No. 02-18-00106-CV

IN THE COURT OF APPEALS OF TEXAS
SECOND JUDICIAL DISTRICT

CITY OF SAN FRANCISCO *et al.*, Appellants
v.
EXXON MOBIL CORPORATION, Appellee

Appeal from Cause No. 096-297222-18
In the 96th District Court of Tarrant County, Texas
The Honorable R.H. Wallace, Jr., Presiding

BRIEF OF APPELLANTS CITY OF OAKLAND, BARBARA J. PARKER, SABRINA B. LANDRETH, AND MATTHEW F. PAWA

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Oral Argument Requested

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ABBREVIATIONS

App.	Items in the Appendix to this brief, by number.
CR	Clerk's Record
Exxon	Appellee-petitioner Exxon Mobil Corp.
Oakland and Pawa	The four appellant-respondents submitting this brief: (1) the City of Oakland, (2) Oakland City Attorney Barbara J. Parker, (3) Oakland City Administrator Sabrina B. Landreth, and (4) Matthew F. Pawa, an outside lawyer who represents Oakland and another California municipality.
Petition	Exxon's petition for pre-suit discovery under Tex. R. Civ. P. 202.
Potential defendants	All 16 parties named as potential defendants in the anticipated lawsuit described in Exxon's petition.
Potential witnesses	All 16 parties named as potential witnesses in Exxon's 202 petition.
Respondents	All 23 potential defendants and potential witnesses named in Exxon's 202 petition.
RR	Reporter's Record (transcript).
SCR	Supplemental Clerk's Record.
San Francisco Appellants	Appellants-respondents the City of San Francisco, Dennis Herrera, and Edward Reiskin.
San Mateo Appellants	Appellants-respondents San Mateo County, Marin County, Santa Cruz County, City of Santa Cruz,

	City of Imperial Beach, John C. Beiers, John L. Maltbie, Jennifer Lyon, Andy Hall, Serge Dedina, Brian Washington, Matthew Hymel, Dana McRae, Carlos Palacios, Anthony P. Condotti, and Martin Bernal.

STATEMENT OF THE CASE

Nature of the Case	This is an appeal from orders denying special appearances. Exxon Mobil Corporation ("Exxon") brought a petition for pre-suit discovery under Texas Rule of Civil Procedure 202 against seven California municipalities and counties, eight California municipal and county officials, and an attorney from Massachusetts who represents two of these municipalities in lawsuits in California against Exxon. 1 CR 63. Exxon asserts it has potential claims for abuse of process, civil conspiracy and constitutional violations against the potential defendants here. 1 CR 52. Exxon's claims are based upon the foregoing nonresidents suing Exxon and other energy companies (a subset of which are located in Texas) in California state court for committing a public nuisance and other transgressions against California cities, counties, and residents. 1 CR 9, 18. Exxon seeks pre-suit discovery from sixteen potential witnesses of its alleged claims against the potential defendants. 1 CR 11-15.
Course of the Proceedings	Exxon is a New Jersey corporation headquartered in Irving, Texas. It filed the Rule 202 petition on January 8, 2018 in the district court for Tarrant County. 1 CR 6. The defendants filed special appearances to challenge the trial court's personal jurisdiction. 1 CR 1802, 1843, 1916; 5 CR 7078, 7100, 7137. The trial court held a hearing on the special appearances on March 8, 2018. RR 1-110.
Trial Court	The Honorable R.H. Wallace, Jr., Presiding Judge, 96th District Court of Tarrant County, Texas.
Trial Court's Disposition of the Case	On March 14, 2018, the trial court denied all the special appearances. 5 CR 7210, App. 1. On April 24, 2018, after receiving proposed findings of fact and conclusions of law from all parties, the trial court adopted (with minor changes) Exxon's proposed findings of fact and conclusions of law (3 SCR 113-128, App. 2) over written objections filed by the potential defendants and witnesses (5 CR 7254-7292; 1 SCR 68-157; 4 SCR 4-60).

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39, Oakland and Pawa respectfully request oral argument because this court's decision-making process would be significantly aided by oral argument.

ISSUES PRESENTED

1. **Due Process/No Minimum Contacts.** Whether a Texas state court may exercise specific personal jurisdiction over a California municipality, its public officials and their outside counsel who otherwise have had no contacts with the State of Texas on the theory that these out-of-state residents "targeted" Texas itself by filing lawsuits in California courts against a group of corporations, some of which are based in Texas and some of which are not, for public nuisance harms to California state residents and public entities.

2. **The Texas long-arm statute.** Whether the Texas long-arm statute, which applies to "an individual who is not a resident of this state" or a "foreign corporation, joint-stock company, association or partnership," and which defines "doing business" in Texas by a nonresident to include "commit[ting] a tort in whole or in part in this state," Tex. Civ. Prac. & Rem. Code §§ 17.041 & 17.042(2), applies to a government, its officials or its outside counsel for taking official government action to enforce a sister state's laws.

3. **The findings of fact.** As set forth below in the Argument on Issue #1, the findings of fact as to the appellants' motive go to the merits and these findings are thus irrelevant to personal jurisdiction. In the alternative:

(A) Whether the trial court's factual findings were based upon factually and legally insufficient evidence when they attributed motives to all the potential defendants based upon statements made by third parties at meetings which one of the potential defendants attended or was invited to attend.

(B) Whether Exxon was precluded by collateral estoppel with respect to certain findings of fact on the appellants' motive by a final New York federal court decision finding no improper motive based upon the same statements from the same documents that Exxon used in this 202 proceeding.

4. **Personal jurisdiction over potential witnesses.** Whether in a pre-suit discovery proceeding under Texas Rule of Civil Procedure 202 the petitioner may take discovery of a potential witness without establishing personal jurisdiction over the potential witness.

INTRODUCTION

This matter involves out-of-state activity that Exxon alleges targeted it and other corporations – some of which are based in Texas and some of which are not. According to Exxon, this out-of-state activity allegedly targeting an industry somehow should be deemed to be targeting Texas itself. This theory of specific personal jurisdiction is invalid under controlling law. The trial court erred as a matter of law in accepting it.

Exxon commenced this proceeding shortly after seven California municipalities and counties brought lawsuits in California against Exxon and other oil and gas companies, including many based outside Texas. In response, Exxon brought this 202 petition in Tarrant County; Exxon seeks discovery of purported, potential countersuit claims for abuse of process, conspiracy, and First Amendment violations that Exxon wants to bring in Texas if it can find supporting evidence. The potential defendants in Exxon's potential lawsuit are the seven municipalities and counties, plus their officials and an outside lawyer. Among these potential defendants are the City of Oakland, its city attorney Barbara J. Parker, and Matthew Pawa, an attorney in private practice in Massachusetts who represents Oakland

(collectively referred to herein, along with Oakland City Administrator Sabrina B. Landreth, who Exxon named as a potential witness, as "Oakland and Pawa").

The only question on appeal is whether the district court properly asserted personal jurisdiction over these nonresidents. It is undisputed that Oakland and Pawa did not visit Texas, email anyone in Texas, call anyone in Texas, transact any business in Texas, or make any other contacts with Texas for any purpose related to the matters asserted in Exxon's 202 petition. Instead, Exxon's theory of specific personal jurisdiction is that these out-of-state residents "targeted" Texas itself by activities they undertook entirely outside of Texas, most importantly by suing Texas and non-Texas corporations for public nuisance in California courts for harms to California state residents and California public entities. The only "contacts" with Texas that Exxon relies on are *Exxon's own contacts or contacts by third parties* with Texas – namely, that (a) Exxon and some other companies that Oakland has sued in California are from Texas, and (b) the California lawsuits are supposedly motivated by a desire to silence the speech of energy companies on the issue of climate change, including Exxon and others that happen to be based in Texas.

The trial court accepted Exxon's theory, but it is fundamental that personal jurisdiction must be based on the *defendants'* activity purposefully availing itself of

the benefits of Texas, and thus cannot be based on the fact that the plaintiff resides in Texas or on any other contact by anyone other than the defendant itself. The Texas Supreme Court has specifically, expressly, and repeatedly rejected the theory advanced here that a nonresident may be subjected to personal jurisdiction in Texas for having directed a tort at Texas residents by engaging in activity outside the state. *E.g., Old Republic Nat'l Title Ins. Co. v. Bell*, No. 17-0245, 2018 WL 2449360, at *4 (Tex. June 1, 2018). Courts have repeatedly applied this rule to reject jurisdiction over nonresidents who supposedly have targeted forum residents with allegedly abusive litigation; every such decision of which appellants are aware rejects Exxon's theory. These decisions reflect a basic legal principle: suing forum residents or engaging in other out-of-state activity directed at forum residents is not a purposeful availment of the forum. The special appearances should have been granted.

STATEMENT OF FACTS

I. The California lawsuits.

In 2017, seven California cities and counties brought separate lawsuits in California state courts against certain fossil fuel companies located all over the world. The California lawsuits allege that these companies contributed to global warming, primarily by producing and selling fossil fuels in massive quantities. 1 CR 593-1291. In addition – and consistent with California law holding that deceptive promotion of a product is relevant to holding a product seller liable under public nuisance[1] – the seven California lawsuits allege that these same companies deceptively promoted these fuels. The lawsuits seek, among other things, an order requiring these companies to pay for infrastructure to protect the municipalities against global warming-induced rising seas and increased storm surges. 1 CR 959, 1012.

These lawsuits fall into two distinct groups: (i) five lawsuits referred to here as the "San Mateo Lawsuits," 1 CR 593, 701, 813, 1025, 1161, and (ii) two lawsuits filed by Oakland and San Francisco, 1 CR 924, 972. All seven lawsuits were brought pursuant to a California statute authorizing city and county attorneys to bring

[1] *See, e.g., Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 310 (2006).

nuisance claims on behalf of the People of the State of California. *See* Cal. Code Civ. Proc. § 731, App. 7; 1 CR 600, 708, 820, 930, 979, 1033, 1169.

(i) ***The San Mateo Lawsuits.*** In July 2017, two counties and one city (San Mateo County, Marin County, and the City of Imperial Beach) each brought a lawsuit against 34 fossil fuel producers. Of these 34 companies, Exxon and 17 others are residents of Texas; the rest are based all over the world. 1 CR 593-922. A few months later, two more lawsuits were brought by the City of Santa Cruz and Santa Cruz County. 1 CR 1025-1291. All five cities and counties are represented by the same California-based law firm, and these five San Mateo Lawsuits are nearly identical. 1 CR 593-922, 1025-1291. Exxon and the other defendants removed these San Mateo Lawsuits to the U.S. District Court for the Northern District of California, where they were assigned to Judge Vince Chhabria, who granted the San Mateo municipalities' motion to remand the cases to California state court, a decision Exxon and the other defendants are appealing. *County of San Mateo v. Chevron Corp*., No. 17-cv-04929-VC, 2018 WL 1414774, at *1 (N.D. Cal. Mar. 16, 2018), *appeal pending*, No. 18-15499 (9th Cir.).

(ii) ***The Oakland and San Francisco Lawsuits.*** The Oakland and San Francisco lawsuits were filed by the city attorneys of Oakland and San Francisco in

September 2017. 1 CR 924-1023. The Oakland and San Francisco lawsuits seek only monetary relief (*i.e.*, a fund to abate the harms from the nuisance) and expressly disclaim any remedy to control defendants' conduct. 1 CR 930, ¶ 11; 1 CR 978, ¶ 11. The two lawsuits are nearly identical to each other, but they differ from the San Mateo Lawsuits in their legal theories and in suing only five defendants. 1 CR 924, 972. Three of the five Oakland/San Francisco defendants are energy companies based in California, Great Britain, or the Netherlands (Chevron Corp., BP p.l.c., and Royal Dutch Shell plc, respectively). 1 CR 930-31, 933, 979-80, 982. The remaining two are based in Texas (Exxon and ConocoPhillips). 1 CR 932, 980-81. Oakland and San Francisco are represented by lawyers from a Seattle-based law firm (*i.e.*, a different firm from the one that represents the plaintiffs in the San Mateo Lawsuits). 1 CR 960, 1014. One of these attorneys is Matt Pawa, from the Seattle firm's Newton, Massachusetts, office. 1 CR 960, 1014. Pawa and his colleagues do not represent any of the San Mateo plaintiffs and the uncontradicted record evidence is that Pawa and the Oakland City Attorney have had "no involvement" in the San Mateo Lawsuits. *See* 1 CR 1863, ¶ 13; 1 CR 1841, ¶ 13.[2]

[2] There is also no evidence in the record that San Francisco or its officials, whom Pawa also represents, have had any involvement in the San Mateo lawsuits.

Exxon and the other defendants removed the Oakland and San Francisco lawsuits to the Northern District of California, where they were assigned to Judge William H. Alsup, who denied the cities' remand motion. *California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018). In the remand briefing, Exxon and the other defendants argued to the California federal court that the Oakland and San Francisco lawsuits "depend on Defendants' nationwide and global activities." 1 CR 1872, at 2:9-10. Judge Alsup recently granted the defendants' motion to dismiss. *City of Oakland v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 3109726 (N.D. Cal. June 25, 2018). Prior to the dismissal, Exxon and the other defendants had informed Judge Alsup that they planned to bring counterclaims in the Oakland and San Francisco lawsuits. 1 CR 1877.

II. Exxon's 202 petition.

A few months after the California lawsuits were filed, Exxon filed its 202 petition in Tarrant County. 1 CR 6-65. The petition alleges a conspiracy theory in which the potential defendants seek to enact a "bad faith" plot to silence the entire "Texas energy sector" on climate change. 1 CR 10, 18, 31-32, 51.

The potential witnesses and potential defendants. To collect evidence for this supposed plot, Exxon seeks discovery from 16 individuals: the mayor of

Imperial Beach; seven city attorneys and county counsels; attorney Pawa; and seven top financial administrators for the municipalities (collectively, the "potential witnesses"). 1 CR 11-15, ¶ 11. These potential witnesses include Sabrina B. Landreth, who is the Oakland City Administrator and one of the Oakland appellants submitting this brief. The potential defendants in Exxon's anticipated lawsuit are the seven city attorneys and county counsels, the one mayor, the seven municipalities themselves, and Pawa. 1 CR 63-64, ¶ 137. In other words, Exxon has double-listed all of the individual potential defendants as potential witnesses.

The personal jurisdiction allegation. Exxon seeks discovery here to support anticipated claims of "abuse of process, conspiracy, and constitutional violations." 1 CR 52, ¶ 113. Exxon alleges that Texas courts have personal jurisdiction over the potential defendants because they allegedly "targeted" Exxon and other fossil fuel companies for statements those companies made in Texas – which supposedly amounts to targeting the State of Texas itself. 1 CR 18. Here, in full, is the only allegation related to personal jurisdiction in Exxon's petition:

> This Court has personal jurisdiction over the potential defendants, pursuant to Section 17.042(2) of the Texas Civil Practice and Remedies Code, because the potential abuse of process, civil conspiracy, and constitutional violations were intentionally targeted at the State of Texas to encourage the Texas energy sector to adopt the co-conspirator's [*sic*] desired legislative and regulatory responses to

> climate change. ExxonMobil and the 17 other Texas-based companies [*sic*] that are named in the California municipalities' lawsuits exercise their First Amendment right in Texas to participate in the national dialogue about climate change. The speech and other First Amendment activity of the energy sector in Texas is precisely what the potential defendants have attempted to stifle through their abuse of law enforcement power and civil litigation.

1 CR 18, ¶ 32.

The "potential abuse of process, civil conspiracy, and constitutional violations" that Exxon alleges in this personal jurisdiction paragraph refer to the potential claims on which Exxon seeks to take discovery – *i.e.*, potential claims based upon the cities and counties having filed the above-mentioned lawsuits in California courts. *See* CR 10-11, ¶¶ 9-10. The petition does not allege that the potential defendants did anything in Texas to commit these potential torts or constitutional violations, except that process in the San Mateo Lawsuits was served on Exxon and the other Texas-based companies by an agent in Texas. 1 CR 33, 35, 38. Although the trial court's legal conclusions say that all seven lawsuits were served in Texas, the trial court's factual findings specifically and correctly stated that process for the Oakland and San Francisco lawsuits was served on Exxon and its co-defendants through their corporate agents *in California*. 3 SCR 121, ¶ 26. It is also undisputed that many of the statements that are at issue in the Oakland and

San Francisco cases – including statements by Exxon – are not statements made specifically in Texas.[3]

The merits allegations. The merits allegations in Exxon's petition (*e.g.*, about the respondents' alleged bad faith) are irrelevant to the special appearances – yet they became the backbone of the trial court's findings on personal jurisdiction. *See* 3 SCR 115-120, App. 2. These allegations mainly blame attorney Pawa for statements made by others; *none* show any contact with Texas. For example:

- Exxon's petition describes a 2012 conference in La Jolla, California attended by Pawa and many other people. The petition primarily quotes statements by other people at the conference, and attributes their motives to Pawa. 1 CR 19-21.
- Exxon's petition also relies on statements in a draft agenda for a meeting at the Rockefeller Family Fund offices in New York City – an agenda that (as Exxon's own documents clearly show) was written by someone else, for a meeting to which Pawa was invited. 1 CR 21-22, ¶ 38.

[3] *See, e.g.*, 1 CR 949-50, ¶ 74 (Exxon *New York Times* advertisement); *id.* 947-48, ¶¶ 64-67 (Washington D.C.-based group funded by Exxon); *id.* 948, ¶ 68 (same); *id.* 948-49, ¶¶ 70-71 (Exxon funding groups, not located in Texas, engaged in misleading on science); *id.* 949, ¶ 72 (similar); *see also id.* 949-50, ¶¶ 73 & 77 (statements by trade group in Washington).

