Exhibit 1

to Kelman Affirmation

(Proposed Brief Amicus Curiae in Opposition to Motion to Intervene)

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

PEOPLE OF THE STATE OF NEW YORK, By LETITIA JAMES, Attorney General of the State of New York, Plaintiff, - against – EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 10

MATTHEW PAWA'S [PROPOSED] BRIEF *AMICUS CURIAE*
IN OPPOSITION TO MOTION TO INTERVENE

Attorney Matthew Pawa, as a proposed *amicus*, respectfully requests that the Court consider the following points and authorities in opposition to the motion to intervene of Energy Policy Advocates and its executive director Robert Schilling (collectively, "EP Advocates"). EP Advocates has moved to intervene for the purpose of seeking to unseal records related to Mr. Pawa's communications with the Office of the Attorney General ("OAG") about the OAG's enforcement efforts against Exxon Mobil Corporation ("Exxon").

EP Advocates' motion should be denied because it is untimely: final judgment in this case was entered more than a month ago and the Court made the sealing decision more than seven months ago—a decision that, as set forth below, EP Advocates likely knew about at the time but decided not to challenge until now. EP Advocates has also admitted that a separate Article 78 proceeding is the "preferred" method of unsealing records, and it appears to be closely tied to another organization that already has brought Article 78 proceedings seeking the very emails at issue here, without success. EP Advocates makes no attempt to demonstrate that it had no knowledge of this Court's decision to seal and therefore fails to establish that its motion is timely.

In addition, EP Advocates' motion should be denied on two other bases. Its interests were adequately represented by Exxon, which sought the very same relief (disclosure of Attorney Pawa's emails) that EP Advocates seeks here. Finally, EP Advocates lacks a real and substantial interest in the outcome of the proceedings, as this case was about whether there was a securities violation and the issue of disclosure of emails between Attorney Pawa and OAG is tangential at best. As set forth below, this case bears a striking resemblance to *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 2007 WL 2247577 (D. Vt. July 31, 2007), where Chief Judge Sessions denied, on all three of the above grounds, a motion to intervene by a non-

profit group that sought to intervene after trial in order to seek the unsealing of records so that it could publicize the alleged connections between an expert witness and fossil fuel interests. *Green Mountain* is directly on point and consistent with New York law on intervention.

Under these unique circumstances, intervention should be denied. In the alternative, given EP Advocates' apparent ties to the fossil fuel industry, the Court should condition intervention on EP Advocates' disclosures *in camera* of any connection or communications between itself and Exxon, to ensure that Exxon is not using EP Advocates to get a second bite at unsealing the Pawa-OAG emails, even as Exxon pursues these same documents in other venues.

Background

Before this case ended more than a month ago, it concerned whether Exxon committed securities fraud when it made statements in 2014 about the effects of carbon regulation on its business. At one point, Exxon attempted to defend itself against these claims by asserting affirmative defenses related to prosecutorial misconduct. Dkt. No. 241, at 35-46. Exxon's theory was based largely on statements made by former Attorney General Eric Schneiderman at a press conference held two years before the OAG filed this lawsuit, and on a 2012 conference in La Jolla, California that Attorney Pawa attended. *Id.* at 40, ¶¶ 40-42 & 36, ¶ 32.[1]

Pawa is an environmental lawyer who has represented state and municipal entities against Exxon and other fossil fuel companies in climate cases and in cases involving groundwater

[1] At times Exxon's counsel has incorrectly informed the Court that Pawa "said" things merely because they appear in a summary of the La Jolla conference, even though the summary does not attribute these statements to Pawa. *Compare* Dkt. No. 240, at 28:3-5 ("Pawa explains. He says ... ," quoting a statement that the summary does not attribute to Pawa); *id.* 27:24-28:5 ("Pawa laid out," similar), *with* Dkt. No. 119, Ex. 1, at 11, 27 (La Jolla summary). The Court need not weigh in on the particulars of these statements; Attorney Pawa simply wishes to advise the Court that he does not accede to Exxon's attribution of quotes to him.

contamination.[2] Because it is his emails with OAG that are now at issue in this case, he has moved to appear as an *amicus curiae*.

