**0No. 20-0558**

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**IN THE**
# Supreme Court of Texas

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EXXON MOBIL CORPORATION,
*PETITIONER*,

V.

CITY OF SAN FRANCISCO, ET AL.,
*RESPONDENTS*.

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## GOVERNMENTAL RESPONDENTS' BRIEF ON THE MERITS

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**From the Court of Appeals for the Second District Sitting in Fort Worth, Texas, No. 02-18-00106-CV**

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## ABBREVIATIONS

**Parties:**

"Exxon" refers to Petitioner Exxon Mobil Corporation.

"Respondents" refers to Respondents, the political subdivisions of the City and County of San Francisco, the City of Oakland, the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz; and the individuals the County of Santa Cruz, and Barbara J. Parker, Dennis J. Herrera, John C. Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, Anthony P. Condotti, and Matthew F. Pawa.

**Record Citations:**

"CR[#]" refers to the Clerk's Record and the cited pages thereof.

"FOF/COL [#]" refers to the Findings of Fact and Conclusions of Law reached in this case by the 96th Judicial District Court, Tarrant County, and the cited paragraphs thereof.

"Opinion at *[#]" refers to the Second District Court of Appeals' opinion in this case, *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558 (Tex. App.—Fort Worth June 18, 2020) (mem. op.), and the cited pages thereof based on the pagination used in the Westlaw digital database.

"Pet. Br. [#]" refers to the Petitioner's Brief on the Merits and the cited pages thereof.

## STATEMENT OF THE CASE

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| ***Nature of the Case:*** | This case concerns whether, consistent with the Due Process Clause of the Fourteenth Amendment, a Texas state court may exercise specific personal jurisdiction over Respondents—23 California public entities and officials and one individual who is separately represented and is submitting a separate opposition brief—that Exxon identified in a Tex. R. Civ. P. 202 petition as potential defendants and/or witnesses in a future lawsuit. |
| ***Trial Court:*** | The case was heard in the 96th Judicial District Court, Tarrant County, Texas by the Honorable R.H. Wallace, Jr. |
| ***Trial Court's Disposition:*** | The trial court summarily denied Respondents' special appearances and, over Respondents' written objections, entered Exxon's proposed findings of fact and conclusions of law. |
| ***Court of Appeals:*** | Second District Court of Appeals. *See City of San Francisco v. Exxon Mobil Corp*., No. 02-18-00106-CV, 2020 WL 3969558 (Tex. App.—Fort Worth June 18, 2020) (mem. op.). |
| ***Disposition:*** | The court of appeals reversed in a memorandum opinion written by Justice Elizabeth Kerr and joined by Chief Justice Bonnie Sudderth and Justice Wade Birdwell. The court of appeals held that under binding United States Supreme Court and Texas Supreme Court precedent, Exxon had failed to show that Respondents had sufficient contacts with the State of Texas to be subject to personal jurisdiction in Texas state court. Chief Justice Sudderth separately concurred. |

## STATEMENT OF JURISDICTION

Exxon's petition does not present any question of law important to the jurisprudence of the State. *See* Texas Gov't Code § 22.001. The federal due process issues raised by Exxon's Rule 202 Petition are governed by well-settled precedent from the United States Supreme Court and from this Court, which the court of appeals properly applied.

## ISSUE PRESENTED

Whether the due process guarantee of the United States Constitution permits a Texas court to exercise specific personal jurisdiction over California public entities and officials based solely upon a Texas-headquartered company's contention that lawsuits filed by the public entities against the company in California state court, seeking California-specific remedies for violations of California law, were wrongfully intended to "chill" the company's future speech in Texas.

## INTRODUCTION

The court of appeals correctly concluded that Respondents, as the potential defendants named in Exxon's Rule 202 petition, "lack the requisite minimum contacts to be subject to personal jurisdiction" in Texas because their "out-of-state actions were directed at Exxon, not Texas." *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558 at *1, *16 (Tex. App.—Fort Worth June 18, 2020) (mem. op.). This conclusion was unquestionably correct and was compelled by more than a dozen United States Supreme Court and Texas Supreme Court personal-jurisdiction decisions.

The only "contacts" that Exxon claims Respondents had with the State of Texas are the lawsuits that the seven California public entity Respondents filed against Exxon and others in California state court. All seven complaints plead representative claims on behalf of the People of the State of California to abate a public nuisance, and five include claims for harms suffered by the public entities themselves. Those lawsuits seek exclusively economic relief against Exxon and other companies under California state law, for harms to public infrastructure in California caused by those companies' deceptive speech and wrongful conduct.

Exxon alleged in its Rule 202 Petition that it needed to take discovery to determine whether Respondents filed those seven California enforcement actions with the wrongful "intent" of chilling Exxon's future speech about climate change

and other issues, including speech Exxon might make from its headquarters in Texas. CR6, 51. Exxon insists that "Texas courts are authorized under existing law to assert [personal] jurisdiction" because Respondents secretly harbored such allegedly wrongful intent. *See* Pet. Br. at xviii (emphasis in original). That is plainly incorrect. No court has ever based personal jurisdiction on a nonresident's mere "intent" to cause future harms to a forum-state party; and this Court, like the United States Supreme Court, has repeatedly and "explicitly rejected an approach to specific jurisdiction that turns upon where a defendant 'directed a tort' rather than on the defendant's contacts" with the forum state. *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 565 (Tex. 2018) (quoting *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 790–92 (Tex. 2005)); *see also* Opinion at *15, *17 (citing cases).

Far from conforming to "existing law," Exxon's radical new theory of indirect, intent-based personal jurisdiction would effect a revolutionary transformation of due-process principles, requiring this Court to jettison more than a century of "minimum contacts" jurisprudence. *See, e.g.*, *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (cited in *International Shoe v. Washington*, 326 U.S. 310, 316 (1945)).

Exxon's remarkable theory has no logical limits. It would allow any defendant to obtain personal jurisdiction in its home state over any nonresident plaintiff,

without having to show any "purposeful availment" by that plaintiff of the benefits or privileges of conducting activities in that state. All that would be required, according to Exxon, is an allegation that the nonresident filed its lawsuit with an unstated, ulterior motive of influencing the defendant's future speech about lawsuit-related issues in the forum state. *See* Pet. Br. at 25–26 (contending that the California lawsuits might affect how Exxon expresses itself in the future). Even more stunning, personal jurisdiction would be available under Exxon's theory even where, as here, (1) the nonresidents' out-of-state lawsuits do not seek injunctive relief or any remedy that would expressly limit the forum-state party's speech, and (2) those lawsuits have not, in fact, influenced that speech, in the forum state or anywhere else.

The due-process ramifications of Exxon's theory are staggering. To obtain personal jurisdiction, a party like Exxon would no longer have to demonstrate actual minimum contacts with its home state. Instead, it could simply allege that a nonresident plaintiff sued it with the secret intent of influencing its future in-state speech about a lawsuit-related issue.

Exxon's new theory, while presented as a one-way street, would actually operate like a two-way superhighway. If Exxon were right, any *Texas* residents, including state and local government entities and law-enforcement officials, could be haled into distant state courts every time they initiate a civil action or enforcement proceeding in Texas against a defendant that resides or does business out of state,

based on nothing more than a speculative assertion that the underlying, unstated "intent" of that civil action or enforcement proceeding was to influence a defendant's future comments about issues related to the litigation. Allowing personal jurisdiction under these circumstances would gut the long-established protections of the Due Process Clause.

The California public entities' state-court lawsuits seek equitable abatement, and in some cases damages, alleging that Exxon and its co-defendants engaged in a decades-long pattern of deliberate misrepresentations about the effects of fossil fuel combustion on global warming. In addition to Exxon, a New Jersey corporation headquartered in Texas, those lawsuits name between 4 and 37 other defendants, the majority of which are headquartered outside of Texas and all of which conduct business throughout the United States and abroad. Most of those same companies have also been named as defendants in at least 17 other pending lawsuits filed by state attorneys general in Connecticut, Delaware, Massachusetts, Minnesota, Rhode Island, Vermont, and Washington D.C., and by seven cities and counties in five other states, based on the same or similar allegations. *See* Pet. Br. at 16–17 n.4; *infra* at 14 n.2. If Exxon's theory were accepted, each of those other, *non*-California public entities and officials would be subject to personal jurisdiction in Texas as well, just as every *Texas* public entity and official would be subject to personal jurisdiction in California and other distant states whenever they pursue enforcement actions in

Texas against any California or other out-of-state resident. Exxon's theory has no logical stopping point.

Toward the end of its brief, Exxon tries to salvage its theory of near limitless personal jurisdiction by arguing that its theory could be restricted to out-of-state defendants who sue companies in industries that are "vital" to their home state economies. Pet. Br. at 35–36. But as Respondents explained in their Opposition to Petitioner's Petition for Review at 16–20, nothing in Due Process Clause jurisprudence supports that amorphous exception, which would be all but impossible to define or apply. True, the oil and gas industry is an important contributor to the Texas economy and to the economies of many other states, but so are many other industries. The fact that a defendant contends that it operates in a "vital" industry or is one of several defendants that operates in such an industry cannot create personal jurisdiction that otherwise does not exist.

