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

APPELLANTS' CONSOLIDATED REPLY BRIEF

Robert M. Manley
rmanley@mckoolsmith.com
Richard Kamprath
rkamprath@mckoolsmith.com
Benjamin G. Murray
bmurray@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
Tel: (214) 978-4000

Attorneys for Appellants City and County of San Francisco, Dennis J. Herrera, Edward Reiskin, City of Oakland, Barbara J. Parker, Sabrina B. Landreth and Matthew F. Pawa

Pete Marketos
pete.marketos@rm-firm.com
Tyler Bexley
tyler.bexley@rm-firm.com
REESE MARKETOS LLP
750 N. Saint Paul Street, Suite 600
Dallas, TX 75201
Tel: (214) 382-9810

Attorneys for the County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, Anthony Condotti, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martin Bernal

Oral Argument Requested

(Additional counsel on following pages)

Steven K. Hayes
shayes@stevenhayeslaw.com
LAW OFFICES OF STEVEN K. HAYES
500 Main Street, Suite 340
Fort Worth, TX 76102
Tel: (817) 371-8759

Attorneys for Matthew F. Pawa

Marc R. Stanley
marcstanley@mac.com
Martin Woodward
mwoodward@stanleylawgroup.com
Scott Kitner
skitner@stanleylawgroup.com
STANLEY LAW GROUP
6116 N. Central Expressway, Suite 1500
Dallas, TX 75206
Tel: (214) 443-4301

Attorneys for Matthew F. Pawa

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INTRODUCTION

All parties, including appellee Exxon Mobil Corporation ("Exxon"), agree on the legal principles governing this appeal. Most critically, the parties agree that the Due Process Clause of the United States and Texas Constitutions prohibits Texas state courts from exercising specific personal jurisdiction over nonresidents, even those whose allegedly tortious out-of-state conduct caused foreseeable in-state harm to a Texas resident, unless the nonresidents' conduct targeted *the State of Texas* itself. *See, e.g., TV Azteca v. Ruiz*, 490 S.W.3d 29, 43 (Tex. 2016), *reh'g denied* (June 10, 2016), *cert. denied*, 137 S. Ct. 2290 (2017) (emphasizing 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") (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 789 (Tex. 2005)); *accord Walden v. Fiore*, 571 U.S. 277, 284-86, 288 (2014); *OZO Capital, Inc. v. Syphers*, No. 02-17-00131-CV, 2018 WL 1531444 at *9 (Tex. App.—Fort Worth March 29, 2018, no pet.).

The Texas Supreme Court and United States Supreme Court have expressly rejected the "direct-a-tort" or "effects-based" approach to establishing specific personal jurisdiction. *See Walden*, 571 U.S. at 287-88; *Michiana*, 168 S.W.3d at 789-90. Exxon does not disagree. Brief of Appellee Exxon Mobil Corporation ("Exxon Br.") at 2, 24, 41, 42-46, 87. Nonetheless, the Tarrant County District

Court applied that long-discredited effects-based test as the basis for denying Appellants' Special Appearances. Instead of requiring proof that Appellants purposefully availed themselves of the benefits and protections of Texas law, as due process requires, the district court erroneously rested its ruling on the speculative future effects of those California lawsuits *on Exxon*, a constitutionally impermissible basis for exercising specific personal jurisdiction.[1]

The *relevant* facts are undisputed and dispositive. None of the Appellants had any physical presence in Texas, conducted any business in Texas, entered into any contracts in Texas, or invoked the protections of any Texas laws. *See* Brief of Appellants City of San Francisco, Dennis J. Herrera, and Edward Reiskin ("SF Br.") at 14-15, 38-39; Brief of Appellants City of Oakland, Barbara J. Parker, Sabrina Landreth, and Matthew F. Pawa ("Oakland Br.") at 11-12; Brief of Appellants San Mateo County et al. ("San Mateo Br.") at 8-9. None of them owned, rented, or leased real or personal property in Texas. *Id.* None had bank

[1] Because the threshold due process issues are dispositive, and because there are no *material* factual disputes, all 23 Appellants join in this single consolidated brief. While the Court must evaluate personal jurisdiction separately for each Potential Defendant named in Exxon's Rule 202 Petition, *see Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980); *In re Doe (Trooper)*, 444 S.W.3d 603, 608 (Tex. 2014); *Ball Up, LLC v. Strategic Partners Corp.*, No. 02-17-00197-CV, 2018 WL 3673044 at *13-14 (Tex. App.—Fort Worth Aug. 2, 2018, no pet.); *see also* Exxon Br. at 30 (referring to conduct of "each Potential Defendant"), under the constitutionally required due process standard the district court had no authority to assert personal jurisdiction over *any* of them.

accounts in Texas, engaged in business in Texas, or employed persons who resided in or regularly traveled to Texas. *Id.* Each of those facts is beyond dispute.

In its effort to overcome the rule against "effects-based" personal jurisdiction, Exxon contends that Appellants engaged in conduct directed at the State of Texas by suing Exxon and other companies (many of which are *not* headquartered in Texas) in California court. Exxon Br. at 23-24. According to Exxon, Appellants' conduct in filing those California lawsuits (under California state law, to obtain remedies for harms suffered by the California public entities and their residents in California) constitutes "purposeful availment" of *Texas* because those public entities: (1) served their California lawsuits on Texas-headquartered Exxon's designated agents for service of process; (2) *intended* to seek discovery from Exxon once the cases were at issue (including by requesting production of documents that Exxon might maintain in hard copy or electronically in Texas); and (3) *intended* Exxon to react to those lawsuits by self-censoring its future comments about climate change. Exxon Br. at 30-31.

If those "facts" were sufficient to establish personal jurisdiction in Texas state court over an out-of-state litigant who sued a Texas resident, *every* out-of-state plaintiff in *every* out-of-state lawsuit against a defendant with operations in Texas could be sued in Texas state court or forced to respond to pre-litigation Rule 202 discovery in Texas, without having any actual Texas contacts or undertaking

any "purposeful availment" of the State of Texas. After all, *every* lawsuit requires service of process before it may proceed; *every* lawsuit requires the defendant to respond to reasonable discovery requests (including by producing relevant documents that it maintains and controls wherever it does business); and *every* lawsuit has the potential for causing the defendant to think twice before publicly commenting on the lawsuit or its subject matter.

State and federal courts have repeatedly held that the filing and prosecution of an out-of-state lawsuit against an in-state resident does not constitute purposeful availment of the state where that defendant resides, even if the lawsuit seeks to affect the resident's in-state conduct. Exxon ignores most of those cases (or cites them only for inconsequential points), yet their holdings are directly on point.[2]

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[2] *See, e.g.*, *Walden*, 571 U.S. at 289-90 (targeting forum resident with unconstitutional law enforcement proceedings is not purposeful availment); *OZO Capital*, 2018 WL 1531444 at *2 (defendants collusively settled Texas litigation to deprive Texas residents of property held by Texas company; no purposeful availment); *Stanton v. Gloersen*, No. 05-16-00214-CV, 2016 WL 7166550 at *2 (Tex. App.–Dallas Nov. 30, 2016, pet. denied) (lawyer threatened to initiate proceedings against Texas resident to induce resident to alter Texas-based conduct; no purposeful availment); *Estate of Hood*, No. 02-16-00036-CV, 2016 WL 6803186 at *2 (Tex. App.—Fort Worth Nov. 17, 2016, no pet.) (lawyer threatened to withhold funds from Texas residents unless they signed releases relating to probate matter in Mississippi; no purposeful availment); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008) (threat of unconstitutional litigation to induce Texas business to stop sending solicitations from Texas to Arizona; no purposeful availment); *Allred v. Moore & Peterson*, 117 F.3d 278, 280, 287 (5th Cir. 1997) (no purposeful availment from abusive lawsuit, despite service of process and service of interrogatories on forum resident); *Wallace v. Herron*, 778 F.2d 391, 394-95 (7th Cir. 1985) (similar, interrogatories and document requests).