- Exxon alleges that Pawa met with several state attorneys general in New York City just before the New York and Massachusetts AGs made public remarks about investigating Exxon for securities and consumer fraud. 1 CR 27, ¶ 50.
- Exxon's petition relies on a hacked copy of a confidential memo Pawa wrote and sent from his office in Massachusetts to an attorney and a scientist at a California non-profit organization (NextGen America). The memo analyzed a potential climate change case by the State of California – not by the municipalities. 1 CR 32, ¶ 61.
- Finally, Exxon's petition tries to show bad faith by quoting out-of-context snippets of statements made by the seven cities in prospectuses for municipal bonds that they issued. *See, e.g.*, 1 CR 9-10, 34-47, 929, ¶ 9, 1007-09, ¶ 89.

None of these allegations involved any contact with Texas.

III. The special appearances in the district court.

All the potential defendants and witnesses filed special appearances contesting personal jurisdiction and filed affidavits establishing that none of them had any contacts with Texas related to the matters set forth in Exxon's 202 petition. 1 CR 1802, 1843, 1912, 1916; 5 CR 7078, 7100, 7137, 1839, 1861, 1912. For example, Parker, Landreth and Pawa state in their affidavits that (1) they (and

Oakland itself) have no employees, offices, bank accounts, real property, or agents for service of process in Texas, (2) they and Oakland have no contracts with anyone in Texas related to the matters in Exxon's petitions, and (3) neither they nor their employees nor Oakland's employees traveled to Texas for purposes related to any subject at issue in Exxon's petition. 1 CR 1839-41, 1861-63, 1912-14; 5 CR 7115-17. This evidence was never contradicted.

The special appearances focused on the respondents' absence of contacts with Texas and did not respond to Exxon's merits allegations – *e.g.*, the allegations about Pawa's statements and intent. In framing the evidence in this way, the special appearances pointed out that Texas courts have specifically advised litigants to focus their special appearances on contacts, and not on intent or other merits allegations. 5 CR 7120, 7193-94; *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 791 (Tex. 2005) (jurisdictional affidavits did "not deny [the plaintiff's] fraud allegations," but were instead "*rightly focused* . . . on lack of contacts rather than lack of culpability") (emphasis added).

While the respondents followed this directive from the Texas Supreme Court, Exxon flouted it. Exxon responded not by contesting any of the jurisdictional facts presented in the respondents' affidavits, but by submitting a mass of "evidence" on

the merits of its petition. This evidence consisted almost entirely of the same documents used to support the merits allegations in the petition on Exxon's potential claims, which were mostly third-party statements (*e.g.*, the draft agenda for the meeting in New York at the Rockefeller foundation office to which Pawa was invited). At the hearing on the special appearances, the trial court was reminded that on a special appearance the respondents were "constrained not to respond to the factual arguments that were proffered by Exxon." *See* RR 72:7-10. And Exxon eventually conceded at the hearing that "intent doesn't matter" and that the *only* relevant question was the effect the California lawsuits had on Texas entities:

> Judge, *it doesn't matter if they claim they had good intentions for filing their lawsuit. ... Their intent doesn't matter.* What matters is: What effect did those lawsuits have on energy companies in Texas?

RR 105:3-11 (emphasis added); *see also* RR 103:3-4 (Exxon attorney: whether allegations about Potential Defendants' intent "can be ultimately proved is not the point"). Despite this concession, Exxon never submitted any evidence that any respondent had had any effect on it or any other Texas entity.

On March 14, the trial court issued a one-page order denying all the special appearances, without making any findings, providing any reasoning, or citing any law. 5 CR 7210, App. 1.

IV. The trial court adopts Exxon's proposed findings and conclusions.

After the March 14 denial of the special appearances, all parties submitted proposed findings of fact and conclusions of law to the trial court. 1 SCR 7; 1 SCR 64; 5 CR 7293; 5 CR 7214. Notwithstanding Exxon's prior concession on the irrelevance of the merits, Exxon now asked the trial court to enter findings substantiating Exxon's entire case on the merits – including all the innuendo about Pawa's alleged motives and his purported role masterminding all seven lawsuits (including the San Mateo Lawsuits, despite Pawa's uncontradicted affidavit stating he had "no involvement" in those lawsuits). 5 CR 7220-26.

In addition to proposing their own findings and conclusions, 1 SCR 7; 1 SCR 64; 5 CR 7293, the respondents objected to Exxon's proposed findings and conclusions on multiple grounds, including that Exxon's findings (1) were improper and irrelevant findings going to the merits, (2) were not supported by the evidence because they constituted "innuendo by a chain of speculative inferences," or because they were not supported by any evidence at all, and (3) contradicted final decisions by a New York federal court and a Massachusetts state court, including specific findings by the federal court that Pawa had no improper intent. 4 SCR 10 & 4-21;

see also 4 SCR 68-157; 5 CR 7254-7429. The trial court nonetheless adopted Exxon's proposal with a few very minor changes. 3 SCR 113-128, App. 2.

The findings of fact. Notwithstanding *Michiana* and Exxon's concession at the hearing that "intent doesn't matter," RR 105:3-11, the findings and conclusions consisted almost entirely of findings about the potential defendants' purported bad faith – findings related to the *merits* of a lawsuit that Exxon has not even brought yet, and for which it supposedly needs pre-suit discovery. 3 SCR 115-25, App. 2. These findings employed Exxon's guilt-by-association technique, with findings about third-party statements (1) at the La Jolla, California meeting, (2) in the draft agenda for the Rockefeller meeting in New York, and (3) at the AGs' New York press conference. *Id.* The findings also contained out-of-context snippets from the municipal bonds, which were used to make inferences about Pawa's intent *and* the intent of the other 15 potential defendants. 3 SCR 123-24, App. 2.

Exxon's findings also asked the trial court to decide not just the merits of its anticipated lawsuit against the parties, but also issues related to whether its 202 petition should be granted. For example, it threw in a finding that discovery is necessary since Pawa declined to confirm his attendance at a meeting of AGs in New York at the request of a potential AG client (which supposedly shows an intent to

"conceal" evidence), and that all the potential witnesses likely have evidence relevant to Exxon's anticipated lawsuit. 5 CR 7223-30. The trial court adopted these findings, too. 3 SCR 118, ¶¶ 17-18, 3 SCR 125, ¶ 41, App. 2.

The findings admitted that the potential defendants do not reside in Texas and have done no business there related to this matter. 3 SCR 114-15, ¶¶ 2-4, App. 2. The findings do not identify any Texas contacts by the Oakland and Pawa but merely cite instances of Exxon's own statements – *e.g.*, on its website, in a speech, and in a national advertising campaign, 3 SCR 121-22, ¶¶ 29-30, App. 2. The findings say that the California complaints "focus on ExxonMobil property based in Texas, including ExxonMobil's internal memos and scientific research" because the complaints identify evidence of Exxon's early knowledge about the climate change problem or misstatements that Exxon says are found in documents (*i.e.*, its discovery documents for the California cases) located in Texas. 3 SCR 122, ¶ 31, App. 2.

The conclusions of law. The trial court essentially made three conclusions of law on personal jurisdiction. 3 SCR 126-27, App. 2. First, it found that Pawa is subject to personal jurisdiction because he represents Oakland and San Francisco in lawsuits in California against Exxon and one other Texas company, and has done so with an intent to influence other unnamed "Texas-based energy companies" (*i.e.*,

with the very intent that Exxon had previously admitted "doesn't matter" to personal jurisdiction). 3 SCR 126, ¶ 49, App. 2. Second, the trial court concluded that personal jurisdiction can be asserted over *all* potential defendants because they worked on complaints that "expressly target" speech by Exxon and "other," again unnamed, "Texas-based companies," and because process for the San Mateo Lawsuits was served on Exxon in Texas. 3 SCR 127, ¶ 50, App. 2.[4] Third, with respect to the individuals who are potential witnesses but not potential defendants (*e.g.*, Oakland City Administrator Sabrina Landreth and other financial officials allegedly involved in municipal bond issuances), the trial court concluded it was "not required" to have personal jurisdiction over these individuals and thus denied their special appearances. 3 SCR 125, ¶ 43, App. 2.

V. Exxon's prior (failed) lawsuits against state attorneys general.

Exxon's 202 petition is not the first (or even the second) time Exxon has alleged a conspiracy between Pawa and government officials to silence Exxon, nor is it the first time Exxon has done so by improperly bringing legal proceedings in Texas.

[4] In this conclusion of law, as noted above, the trial court contradicted its own finding that the Oakland and San Francisco lawsuits were served in California. 3 SCR 121, ¶ 26.

In 2016 Exxon brought a federal lawsuit against the Massachusetts and New York attorneys general in the Northern District of Texas. In January 2017, the Texas federal court, after "careful consideration" of the AGs' briefing (which sought dismissal for lack of personal jurisdiction), transferred venue to the Southern District of New York. 1 CR 249. In January 2018, Exxon filed a Second Amended Complaint ("SAC") in the New York federal court attaching over 1,300 pages of exhibits. 4 SCR 9 n.1.[5]

Exxon's allegations and exhibits in its federal SAC present virtually the same allegations and exhibits about Pawa and the AGs that Exxon made and introduced here.[6] For example, the exhibits include the same summary of the La Jolla meeting, the same draft agenda for the Rockefeller meeting, the same transcript of the AGs' New York press conference, the same emails between Pawa and state officials about the press conference, and the same copy of a hacked memo from Pawa to NextGen

[5] These exhibits and pleadings in Exxon's lawsuits against the attorneys general are (as Oakland and Pawa pointed out to the trial court, 4 SCR 9 n.1) available on a government website maintained by the Massachusetts attorney general's office. *See* https://www.mass.gov/files/documents/2018/01/29/Exxon%20Mobil%20Corporation%E2%80%99s%20Declaration%20in%20Support%20of%20%20Motion%20to%20Amend%20the%20First%20Amended%20Complaint%20with%20Exhibits.pdf.

[6] *See* App. 8 and 9 (charts comparing the allegations and evidence in Exxon's 202 petition with the overlapping allegations and evidence in Exxon's lawsuits against the AGs). These appendices are based on filings collected on the Massachusetts attorney general's website, as described above. *See* https://www.mass.gov/lists/attorney-generals-office-exxon-investigation. *See also* 1 CR 1847; 5 CR 7082; 4 SCR 9 n.1 (directing trial court to this website).

America. *See* App. 9. And in its SAC, Exxon alleged that these documents showed Pawa's improper motives, and then used these motives to try to taint the AGs' investigations – the same move Exxon has made here in this 202 proceeding against Pawa and the California municipalities. *See* App. 8.[7]

On March 29, 2018, the federal court in New York issued a detailed order that considered all of Exxon's evidence and allegations and dismissed Exxon's claims against the AGs as implausible. The federal court held that almost all the same statements cited in Exxon's 202 petition were, if anything, consistent with a good-faith belief by both the AGs *and by Pawa himself* that Exxon has acted illegally. *Exxon Mobil Corp. v. Schneiderman*, No. 17-CV-2301 (VEC), 2018 WL 1605572, at *19 (S.D.N.Y. Mar. 29, 2018), *appeal pending sub nom. Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir.).

In 2016 Exxon also launched a legal challenge in Massachusetts Superior Court against the Massachusetts Attorney General's issuance of a subpoena. *In re*

[7] Exxon also used this federal case to try to take discovery of Pawa. Exxon issued a federal subpoena to him and his prior law firm that sought essentially the same discovery (and then some) that Exxon seeks from Pawa in its 202 petition. 1 CR 1846-48, 1864, 1879-1900; 5 CR 7081-83. Pawa moved to quash the subpoena in federal court in Massachusetts (on First Amendment grounds, among others), Exxon cross-moved to compel and these proceedings have been stayed and remain pending. 1 CR 1864, ¶¶ 17, 19, 20, 1879-1900, 1908, 1910-11; *Exxon Mobil Corp. v. Pawa Law Group, P.C.*, No. 16-cv-12504-WGY (D. Mass.). Exxon assured the Massachusetts federal court in legal briefing that Exxon was not "covertly planning to sue Pawa." 1 CR 1911, n.11.

Civil Investigative Demand No. 2016-EPD-36, No. SUCV20161888F, 2017 WL 627305 (Mass. Super. Ct. Jan. 11, 2017). The allegations in Exxon's Massachusetts petition, like Exxon's federal lawsuit, overlap extensively with the allegations here, including the allegations based upon Pawa's meeting with the attorneys general, the AGs' press conference in New York City, the La Jolla conference, and the Rockefeller Family Fund draft agenda. *See* App. 8. The Massachusetts Superior Court took evidence and in a final decision on the merits rejected Exxon's arguments that the investigation was "politically motivated, that Exxon is the victim of viewpoint discrimination, and that it is being punished for its views on global warming." *Id*. at * 4. This decision was affirmed by the state's highest court. *Exxon Mobil Corp. v. Attorney Gen.*, 94 N.E.3d 786 (Mass. 2018).

The New York federal court decision and the Massachusetts Supreme Judicial Court decision were issued before the trial court here issued its findings and conclusions. The respondents promptly brought the New York federal court decision to the trial court's attention in their objections to Exxon's proposed findings and conclusions. They argued that Exxon was collaterally estopped by the New York decision from seeking a finding on Pawa's intent – and that decisions in both of Exxon's prior cases against the AGs showed the impropriety of wading into the

merits on personal jurisdiction, lest there be contradictory rulings. 4 SCR 8-9. But the trial court's only references to Exxon's prior lawsuits in its findings were interlocutory statements that the federal court in Texas had included in its transfer order relating to its view of the merits. 3 SCR 120, App. 2. These observations were vacated as "entirely *dicta*" in the federal court's final decision on the merits. *Schneiderman*, 2018 WL 1605572, at *7 n.15.

SUMMARY OF ARGUMENT

There is no personal jurisdiction here, for several independent reasons.

Due process: minimum contacts. Exxon's sole alleged jurisdictional "contact" by Oakland, Parker and Pawa is that they have brought lawsuits in California against two Texas energy companies, and that they did so with the motive to influence still other (unnamed) energy companies in Texas. But this theory relies entirely on contacts with Texas by Exxon itself and other energy companies, and not on any contacts by the potential defendants. This version of "minimum contacts" has been explicitly rejected by both the U.S. Supreme Court and the Texas Supreme Court.[8] The Texas Supreme Court rejects even *considering* a defendant's mere

[8] *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) ("our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."); *Old Republic*, 2018 WL 2449360, at *4 (Tex. June 1, 2018) ("the mere allegation that a nonresident directed a tort from outside the forum against a resident is

intent to harm Texas residents, *Michiana*, 168 S.W.3d at 791, a point Exxon conceded when it admitted at the hearing below that "intent doesn't matter." RR 105:3-11. Simply put, suing two Texas residents in California under California law is manifestly not a "purposeful availment" of the benefits and protections of Texas law; minimum contacts are utterly lacking. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013).

Due process: fair play. Due process also requires courts to determine that an assertion of jurisdiction is consistent with "traditional notions of fair play and substantial justice." *Id.* at 154-155. "Going on offense" in Texas court against the nonresident parties and lawyers who first initiated pending litigation elsewhere – as Exxon has done here – is about as far from fair play as it gets.

Long-arm statute. The Texas long-arm statute applies to individuals and various business entities and associations who commit torts in Texas; it does not apply to official government action to enforce a sister state's laws, even when the defendant is an individual. In *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), the Fifth Circuit considered a case where a Texas resident brought a Texas lawsuit against an Arizona government official, for enforcing Arizona law in

insufficient to establish personal jurisdiction."); *Michiana*, 168 S.W.3d at 790-91 (rejecting "directed-a-tort jurisdiction").

a way that allegedly violated the Texan's constitutional rights. The court pointed out that the suit was in actuality against the sister state itself (and, additionally, that a constitutional claim is not a "tort") and therefore "only by twisting the meaning of the terms covered by the long-arm statute" could attempts to enforce Arizona law "be encompassed and adjudicated in Texas courts." *Id.*at 483. Just so here: the long-arm statute does not apply to official efforts to enforce California law; nor does it apply to constitutional claims, which are not torts.

Factual findings about motive. Most of the trial court's factual findings are about the potential defendants' motives – and are therefore completely irrelevant to "minimum contacts" and personal jurisdiction. As the Texas Supreme Court has held, jurisdictional 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." *Michiana*, 168 S.W.3d at 791. But even if these motive findings *were* relevant, they are based on evidence that is factually and legally insufficient. They attribute statements made by *other people* to Pawa, merely because he attended or was invited to the same conference, and then attribute the same motive to the other 15 potential defendants, merely because two of the seven

municipalities hired Pawa's law firm. This sort of guilt by association is totally improper. Moreover, many of the key findings contradict the New York federal court's decision, which found that the very same statements from the very same documents that Exxon relies on here do *not* show that anyone (specifically including Pawa) acted in bad faith. This should have prevented the trial court from venturing to make contradictory findings about Pawa's motive – both as a matter of issue preclusion and as a simple matter of comity and common sense.

Jurisdiction over potential witnesses. Exxon contends it can take discovery of any potential witness as long as there is jurisdiction over one potential defendant. Exxon has thus double-listed potential defendants as potential witnesses so that even if a court finds that it lacks jurisdiction over a potential defendant, it can take discovery of that person anyway as a potential witness. While there is no jurisdiction here over anyone, Exxon's tactic, if allowed, would be an improper end run around the Texas Supreme Court's ruling that personal jurisdiction is required over each potential defendant. *In re Doe ("Trooper")*, 444 S.W.3d 603, 605 (Tex. 2014). Relatedly, at Exxon's urging, the trial court found that it could order discovery against the city financial administrators (such as Oakland City Administrator Landreth) without establishing its jurisdiction over them. This is supposedly

because these administrators are potential witnesses, not potential defendants in Exxon's planned lawsuit. 3 SCR 125, ¶ 43. This was error as well, because it would authorize pre-suit discovery against virtually anyone anywhere in the world, as long as there is jurisdiction over a single potential defendant. No court has accepted such a broad reading of Rule 202.

ARGUMENT

I. Standard of Review.

Whether the trial court "has personal jurisdiction over a defendant is a question of law, which [the appellate court will] review de novo based on all the evidence." *OZO Capital, Inc. v. Syphers*, 2018 WL 1531444, at *4 (Tex. App.—Fort Worth Mar. 29, 2018, no pet. h.). As a potential plaintiff in a Rule 202 petition, Exxon bears the initial burden of pleading allegations sufficient to establish personal jurisdiction over each potential defendant. *In re Doe a/k/a "Trooper,"* 444 S.W.3d 603, 608, 610 (Tex. 2014). In this analysis, "each defendant's contacts with the forum State must be assessed individually," and not in the aggregate. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 52 (Tex. 2016).