The Court of Appeals, citing an unbroken line of constitutional authority, concluded that Respondents' "knowledge that Exxon will feel the effects [of the California lawsuits] in Texas does *not* suffice" to create personal jurisdiction under the Fourteenth Amendment. Opinion at *17 (emphasis added); *see also id.* at *20 ("Our reading of the law simply does not permit us to agree with Exxon's contention that the Potential Defendants have the purposeful contacts with our state needed to satisfy the minimum-contacts standard that binds us."). That opinion correctly

applied long settled due process precedents, and Exxon has not presented any compelling reasons why review should be granted or why a different conclusion should be reached.

## STATEMENT OF FACTS

### A. Factual Background

In 2017, seven California public entities filed separate civil enforcement lawsuits in California state court against Exxon and three dozen other fossil fuel companies, many of which Exxon concedes are neither incorporated nor headquartered in Texas. CR2250–51, 2360–61, 2472–73 2584, 2630, 2681–82, 2817–18; Pet. Br. at 11.[1] The lawsuits allege that over the past half century, those companies engaged in misleading and deceptive nationwide advertising and public relations campaigns to falsely promote their products as safe and environmentally responsible, while deliberately concealing their knowledge of the causes, harms, and

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[1] *See City and County of San Francisco v. B.P. p.l.c.*, 17-cv-06012-WHA (N.D. Cal.); *City of Oakland v. BP p.l.c.*, 17-cv-06011-WHA (N.D. Cal.); *County of San Mateo v. Chevron Corp.*, 3:17-cv-0492-VC (N.D. Cal.); *City of Imperial Beach v. Chevron Corp.*, 3:17-cv-04934-VC (N.D. Cal.); *County of Marin v. Chevron Corp.*, 3:17-cv-04935-VC (N.D. Cal.); *City of Santa Cruz v. Chevron Corp*., Civ. No. 17-3243 (Cal. Super. Ct. Dec. 20, 2017); *County of Santa Cruz v. Chevron Corp.*, Civ. No. 17-3242 (Cal. Super. Ct. Dec. 20, 2017). The Oakland and San Francisco cases are brought against Exxon and four other companies, only one of which is headquartered in Texas; the other cases name Exxon and three dozen other companies, 20 of which are headquartered out of state. CR2258–73, 2368–83, 2480–94, 2590–93, 2637–40, 2691–2702, 2826–38. Exxon itself is incorporated in New Jersey. CR15.

risks of climate change. CR2287–2316, 2397–2427, 2508–45, 2601–13, 2649–62, 2727–59, 2864–95. The lawsuits plead exclusively California state-law claims, *see* CR2252–53, 2361–62, 2473–74, 2617–18, 2668–69, 2684, 2820, and seek only to remediate local harms to the California public entities' infrastructure caused by defendants' wrongful and deceptive conduct, *see* CR2324–47, 2435–60, 2546–71, 2613–18, 2662–69, 2767–2806, 2903–38. The only relief requested in the California cases is equitable abatement (Oakland and San Francisco) or equitable abatement plus damages (the other public entities). CR2348, 2461, 2572, 2619, 2670, 2807, 2939. None of the lawsuits seek injunctive relief. *Id.*

At least 17 other cases are currently pending in state and federal courts across the country, brought by other cities, counties, and states, that present similar allegations and seek similar relief from Exxon and other fossil fuel companies—most of which are headquartered outside Texas and operate throughout the world.[2]

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[2] *See Vermont v. Exxon Mobil Co.*, No. 21-CV-2778 (Vt. Sup. Ct. Sept. 14, 2021); *Anne Arundel County v. BP P.L.C.*, Civ. No. 21-565 (Md. Cir. Ct. Apr. 26, 2021); *City of New York v. Exxon Mobil Corp*., No. 451071/2021 (N.Y. Sup. Ct. Apr. 22, 2021); *City of Annapolis v. BP P.L.C.*, Civ. No. 21-250 (Md. Cir. Ct. Feb. 22, 2021); *County of Maui v. Sunoco LP*, Civ. No. 20-283 (Haw. Cir. Ct. Oct. 12, 2020); *Connecticut v. Exxon Mobil Corp*., Civ. No. 20-6132568 (Conn. Super. Ct. Sept. 14, 2020); *Delaware v. BP America Inc.*, Civ. No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020); *City of Charleston v. Brabham Oil Co*., Civ. No. 2020-CP-10-3975 (S.C. Com. Pl. Sept. 9, 2020); *City of Hoboken v. Exxon Mobil Corp*., Civ. No. 20-3179 (N.J. Super. Ct. Sept. 2, 2020*); District of Columbia v. Exxon Mobil Corp*., Civ. No.

Exxon contends that, despite the plain language and limited scope of Respondents' complaints, Respondents secretly intended that a collateral effect of their lawsuits in California would be to influence Exxon's future speech about climate change or other public policy issues. CR6-11, 2013-15.

In January 2018, Exxon filed a Rule 202 petition in Tarrant County District Court seeking pre-suit discovery against Respondents "to investigate potential claims of abuse of process, civil conspiracy, and constitutional violations" allegedly committed in filing and prosecuting the California lawsuits. CR11. The petition named as potential defendants the seven California public entities who brought the lawsuits, as well as eight of their municipal officials, including City Attorneys, County Counsel, and one Mayor. CR63. Matthew F. Pawa, a former outside co-counsel in two of the lawsuits (who is separately represented in these proceedings), is also named as a potential defendant. *Id.* Exxon's petition sought pre-suit discovery, including from the public entities' highest-level administrators. CR15–

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20-2892 (D.C. Sup. Ct. June 25, 2020); *Minnesota v. Am. Petroleum Inst*., Civ. No. 20-3837 (Minn. Dist. Ct. June 24, 2020); *City & County of Honolulu v. Sunoco LP*, Civ. No. 20-380 (Haw. Cir. Ct. Mar. 9, 2020); *Massachusetts v. ExxonMobil Corp*., Civ. No. 19-3333 (Mass. Super. Ct. Oct. 24, 2019); *Mayor & City Council of Baltimore v. BP p.l.c.*, Civ. No. 18-4219 (Md. Cir. Ct. July 20, 2018); *Rhode Island v. Chevron Corp*., Civ. No. 18-4716 (R.I. Super. Ct. July 2, 2018); *Bd. of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.), Inc*., Civ. No. 18-30349 (Colo. Dist. Ct. Apr. 17, 2018); *City of Richmond v. Chevron Corp*., Civ. No. 18-55 (Cal. Super. Ct. Jan. 22, 2018).

17. Although Exxon could have asserted its potential claims as compulsory counterclaims in the California actions, CR1877, it chose instead to burden the Texas court system with its pre-litigation discovery demands.

Under Rule 202, a prospective plaintiff like Exxon may only obtain pre-filing discovery from potential nonresident defendants if it can first establish personal jurisdiction over each of them. *In re Doe*, 444 S.W.3d 603, 608–09 (Tex. 2014) (orig. proceeding); Opinion at *10. Exxon does not dispute that *none* of the Respondents:

- conducts business in Texas;
- employs persons who reside in or regularly travel to Texas;
- has bank accounts in Texas;
- maintains any offices or registered agents in Texas;
- owns, rents, or leases any real or personal property in Texas; or
- has entered into any contracts in Texas having any connection with the public entities' California state court lawsuits.

CR1823–25, 1831–33, 1839–41, 1861–63, 1912–14, 1955–95, 7115–17, 7172–73.

**B. Procedural Background**

Respondents timely contested whether the trial court's exercise of personal jurisdiction would violate the due process guarantee of the United States Constitution. The trial court, however, summarily rejected Respondents' jurisdictional challenge. CR7210. Exxon then submitted proposed findings of fact

and conclusions of law, to which Respondents objected. CR7211–23, 7253–92. The trial court adopted Exxon's proposed findings and conclusions almost verbatim, rejecting Respondents' objections. *See* 3SCR113–28 (FOF/COL).

The court of appeals reversed the trial court's ruling, emphasizing that the United States Supreme Court and this Court have repeatedly rejected the effects-on-a-plaintiff test for establishing personal jurisdiction and that minimum contacts analysis demands proof that the nonresident parties purposefully availed themselves of the benefits and privileges of *the state* and its laws. *See, e.g.*, Opinion at *16. The Court correctly explained that "mere injury to a forum resident is an insufficient connection to the forum," *id.* at *17 (citing *Walden v. Fiore*, 571 U.S. 277, 290 (2014)), just as "'[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.'" *Id.* (quoting *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 68–69 (Tex. 2016)); *see also id.* at *10–*12, *14–*19.

Focusing on Respondents' only alleged contact with Texas—the California lawsuits—the court of appeals concluded that "th[o]se out-of-state actions were directed at Exxon, not Texas," and that "[w]ithout more, . . . [Respondents'] "knowledge that Exxon will feel the effects [of the California lawsuits] in Texas does not suffice." *Id.* at *16–*17. The Court further held that "the trial court's findings regarding the Potential Defendants' intent in filing the California lawsuits

are irrelevant to [the] personal-jurisdiction analysis," because the Texas Supreme Court has "expressly disapproved of the notion that 'specific jurisdiction turns on whether a defendant's contacts were tortious [i.e., because they rested on a wrongful, malicious intent] rather than [turning on] the contacts themselves.'" *Id.* at *14 (quoting inter alia *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 792 (2005)). As a result, the Court found it unnecessary to reach Respondents' objections to the sufficiency of the evidence presented to establish the public entities' purported wrongful "intent." *Id*. at *15, *17.