In determining whether Appellants purposefully availed themselves of Texas's laws and benefits, the focus must be on what those entities and individuals actually *did*, not whether they had a wrongful or improper purpose in doing it. *Old Republic National Title Ins. Co. v. Bell*, 549 S.W.3d 550, 562, 564-65 (Tex. 2018); *TV Azteca*, 490 S.W.3d at 46; *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 147, 157 (Tex. 2013) ("what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts"); *Michiana*, 168 S.W.3d at 789-91 (nonresident's contacts with forum state are "generally a matter of physical fact," not what the parties "thought, said, or intended."); *Johns Hopkins University v. Nath*, 238 S.W.3d 492, 499 (Tex. App.—Houston, 2007, pet. denied) (nonresident's allegedly "purposeful attempts to interfere with [Texas physician's] business relations with two of [his] Texas patients" cannot establish specific personal jurisdiction because the challenged conduct occurred in Maryland and in emails to a Canadian doctor).

Here, the only *conduct* by Appellants that the district court identified was their filing of several California state court lawsuits. The case law is clear, though, that the mere filing and prosecution of an out-of-state lawsuit, even if alleged to be pretextual or to have adverse effects on a Texas resident, does not direct a tort at the State of Texas and cannot constitute purposeful availment of the forum.

For these reasons, and because the Texas long-arm statute does not even apply to public entities and public officials, *see infra* at 32-33, this Court should reverse the district court's denial of the Appellants' Special Appearances and dismiss Exxon's Rule 202 Petition for lack of personal jurisdiction.

ARGUMENT

I. The core legal principles governing specific personal jurisdiction are well-established.

The basic principles governing specific personal jurisdiction are well-established. Indeed, the parties expressed those principles in nearly identical language and cited nearly identical cases in their briefs. *See* SF Br. at 17, 39-40; Oakland Br. at 27-28; San Mateo Br. at 17-18; Exxon Br. at 27-29.

The parties agree that Exxon must establish each of the following before the Texas courts obtain constitutional authority to assert specific personal jurisdiction over any of the Appellants:

First, Exxon must demonstrate that each Appellant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State [Texas], 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 (1958)); *accord Walden*, 571 U.S. at 285; *TV Azteca*, 490 S.W.3d at 37-38; *Moncrief Oil*, 414 S.W.3d at 150; Exxon Br. at 27. Exxon acknowledges that under this first prong, (1) "only [Appellants'] contacts with the forum are

relevant," not Exxon's "unilateral" conduct; (2) Appellants' contacts with Texas "must be purposeful rather than random, fortuitous, or attenuated"; and (3) each Appellant by engaging in such contacts "must seek some benefit, advantage or profit by availing itself of" Texas. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007) (internal citations and quotations omitted); *accord Searcy v. Parex Resources, Inc.*, 496 S.W.3d 58, 67 (Tex. 2016); *Moncrief Oil*, 414 S.W.3d at 151; Exxon Br. at 29.

Second, Exxon must establish that its threatened lawsuit against Appellants (given the Rule 202 context, *see In re Doe*, 444 S.W.3d at 610), "arise[s] out of or relate[s] to [each Appellant's] contacts with the forum." *Bristol-Myers Squibb Co. v. Sup. Ct.*, 137 S.Ct. 1773, 1780 (2017) (emphasis and citation omitted). "What 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.*, 512 S.W.3d 878, 886 (Tex. 2017); Exxon Br. at 29.

Third, Exxon must show that the district court's assertion of personal jurisdiction over each Appellant "comports with traditional notions of fair play and substantial justice." *TV Azteca*, 490 S.W.3d at 36 (internal quotation omitted); *accord Moncrief Oil*, 414 S.W.3d at 150; *Stroman Realty*, 513 F.3d at 484, 487; Exxon Br. at 27-28.

Unless all three requirements are met, any exercise of specific personal jurisdiction over any of the Appellants violates due process.

II. None of the Appellants purposefully availed themselves of the privilege of conducting activities within the State of Texas.

Appellants have shown, without any rebuttal from Exxon, that none of them had any physical presence in Texas, conducted any business in Texas, or otherwise invoked the protections of any Texas laws. *See supra* at 2-3. Exxon nonetheless asserts that Appellants "purposefully availed" themselves of Texas's laws and benefits for due process purposes because "they signed, approved, or participated in the filing of lawsuits against ExxonMobil and other Texas-based energy companies to suppress speech and associational rights in Texas and obtain documents in Texas," and because they each "hired a process server to cause the service of their complaints to reach ExxonMobil in Texas." Exxon Br. at 30. We address each assertion below.[3]

A. Filing a lawsuit in California does not constitute purposeful availment of Texas.

Exxon's main argument is that Appellants purposefully availed themselves of Texas because, by filing lawsuits against Exxon in California state court under California state law (to remedy harms suffered in California by Exxon and others,

[3] Because Exxon rests its entire jurisdictional argument on the intended effects of the California lawsuits, the first two prongs of specific personal jurisdiction (purposeful availment and contacts relating to that purposeful availment) overlap in this case. We therefore address them together.

each of which was alleged to have a substantial California presence, *see* 1 CR 602-16, 711-25, 822-36, 934-36, 983-85, 1035-47, 1171-83), Appellants acted with a secret intent: to discourage Exxon from speaking candidly about climate-change issues and to obtain discovery from Exxon relating to the allegations in the California lawsuits. But ulterior motives, even if provable, cannot be the basis for specific personal jurisdiction. Even if some plausible factual support existed for Exxon's absurdly speculative conspiracy allegations, the act of filing an out-of-state lawsuit with the supposed intent of chilling a defendant's future in-state speech or obtaining that defendant's in-state documents in discovery cannot, as a matter of law, constitute purposeful availment.

Exxon is a New Jersey corporation. It is currently headquartered in Texas (having moved from New York City in 1990).[4] Many of the other 29 defendants in the California lawsuits are headquartered in other states or foreign countries. All have operations throughout the world. What matters for this appeal, though, is that Appellants sued each of those defendants *in California*. Whatever effect those lawsuits may have on Exxon in Texas, Appellants did not "purposefully avail" themselves of the privilege of invoking the benefits and protections of Texas by filing those lawsuits in California.

[4] *See Youell v. Exxon Corp.*, 48 F.3d 105, 107 (2d Cir. 1995), *cert. granted, vacated on other grnds*, 516 U.S. 801 (1995).