A defendant may negate personal jurisdiction factually, by presenting counter-evidence negating its alleged contacts with Texas, or legally by demonstrating "(1) those facts are not sufficient to establish jurisdiction, (2) the

defendant's Texas contacts fall short of purposeful availment, (3) the claims do not arise from the defendant's Texas contacts, or (4) exercising jurisdiction over the defendant would offend traditional notions of fair play and substantial justice." *OZO Capital*, 2018 WL 1531444, at *4. The plaintiff then "risks dismissal of its suit if it does not present the trial court with evidence affirming its jurisdictional allegations and establishing personal jurisdiction over the defendant." *Id*. The sufficiency of legal conclusions is a question of law that this Court reviews *de novo*. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

As set forth below, Exxon failed to plead any facts showing that Oakland and Pawa are subject to specific jurisdiction in Texas, sufficient to shift the burden to Oakland and Pawa. Rather, the sum of Exxon's jurisdictional allegations consists of acts undertaken outside of Texas, and the purported intended effect of those acts on Exxon – none of which is sufficient to confer personal jurisdiction in Texas. And even if Exxon had pled sufficient facts to shift the burden, Exxon's evidence submitted in response to the respondents' affidavits failed as a matter of law to establish any of the requisite elements of specific personal jurisdiction.

II. The trial court's exercise of personal jurisdiction violates due process (Issue #1).

As the petitioner, Exxon is required to establish the district court's personal jurisdiction over the respondents. *See In re Doe ("Trooper")*, 444 S.W.3d 603, 605 (Tex. 2014). The federal and state constitutional protections of due process require a showing (1) that the defendant has "minimum contacts" with Texas, *i.e.*, that the defendant "purposefully availed itself of the privilege of conducting business with the forum state, invoking the benefits and protections of its laws," *Moncrief Oil*, 414 S.W.3d at 150 (quotation marks omitted); (2) that the plaintiff's cause of action arises from or relates to those contacts, *i.e.*, a "substantial connection between those contacts and the operative facts of the litigation," *id.* at 156 (quotation marks omitted); and (3) that the assertion of jurisdiction is consistent with "traditional notions of fair play and substantial justice." *Id.* at 150 (quotation marks omitted). Exxon's allegations in its petition and its evidence failed as a matter of law on all three elements.

A. Oakland and Pawa have not purposefully availed themselves of the privilege of conducting business in Texas.

Minimum contacts are patently lacking here. Minimum contacts must show purposeful availment of the privilege of conducting business with the forum state, invoking the benefits and protections of its laws. In this analysis:

> (1) the relevant contacts are those of the defendant, and the unilateral activity of another person or a third party is not pertinent;
>
> (2) the contacts that establish purposeful availment must be purposeful rather than random, fortuitous, isolated, or attenuated; and
>
> (3) the defendant must seek some benefit, advantage, or profit by "availing" itself of the jurisdiction.

Searcy v. Parex Res., Inc., 496 S.W.3d 58, 67 (Tex. 2016) (footnotes omitted). As noted above, "each defendant's contacts with the forum State must be assessed individually," and not in the aggregate. *TV Azteca*, 490 S.W.3d at 52.

Oakland and Pawa have not purposefully availed themselves of the privilege of conducting business in Texas. Here, the Oakland and Pawa submitted affidavits establishing that they had no contacts with Texas related to the Exxon's claims – no visits to Texas, no contracts with Texans, no employees in Texas, no bank accounts in Texas. 1 CR 1839-41, 1861-63, 1912-14; 5 CR 7115-17. This evidence is uncontradicted and there are no trial court findings to the contrary.

Instead, the district court held that personal jurisdiction was proper over all 16 potential defendants because they (A) helped prepare the California lawsuits that "target" speech by Exxon and other (unnamed) Texas energy companies; (B) had the intent to "chill and affect speech, activities and property" by Texas energy

companies; and (C) used an agent to serve Exxon in Texas. 3 SCR 127, ¶ 50, App. 2. The district court made similar legal conclusions about Pawa, and also concluded that he "instigat[ed]" the AGs' investigation of Exxon. 3 SCR 126-27, ¶ 49, App. 2. These conclusions are insufficient as a matter of law to establish purposeful availment.

1. Suing two Texas residents in California is not a purposeful availment of Texas law.

Bringing, or even instigating, lawsuits against Texas residents in other states based on alleged torts or constitutional violations is not a purposeful availment of the benefits and protections of Texas law.

First, this Court should be clear about the factual findings that the district court actually made. Although the trial court's conclusions vaguely refer to speech by Exxon "and other Texas-based energy companies," the only speech specifically mentioned in the trial court's findings was Exxon's speech, and the only other Texas entity named in the Oakland and San Francisco lawsuits is ConocoPhillips. *See* 3 SCR 121-22, ¶¶ 29-30, App. 2; 1 CR 932, ¶ 21, 980, ¶ 21.

Second, as a matter of law, targeting forum residents with a tort is not enough to sustain jurisdiction. For example, in *Walden v. Fiore*, the U.S. Supreme Court rejected personal jurisdiction over a government official who targeted two forum

residents with a constitutional violation. The Court held that "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 134 S. Ct. at 1125; *accord Old Republic*, 2018 WL 2449360, at *5 (citing this passage). The Court also rejected basing personal jurisdiction on "where the plaintiff experienced a particular injury or effect." *Walden*, 134 S. Ct. at 1122.

Texas decisions are even more emphatic. In *Michiana*, the Texas Supreme Court specifically rejected what it called "directed-a-tort jurisdiction." 168 S.W.3d at 790. The Court held that "minimum-contacts analysis focuses solely on the actions and reasonable expectations of the defendant" – not on the defendant's intent or the place of the plaintiff's injury. *Id.* The court reasoned that jurisdictional 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.

Id. at 791. Subsequent decisions treat *Michiana* as a seminal case and have repeatedly held that directing a tort at a Texas resident is not enough to sustain

jurisdiction.[9] The U.S. Supreme Court and this Court have also rejected jurisdiction for torts allegedly targeting *multiple* forum residents.[10]

Third, courts have applied these principles to situations essentially identical to this one. For example, in a decision handed down just a few weeks ago, the Texas Supreme Court categorically held that the "mere existence or allegation of a conspiracy directed at Texas is not sufficient to confer jurisdiction." *Old Republic*, 2018 WL 2449360, at *4 (Tex. June 1, 2018); *accord 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 in the forum state").[11] In addition

[9] *See, e.g., Old Republic*, 2018 WL 2449360, at *4 ("the mere allegation that a nonresident directed a tort from outside the forum against a resident is insufficient to establish personal jurisdiction"); *Searcy*, 496 S.W.3d at 69 ("The *Michiana* court thus expressly rejected the 'directed-a-tort' theory from the jurisprudence surrounding specific jurisdiction. Even if a nonresident defendant knows that the effects of its actions will be felt by a resident plaintiff, that knowledge alone is insufficient to confer personal jurisdiction over the nonresident."); *Moncrief Oil*, 414 S.W.3d at 157 ("a nonresident directing a tort at Texas from afar is insufficient to confer specific jurisdiction"); *Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 661 (Tex. 2010) (although plaintiff was defrauded in Texas, there was no allegation that "any part of the claim originates from the [defendants'] conduct in Texas"; "we rejected the concept of directed-a-tort jurisdiction in *Michiana*, instead affirming the importance of the defendant's contacts with the forum state."); *OZO Capital*, 2018 WL 1531444, at *9 ("Mere injury to a forum resident is not a sufficient connection to the forum state."); *Furtek & Assocs. v. Maxus Healthcare Partners*, No. 02-15-00309-CV, 2016 WL 1600850, at *7 (Tex. App.—Fort Worth Apr. 21, 2016, no pet.) (memo. op.) (rejecting personal jurisdiction because in *Michiana* "the court specifically rejected the argument that Texas has specific jurisdiction if the nonresident defendant 'directed a tort' at a Texas resident.").

[10] *See, e.g., Walden*, 134 S. Ct. at 1122 (injury to two forum residents not enough); *OZO Capital, Inc.*, 2018 WL 1531444, at *10 (two forum residents, no jurisdiction); *Estate of Hood*, No. 02-16-00036-CV, 2016 WL 6803186, at *7 (Tex. App.—Fort Worth, Nov. 17, 2016, no pet.) (memo. op.) (seven Texas residents, no jurisdiction).

[11] Notably, *Old Republic* involved significant conduct by the defendant in Texas – but the Supreme Court still rejected jurisdiction. A Texas resident sold her Texas house and transferred

to *Walden*, *Old Republic* and *Michiana*, there are many decisions that specifically reject jurisdiction over lawyers and other defendants who have allegedly engaged in alleged "conspiracies," "schemes," "abusive" litigation, or constitutional violations aimed at Texas residents:

- *Stanton v. Gloersen*, No. 05-16-00214-CV, 2016 WL 7166550 (Tex. App.–Dallas Nov. 30, 2016, pet. denied) (memo. op.). The defendant was a Florida lawyer accused of conspiring to (a) maliciously prosecute a Texas resident and (b) tortiously interfere in a Texas probate proceeding. Relying on the *Michiana* rule, the court held that the plaintiff had merely alleged "a tort directed at a Texas resident," based on "[t]he happenstance" of the plaintiff's connection to Texas; it rejected personal jurisdiction. *Id.* at *11 (quotation marks omitted).

- *Estate of Hood*, No. 02-16-00036-CV, 2016 WL 6803186 (Tex. App.—Fort Worth, Nov. 17, 2016, no pet.) (memo. op.). The defendant was a Mississippi lawyer who mailed an allegedly "extortionate" letter to Texas, threatening to withhold from seven Texas residents the proceeds from the sale of Texas real property – property that was being probated in competing Texas and Mississippi proceedings. This Court rejected personal jurisdiction over the lawyer: "to the extent that Appellees argue that specific jurisdiction exists in this case because [the lawyer] directed a tort at a Texas resident, that argument is foreclosed by *Michiana*." *Id.* at *7.

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the proceeds to a close friend in Louisiana to avoid garnishment by the United States – thereby defrauding another Texas resident who got hit with a federal lien after she bought the house. 2018 WL 2449360, at *1-2. As part of the asset-shielding scheme, the Louisiana friend undertook significant conduct in Texas – dozens of phone calls and money transfers into Texas, and liens filed on three Texas vehicles. *Id.* at *4-6. Yet the Texas Supreme Court unanimously held that there was no personal jurisdiction over the Louisiana friend. Her Texas-related activity occurred only because of a friend "who happens to live in Texas," *id.* at *5, and was not an attempt by her to seek some benefit from the forum.

- *OZO Capital*, 2018 WL 1531444. A North Carolina LLC and a Texas LLC had a dispute over which LLC owned certain mortgage notes (which were physically located in Texas). The North Carolina LLC intervened in a Texas lawsuit over title to the notes, and the lawsuit eventually settled. After this settlement, the Texas LLC brought a second lawsuit in Texas, contending that the prior settlement agreement was collusive. The sole question on appeal was whether there was personal jurisdiction in this second lawsuit over the individual managers of the North Carolina LLC – *i.e.*, two nonresident individuals who had caused the LLC to intervene in the first Texas litigation, and who had individually testified in Texas in support of the collusive settlement. This Court rejected personal jurisdiction: there was no showing that these nonresidents "directed any alleged individual actions at Texas rather than merely at a Texas resident." *Id.* at *10.

- *Tang v. Garcia*, No. 13-06-00367-CV, 2007 WL 2199269 (Tex. App.—Corpus Christi-Edinburg Aug. 2, 2007, pet. denied) (memo. op.). The plaintiff was a Texas resident who claimed abuse of process. The defendants were out-of-state lawyers who allegedly initiated "a campaign of abuse and harassment" against the Texas resident, and who allegedly filed baseless claims in Texas and lied to Texas courts about the plaintiff. *Id.* at *2. The court rejected specific jurisdiction, because the allegations did not meet the "requirement of physical facts" articulated in *Michiana*. *Id.* at *6.

- *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008). The defendant was the commissioner of the Arizona Department of Real Estate, and she issued a cease-and-desist letter to a Texas business that was selling time-shares to Arizona residents without a license. The Texas business said (just as Exxon says here) that there was personal jurisdiction over the government official because its constitutional rights were violated in Texas. The Fifth Circuit disagreed. It held (1) that the commissioner's enforcement of Arizona law was categorically not a purposeful availment of "the benefits of Texas law," *id.* at 484, (2) that "[w]e have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas

resident," *id.* at 486, and (3) that the connection between the commissioner and Texas was "based entirely on the unilateral actions of [the plaintiff], not the Commissioner," *id.*

- *Claro v. Mason*, No. H-06-2398, 2007 WL 654609, at *7 (S.D. Tex. Feb. 27, 2007). The court rejected personal jurisdiction in a malicious prosecution case: "merely alleging that a defendant in a foreign state made tortious statements or communications that had harmful effects directed to Texas cannot be the basis for specific personal jurisdiction in Texas."

- *Morrill v. Scott Finc'l Corp.*, 873 F.3d 1136 (9th Cir. 2017). A lawyer had injured two forum residents, had travelled to the forum as part of the allegedly abusive litigation, and had even sought a subpoena from a court within the forum. Yet the Ninth Circuit rejected jurisdiction: these connections to the forum "occurred only because [the forum] happened to be where Plaintiffs resided," and did not constitute purposeful availment. *Id.* at 1144-45.

This is only a partial list; many other cases from around the country are similar.[12] They are based on interpretations of federal due process and thus are directly on point here.

[12] *See Harmer v. Colom*, 650 F. App'x 267, 272 (6th Cir. 2016) (no personal jurisdiction over lawyer who brought allegedly abusive litigation against forum residents "with the intent of causing negative consequences in [the forum]"); *Allred v. Moore & Peterson*, 117 F.3d 278, 283 (5th Cir. 1997) (similar); *Wallace v. Herron*, 778 F.2d 391, 394–95 (7th Cir. 1985) (similar); *SpaceCo Bus. Sols., Inc. v. Mass Engineered Design, Inc.*, 942 F. Supp. 2d 1148, 1154 (D. Colo. 2013) (rejecting personal jurisdiction over party who brought abusive litigation against forum resident; no authority to support proposition that "anytime a plaintiff files a suit in a jurisdiction other than the defendant's principal place of business, ... he renders himself vulnerable to being sued by the defendant in the defendant's home state, again regardless of whether the plaintiff turned defendant has had any other contacts with that state."); *Midwest Mfg., Inc. v. Ausland*, 273 P.3d 804, 811 (Kan. App. 2012) (similar).

The relevance to these appeals is clear: the only allegedly "Texas-related" act by Oakland and Pawa is that they have accused Exxon and one other Texas resident of a legal violation, just like the defendants in *Stanton*, *Tang*, *Stroman*, and *Morrill*. And there is even less of a connection to Texas here than in cases like *Hood* and *OZO*, which rejected personal jurisdiction even when defendants interfered in lawsuits that were heard by Texas courts and that were intimately connected with title to Texas property (real property in *Hood*, the mortgage notes in *OZO*). Instead, the California lawsuits would have been the same "if Texas had no law at all," *Michiana*, 168 S.W.3d at 787, or if Exxon or ConocoPhillips (or any other Texas company named in any of the California lawsuits) "happened to be" located in another state, *Hood*, 2016 WL 6803186, at *6; *accord Pearl v. Abshire*, No. 02-08-00286-CV, 2009 WL 1996288, at *4 (Tex. App.—Fort Worth July 9, 2009, no pet.) (memo. op.). The cases are unanimous: that the California lawsuits supposedly "target" two forum residents is not a purposeful availment by any potential defendant of Texas law. Thus, Exxon's jurisdictional allegations were insufficient as a matter of law to carry its initial burden to plead sufficient minimum contacts or purposeful availment; and, in any event, if the burden ever shifted, then when it shifted back to

Exxon its "evidence" failed as a matter of law to establish minimum contacts or purposeful availment.

2. The potential defendants' motive goes to the merits and is irrelevant to purposeful availment.

Exxon tried to overcome this mountain of legal authority by arguing that the potential defendants had a motive "to chill and affect speech, activities and property of Exxon and other [unnamed] Texas-based energy companies." 3 SCR 127, ¶ 50, App. 2. Exxon introduced thousands of pages of documents at the hearing in support of this supposed motive against certain energy companies, and contended that this alleged motive somehow amounts to an availment by the potential defendants of the benefits and protections of Texas law. But Exxon has never cited any decision by any court sustaining jurisdiction based on an alleged animus against an industry. Exxon's allegations and evidence on motive were irrelevant and its theory should have been rejected as a matter of law.

First, it makes no sense to say that lawsuits targeting multiple defendants, most of whom are not residents of Texas, for actions that they have taken globally, constitutes targeting Texas itself. Oakland and San Francisco have sued five companies, three of whom are *not* based in Texas. As Exxon admitted to the California court, the Oakland and San Francisco lawsuits "depend on Defendants'

nationwide and global activities" – not on their Texas activities in particular. 1 CR 1872, at 2:9-10.

Second, motive is irrelevant to personal jurisdiction. Exxon itself admitted at the hearing below that the potential defendants' "intent doesn't matter." RR 105:3-11. And it made this concession because it had no choice: this is precisely what this Court and the Texas Supreme Court repeatedly have emphasized. *Michiana,* 168 S.W.3d at 791 (jurisdictional 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."); *Searcy*, 496 S.W.3d at 71 (on the *Michiana* "physical fact" analysis: "What we said then remains good law and binds us today."). For example, the Texas Supreme Court in *Old Republic* could not have been clearer that the focus in personal jurisdiction remains on the defendants' contacts, not on the merits of whether defendants "were in fact part of an elaborate conspiracy."[13] And in *OZO*, this Court was also clear that it is improper to "address the merits of the tort

[13] *Old Republic*, 2018 WL 2449360 at *6 ("whether the transfers were no-interest loans or were in fact part of an elaborate conspiracy to defraud … creditors, we limit our inquiry to [the defendant's] contacts with the state of Texas").

claims in reviewing the special appearance."[14] Minimum contacts are "solely" about "the *actions* and reasonable expectations of the defendant," *Michiana*, 168 S.W.3d at 790 (emphasis added), not alleged thought crimes.