To support its affirmative defenses in this Court, Exxon sought discovery from the OAG about its motivations for pursuing claims against Exxon. The OAG moved to dismiss these defenses and for a protective order—but it still produced documents while these motions were pending, so as not to jeopardize the 2019 trial date. *See* Dkt. 159, at 2-3. The OAG designated the documents as confidential pursuant to the Court's protective order. *See* Dkt. No. 46. In March 2019, Exxon sought to file some of these documents as part of a proposed amended answer, and OAG moved in April to have the documents sealed. *See* Dkt. Nos. 117, 119, 159. All of the documents at issue were apparently emails between Pawa and OAG. In two hearings on June 12 and June 28, 2019, the Court allowed Exxon to file the amended answer, but dismissed Exxon's defenses and granted the OAG's request to keep the OAG-Pawa emails under seal. *See* Dkt. No. 240, at 35:23 & 45:13-18; Dkt. No. 296, at 15:19-16:11. In dismissing Exxon's defenses, the Court referred to *Exxon Mobil v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018), *appeal pending*, No. 18-1170 (2d Cir.), in which Judge Caproni rejected a federal lawsuit by Exxon against the New York and Massachusetts AGs. *See* Dkt. No. 296, at 15:19-16:11. This federal lawsuit was based on the same facts and legal theories underlying the contested affirmative defenses in this case. Judge Caproni held that Schneiderman's statements at the press conference and the statements that Exxon attributed to Pawa from La Jolla did not

[2] *See, e.g.*, *State v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015) (sustaining $236 million jury verdict for Pawa's client the State of New Hampshire against Exxon for groundwater contamination). Pawa is also counsel to New York City in its climate change lawsuit against Exxon and others, and is representing Rhode Island in a groundwater contamination case in which Exxon is a defendant. *See City of New York v. BP P.L.C.*, No. 18-2188 (2d Cir.); *State of Rhode Island v. Atlantic Richfield*, No. 1:17-cv-00204-WES (D.R.I.).

show bias and were consistent with a reasonable belief by Schneiderman and Pawa that Exxon had committed fraud. *Id.* at 709. Exxon also served a subpoena on Pawa in 2016 in the federal case; cross-motions by Pawa to quash and Exxon to compel are pending before Judge William Young in federal court in Massachusetts. *See Exxon Mobil Corp. v. Pawa Law Group, P.C.*, No. 1:16-cv-12504-WGY (D. Mass.). Judge Young stayed the subpoena proceedings when Judge Caproni halted discovery and the matter remains stayed.[3]

EP Advocates now moves to intervene to once again seek access to Pawa's emails. EP Advocates is a non-profit group that appears to exist primarily to file public records requests related to Pawa and public officials who have investigated Exxon and other fossil fuel companies. *See* EP Advocates Br. at 9-10 (listing a mass of "newly obtained" emails relating to Pawa). One of the three board members listed on its website is a former coal attorney.[4] Media reports and overlapping personnel suggest that EP Advocates is connected to another non-profit known as the Energy & Environmental Legal Institute ("EELI"). EELI has already brought a legal action seeking to use FOIL to require the OAG to release its communications with Pawa.[5] EELI was represented in its FOIL litigation by Matthew Hardin and Francis Menton, both of whom are EP Advocates' lawyers in this matter; Mr. Hardin is also an EP Advocates board

[3] Exxon also is currently seeking to take discovery from Pawa and from certain Californian municipal officials through a pre-suit discovery petition pending in state court in Texas, which is currently on appeal on the question of personal jurisdiction. *See City of San Francisco et al. v. Exxon Mobil Corp.*, No. 02-18-00106-CV (Tex. 2d Ct. App.).

[4] http://epadvocates.org/about-2/ (Mike Gardner).

[5] *Energy & Envtl. Legal Inst. v. Attorney Gen. of State*, 162 A.D.3d 458 (1st Dept. 2018).

member.[6] EELI also has one board member, Steve Milloy, a self-proclaimed junk science specialist and former consultant for Philip Morris who previously accepted $90,000 in Exxon funding to operate two non-profits out of his house.[7] In addition, Menton and Hardin have represented at least one other group that has also filed unsuccessful FOIL litigation to probe the OAG's enforcement activity against Exxon;[8] this group is known to have accepted money from a major coal company.[9]

EP Advocates' motion comes one month after the Court's entry of final judgment in Exxon's favor on the underlying fraud charges, seven months after the Court sealed the documents and dismissed the affirmative defenses, and more than nine months after Exxon filed the documents under seal. *See* Dkt. No. 240, at 49:2-4. Given the longstanding pursuit of the Pawa-OAG emails by entities affiliated with EP Advocates and by Exxon itself, it seems likely that EP Advocates was well aware of these developments, but sat on its hands until now.[10] This Court's trial decision has not been appealed and thus all rulings are now final.