Exxon and its co-defendants in the California lawsuits "could, quite literally, have been based anywhere in the world, and [Appellants] would presumably have interacted with [them] in the same way as they did with [them] here." *Searcy*, 496 S.W.3d at 74-75; *accord Walden*, 571 U.S. at 290; *Old Republic*, 549 S.W.3d at 564-65 ("the 'effects' of the alleged tort must connect the defendant to the forum state itself, not just to a plaintiff who lives there"); *Michiana*, 168 S.W.3d at 789 (Texas Supreme Court "has expressly rejected jurisdiction based solely upon the effects or consequences of an alleged conspiracy") (internal quotation omitted); *Allred*, 117 F.3d at 282-83 (defendant cannot "bootstrap his alleged damages" from alleged abuse of process "to achieve personal jurisdiction over his abuse of process claim").

The California lawsuits allege that Exxon and its co-defendants were a contributing legal cause of a "public nuisance" (and in some lawsuits, other state law torts as well) that will require the California public entities and their taxpaying residents to spend enormous sums to address rising sea levels, increased flooding, and more frequent and intense storms resulting from climate change. *See* 1 CR 671-90, 783-802, 894-913, 957-58, 1010-12, 1127-50, 1259-82. Those lawsuits

seek to require defendants to remediate the current and future consequences of their past wrongful conduct.[5]

The lawsuits seek relief in California for harms to Californians suffered in California. Whatever Exxon "unilaterally" chooses to do or say in Texas in response to Appellants' out-of-state lawsuits cannot constitute purposeful availment by Appellants of Texas, because any such response is one step further removed from the "effect" of those lawsuits on Exxon, and even direct effects are not sufficient to establish specific personal jurisdiction. *See Walden*, 571 U.S. at 285 ("however significant the plaintiff's contacts with the forum may be, those contacts cannot be decisive in determining whether the defendant's due process rights are violated") (quotation marks omitted); *Searcy*, 496 S.W.3d at 67 ("the relevant contacts are those of the defendant, and the unilateral activity of another person or a third party is not pertinent").

[5] The California lawsuits cite considerable evidence to support those allegations, including documents and public statements (many made in New York and Washington, not Texas, *see* Oakland Br. at 10 n.3) demonstrating that Exxon and the other defendants have known for decades that their business operations would have these inevitable consequences, yet deliberately hid that knowledge from the public and made knowingly misleading statements to the contrary. *See, e.g.*, 1 CR 639-40, 646 ¶¶101, 104, 117; 1 CR 748-49, 755 ¶¶101, 104, 117; 1 CR 859-61, 868 ¶¶101, 104, 121; 1 CR 943, 949-50 ¶¶59, 74; 1 CR 993, 998-99 ¶¶61, 70-72; 1 CR 1081-83, 1090, 1092-93 ¶¶143, 146, 162, 166-67; 1 CR 1217-19, 1226-29 ¶¶142, 145, 161, 165-66.

The judicial inquiry into purposeful availment is limited to what the nonresident actually did, not whether it acted with wrongful intent, including intent to cause harm to an in-state resident.[6] While the *merits* of the parties' dispute may turn on a defendant's scienter (i.e., whether the nonresident acted negligently or willfully, whether its justifications were pretextual, whether it knew that its defamatory statements were false), merits inquiries are irrelevant to specific-personal-jurisdiction analysis. *See, e.g.*, *Michiana*, 168 S.W.3d at 790-91; *Old Republic*, 549 S.W.3d at 562 ("[W]e look only to [the defendant's] contacts with the state of Texas, taking care not to turn a jurisdictional inquiry into an analysis of the underlying merits."); *Searcy*, 496 S.W.3d at 70-71. As the Texas Supreme Court held in *Michiana*, "judges should limit their jurisdictional decisions" to "matters of physical fact," rather than "involving themselves in trying" "what the parties thought, said, or intended." 168 S.W.3d at 791.

Not surprisingly, in every case cited by the parties in this appeal, specific personal jurisdiction was either established or found lacking based solely on the facts establishing what the nonresident did, rather than whether it acted with an intent to cause harm.

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[6] Exxon conceded before the district court that "intent doesn't matter" for purposes of jurisdiction, *see* RR 105:3-11, although it now tries to retreat from that concession by using ellipses bridging multiple transcript pages to connect that concession to an entirely different argument made at a different point in the hearing. *See* Exxon Br. at 47.

In *TV Azteca*, for example, the Texas Supreme Court declined to consider whether the defendant's allegedly defamatory broadcasts were intended to harm the in-state plaintiff (which would not be a sufficient basis for personal jurisdiction under *Michiana*). Instead, the Court focused on "whether [the nonresident defendant] purposefully availed itself of Texas through those broadcasts" (which it did by negotiating more than a hundred contracts with Texas advertisers worth nearly $2 million, by maintaining a business office and production studio in Texas, and by thereby "continuously and deliberately exploit[ing] the Texas market"). 490 S.W.3d at 49-50, 52 (internal brackets omitted). As the Court made clear, "the mere fact that [defendants] directed defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction." *Id.* at 43.[7]

[7] Exxon also cites *Paul Gillrie Institute, Inc. v. Universal Computer Consulting, Inc.*, 183 S.W.3d 755 (Tex. App.—Houston 2005, no pet.), a defamation suit like *TV Azteca.* But the analogy to *Paul Gillrie* fails for the same reason as does Exxon's reliance on *TV Azteca*. As in *TV Azteca*, the court in *Gillrie* held that a publisher that sold copies of its allegedly tortious publication to customers throughout a jurisdiction can be sued in that jurisdiction, whose markets it commercially exploited. Key to *Gillrie* and *TV Azteca* was the close connection between the out-of-state defendants and their in-state *audiences*—the large number of Texas residents who received defendants' tortious publication or broadcasts but were not themselves parties to the lawsuit, yet from whom the defendants benefitted economically. *See also Johns Hopkins*, 238 S.W.3d at 499 n.2 (discussing *Gillrie*'s focus on the publisher availing itself of an audience throughout the state).

Similarly, in *Walden*, 571 U.S. at 289-90 (the leading case rejecting effects-based jurisdiction, which Exxon relegates to a brief footnote), the U.S. Supreme Court concluded that specific personal jurisdiction could not be based on the effects of a Georgia police officer's false affidavit on the two Nevada plaintiffs. In *Estate of Hood*, this Court held that an attorney's allegedly fraudulent correspondence intended to induce Texas residents to release valid claims to a decedent's estate did not constitute purposeful availment of Texas, emphasizing that the argument "that specific jurisdiction exists in this case because [the attorney] directed a tort at a Texas resident," was "foreclosed by *Michiana*." 2016 WL 6803186 at *7.[8] This Court reached the same conclusion in *OZO Capital*, holding that the nonresidents' allegedly collusive settlement of Texas litigation with the intent to deprive Texas residents of property did not establish purposeful availment of the state. Although the defendants knew that their conduct would harm Texas-based companies, they did not "direct[] any alleged individual actions at Texas rather than merely at a Texas resident." 2018 WL 1531444, at *10 (citing *Walden*, 571 U.S. at 289; *TV Azteca*, 490 S.W.3d at 43; and *Booth v. Kontomitras*,

[8] Exxon asserts that the attorney's only contact with Texas in *Hood* was "mailing a hearing notice to a beneficiary in Texas." Exxon Br. 44. But what the attorney actually mailed was a petition to close the estate, a proposed release of all claims, and a cover letter that linked the signing of the release to the distribution of estate funds—the very documents that constituted his alleged fraud and extortion. *Hood*, 2016 WL 6803186, at *3.