Here, all of the potential defendants followed *Michiana* by focusing on jurisdictional facts, instead of dealing with the alleged merits of the claim. *See* 168 S.W.3d 791 (jurisdictional affidavits did "not deny [the plaintiff's] fraud allegations," but were instead "*rightly focused* ... on lack of contacts rather than lack of culpability") (emphasis added). Exxon, however, dragged the trial court off into the merits with a mass of allegations and documents that are irrelevant to personal jurisdiction, thereby inviting, and creating, error.

Third, Exxon's allegation about a motive to attack the "Texas energy industry" is based on the potential defendants' motives toward Texas *residents*, and not their contacts with the state itself. Even if, for the sake of argument, motives

[14] *OZO*, 2018 WL 1531444, at *7 n.9 ("Much of appellants' responsive evidence relates to the merits of their tort claims, *e.g.*, when Syphers and Edens first became aware of [certain facts]. We do not detail that evidence in this opinion because we do not address the merits of the tort claims in reviewing the special appearance; rather, we instead analyze the quality and nature of appellees' proven contacts in light of appellants' pleaded tort claims," citing *Michiana*); *accord Lensing v. Card*, 417 S.W.3d 152, 160 (Tex. App.--Dallas 2013) ("In *Michiana*, the Texas Supreme Court concluded that personal-jurisdiction inquiries in tort cases must focus on the 'physical fact' of the defendant's contacts with Texas without attempting to decide the merits of the case"); *Tang*, 2007 WL 2199269, at *6 (rejecting personal jurisdiction because evidence of the defendants' attempted harassment of a Texas resident did not meet the "requirement of physical facts" described in *Michiana*).

were relevant despite the clear rule of *Michiana* to the contrary, attempting to chill the speech of multiple Texas companies would still be just (at most) a tort directed at Texas residents – which is to say, a contact based on the activity of "another party or a third person," and not on the purposeful availment by the potential defendants of the benefits of Texas law. *Searcy*, 496 S.W.3d at 67; *see also Gordon & Doner, P.A. v. Joros*, 287 S.W.3d 325, 334 (Tex. App.—Fort Worth 2009, no pet.) ("imputing [joint venturer's] conduct to Gordon still results only in liability based on a legal theory rather than actual contacts with Texas by Gordon.").

This reliance on third-party contacts distinguishes this appeal from the only two cases cited in the trial court's conclusions of law – *Hoskins v. Ricco Family Partners*, Ltd., Nos. 02-15-00249-CV and 02-15-00253-CV, 2016 WL 2772164 (Tex. App—Fort Worth, May 12, 2016, no pet.) (memo. op.) and *TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016). As this Court pointed out in *OZO Capital*, *Hoskins* involved a fraudulent lien prepared by the defendants *for filing in Texas* that would have corrupted the state's property records system, and that constituted a classic availment (in fact a direct perversion) of the laws of Texas. *See OZO Capital*, 2018 WL 1531444, at *11. And in *TV Azteca*, the decisive contacts by the defendants were maintaining an office in Texas, selling millions of dollars of advertisement to

Texas residents, and going on a book tour in Texas to promote the defamatory TV show in question – again, classic availments of the benefits of Texas. *See TV Azteca,* 490 S.W.3d at 49-52. There are no similar acts by Oakland or Pawa or any appellant in this matter availing themselves of any benefit of Texas.

At bottom, Exxon's "motive" argument is an improper attempt to extend *Calder v. Jones*, 465 U.S. 783 (1984), a case that was the high-water mark of the "effects" jurisdiction Exxon alleges here and that Exxon invoked at the hearing below. RR 66:9. In *Calder*, the defendants published a defamatory article in the *National Enquirer* about the plaintiff, who was a California resident. But as *Walden* recently emphasized, the defendants in *Calder* made "phone calls to 'California sources' for the information in their article" and targeted California by writing an article "for publication in California that was read by a large number of California citizens" because, as the defendants knew, millions of copies of the *Enquirer* were sold in California. *Walden,* 571 U.S. at 287-88. No such contacts with the forum or exploitations of the forum market are present here. Nor (unlike in *Calder*) are there any findings of actual harm or effect in the forum on Exxon or any other forum resident.

And far from extending *Calder*, the courts have gone in precisely the opposite direction. As the Texas Supreme Court held in *Old Republic*, the *Calder* effects test "is not an alternative to our traditional "minimum contacts" analysis, and it does not displace the factors we look to in determining whether a defendant purposefully availed itself of the state." *Old Republic*, 2018 WL 2449360, at *8. The Court explained that "the factors we look to" are the three traditional requirements for purposeful availment, *i.e.*, the contacts must be those of the defendant, they must not be fortuitous, random or attenuated, and the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction. *Id.* at *8 n.5. And it is precisely these three requirements that Exxon has never even attempted to satisfy, and cannot satisfy, because (1) neither Oakland nor Pawa have made any contacts with Texas related to the allegations in Exxon's petition, (2) the supposed "contacts" Exxon relies on are based on the fortuity of where some of the defendants in the California litigation happen to reside, and (3) neither Oakland nor Pawa has ever sought any benefit, advantage or profit by availing itself of Texas.[15]

[15] The other cases Exxon cited to the district court depended on some kind of availment of the benefits of Texas, whether through visits, meetings, phone calls, or direct reliance on Texas law, all of which are lacking here. *See, e.g.*, *Glencoe Capital Partners II, L.P. v. Gernsbacher*, 269 S.W.3d 157, 167 (Tex. App.—Fort Worth 2008, no pet.) (participation by phone in board meetings of Texas-based company, with Texas-based participants); *Trois v. Apple Tree Auction Ctr.*, No. 16-51414, 2018 WL 706517, at *4 (5th Cir. Feb. 5, 2018) (defendants "reach[ed] out to Texas via phone in order to garner business and make specific representations"); *Elton v.*

This Court should decline Exxon's invitation to contradict controlling law. The motives of Oakland, Parker or Pawa go to the merits; they do not constitute a purposeful availment of Texas. Here again, Exxon's jurisdictional allegations were insufficient as a matter of law to carry its initial burden to show sufficient minimum contacts by Oakland and Pawa (or by any other appellant). And, in any event, if the burden ever shifted, then when it shifted back to Exxon its "evidence" failed as a matter of law to establish minimum contacts or purposeful availment.

3. Serving the California lawsuits in California and the existence of possible discovery documents that happen to be in Texas are not purposeful availments of Texas law.

The only other "contacts" cited in the trial court's jurisdictional conclusion are ordinary incidents of litigation in California. Specifically, the district court found that jurisdiction was based in part on service of the Oakland and San Francisco lawsuits on Exxon, and on the potential defendants' alleged motive to "affect … property in Texas." 3 SCR 127, ¶ 50, App. 2. The effect on property turns out to be

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McClain, No. SA–11–CV–00559–XR, 2011 WL 6934812, at *3 (W.D. Tex. Dec. 29, 2011) (physical visits); *Middlebrook v. Anderson*, No. Civ.A. 3:04-CV-2294, 2005 WL 350578, at *3 (N.D. Tex. Feb. 11, 2005) (one visit to Texas and multiple defamatory emails sent to Texas); *Long v. Grafton Exec. Search, LLC*, 263 F. Supp. 2d 1085, 1089-90 (N.D. Tex. 2003) (multiple defamatory phone calls to Texas and an email to Texas residents); *Bear Stearns Cos. v. Lavalle*, No. Civ.A. 300CV1900-D, 2001 WL 406217, at *3-4 (N.D. Tex. Apr. 18, 2001) (numerous harassing phone calls and emails to plaintiffs' Texas employees); *cf. Prof'l Ass'n of Golf Officials v. Phillips Campbell & Phillips, L.L.P.*, No. 02-12-00426-CV, 2013 WL 6869862, at *7 (Tex. App.—Fort Worth Dec. 27, 2013, pet. denied) (memo. op.) (in legal malpractice claim, phone calls with Texas residents were "too inconsequential" to support personal jurisdiction).

the ordinary discovery process in which copies of *documents* are requested and produced, some of which Exxon says are located in Texas. 3 SCR 122, ¶ 31, App. 2. Neither service of process nor discovery is a purposeful availment of Texas by Oakland and Pawa.

First, service of process in the forum on a forum resident is a routine part of litigation outside the forum and is not substantial enough to sustain personal jurisdiction.[16] Moreover, conclusion #50 incorrectly states that all the potential defendants "us[ed] an agent to serve ExxonMobil in Texas," despite the trial court's earlier finding in the very same order that the Oakland and San Francisco lawsuits were served in California. 3 SCR 121, ¶¶ 26-27, 127, App. 2. Conclusion #50 is thus factually wrong, and is in any event insufficient as a matter of law to confer personal jurisdiction.

[16] *See Morrill*, 873 F.3d at 1146 (service of process within the forum not sufficient to confer personal jurisdiction); *Stroman*, 513 F.3d at 480, 484 (no personal jurisdiction where Arizona state official sent certified mail to Texas company); *Allred*, 117 F.3d at 286 (service on resident within forum is not sufficient "minimum contact"); *Wallace*, 778 F.2d at 392 (same); *cf. Hood*, 2016 WL 6803186, at *7 (mailing settlement demand to Texas resident not sufficient to confer jurisdiction); *OZO*, 2018 WL 1531444, at *1-2 (no personal jurisdiction over individuals who caused their LLC to enforce an injunction against a Texas resident, and who personally visited Texas to participate in second, allegedly collusive, lawsuit in Texas against Texas resident). Moreover, it is undisputed here that Oakland and Pawa have had no involvement in the San Mateo suits, *see* 1 CR 1863, 1841, and it is improper to lump together alleged contacts from different potential defendants.

Second, the attributed motive to "affect … property in Texas" is also not a sufficient contact with Texas. This is another conclusion about the potential defendants' motives, which is a merits inquiry that is out of bounds on a special appearance, as set forth above. Moreover, the only effect on "property" mentioned in the trial court's findings is that the complaints in the California lawsuits supposedly "focus on ExxonMobil's property in Texas, including ExxonMobil's internal memos and scientific research." 3 SCR, 122, ¶ 31, App. 2. But how this "focus" affects Texas property is a mystery: the only possible effect the California lawsuits could have on these documents is that Exxon could at some point be required to produce copies of them as part of any discovery.

Such discovery in a California lawsuit of a Texas defendant is not a purposeful availment of Texas law. Apart from a few decisions in which a defendant tried to file fraudulent documents in Texas real property records – which is probably *the* paradigm case of a purposeful availment of Texas law and thus easily distinguished – Texas courts have repeatedly rejected attempts to base personal jurisdiction on acts merely because they affect property that happens to be located in Texas.[17] Many of

[17] *Compare Hoskins*, 2016 WL 2772164 (defendant created fraudulent lien *to be filed in Texas* real property records), *and Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333 (Tex. 2009) (similar) *with OZO*, 2018 WL 1531444, at *1 (no personal jurisdiction over individuals involved in Texas lawsuit over title to mortgage notes held in Texas); *Hood*, 2016

these cases rejecting jurisdiction involved contacts with Texas that are not present here – for example, any discovery into Exxon's documents certainly would not involve real property (unlike *Old Republic* and *Hood*), and would not result in a transfer of title to property (unlike *OZO*). There is no purposeful availment here.[18]

Again, Exxon's jurisdictional allegations were insufficient as a matter of law to carry its initial burden to show sufficient minimum contacts by Oakland and Pawa (or by any other appellant). And, in any event, if the burden ever shifted, then when it shifted back to Exxon its "evidence" failed as a matter of law to establish minimum contacts or purposeful availment. The trial court decision should be reversed as a matter of law based upon the absence of any minimum contacts or purposeful availment.

B. Exxon failed to establish any connection between any of the potential defendants' allegedly tortious or unconstitutional conduct and the State of Texas.

Even if Exxon could contradict controlling law with its purposeful availment theory, personal jurisdiction still would be absent here because Exxon's allegations

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WL 6803186, at *1 (no personal jurisdiction over lawyer involved in administration of estate made up primarily of Texas real property); *and Old Republic*, 2018 WL 2449360, at *7 (no personal jurisdiction over nonresident who helped shield proceeds from sale of Texas residence, which led to filing of federal lien on the residence).

[18] Acts related to real property are also categorically different from acts related to other property. *Cf. Retamco Operating*, 278 S.W.3d at 340 ("Where a phone call originates or where a shipment ends up may be random or fortuitous, but when purchasing real property, the location matters").

and evidence failed to show a "substantial connection between" the activities of Oakland and Pawa "and the operative facts of the litigation," a required element of due process. *Searcy*, 496 S.W.3d at 90 (quotation marks omitted).

Exxon failed to establish any connection between any of the allegedly tortious or unconstitutional conduct and the State of Texas. Nothing in Exxon's petition, its evidence or the trial court's decision identifies any conduct or activities of the potential defendants in Texas that support Exxon's planned claims for abuse of process, conspiracy, or First Amendment violations. The arguments of the San Mateo Appellants on "substantial connection" (section C.2 of their brief) are adopted herein by reference. *See* Tex. R. App. P. 9.7; *see also* § VI, *infra*.

C. An assertion of jurisdiction would offend "traditional notions of fair play and substantial justice."

Even if purposeful availment and the substantial connection elements were satisfied – which they are not – an assertion of jurisdiction would violate "traditional notions of fair play and substantial justice." *Moncrief*, 414 S.W.3d at 150. Allowing jurisdiction would allow a Texas company to bring a separate suit to conduct discovery against nonresidents merely because they have filed lawsuits in another state against a Texas resident—and after the Texas resident has brought multiple

proceedings in other fora seeking the same discovery. This kind of tactic is about as far from "fair play and substantial justice" as it gets.

To show that "fair play and substantial justice" do not support jurisdiction over a defendant, the defendant must show "that the presence of some consideration would render jurisdiction unreasonable," based on five factors:

> (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute … ; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Guardian Royal Exch. Assur. V. English China Clays, 815 S.W.2d 223, 231 (Tex. 1991) (quotation marks omitted). A district court's analysis of these five factors is reviewed *de novo*.[19]

The trial court's conclusions on these five factors are almost entirely boilerplate and are insufficient as a matter of law. ***First***, the undisputed evidence showed municipal officials and lawyers with extraordinary responsibilities – responsibilities that inevitably would be burdened by having to litigate against

[19] *See HMS Aviation v. Layale Enterprises, S.A.*, 149 S.W.3d 182, 198 (Tex. App.—Fort Worth 2004, no pet.) (rejecting personal jurisdiction and reversing district court's "fair play" analysis, no deference mentioned); *Brittingham-Sada de Powers v. Ancillary Estate of Brittingham-McLean*, 158 S.W.3d 518, 525 (Tex. App.—San Antonio 2004, pet. denied) (same).

Exxon in Texas. Exxon never rebutted any of this evidence, and the trial court never found that any of these responsibilities do not in fact exist – instead the trial court merely adopted Exxon's empty conclusion that it "would not be burdensome" for the potential defendants to litigate in Texas, without explanation. 3 SCR 127, ¶ 55, App. 2.[20] The undisputed evidence showed:

- **Barbara J. Parker**, as the Oakland City Attorney, supervises a staff of 75 people who defend well over 100 lawsuits filed each year against the City. 5 CR 7079, 7101.

- The **City of Oakland** would be burdened in that Exxon seeks discovery from Sabrina Landreth, its City Administrator. She is entrusted with responsibility for the administration of a city with a $1.3 billion annual budget, and typically attends meetings by the City Council and the Council's many committees, boards, and commissions. 5 CR 7080.

- **Matt Pawa** is a senior litigator responsible for several complex lawsuits filed on behalf of municipal and state governments, including two significant groundwater contamination cases filed by Rhode Island and Vermont against Exxon and other energy companies. Just doing a privilege review of the documents Exxon seeks in this petition would take "well over a hundred hours of my time and similar amounts from attorneys who report to me." 1 CR 1865, ¶ 21.

[20] To the extent this Court construes the district court's bare legal conclusion as a factual finding (which it should not do, as discussed above), this finding would still be factually and legally insufficient, since the only evidence on burden was submitted by the respondents.

These are substantial burdens, particularly given Exxon's history of highly aggressive discovery and litigation tactics.[21]

Moreover, taking discovery from opposing counsel (like Parker and Pawa) is *categorically* viewed as extraordinarily burdensome.[22] A leading case has put it this way:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. . . . Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

[21] In a mandamus petition to the Fifth Circuit prior to transfer of Exxon's federal case, the Massachusetts attorney general described Exxon's discovery in the lawsuit against her as follows: "Exxon served on the Attorney General over 100 requests for written discovery and documents, noticed depositions of her and two of her staff in Boston, noticed the depositions of New York Attorney General Schneiderman and two of his staff in New York, and subpoenaed eleven third parties." *See* https://www.mass.gov/files/documents/2016/12/pl/massag-5th-cir-mandamus-petition-exxon.pdf, at 10; *see also Exxon Valdez v. Exxon Mobil Corp.*, 568 F.3d 1077, 1079, 1081 (9th Cir. 2009) (describing the "epic" and "hard-fought, even relentless, battle" Exxon waged in response to the 1989 Exxon Valdez oil spill); *Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1363 (S.D. Fla. 2005) (describing Exxon's "bad faith attempt[] to make a 'judicial train wreck'" of a claims-administration process as part of a "cynical plan to prolong [a] litigation which has endured more than thirteen years").