Although the court of appeals acknowledged in dicta that it disapproved of the California lawsuits as a matter of policy, it recognized that political preferences had no bearing on its obligation "to follow settled legal principles [of personal jurisdiction] set out by higher courts." *Id.* at *20. Bound by those precedents, the Court concluded that Respondents simply did not "have the purposeful contacts with our state needed to satisfy the minimum-contacts standard that binds us." *Id*. at *16, *20.

In a separate concurrence agreeing with the analysis and result (because "our job is . . . to apply the law"), Chief Justice Sudderth "urge[d]" this Court "to reconsider the minimum-contacts standard," but did not identify which specific aspect of the federal constitutional standard warranted reconsideration or under what

authority this Court would be empowered to rewrite controlling United States Supreme Court precedent. *See id*. at *20 (Sudderth, C.J., concurring).

## SUMMARY OF ARGUMENT

The court of appeals correctly held that the Texas court's exercise of specific personal jurisdiction would deprive Respondents of core protections guaranteed by the Fourteenth Amendment. The only basis for personal jurisdiction asserted by Exxon was each public entity Respondent's filing of a California state court lawsuit seeking economic relief from harm to California property. Whether or not those lawsuits established minimum contacts between Respondents and *Exxon*, they did not establish the minimum contacts *with the State of Texas* required by the Due Process Clause. "[M]inimum contacts analysis looks to the defendant's contacts *with the forum State itself*, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 285 (2014) (emphasis added). The court of appeals was therefore correct in holding that Exxon's allegations failed to establish that any Respondent purposefully availed itself of the privilege of conducting activities in Texas or invoked the benefits and protections of its laws, as the Due Process Clause requires. Opinion at *10, *20.

Exxon's "direct-a-tort" theory of personal jurisdiction has been repeatedly repudiated by this Court and the United States Supreme Court. *See* Opinion at *15–*17. Exxon nonetheless contends that the Due Process Clause permits personal

jurisdiction here because Respondents "intended" their California lawsuits to discourage Exxon from speaking to Texas residents about climate change and other public policy issues. But just as personal jurisdiction cannot rest upon the "effects" of out-of-state conduct on a forum-state actor, neither can it rest upon an "intent" to cause those effects, let alone upon a secret, unstated intent that never in fact caused any such effects. The allegations in Respondents' California lawsuits narrowly focus on those defendants' *previous* misconduct and *previous* factual misrepresentations, and their ongoing impacts on local infrastructure. They do not seek to enjoin any ongoing or future conduct. Any potential impact on Exxon's future speech would therefore be indirect at best; and Exxon *concedes* that over the past four years since Respondents' lawsuits were filed, none of those lawsuits have had *any* actual impact on Exxon's free speech rights in Texas or elsewhere, or any other actual forum-state effects.

Ultimately, neither Respondents' alleged intent nor the possibility of hypothetical, second-order effects on Exxon's activities in Texas are constitutionally sufficient to confer personal jurisdiction over Respondents. Any other conclusion would allow every defendant in every lawsuit to bring a countersuit in another jurisdiction where it does business, and to obtain personal jurisdiction over its out-of-state adversaries simply by alleging that those nonresidents had a secret intent to chill the defendant's future home state speech.

Exxon's exaggerated portrayal of the California lawsuits as an assault on the entire Texas energy industry, on statewide freedom of speech, and on Texas sovereignty is also insufficient to establish minimum contacts with the State of Texas. Lawsuits filed by California cities and counties against Exxon, a few other Texas-based companies, and a larger number of non-Texas-based companies are not lawsuits brought against the Texas energy industry or the State of Texas itself. Respondents' lawsuits do not seek to regulate fossil fuel production, to dictate changes in Texas law or policy, or to impose restrictions on anyone's speech; and Exxon has not and cannot present evidence that any of those occurrences have happened or will happen as a result of the California litigation.

Finally, Exxon's assertion that Texas courts may exercise personal jurisdiction over any public or private litigant that pursues legal relief against a Texas-headquartered company that operates in an industry it claims to be "vital" to the Texas economy, ignores fundamental due process principles and would significantly interfere with comity among the several states.

## ARGUMENT

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017, 1024 (2021). Before a state court may exercise

specific personal jurisdiction, the plaintiff (here, Exxon) must make three independent showings. *See id.*

First, it must show "'minimum contacts' between the nonresident defendant and the forum State," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (quoting *International Shoe*, 326 U.S. at 316), based on evidence that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013); *Searcy*, 496 S.W.3d at 67. Second, the plaintiff must establish that its claims "arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S.Ct. 1773, 1780 (2017). Third, it must demonstrate that the court's exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice." *Ford Motor Co.*, 141 S.Ct. at 1024; *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 559 (Tex. 2018). Exxon's petition fails all three elements—although the court of appeals only needed to reach the first, because Exxon failed to establish "purposeful availment."

## I. Respondents did not "purposefully avail themselves" of the privileges and benefits of conducting activities within the State of Texas.

To satisfy the "purposeful availment" requirement, Exxon had to demonstrate that Respondents' contacts with the State of Texas were "purposeful" and "substantial," rather than "random, fortuitous, isolated, or attenuated." *Searcy*, 496

S.W.3d at 67; *Ford Motor Co.*, 141 S.Ct. at 1024–25; *Walden v. Fiore*, 571 U.S. 277, 284, 286 (2014). Those contacts had to be with the forum itself, not just a resident of the forum. *Walden*, 517 U.S. at 285 ("'[M]inimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."); *Searcy*, 496 S.W.3d at 67; *TV Azteca v. Ruiz*, 490 S.W.3d 29, 41–42 (Tex. 2016) ("[T]he important factor [is] the extent of the defendant's activities, not merely the residence of the victim.").

Showing that a nonresident's out-of-state conduct may affect a forum-state resident "is not an alternative to traditional 'minimum contacts' analysis and does not displace the factors [courts] look to in determining whether a defendant purposefully availed itself of the state.'" *Old Republic*, 549 S.W.3d at 564–65; *see Walden*, 571 U.S. at 285. Moreover, the nonresident's contacts with the forum must be sufficiently extensive to demonstrate its objective intent to secure the "benefits and protections" of the forum's laws. *Moncrief Oil*, 414 S.W.3d at 150; *TV Azteca*, 490 S.W.3d at 43. "The nub of the purposeful availment analysis is whether a nonresident defendant's conduct in and connection with Texas are such that it could reasonably anticipate being haled into court here." *Searcy*, 496 S.W.3d at 67.

The court of appeals correctly held that Exxon did not establish purposeful availment under these well settled standards. Moreover, Exxon's contention that Respondents filed their lawsuits with the intent that Exxon would later decide to

change how it speaks about climate-related issues is even *less* sufficient to establish purposeful availment of the forum, because an intent to increase the likelihood of causing a particular effect on a forum-state resident is at least one step removed from actually causing such an effect.

Exxon acknowledges that Respondents' lawsuits in California provide the only "connection" with Texas that could potentially support personal jurisdiction. But at most, those lawsuits connect Respondents to Exxon and to the other defendants (wherever they may be located), not to Texas. That Exxon and some of the other defendants are headquartered in Texas is a fortuity. The merits of Respondents' claims have nothing to do with where any defendant is headquartered or does business. Nothing in the record suggests that Respondents sued Exxon or any other defendant *because* it was headquartered in a particular state; even if they had, that still would not establish substantial and purposeful contacts with the State of Texas itself.

### A. Any indirect "contacts" Respondents may have had with Texas were random, fortuitous, isolated, and attenuated.

Exxon concedes that no Respondent had offices or employees in Texas, conducted business in Texas, or entered into any lawsuit-related contracts in Texas. *See* Statement of Facts, Part A, *supra* at 9. The only "contacts" Exxon alleges are

the lawsuits themselves.[3] While Exxon describes several meetings, statements, and documents that supposedly demonstrate Respondents' wrongful "conspiracy," none of those events or actions occurred in or were directed at Texas. *See, e.g.*, CR19–25; 3SCR116–23 (describing events that occurred exclusively in California, New York, and Massachusetts). Like the California litigation, Exxon's alleged "conspiracy"—which in fact never happened—at most targeted Exxon, not Texas.[4]

The fact that Respondents' California lawsuits include several Texas-based companies is "fortuitous," not "purposeful," and there is no evidence to the contrary—let alone any logical reason why Respondents would target defendants from any particular foreign state or country or would care where they were headquartered. *See Searcy*, 496 S.W.3d at 67 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).[5]

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[3] Exxon has abandoned its previous argument that service of process on Exxon in Texas constituted a jurisdictionally relevant contact with the State, an argument the Court of Appeals properly rejected. *See* Opinion at *18.

[4] If Exxon were correct about the existence of a "conspiracy" among Respondents, that "conspiracy" would presumably also encompass the dozens of other public entities and officials who filed and are prosecuting similar lawsuits throughout the country, *see supra* at 7 n.2, which means that if Exxon's theory of personal jurisdiction were correct, Exxon could amend its Rule 202 petition to haul into Texas state court each of those other cities, counties, and states as well as those public entities' agents, attorneys, and officials.

[5] The majority of the defendants in Respondents' lawsuits are *not* based in Texas. *See* CR2826–40 (naming as defendants, *inter alia*, companies headquartered in the

Respondents' lawsuits challenge defendants' deceptive and misleading promotions and communications campaigns, which occurred in most if not all of the jurisdictions in which those companies operated, including California. *See* CR2287–2316, 2397–2427, 2508–45, 2601–13, 2649–62, 2727–59, 2864–95. The lawsuits were not aimed at any state, let alone Texas. While Exxon has strong ties to Texas—and to New Jersey, where it is incorporated, and to California and scores of other jurisdictions where it operates and does business—those ties alone do not establish a "substantial connection" between Respondents and any of those states. *Walden*, 571 U.S. at 284. The location of Exxon's headquarters is not "the focus of the [Respondents'] activities," *TV Azteca*, 490 S.W.3d at 43, and where Exxon chose to move its headquarters in 1989 has nothing to do with why it was sued or what relief Respondents are seeking in the California litigation.