485 S.W.3d 461, 486-87 (Tex. App.—Beaumont 2016, no pet.); *accord Stanton*, 2016 WL 7166550, at *2*; City of White Settlement v. Emmons*, No. 02-17-00358-CV, 2018 WL 4625823, at *14 (Tex. App.—Fort Worth Sept. 27, 2018, pet. filed); *Ball Up*, 2018 WL 3673044, at *13-14.

The federal courts of appeal have applied the protections of the Due Process Clause the same way. The Fifth Circuit in *Stroman Realty* found no purposeful availment where an Arizona official threatened allegedly unconstitutional litigation for the purpose of causing a Texas business to stop sending solicitations from Texas to Arizona. 513 F.3d at 484, 486. Similarly, the Ninth Circuit in *Morrill v. Scott Financial Corp.*, 873 F.3d 1136 (9th Cir. 2017), held that an out-of-state attorney did not subject himself to specific personal jurisdiction by pursuing allegedly abusive litigation and litigation tactics against an in-state resident, even though the attorney had filed related actions in the forum and had traveled to the forum to oppose a motion to quash a subpoena issued for a forum resident. *Id.* at 1145-46.

Exxon has no answer to the analysis in these cases, each of which squarely rejected the fundamental effects-based premise of its argument.

Due process does not allow Exxon to drag out-of-state public entities and their officials and attorneys into its home state and subject them to its home courts' jurisdiction simply by alleging they acted with wrongful motive. Exxon claims

that public officials in California, New York, and Massachusetts abused their public trust and constitutional obligations by filing a series of pretextual lawsuits for the purpose of chilling speech and discovering documents, rather than for the legitimate purpose of shifting the costs of remediating the enormous damage to public infrastructure caused by Exxon's and others' wrongful conduct. Even if Exxon had some plausible basis for that claim (which it does not), what matters for this appeal is that Appellants filed their lawsuits against Exxon in California, and that none of them engaged in any conduct in Texas or otherwise purposefully availed themselves of Texas itself.

Because Appellants did not engage in *any* conduct in Texas, let alone conduct that "continuously and deliberately exploited the [Texas] market," *TV Azteca*, 490 S.W.3d at 52, and did not otherwise purposefully avail themselves of Texas in any way, this Court must reverse the district court's denial of the Special Appearances and dismiss Exxon's Rule 202 Petition.

B. Exxon's claims of First Amendment injury should not be treated differently from any other claims for purposes of specific personal jurisdiction.

Exxon tries to avoid application of the rule that out-of-state conduct, even if allegedly tortious, does not constitute "purposeful availment" of the state. It contends that this case is different from the usual "effects-on-the-resident" cases because Appellants' lawsuits supposedly had a chilling effect on its First

Amendment rights. Exxon Br. 2, 34-35, 51. Exxon thus asks this Court to carve out a novel exception to longstanding constitutional doctrine by holding that out-of-state conduct that has a potentially chilling effect on future in-state speech should be treated for due process purposes as if it were a tort committed against the state itself. That argument is baseless.

First, no court has ever adopted Exxon's proposed far-reaching exception to the uniform case authority holding that the Due Process Clause requires proof that the nonresident purposefully availed itself of the state's benefits by engaging in conduct in the state or directing its tort against the state.

The potential "effects" of a nonresident's out-of-state conduct on an in-state resident has never been found sufficient to satisfy due process by itself, no matter how foreseeable or intentional. *See*, *e.g.*, *Moncrief Oil*, 414 S.W.3d at 157 (conduct in California that allegedly tortiously interfered with Texas resident's business relationships not a basis for specific jurisdiction). If the rule were otherwise, every out-of-state lawsuit filed against an in-state resident would support personal jurisdiction against the out-of-state party, because every lawsuit inevitably has some "effect" on the named defendants—whether it seeks to enjoin wrongful conduct or obtain compensation or other relief. Moreover, because resulting "damages" are an element of nearly every claim for tort or breach of contract, under Exxon's expansive theory of due process an in-state resident could

always obtain home-state personal jurisdiction simply by alleging that an out-of-state plaintiffs' wholly out-of-state conduct caused it to suffer in-state damages and was therefore committed, in part, in that home state.

Second, it is well established that "the relevant contacts are those of the defendant, and the unilateral activity of another person or a third party is not pertinent." *Searcy*, 496 S.W.3d at 67 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). But nothing in the California lawsuits requires Exxon to issue any particular future statements about climate change or anything else. Exxon tries to cloak the speculative effects of the California lawsuits on its future actions in First Amendment language. But whatever Exxon may later choose to say about the California lawsuits is "unilateral activity" that at most constitutes an attenuated, indirect response to the "effect" of Appellants' out-of-state conduct *on Exxon*, not on the State of Texas. That is not a constitutionally sufficient basis for personal jurisdiction.

Lawsuits always have the potential to affect a defendant's conduct or to "chill" its willingness to speak frankly about the issues raised by the lawsuit, particularly where the lawsuit alleges fraud, misrepresentation, or other false statements. In nearly every case, though, the defendant will likely choose its words carefully when discussing the lawsuit and the issues it raises. If personal jurisdiction could be based on the foreseeability that a defendant might be more

circumspect than usual after it has been sued, the Due Process Clause would provide out-of-state plaintiffs no protection at all.

Exxon tries to support its proposed due process carve-out by selectively quoting snippets from four cases, *none* of which involved a dispute over personal jurisdiction. Exxon urges the remarkable proposition that any conduct that might have an impact on a Texas resident's ability to fully exercise its free-speech rights must be treated, as a matter of law, as conduct that occurred *in Texas* and was directed *against Texas* for purposeful availment purposes. *See* Exxon Br. at 51, 63. Exxon's cases are easily distinguished. None come close to holding that conduct that allegedly interferes with First Amendment rights is deemed to have been committed, for purposes of personal jurisdiction, in the state where the complaining party resides.

Two of Exxon's cases, *Asgeirsson v. Abbott*, 773 F.Supp.2d 684, 693 (W.D. Tex. 2011), and *Kalman v. Cortes*, 646 F.Supp.2d 738, 742 (E.D. Pa. 2009), address venue under a federal statute, not personal jurisdiction under the Due Process Clause. Disputes over venue can only arise in a forum that *already* has subject matter jurisdiction and personal jurisdiction, and it turns on whether "a substantial part of the events or omissions giving rise to the claim occurred" in that jurisdiction, even if those events affected only one of the parties. *See Asgeirsson*, 773 F.Supp.2d at 693 (quoting 28 U.S.C. §1391(b)). Moreover, the defendants in

those two cases (Texas and Pennsylvania officials) were residents of the states where they were sued and were therefore subject to *general* personal jurisdiction.

