

V. Massachusetts Courts Are Consistently Deferential to the Attorney General when Resolving Challenges to CIDs.

In recognition of the importance of the CID to the Attorney General's fulfilment of her statutory duties, courts in the Commonwealth have consistently reasoned that "the statute [c. 93A, § 6] should be construed liberally in favor of the government." *Yankee Milk*, 372 Mass. at 364. Accordingly, "[t]he

party moving to set aside a C.I.D. bears a heavy burden to show good cause why it should not be compelled to respond." *Id.* at 544. "Good cause is shown only if the moving party demonstrates that the Attorney General acted arbitrarily or capriciously or that the information sought is plainly irrelevant." *Harmon Law Offices*, 83 Mass. App. Ct. at 834-35.

The statute authorizes the Attorney General to issue a CID when she has reason to believe that wrongdoing has occurred. She "need not be confident of the probable result of h[er] investigation." *CUNA Mut. Ins. Soc'y*, 380 Mass. at 542 n.5. Indeed, the point of the CID is to access the information that the Attorney General needs in order to decide whether it is in the interest of the Commonwealth and the people of the Commonwealth to proceed with an enforcement action. The recipient of the CID need not be the target of the investigation and the Attorney General need not even disclose in the CID the name of the person or entity being investigated. *Id.* at 542-43.

The Attorney General has considerable discretion in determining the scope of the CID. "[T]he limit to be applied is simply one of relevance." *Yankee Milk*, 372 Mass. at 356. As the Supreme Judicial Court has

held, "[d]ocumentary demands exceed reasonable limits only when they 'seriously interfere with the functioning of the investigated party by placing excessive burdens on manpower or requiring removal of critical records.'" *Bodimetric Profiles*, 404 Mass. at 158-59 (quoting *In re Yankee Milk*, 372 Mass. at 361 n.8). Such broad discretion is necessary, "because the requested information is often peculiarly within the province of the person to whom the C.I.D. is addressed." *Id.* at 159.

Moreover, because the Attorney General issues a CID at an early stage of an investigation, "the question of [a CID recipient's] liability under . . . c. 93A . . . has no bearing on the validity of the CIDs." *Harmon Law Offices*, 83 Mass. App. Ct. at 836. As the Supreme Judicial Court has repeatedly stated, "'the issue of what conduct is covered by a particular statute is not appropriately before the court' when the person to whom the C.I.D. is addressed seeks to have it modified or set aside." *Bodimetric Profiles*, 404 Mass. at 157 (quoting *CUNA Mutual Ins. Soc'y*, 380 Mass. at 543 n.6). In keeping with these decisions, this Court should not adopt a narrow view of personal

jurisdiction, which would hinder investigations at this early stage.

CONCLUSION

This Court should accord the same deference to the Attorney General that the courts did in *Yankee Milk*, *CUNA Mutual*, *Bodimetric Profiles*, and *Harmon* to ensure her ability to protect the citizens of the Commonwealth. Accordingly, the decision of the Superior Court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k), Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of the court that pertain to the filing of briefs, including without limitation Rules 16(a)(6), 16(e), 16(f), 16(h), 18 and 20, Mass. R. App. P.

/s/ Wendy B. Jacobs
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CERTIFICATE OF SERVICE

I, Wendy B. Jacobs, certify that on June 7, 2017, two copies of the Brief of *Amici Curiae* Former Massachusetts Attorneys General were served on the following counsel of record in this case by first class mail.

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