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[6] http://epadvocates.org/about-2/ (Hardin's status as EP Advocates board member); https://tinyurl.com/ry4lodk (Hardin's representation of EELI); https://tinyurl.com/r2y5zh8 (original FOIL request).

[7] https://tinyurl.com/tga7zka.

[8] *See Free Mkt. Envtl. Law Clinic v. Attorney Gen. of New York*, 159 A.D.3d 467 (1st Dept. 2018) (Menton's representation); https://tinyurl.com/rznq8sc (Hardin's representation).

[9] https://tinyurl.com/t7snegp.

[10] One of EP Advocates' attorneys, Francis Menton, has blogged frequently about this case and about Exxon's attempts to obtain discovery from Pawa in Texas. https://tinyurl.com/r232p4f; https://tinyurl.com/qkpukc9; https://tinyurl.com/rlnoph5; https://tinyurl.com/w5ea3mo.

Argument

I. The Court should deny intervention.

Although EP Advocates admits that "an Article 78 Special Proceeding [is] perhaps the preferred means" for parties seeking to unseal court records, EP Advocates Br. at 3, it nonetheless seeks permissive intervention under CPLR 1013. This rule provides: "Upon *timely* motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim . . . and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1013 (emphasis added). The proposed intervenor must have a "real and substantial interest in the outcome of the proceedings," and the Court's decision is, as the term "permissive" indicates, discretionary. *Trent v. Jackson*, 129 A.D.3d 1062 (2d Dept. 2015). EP Advocates' motion should be denied because it is untimely, because its interests in disclosure of the documents at issue were fully represented by Exxon in this case, and because it lacks any "real and substantial interest" in the case.

A. EP Advocates' motion is untimely.

Courts have emphasized that "[c]onsideration of any motion to intervene begins with the question of whether the motion is timely," and that the timeliness and the "unduly delay" requirements are not met where the intervenor waited months to intervene after discovering the lawsuit.[11] And "courts appear to be wholly unwilling to entertain a motion for permissive intervention after judgment." Vincent Alexander, Practice Commentary to CPLR 1013.

[11] *In re HSBC Bank U.S.A.*, 135 A.D.3d 534 (1st Dept. 2016) (motion was properly denied where intervenors had long known about the action without intervening); *accord RKH Holding Corp. v. 207 Second Ave. Realty.*, 236 A.D.2d 254, 255 (1st Dept. 1997) ("Leave to intervene was also

Under this standard, intervention should be denied because EP Advocates' motion is far from "timely" in that the entire lawsuit has already terminated with a final, unappealable judgment. As noted above, publicly available documents show that entities closely related to EP Advocates have for years now pursued FOIL litigation to obtain OAG emails, and its lawyer has been blogging about this case practically since it was filed. *See supra* nn. 5-10. Tellingly, the intervention motion says nothing to suggest that EP Advocates has only recently discovered the sealed documents, which Exxon filed last March.

Moreover, given the obvious alliance of interests between Exxon and EP Advocates (as they seek the same relief in multiple courts), it would run contrary to the most basic rules governing the orderly administration of justice to revive the question of unsealing: the OAG moved for a protective order, the Court granted that motion, Exxon did not appeal that ruling, and its time to appeal has expired, which renders this Court's decision final. *Slater v. Am. Mineral Spirits Co.*, 33 N.Y.2d 443, 446 (1974) ("no appeal having been taken those dispositions became final"). In fact EP Advocates admits that this "action has now been resolved with a final … judgment." EP Advocates Br. at 4. Yet EP Advocates now seeks to revive an issue that Exxon itself, despite its repeated efforts to obtain the same documents, can no longer litigate in this matter.