Exxon's third case is an unpublished federal district court decision, *Francis v. API Tec. Servs., LLC*, No. 4:13-CV-627, 2014 WL 11462447 (E.D. Tex. Apr. 29, 2014), decided under the no-longer-valid *Calder* "effects-on-the-resident" test. That decision makes no mention of the First Amendment; and it based personal jurisdiction on the nonresident's actions in hacking into the in-state plaintiff's home computer IP address and obtaining private information from that computer without authorization. 2014 WL 11462447 at *6.

The fourth case, *Electronic Frontier Foundation v. Glob. Equity Mgmt. (SA) Pty Ltd.*, 290 F.Supp.3d 923 (N.D. Cal. 2017) ("*EFF*"), also relied on the outdated "effects" test, and is also easily distinguished. In *EFF*, the nonresident availed itself of the forum state by, among other things, mailing demand letters to plaintiff in the forum, obtaining and seeking to enforce an injunction that required plaintiff to retract speech and to stop engaging in speech in the forum (a requirement that would directly affect 8,500 of plaintiff's in-forum donors and 48,000 of its in-forum readers), and requiring plaintiff to remove all references to its speech from all search engines, "many of [which were] also located in" the forum. *Id.* at 936-39.

In contrast, courts that have squarely addressed the issue—even pre-*Walden* (the U.S. Supreme Court case that first squarely rejected the "effects" test)—have held that specific personal jurisdiction cannot rest on the alleged effects of a First Amendment violation on an in-state resident. *See, e.g.*, *Zieper v. Reno*, 111 F.Supp.2d 484, 491-92 (D.N.J. 2000) (New Jersey court could not assert personal jurisdiction over New York prosecutor whose out-of-state communications allegedly interfered with New Jersey resident's First Amendment right to broadcast video: "Conduct which has an effect in New Jersey by itself…is not enough to sustain personal jurisdiction."); *Marten v. Godwin*, 499 F.3d 290, 299 (3d Cir. 2007) (Pennsylvania court could not assert jurisdiction over online degree program based in Kansas, despite in-state plaintiff's allegation that his expulsion from that program was in response to protected First Amendment speech: "A defendant can commit First Amendment retaliation without 'expressly aiming' his conduct at the plaintiff's location, or even knowing where the plaintiff would be likely to suffer.").

If Exxon could establish specific personal jurisdiction based on the potential chilling effect of the California lawsuits on Exxon's future speech in Texas, any Texas resident could use Rule 202 to obtain discovery (without filing suit) against any nonresident against which it has a grudge, legitimate or otherwise, on the theory that the out-of-state party took some action or made some comment that

chilled the Texas resident's speech. Exxon's new theory of purposeful availment would stretch the Due Process Clause well past its breaking point.[9]

C. The possibility of obtaining documents through discovery is not "purposeful availment."

Exxon next argues that Appellants purposefully availed themselves of the State of Texas because their California state lawsuits "target[ed] Texas property"—i.e., whatever documents Appellants would be entitled to seek in discovery from Exxon (if the California lawsuits are remanded and not dismissed after the pending Ninth Circuit appeals)—to the extent those documents are physically located in Texas. *See* Exxon Br. at 35-38.

That argument fails as well, mostly for the reasons explained above. If specific personal jurisdiction over a nonresident could rest on the likelihood that the nonresident's lawsuit would require a Texas resident to produce relevant discovery, every out-of-state plaintiff who sued a Texas resident would thereby be subjecting itself to personal jurisdiction in the Texas courts. Exxon's reliance on the physical location of its potential discovery documents is especially weak because those documents can be scanned, copied, and produced electronically no

[9] Exxon's underlying assumption that Appellants' alleged conduct would be actionable under the First Amendment or state tort law is also highly doubtful, *see* San Mateo Br. at 32 n.14, although whether Exxon could actually state a claim against Appellants is not the issue at this threshold personal jurisdiction stage.

matter where the originals are located, and without having to physically produce or hand over the originals.[10]

No court has ever accepted Exxon's expansive theory of personal jurisdiction based on anticipated discovery responses. Exxon cites two cases, *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333 (Tex. 2009), and *Hoskins v. Ricco Family Partners, Ltd.*, No. 02–15–00249–CV, 2016 WL 2772164 (Tex. App.—Fort Worth May 12, 2016, no pet.), but both involved disputes over the disposition of Texas *real property*. As Appellants previously explained, those cases highlight the critical difference under "purposeful availment" analysis between a lawsuit that centers on a dispute over *ownership interests in Texas real property* (permanently fixed parcels of land subject to a complex skein of state laws and regulations) and *discovery requests* seeking the

[10] Exxon also ignores that many relevant documents may not even be physically located in Texas. For example, every document cited in the California complaints (to show that Exxon has long concealed its knowledge about the impacts of its operations) can be accessed on the internet and through third-party servers—and thus need not be accessed *in Texas* at all. *See, e.g.*, 1 CR 634 ¶92 (describing 1979 Research and Engineering memo available at http://insideclimatenews.org); 1 CR ¶107 (description of ExxonMobil project environmental impact statement including estimated rise in water level, available at http://soep.com); 1 CR 854 ¶91 (describing 1979 memo urging "aggressive defensive program" available at http://insideclimatenews.org); 1 CR 944 ¶60 (describing presentation by scientists to Exxon management warning about use of fossil fuels in 1977, available at http://insideclimatenews.org); 1 CR 994 ¶61 (same); 1 CR 1081-82 ¶144 (describing 1982 internal memo available at http://insideclimatenews.org); 1 CR 1218 ¶143 (same).

production of documents (which may be in electronic or hard copy form, which are easily copied, scanned, or mailed, and whose production is subject to the laws of the jurisdiction of the court from which the discovery request issued). Oakland Br. at 39, 44-45; San Mateo Br. at 27-28 n.12.

Exxon asserts that the distinction between real and personal property "appears nowhere in the text of [*Retamco* or *Hoskins*], and no court construing those decisions has accepted such a limitation." Exxon Br. at 39. That is not true. The courts in *Retamco* and *Hoskins* explicitly and repeatedly recognized that distinction, limiting their holding and reasoning to the unique context of Texas-based real property. *See Retamco*, 278 S.W.3d at 339-40 (property owner who seeks to enforce Texas real property rights invokes "the processes and protections of Texas law" because the "purchase and 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"); *id.* at 339 ("Unlike personal property, Republic's real property will always be in Texas, which leaves no doubt of the continuing relationship that this ownership creates."); *Hoskins*, 2016 WL 2772164, at *7-8 (distinguishing between torts aimed at Texas real property in Texas—there, preparing a fraudulent lien for filing in Texas that would corrupt the state's property records system—and torts aimed at individuals who happen to reside in

Texas). Exxon is also wrong in asserting that no subsequent case has accepted that distinction. The Texas Supreme Court did exactly that in *Old Republic*, 549 S.W.3d at 564, where it distinguished fixed real property from personal property having "no continuing presence in Texas…for purposes of determining whether [a defendant] had sufficient contacts."

Exxon also cites *TravelJungle v. American Airlines, Inc.*, 212 S.W.3d 841, 844 (Tex. App.—Fort Worth 2006, no pet.). But that case, which predates *Retamco*, does not include any discussion of the jurisdictional significance of "property." The Court in *TravelJungle* found that an overseas-based travel website purposefully availed itself of Texas when, in furtherance of its commercial, profit-seeking operations, it repeatedly and continuously accessed information from an American Airlines website server physically located in Texas, by sending electronic "robots" and "spiders" into that Texas-based server, including as often as 2,972 times on a single day. The court distinguished between the act of "merely 'look[ing] at'" a website—the equivalent of obtaining copies of a document in discovery—and overwhelming the server capacity of that website and thus "depriv[ing] American of the ability to use that same capacity to serve its other customers." *Id*. at 849-50.