Exxon has not identified any other relevant contacts between any Respondent and the State of Texas. *See Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (courts must decide personal jurisdiction on a defendant-by-defendant basis and must not impute contacts across an alleged conspiracy). Its entire argument

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Netherlands, England, Italy, Spain, Canada, California, New York, Oklahoma, Ohio, and Texas with, *inter alia*, domestic operations in Alaska, Arkansas, Colorado, Kansas, Louisiana, New Mexico, Montana, New York, Oklahoma, Pennsylvania, North Dakota, South Dakota, Texas, Wyoming, and the Gulf of Mexico, and foreign operations in Algeria, Canada, Columbia, Denmark, Egypt, Equatorial Guinea, Ghana, Malaysia, Mozambique, Norway, and Thailand).

rests on speculation about the potential indirect effects of Respondents' California lawsuits on Exxon and other defendants. But speculation about the indirect effects that out-of-state conduct might have on a state resident like Exxon is far too "attenuated" to constitute purposeful availment of the state itself.

### B. The United States Supreme Court and the Texas Supreme Court have squarely rejected Exxon's "direct-a-tort" theory.

Exxon repeatedly returns to its argument that Respondents can be sued in Texas because they intended the impacts of their California litigation to be felt in Texas. But the United States Supreme Court has been unambiguous: "the place of a plaintiff's injury and residence cannot create a defendant's contact with the forum state." *Ford Motor Co.*, 141 S.Ct. at 1031. Under the Due Process Clause, "where a defendant 'directed a tort'" is irrelevant, and what matters is the nature and extent of its contacts with the forum. *Old Republic*, 549 S.W.3d at 565 (quoting *Michiana*, 168 S.W.3d at 790–92); *Walden*, 571 U.S. at 288–89. The court of appeals' opinion properly applied these well-settled authorities. *See, e.g.*, Opinion at *16.

In *Walden*, for example, the United States Supreme Court held that a Nevada federal district court improperly exercised personal jurisdiction over a Georgia police officer who allegedly conducted an illegal search of two Nevada residents in Atlanta and later prepared a "false probable cause affidavit" that caused the Nevada residents to suffer harm in Nevada. 571 U.S. at 282 (citation omitted). Despite the allegation that the officer *intended* to deprive the plaintiffs of their rights in Nevada,

the Supreme Court held that the lower court impermissibly based jurisdiction on the officer's contacts with the Nevada *plaintiffs*, rather than on the officer's contacts with the *forum*, the State of Nevada itself. *Id*. at 289. For the "effects" of tortious conduct to be constitutionally relevant, the Court explained, those effects must connect the defendant's conduct to the forum itself, "not just to a plaintiff who lived there." *Id*. at 288.

This Court has likewise held that "[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." *Old Republic*, 549 S.W.3d at 565 (quoting *Searcy*, 496 S.W.3d at 68–69). Similarly, "the mere allegation that a nonresident directed a tort from outside the forum against a resident is insufficient to establish personal jurisdiction." *Id.* at 562; *see also TV Azteca*, 490 S.W.3d at 43 ("[T]he mere fact that Petitioners directed defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction over Petitioners."). Under these controlling authorities, the court of appeals was undoubtedly correct that the potential intended effects of Respondents' lawsuits on Exxon could not establish the constitutionally required actual contacts with the State.

Even the high water mark case of so-called "effects test" jurisprudence, *Calder v. Jones*, 465 U.S. 783 (1984), does not help Exxon. In *Calder*, the "necessary contacts *with the forum*" were established by evidence demonstrating not only that

the nonresident defendants had caused harm to a forum resident, but also that the defendants' allegedly defamatory magazine article had been sold and distributed to 600,000 residents of the forum state. *See Walden*, 571 U.S. at 287–88 (emphasis added) (distinguishing *Calder* on that basis). As this Court has concluded, "the important factor" in *Calder* "was the extent of the defendant[s'] activities" in the forum where their defamatory magazine article was distributed, "not merely the residence of the victim." *Michiana,* 168 S.W.3d at 789 (citing *Calder* and its companion case, *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770 (1984) (minimum contacts satisfied because defendant sold 10,000 copies of magazine containing allegedly defamatory article in the forum)). In sharp contrast, Respondents' *only* alleged contact with Texas here was their filing of separate civil suits in California against numerous defendants, some of which were Texas-based, and one of which was Exxon. No court, state or federal, has predicated personal jurisdiction on the mere filing of an out-of-state lawsuit without evidence of other significant, non-speculative, actual contacts with the forum state. Exxon's attempt to rest jurisdiction on the supposed impacts of the California litigation in Texas must therefore fail.[6]

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[6] Exxon cites an unpublished order from a federal district court judge in the Northern District of California, which in two brief sentences asserted personal jurisdiction over the Texas Attorney General based on his issuance of a Civil Investigative Demand ("CID") for documents from a California corporation. *Twitter, Inc. v.*

### C. Exxon's allegations that Respondents harbored wrongful intent do not establish minimum contacts.

Exxon tries to overcome the dispositive fact that none of the Respondents has *any* physical, legal, business, or operational presence in Texas—much less a substantial one—by urging a radical new approach to establishing minimum contacts. According to Exxon, a nonresident defendant's contact with a forum-state resident should be treated as contact with the state itself whenever the nonresident defendant *intends* its conduct to have indirect, secondary effects in the forum state. Pet. Br. 25, 32. This theory, if accepted, would eviscerate the due process protections underlying the doctrine of personal jurisdiction. It would enable any plaintiff to manufacture personal jurisdiction by alleging that a nonresident defendant sued the plaintiff with the unstated ulterior motive to harm the plaintiff in a jurisdiction where it does business. Pet. Br. 25–26. Because the "effects test" does not provide a sufficient independent basis for personal jurisdiction, as explained above, it necessarily follows that Exxon's further attenuated "intended effects test" cannot provide a basis for personal jurisdiction either.

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*Paxton*, No. 21-1644, 2021 WL 1893140 at *2 (N.D. Cal. May 11, 2021)). That order is currently being appealed, *Twitter v. Paxton*, No. 21-15869 (9th Cir.), and its stated ground for decision—the potential, indirect effects of the CID on a local resident—is inconsistent with the uniform, controlling appellate authority. *See Walden*, 571 U.S. at 287-88; *Old Republic*, 549 S.W.3d at 565.

Even if actual "effects" on a forum-state resident could create minimum contacts, it is well settled that "what the parties thought, said, or intended is generally irrelevant to their jurisdictional contacts." *Moncrief Oil*, 414 S.W.3d at 154. "Jurisdiction cannot turn on . . . whether a plaintiff merely alleges wrongdoing . . . as virtually all will." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 791 (Tex. 2005); *see also Old Republic*, 549 S.W.3d at 560. Personal jurisdiction must rest on objective facts, not subjective intent, which is frequently unknowable and nearly always depends on whether the forum-state plaintiff can prove the ultimate merits of its claim (such as whether the nonresident actually acted with wrongful intent). *See Michiana*, 168 S.W.3d at 791; *Searcy*, 496 S.W.3d at 71. Because personal jurisdiction cannot depend on the "underlying merits" of a plaintiff's claim, "courts at the jurisdiction phase [are required to] examine . . . contacts, not what the parties thought or intended[.]" *Moncrief Oil*, 414 S.W.3d at 154; *accord Walden*, 571 U.S. at 289 (Georgia defendant's knowledge and intent that conduct would cause harm to plaintiffs in Nevada does not establish personal jurisdiction, even though conduct caused the intended harm); *Old Republic*, 549 S.W.3d at 562 (whether nonresident defendant's transfers of money into Texas were part of a conspiracy intended to defraud creditors or were "innocent in nature" is irrelevant to personal jurisdiction inquiry, which must be limited to objective fact that those transfers were made, regardless of underlying intent).

Exxon's argument that personal jurisdiction could rest on Respondents' alleged intent to interfere with various companies' protected speech "confuse[s] the roles of judge and jury by equating the jurisdictional inquiry with the underlying merits" of Exxon's threatened merits claims. *Michiana*, 168 S.W.3d at 790–91 (allegedly fraudulent intent did not establish minimum contacts); *see Walden*, 571 U.S. at 285 (intentional tort allegedly directed at plaintiffs in the forum state did not establish minimum contacts). The court of appeals was therefore correct that the trial court's findings "regarding the Potential Defendants' intent in filing the California lawsuits are irrelevant to [its] personal jurisdiction analysis" and that due process analysis must instead "focus on the quality and nature of the Potential Defendants' contacts with Texas." Opinion at *15.

