CASE NO. 02-18-00106-CV

IN THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS
FORT WORTH

THE CITY OF SAN FRANCISCO, ET AL.,
Appellants,

vs.

EXXON MOBIL CORPORATION,
Appellee.

On Appeal from the 96th Judicial District Court, Tarrant County
The Hon. R.H. Wallace, Jr. Presiding

BRIEF OF APPELLANTS SAN MATEO COUNTY ET AL.

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Oral Argument Requested

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STATEMENT OF THE CASE

Nature of the Case	This is an appeal from an order denying all defendants/appellants' special appearances. Petitioner Exxon Mobil Corporation ("Exxon") filed a Petition pursuant to Texas Rule of Civil Procedure 202, seeking pre-litigation written and oral discovery for a potential lawsuit against seven California municipalities, eight local officials, and an attorney from Massachusetts who represents two of these municipalities. 1 CR 6 *set seq*. Exxon's Petition alleged that those potential defendants had engaged in abuse of process, First Amendment violations, and civil conspiracy by planning and filing lawsuits in California against more than 30 oil and gas companies, including Exxon, alleging public nuisance and other torts, and seeking abatement and equitable remedies. 1 CR 51-52.
Course of the Proceedings	Exxon, a New Jersey corporation headquartered in Irving, Texas, filed its Rule 202 petition on January 8, 2018 in the district court for Tarrant County. 1 CR 6. The defendants filed special appearances to challenge the trial court's personal jurisdiction. 1 CR 1843; 1 CR 1916; 5 CR 7078; 5 CR 7100; 5 CR 7137. The trial court (Wallace, J.) held a hearing on the special appearances on March 8, 2018.
Trial Court	The Honorable R.H. Wallace, Jr., Presiding Judge, 96th District Court of Tarrant County, Texas
Trial Court's Disposition of the Case	On March 14, 2018, the trial court denied all the special appearances. 5 CR 7210. On April 24, 2018, the trial court adopted (with minor changes) Exxon's proposed findings of fact and conclusions of law (5 CR 7218-7233) over written objections filed by the potential defendants and witnesses (5 CR 7254-92). 3d Supp. CR 113-28.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39, the San Mateo Appellants respectfully request oral argument because this Court's decision-making process would be significantly aided by oral argument.

ISSUES PRESENTED

1. May a Texas state court exercise specific personal jurisdiction, consistent with due process, over California cities, counties, and public officials that had no contacts with the State of Texas, on the theory that those out-of-state residents "targeted" the State of Texas by suing a Texas corporation, among others, for public nuisance and other tort claims in California state court, under California state law, for harms caused to California state residents and public entities?
2. Are out-of-state public entities and officers of those public entities who are sued in their official capacities "nonresidents" within the meaning of Texas Civil Practice and Remedies Code § 17.041, despite being neither "individuals," nor "foreign corporation[s], joint-stock compan[ies], association[s], or partnership[s]"?

INTRODUCTION

The U.S. Supreme Court, the Texas Supreme Court, and this Court have repeatedly and consistently held, under the Due Process Clause and state long-arm statutes, that a state court cannot exercise "specific personal jurisdiction" over an out-of-state defendant, even one that allegedly "directed a tort" against an in-state resident, unless that defendant "purposefully availed" itself of the benefits of the state's laws and engaged in conduct relating to its alleged tort that targeted *the state itself*. *See, e.g., Walden v. Fiore*, 571 U.S. 277 (2014); *TV Azteca v. Ruiz*, 490 S.W.3d 29, 43 (Tex. 2016); *Old Republic Nat'l Title Ins. Co. v. Bell*, __ S.W.3d __, No. 17-0245, 2018 WL 2449360, at *8 (Tex. June 1, 2018); *OZO Capital, Inc. v. Syphers*, No. 02-17-00131-CV, 2018 WL 1531444, at *4 (Tex. App.—Fort Worth, Mar. 29, 2018, no pet. h.).

These constitutional constraints require courts evaluating a challenge to specific personal jurisdiction to focus on the nature and extent of the non-resident's contacts with *the forum*, "not just [its contacts with] a plaintiff who lived there." *Walden*, 571 U.S. at 288. Evidence that "the brunt of the injury will be felt by a particular resident in the forum state" is *not* enough to establish personal jurisdiction, *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005), as the Due Process Clause draws a "crucial difference between

directing a tort at an individual who happens to live in a particular state and directing a tort at that state." *TV Azteca*, 490 S.W.3d at 43.

In this case, the trial court (Wallace, J.) got these principles exactly backwards. Plaintiff Exxon Mobil Corporation ("Exxon") filed a petition in Tarrant County District Court seeking pre-litigation discovery under Texas Rule of Civil Procedure 202 against several California cities, counties, and public officials that Exxon was considering suing. Exxon's theory was that those California public entities had tortiously interfered with Exxon's First Amendment rights and had committed an abuse of process by filing lawsuits against Exxon and more than 30 other companies under California state law in California state court for committing a public nuisance and other state-law torts against California cities, counties, and residents. None of those California public entities has offices in Texas, does business in Texas, or entered into any contracts in Texas—as Exxon conceded. Nonetheless, Exxon contended that the Texas state court could exercise jurisdiction over these entities because Exxon felt the effects of the California lawsuits on its ability to speak publicly *in Texas* about the "national" debate over climate change. 1 CR 18 at ¶ 32. The trial court denied the California parties' Special Appearances and erroneously concluded, on the basis of its discredited theory of personal jurisdiction and "factual findings" that were mostly irrelevant or lacked evidentiary support (and were adopted nearly verbatim from Exxon's submissions) that it had

the power to exercise specific personal jurisdiction under the Texas long-arm statute and the Due Process Clause of the United States and Texas Constitutions. *See* 3rd Supp. CR 126 at ¶¶ 46, 48.

This appeal is brought by three California counties (Marin, San Mateo, Santa Cruz), two California cities (Imperial Beach, Santa Cruz), and 11 public officials (mayors, city managers, a chief administrative officer, and city and county attorneys—collectively, the "San Mateo Appellants"). Although Exxon's Rule 202 Petition and the Tarrant County District Court's ruling included two other California public entities and several of their officials and outside counsel as well, those parties are separately represented in this appeal, as they were in the trial court.

The Due Process Clause requires courts to separately analyze each non-resident defendant's conduct with respect to each separate claim in determining whether it can assert personal jurisdiction over those defendants and claims. *See, e.g., Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980) (requirements of due process "must be met as to each defendant over whom a state court exercises jurisdiction."); *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 147 (Tex. 2013); *Johns Hopkins University v. Nath*, 238 S.W.3d 492, 498-501 (Tex. App.—Houston [14th Dist.] 2007, *pet. denied*). For purposes of this appeal, then, the question is whether the trial erred in finding that each of the San Mateo

Appellants had sufficient contacts with Texas to satisfy due process requirements for personal jurisdiction with respect to each of Exxon's threatened legal claims against them.[1]

STATEMENT OF FACTS

On July 17, 2017, three California public entities (Marin County, San Mateo County, and the City of Imperial Beach) filed civil lawsuits in California state court against Exxon and more than 30 other oil and gas companies. 3rd Supp. CR 121 at ¶ 27.[2] The lawsuits alleged that the companies' oil and gas extractions are responsible for a substantial amount of the world's carbon dioxide emissions since 1965, that those emissions have caused and will continue to cause a significant rise in California sea levels and other harms to the California public, and that the companies knew about and misled the California public about the relationship between their oil and gas extraction and these resulting harms. The City and County of San Francisco and the City of Oakland filed California state court public nuisance lawsuits containing similar allegations against Exxon and others. 3rd

[1] There are two categories of personal jurisdiction: "'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." *Bristol-Myers Squibb Co. v. Superior Court*, __U.S. __, 137 S.Ct. 1773, 1780 (2017) (internal quotations omitted). Exxon did not allege *general* personal jurisdiction below, and the trial court correctly ruled that it could not exercise general personal jurisdiction over the San Mateo Appellants. 3rd Supp. CR 125 ¶ 44.