Exxon also ignores the many appellate decisions described above and in Appellants' opening briefs holding that allegedly abusive litigation, threats of

litigation, and efforts to pursue litigation through in-state discovery are not sufficient grounds for specific personal jurisdiction, despite the inevitable impacts of that litigation on an in-state defendant. *See supra* at 4 n.2; 12-15; *see also, e.g.*, *Allred*, 117 F.3d at 280, 287 (no jurisdiction in Mississippi over Texas resident who served process and interrogatories on Mississippi resident); *Wallace*, 778 F.2d at 394-95 (due process protections would be "significantly undercut" if jurisdiction could be based on service of document requests, interrogatories, and depositions in out-of-state litigation); *see also* San Mateo Br. at 35 n.16 (citing additional cases holding that the Due Process Clause prohibits the exercise of personal jurisdiction over nonresident defendants based solely on lawsuits filed by those nonresidents in another state). Indeed, this Court has itself twice held that "contacts" between an out-of-state litigant and a Texas resident in furtherance of out-of-state litigation are not enough for specific personal jurisdiction. *See OZO Capital*, 2018 WL 1531444, at *10 (no jurisdiction over nonresidents based on their role in negotiating settlement with Texas-based plaintiffs); *Estate of Hood*, 2016 WL 6803186 at *6 (no jurisdiction over attorney who allegedly committed fraud and extortion by sending releases to Texas resident as part of probate proceedings).

In short, filing a lawsuit that may result in the discovery of documents located in another state is completely different for due process purposes from seeking adjudication of a dispute over real property that invokes the benefits or

protections of another state's laws. Contrary to Exxon's assertions, courts in Texas and throughout the country have consistently recognized this distinction. If the law were otherwise, every lawsuit against a party would give rise to specific personal jurisdiction in every state where that party operated or stored discoverable documents. Recognizing this, courts have repeatedly rejected personal jurisdiction based on discovery in out-of-state lawsuits in closely analogous abuse-of-process suits that Exxon has failed to distinguish.

D. Service of process is not purposeful availment.

Exxon's final argument is that the public entities' service of process on Exxon in the California litigation is a jurisdictional "contact," yet Exxon acknowledges that service of process by itself can never be a sufficient basis for personal jurisdiction under the Due Process Clause. Exxon Br. at 49 (citing *Allred*, 117 F.3d at 287). That must be right. If it were not, whenever an out-of-state plaintiff perfected a lawsuit against an in-state defendant by serving a summons, that defendant could respond (as Exxon tries to do here) with a retaliatory, stand-alone, home-state counter-suit seeking Rule 202 discovery (if that state is Texas) or pursuing what would otherwise be a mandatory counterclaim in the out-of-state lawsuit—all because the out-of-state plaintiff served its lawsuit on defendants, as

every state law and due process notice requires. *See, e.g.*, Fed. R. Civ. Proc. 4(m); Cal. Code of Civ. Proc. §583.250.[11]

Service of process—the one-time, ministerial act of initiating a lawsuit—is not purposeful availment. As Exxon recognizes, no court has ever based personal jurisdiction on service of process alone. *See* Exxon Br. at 48-49. That is because service of process does not create any relationship between the serving party and the *forum*, just between the serving party and the party served. *See Walden*, 571 U.S. at 285 ("the plaintiff cannot be the only link between the defendant and the forum").

Neither of the two cases cited by Exxon is to the contrary. In the federal district court case, *EFF*, 290 F.Supp.3d at 937, personal jurisdiction rested on the nonresident's conduct in obtaining an injunction requiring an in-state resident to engage in court-mandated actions in the state, and the court found that service of process had "little significance on [its] own" to the personal jurisdiction inquiry. *See also supra* at 20. In the unpublished Texas appellate case, *Smith v. Cattier*, No. 05-99-01643-CV, 2000 WL 893243 at *4 (Tex. App.—Dallas July 6, 2000, no

[11] The City and County of San Francisco and the City of Oakland did not even serve process on Exxon *in Texas*. Instead, they served process on Exxon *in California*. *See* Exxon Br. at 30-31. Thus, with respect to these two public entities and their counsel, this claimed "contact" is not just constitutionally irrelevant; it is nonexistent.

pet.), personal jurisdiction rested on the nonresident's travel *into Texas* to provide allegedly false and defamatory testimony to the FBI.

For all of these reasons, Exxon has failed to satisfy *either* of the first two requirements to establish specific personal jurisdiction, and the district court erred in ruling otherwise.

III. Exercise of jurisdiction over Appellants would offend fair play and substantial justice.

Exxon also fails to satisfy the third requirement because it cannot show that asserting personal jurisdiction over Appellants would comport with traditional notions of fair play and substantial justice. *See* SF Br. at 39-42; Oakland Br. at 46-54; San Mateo Br. at 35-39.

Again, all parties agree on the relevant factors, which require courts to consider: (1) the nature and extent of any burden on Appellants in defending against Exxon's threatened action in Texas state court; (2) the State of Texas's interests in adjudicating the dispute over Appellants' alleged abuse of process; (3) Exxon'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 states' shared interest in furthering fundamental substantive social policies. SF Br. at 40; Oakland Br. at 47; San Mateo Br. at 36; Exxon Br. at 52-53; *see Retamco*, 278 S.W.3d at 341; *Guardian Royal Exch.*

Assur., Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 232 (Tex. 1991). These factors weigh strongly *against* specific personal jurisdiction.

First, Appellants have demonstrated the substantial burdens that would be imposed on those public entities and their "apex" public officials if forced to respond to Exxon's Rule 202 Petition and threatened litigation in Texas. *See* SF Br. at 40; Oakland Br. at 47-50; San Mateo Br. at 36-37; *see also* 1 CR 1956, 1965, 1969-70, 1980-81, 1988-80, 1996-97; 5 CR 7079-80, 7138-39.[12]

Exxon downplays those burdens, contending that all nonresidents suffer some burden when required to appear in a foreign jurisdiction. But the mayors, county administrators, and city and county counsel named by Exxon in its Rule 202 petition are the California public entities' highest-ranking officials, and their public obligations in their home state are entitled to special deference and a substantially heightened showing of need. *See* Oakland Br. at 49-50 & n. 22, 23; 5 CR 7079-80.[13]

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[12] Exxon claims that the Appellants "did not identify any burden," Exxon Br. at 53, but that is not so. *See, e.g.*, 5 CR 7079, 7138-39.