Exxon has been unable to cite *any* precedent to support its assertion that a nonresident's intent to have its conduct create indirect, second-, or third-tier effects on a forum-state plaintiff could be sufficient by itself to establish purposeful availment. If intent to cause harm to a forum-state resident were all it took to establish personal jurisdiction, this Court's decisions in *Michiana* and *Old Republic* and the United States Supreme Court's decision in *Walden*, among many others, would have come out the other way. *See Old Republic*, 549 S.W.3d at 562 (no minimum contacts despite alleged intent to defraud forum-state residents); *Michiana*, 168 S.W.3d at 791 (no minimum contacts despite allegedly fraudulent

intent of Texas contracts); *Walden*, 571 U.S. at 285 (no minimum contacts despite intentional tort allegedly directed at plaintiffs in forum state). But of course, "[t]he mere existence or allegation of a conspiracy directed at Texas is not sufficient to confer jurisdiction." *Old Republic*, 549 S.W.3d at 560. Accordingly, Exxon's "intent" argument necessarily fails.

### D. Fifth Circuit precedent confirms that wrongful intent or hypothetical effects on a forum-state plaintiff are insufficient to confer jurisdiction.

Exxon's novel theory is precluded not only by United States and Texas Supreme Court precedent but also by the Fifth Circuit's decisions in *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008) and most recently in *Bulkley & Associates L.L.C v. Department of Industrial Relations*, 1 F.4th 346 (5th Cir. 2021). Both cases establish that a nonresident's subjective intent to cause a particular impact on a forum resident is insufficient to create minimum contacts with the forum state.

In *Stroman*, the Commissioner of Arizona's Department of Real Estate sent a cease-and-desist letter to a Texas-based real estate company, accusing it of brokering Arizona real estate transactions without a license and demanding that it remove from its website all advertisements for Arizona real property. 513 F.3d at 480. The Texas company sued the Arizona Commissioner in Texas, arguing there was personal jurisdiction because the Commissioner sent the cease-and-desist letter from Arizona into Texas and that the company's compliance with the cease-and-desist letter would

chill its free speech rights and cause it to suffer economic harm in Texas. *Id*. at 481. In a unanimous decision authored by Judge Edith Jones, the Fifth Circuit held that was not enough to confer personal jurisdiction, because the Commissioner had not purposefully directed her conduct at the *state*. Even though the Commissioner's letter challenged the company's speech in Texas and was intended to affect the company's conduct in Texas, the Fifth Circuit concluded that the Commissioner's actions did not constitute purposeful availment of the state because the Commissioner was "simply attempting to uniformly apply [Arizona's] laws." *Id.* at 486.

The Fifth Circuit recently reaffirmed *Stroman* and its analysis in *Bulkley*. In that case, California's Department of Industrial Relations assessed penalties against a Texas-based trucking company for violating California health and safety laws while making deliveries in California. 1 F.4th at 349–50. The California agency sent a letter to the company's home office in Texas, threatening further enforcement actions and litigation in California state court to collect unpaid penalties if the company's violations continued. *Id.* Relying on *Stroman*, the Fifth Circuit (Willet, J.) held that the California agency had not purposefully availed itself of the benefits and privileges of Texas law, even though the trucking company could only remedy violations of California law "by changing its policies in Texas." *Id.* at 354.

The panels in *Stroman* and *Bulkley* reiterated the same constitutional principles that the court of appeals found dispositive here: for purposes of minimum contacts analysis, when an out-of-state government official takes steps to remedy violations of its own state's laws affecting its own residents or public property, "it does not matter if the out-of-state official's enforcement efforts revolve around conduct that takes place in Texas." *Bulkley*, 1 F.4th at 353. The fact that Respondents' efforts to remedy violations of California state law involving California property and residents might influence Exxon's conduct in Texas is similarly insufficient to establish minimum contacts with the state.[7]

Exxon wrongly contends that this case is more like *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020), than *Stroman.* Yet not only did the Fifth Circuit reaffirm *Stroman* in its recent *Bulkley* decision, but the opinion in *Grewal* itself acknowledged the continued validity of *Stroman* and distinguished it based on *Grewal*'s unusual facts, which are not present here.

In *Grewal*, the New Jersey Attorney General sent a cease-and-desist letter to a Texas-based company, demanding it halt all, nationwide publication of materials describing how to manufacture firearms using 3D-printing technology. *Id.* at 489.

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[7] The lack of personal jurisdiction is even clearer here than in *Stroman* and *Bulkley*, because none of the Respondents here sent any cease-and-desist letters to Exxon or had any other direct contacts or communications with Exxon within Texas.

The New Jersey Attorney General's cease-and-desist letter demanded that the Texas company cease its First Amendment protected activity *everywhere*, not just in New Jersey, thus "assert[ing] a pseudo-national executive authority" that extended beyond any New Jersey-specific law enforcement interest. *Grewal*, 971 F.3d at 493. The cease-and-desist letter in *Grewal* accomplished its stated goal, thereby having the *actual* and *immediate* effect of causing the Texas company to cease publication and thereby "directly" suppressing speech in Texas. *Id.* at 489, 492 & 496 n.10.

In sharp contrast to this case, the impacts of the New Jersey Attorney General's cease-and-desist letter in *Grewal* were not hypothetical, indirect, or speculative. The Texas company ceased publishing its challenged materials as the demand letter required. *See id*. at 492 & 496 n.10. Nor did *Grewal* involve a narrowly focused law enforcement proceeding that sought a remedy limited to the prosecuting entity's home state only. Rather, as the Fifth Circuit later concluded when explaining the *Grewal* decision in *Bulkley*, the reason the New Jersey Attorney General in *Grewal* "created minimum Texas contacts [was] because he failed to cabin his nationwide enforcement efforts to conduct involving New Jersey property or residents." *Bulkley*, 1 F.4th at 346. Here, unlike in *Grewal*, the California public entities' lawsuits allege that Exxon and its co-defendants engaged in conduct that violated California law; the suits target the defendants' past conduct and do not seek to enjoin any ongoing or future speech; and the relief sought is directly related and

expressly limited to the ongoing harms suffered by public entities, residents, and property in California. *See* Statement of Facts, Part A, *supra*. The facts of this case are akin to *Bulkley* and *Stroman*, not *Grewal*.

### E. Exxon's allegations of hypothetical effects would not establish minimum contacts even if they were accurate.

Exxon's rhetorical arguments cannot mask the fundamental weakness of its legal position. Exxon insists that Respondents' civil law enforcement efforts might have widespread effects throughout Texas by chilling its climate-related speech, thereby depriving Texas residents of the opportunity to listen to that speech. Even if those allegations were factually supported, which they are not, they would be insufficient to establish personal jurisdiction. Exxon has never contended, let alone submitted evidence, that Respondents' lawsuits have in fact "chill[ed]" Exxon's speech, or anyone else's—in Texas or elsewhere. Pet. Br. 29–30. Nor do the complaints in those cases seek any relief, injunctive or otherwise, against *any* future conduct or speech by Exxon or the other defendants. *See* CR2348, 2461, 2572, 2619, 2670, 2807, 2939. Only concrete, actual contacts with a forum state can confer jurisdiction. None exists here.

Because Exxon's constitutional theory rests upon the *hypothetical* future effects of Respondents' lawsuits, it cannot survive the uniform line of authority holding that jurisdiction cannot rest on a mere "possibility" that minimum contacts might occur. "[M]inimum contacts must be 'known' and not 'hypothetical.'"

*Bulkley*, 1 F.4th at 353 (quoting *Stroman*, 513 F.3d at 484). Exxon's theory rests on the implicit assumption that it *might* choose to speak differently about climate change or other public policy issues in Texas if found liable in the California cases—a theory Exxon never asserted in its Rule 202 petition or supported with any evidence in the district court. That theory is at most a hypothetical possibility, not an actual, existing contact between Respondents and the State of Texas, which would not be sufficient for purposeful availment in any event, because of its attenuated nature and because the possibility of future changed behavior by a remorseful defendant exists in almost every lawsuit.

### F. Exxon's additional arguments in support of its radical theory of personal jurisdiction are unavailing.

Exxon next makes a series of unrelated arguments to support its position that the California public entities' lawsuits were purposefully directed against the State of Texas. None of those arguments works either.

First, Exxon places great weight on the fact that two of the five companies sued by Oakland and San Francisco (Exxon and ConocoPhillips) and 17 of the 37 companies sued by the other California public entities are headquartered in Texas. Pet. Br. 25; Opinion at *4 n.1. It is not clear whether Exxon is conceding that personal jurisdiction would be lacking if it were the only Texas-based defendant, or what threshold number or percentage Exxon believes the Due Process Clause requires when more than one defendant resides in a particular jurisdiction. But

regardless of how Exxon tallies the numbers, nothing in the California lawsuits seeks any privilege or benefit from operating in Texas or under Texas law, and the fact that only some defendants reside in Texas undercuts Exxon's assertion that Respondents purposefully availed themselves of the privilege of conducting activities in Texas (or any other state in which one or more defendants resides).

Second, contrary to Exxon's assertion, the court of appeals did not require Exxon to establish Respondents' "physical contacts" with Texas. Pet. Br. 36. Quite the opposite. The panel recognized that a "nonresident's conduct need not actually occur in Texas" and that a nonresident's "physical presence in the forum . . . is not a prerequisite to jurisdiction." Opinion at *15.

Exxon also misconstrues the court of appeals' discussion of the "physical fact of a defendant's contacts with Texas." Opinion at *14. In that paragraph, the court of appeals was merely quoting *Michiana* to explain why courts must focus on objective contacts when determining personal jurisdiction, not on the defendant's subjective intent. *See id.* (quoting *Michiana*, 168 S.W.3d at 791 ("Business contacts are generally a matter of physical fact, while tort liability . . . turns on what the parties thought, said, or intended. Far better that judges should limit their jurisdictional decisions to the former rather than involving themselves in trying the latter.").