[22] *See, e.g., In re Baptist Hosps. of Southeast Texas*, 172 S.W.3d 136, 145 (Tex. App.—Beaumont 2005, orig. proceeding) ("As with compelling production of opposing counsel's litigation file, compelling a deposition of the opposing party's attorney of record concerning the subject matter of the litigation is inappropriate under most circumstances"); *In re Southpak Container Corp.*, 418 S.W.3d 360, 364 (Tex. App.—Dallas 2013, orig. proceeding) (similar).

Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). In fact, Exxon itself has prevailed upon Texas courts not to "inquire into mental processes of [opposing] counsel." *In re Exxon Corp*., 208 S.W.3d 70, 76 (Tex. App.—Beaumont 2006, orig. proceeding) (conditionally granting writ quashing deposition of Exxon attorney).

A similar rule has been applied to discourage attempts to take depositions from high-ranking municipal officials (here, Parker and Landreth).[23] It is also undisputed that Oakland, Parker, and Pawa are entirely strangers in Texas courts, and will have to continue to expend resources on their Texas attorneys in responding to such discovery. The burden on the Oakland, Parker and Pawa is high.

Second, the trial court found that Texas has an interest in adjudicating the dispute because it involves "constitutional torts committed in Texas against Texas residents." 3 SCR, 127-28, ¶ 56, App. 2. But this factor does not create a significant interest. Exxon alleges that the Oakland and Pawa committed a tort against two Texas residents, and this is the sole basis in the record for any conclusion that a tort

[23] *See Coleman v. Schwarzenegger*, No. CIV S–90–0520 LKK JFM P, 2008 WL 4300437, at *2 (E.D. Cal. Sept. 15, 2008) ("the settled rule across the circuits is that absent extraordinary circumstances, high-ranking officials may not be subjected to depositions or called to testify regarding their official actions"); *Rodriguez v. City of Los Angeles*, No. CV 11–01135 DMG (JEMx), 2013 WL 12212435, at *1 (C.D. Cal. Oct. 30, 2013) (former LA city attorney is high-ranking official for purposes of this rule).

was "committed in Texas." As the Supreme Court put it in *Moncrief*, "Texas's interest in protecting its citizens against torts" is *not* sufficient to create jurisdiction over a nonresident who has allegedly "directed a tort from outside the forum against a resident." 414 S.W.3d at 152.

Third, the trial court concluded (without providing any details, and without any legally or factually sufficient supporting evidence) that Exxon has "an inherent interest in obtaining convenient and effective relief by litigating its potential claims in Texas." 3 SCR 128, ¶ 57, App. 2. But there is nothing inherently convenient or effective about litigating in Texas. Exxon is a multinational corporation that has already hired California counsel to litigate in California; there is nothing that makes Tarrant County (which is not even Exxon's home county) uniquely convenient to Exxon. In fact, if the dismissal of the Oakland and San Francisco cases does end up being reversed on appeal, Exxon would be *required* to bring any claims against Oakland, Parker and Pawa in California, as compulsory counterclaims under Federal Rule 13(a) – and Texas courts would likely stay any parallel litigation in Texas in deference to the California cases, because the California cases were filed first. *In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007).[24] Given the contingencies that

[24] And even if the Oakland and San Francisco dismissals are *not* reversed on appeal, then Exxon's abuse of process, conspiracy, and constitutional claims against Oakland, Parker and

would beset any litigation in Texas, the idea that Exxon has brought this petition in Tarrant County because of convenience, rather than tactics, is implausible.

Fourth, there is the "interstate judicial system's interest in obtaining the most efficient resolution of controversies," which heavily favors the potential defendants here. The trial court's conclusion on this point says that Exxon's petition "encompasses claims and parties that are not part of the Potential Defendants' California nuisance suits and ExxonMobil has objected to the exercise of personal jurisdiction in those suits." 3 SCR 128, ¶ 58, App. 2. But here again there is the possibility that the San Francisco and Oakland Lawsuits will be reinstated by the Ninth Circuit, or that any California court hearing the San Mateo Lawsuits could determine that these lawsuits are *bona fide*. If this happened, a ruling in Texas on whether the Oakland and San Francisco lawsuits are abusive or conspiracies or unconstitutional "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue." *Stroman*, 513 F.3d at 488. In *Stroman*, the Fifth Circuit held that the mere *possibility* of "inconsistent" decisions by different courts was a reason

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Pawa will be moot. *See Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 897 (Tex. App.–Dallas 2008, no pet.) ("The critical aspect of [abuse of process] is the improper use of the process after it has been issued. … When the process is used for the purpose for which it was intended, even though accomplished by an ulterior motive, no abuse of process has occurred.").

to reject jurisdiction in Texas over an Arizona law enforcement official who had allegedly violated the plaintiff's constitutional rights. Just so here.

Even apart from the potential for inconsistency or redundancy, the aggressive nature of Exxon's jurisdictional theory is a profound threat to the interstate judicial system. Exxon's tactic here could be repeated by residents of other states – *i.e.*, attacks on nonresident officials charged with protecting the public, filed in the residents' home state without any need to allege any act in the forum by the nonresident official, and without defending the company's original fraud or other misconduct. This is not how our system is supposed to work. As the Fifth Circuit pointed out in *Stroman*, in a holding directly on point: "The 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. This practice would greatly diminish the independence of the states." 513 F.3d at 488.

Fifth, California has a much greater interest than Texas in "furthering [its] substantive social policies." The Oakland and San Francisco lawsuits invoke the city attorneys' authority to bring claims on behalf of the People and allege widespread and substantial property damage in California, which gives the federal

courts in California an obvious interest in deciding this matter. *See Stroman*, 513 F.3d at 488 ("Arizona, as a sovereign, has a strong interest in not having an out-of-state court evaluate the validity of its laws."). Texas's only possible interest is in protecting two of its residents from alleged torts and constitutional violations allegedly directed at them by conduct occurring outside the state – an interest the Texas Supreme Court expressly rejected in *Michiana* and subsequent cases.

The bottom line is that, with respect to traditional notions of fair play and substantial justice, this case is similar to the Fifth Circuit case of *Stroman v. Wercinski* – except that jurisdiction is even more unreasonable here because Exxon filed its petition months *after* litigation began in California (disregarding the comity that Texas courts extend to first-filed lawsuits), and because Exxon has gone after opposing counsel (an inherently burdensome approach that courts forbid without exceptional circumstances). If Texas is to avoid becoming a haven for the worst kind of forum shopping, jurisdiction in cases like this one must be rejected.

III. The long-arm statute does not reach official government action to enforce a sister state's law (Issue #2).

In addition to being forbidden by due process, personal jurisdiction over Oakland and Pawa is not authorized by the Texas long-arm statute. The trial court's only statement on this point was that section 17.042(2) applies, which authorizes

jurisdiction over a "nonresident" who has "commit[ted] a tort in whole or in part" in Texas. *See* Tex. Civ. Prac. & Rem. Code § 17.042(2), App. 6; 3 SCR, 126, ¶ 46, App. 2. The statute defines "nonresident" to include two categories: (1) "an individual," and (2) "a foreign corporation, joint-stock company, association, or partnership." Tex. Civ. Prac. & Rem. Code § 17.041, App. 5.

Here, the Oakland and San Francisco cases were brought under a California statute authorizing a city attorney to sue on behalf of the state.[25] The Fifth Circuit's decision in *Stroman v. Wercinski* speaks directly to whether the long arm statute can apply in such a case. Stroman Realty, a Texas resident, brought a lawsuit in Texas against an Arizona government official, for enforcing Arizona law in a way that allegedly violated Stroman's constitutional rights. The Fifth Circuit *sua sponte* pointed out that "only by twisting the meaning of the terms covered by the long-arm statute" could attempts to enforce Arizona law "be encompassed and adjudicated in Texas courts." *Stroman*, 513 F.3d at 483. The court gave two reasons. First, a suit against even an individual for taking official government action on behalf of a sister

[25] *See* Cal. Code Civ. Proc. § 731, App. 7 ("A civil action may be brought in the name of the people of the State of California to abate a public nuisance… by the district attorney or 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 (DFMx), 2014 WL 6065907, at *3 (C.D. Cal. Nov. 12, 2014) (holding that "the People of the State of California—and therefore the State itself—are the real party in interest" in public nuisance case by district attorney and county attorney).

state is tantamount to a suit against the state itself – and is therefore not a suit against any of the persons or legal entities covered by the long-arm statute. Second, committing an alleged constitutional violation is not "committing a tort" (in Texas or anywhere else) under the statute. A federal court in Georgia recently relied upon *Stroman* in reaching the same conclusion under a similar state long-arm statute. *See Berry Coll., Inc. v. Rhoda*, 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" within the meaning of Georgia long-arm statute). Here, just as in *Stroman v. Wercinksi* and *Berry College*, Exxon asserts claims against official government action and asserts its constitutional claims under 42 U.S.C. § 1983, *see* 1 CR 52, ¶ 113, which applies only to government actors or others acting under color of law. *Goodman v. Harris Cty.*, 571 F.3d 388, 394 (5th Cir. 2009).

At bottom, any alleged tort was consummated by the filing of the California lawsuits, which under California law was an act of the state itself; and any alleged constitutional violation is not a tort. *Stroman v. Wercinski* was correct, and apparently has never been contradicted by any subsequent Texas decision. On this ground alone, personal jurisdiction over Oakland and Pawa should be rejected.

IV. The trial court's "motive" findings are not only irrelevant but erroneous (Issue #3).

As set forth above, the trial court's findings about the potential defendants' motives are irrelevant. This means, in turn, that the Court need not determine whether these findings were factually and legally sufficient and must reverse the trial court's decision as a matter of law. *Michiana*, 168 S.W.3d at 791 (reversing assertion of jurisdiction without reaching factual issues related to defendant's intent). But even if these motive findings were relevant, they would have to be reversed.

A. The trial court's findings were improperly based on "suspicion" and "surmise."

The trial court's factual findings, if relevant at all, must be reversed under this Court's tests for "factual" and "legal" sufficiency.[26] These standards forbid findings that are based on the district judge's "surmise" or "suspicion," or findings that "pil[e]

[26] Legal insufficiency exists where "the evidence offered to prove a vital fact is no more than a mere scintilla," or where the "evidence establishes conclusively the opposite of a vital fact." *Matlock Place Apartments, L.P. v. Druce*, 369 S.W.3d 355, 367 (Tex. App. —Fort Worth 2012, pet. denied). In this inquiry, the Court asks "whether the evidence would enable reasonable and fair-minded people to reach the finding under review." *McDaniel v. Town of Double Oak*, No. 02–10–00452–CV, 2012 WL 662367, at *3 (Tex. App.—Fort Worth Mar. 1, 2012, review denied). "Factual" sufficiency is similar. This Court has reversed findings under this standard where the record shows that "the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the [finding] should be set aside." *Lake v. Cravens*, 488 S.W.3d 867, 891 (Tex. App.—Fort Worth 2016, no pet h.).

one inference upon another."[27] With respect, the trial court's findings, which Exxon drafted, are chock full of suspicion, surmise, and guesswork.

Guilt by association. The trial court fundamentally erred by attributing numerous statements made by other people to the potential defendants. For example, the findings quote seven statements supposedly made at the La Jolla meeting – and of these seven, only two were made by Pawa, with the other five all made by other people, most of them totally anonymous. *See* 3 SCR, 115-16, ¶¶ 7-9, App. 2. Similarly, Exxon's only evidence about the Rockefeller meeting in New York is a draft agenda, written by a third party and sent to a large group including Pawa who were invited to the meeting; there is no evidence that Pawa had any leadership role in the meeting, that he or anyone else agreed with the draft agenda, or that the draft agenda is what was actually discussed at any meeting. 2 CR 2111-13. Yet the trial court's findings say in essence that Pawa organized the meeting and set the agenda

[27] *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (surmise and suspicion); *Brittingham v. Fed. Home Loan Mortg. Corp.*, No. 02–12–00416–CV, 2013 WL 4506787, at *3 (Tex. App.—Fort Worth Aug. 22, 2013, review dismissed w.o.j.) (same); *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 16 (Tex. App.—Fort Worth 2002, no pet.) (inferences). Furthermore, "[a]n inference is not reasonable if it is susceptible to multiple, equally probable inferences, requiring the factfinder to guess in order to reach a conclusion." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 634 (Tex. 2015).

– and, speculatively, that this agenda was another step in a purported plot hatched in La Jolla.[28]

Having put words in Pawa's mouth that he never said, Exxon and the trial court then attribute the same words to all the other potential defendants. Specifically, the trial court found that Pawa persuaded California municipal officials and the AGs to adopt the "strategy" that Pawa "developed at La Jolla" and "urged at … the Rockefeller meeting." 3 SCR, 117, 120, ¶¶ 13, 14, 23, App. 2. Absurdly, this attribution extends to all 15 municipalities and municipal officials named as potential defendants – including the five San Mateo municipalities, even though the uncontradicted evidence is that Pawa had "no involvement" in the San Mateo cases. 1 CR 1863, ¶ 13.

These findings are a textbook example of "guilt by association," which is "obviously . . . contrary to our system of justice." *Allen v. State*, 249 S.W.3d 680, 702 (Tex. App.—Austin 2008, no pet.). And they are also clear examples of the sort of "suspicion" and "surmise" that are totally insufficient evidence to support a finding of fact. *See Ford*, 135 S.W.3d at 601; *cf. Suarez*, 465 S.W.3d at 634 ("some

[28] *See* 3 SCR, 116, ¶ 10, App. 2 ("Pawa engaged participants at the Rockefeller Family Fund … to further solidify the '[g]oals of an Exxon campaign' that Mr. Pawa developed at the La Jolla conference."); *id.*, 126-27, ¶ 49 (Pawa "engag[ed] with the Rockefeller Family Fund" to delegitimize Exxon).

suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence."). Specifically, it is *at most* a mere "suspicion" or "surmise" (a) that Pawa agreed with the statements made by others at the La Jolla meeting, merely because he attended the meeting; (b) that Pawa agreed with the Rockefeller draft agenda, merely because he received an email containing the draft agenda; and (c) that all the other potential defendants agreed with whatever Pawa agreed with, solely because two of the municipalities hired Pawa's law firm. These are not findings that "reasonable and fair-minded people" could support; they are alien to a fair and impartial judicial system and require reversal. *McDaniel*, 2012 WL 662367, at *3.

The findings on the municipal bonds. The findings based on the City's bonds are also based on inferences and surmises. 3 SCR 123-25, ¶¶ 35-40, App. 2. The trial court's findings, written by Exxon, selectively quote boilerplate statements from the bonds that the municipalities are "unable to predict" the extent of any climate impacts (even though sometimes the bond itself describes in the same passage massive and concrete harms expected from climate change).[29] The findings then use

[29] For example, Exxon and then the district court relied on a passage in a San Francisco bond that supposedly concedes that the city is "unable to predict" the extent of climate impacts. 3 SCR 123, ¶ 36, App. 2. But Exxon says nothing about a passage on the same page in the same document stating that scientific research indicates climate change is expected to cause

this purported "contradiction" to infer that the municipalities do not actually believe the allegations in their lawsuits about climate change. But as set forth in the California complaints, the municipalities have published extensive and detailed planning documents describing specific capital expenditures necessitated by current and near-term climate impacts. 1 CR 955-57, 1007-10. These documents are based on state and federal projections showing substantial impacts on coastal California.[30] Just because Exxon has found some supposedly inconsistent language in municipal bonds does not make it likely or even plausible that this massive and ongoing planning effort by hundreds of municipal, state and federal officials is a Potemkin village – yet this is precisely what the trial court's findings imply. Here again, the district court's reading of the record – and its reliance on snippets from the bonds

"significant flooding" in California, and that the replacement value of affected property, most of it in San Francisco Bay, "totals nearly $100 billion (in 2000 dollars)." 3 CR 5920. This passage in the bond concludes that a "wide range of critical infrastructure, such as roads, hospitals, schools, emergency facilities, wastewater treatment plants, power plants, and wetlands is also vulnerable." 3 CR 5920.

[30] For example, the Oakland complaint relies on a detailed scientific report produced by multiple California agencies as official guidance. 1 CR 928 n.2; 1 CR 955 ¶ 88. The Oakland complaint also relies on the city's own hazard mitigation plan – a detailed document approved by the federal government and prepared in consultation with federal scientists. 1 CR 955, ¶ 88. The reports themselves are government records available on official websites: http://www.opc.ca.gov/webmaster/ftp/pdf/docs/rising-seas-in-california-an-update-on-sea-level-rise-science.pdf; http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak058455.pdf.

quoted out of context – is not a reading that "reasonable and fair-minded people" could support. *McDaniel*, 2012 WL 662367, at *3.

Hearsay. Much of Exxon's evidence was blatant hearsay – *e.g.*, the summary of the La Jolla conference, the email to Pawa with the draft agenda for the Rockefeller meeting, as well as any number of newspaper articles.[31] Although the district court found that there was no objection to this evidence, 3 SCR 113-14, App. 2, Oakland and Pawa did object, in writing and immediately after Exxon offered these documents in opposition to the special appearances. 5 CR 7121 n.2. But even if these documents were properly admitted, hearsay is still inherently far less reliable than traditional evidence, and should not have been used as the primary support (or in some instances, the sole support) for the district court's many forays into the thought processes of Pawa and the other 15 potential defendants.

These are reversible errors. Motive was at the heart of the trial court's decision to deny the special appearances, and the findings described above were at the heart of its conclusions about these motives. See 3 SCR 115-125, App. 2.

[31] *See, e.g.*, 2 CR 2074 (summary of La Jolla conference); 2 CR 2111-14 (email of Rockefeller draft agenda); 2 CR 2961, 2977 (newspaper articles).

Because these findings were legally and factually insufficient, the district court's order relying on these findings should be reversed.

B. The trial court's motive findings contradict a prior federal court ruling.

The trial court made findings about Pawa's motives that are directly contradicted by a prior order by the federal court in Exxon's similar lawsuit against the New York and Massachusetts AGs. The trial court should have declined to make these findings, as a matter of issue preclusion, comity and simple common sense.