[13] Exxon also argues that as long as the court can exercise personal jurisdiction against *any* of the Appellants, Exxon has the legal right to take Rule 202 discovery of *every* individual identified in its Petition as a potential witness (e.g., the public entities' top financial administrators), even if they are not potential defendants (although some are named as potential witnesses *and* as potential defendants). Exxon Br. at 16-17, 25. That cannot be. Only if the district court is found to have jurisdiction over the particular public entity employing a particular official would that official's testimony be relevant to the claims against any party. *See* Oakland

Second, Texas has little interest in adjudicating this dispute, which involves California public entities and officials and their efforts in California to protect California taxpayers and residents. Exxon argues that Texas has an interest in protecting its residents from torts, Exxon Br. at 54, but the case it cites confirms that "Texas's interest in protecting its citizens against torts" is *not* sufficient to support personal jurisdiction over a nonresident. *Moncrief Oil*, 414 S.W.3d at 152. Moreover, even if there were some legal and factual basis for Exxon's threatened abuse-of-process allegations, Texas has far less interest in adjudicating those allegations than California, in whose courts the allegedly abusive lawsuits were filed. *See Moncrief Oil*, 414 S.W.3d at 152 (courts must consider interests other than protecting in-forum plaintiffs from torts); *Michiana*, 168 S.W.3d at 790-91; *In re Doe*, 444 S.W.3d at 611.

Third, Exxon's interest in obtaining convenient and effective relief does not favor Texas either. Exxon has not shown any inability to obtain relief in California *if* it has a valid claim. It is already litigating the underlying lawsuits in California, whose courts are already familiar with the issues and therefore best positioned to adjudicate any abuse-of-process claim, if and when it ripens.

Br. at 68-71; San Mateo Br. at 16-17. As the Texas Supreme Court has explained, Rule 202 was never intended to "make Texas the world's inspector general." *In re Doe*, 444 S.W.3d at 611.

Finally, for the same reason, the interests of the interstate judicial system are best furthered by consolidating all related lawsuits in one forum. There is no reason why Exxon could not pursue its abuse-of-process, First Amendment, and civil conspiracy claims in California (if there were any basis for those claims). If Appellants' conduct in California were actually tortious—which it was not—the California courts would be best positioned to efficiently adjudicate the parties' disputes. Conversely, the interstate judicial system has a strong interest in *not* allowing defendants who are already litigating in one state to use countersuits in their home state to intimidate or harass their opponents, or to create a situation where courts in two states issue conflicting judgments concerning the same issues.

For all these reasons, considerations of fair play and substantial justice under the Due Process Clause independently require reversal of the district court's ruling.

IV. The Texas long-arm statute does not reach Appellants, who are not "nonresidents" within the meaning of the statute.

Appellants demonstrated in their opening briefs that the plain language of the Texas long-arm statute does not encompass out-of-state public entities and officials acting in their public capacities. Thus, even if Exxon were correct about the scope of the Due Process Clause, the Texas courts would still not have *statutory* authority to assert specific personal jurisdiction over Appellants.

Exxon offers no response to the plain statutory language. While it cites a handful of cases in which Texas courts asserted personal jurisdiction over out-of-

state public entities and officials, Exxon Br. at 59-60, none of those cases addressed the application of Texas's long-arm statute to public entities and the cases therefore have no precedential or persuasive value.[14]

Exxon makes the point that the analysis in *Stroman Realty*, 513 F.3d at 483, which laid out the textual argument in precise detail, was dicta and not controlling. Exxon Br. at 62. Appellants agree, but that dicta was well-reasoned, carefully analyzed, and persuasive. Indeed, the Fifth Circuit's plain-language reading of Tex. Civ. Prac. & Rem. Code §17.041 and §17.042 is the only possible reading of the statutory text. SF Br. at 49-50; Oakland Br. at 54-56; San Mateo Br. at 39-40. As the Court of Appeals explained, "it is only by twisting the ordinary meaning of the terms covered by the long-arm statute is [the non-Texas state's] regulatory activity intended to be encompassed and adjudicated in Texas courts." *Stroman Realty*, 513 F.3d at 483; *see also Berry College v. Rhoda*, No. 4:13-CV-0115-HLM, 2013 WL 12109374 at *5 (N.D. Ga. June 12, 2013) (following *Stroman*

[14] In two of the cases (one of which is unpublished and for that additional reason has no precedential value, *see* Tex. R. App. P. 47.7(b)), there was no discussion of the meaning of the term "nonresident" in Tex. Civ. Rem. & Prac. Code §17.041 at all. *See Infanti v. Castle*, No. 05-92-00061-CV, 1993 WL 493673 (Tex. App.—Dallas Oct. 28, 1993, no pet.); *Bd. of Cnty. Comm'rs of Cnty. of Beaver Okl. v. Amarillo Hosp. Dist.*, 835 S.W.2d 115 (Tex. App.—Amarillo 1992, no pet.). The third case did not involve a city or county government *or* Section 17.041. Rather, it simply held that a "body corporate organized and existing under" New York law was covered by an earlier, long-since repealed version of Texas's long-arm statute, Art. 2031b, Rev. Civil Stat. of Texas. *21 Turtle Creek Square, Ltd. v. N.Y. State Teachers' Ret. Sys.*, 425 F.2d 1366, 1367, 1368 (5th Cir. 1970).

Realty, and holding that defendants sued in their official capacities are not "nonresidents" within the meaning of Georgia's long-arm statute).

Exxon entirely ignores the statutory text. It offers no contrary construction that would be consistent with the language used by the Texas Legislature. Given the many reasons that could explain *why* the Texas Legislature drew the line where it did (for example, in recognition of the enormous burden on the governmental operations of public entities and their governors, mayors and other high-ranking officials), the Court should accept the statutory text as accurately stating the Legislature's intent, and for this independent reason conclude that the district court committed reversible error.

V. The trial court's "Findings of Fact" do not require a different result.

Appellants have explained at length why the district court's "Findings of Fact" do not support the exercise of jurisdiction. *See* SF Br. at 28-37; Oakland Br. at 36-38, 57-63; San Mateo Br. at 16 n.10, 31-32 & n.14. The vast majority of those findings (to which Appellants timely objected, notwithstanding Exxon's argument to the contrary, *see* SF Br. at 7; San Mateo Br. at 16 n.10; Oakland Br. at 57-68; *see also* 5 CR 7121 n.2, 7254-91; 4 SCR 4-60, 68-157) are legally irrelevant, because they pertain to the ultimate merits of Exxon's Rule 202 Petition/threatened lawsuit, not to any threshold issue of personal jurisdiction.

Even aside from the district court's error in deciding ultimate merits questions at this threshold jurisdictional stage—i.e., whether there was a conspiracy, and if so what was its purpose and who were the participants—the court never cited any evidence of an actual conspiracy (because there was none), so its findings also fail for lack of supporting evidence. *See* SF Br. at 28-31; Oakland Br. at 57-60; San Mateo Br. at 32 n.14. Besides, it is well established that "[t]he mere existence or allegation of a conspiracy directed at Texas is not sufficient to confer jurisdiction." *Old Republic*, 2018 WL 2449360, at *4 (citing *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995)); *Michiana*, 168 S.W.3d at 789.

The district court's remaining "findings"—for example, that the California lawsuits "expressly target speech and associational activities in Texas" and were "directed at Texas-based speech, activities, and property," FOF ¶¶28-30, 41—are either mislabeled conclusions of law (which must be reviewed de novo), or not supported by legally and factually sufficient evidence. 3 SCR 121-33, 125; *see BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *George v. Deardorff*, 360 S.W.3d 683, 686-87 (Tex. App.—Fort Worth 2012, no pet.).