Third, Exxon is incorrect in asserting that the court of appeals "failed to consider the effects" of Respondents' conduct. Pet. Br. 38. The court of appeals properly focused on the *actual* effects of Respondents' conduct and found them inadequate to establish personal jurisdiction. Opinion at *17–18. Critically, there is no evidence in the record and no factual finding by the trial court establishing any actual, or even any reasonably imminent, effects in Texas from the California lawsuits. *See* CR2007–7069; FOF/COL. Speculative assertions about the potential indirect, forum-state effects of a nonresident's out-of-state conduct (the lawsuits) on a forum-state actor (Exxon) are not enough to overcome the protections of the Due Process Clause. *See* Part I.B, *supra*; Opinion at *15. While Exxon may believe that the court of appeals gave insufficient weight to the trial court's finding that Respondents had an unstated "intent" to indirectly discourage Exxon's speech in Texas, the court of appeals was undoubtedly correct to disregard any such alleged intent.

Fourth, the court of appeals' reference to "additional conduct" evidence was entirely appropriate. *See* Pet. Br. 39–40. Once the court of appeals concluded that Exxon had failed to establish that Respondents' lawsuits had sufficient effects on Texas to establish the requisite minimum contacts, it searched the record for any *other* evidence of Respondents' contacts with Texas sufficient to establish purposeful availment. It found none. Opinion at *15–17. That was perfectly

appropriate, because as this Court has explained, courts may look for "additional conduct" sufficient to establish minimum contacts if the "actionable conduct" itself, i.e., the "conduct from which the plaintiff's claim arose," is not itself sufficient. *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 18 (Tex. 2021); *see also Ford Motor Co.*, 141 S.Ct. at 1026. "The additional conduct serves merely to ensure that the nonresident defendant has purposefully targeted the [state]." *Luciano*, 625 S.W.3d at 18. There is no logical or conceptual reason why that general principle should be limited to "stream-of-commerce" or "broadcasting" cases, as Exxon asserts. Pet. Br. 39–40.

Fifth, not a scintilla of evidence supports the trial court's finding that the California lawsuits "targeted" Exxon's (or other defendants') future speech in Texas (which is just another way of finding that Respondents "intended" their lawsuits to chill Exxon's future speech, which for the reasons stated above is a legally insufficient basis for assertion personal jurisdiction). The complaints speak for themselves: Exxon is just one of dozens of defendants in the California lawsuits, the majority of which are headquartered outside Texas. CR2258–73, 2368–83, 2480–94, 2590–93, 2637–40, 2691–2702, 2826–38. While the complaints allege defendants' wrongful conduct in great detail, almost none of that conduct is alleged to have occurred in Texas. CR2299–2314, 2410–24, 2521–63, 2606–13, 2654–62, 2743–57, 2879–93; *see Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex.

2004) ("[E]vidence must transcend mere suspicion. Evidence that is so slight as to make any inference a guess is in legal effect no evidence.") *see City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005) (sufficiency of evidence must be based on documents viewed as a whole, not piecemeal excerpts). Nor does it matter to the merits of Respondents' claims *where* any of the challenged conduct occurred or where Exxon or any of the other defendants happened to be headquartered or incorporated.[8]

The trial court's finding that Respondents intended to "chill" or "suppress" speech in Texas is also entirely speculative. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d at 601 ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."). Exxon points to certain statements made by Respondent Matthew Pawa. But Pawa had "no involvement" in the five lawsuits brought by San Mateo County, Marin County, City of Imperial Beach, and the City and County of Santa Cruz. CR1863, ¶13. Although

[8] Exxon argued in the Court of Appeals that Respondents had waived their right to challenge the trial court's factual findings by failing to timely object to Exxon's *evidence*. But what matters is that Respondents made timely written objections to Exxon's proposed *findings of fact* on the ground that the evidence submitted by Exxon was insufficient to support those findings. CR7254-92. Respondents then renewed those same objections in the Court of Appeals. San Francisco Appellate Br. at 28–37, City of Oakland Appellate Br. at 57–62, San Mateo County et al. Appellate Br. at 16 n.10.

the trial court found that the Oakland and San Francisco lawsuits "[f]ollow[ed] through on the strategy Mr. Pawa outlined in his memorandum to NextGen America," FOF/COL 26, there is no evidence that any other Respondent saw, received, discussed, or was aware of that memorandum. Besides, nothing in that memorandum advocated suppression of speech. FOF/COL 24.

Most of the "evidence" cited by Exxon, moreover, pertains to statements and conduct by third parties unrelated to any of the California lawsuits. *See, e.g.*, FOF/COL 6–9 (five anonymous statements at a meeting convened by a third party), 10–11 (draft agenda by third party for Rockefeller meeting), 12–15 (statements by New York and Massachusetts attorneys general and others at press conference), 19–22 (investigations by New York and Massachusetts attorneys general). Several courts in other cases have found those same documents and statements insufficient to establish even the non-California *drafters' and speakers'* bad faith. *See Exxon Mobil Corp. v. Schneiderman*, 316 F.Supp.3d 679, 686, 690 (S.D.N.Y. 2018) (appeal pending); *In re Civil Investigative Demand No. 2016-EPD-36*, No. SUCV20161888F, 2017 WL 627305 (Mass. Super. Ct. Jan. 11, 2017); *see* City of Oakland Appellate Br. App. 8; Opinion at *3. The *Schneiderman* decision, which rejected Exxon's arguments and was issued before the trial court entered its findings of fact here, should have been issue preclusive against Exxon, which was a party to

that litigation. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990).

### G. Policy considerations also weigh heavily against adopting Exxon's theory.

Exxon's theory has no boundaries. Every lawsuit that seeks any significant remedy *could* at some future date have the indirect effect of inducing a defendant to change its future behavior. Under Exxon's theory, every plaintiff in virtually every case could be sued anywhere it does business, even if the plaintiff and defendant reside in the same state, simply by defendant alleging that the plaintiff might have had an ulterior motive to affect the defendant's future business decisions. Allowing personal jurisdiction to rest on such easily manufactured assertions about subjective intent would be an unprecedented and dangerously unconstrained invasion of long-established due process protections.

Allowing Exxon to expand the personal jurisdiction doctrine in this manner would also have profoundly negative consequences on state and local civil enforcement efforts. Every time a public official sought to enforce state or local laws against an out-of-state actor (or even against a local actor with significant operations in another state), that public official could be subject to a retaliatory suit in a far

away jurisdiction.[9] The chilling effect that should most concern this Court is therefore the chill that would result from adopting Exxon's theory, a chill that would be felt by state and local officials throughout the country who would have to balance their duty to enforce state laws and to protect state and local citizens against the risk of being required to expend public resources and staff time in remote jurisdictions,

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[9] Texas officials would be no less subject to this rule than others. To cite just a few recent examples, under Exxon's theory the Texas Attorney General could be subject to suit: in New Jersey and Massachusetts based on his enforcement actions against Johnson & Johnson and Boston Scientific Corporation to curb allegedly deceptive marketing practices, *see* https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-1169-million-multistate-settlement-johnson-johnson-ethicon-inc-deceptive *and* https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-1886-million-multistate-settlement-medical-device-manufacturer-boston-scientific; in Connecticut, Pennsylvania, Ohio, and New York for his effort to rein in the opioids crisis, including by pursuing claims against pharmaceutical companies claims for deceptive trade practices and misrepresenting the risks of opioid products, *see* https://www.texasattorneygeneral.gov/globalopioidsettlement *and* https://www.texasattorneygeneral.gov/initiatives/opioid-crisis; in North Carolina for his enforcement efforts against various tobacco companies, *see* https://www.texasattorneygeneral.gov/news/releases/paxton-reaches-agreement-tobacco-companies-resulting-195-million-awarded-texas; in Kansas for his antitrust enforcement efforts against telecommunications companies Sprint and T-Mobile, *see* https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-settlement-agreement-t-mobile-sprint-merger; in Georgia for his enforcement efforts to remedy data breaches by Home Depot, *see* https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-175-million-settlement-home-depot-regarding-data-breach; and in California, New York, Nebraska, Virginia, and Illinois for his investigations into the consumer trading practices of various financial services companies, *see* https://www.texasattorneygeneral.gov/news/releases/ag-paxton-issues-cids-robinhood-discord-citadel-and-others-suspended-stock-trading-and-investing.

defending against allegations that a wrongful, "secret intent" influenced their prosecutorial and law enforcement decisions.

### H. Exxon's hyperbolic allegations of an "assault" on Texas sovereignty are groundless and do not create minimum contacts.

In an effort to overcome the overwhelming authority holding that actions directed against a forum-state plaintiff cannot be treated as actions directed against the state for personal jurisdiction purposes, Exxon tries to spin the California public entities' lawsuits into a coordinated "assault" on the "entire Texas energy industry" and on Texas "sovereignty." Pet. Br. 26, 29, 31–35. That overheated rhetoric cannot overcome the plain fact that the California litigation pleads specific claims against specific defendants that operate throughout the country and the world, none of which are incorporated in Texas, and fewer than half of which are headquartered here. Nothing about Respondents' litigation in California threatens or abuses Texas's sovereignty or economy, directly or indirectly.