[2] *County of San Mateo v. Chevron Corp. et. al.*, 3:17-cv-04929-VC (N.D. Cal.); *City of Imperial Beach v. Chevron Corp. et. al.*, 3:17-cv-04934-VC (N.D. Cal.); *County of Marin v. Chevron Corp. et. al.* 3:17-cv-04935-VC.

Supp. CR 121 at ¶ 26. The City of Santa Cruz, County of Santa Cruz and the City of Richmond subsequently filed state court lawsuits of their own.[3] Each of those cases was removed to the U.S. District Court for the Northern District of California by Exxon and the other California defendants. The San Mateo, Santa Cruz, Marin, Imperial Beach, and Richmond cases were subsequently remanded and stayed pending Exxon et al.'s appellate challenges to the remand orders. The San Francisco and Oakland cases were dismissed on June 25, 2018.

None of the San Mateo Appellants own, rent, or lease real or personal property in Texas.[4] None have bank accounts in Texas, engage in business in Texas, employ persons who reside in or regularly travel to Texas, or maintain an office or registered agent in Texas.[5] None of them have entered into any contracts in Texas having any connection with their California state court lawsuits against

[3] *County of Santa Cruz v. Chevron Corp. et. al.*, 3:18-cv-00450-VC (N.D. Cal.); *City of Santa Cruz v. Chevron Corp. et. al.*, 3:18-cv-00458-VC (N.D. Cal.).

[4] Each of these facts is established by admissible evidence in the trial court record and has not been disputed by Exxon. *See* 1 CR 1959 at ¶ 6 (City of Santa Cruz); 1 CR 1980 at ¶ 6; 1 CR 1955 at ¶ 6; 1 CR 1963 at ¶ 6; 1 CR 1991 at ¶ 6 (County of Santa Cruz); 1 CR 1983 at ¶ 6 (County of San Mateo); 1 CR 1987 at ¶ 6 (County of Santa Cruz); 1 CR 1969 at ¶ 6; 1 CR 1995 at ¶ 6 (County of Marin); 1 CR 1972 at ¶ 6 (City of Imperial Beach); 1 CR 1976 at ¶ 6.

[5] *See* 1 CR 1959-60 at ¶¶ 4, 7, 9, 12, 14; 1 CR 1976-77 at ¶¶ 4, 7, 11, 12; 1 CR 1979-80 at ¶¶ 4, 7, 9, 12; 1 CR 1955 at ¶¶ 4, 7, 9, 12, 14; 1 CR 1964-65 at ¶¶ 4, 7, 9, 12, 14; 1 CR 1991-92 at ¶¶ 4, 7, 9, 12, 14; 1 CR 1983-84 at ¶¶ 4, 7, 9, 12, 14; 1 CR 1987-88 at ¶¶ 4, 7, 9, 12, 14; 1 CR 1969 at ¶¶ 4, 7, 9, 13; 1 CR 1995-96 at ¶¶4, 7, 9, 12, 14; 1 CR 1972-73 at ¶¶ 4, 7, 9, 12, 14. *See also* 3rd Supp. CR 114-15 at ¶¶ 2-3, 5.

Exxon.[6] And none of the San Mateo Appellants or anyone acting on their behalf has traveled to Texas during the past five years.[7]

On January 8, 2018, Exxon filed a Rule 202 Petition in Tarrant County District Court. Exxon's Petition sought permission to obtain written and oral testimony that it claimed would be necessary "to investigate potential claims of abuse of process, civil conspiracy, and constitutional violations" committed by the California public entities and officials (and with respect to San Francisco and Oakland, those cities' outside counsel too). 1 CR 11 at ¶ 10. Although Exxon could have asserted its threatened tort claims as compulsory counterclaims in the California actions and could have sought the same discovery in the California actions that it seeks in its Rule 202 Petition,[8] Exxon instead sought to obtain home-court advantage by asking a Tarrant County judge to authorize "pre-litigation" discovery in Texas state court, purportedly to enable Exxon "to determine whether legal action is warranted and perpetuate evidence for a likely lawsuit in Texas" against the California entities that sued it in California. 1 CR 11 at ¶ 10.

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[6] *See* 1 CR 1959 at ¶ 8; 1 CR 1976 at ¶ 8; 1 CR 1980 at ¶ 8; 1 CR 1955 at ¶ 8; 1 CR 1964 at ¶ 8; 1 CR 1992 at ¶ 8; 1 CR 1983 at ¶ 8; 1 CR 1988 at ¶ 8; 1 CR 1959 at ¶ 8; 1 CR 1995 at ¶ 8; 1 CR 1972 at ¶ 8.

[7] *See* 1 CR 1959 at ¶¶ 5, 12; 1 CR 1976 at ¶ 5, 11; 1 CR 1980 at ¶ 5; 1 CR 1955 at ¶ 5; 1 CR 1964 at ¶¶ 5, 12; 1 CR 1991-92 at ¶¶ 5, 12; 1 CR 1983 at ¶¶ 5, 12; 1 CR 1987-88 at ¶¶ 5, 12; 1 CR 1969 at ¶ 5; 1 CR 1995-96 at ¶¶ 5, 12; 1 CR 1972-73 at ¶¶ 5, 12.

[8] *But see Westly v. Superior Court*, 125 Cal.App.4th 907, 911-12 (2004) (limiting depositions of "apex" public officials absent compelling showing of necessity and absence of alternative sources of information).

Exxon's Rule 202 Petition contained a single paragraph addressing personal jurisdiction, which stated:

> This Court has personal jurisdiction over the potential defendants, pursuant to Section 17.042(2) of the Texas Civil Practices and Remedies Code, because the potential abuse of process, civil conspiracy, and constitutional violations *were intentionally targeted at the State of Texas to encourage the Texas energy sector to adopt the co-conspirator's [sic] desired legislative and regulatory response to climate change*. ExxonMobil and 17 other Texas-based companies that are named in the California municipalities' lawsuits exercise their First Amendment right in Texas to participate in the national dialogue about climate change. The speech and other First Amendment activity of the energy sector in Texas is precisely what the potential defendants have attempted to stifle through their abuse of law enforcement powers and civil litigation.

1 CR 18 at ¶ 32 (emphasis added). The "potential abuse of process, civil conspiracy, and constitutional violations" that Exxon alleged in its Petition all refer to the public entities' filing of the California public nuisance actions. *See* 1 CR 10-11 at ¶¶ 9-10.

Each potential defendant identified in Exxon's Rule 202 Petition filed timely Special Appearances to challenge the Tarrant County District Court's authority to exercise personal jurisdiction under the Due Process Clause and the Texas long-arm statute. 1 CR 1802; 1 CR 1843; 1 CR 1916; 5 CR 7078; 5 CR 7100; 5 CR 7137. After submission of briefs and documentary evidence, and oral presentations by counsel, the court concluded that it had authority to exercise specific personal jurisdiction over all parties on all potential claims. 5 CR 7210.

The court then entered Exxon's proposed Findings of Fact and Conclusions of Law, with only slight modifications. *Compare* 3rd Supp. CR 113-128 *with* 5 CR 7218-7233. All further proceedings were automatically stayed upon the filing of this appeal and the San Francisco and Oakland appeals. 3rd Supp. CR 4.