Those findings must also be rejected, as explained in Oakland Br. at 19-21, 63-68 and SF Br. at 5-6, because of the preclusive effect of the New York federal

district court's ruling in *Exxon Mobil Corp. v. Schneiderman*, 316 F.Supp.3d 679 (S.D.N.Y. 2018), which was a final judgment on the merits. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under FRCP 12(b)(6) is a 'judgment on the merits.'"). That New York judgment was based on the federal court's review of the same documents about meetings in California and New York that the district court considered here; and the federal court unambiguously rejected the proposition that those documents established any improper motive by the participants in those meetings—a key finding, because here the district court ruled that the allegedly wrongful motives of one participant in those meetings should be attributed to all Appellants. *See infra* at 38.

In response, Exxon mainly argues an issue of timing. It states that Judge Wallace actually ruled first, because he summarily denied Appellants' Special Appearances before the federal court issued its order of dismissal. Exxon Br. at 79-80. That argument misses the point, which is that for purposes of collateral estoppel, an order must be final and "supported…with a reasoned opinion." *Mower v. Boyer*, 811 S.W.2d 560, 562 (Tex. 1991). Judge Wallace's initial order did not contain any statement of reasoning, and it did not include any of the

Findings of Fact or Conclusions of Law now at issue.[15] Under Texas law, jurisdictional findings are not treated as fully litigated or final merits determinations. *See* Tex. R. Civ. P. 120a ¶2.

Thus, although Exxon is correct as a general matter that a district court may support a previously issued order with subsequently issued findings and conclusions, Exxon Br. at 80, once the New York federal court issued a binding final judgment in the *Exxon* case, res judicata precluded the district court in this case from making any findings or conclusions that contradicted that judgment.

Aside from the district court's legally inadequate conclusions-as-findings, nothing remains that could support specific personal jurisdiction, even if those findings were supported by the evidence and not precluded by *Schneiderman*.

The district court made findings about public statements made by one California mayor and two city attorneys to the effect that the California defendants and others knew about the consequences of global warming but withheld that information from the general public. *See* 3 SCR 122-23 (FOF ¶¶32-34). But those

[15] *See also Midwest Mechanical Contractors, Inc. v. Commonwealth Const. Co.*, 801 F.2d 748, 751-52 (5th Cir. 1986) (order that "did not indicate its basis" did not "actually reach[] and decide[]" issue for issue preclusion purposes); *Restatement (Second) of Judgments* §13 cmt. g ("tentative" orders and non-final orders without "reasoned opinion" are not preclusive). The case Exxon relies on is not on point. *See Cycles, Ltd. v. Navistar Fin.*, 37 F.3d 1088 (5th Cir. 1994) (detailed final judgment that was merely subject to motions to amend was sufficiently final for res judicata purposes).

statements were not directed at *Texas* or at any particular defendant. Moreover, even if those statements had specifically singled out or identified Exxon, they were made *in California* and were not specifically directed or disseminated to any particular audience, either in Texas or elsewhere.

The court also made a series of findings pertaining to an outside attorney for San Francisco and Oakland based on statements made by third parties at meetings in California and New York that the attorney either attended or for which he received a draft agenda. The district court used those third-party statements to attribute wrongful intent to that outside attorney and, by inference, to every other Appellant. Yet that attorney has never represented any of the public entities or officials in five of the seven California lawsuits brought against Exxon. Besides, intent is not relevant for the reasons stated above. And in any event, each of the California public entities made all material litigation decisions themselves, consistent with the requirements of California law. *See Santa Clara v. Superior Court*, 50 Cal.4th 35, 61-62 (2010).[16]

[16] Exxon insists that the district court "clearly and accurately attribut[ed]" those statements to third parties, not the outside attorney, but that all Appellants should still be held responsible for those statements. Exxon Br. at 69. There is no basis for that contention. Although ambiguous language in the district court's Findings of Fact might suggest that the outside attorney joined or concurred in the statements made by third parties at the California meeting (*e.g.*, "attendees also concluded," "participants concluded") or that the outside attorney was an organizer of the New York meeting (*e.g.*, the attorney "engaged participants" at the meeting, or "[the attorney] and the other participants aimed" to follow the draft agenda), *see*

The trial court also made 16 factual findings about Attorneys General from other states who are neither potential defendants nor witnesses in the Rule 202 Petition. These findings are completely irrelevant to the *Appellants'* contacts within Texas.

For these reasons, nothing in the district court's findings or conclusions supports its denial of the Appellants' Special Appearances.

PRAYER FOR RELIEF

For the reasons stated above and in Appellants' opening briefs, this Court should reverse the decision of the district court, grant all Appellants' Special Appearances, and dismiss Exxon's Rule 202 Petition with prejudice for lack of personal jurisdiction. Appellants pray that this Court grant the relief requested herein and for such additional relief as the Court deems proper.

Dated: December 17, 2018

Respectfully submitted,

By: */s/ Robert M. Manley*

Robert M. Manley
rmanley@mckoolsmith.com
Richard Kamprath
rkamprath@mckoolsmith.com

By: */s/ Pete Marketos*

Pete Marketos
pete.marketos@rm-firm.com
Tyler Bexley
tyler.bexley@rm-firm.com

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3 SCR 117 116, 126 (¶¶ 7-8, 10, 11, 49), there is no evidence that the outside attorney—let alone any Appellant (none of whom were present)—made any of those statements or played any role in organizing that meeting. Nor is there any evidence that the outside attorney (or any other Appellant) "brainstormed" the draft agenda for the New York meeting, *see* Exxon Br. at 32, only that he received a copy of it.

Benjamin G. Murray
bmurray@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
Tel: (214) 978-4000

Attorneys for Appellants City and County of San Francisco, Dennis J. Herrera, Edward Reiskin, City of Oakland, Barbara J. Parker, Sabrina B. Landreth and Matthew F. Pawa

Steven K. Hayes
shayes@stevenhayeslaw.com
LAW OFFICES OF STEVEN K. HAYES
500 Main Street, Suite 340
Fort Worth, TX 76102
Tel: (817) 371-8759

Attorneys for Matthew F. Pawa

REESE MARKETOS LLP
750 N. Saint Paul Street, Suite 600
Dallas, TX 75201
Tel: (214) 382-9810

Attorneys for the County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, Anthony Condotti, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martin Bernal

Marc R. Stanley
marcstanley@mac.com
Martin Woodward
mwoodward@stanleylawgroup.com
Scott Kitner
skitner@stanleylawgroup.com
STANLEY LAW GROUP
6116 N. Central Expressway, Suite 1500
Dallas, TX 75206
Tel: (214) 443-4301

Attorneys for Matthew F. Pawa

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018, a true and correct copy of the foregoing document was served on all counsel of record by electronic mail or by another manner authorized by Tex. R. App. P. 9.5(b).

/s/ Richard A. Kamprath
Richard A. Kamprath

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(C) because it contains 9,524 words on pages 1-39, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1), as authorized by this Court's order on December 12, 2018. This brief complies with the typeface and type style requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a monospaced typeface using Times New Roman 14 point font in text and Times New Roman 14 point font in footnotes.

/s/ Richard A. Kamprath
Richard A. Kamprath