The California lawsuits do not make allegations against or seek relief from the "entire Texas energy industry." Oakland and San Francisco sued five companies (of the more than 10,000 oil and gas production companies currently operating in Texas[10]), and the other public entities sued 37 companies. The only Texas-based

[10] *See* Shale XP, Oil and Gas Companies in Texas https://www.shalexp.com/texas/companies (accessed Oct. 29, 2021).

company whose conduct in Texas is specifically described in any of the seven complaints is Exxon. CR2299–2314, 2410–24, 2521–63, 2606–13, 2654–62, 2743–57, 2879–93. There is no finding by the trial court that Respondents intended to chill the speech of the entire industry, let alone the Texas-based speech of the entire worldwide oil and gas industry.[11] And there is no finding (or underlying evidence) that the California lawsuits have affected or will affect any company other than the named defendants.

Exxon cannot transform the speculative possibility that one or more Texas-based defendants might someday decide to change how they speak about climate change issues into a statewide deprivation of the right of Texas residents to listen to defendants' unfiltered speech. Pet. Br. 2, 27, 29. First, Exxon failed to make that argument below, and therefore waived it. *See Horizon Health Corp. v. Acadia Healthcare Co., Inc*., 520 S.W.3d 848, 885 (Tex. 2017) (arguments not raised in the court of appeals are waived). Second, even without waiver, the argument fails because it rests upon pure speculation, as there is no evidence in the record or in any of the trial court's findings to support it. Moreover, if Exxon were correct, there

[11] At most, the trial court found (over Respondents' objections) that the California lawsuits sought "to . . . affect speech, activities, and property" of the defendants in those cases, including several Texas-based energy companies," FOF/COL 50; *see also id.* 28, 48, 52, not that it sought to chill the speech of the Texas energy industry as a whole.

would be no limits on personal jurisdiction, because every case that could have a potential indirect chilling effect on future speech could also potentially have an indirect effect on the potential audience for that speech.

To accept Exxon's newest (but waived) theory would enable every defendant to obtain personal jurisdiction in any state it operates, by the simple expedient of arguing that its future speech might potentially be affected by concerns about pending litigation and, if so, that the state's residents would be deprived of their right to hear what the company might otherwise have said. Such a revolutionary reformulation of personal jurisdiction doctrine would enable every defendant in every case alleging fraud, defamation, false advertising, or other unprotected speech, or seeking any significant amount of damages, to sue the plaintiffs in that defendant's favored forum, regardless of those plaintiffs' actual contacts with that forum, simply by asserting that forum residents might later be deprived of their right to listen to defendant's future speech.

Exxon also repeats its prior argument that the Due Process Clause entitles it to sue California public entities and officials in Texas because those public servants had the temerity to pursue claims against Exxon and other companies that operate in an industry that Exxon characterizes as "vital" to the Texas economy. Pet. Br. 35–36. Exxon has not cited a single case—and none exists or could exist under the Due Process Clause—in which specific personal jurisdiction depended upon the extent

of a company's influence, industry, or impact on a state's economy. Nor does Exxon offer any criteria for determining when an industry is sufficiently "vital" to a state's economy that companies in that industry become the equivalent of the state for personal jurisdiction purposes. In effect, Exxon is asking this Court to grant it special jurisdictional privileges that are not available to any individual Texan or to any Texas company outside the oil and gas industry. Due process does not countenance such a two-tiered system of justice.

Respondents do not dispute that the oil and gas industry significantly contributes to the Texas economy—as it does to many states' economies.[12] But other industries are no less "vital" to Texas. Since 2010, for example, the healthcare and social assistance industry employed more Texas residents, and at least three industries (manufacturing, professional and business services, and real estate) currently contribute more to the State's GDP.[13] For due process purposes, treating

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[12] In fact, the oil-and-gas industry contributes a greater percentage of state GDP in Alaska, North Dakota, Oklahoma, and Wyoming than in Texas. *See* Hannah Lang, Top industries in every state, Stacker (Dec. 4, 2019), https://stacker.com/stories/2571/top-industries-every-state.

[13] Major industries with highest employment, by state, 1990-2015, U.S. Bureau of Labor Statistics (Aug. 5, 2016), https://www.bls.gov/opub/ted/2016/major-industries-with-highest-employment-by-state.htm; U.S. Bureau of Labor Statistics, Current Texas and U.S. Industry Employment, Seasonally Adjusted (2021), https://www.bls.gov/regions/southwest/data/industryemployment_current_texasus_table_pdf.pdf.

an industry (or any company in that industry) as equivalent to the forum State itself would create the slipperiest of slopes and could easily lead to unintended consequences.

If this Court were to deem the oil and gas industry so "vital" to the Texas economy that every out-of-state lawsuit against any company in that industry would be "an assault on Texas's sovereignty" for personal jurisdiction purposes, Pet. Br. 33–35, Texas courts would be inundated with Rule 202 petitions from companies making that argument, not only in the oil and gas industry but also in every other industry that significantly contributes to the Texas economy. Courts would then be forced to answer the many questions Exxon has skirted and cannot answer, such as: By what specific metric(s) should a court judge an industry's "vitalness"? What weight should be given to the company's or industry's employment rates, total wages, GDP contributions, tax revenue, or other factors in relation to other companies and industries in that state? Does the prominence of the industry in other states matter? And so on.

The Supreme Court has repeatedly stated that "administrative simplicity is a major virtue" in jurisdictional analysis. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Requiring courts to determine whether or why an industry is sufficiently "vital" to a state's economy (applying some as yet undefined and indefinable metric) that litigation against any of its participants must be treated as a threat to the

sovereign would violate that principle and enmesh the courts in immensely complicated and indeterminate litigation unrelated to the merits of the controversy, without any meaningful standards to guide them.

The problem will not stop in Texas. If the Due Process Clause permits Exxon to equate itself with Texas because it operates in a particular industry, companies in industries associated with other states will soon follow Exxon's lead. A Texas citizen who files a defamation suit in Texas court against a Hollywood studio, or a nuisance suit against a New York bank, or a design-defect case against a Detroit automaker, could find herself dragged into a retaliatory action in California, New York, or Michigan, with the company alleging (in equally conclusory terms) that the Texas plaintiff "seek[s] to regulate the [State] industry's speech." Pet. Br. 31.

Exxon invites this Court to create a rule that would give judges unbridled authority to impose their personal beliefs about which industries are sufficiently "vital" to a state's economy to deem a lawsuit against an actor in that industry a lawsuit against the state itself. This Court should decline this invitation to judicial activism. The Due Process Clause and the protections it affords out-of-state residents cannot be left to depend on such an ambiguous, ill-defined standard.

Finally, Exxon tries to manufacture minimum contacts by arguing—again for the first time—that the public entities' lawsuits seek to "commandeer Texas energy policy." Pet. Br. 3, 22, 34, 51. There is no evidence in the record to support that

waived, hyperbolic argument either. Besides, the California lawsuits seek monetary remedies only, based on the ongoing effects of defendants' previous deceptive conduct, not any changes to the energy policy of the State of Texas (or any other jurisdiction). Indeed, several Respondents' complaints expressly disclaim any attempt to regulate emissions or fossil fuel production. *See* CR2590 ¶11, CR2636 ¶11 ("The People do not seek to impose liability on Defendants for their direct emissions of greenhouse gases and do not seek to restrain Defendants from engaging in their business operations."); Opinion at *4.[14] Under Exxon's radical new due process theory, though, every time a lawsuit has the potential to impose liability on

[14] The other state and federal courts that have analyzed complaints by state and local governments based on similar allegations have recognized that the public entity plaintiffs in those cases, as here, seek remedies for the defendants' alleged deceptive marketing and failure to warn and do not seek to regulate those defendants' emissions or fossil-fuel production. *See, e.g.*, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S.Ct. 1532, 1535–36 (2021) ("[The plaintiff] sued various energy companies for promoting fossil fuels while allegedly concealing their environmental impacts . . . ."); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc*., 405 F. Supp. 3d 947, 971 (D. Colo. 2019) ("Plaintiffs do not seek to regulate the conduct of the Defendants or their emissions, nor do they seek injunctive relief to induce Defendants to take action to reduce emissions."), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *cert. granted, judgment vacated*, 141 S.Ct. 2667 (2021); *Minnesota v. Am. Petroleum Inst*., No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *10 (D. Minn. Mar. 31, 2021) ("[T]he State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign."); *Connecticut v. Exxon Mobil Corp*., No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *3, *13 (D. Conn. June 2, 2021) (rejecting Exxon's "characterization of Connecticut's claims as targeting pollution" because "Connecticut's claims seek redress for the allegedly deceptive and unfair manner by which ExxonMobil interacted with Connecticut consumers").

an oil or gas company that happens to be operating in Texas, that potential would constitute "commandeering Texas energy policy" because a liability finding might in some way affect the company's operations in Texas. That is not, and should never be, the law.

## II. Exxon's threatened claims do not arise out of or relate to any contact between Respondents and the State of Texas.

Even if Exxon were correct that the California public entities purposefully directed any relevant conduct into Texas, personal jurisdiction in Texas would still be inappropriate because Exxon cannot establish the requisite "substantial connection" between the Respondents' contacts with the state and the "operative facts of [Exxon's] litigation." *TV Azteca*, 490 S.W.3d at 52–53 (citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007)); *see also Ford Motor Co.*, 141 S.Ct. at 1025.

As noted above, none of the Respondents' lawsuit-related conduct involved any constitutionally cognizable contacts with Texas, let alone any activities that occurred in Texas. *See Moncrief Oil*, 414 S.W.3d at 151 (whether jurisdiction exists depends in significant part on the location of meetings where the allegedly tortious action occurred); *TV Azteca*, 490 S.W.3d at 53 (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 in the forum state). The California public entities' litigation-related conduct has nothing to do with Texas itself.