SUMMARY OF ARGUMENT

Texas state courts have no authority to order Rule 202 discovery against a prospective defendant unless the party seeking that discovery (here, Exxon) establishes through admissible evidence that the court can exercise personal jurisdiction consistent with the Due Process Clause and Texas's long-arm statute over that prospective defendant in the threatened future case. *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014); 3rd Supp. CR 125 at ¶ 42. Because Exxon has not shown, and cannot show, that the San Mateo Appellants have sufficient contacts with Texas to satisfy Exxon's heavy burden of establishing specific personal jurisdiction, the Tarrant County District Court erred in concluding that it could exercise personal jurisdiction. This Court must therefore order Exxon's Rule 202 Petition dismissed with prejudice.

Exxon's theory of personal jurisdiction is that the California cities and counties that sued it in California thereby "targeted" and "directed a tort" against Exxon, with the intent of depriving Exxon of its First Amendment right to speak freely about climate-change issues in Texas and elsewhere. Even if Exxon had

some plausible basis for these allegations (and could overcome the extensive evidence that the California entities filed their lawsuits for entirely legitimate reasons, relying on well-established California case precedent and documents establishing Exxon and other companies withheld climate-change information from the public), Exxon's theory of personal jurisdiction and the evidence it submitted are simply not sufficient as a matter of law to satisfy due process.

State and federal courts throughout the country, including the Supreme Courts of the United States and Texas, have consistently rejected efforts by plaintiffs to establish personal jurisdiction over out-of-state defendants based on a "targeted-a-tort" theory like Exxon's, and have repeatedly held that "directing a tort at an individual who happens to live in a particular state" is *not* enough to establish personal jurisdiction in that state. *See, e.g.*, *TV Azteca*, 490 S.W.3d at 43. The trial court's findings of fact and conclusions of law failed to distinguish those cases factually or legally. Moreover, the court's factual findings almost exclusively address the conduct of San Francisco and Oakland and their outside counsel, and not the San Mateo Appellants bringing this appeal, *see infra* at 29-30).

As to the San Mateo Appellants specifically, the trial court's ruling rests solely upon:

(1) Evidence that the California public entities served their California state court complaints on Exxon's registered agent for service of process (3rd Supp. CR 121, 127 at ¶¶ 27, 50), which cannot provide a basis for specific personal jurisdiction because otherwise every out-of-state lawsuit served on an in-state resident would trigger specific personal jurisdiction);

(2) Evidence that the San Mateo Appellants made statements in municipal bond offerings that allegedly minimized or failed to mention the future risk of climate-change-related expenses (3rd Supp. CR 123-25 at ¶¶ 35-40), which offerings had no connection to Texas and are not alleged to have caused any harm to Exxon in Texas or elsewhere); and

(3) The conclusory statement that the California lawsuits "target speech and associational activities in Texas" (3rd Supp. CR 121, 127 at ¶¶ 28, 50), which even if Exxon could establish through admissible evidence, is precisely the type of direct-a-tort allegation that courts have found insufficient as a matter of due process to establish specific personal jurisdiction).[9]

[9] The only findings of fact that refer to conduct by the San Mateo Appellants are set forth in 3rd Supp. CR 121-25 at ¶¶ 27-28, 30-32, and 37-41. Paragraph 32 briefly refers to Imperial Beach Mayor Dedina's July 2017 op-ed in the *San Diego Union-Tribune* and his July 2017 appearance on a San Diego radio show, neither of which had anything to do with Texas. Paragraphs 37 through 41, which describe the content of some of the San Mateo Appellants' municipal bond offerings, do not identify any connection between those bonds and Texas—much less a connection "arising from" the California public entities' supposedly tortious conduct in filing suits. The remaining findings (3rd Supp. CR 121-22 at ¶¶ 27-28,

Separate and apart from the legal insufficiency of Exxon's allegations that the California public entities and officials purposefully availed themselves of the benefits of Texas law and directed their conduct *at the State of Texas* itself, the trial court also erred because those California entities are not "nonresidents" as defined by Texas' long-arm statute. That statute defines a "nonresident" as "an individual who is not a resident of this state," or "a foreign corporation, joint-stock company, association, or partnership"—i.e., private entities. Tex. Civ. Prac. & Rem. Code § 17.041. The cities and counties that Exxon seeks to sue, and those public entities' mayors, city attorneys, and other employees acting in their official capacities, are not "nonresidents" under this definition, for the reasons the U.S. Court of Appeal for the Fifth Circuit explained in *Stroman v. Wercinski*, 513 F.3d 476, 482-83 (5th Cir. 2008). For this reason as well, the Tarrant County District Court erred in denying those entities' and officials' Special Appearance and in asserting personal jurisdiction over Exxon's Rule 202 Petition.

30-31) describe the California lawsuits filed by the California public entities and assert that those lawsuits "target" Exxon's speech insofar as they allege that some of Exxon's public statements were factually inaccurate and deliberately misleading. If specific personal jurisdiction could be exercised whenever one company challenged the truthfulness of another company's public statements, every case alleging defamation, fraud, misrepresentation, or any other conduct involving misleading speech would subject the speaker to suit wherever the alleged victim resided or conducted business. That cannot be, for as shown *infra* at 21-22, even a deliberate intent by an out-of-state entity to commit a tort against an in-state company is not enough to establish specific personal jurisdiction.

ARGUMENT

Exxon is incorporated in New Jersey, but headquartered in Irving, Texas, where it has employees, maintains documents, and conducts aspects of its worldwide business operations. 3rd Supp. CR 114 at ¶ 1. Exxon argued below that the Tarrant County District Court (like every court in every county where Exxon does business) has the constitutional power to assert personal jurisdiction over any out-of-state resident that sues Exxon anywhere in the country, because that lawsuit would necessarily affect Exxon's speech and operations in its home state of Texas. The trial court accepted that argument, despite the uniform line of state and federal appellate authority limiting the constitutional reach of the state courts' jurisdictional authority over non-residents like the San Mateo Appellants here.

A. Appellate Courts Review a Trial Court's Denial of a Special Appearance De Novo

Whether a court may exercise personal jurisdiction over an out-of-state party is a question of law that an appellate court must review de novo. *George v. Deardorff*, 360 S.W.3d 683, 686 (Tex. App.—Fort Worth 2012, no pet.). "[T]he plaintiff bears the initial burden to plead sufficient allegations that would permit the trial court to exercise personal jurisdiction over a defendant. … The defendant can negate jurisdiction on a factual basis by presenting evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations." *OZO*

Capital, Inc., 2018 WL 1531444, at *4. "The defendant can also negate jurisdiction on a legal basis by showing that even if the plaintiff's alleged jurisdictional facts are true," they are insufficient to establish jurisdiction under Texas's long-arm statute or the Due Process Clause. *Id.* Where, as here, the trial court has issued findings of fact and conclusions of law, the court of appeal also reviews the fact findings "on legal and factual sufficiency grounds." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).[10]

B. Exxon Must Establish Personal Jurisdiction Over Each Prospective Defendant to Obtain Pre-Litigation Discovery

A prospective plaintiff like Exxon may only obtain pre-filing discovery under Texas Rule of Civil Procedure 202 if it can establish that the court would have personal jurisdiction over each prospective defendant. *In re Doe*, 444 S.W.3d at 608. This requirement prevents a party from "circumvent[ing]" the requirement