The situation here is nearly identical to that of *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 2007 U.S. Dist. LEXIS 55992 (D. Vt. July 31, 2007), where Chief Judge Sessions denied intervention—except there the shoe was on the other foot. In *Green Mountain*, the automobile industry sued Vermont, seeking to strike down a state law regulating

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properly denied in view of the proposed intervenor's year-long delay in seeking such relief, despite her undisputed knowledge that the foreclosure action had been commenced.").

greenhouse gas emissions from tailpipes. As here, after a long and hard-fought litigation and a lengthy trial, the Court issued a lengthy, thorough and detailed decision on the merits and entered judgment for the defendant. Subsequently, Greenpeace moved to intervene for the purpose of seeking to unseal documents. Like EP Advocates, Greenpeace claimed a public interest in publicizing information about its ideological opponent, *i.e.*, an expert witness who was a professional climate denialist. Greenpeace apparently believed the sealed records would show that this witness was connected to fossil fuel interests such as Exxon. Greenpeace filed its motion ten weeks after it was "on notice" that the documents at issue would remain under seal. *Green Mountain*, 2007 WL 2247577, at *2. Judge Sessions found that, although normally a ten-week delay would not make intervention untimely, "where the precise issues of the scope of the [confidential] designation, the sealing of documents, and the treatment of [confidential]-labeled exhibits and submissions were litigated and negotiated at length before and during the trial, Greenpeace waited too long to attempt to enter the fray." *Id.* In "the exercise of its discretion" the Court denied permissive intervention as untimely. *Id.* at *3. That is the situation here: the issues of Exxon's affirmative defenses and whether to unseal the records were thoroughly litigated while EP Advocates bided its time before entering the fray. This Court should exercise its discretion in the same fashion as did Chief Judge Sessions.

The main authority that EP Advocates relies on is easily distinguished. In *People v. Macedonio*, 51 Misc. 3d 1219(A) (2016), a Supreme Court justice in Suffolk County permitted Newsday to intervene to seek sealed records in a closed criminal case. But in that case, there was no indication that Newsday knew about the sealing at the time. And one of the key authorities that *Macedonio* relied on was *Crain Commc'ns, Inc. v. Hughes*, 74 N.Y.2d 626 (1989), which denied Article 78 relief but suggested that a magazine could seek to unseal records

in a closed case "via a motion to vacate [judgment] pursuant to CPLR 5015(a) in which all interested parties may be joined." *Id.* at 628. Here, EP Advocates has made no motion under Rule 5015(a), and has made no attempt to show that it could satisfy any of the enumerated bases for 5015(a) relief (*e.g.*, "excusable neglect" related to a default) from the Court's sealing order of last June. These cases do not establish that EP Advocates has made a timely and proper application to participate in this case, or that this Court lacks discretion to reject EP Advocates' intervention on this basis.

The bottom line is that this Court has made utterly extraordinary efforts to put an intense and hard-fought litigation to bed, which is where it should stay. Instead, EP Advocates belatedly seeks to turn this Court into yet another battleground in the national fight by Exxon and allied interests to try to turn the tables on Exxon's opposing counsel in climate change and other environmental cases. The Court should reject the intervention motion as untimely.

B. EP Advocates' interests have been adequately represented by Exxon.

The Court can and should deny intervention for another reason. Where the proposed intervenor's interests are already represented by a party, intervention is improper. *HSBC Bank*, 135 A.D.3d at 534 (denying intervention on this ground).

Here again, Judge Sessions' decision in *Green Mountain* is on point. The court denied Greenpeace's intervention motion not only because it was untimely but because other parties in that case (including other environmental groups) had adequately represented Greenpeace's interests. *Green Mountain*, 2007 WL 2247577, at *2. In this case Exxon, a corporation with nearly unlimited resources, made it a priority in this Court to obtain and disclose the very same documents that EP Advocates now seeks to obtain and disclose. In fact, disclosure of these documents has been such a high priority for Exxon that it has commenced multiple legal

proceedings around the country seeking Pawa's communications with the OAG. Under these circumstances, it would be absurd to suggest that EP Advocates' interests were not adequately represented.