## III. The exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice.

Exxon also fails to satisfy the third necessary element for personal jurisdiction because it cannot establish that exercising jurisdiction over Respondents would comport with "traditional notions of fair play and substantial justice." *Ford Motor Co.*, 141 S.Ct. at 1024; *see Moncrief Oil*, 414 S.W.3d at 155.

First, exercising personal jurisdiction would cause serious hardship to Respondents, which are taxpayer-funded public entities and officials in California. The evidence Respondents submitted on this point was undisputed: Forcing public officials to litigate in an unfamiliar jurisdiction 1,700 miles away from their place of employment would require them to expend limited public funds on out-of-state representation and travel and would unduly occupy the time and attention of senior city officials who have day to day responsibility for managing the needs of their constituents and responding quickly to unexpected events. CR1823–25, 1831–33, 1954–96, 7079–80, 7101. The inevitable result of Exxon's overbroad theory would be to discourage public entities and officials nationwide from enforcing local laws against out-of-state defendants (and against local defendants with large out-of-state operations) lest they subject themselves to retaliatory lawsuits in far flung jurisdictions.

Second, this Court has already held that "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 this Court have renounced any desire to "make Texas the world's inspector general." *In re Doe*, 444 S.W.3d at 611 (finding no personal jurisdiction over Rule 202 potential defendant).

Third, Exxon would face no injustice if jurisdiction over Respondents were unavailable in Texas, because it could still litigate any claims it may have against Respondents as counterclaims in the California actions. Exxon is one of the largest corporations in the world. It regularly litigates throughout the United States and worldwide, including in California. Indeed, Exxon is already litigating against the California public entities' claims in the Northern District of California and the Ninth Circuit and can raise the claims identified in its Rule 202 petition as counterclaims, whether those cases are remanded or remain in federal court.

Fourth, exercising personal jurisdiction here and in these types of cases would undermine the interstate judicial system's interest in the efficient resolution of controversies. If Exxon's new theory were accepted, almost every controversial interstate tort could be litigated twice: first, in the state where the lawsuit was filed; and then in the state where a resident defendant retaliates with a lawsuit of its own. Here, at least some the oil and gas company defendants in the California lawsuits

have already raised First Amendment defenses.[15] Allowing them to assert the same First Amendment arguments in parallel Texas proceedings "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue." *Stroman*, 513 F.3d at 488. By contrast, if the First Amendment issues are litigated in the same California court, "judicial efficiency and uniformity [would] prevail." *Id.*

Fifth, principles of interstate comity and state sovereignty weigh heavily against asserting personal jurisdiction in cases like this. The constitutional restraints on exercise of personal jurisdiction do more than "protect the defendant against the burdens of litigating in a distant or inconvenient forum"; they also "ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292; *see also Bristol-Myers Squibb Co.*, 137 S.Ct. at 1780. Here, "[t]he effect of holding that a [Texas court] had personal jurisdiction over a nonresident state official would create an avenue for challenging the validity of one state's laws in courts located in another state." *Stroman*, 513 F.3d at 488. To endorse Exxon's retaliatory strategy—by allowing a company to interfere with the law enforcement efforts of nonresident public officials seeking to enforce local state laws on behalf of local residents by suing those officials in a distant forum, without having to allege

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[15] *See, e.g.*, Answering Brief of Defendant-Appellee Chevron Corp., *City of Oakland v. B.P. LLC*, 9th Cir. Case No. 18-6663 (2019) at 52–55.

or prove any actual conduct in that forum or even any actual effects in that forum—"would greatly diminish the independence of the states," *id.*, and would inevitably lead to a multiplicity of such actions by aggressive defendants whose principal goal is to deter public law enforcement.

## IV. This case is a poor vehicle to address these issues.

As Respondents explained in their Opposition to Petitioner's Petition for Review at 20–21, review should be denied not only because the court of appeals correctly applied long-settled due process precedents to the facts, but also because this case would be a particularly poor vehicle for rewriting those precedents even if it were within this Court's authority to do so.

First, this case raises a threshold legal issue that could result in affirming the court of appeals on an alternative ground, because the plain language of the Texas long arm statute does not permit the state's courts to exercise personal jurisdiction over public entities or officials sued in their official capacities.[16] The Texas long arm statute provides that the state has jurisdiction over "nonresidents," defined as either "an individual who is not a resident of this state" or "a foreign corporation, joint-stock company, association, or partnership." Texas Civ. Prac. & Rem. Code § 17.041. Public entities are neither individuals nor the business entities listed in the

[16] The Court of Appeals did not reach this issue but assumed that the long-arm statute applied. Opinion at *12 & n.12.

statute. Public officials are obviously not corporations, joint-stock companies, associations, or partnerships. Nor, when they are sued solely in their official capacities, are they "individuals," as any such suit is tantamount to a suit against the public entity itself. *See Stroman*, 513 F.3d at 482–83 ("the Texas statute offers no obvious rationale for including nonresident individuals sued solely in their official capacity"); *cf. Berry Coll., Inc. v. Rhoda*, No. 4:13-CV-0115-HLM, 2013 WL 12109374, at *5 (N.D. Ga. June 12, 2013) (suit against nonresident higher education officials was the "substantive equivalent" of suing the state of Tennessee, which was not an "individual" or "legal or commercial entity" under the Georgia long arm statute).

Here, Exxon's Rule 202 petition names the California officials solely in their official capacities, CR12-15-17, and asserts claims against them challenging official government action under 42 U.S.C. § 1983, which applies only to government actors or others acting under color of law. CR52; *see Goodman v. Harris Cty.*, 571 F.3d 388, 394 (5th Cir. 2009). Moreover, the California lawsuits, although filed and served by the public officials in their official capacities, plead public nuisance claims on behalf of the People of the State of California pursuant to California Code of Civil Procedure § 731, and therefore by the State itself. *See* CR2257, 2328, 2366, 2441,

2478, 2552, 2590, 2617, 2637, 2668, 2688, 2783, 2825, 2915.[17] Because the California public entities and individuals are not "nonresidents" within the meaning of the Texas long arm statute, Exxon's arguments could be disposed of on statutory grounds, without the Court reaching the Fourteenth Amendment issues raised in Exxon's petition.

Second, it makes no sense to prolong this litigation further, given the extraordinary weakness of Exxon's underlying claims on their merits. While the merits are irrelevant to the due process analysis, this Court's discretionary decision whether to grant review may legitimately consider how unlikely it is that, even if personal jurisdiction existed, Exxon could overcome an anti-SLAPP motion, let alone ultimately prevail, if it were to pursue its threatened litigation against Respondents.

Exxon's threatened abuse of process claim requires proof of "an improper use of the process other than the mere institution of [a] civil action," and "damages other than [those] necessarily incident to filing a lawsuit." *See Detenbeck v. Koester*, 886

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[17] *See also* Cal. Code Civ. Pro. § 731 ("A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the . . . county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists."); *California v. Purdue Pharma L.P.*, No. SACV 14–1080–JLS, 2014 WL 6065907, at *3 (C.D. Cal. Nov. 12, 2014) ("the People of the State of California—and therefore the State itself—are the real party in interest" in public nuisance case by county attorney).

S.W.2d 477, 481 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd) (quoting *Martin v. Trevino*, 578 S.W.2d 769 (Tex. Civ. App.—Corpus Christi 1978, *writ ref'd n.r.e.*)); *see also Tex. Beef Cattle v. Green*, 921 S.W.2d 203, 208 (Tex. 1996); *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997). Nothing in Exxon's Rule 202 Petition alleges any acts undertaken anywhere by any Respondent after the California lawsuits were filed; and the filing of a lawsuit, by itself, cannot constitute abuse of process.

Exxon's threatened First Amendment claim is also meritless. Exxon vaguely asserts that the California lawsuits were filed with the intent of discouraging it from engaging in constitutionally protected speech regarding certain unidentified public policies. CR18, 51. But Exxon never explains what speech it believes will be chilled, in Texas or elsewhere (and previously lost similar arguments, on nearly identical facts, in two other courts, *see* Part I.F, *supra* at 36–37). Nor does Exxon explain how the filing of the California lawsuits could constitute a violation of Exxon's First Amendment rights, because those lawsuits do not seek a court order limiting Exxon's protected speech and would impose liability only for the ongoing effects of Exxon's past conduct and previous misrepresentations of fact (which are not constitutionally protected, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980)).

Finally, Exxon's potential civil conspiracy claim rests entirely on the first two claims and necessarily fails for the same reasons.

## PRAYER

For these reasons, Respondents request that Exxon's petition for review be denied, or, in the alternative, that the Court affirm the court of appeals' decision.

Dated: December 1, 2021

Respectfully submitted,

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I hereby certify that this document complies with the length limitations of Tex. R. App. P. 9.4(i)(2). This certification is made in reliance on the word count reported by Microsoft Word, the computer program used to prepare the document, which reports a total length of 12,923 words, excluding those parts expressly exempted by Tex. R. App. P. 9.4(i)(1).

Dated: December 1, 2021

*/s/ Michael Rubin*
Michael Rubin

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I hereby certify that on December 1, 2021, a true and correct searchable PDF electronic copy of the foregoing document was served upon the counsel listed below, who are counsel of record for Petitioner Exxon Mobil Corporation.

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