[10] For the reasons described *infra*, even if each of Exxon's allegations were accepted as true, those allegations would be legally insufficient to support the trial court's exercise of personal jurisdiction. However, the trial court's findings of fact do not support its ruling. First, several of those purported findings are legal conclusions that must be reviewed *de novo*, such as the findings that the California lawsuits "target speech and associational activities" and property in Texas and that the filing of those lawsuits constitutes "conduct…directed at Texas-based speech, activities, and property." *See* 3rd Supp. CR 121, 125 at ¶¶ 28-29, 41. Second, many of the other findings are not supported by competent evidence and must be rejected for factual, as well as legal, sufficiency, for the reasons explained in the briefs filed by the Oakland and San Francisco Appellants. Finally, most of the trial court's factual findings are entirely irrelevant to Exxon's claims against the San Mateo Appellants, because those findings refer to events and individuals entirely unconnected to the San Mateo Appellants' California lawsuits or to any other supposed connection between the San Mateo Appellants and Texas. *See, e.g.* 3rd Supp. CR 116-20 ¶¶ 12-22 (discussing lawsuits filed in New York and Massachusetts by state officials there and a press conference about those suits).

of personal jurisdiction by seeking discovery under Rule 202. *Id.* As the prospective plaintiff, Exxon has the burden of proving personal jurisdiction under Rule 202. *Id.* at 610; *see also Moncrief Oil*, 414 S.W.3d at 150.

C. The Trial Court's Exercise of Personal Jurisdiction Violates Due Process

Texas courts cannot exercise specific personal jurisdiction over a non-resident unless the moving party makes three separate showings under the Due Process Clause of the U.S. and Texas Constitutions. First, it must demonstrate that each non-resident "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)); *accord*, *Walden*, 571 U.S. at 285. In evaluating this prong, (1) "only the defendant's contacts with the forum are relevant," not the plaintiff's or any other entity's; (2) the contacts that establish purposeful availment "must be purposeful rather than random, fortuitous, or attenuated"; and (3) the defendant "must seek some benefit, advantage or profit by availing itself of the jurisdiction." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007) (internal citations and quotations omitted); *accord*, *Moncrief Oil*, 414 S.W.3d at 151; *Searcy v. Parex Resources, Inc.*, 496 S.W.3d 58, 67 (Tex. 2016), *reh'g denied* (Sept. 23, 2016).

Second, the moving party must establish that its lawsuit (or threatened lawsuit, in the context of a Rule 202 Petition) "arise[s] out of or relate[s] to [each nonresident] defendant's contacts with the *forum*." *Bristol-Myers Squibb Co.*, 137 S.Ct. at 1780 (emphasis in original). In other words, "[w]hat is needed…is a connection between the forum and the specific claims at issue." *Id*. at 1781; *accord, Walden*, 571 U.S. at 288, 290; *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc*., 512 S.W.3d 878, 886 (Tex. 2017).

Third, the moving party must show that the court's exercise of personal jurisdiction over the defendant with respect to a particular claim satisfies "traditional notions of fair play and substantial justice." *Stroman Realty*, 513 F.3d at 487 (internal quotation omitted).

Exxon did not meet its burden under any of these separate standards, let alone all three, and the trial court erred in ruling otherwise.

1. The San Mateo Appellants have not "purposefully availed" themselves of the privilege of conducting activities within Texas

Exxon's Rule 202 Petition and supporting documentation do not come close to establishing purposeful availment. Exxon does not identify any conduct by the San Mateo Appellants that physically occurred in Texas. *See OZO Capital*, 2018 WL 1531444, at *10 ("Although appellants claim that appellees both committed a tort 'in Texas,' there is no evidence in the record that appellees committed a tort while physically present in Texas."). "The mere existence or allegation of a

conspiracy directed at Texas is not sufficient to confer jurisdiction." *Old Republic Nat'l Title Ins. Co.*, 2018 WL 2449360, at *4. The conduct alleged by Exxon and cited by the trial court occurred almost exclusively in California, *see, e.g.* 1 CR 19-21 at ¶¶ 35-37; 3rd Supp. CR 121-23 at ¶¶ 6-9, 27-34, although some occurred in New York, *see, e.g.*, 1 CR 21, 23-25 at ¶¶ 38, 44-48, 3rd Supp. CR 116-119 at ¶¶ 10-16, 19, 21, and Massachusetts, 3rd Supp. CR 119 at ¶ 20. Any contacts that the San Mateo Appellants may have had with Texas, moreover, were at most "isolated, fortuitous, and attenuated": isolated because the San Mateo Appellants' only contact with Texas was, arguably, their service of process upon Exxon's agent as required to initiate their California litigation; fortuitous, because the California lawsuits were directed against more than 30 oil and gas companies worldwide based on those companies' size and past conduct, not where they happened to be headquartered; and attenuated, because any contacts were at best indirect.

Because there is no evidence in the record that the San Mateo Appellants sought any benefit, advantage, or profit from *Texas* itself, the trial court had no basis for concluding that the California entities' contacts with Texas were "deliberate and purposeful," 3rd Supp. CR 127 at ¶ 51, or that those entities purposefully availed themselves "of the jurisdiction," as the Due Process Clause requires. The fact that the San Mateo Appellants' California lawsuits were brought, in part, against a Texas-headquartered company law, does not establish

constitutionally sufficient contacts with Texas itself. "Specific jurisdiction…does not turn on where a plaintiff happens to be." *Searcy*, 496 S.W.3d at 70.

Exxon has never alleged, and the trial court did not find, any conduct by the San Mateo Appellants *within* the State of Texas. Nor did Exxon make any effort to rebut the San Mateo Appellants' affidavits establishing that they had no such contacts. Instead, Exxon rested its arguments on the constitutionally inadequate theory that the trial court could exercise specific personal jurisdiction because the San Mateo Appellants had an unlawful ulterior motive for filing their California lawsuits—to chill Exxon's ability to speak out on issues of global climate change—and that Exxon will experience that chill, at least in part, in Texas where it is headquartered. *See* 2 CR 2030-43. Although Exxon acknowledges that its public positions on climate change are part of a "*national* dialogue," 1 CR 18 at ¶ 32 (emphasis added), it contends that because it would feel the impacts of the California lawsuits in Texas (and, presumably, everywhere else it may conduct business), that is enough to satisfy the Due Process Clause—and the trial court agreed. *See* 3rd Supp. CR 127 at ¶ 50.

That was, of course, error. To satisfy the due process requirements of specific personal jurisdiction, the relationship between a defendant and the forum "must arise from the purposeful contacts the individual created with the state rather than with a state resident." *OZO Capital*, 2018 WL 1531444, at *9 (citing *Walden*,

571 U.S. at 284, and *Michiana*, 168 S.W.3d at 788-79). Exxon's theory of jurisdiction has thus been flatly rejected by both the U.S. and Texas Supreme Courts. In *Walden*, for example, the court of appeal authorized suit in a Nevada court based on a claim by Nevada residents that a Georgia police officer had improperly searched them in the Atlanta airport and had later prepared an allegedly "false probable cause affidavit" that foreseeably caused the plaintiffs to suffer economic and other harms in their home state of Nevada. *Walden*, 571 U.S. at 282. The U.S. Supreme Court reversed, holding that the lower court's analysis impermissibly focused on the defendant's contacts with the *plaintiffs* rather than with the *forum* when it based jurisdiction on the foreseeability that the defendant police officer's conduct would cause harm to plaintiffs in Nevada. *Id*. at 289. For the "effects" of tortious conduct to be constitutionally relevant, the Court explained, those effects must connect the defendants' conduct to *the forum*, "not just to a plaintiff who lived there." *Id*. at 288; *see also id.* at 284. For the same reasons, the fact that Exxon is headquartered in Texas and may, in response to the California lawsuits, formulate some of its litigation strategies and public responses in Texas, cannot establish the constitutionally required contacts between the San Mateo Appellants and the State of Texas, even if Exxon could prove that the San Mateo Appellants knew and intended their California lawsuits to have such an effect on Exxon in Texas.