The federal court's ruling. Facing a 12(b)(6) motion to dismiss its federal action against the New York and Massachusetts AGs, Exxon moved to file a Second Amended Complaint ("SAC"). Exxon lodged its SAC with the federal court within days of filing its 202 petition in Tarrant County. The two documents substantially overlap, with the same allegations and evidence allegedly establishing an intent to chill Exxon's speech. *See* App. 8 (chart showing overlap of allegations in two proceedings); App. 9 (overlap of evidence).

The federal court granted the AGs' 12(b)(6) motion, gave detailed consideration to Exxon's allegations in its SAC and 1300-plus pages of exhibits, and entered a final judgment dismissing Exxon's claims on the merits with prejudice. In

doing so, the federal court specifically held that Exxon's trove of documents did not suffice to make out even a plausible allegation that Pawa had improper motives:

> Moreover, the SAC does not include any factual allegations to suggest that Pawa and Frumhoff and their confederates [from the La Jolla and Rockefeller meetings] do not believe that Exxon has committed fraud. At best (for Exxon) the meetings are evidence that the activists recognize that the discovery process could reveal documents that would benefit their public relations campaign by showing that Exxon has made public statements about climate change that are inconsistent with its internal documents on the subject. This evidence falls short of an inference that the activists—to say nothing of the AGs—do not believe that there is a reasonable basis to investigate Exxon for fraud.

Schneiderman, 2018 WL 1605572, at *19.

The federal court's decision was issued on March 29, 2018 – two days after Exxon submitted its proposed findings of fact and conclusions of law but over three weeks prior to the trial court's adoption of them. Yet during this period of time, Exxon continued to urge the trial court to adopt its proposed findings that Pawa had the very motives that the federal court had rejected, based on the very same documents that the federal court had considered. And when the trial court issued its findings and conclusions, it simply adopted Exxon's proposal – without mentioning the federal court's ruling, and without addressing the respondents' arguments that the federal court ruling contradicted many of the findings Exxon had proposed. In fact, at Exxon's behest, the trial court's findings quoted interlocutory statements

made by the federal court in Texas when it transferred the case to New York – statements that were ultimately rejected in the final decision on the merits as "irrelevant," "entirely *dicta*." *Id.* at *7 n.15.

Issue preclusion. Issue preclusion applies where "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006). The Texas law of preclusion is similar. *Aflatouni v. Enclave at Grapevine, L.P.*, No. 02–17–00366–CV, 2018 WL 2248489, at *4 (Tex. App.—Fort Worth May 17, 2018, no pet. h.).[32]

All of these requirements are met here. First, the issue of Pawa's improper motive was raised and actually litigated in *Schneiderman* – as part of Exxon's attempt to show that Pawa has helped lead an improper attempt to chill legitimate speech. *See* App. 8 (chart reviewing common allegations). Exxon also had a full

[32] In the district court, Exxon contended that the preclusive effect of a federal judgment is determined by federal law rather than Texas law. This is the rule with claim preclusion, but the Texas Supreme Court has declined to decide whether this rule applies to issue preclusion because the state and federal rules of issue preclusion are the same. *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 288 (Tex. 2002).

and fair opportunity to litigate the issue in *Schneiderman*; it submitted the same documents that it relies on here for key findings, and the issue was decided after detailed briefing and oral argument. *See* App. 9 (chart reviewing common evidence, including on the La Jolla meeting, the Rockefeller meeting, the NextGen memo, and the AG press conference). *Schneiderman* also clearly resolved the issue: the federal court found that Pawa had no improper motive, and this finding was necessary to its determination that there was no larger plan by the AGs to chill Exxon's speech – which in turn was one of the key findings supporting the federal court's decision to issue a final judgment dismissing Exxon's constitutional and other claims with prejudice. *See Schneiderman*, 2018 WL 1605572, at *19 (Exxon's "evidence falls short of an inference" that Pawa and others who allegedly attended the La Jolla and Rockefeller meetings "do not believe that Exxon has committed fraud."). That this judgment is under appeal does not limit its preclusive effect. *See* Wright & Miller, 18A Federal Practice & Procedure § 4433.[33]

[33] Dismissals for failure to state a claim are judgments on the merits entitled to issue preclusive effect. *See, e.g., Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986) ("A prior Fed. R. Civ. P. 12(b)(6) dismissal for failure to state a claim upon which relief may be granted operates as an adjudication on the merits for issue and claim preclusion purposes"); *Hutchens v. Fed. Home Loan Mortg. Corp.*, No. 3:12-CV-281, 2013 WL 12250813, at *5 (E.D. Tenn. Mar. 15, 2013) (same).

In defending its proposed findings in the district court, Exxon's primary argument was an attempt to rewrite history. It argued that the trial court actually ruled on Pawa's intent first, when it made the one-page denial of the special appearances on March 14, 2018. *See* 5 CR 7210, App. 1. In doing so, Exxon relied on *Cycles, Ltd. v. Navistar Fin. Corp.*, 37 F.3d 1088 (5th Cir. 1994), which held that *explicit judicial findings* that have been "fully litigated" are not precluded by a subsequent final judgment from another court, even if the first court's findings are still subject to revision (*e.g.*, because of post-judgment motions) at the time the second court enters final judgment. *Id.* at 1091. But the trial court's March 14 one-page decision was totally different from the "Final Judgment" in *Cycles*, where there were explicit findings on the key issue (subject only to post-judgment motions). Far from being "final" and "fully litigated" like the judgment in *Cycles*, here it was not until the trial court issued its Findings of Fact and Conclusions of Law that it made any findings at all about Pawa's motive – and this occurred only *after* the New York federal court's final decision on the merits.

And whether or not the trial court was bound by the federal decision, this decision should have reminded the trial court not to stray into the merits when it decided the special appearances. Where a complex federal litigation devoted

explicitly to the merits has determined that a certain merits-related fact has not been even plausibly *alleged* by Exxon, then *a fortiori* it makes no sense for another trial court to actually *rule* in Exxon's favor on the same issue – above all in an initial proceeding where neither the parties nor the court were supposed to address the merits at all. *Michiana*, 168 S.W.3d at 791.

The trial court was precluded from issuing a finding about Pawa's intent that contradicted the federal *Schneiderman* decision. And because the district court's entire jurisdictional analysis was based on this contradictory determination of Pawa's intent,[34] its entire order must be overturned.

V. Exxon was required to establish personal jurisdiction over each potential witness, including Sabrina Landreth (Issue #4).

The trial court never made any finding that the individuals named solely as potential witnesses (the administrators associated with issuing the municipal bonds) were subject to jurisdiction. Instead the court found that it was not required to do so, and that discovery via a 202 petition is proper as to any witness if there is jurisdiction over even a single potential defendant. 3 SCR 125, ¶ 42-43, App. 2.

[34] *See, e.g.*, 3 SCR 115-16, ¶¶ 6-15, App. 2 (attributing motive to Pawa based on La Jolla and Rockefeller meetings); *id.* at 116-20, ¶¶ 12-22 (AGs implement plot that Pawa "urged at La Jolla"); *id.* at 120-25, ¶¶ 23-41 (Pawa promoted his "La Jolla strategy" to instigate the California lawsuits); *id.* at 126, ¶ 49 (key jurisdictional conclusion: California lawsuits and AG investigations were "instigat[ed]" "promot[ed]" and "solicit[ed]" by Pawa, based on strategy from "La Jolla" and "Rockefeller" meetings).

The Texas Supreme Court has held that personal jurisdiction is required over potential defendants in a 202 proceeding, *see In re Doe ("Trooper")*, 444 S.W.3d 603, 605 (Tex. 2014), but it appears that no court has decided whether or not this requirement also applies to potential witnesses. The trial court decided this issue over the potential witnesses' objections and special appearances and without any analysis or explanation.

The issue is undoubtedly superfluous because there is no jurisdiction over any potential defendants. But, in an abundance of caution, it is respectfully submitted that this ruling was erroneous, both as to potential witness Sabrina Landreth and all other potential witnesses, including those witnesses Exxon has double-listed as both potential defendants and potential witnesses. Under Exxon's view of the law, Rule 202 would effectively empower Texas courts to authorize pre-suit discovery over any human being on the planet with discoverable information, whenever the petition can identify a single potential defendant over whom the court has jurisdiction. For example, under Exxon's theory, if this Court were to find that there is valid jurisdiction over just one potential defendant, then Exxon would be permitted to take discovery all the *other* individual potential defendants over whom it has held there

is *not* jurisdiction, solely because Exxon has double-listed these potential defendants as potential witnesses in its 202 petition. 1 CR 11-15, ¶ 11.

Allowing Exxon to take discovery of individuals double-listed as potential defendants and potential witnesses would undo the Texas Supreme Court's ruling in *Trooper*, which required establishing personal jurisdiction over the potential defendants in a 202 proceeding. Indeed, there must be personal jurisdiction over each and every potential defendant as to which Exxon seeks discovery. *See eBay Inc. v. Mary Kay Inc.*, No. 05-14-00782-CV, 2015 WL 3898240, at *1 (Tex. App. June 25, 2015, review denied) ("Trooper places the burden on [the 202 petitioner] to plead allegations showing the trial court's personal jurisdiction over the forty-eight potential defendants").

With respect to potential witnesses such as Landreth, Exxon's position, as embraced by the trial court, would constitute a massive expansion of Rule 202 and make Texas home to all sorts of abusive forum shopping. This court should reject this expansion. *See Trooper*, 444 S.W.3d at 611 ("We will not interpret Rule 202 to make Texas the world's inspector general."); *In re Wolfe*, 341 S.W.3d 932 (Tex. 2011) ("Rule 202 is not a license for forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule."); Tex. R.

Civ. P. 816 ("These rules shall not be construed to extend or limit the jurisdiction of the courts of the State of Texas nor the venue of actions therein.").[35]

VI. Adoption of arguments made by the San Francisco and San Mateo Appellants.

As authorized by Rule 9.7 of the Texas Rules of Appellate Procedure, Oakland and Pawa incorporate by reference all of the arguments submitted by the San Francisco and San Mateo Appellants. *See* Tex. R. App. P. 9.7.

PRAYER

Oakland and Pawa pray that this Court (1) reverse the trial court's order denying all respondents' special appearances; (2) set aside its findings and conclusions; and (3) direct the trial court to dismiss Exxon's petition for lack of personal jurisdiction.

July 6, 2018

Respectfully submitted,

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[35] Notably, Rule 202.2(b)(2) states that, where the petitioner wants to investigate a "potential" claim, the 202 proceeding must be venued in the Texas court "where the witness resides." App. 3. This provision indicates that Rule 202 was intended for use against resident witnesses – and thus that it does not apply to witnesses over whom the court lacks personal jurisdiction.

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies that this brief is 14,368 words in length (less than 15,000 words). The undersigned is relying on the word count of the computer program used to prepare this brief.

/s/ *Marc R. Stanley*
Marc R. Stanley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served on the below-listed counsel on July 6, 2018, at the time of the filing of the brief. Service was completed electronically through the electronic filing manager if the email address of the attorney below was on file with the electronic filing manager, or was completed by e-mail as indicated below.

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No. 02-18-00106-CV

IN THE COURT OF APPEALS OF TEXAS
SECOND JUDICIAL DISTRICT

CITY OF SAN FRANCISCO ET AL., Appellants
V.
EXXON MOBIL CORPORATION, Appellee

Appeal from Cause No. 096-297222-18
In the 96th District Court of Tarrant County, Texas
The Honorable R.H. Wallace, Jr., Presiding

APPENDIX TO BRIEF OF APPELLANTS CITY OF OAKLAND, BARBARA J. PARKER, SABRINA B. LANDRETH, AND MATTHEW F. PAWA

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1. Order on Special Appearances (5 CR 7210).

2. Findings of Facts and Conclusions of Law (3 SCR 113).

3. Tex. R. Civ. P. 202.1-202.5.

4. Tex. R. Civ. P. 120a.

5. Tex. Civ. Prac. & Rem. Code § 17.041.

6. Tex. Civ. Prac. & Rem. Code § 17.042.

7. Cal. Code Civ. Proc. § 731.

8. Chart: Common Factual Allegations in Exxon's 202 Petition, Federal

Complaint, and Massachusetts State Petition.

9. Chart: Common Exhibits in Exxon's 202 Petition and Federal Complaint.

APPENDIX 1

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

ORDER ON SPECIAL APPEARANCES

On March 8, 2018, the Court held an oral hearing on the special appearances filed in connection with this matter. Based on the pleadings, affidavits and attachments on file, and the applicable law, the Court has determined that the special appearances should be denied. Accordingly:

IT IS HEREBY ORDERED that the special appearances of **prospective witnesses** John Maltbie, Andy Hall, Matthew Hymel, Sabrina Landreth, Edward Reiskin, Carlos Palacios, and Martín Bernal are DENIED.

IT IS FURTHER ORDERED that the special appearances of **potential defendants and prospective witnesses** Matthew Pawa, John Beiers, Jennifer Lyon, Serge Dedina, Brian Washington, Barbara Parker, Dennis Herrera, Dana McRae, and Anthony Condotti; and **potential defendants** San Mateo County, City of Imperial Beach, Marin County, City of Oakland, City of San Francisco, County of Santa Cruz, and City of Santa Cruz are DENIED.

IT IS SO ORDERED.

Signed on Mar. 14, 2018.

R.H. Wallace Jr.

R.H. Wallace Jr., Presiding Judge

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APPENDIX 2

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 8, 2018, Exxon Mobil Corporation ("ExxonMobil") filed a petition under Rule 202 of the Texas Rules of Civil Procedure seeking pre-suit discovery to evaluate potential claims and preserve evidence related to constitutional violations, abuse of process, and civil conspiracy. ExxonMobil's potential claims arise from an alleged conspiracy by California municipalities to suppress Texas-based speech and associational activities on climate policy that are out-of-step with the prevailing views of California public officials. According to ExxonMobil's petition, the California municipalities alleged facts in their lawsuits against the Texas energy sector that are contradicted by contemporaneous disclosures to municipal bond investors. ExxonMobil seeks pre-suit discovery on whether the lawsuits were brought in bad faith as a pretext to suppress Texas-based speech and associational activities by members of Texas's energy sector.

The potential defendants and prospective witnesses named in ExxonMobil's petition (collectively the "Respondents") challenged this Court's personal jurisdiction by filing special appearances under Rule 120a of the Texas Rules of Civil Procedure. ExxonMobil opposed. Both the Respondents and ExxonMobil filed affidavits and evidence in support of their respective positions. At a hearing held on March 8, 2018, the Court accepted all filed affidavits and evidence, as permitted by Rule 120a. Neither ExxonMobil nor the Respondents objected to the evidence at

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the hearing; the parties disputed only the legal significance of the uncontested factual record before the Court. On March 14, 2018, the Court denied all of the special appearances in light of the factual record.

On March 27, 2018, ExxonMobil filed a request for findings of fact and conclusions of law supporting this Court's denial of the special appearances. In accordance with Rule 297 of the Texas Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law based on the uncontested evidentiary record.

FINDINGS OF FACT

A. Parties

1. Petitioner ExxonMobil is a corporation incorporated under the laws of the State of New Jersey with its principal place of business in Texas. It formulates and issues statements about climate change from its headquarters in Texas. Most of its corporate records pertaining to climate change are located in Texas, and it engages in speech and associational activities in Texas.

2. Potential Defendants the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, the County of Santa Cruz, the City of Oakland, and the City of San Francisco are cities or counties in California that do not maintain a registered agent, telephone listing, or post office box in Texas.

3. Potential Defendants Barbara J. Parker, Dennis J. Herrera, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, and Anthony Condotti are California municipal officers who do not reside in Texas or maintain offices or registered agents in Texas.

4. Potential Defendant Matthew F. Pawa is an attorney in private practice,

based in Massachusetts and serving as outside counsel for Potential Defendants the City of Oakland and the City of San Francisco. Mr. Pawa does not maintain an office or registered agent in Texas and is not licensed to practice law in Texas.

5. Prospective Witnesses Sabrina B. Landreth, Edward Reiskin, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal are California municipal officers who do not reside in Texas or maintain a registered agent, telephone listing, or post office box in Texas.

B. Preparatory Activities Directed at Texas-Based Speech

Pawa and Others Develop a Climate Change Strategy

6. In June 2012, Potential Defendant Pawa and a group ~~of special interests~~ attended a conference in La Jolla, California, called the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists; Naomi Oreskes, then a professor at the University of California, San Diego; and Richard Heede, of the Climate Accountability Institute, conceived of this workshop and invited Mr. Pawa to participate as a featured speaker.

7. During the conference, participants discussed strategies to "[w]in [a]cess to [i]nternal [d]ocuments" of energy companies, like ExxonMobil, that could be used to obtain leverage over these companies. The conference participants concluded that using law enforcement powers and civil litigation to "maintain[ ] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." One commentator observed, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties."

8. At the conference, the attendees also concluded that "a single sympathetic

state attorney general might have substantial success in bringing key internal documents to light."

9. At the conference, Potential Defendant Pawa targeted ExxonMobil's speech on climate change, and identified such speech as a basis for bringing litigation. Mr. Pawa claimed that "Exxon and other defendants distorted the truth" (as Mr. Pawa saw it) and that litigation "serves as a 'potentially powerful means to change corporate behavior.'" Myles Allen, another participant at the La Jolla conference, claimed that "the fossil fuel industry's disinformation has effectively muted a large portion of the electorate."

10. In January 2016, Mr. Pawa engaged participants ~~special interests~~ at the Rockefeller Family Fund offices in New York City to further solidify the "[g]oals of an Exxon campaign" that Mr. Pawa developed at the La Jolla conference. According to a draft agenda for the meeting, the goals of this campaign included: (i) "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (ii) "[t]o delegitimize [ExxonMobil] as a political actor"; (iii) "[t]o drive divestment from Exxon"; and (iv) "[t]o force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc."

11. According to the draft agenda, Mr. Pawa and the other participants aimed to chill and suppress ExxonMobil's speech through "legal actions & related campaigns," including "AGs" and "Tort[]" suits. The draft agenda notes that participants planned to use "AGs" and "Tort[]" suits to "get[] discovery" and "creat[e] scandal."