C. EP Advocates lacks any real and substantial interest in the outcome of the proceedings.

Finally, EP Advocates' motion fails to meet the requirement that it have a "real and substantial interest in the outcome of the proceedings." *Trent,* 129 A.D.3d at 1063.[12] Once again, Chief Judge Sessions's decision in *Green Mountain* is directly on point. Greenpeace argued that it had an interest in educating the public about the connections between climate denialists and their sources of funding, but the Court rejected this argument:

> Greenpeace's interest in promoting transparency and disseminating information on climate change is only tangentially related to the subject matter of this action, which challenges the validity of Vermont's greenhouse gas regulations. Although the state of Vermont certainly shares with Greenpeace its concern about global warming, and for accurate dissemination of information on climate change, at best these issues are at stake in this case only indirectly.

Green Mountain, 2007 WL 2247577, at *2. So too here. The sole question in this case was whether Exxon violated securities fraud laws. The issue of disclosing information about Attorney Pawa is at best a sideshow. Indeed, EP Advocates admits that it has "no connection to the substance of the dispute in this matter." EP Advocates Br. At 2. The Court should decline EP Advocates' invitation to take an after-the-fact detour into extraneous issues and satellite litigation.

[12] *See also Spota v. Cty. of Suffolk*, 110 A.D.3d 785, 787 (2d Dept. 2013) (denying intervention where proposed intervenor "failed to demonstrate that he has a 'real and substantial interest' in the action"); *Karpen v. Golden Jubilee Realty, LLC*, 47 Misc. 3d 1208(A), 15 N.Y.S.3d 712 (Sup. Ct. Kings Co. 2015) (proposed intervenor had "no real stake in the outcome of th[e] action"), *aff'd*, 157 A.D.3d 779 (2d Dept. 2018).

II. In the alternative, the Court should require proof *in camera* that EP Advocates is not affiliated with Exxon.

A separate concern is that EP Advocates may be at least indirectly supported in its quest by Exxon—which, if true, would mean that the intervention motion is effectively an attempt to give Exxon a second shot at unsealing the Pawa-OAG emails, long after its deadline to appeal the Court's June sealing decision has passed. As noted above, publicly available documents indicate that EP Advocates has a former coal attorney on its board, and is associated with at least one entity funded by coal money; one of these affiliated entities is run in part by someone who previously accepted money from Exxon to promote the view that virtually all climate science is "junk science." The Court has ample authority to impose conditions on intervention. *See* Practice Commentary, CPLR 1013 ("Because intervention under CPLR 1013 is discretionary, it seems clear that the court may impose appropriate conditions on the intervention."). The Court should deny intervention altogether. But if it does not, under the unusual circumstances presented here, before granting EP Advocates' motion to intervene the Court should require EP Advocates and Exxon to disclose to the Court any connections they have with each other, including any direct or indirect support of EP Advocates by Exxon and any written communications between the two entities (through counsel or otherwise). It also should require disclosure with respect to any oral communications between Exxon and EP Advocates or their counsel. To be clear, Mr. Pawa respectfully suggests that any such disclosures occur *in camera*, without other parties, himself, or their counsel present; Mr. Pawa has no interest in using this Court to force disclosure of information into the public on either side. It may be that no connection exists between Exxon and EP Advocates despite the alliance of interests and frequent blogging about Exxon's legal actions against Pawa by EP Advocates' counsel, but it seems indisputable that such connections, if any, would be relevant to whether EP Advocates'

intervention is proper and timely. And since EP Advocates' apparent credo is that transparency is king and even that the organization is (according to its own slogan) "[w]here energy, environment, and truth meet,"[13] it is only fair for it to divulge any facts in its possession connecting it to Exxon.[14]

Conclusion

EP Advocates' motion to intervene should be denied. In the alternative, before granting EP Advocates' motion to intervene, the Court should require EP Advocates and Exxon to disclose *in camera* any communication or connections with each other, including whether Exxon has provided any direct or indirect support to EP Advocates.

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Respectfully submitted,

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[13] http://epadvocates.org/.

[14] This brief does not respond to EP Advocates' arguments for unsealing because EP Advocates' motion expressly requests a subsequent proceeding on unsealing. If the Court reaches it at all, that issue is for another time.

Certificate of Compliance

I certify that, according to the word count feature of Microsoft Word, this proposed brief contains 3,708 words, in compliance with the word limits in Rule 17 of the Commercial Division of the Supreme Court.

January 25, 2020 /s/ Wesley Kelman