Similarly, the Texas Supreme Court held in *Michiana* that a Texas trial court had erred in exercising specific personal jurisdiction over a Texas resident's claim against an Indiana RV dealer who allegedly made fraudulent misrepresentations about the quality of a vehicle when selling it by telephone to the Texas resident. Even though the Indiana dealer knew that its RV was to be delivered and used in Texas and even though the in-Texas harms caused by that dealer's alleged fraud were foreseeable, the Supreme Court reversed on the ground that aside from that one allegedly fraudulent telephone communication, the RV dealer had no substantial presence in Texas and did not seek any benefits or protections from Texas state law. *Michiana*, 168 S.W.3d at 789-90. The Court emphasized that the constitutional exercise of specific personal jurisdiction depends on the defendant's actual contacts with a forum state, which are "generally a matter of physical fact," not "what the parties thought, said, or intended." *Id.* at 790-91.

Since *Michiana*, the Texas Supreme Court has consistently declined to find specific personal jurisdiction over non-residents whose allegedly tortious conduct had adverse impacts on Texas residents, unless the record independently established the non-residents' substantial contacts with the *state*. These cases make clear that a tortfeasor's knowledge that "the brunt of the injury will be felt by a particular resident in the forum state," as the trial court found sufficient here, is *not* a constitutionally adequate basis for exercising specific personal jurisdiction.

Michiana, 168 S.W.3d at 788; *accord Old Republic Nat'l Title Ins.*, 2018 WL 2449360, at *8 ("even if a tort was committed" and the tortfeasor "knew [its] actions would cause an injury in Texas," contacts "do not rise to the level of purposeful availment simply because the alleged harm occurred in Texas"). The Due Process inquiry must focus on the in-state conduct of the out-of-state defendant (e.g., the San Mateo Appellants' conduct in Texas), not the in-state (Texas) effects of that defendant's out-of-state (California) conduct. *Michiana*, 168 S.W.3d at 790.

In *Moncrief Oil,* 414 S.W.3d at 157, the Texas Supreme Court again held that "a nonresident directing a tort at Texas from afar is insufficient to confer specific jurisdiction." The Court in *Moncrief* considered two tort claims by a Texas company against a nonresident competitor: misappropriation of trade secrets and tortious interference with business. Evaluating each claim separately for purposes of specific personal jurisdiction, the Court ruled that the trial court could exercise jurisdiction over the trade secrets claim, because the alleged misappropriation occurred during two meetings that physically occurred in Texas and because those alleged trade secrets pertained to "a proposed joint venture in Texas." *Id*. at 153. The Court also held, however, that there was *no* specific personal jurisdiction over the tortious interference claim, even though that tort was directed against a Texas resident, because the meeting at which the interference

allegedly occurred was in California. *Id*. at 157. Although the alleged purpose of that California meeting was to wrongfully interfere with the Texas-based plaintiff's business relationships, the Court rested its analysis on the principles, equally controlling here, that "what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts," and that a California entity's "alleged tortious conduct in California against a Texas resident is insufficient to confer specific jurisdiction" in Texas. *Id.* at 147, 157.

The Texas Supreme Court reached a similar result in *Searcy*, holding that specific personal jurisdiction was not available in a lawsuit for tortious interference against a nonresident defendant, notwithstanding the harms that conduct allegedly caused to the plaintiff corporation in Texas. In *Searcy*, the nonresident defendant had engaged in ongoing business dealings with a company it knew to be based in Texas. Because those business dealings involved a foreign project and were structured to operate under foreign law, the Supreme Court held that the out-of-state defendant did not "purposefully avail" itself of *Texas's* laws or markets in its allegedly tortious dealings with the Texas company. Reiterating its analysis in *Michiana*, the Court again emphasized that an out-of-state defendant's "[m]ere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Searcy*, 496 S.W.3d at 68-69.

Finally, and perhaps most importantly, in *TV Azteca* (the only Texas Supreme Court case cited in the trial court's Conclusions of Law, although it supports the California public entities' position, not Exxon's), the Texas Supreme Court again rested its analysis on "the crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state." 490 S.W.3d at 43. In *TV Azteca*, a popular recording artist living in Texas sued a Mexico-based broadcaster for defaming her in television broadcasts that originated in Mexico but were knowingly transmitted to Texas. 490 S.W.3d at 35. The broadcaster's comments about plaintiff allegedly caused her to suffer personal and professional harm in Texas. *Id.* at 45-46. The broadcaster allegedly knew when it transmitted those comments that she would suffer those harms. *Id.* The broadcaster also knew that other Texas residents would watch the widely broadcast program containing the alleged defamation. *Id*. Nonetheless, the Texas Supreme Court held in the first part of its opinion that those facts were *not* sufficient to establish specific personal jurisdiction over the broadcaster. *Id*. at 46. As the Court made clear, foreseeability of in-state harm to an in-state resident caused by the conduct of an out-of-state resident is simply not a sufficient basis for exercising specific personal jurisdiction. *Id.* at 43.

While the Court concluded, in the second part of its *TV Azteca* decision, that the lawsuit could nonetheless proceed, that was only because the Texas plaintiff

was able to present *additional* independent evidence demonstrating that the non-resident broadcaster "'continuously and deliberately exploited'" the Texas television market by maintaining a business office and production studio in Texas, selling advertising time to Texas businesses, and taking affirmative steps to boost the Texas viewership of the television program in which it allegedly defamed plaintiff. *Id.* at 49-50 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984)). All of this was case-specific evidence of purposeful availment that has no counterpart in the present case. *Id*. at 49-52.[11]

Allowing specific personal jurisdiction based on the alleged Texas "effects" of the California entities' California state court lawsuits would not only obliterate

[11] In the trial court, Exxon erroneously relied upon *Calder v. Jones*, 465 U.S. 783 (1984) as support for its effects-test standard, but Exxon's reading of *Calder* has repeatedly been rejected. Like *TV Azteca*, *Calder* was a defamation suit against an out-of-state defendant that had a large in-state commercial audience (600,000 weekly subscribers in *Calder*, 465 U.S. at 785 n.2; over one million viewers in *TV Azteca*, 490 S.W.3d at 44). Specific personal jurisdiction in *Calder*, as in *TV Azteca*, rested *not* on where the defamation plaintiff resided or where she felt the "effects" of the alleged defamation but upon evidence that the out-of-state defendant had targeted its challenged defamatory publication at the forum state as a whole where it had a substantial in-state audience. *Calder*, 465 U.S. at 789-90. Indeed, the Texas Supreme Court drew this express distinction in *TV Azteca* and *Michiana*, describing as "overly simplistic" the construction of *Calder* that Exxon has asserted, and holding that specific personal jurisdiction depends on the scope of the defendant's claims-related activities in the forum state, not whether the plaintiff resided or felt the effects of those activities in that state. *TV Azteca*, 490 S.W.3d at 41-42, *citing Michiana*, 168 S.W.3d at 789-90 ("[In *Michiana*] we rejected a jurisdictional test 'based solely upon the effects or consequences' in the forum state, such as the court of appeals' 'directed-a-tort' test, and concluded that 'the important factor was the extent of the defendant's activities, not merely the residence of the victim.'"); *see also Walden v. Fiore*, 571 U.S. at 290 (rejecting effects-test construction of *Calder*, in which the Supreme Court had "made clear that mere injury to a forum resident is not a sufficient connection to the forum."); *Old Republic Nat'l Title Ins. Co.*, 2018 WL 2449360 at *8 (reiterating that in *Michiana*, the Texas Supreme Court, consistent with *Calder*, had "explicitly rejected an approach to specific jurisdiction that turns upon where a defendant 'directed a tort rather than on the defendant's contacts").