State Attorneys General Adopt the Climate Change Strategy

12. On March 29, 2016, New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey, and other state attorneys general, calling

themselves the "Green 20," held a press conference where they promoted regulating the speech of energy companies, including ExxonMobil, whom they perceived as an obstacle to enacting their preferred policy responses to climate change. Attorneys General Schneiderman and Healey discussed their investigations of ExxonMobil. They were also joined by former Vice President Al Gore, an investor in alternative energy companies.

13. At the press conference, Attorney General Schneiderman discussed the need to regulate the energy industry's speech on climate change, just as Potential Defendant Pawa had urged at La Jolla and at the Rockefeller meeting. He stated, "There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up." Attorney General Schneiderman denounced the "highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action" and announced that "today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."

14. Attorney General Healey similarly echoed themes from the strategy Mr. Pawa developed at La Jolla. She stated, "Part of the problem has been one of public perception," and she blamed "[f]ossil fuel companies" for purportedly causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." Attorney General Healey announced that those who "deceived" the public "should be, must be, held accountable." In the next sentence, she disclosed that she too had begun investigating ExxonMobil and concluded, before receiving a single document from ExxonMobil, that there was a "troubling disconnect between what Exxon knew . . . and what the company and industry chose

to share with investors and with the American public."

15. At the press conference, former Vice President Al Gore praised Attorney General Schneiderman's efforts to "hold to account those commercial interests" who "are now trying to convince people that renewable energy is not a viable option"~~, a position that aligned well with Mr. Gore's financial stake in renewable energy companies.~~ Mr. Gore also focused on First Amendment-protected activities, condemning the "political and lobbying efforts" of the traditional energy industry.

State Attorneys General Conceal Ties to Pawa

16. At a closed-door meeting held before the March 2016 press conference, Mr. Pawa and Dr. Frumhoff conducted briefings for assembled members of the attorneys general's offices. Mr. Pawa, whose briefing was on "climate change litigation," has subsequently admitted to attending the meeting, but only after he and the attorneys general attempted and failed to conceal it.

17. The New York Attorney General's Office attempted to keep Mr. Pawa's involvement in this meeting secret. When a reporter contacted Mr. Pawa shortly after this meeting and inquired about the press conference, the Chief of the Environmental Protection Bureau at the New York Attorney General's Office told Mr. Pawa, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."

18. Similarly, the Vermont Attorney General's Office—another member of the "Green 20" coalition—admitted at a court hearing that when it receives a public records request to share information concerning the coalition's activities, it researches the party who requested the records, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before [it] share[s] information with this entity."

State Attorneys General Target Texas-based Speech, Activities, and Property

19. Attorney General Schneiderman issued a subpoena and Attorney General Healey issued a civil investigative demand ("CID") to ExxonMobil requesting documents and communications concerning climate change and expressly referencing documents in ExxonMobil's possession in Texas.

20. The Massachusetts CID targets specific statements ExxonMobil and its executives made in Texas. For example, it requests documents concerning (i) a 1982 article prepared by the Coordination and Planning Division of Exxon Research and Engineering Company; (ii) former Chairman and CEO Rex Tillerson's "statements regarding Climate Change and Global Warming . . . at an Exxon shareholder meeting in Dallas, Texas"; (iii) ExxonMobil's 2016 Energy Outlook, which was prepared and reviewed in Texas; and (iv) internal corporate documents and communications concerning regulatory filings prepared at ExxonMobil's corporate offices in Texas. Many of the statements under government scrutiny pertain expressly to matters of public policy, such as remarks by ExxonMobil's former CEO that "[i]ssues such as global poverty [are] more pressing than climate change." The Massachusetts CID also seeks documents pertaining to ExxonMobil's associational activities, including its communications with 12 organizations derided as climate deniers and its reasons for associating with those entities.

21. The New York subpoena also targets ExxonMobil's speech and associational activities in Texas, including investor filings, the "*Outlook For Energy* reports," the "*Energy Trends, Greenhouse Gas Emissions, and Alternative Energy* reports," the "*Energy and Carbon - Managing the Risks Report*," and communications with trade associations and industry groups.

22. ExxonMobil filed a lawsuit seeking injunctive and declaratory relief against

Attorneys General Schneiderman and Healey. The Attorney General of the State of Texas, along with ten other state attorneys general, filed an amicus brief in support of ExxonMobil's claims, stating that a state official's power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates." Judge Ed Kinkeade of the U.S. District Court for the Northern District of Texas questioned whether the New York and Massachusetts Attorneys General were attempting to "further their personal agendas by using the vast power of government to silence the voices of all those who disagree with them."

C. Lawsuits Against the Texas Energy-Sector Are Directed at Texas-Based Speech, Activities, and Property

23. With the investigations of the state attorneys general underway, Mr. Pawa next promoted his La Jolla strategy to California municipalities, as potential plaintiffs in tort litigation that would be filed against energy companies, including ExxonMobil.

24. Mr. Pawa sent a memo outlining this strategy to NextGen America, the political action group funded by political activist Tom Steyer. The memo "summarize[d] a potential legal case against major fossil fuel corporations," premised on the claim that "certain fossil fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming." Mr. Pawa emphasized that "simply proceeding to the discovery phase would be significant" and "obtaining industry documents would be a remarkable achievement that would advance the case and the cause."

25. Mr. Pawa also gave a number of speeches in which he targeted speech that ExxonMobil formulated and made in Texas. At a 2016 conference, for instance, Mr. Pawa accused ExxonMobil of "undert[aking] a campaign of deception and denial" and targeted a speech concerning climate change delivered by former CEO Tillerson in Texas. In the same speech, Mr.

Pawa also discussed the company's internal memos from the 1980s, where company scientists evaluated potential climate change impacts.

26. Following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, Potential Defendants Parker, Herrera, and the Cities of Oakland and San Francisco filed public nuisance lawsuits against ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. Mr. Pawa represents the plaintiffs in those actions, and Ms. Parker and Mr. Herrera signed the complaints on behalf of the City of Oakland and the City of San Francisco, respectively. They used an agent to serve the complaints on ExxonMobil's registered agent in California, whose role is to transmit legal process to ExxonMobil in Texas.

27. Potential Defendants Lyon, Washington, Beiers, Condotti, McRae, the City of Imperial Beach, Marin County, San Mateo County, and the City and the County of Santa Cruz filed similar public nuisance complaints against ExxonMobil and other energy companies, including the following 17 Texas-based energy companies: BP America, Inc., Shell Oil Products Company LLC, Citgo Petroleum Corp., ConocoPhillips, ConocoPhillips Company, Phillips 66, Total E&P USA Inc., Total Specialties USA Inc., Eni Oil & Gas Inc., Anadarko Petroleum Corp., Occidental Petroleum Corp., Occidental Chemical Corp., Repsol Energy North America Corp., Repsol Trading USA Corp., Marathon Oil Company, Marathon Oil Corporation, and Apache Corp. Potential Defendants Beiers, Lyon, McRae, Washington, and Condotti signed these complaints. They used an agent to serve the complaints on ExxonMobil's registered agent in Texas.

28. Each of the seven California complaints expressly target speech and associational activities in Texas.

29. The Oakland and San Francisco complaints, for example, target ExxonMobil's Texas-based speech, including a statement by "then-CEO Rex Tillerson" at

"Exxon's annual shareholder meeting" in Texas, where they claim Mr. Tillerson allegedly "misleadingly downplayed global warming's risks." These complaints also target corporate statements issued from Texas, such as ExxonMobil's "annual 'Outlook for Energy' reports," "Exxon's website," and "Exxon's 'Lights Across America' website advertisements." In addition, the complaints target ExxonMobil's associational activities in Texas, including corporate decisions to fund various non-profit groups that perform climate change-related research that the complaints deem to be "front groups" and "denialist groups."

30. The City of Imperial Beach, Marin County, San Mateo County, and the City and County of Santa Cruz complaints similarly focus on ExxonMobil's Texas-based speech and associational activities. For example, they target (i) a 1988 memo from an Exxon public affairs manager that proposes "[r]esist[ing] the overstatement and sensationalization [sic] of potential greenhouse effect"; (ii) a "publication" that "Exxon released" in "1996" with a preface by former "Exxon CEO Lee Raymond"; and (iii) a 2007 Corporate Citizenship Report, issued from the company's Texas headquarters.

31. Each of the seven California complaints also explicitly focus on ExxonMobil property in Texas, including ExxonMobil's internal memos and scientific research. (Imperial Beach Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Marin County Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; San Mateo Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Oakland Compl. ¶¶ 60-61; San Francisco Compl. ¶¶ 60-62; County of Santa Cruz Compl. ¶¶ 130-32, 135-37, 140-42, 144-47; City of Santa Cruz Compl. ¶¶ 129-31, 134-36, 139-41, 143-46.)

32. Several Potential Defendants also made statements shortly after filing the lawsuits focusing on Texas-based speech. In a July 20, 2017 op-ed for *The San Diego Union-Tribune*, Potential Defendant Dedina, the mayor of the City of Imperial Beach, justified his

participation in this litigation by accusing the energy sector of attempting to "sow uncertainty" about climate change. In a July 26, 2017 appearance at a local radio station, Mr. Dedina accused ExxonMobil of carrying out a "merchants of doubt campaign."

33. Oakland City Attorney Barbara Parker issued a press release soon after filing suit, asserting that "[i]t is past time to debate or question the reality of global warming." According to Parker, "[j]ust like BIG TOBACCO, BIG OIL knew the truth long ago and peddled misinformation to con their customers and the American public."

34. San Francisco City Attorney Dennis Herrera similarly accused "fossil fuel companies" of launching a "disinformation campaign to deny and discredit what was clear even to their own scientists: global warming is real," and pledged to ensure that these companies "are held to account."

35. These allegations, ~~which pervade Respondents' lawsuits,~~ are contradicted by the Respondents' own municipal bond disclosures. While the California municipalities alleged in their complaints against the energy companies that the impacts of climate change were knowable, quantifiable, and certain, they told their investors the exact opposite. These contradictions raise the question of whether the California municipalities brought these lawsuits for an improper purpose.

36. For example, Oakland and San Francisco's complaints claim that ExxonMobil's and other energy company's "conduct will continue to cause ongoing and increasingly severe sea level rise harms" to the cities. However, the municipal bonds issued by Oakland and San Francisco disclaim knowledge of any such impending catastrophe, stating the Cities are "unable to predict" whether sea-level rise "or other impacts of climate change" will occur, and "if any such events occur, whether they will have a material adverse effect on the

business operations or financial condition of the City" or the "local economy."

37. Similarly, according to the San Mateo Complaint, the county is "particularly vulnerable to sea level rise," with "a 93% chance that the County experiences a devastating three-foot flood before the year 2050, and a 50% chance that such a flood occurs before 2030." Despite this, nearly all of the county's bond offerings contain no reference to climate change, and 2014 and 2016 bond offerings assure that "[t]he County is unable to predict whether sea-level rise or other impacts of climate change or flooding from a major storm will occur."

38. The Imperial Beach Complaint alleges that it is vulnerable to "significant, and dangerous sea level rise" due to "unabated greenhouse gas emissions." Imperial Beach has never warned investors in its bonds of any such vulnerability. A 2013 bond offering, for instance, contains nothing but a boilerplate disclosure that "earthquake . . . , flood, fire, or other natural disaster, could cause a reduction in the Tax Revenues securing the Bonds . . . ."

39. The Marin County complaint warns that "there is a 99% risk that the County experiences a devastating three-foot flood before the year 2050, and a 47% chance that such a flood occurs before 2030." It also asserts that "[w]ithin the next 15 years, the County's Bay-adjacent coast will endure multiple, significant impacts from sea level rise." However, its bond offerings do not contain any specific references to climate change risks, noting only, for example, that "natural or manmade disaster[s], such as earthquake, flood, fire, terrorist activities, [and] toxic dumping" are potential risks.

40. The Santa Cruz complaints warn of dire climate change threats. The county alleges that there is "a 98% chance that the County experiences a devastating three-foot flood before the year 2050, and a 22% chance that such a flood occurs before 2030." The Santa Cruz City Complaint similarly warns that "increased flooding and severe storm events associated with

climate change will result in significant structural and financial losses in the City's low-lying downtown." But none of the city or county bond offerings mention these dire and specific warnings. A 2016 county disclosure merely states that areas within the county "may be subject to unpredictable climatic conditions, such as flood, droughts and destructive storms." A 2017 city bond offering has a boilerplate message that,"[f]rom time to time, the City is subject to natural calamities," including flood and wildfire.

41. Potential Defendants Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, Condotti, County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, City of Oakland, and City of San Francisco either approved or participated in filing the lawsuits against the Texas energy sector. That conduct was directed at Texas-based speech, activities, and property. Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal approved the contemporaneous disclosures that contradict the allegations in the municipal complaints. Those witnesses, along with the Potential Defendants, are likely to have evidence pertaining to that contradiction.

CONCLUSIONS OF LAW

42. Under Rule 202 of the Texas Rules of Civil Procedure, a proper court may allow discovery of a potential claim if the court would have personal jurisdiction over the potential defendants to the anticipated suit.

43. Because this Court is not required to have personal jurisdiction over prospective witnesses who are not potential defendants, the special appearances of Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal are denied.

44. This Court would not have general personal jurisdiction over the Potential Defendants to the anticipated suit.

45. This Court could exercise specific personal jurisdiction over the Potential Defendants for the anticipated claims of constitutional violations, abuse of process, and civil conspiracy.

46. The exercise of personal jurisdiction over the Potential Defendants to the anticipated action would be permitted under the Texas long-arm statute, which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(2). Each of the Potential Defendants is a nonresident within the meaning of the long-arm statute.

47. A violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation. ExxonMobil exercises its First Amendment rights in Texas, and Texas is the site of the speech challenged by the Potential Defendants' lawsuits. The anticipated claims therefore concern potential constitutional torts committed in Texas.

48. Exercising jurisdiction over the Potential Defendants in the anticipated action would comport with due process because the potential claims arise from minimum contacts initiated by the Potential Defendants which purposefully target Texas, including speech, activities, and property in Texas.

49. Mr. Pawa initiated contact and created a continuing relationship with Texas by, among other activities, (i) initiating a plan to use litigation to change corporate behavior of Texas-based energy companies at the La Jolla conference; (ii) engaging with the Rockefeller Family Fund to solidify and promote the goal of delegitimizing ExxonMobil as a political actor; (iii) instigating state attorneys general to commence investigations of ExxonMobil in order to obtain documents stored in Texas; and (iv) soliciting and actively promoting litigation by

California municipalities against the Texas energy industry, including ExxonMobil, to target Texas-based speech and obtain documents in Texas.

50. All of the Potential Defendants initiated contact and created a continuing relationship with Texas by (i) developing, signing, approving, and/or filing complaints that expressly target the speech, research, and funding decisions of ExxonMobil and other Texas-based energy companies to chill and affect speech, activities, and property in Texas; and (ii) using an agent to serve ExxonMobil in Texas.

51. The Potential Defendants' contacts were deliberate and purposeful, and not random, fortuitous, or attenuated.

52. Purposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas. *See, e.g.*, *TV Azteca* v. *Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016); *Hoskins* v. *Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016).

53. Based on the foregoing findings of fact, ExxonMobil's potential claims of First Amendment violation, abuse of process, and civil conspiracy would arise from the Potential Defendants' contacts with Texas.

54. Exercising jurisdiction over the Potential Defendants for the potential claims would comport with traditional notions of fair play and substantial justice.

55. It would not be burdensome for the Potential Defendants to litigate ExxonMobil's potential claims in Texas, and the Potential Defendants have failed to provide substantial evidence of burden.

56. Texas has a substantial state interest in adjudicating claims concerning

constitutional torts committed in Texas against Texas residents.

57. ExxonMobil has an inherent interest in obtaining convenient and effective relief by litigating its potential claims in Texas.

58. Exercising jurisdiction in this potential action would comport with the interstate judicial system's interest in obtaining the most efficient resolution of controversies because ExxonMobil's anticipated action encompasses claims and parties that are not part of the Potential Defendants' California nuisance suits and ExxonMobil has objected to the exercise of personal jurisdiction in those suits.

59. Exercising jurisdiction in this potential action would support the shared interest of the several states in furthering substantive social policies because ExxonMobil's anticipated action concerns a conspiracy to suppress and chill speech and associational activities of the Texas energy sector. Texas has an inherent interest in exercising jurisdiction over actions that concern the infringement of constitutional rights within its borders.

60. To the extent the Court's findings of fact are construed by a reviewing court to be conclusions of law or vice-versa, the incorrect designation shall be disregarded and the specified finding and/or conclusion of law shall be deemed to have been correctly designated herein.

SIGNED this 24th day of Apr 2018.

R.H. Wallace Jr., Presiding Judge

APPENDIX 3

TX Rules of Civil Procedure, Rule 202.1

202.1. Generally

Currentness

A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or

(b) to investigate a potential claim or suit.

Credits
Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 202.1, TX R RCP Rule 202.1
Current with amendments received through February 1, 2018

TX Rules of Civil Procedure, Rule 202.2

202.2. Petition

Currentness

The petition must:

(a) be verified;

(b) be filed in a proper court of any county:

(1) where venue of the anticipated suit may lie, if suit is anticipated; or

(2) where the witness resides, if no suit is yet anticipated;

(c) be in the name of the petitioner;

(d) state either:

(1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or

(2) that the petitioner seeks to investigate a potential claim by or against petitioner;

(e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;

(f) if suit is anticipated, either:

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or

(2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons;

(g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and

(h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.

Credits

Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 202.2, TX R RCP Rule 202.2
Current with amendments received through February 1, 2018

End of Document

TX Rules of Civil Procedure, Rule 202.3

202.3. Notice and Service

Currentness

(a) *Personal Service on Witnesses and Persons Named.* At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing--in accordance with Rule 21a--on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) *Service by Publication on Persons Not Named.*

(1) Manner. Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is published.

(2) Objection to Depositions Taken on Notice by Publication. Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) *Service in Probate Cases.* A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) *Modification by Order.* As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.