the Texas Supreme Court's carefully drawn distinction in *TV Azteca* between targeting a forum and targeting a plaintiff, but it would have required a completely different result to the first part of that decision and would have made the entire second part of that decision superfluous. An "in-state effects" rule would make any broadcaster who allegedly defamed a Texas resident subject to suit in Texas, whether or not that broadcaster benefitted from the Texas market or engaged in business with state residents other than plaintiff. The Supreme Court's analysis in *TV Azteca* expressly rejected that result. *TV Azteca*, 490 S.W.3d at 38 & n.5 (citing cases); *see also Moncrief Oil*, 414 S.W.3d at 157. As this Court recently reaffirmed in *OZO Capital*, "[m]ere injury to a forum resident is not a sufficient connection to the forum state." *OZO Capital*, 2018 WL 1531444, at *9.[12]

[12] The only case cited by the trial court here other than *TV Azteca* (for the principle that "[p]urposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas," 3rd Supp. CR 127 at ¶ 52) is *Hoskins v. Ricco Family Partners, Ltd.*, No. 02–15–00249–CV, 2016 WL 2772164 (Tex. App.—Fort Worth May 12, 2016, no pet.). *Hoskins* is entirely consistent with the Supreme Court's ruling in *TV Azteca* that a defendant's knowledge that the effects of its conduct will be felt in Texas is "insufficient to establish that the [defendant] purposefully availed itself of the benefits of conducting activities in that jurisdiction" and that there must be additional conduct by which the defendant "sought some benefit, advantage, or profit" *in Texas*. 490 S.W.3d at 46, 49-52, 54 (internal quotations omitted).

The focus of the parties' dispute in *Hoskins* (as in *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex. 2009), which Exxon also relied upon below), was the ownership and use of *real property in Texas*. *Id.* at *7. In *Retamco*, the Texas Supreme Court concluded that an out-of-state party's

Based on these precedents, the trial court necessarily erred in concluding that Exxon's allegations were sufficient to support specific personal jurisdiction. Any other result would effectively overturn the Texas Supreme Court's consistent

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"purchase and ownership of real property" in Texas satisfied the requirement of purposeful availment because ownership of real property could "involve many contacts over a long period of time, which would carry with it certain continuing obligations," such as "valuation and tax issues" and the "expense[] of maintaining the interest," and because the location of such property is fixed within Texas. *Id*. at 339-40 (internal quotations omitted). A property owner who wishes to enforce his rights to Texas real property necessarily invokes "the processes and protections of Texas law" and thus benefits from its connection with the forum. *Id*. at 340; *see also Old Republic Nat'l Title Ins.*, 2018 WL 2449360, at *7 ("the determining facts" in *Retamco* were "the transfers of Texas-based business operations and real property, which derive profit from Texas and create continuing connection with the state"). For this reason, *Hoskins* expressly distinguished between torts aimed *at property in Texas*, which may provide a basis for finding purposeful availment, and torts aimed at defendants who happen to reside in Texas. *Hoskins*, 2016 WL 2772164, at *7.

While Exxon's trial court briefs characterized some of its "internal memos and scientific research" as its Texas "property" in an effort to come within the holdings of *Retamco* and *Hoskins*, *see also* 3rd Supp. CR 122 at ¶ 31, those two cases concerned *real* property, not personal property (such as documents that may be copied, scanned, or easily transported). Besides, Exxon's physical documents, wherever they may be located, are not the subject of the California complaints. While the content, authorship, or circulation of certain documents may become a focus of discovery, there is no dispute in the California litigation about the physical documents themselves, and the San Mateo Appellants do not face any valuation or tax issues, or other incidents of real property ownership, with respect to Exxon's discoverable documents. Initiating a lawsuit where some discoverable documents may be physically located in another state does not invoke the benefits or protections of that other state's laws. If it did, any litigation against a party that operated in different states and maintained documents, files, or employees (who could be deposed) in other states would create specific personal jurisdiction in every one of those other states.

constitutional precedents. If the California entities' supposed knowledge that Exxon would respond to their California lawsuits by self-censoring its climate-related speech in Texas were enough to establish "purposeful availment," so would an out-of-state RV dealer's knowledge that the defective vehicle it fraudulently sold to a Texas customer would cause problems for that customer in Texas. *Cf. Michiana*, 168 S.W.3d at 788. If meetings in California and New York attended by representatives of San Francisco and Oakland and their outside counsel (but not any of the San Mateo Appellants) were sufficient to establish personal jurisdiction because of alleged discussion at those meetings about the impact of potential litigation against oil and gas companies, so would the California meetings in which OAO Gazprom allegedly conspired to interfere with Moncrief's business relationships. *See Moncrief*, 414 S.W.3d at 157 ("Gazprom Defendants' alleged tortious conduct in California against a Texas resident is insufficient to confer specific jurisdiction"). And if the California entities' conduct in filing a lawsuit in California against a Texas-based corporation (and dozens of others) constituted "purposeful availment," then entering into business dealings with a Texas-based corporation in a foreign country under that foreign country's law would be purposeful availment as well. *See Searcy*, 496 S.W.3d at 75-76. The case law is uniformly to the contrary. *See also Johns Hopkins Univ.*, 238 S.W.3d at 499 (no personal jurisdiction over defamation and intentional interference claim where

statements and solicitations were targeted at all patients and associates of Texas-based plaintiff, not just in-state patients and associates); *Stroman Realty*, 513 F.3d at 486 (Due Process Clause prohibits Texas courts from adjudicating "even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident").[13]

The trial court's "purposeful availment" analysis cannot be reconciled with any of these controlling appellate precedents. Suing a resident of Texas has never been held sufficient to establish the constitutionally required "minimum contacts" for the exercise of specific personal jurisdiction. Specific personal jurisdiction requires proof that the out-of-state party purposefully availed itself of the benefits of the state's laws and aimed its conduct at the state itself, not just that its conduct allegedly had adverse impacts on an in-state resident—even if that conduct were intended to have those impacts. Consequently, the trial court's jurisdictional ruling must be reversed.

2. Exxon's Putative Tort Claims Do Not Arise Out of Any Contact Between the San Mateo Appellants and the State of Texas

[13] In *Stroman Realty*, a Texas-based timeshare broker sought relief under 42 U.S.C. § 1983 for alleged Commerce Clause violations committed by the Commissioner of the Arizona Department of Real Estate, who had issued an order demanding that the Texas broker cease all Arizona-related brokerage activities, stop advertising Arizona properties on its website, and provide refunds to all owners wherever located. 513 F.3d at 480-81. The Fifth Circuit rejected the effects-based theory of jurisdiction, holding that the Due Process Clause did not allow the Texas court to exercise personal jurisdiction over an out-of-state official who was pursuing public litigation in that official's home state, because due process does not permit "jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident." *Id*. at 486

Even if the San Mateo Appellants had purposefully availed themselves of the benefits of Texas law, Exxon's allegations and evidence would still be inadequate to satisfy the second requirement for specific personal jurisdiction: proof of a "substantial connection" between the non-resident's contacts with the state and the "operative facts of the litigation." *TV Azteca*, 490 S.W. 3d at 52-53 (citing *Moki Mac*, 221 S.W.3d at 585). Even purposeful availment of a forum's privileges is insufficient to establish *specific* personal jurisdiction unless the defendant's "alleged liability arises out of or is related to the defendant's activity within the forum." *Moncrief Oil*, 414 S.W.3d at 156; *Moki Mac*, 221 S.W.3d at 576. Where a party cannot establish the required "connection between the forum and the specific claims at issue," due process precludes the exercise of specific personal jurisdiction. *See Bristol-Myers Squibb Co.*, 137 S.Ct. at 1781.

Despite Exxon's voluminous submissions to the trial court (most of which pertained to the ultimate merits of its threatened lawsuit, not the narrow jurisdictional issue in dispute), Exxon failed to establish any connection between the San Mateo Appellants' allegedly tortious conduct and the State of Texas. Exxon's 60-page, 137-paragraph Petition, like the trial court's Findings of Fact and Conclusions of Law based on that Petition, does not identify any facts supporting Exxon's claims that the San Mateo Appellants' filing of the California lawsuits constituted wrongful conduct or activities by the San Mateo Appellants *in Texas*.

To the contrary, the San Mateo Appellants' affidavits established that none of them had any contacts with Texas, least of all contacts relating to their California lawsuits.[14]

[14] Although the merits of Exxon's threatened claims are irrelevant at this threshold jurisdictional stage, it bears emphasis that Exxon cannot state a claim for abuse of process without showing "an improper use of the process other than the mere institution of a civil action" and that it suffered "damages other than [those] necessarily incident to filing a lawsuit." *Martin v. Trevino*, 578 S.W.2d 763, 769 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). "'[*A*]*buse of process consists not in the filing and maintenance of a civil action*, but rather in the perversion of some process issued in the suit after its issuance." *Detenbeck v. Koester*, 886 S.W.2d 477, 481 (Tex. App.—Houston [1st Dist.] 1994, no writ) (emphasis in original) (quoting *Blackstock v. Tatum*, 396 S.W.2d 463, 467-68 (Tex. Civ. App.—Houston [1st Dis.] 1965, no writ)); *see also Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997) (quoting *Prosser and Keeton on Torts*: "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." (emphasis omitted)). Nothing in Exxon's Rule 202 Petition alleges any acts undertaken by the San Mateo Appellants in Texas (or anywhere else for that matter) *after* filing their California lawsuits; and the filing of a lawsuit, by itself, cannot constitute an abuse of process.

Exxon's threatened First Amendment claim, under 42 U.S.C. § 1983, also does not rest upon any conduct by the San Mateo Appellants in Texas. Exxon vaguely asserts that one consequence of the California lawsuits has been to chill its willingness to engage in constitutionally protected speech regarding national policies. 1 CR 18, 51 at ¶¶ 32, 110. But even if that made any difference for purposes of specific jurisdiction (it does not), Exxon never explains what speech was, or will be, chilled, either in Texas or elsewhere. Nor does Exxon explain how the filing of the California lawsuits could be a violation of Exxon's First Amendment rights, since those lawsuits do not seek a court order limiting Exxon's ability to speak and would impose liability only for Exxon's past conduct and previous misrepresentations of fact (which are not constitutionally protected, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980)).

Finally, while Exxon also threatens to bring a civil conspiracy claim against the San Mateo Appellants, that alleged conspiracy rests entirely on the first two claims and thus fails for the same reasons. Moreover, as noted above, each of the alleged acts in support of that conspiracy (most of which are alleged to have involved representatives of San Francisco and Oakland and *not* the San Mateo Appellants) occurred exclusively in California, New York, and Massachusetts, and *not* in Texas. 3rd Supp. CR 115-20 at ¶¶ 6-22; *see also* 1 CR 19-20, 31-32 at ¶¶ 35, 60. Besides, personal jurisdiction over a nonresident with insufficient forum contacts *cannot* be premised upon an alleged conspiracy between that nonresident and another entity whose forum contacts may be jurisdictionally sufficient. *In re Stern*, 321 S.W.3d 828, 841 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding). Due process is a personal right, which is

Exxon's Rule 202 Petition and its 5,000 pages of merits-related submissions sought to establish that the California public entities that filed the California lawsuits had improper motives. But none of those alleged facts or documents, or any findings by the trial court, identified any conduct by the San Mateo Appellants (or any other California entity or resident), improper or not, *in Texas*. Exxon's Petition and the trial court's findings describe a conference in La Jolla, California, a meeting at the Rockefeller Family Fund offices in New York, a press conference in New York, and other conduct that allegedly occurred in New York and Massachusetts (none of which included the San Mateo Appellants). 1 CR 19-21, 21, 23, 29, 23 at ¶¶ 35-37, 38, 44, 55, 42 n. 59; 3rd Supp. CR 115-119 at ¶¶ 6-20. Each of these "operative facts" concerning Exxon's threatened claims against the San Mateo Appellants occurred far outside of Texas. *See Moki Mac*, 221 S.W.3d at 585. Thus, even if there were a plausible factual and legal basis for Exxon's contrived allegations of abuse of process, First Amendment violations, or civil conspiracy, those threatened torts each arose from the San Mateo Appellants' conduct *in California*, not Texas. *See Moncrief* at 157 (whether jurisdiction existed depended in significant part on the location of meetings where the allegedly tortious action occurred); *TV Azteca*, 490 S.W.3d at 52-53 (quoting *Moki*

why the constitutional requirements for exercising personal jurisdiction "must be met as to each defendant over whom a state court exercises jurisdiction." *Rush*, 444 U.S. at 331-32 (1980).

Mac, 221 S.W.3d at 585) (courts should determine whether the events that would be "the focus of the trial" and likely to "consume most if not all of the litigation's attention" occurred within the forum state).

The closest the trial court came to identifying in-state conduct by the San Mateo Appellants was service of process by *some* San Mateo Appellants on Exxon's registered agent, as required to initiate the California lawsuits. 3rd Supp. CR 127 at ¶ 50.[15] But service of process is a one-time ministerial act, and the case law is clear that neither the filing of a lawsuit nor the service of process constitutes the actionable "conduct" needed to exercise specific personal jurisdiction. *See, e.g. Allred*, 117 F.3d at 286 (where service is effected is "immaterial" to where effects of abuse-of-process suit are felt and insufficient to support personal jurisdiction); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1209 (9th Cir. 2006) (appellate court is "unaware of any case" holding that "the service of documents in connection with a suit brought in a foreign court [are] contacts that by themselves justify the exercise of personal jurisdiction"). If service of a complaint were sufficient by itself to confer jurisdiction, every out-of-

[15] Exxon and the trial court also cited a handful of statements (or absence of statements) in certain municipal bond offerings from some California public entities as evidence that those entities had a wrongful motive for filing the lawsuits (apparently on the theory that if the dangers of climate change were as significant as the California lawsuits allege, the cities would have disclosed those dangers in their bond filings). *See* 3rd Supp. CR 123-125 at ¶¶ 35-40; 1 CR 9, 11, 34-39, 46-48 at ¶¶ 7, 11, 67-71, 72-76, 78-81, 96-103. There are many potential responses on the merits, but for present purposes all that matters is that none of those bond offerings were drafted or filed in Texas.

state lawsuit would necessarily give rise to in-state personal jurisdiction against every in-state defendant properly served with the Complaint or a later request for discovery.

For these reasons, the trial court's factual findings based on Exxon's jurisdictional allegations are not sufficient to satisfy the "arises from" requirement of Due Process analysis either.[16]

3. The Exercise of Jurisdiction over the San Mateo Appellants Offends Notions of Fair Play and Substantial Justice

Even if the San Mateo Appellants purposefully availed themselves of the benefits of Texas law, and even if Exxon's threatened claims arose from the San Mateo Appellants' contacts (such as they were) with Texas, the exercise of specific

[16] The federal courts are fully in accord with the Texas case law in holding that an out-of-state resident's lawsuit against an in-state resident is not enough to support specific personal jurisdiction (as those courts must be, given that disputes over personal jurisdiction raise issues of due process under the United States Constitution). *See, e.g., Harmer v. Colom*, 650 F. App'x 267, 272 (6th Cir. 2016) ("Even if we . . . read [the complaint] to allege that Colom filed suit in Mississippi with the intent of causing negative consequences in Tennessee . . . [i]t would be illogical to . . . say that the actions giving rise to the improper litigation occurred in Tennessee."); *Wallace v. Herron*, 778 F.2d 391, 394 (7th Cir. 1985) ("[D]efendants filed these motions on behalf of their clients in a California court pursuant to a California lawsuit, and it would be unreasonable to require the defendants to appear in Indiana to defend this suit on the basis of such attenuated contacts."); *Morrill v. Scott Financial Corp.*, 873 F.3d 1136, 1144 (9th Cir. 2017) (Arizona court did not have personal jurisdiction over nonresident attorney who plaintiff alleged caused foreseeable "reputational injury" in Arizona by filing abusive suit and grievance in Nevada); *see also Bar Group, LLC v. Business Intelligence Advisors, Inc.*, 215 F. Supp. 3d 524, 546 (S.D. Tex. 2017) (claims arising from lawsuit filed by putative defendant against third party in New Jersey do not give rise to specific jurisdiction over putative defendant in Texas even though plaintiff alleged it suffered harm there); *Mandeville v. Crowley*, 695 F. App'x 357 (10th Cir. 2017) (no specific jurisdiction in Oklahoma for 42 U.S.C. § 1983 claim stemming from divorce proceedings in Texas).

personal jurisdiction in Texas would still "not comport with traditional notions of fair play and substantial justice" as due process independently requires. *Moncrief*, 414 S.W.3d at 155.

Texas courts consider five factors when determining whether asserting jurisdiction would offend these notions: "(1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies." *Retamco*, 278 S.W.3d at 341. These factors weigh heavily against the exercise of personal jurisdiction over the San Mateo Appellants in Texas, and the trial court's contrary conclusions (3rd Supp. CR 127-28 at ¶¶ 54-59) should be reversed.

Defending a suit in Texas on the basis of actions taken by public entities and public officials in California would impose substantial burdens on those taxpayer-funded parties. Out-of-state travel and the lost time associated with out-of-state litigation would be particularly burdensome on the individual San Mateo Appellants, who as mayors, city managers, and city attorneys are high-level government officials with day-to-day responsibility for managing the needs of local communities in California and responding quickly to unexpected events. *See*

supra at 8 n.5. Allowing the exercise of jurisdiction against the San Mateo Appellants because they filed lawsuits to protect the rights of California public entities and their residents would also chill public entities nationwide from pursuing legal claims against out-of-state wrongdoers.

If Exxon's aggressive forum-shopping were to succeed, "anytime a plaintiff files suit in a jurisdiction other than the defendant's principal place of business…[the plaintiff] renders himself vulnerable to being sued by the defendant in the defendant's home state,…regardless of whether the plaintiff-turned-defendant has had any other contacts with that state." *SpaceCo Business Solutions, Inc. v. Mass Engineered Design, Inc.*, 942 F. Supp. 2d 1148, 1154 (D. Colo. 2013). A local gas station owner in Fort Worth who sued California-based Chevron Corporation for breach of contract, for example, could find himself hauled into court in Richmond, California where Chevron is headquartered, to defend against a malicious prosecution suit. There would be enormous potential for companies doing business nationwide to engage in abusive litigation tactics in response to out-of-state law suits.

Texas, moreover, has little interest in adjudicating this dispute. "Texas's interest in protecting its citizens against torts is insufficient to automatically exercise personal jurisdiction upon an allegation that a nonresident directed a tort from outside the forum against a resident." *Moncrief Oil*, 414 S.W.3d at 152

(citing *Michiana*, 168 S.W.3d at 790-91). The Texas Legislature and Supreme Court have renounced any desire to "make Texas the world's inspector general." *In re Doe*, 444 S.W.3d at 611. Yet Exxon's theory of jurisdiction would make Texas courts responsible for resolving every claim of abuse of process stemming from any out-of-state litigation against a Texas defendant, and could potentially clog this state's courts while offering little benefit to Texas's enforcement of its own laws. Besides, if Exxon has any meritorious claims against the San Mateo Appellants, it can bring them in the California court cases in which it is already a defendant.

Finally, Exxon's attempted use of the Texas courts as a cudgel against adverse parties hampers the interstate judicial system's efforts at obtaining the efficient resolution of controversies affecting parties from different states. Federal and state courts throughout the country have rejected Exxon's "targeted-a-tort" theory because that theory, if accepted, would potentially enable any state where Exxon (or any defendant to the California lawsuits) conducts business to exercise personal jurisdiction over the California entities in parallel, copycat actions. *See, e.g. Stroman Realty, Inc.*, 513 F.3d at 487-88 (defendants' theory "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue," because the state regulatory authorities' cease-and-desist letters were directed at timeshare

brokers throughout the country). That result would not be consistent with due process.

D. Texas's Long-Arm Statute Does Not Reach the San Mateo Appellants

In addition to Exxon being unable to satisfy the three elements of due process, Exxon also fails to satisfy the independent requirements of the Texas long-arm statute. In the typical case involving out-of-state individuals, businesses, or other private entities, there is no difference between the scope of the Texas long-arm statute and the scope of the Due Process Clause. *See Searcy*, 496 S.W.3d at 66. In this case, though, in which a Texas resident seeks to assert personal jurisdiction over nonresident cities, counties, and high-level government officials, the Texas long-arm statute imposes an additional barrier, as its plain language precludes the exercise of personal jurisdiction over non-resident public entities.

The Texas long-arm statute only permits state courts to exercise personal jurisdiction over nonresident *private* parties doing business in Texas. *See* Tex. Civ. Prac. & Rem. Code §§ 17.041-17.045. The statute defines "nonresident," for purposes of statutory coverage, as "(1) an individual who is not a resident of [Texas]; and (2) a foreign corporation, joint-stock company, association, or partnership." *Id.* §17.041. The California public entities are not "nonresidents" under this definition, because they are neither foreign corporations, joint-stock companies, associations, nor partnerships. The California entities' high-level

officials are also not "nonresidents," because Exxon is seeking to sue those officials in their official capacities, not as private "individuals." *See Stroman Realty,* 513 F.3d at 482-83 (Texas' long-arm statute is not reasonably read as applying to a nonresident public officer sued in her official capacity because such an officer is not sued as an "individual" and is not a business entity). Therefore, Texas' long-arm statute cannot be used as a basis for asserting personal jurisdiction over any of the Prospective Defendants.

For these reasons, this Court could also reverse the trial court's ruling on alternative, purely statutory grounds.

PRAYER FOR RELIEF

For the foregoing reasons, this Court should reverse the decision of the court below, grant the San Mateo Appellants' Special Appearance, set aside the trial court's factual findings, and dismiss Exxon's Rule 202 Petition for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure, the undersigned counsel certifies that this brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) as the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font. The brief complies with the type-volume limitation in Texas Rule of Appellate Procedure 9.4(i) as it contains 10,286 words, excluding the parts exempted from brief requirements under Texas Rule of Appellate Procedure 9.4(i).

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served on all counsel of record in accordance with the Texas Rules of Civil Procedure on July 6, 18.

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