Credits

Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 202.3, TX R RCP Rule 202.3
Current with amendments received through February 1, 2018

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 202. Depositions Before Suit or to Investigate Claims (Refs & Annos)

TX Rules of Civil Procedure, Rule 202.4

202.4. Order

Currentness

(a) *Required Findings.* The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit: or

(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

(b) *Contents.* The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 [1] or 200. [2] The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

Credits

Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Footnotes

1 Vernon's Ann.Rules Civ.Proc., rule 199.1 et seq.

2 Vernon's Ann.Rules Civ.Proc., rule 200.1 et seq.

Vernon's Ann. Texas Rules Civ. Proc., Rule 202.4, TX R RCP Rule 202.4
Current with amendments received through February 1, 2018

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 202. Depositions Before Suit or to Investigate Claims (Refs & Annos)

TX Rules of Civil Procedure, Rule 202.5

202.5. Manner of Taking and Use

Currentness

Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of nonparties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule.

Credits

Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 202.5, TX R RCP Rule 202.5
Current with amendments received through February 1, 2018

End of Document

APPENDIX 4

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 5. Citation (Refs & Annos)

TX Rules of Civil Procedure, Rule 120a

Rule 120a. Special Appearance

Currentness

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

Credits

April 12, 1962, eff. Sept. 1, 1962. Amended by orders of July 22, 1975, eff. Jan. 1, 1976; June 15, 1983, eff. Sept. 1, 1983; April 24, 1990, eff. Sept. 1, 1990.

Vernon's Ann. Texas Rules Civ. Proc., Rule 120a, TX R RCP Rule 120a
Current with amendments received through February 1, 2018

APPENDIX 5

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 17. Parties; Citation; Long-Arm Jurisdiction (Refs & Annos)
Subchapter C. Long-Arm Jurisdiction in Suit on Business Transaction or Tort (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 17.041

§ 17.041. Definition

Currentness

In this subchapter, "nonresident" includes:

(1) an individual who is not a resident of this state; and

(2) a foreign corporation, joint-stock company, association, or partnership.

Credits
Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

V. T. C. A., Civil Practice & Remedies Code § 17.041, TX CIV PRAC & REM § 17.041
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

APPENDIX 6

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 17. Parties; Citation; Long-Arm Jurisdiction (Refs & Annos)
Subchapter C. Long-Arm Jurisdiction in Suit on Business Transaction or Tort (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 17.042

§ 17.042. Acts Constituting Business in This State

Currentness

In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

Credits

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

V. T. C. A., Civil Practice & Remedies Code § 17.042, TX CIV PRAC & REM § 17.042
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

APPENDIX 7

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 10. Actions in Particular Cases (Refs & Annos)
Chapter 2. Actions for Nuisance, Waste, and Willful Trespass, in Certain Cases, on Real Property (Refs & Annos)

West's Ann.Cal.C.C.P. § 731

§ 731. Nuisance; action to abate, damages; parties authorized to sue; public nuisance

Effective: January 1, 2011
Currentness

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code, by the district attorney or 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. Each of those officers shall have concurrent right to bring an action for a public nuisance existing within a town or city. The district attorney, county counsel, or city attorney of any county or city in which the nuisance exists shall bring an action whenever directed by the board of supervisors of the county, or whenever directed by the legislative authority of the town or city.

Credits

(Enacted in 1872. Amended by Stats.1905, c. 128, p. 130, § 1; Stats.2010, c. 570 (A.B.1502), § 2.)

West's Ann. Cal. C.C.P. § 731, CA CIV PRO § 731
Current with urgency legislation through Ch. 13 of 2018 Reg.Sess

End of Document

APPENDIX 8

Appendix 8

Common factual allegations from Exxon's Texas petition, federal complaint and Massachusetts state petition

Topic	**Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]	**Exxon's state ct. petition, *In re CID* (Mass. Super. Ct.)**[3]
La Jolla, California conference in 2012	¶¶ 3, 11(a), 35, 36, 37, 42, 44, 115; 1 CR 11, 19-24, 53	¶¶ 3, 6, 44, 45, 46, 48	¶¶ 2, 32

[1] Exxon's Verified Petition for Pre-Suit Depositions, No. 096-297222-18 (Tarrant Cty. Dist. Ct. Tex. Jan. 8, 2018), 1 CR 6.

[2] Appellants provided the trial court with a link to Exxon's Second Amended Complaint on an official government web site. 4th SCR 9 (citing https://www.mass.gov/files/documents/2018/01/29/Exxon%20Mobil%20Corporation%E2%80%99s%20Declaration%20in%20Support%20of%20%20Motion%20to%20Amend%20the%20First%20Amended%20Complaint%20with%20Exhibits.pdf).

[3] Petition of Exxon Mobil Corporation to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, No. 16-1888F (Mass. Super. Ct. June 16, 2016). This document is available on the same government web site cited above. *See* 4th SCR 9; https://www.mass.gov/files/documents/2016/10/vw/02-petition.pdf.

March 2016 attorneys general press conference in New York City	¶¶ 4, 44, 45, 46, 47, 48, 49, 50; 1 CR 8, 23-27	¶¶ 2, 5, 16, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 61	¶¶ 1, 2, 4, 5, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 36
Presentations by Matthew Pawa and Peter Frumhoff prior to attorneys general March 2016 press conference in NY	¶¶ 11(a), 50, 52; 1 CR 11, 27-28	¶¶ 39, 40, 43, 60, 61	¶¶ 3, 28, 29, 30, 31
Rockefeller Family Fund office meeting in NY in January 2016	¶¶ 38, 39, 117; 1 CR 21-22, 54	¶¶ 4, 52, 53	¶ 33
Attorneys General Climate Change Coalition Common Interest Agreement	¶¶ 53, 54; 1 CR 28-29	¶¶ 62, 63, 64	¶ 34
Matthew Pawa's alleged participation in La Jolla Meeting, Rockefeller Family Fund meeting in NY, AGs meeting in NY, and email with Vermont AG office	¶¶ 11(a), 35, 37, 38, 40, 50, 51, 52, 114, 115, 117; 1 CR 11, 19-22, 27-28	¶¶ 39, 43, 44, 46, 48, 49, 50, 52, 54, 56, 59, 60, 61	¶¶ 3, 31, 32, 33, 34, 35

APPENDIX 9

Appendix 9

Common exhibits in Exxon's Texas petition and federal complaint

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Seth Shulman, Union of Concerned Scientists & Climate Accountability Inst., Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control (2012)	Exh. 1, 1 CR 84-119	Exh. C, App. 29 - 65, ECF Dkt. 252-3
Alana Goodman, *Billionaire Democratic Donor Funding $10 Million Campaign to Impeach Trump Is Linked lo National Lawsuits Against Oil Companies Through Memo to His Environmental Nonprofit Group,* Daily Mail (Nov. 14, 2017, 7:11 AM)	Exh. 2, 1 CR 121-39	Exh. S12, App. 556 - 575, ECF Dkt. 252-11

[1] Exhibits from Exxon's Verified Petition for Pre-Suit Depositions, No. 096-297222-18 (Tarrant Cty. Dist. Ct. Tex. Jan. 8, 2018). 1 CR 6.

[2] Appellants provided the trial court with a link to Exxon's Second Amended Complaint on an official government web site. 4th SCR 9 (citing https://www.mass.gov/files/documents/2018/01/29/Exxon%20Mobil%20Corporation%E2%80%99s%20Declaration%20in%20Support%20of%20%20Motion%20to%20Amend%20the%20First%20Amended%20Complaint%20with%20Exhibits.pdf).

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Email from Kenny Bruno to Lee Wasserman, Dir., Rockefeller Family Fund, et al. (Jan. 5, 2016, 4:42 PM)	Exh. 3, 1 CR 141	Exh. D, App. 66 - 67, ECF Dkt. 252-3
Draft Agenda from ExxonKnew Strategy Meeting in Email from Kenny Bruno to Lee Wasserman et al. (Jan. 5, 2016, 4:42 PM)	Exh. 4, 1 CR 143-44	Exh. S1, App. 478 - 480, ECF Dkt. 252-9
Transcript of the AGs United for Clean Power Press Conference, held on Mar. 29, 2016, which was prepared by counsel based on a video recording of the event.	Exh. 5, 1 CR 146-65	Exh. B, App. 8 - 28, ECF Dkt. 252-3
Email from Wendy Morgan, Chief of Public Protection, Office of the Vermont Attorney General, to Michael Meade, Dir., Intergovernmental Affairs Bureau, Office of the New York Attorney General (Mar. 18, 2016, 6:06 PM)	Exh. 6, 1 CR 167-76	Exh. E, App. 68 - 78, ECF Dkt. 252-3
Email from Lemuel Srolovic, Bureau Chief, Envtl Prot. Bureau, Office of the N. Y. Attorney Gen., to	Exh. 7, 1 CR 178	Exh. F, App. 79 -80, ECF Dkt. 252-4

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Matthew Pawa, President, Pawa Law Grp., P.C. (Mar. 30, 2016, 9:01 PM)		
Climate Change Coalition Common Interest Agreement (May 18, 2016)	Exh. 8, 1 CR 180-98	Exh. V, App. 195 - 214, ECF Dkt. 252-5
Excerpt of Transcript of Oral Argument, *Energy & Envtl. Legal Inst. v. Attorney Gen. of Vt.*, No. 558-9-16 (Mar. 28, 2017)	Exh. 14, 1 CR 265-78	Exh. S41, App. 795 - 809, ECF Dkt. 252-13
Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund.* Wash. Free Beacon (Apr. 14, 2016, 5:00 PM)	Exh. 15, 1 CR 280-82	Exh. U, App. 191 - 194, ECF Dkt. 252-5
Michael Bastasch, *Emails: Eco-Activists Plotted Oil Industry Lawsuits Before Anti-Exxon Stories Released*, Daily Caller (May 16, 2016, 1:10 PM)	Exh. 17, 1 CR 287-88	Exh. S8, App. 547 - 549, ECF Dkt. 252-10
Katie Brown, *Activists Admit at Friendly Forum They've Been Working with NY AG on Climate RICO Campaign for over a Year*, Energy in Depth (June 24, 2016, 7:17 AM)	Exh. 20, 1 CR 304-07	Exh. S7, App. 542 - 546, ECF Dkt. 252-10

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Isabel Vincent, *Schneiderman Tried to Contact Eco-Tycoon Amid Exxon Probe,* N.Y. Post (Sept. 11, 2016, 6:18 AM)	Exh. 21, 1 CR 309-10	Exh. S24, App. 673 - 675, ECF Dkt. 252-12
Katie Brown, *Rockefellers: Not Only Did We Pay for #ExxonKnew, We Were the Ones Who Pulled in NY AG,* Energy in Depth (Dec. 7, 2016, 2:02 PM)	Exh. 22, 1 CR 312-17	Exh. S34, App. 727 - 733, ECF Dkt. 252-12
Katie Brown, *After Even Deeper Collusion With Schneiderman Revealed, #ExxonKnew Campaign Tries to Change the Subject,* Energy in Depth (Mar. 14, 2017)	Exh. 23, 1 CR 319-22	Exh. S22, App. 663 - 667, ECF Dkt. 252-12
Spencer Walrath, *Secret Memo Reveals Tom Steyer May Be Behind #ExxonKnew Climate Lawsuits,* Energy in Depth (Nov. 14, 2017)	Exh. 24, 1 CR 324-27	Exh. S23, App. 668 - 672, ECF Dkt. 252-12
Union of Concerned Scientists, Smoke, Mirrors & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science (2007)	Exh. 43, 1 CR 1297-1364	Exh. Q, App. 159 - 169, ECF Dkt. 252-4

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Jamie Henn, *The Department of Justice Must Investigate ExxonMobil*, 350.org, (Oct. 30, 2015)	Exh. 48, 1 CR 1389-94	Exh. S15, App. 603 - 609, ECF Dkt. 252-11
Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change lies by New York Attorney General,* N. Y. Times (Nov. 5, 2015)	Exh. 49, 1 CR 1396-1401	Exh. A, App. 001 - 007, ECF Dkt. 252-3
Exxon Mobil Corp., 2006 Corporate Citizenship Report (2006)[3]	Exh. 50, 1 CR 1403-06	
Email from Peter Washburn, Policy Advisor, Envtl. Prot. Bureau of the N.Y. Attorney Gen., to Lemuel Srolovic, Bureau Chief: Envtl Prot. Bureau, Office of the N. Y. Attorney Gen.; Scot Kline, Assistant Attorney Gen., Office of the Vt. Attorney Gen. & Wendy Morgan, Chief of Pub. Prat., Office of the Vt. Attorney Gen. (Mar. 25, 2016, 11:49 AM)	Exh. 53, 1 CR 1418-24	Exh. N, App. 129 - 136, ECF Dkt. 252-4
Press Release, Jeff Landry, La. Attorney	Exh. 54, 1 CR 1426-27	Exh. Y, App. 226 - 227, ECF Dkt. 252-5

[3] Exxon submitted slightly different excerpts of the same document.

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Gen., Attorney General Jeff Landry Slams Al Gore's Coalition (Mar. 30, 2016)		
Michael Bastasch, *Kansas AG Takes on Al Gore's Alarmism – Won't Join Anti-Exxon 'Publicity Stunt,'* Daily Caller (Apr. 4, 2016, 10:49 AM)	Exh. 55, 1 CR 1429-30	Exh. QQ, App. 434 - 436, ECF Dkt. 252-9
Kyle Feldscher, *West Virginia AG 'Disappointed' in Probes of Exxon Mobil*, Wash. Examiner (Apr. 5, 2016, 3:17 PM)	Exh. 56, 1 CR 1432-34	Exh. RR, App. 437 - 440, ECF Dkt. 252-9
Respondent's Exemption Log for FOIL Request # 160286, *Free Mkt. Envtl. Law Clinic v. Attorney Gen. of N.Y.*, Index No. 101759_2016 (Jan. 19, 2017)	Exh. 62, App. 1355 - 1362	Exh. S29, App. 686 - 693, ECF Dkt. 252-12
NGO Letter of Support to State Attorneys General	Exh. 69, 1 CR 1521-23	Exh. S16, App. 610 - 613, ECF Dkt. 252-11
Tom Steyer, Founder & President, NextGen America, https://nextgenamerica.org/who-we-are/tomsteyer	Exh. 75, 1 CR 1549-50	Exh. S11, App. 554 - 555, ECF Dkt. 252-11

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Our Story, NextGen America, https://nextgenamerica.org/who-we-are	Exh. 76, 1 CR 1552-56	Exh. S10, App. 552 - 553, ECF Dkt. 252-11
Ken Silverstein, *Rockefeller Foundations Enlist Journalism in 'Moral' Crusade Against ExxonMobil*, Observer (Jan. 6, 2017, 12:30 PM)	Exh. 77, 1 CR 1558-66	Exh. S31, App. 697 - 706, ECF Dkt. 252-12
Katie Brown, *Confirmed: Rockefellers Admit Funding Pay-to-Play Attack "Journalism" Against Exxon*, Energy in Depth (Dec. 2, 2016, 2:02 PM)	Exh. 79, 1 CR 1572-75	Exh. S32, App. 707 - 711, ECF Dkt. 252-12
TomKat Charitable Trust, Form 990-PF Return of Private Foundation (2014)	Exh. 80, 1 CR 1577-1607	Exh. S18, App. 616 - 647, ECF Dkt. 252-11
Tom Hamburger, *Tom Steyer's Staff Answers Questions About His Investments and His Career Change*, Wash. Post (June 9, 2014)	Exh. 81, 1 CR 1609-11	Exh. S19, App. 648 - 651, ECF Dkt. 252-11
Patt Morrison, *Tom Steyer's Green Ambitions*, L.A. Times (Jan. 20, 2015 7:26 PM)	Exh. 82, 1 CR 1613-18	Exh. S20, App. 652 - 658, ECF Dkt. 252-11

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
John McCormick & Bill Allison, *Billionaire Steyer Says There's 'No limit' on His Spending Against Trump*, Bloom berg (Jan. 18, 2017 5:00 AM)	Exh. 83, 1 CR 1620-22	Exh. S21, App. 659 - 662, ECF Dkt. 252-11
Email from Matthew Pawa, President, Pawa Law Grp., P.C., to Scot Kline, Assistant Attorney Gen., Office of the Vt. Attorney Gen., (Jan. 20, 2016, 8:42 AM)	Exh. 86, 1 CR 1650	Exh. S25, App. 676 - 677, ECF Dkt. 252-12
Email from Scot Kline, Assistant Attorney Gen., Office of the Vt. Attorney Gen., to Matthew Pawa, President, Pawa Law Grp., P.C. (Jan. 20, 2016, 9:03 AM)	Exh. 87, 1 CR 1652	Exh. S26, App. 678 - 679, ECF Dkt. 252-12
Email from Matthew Pawa, President, Pawa Law Grp., P.C., to Scot Kline, Assistant Attorney Gen., Office of the Vt. Attorney Gen. (Feb. 15, 2016, l0:09AM)	Exh. 89, 1 CR 1657	Exh. S27, App. 680 - 681, ECF Dkt. 252-12
Draft Agenda, Harvard Law School & Union of Concerned Scientists, Potential Causes of Action Against Major Carbon Producers:	Exh. 91, 1 CR 1662-63	Exh. S47, App. 831 - 833, ECF Dkt. 252-13

Description	**Exxon's Texas Petition**[1]	**Exxon's Second Amended Complaint, *Schneiderman*, (S.D.N.Y.)**[2]
Scientific, Legal, and Historical Perspectives (Mar. 20, 2016)		
Email from Matthew Pawa, President, Pawa Law Grp., P.C., to State Attorneys General and Their Staff (Mar. 31, 2016, 5:31 PM)	Exh. 92, 1 CR 1665	Exh. S46, App. 829 - 830, ECF Dkt. 252-13
Email from Peter Washburn, Policy Advisor, Envtl. Prot. Bureau of the N.Y. Attorney Gen., to Allen Brooks et al. (Apr. 13, 2016, 3:31 PM)	Exh. 95, 1 CR 1679-84	Exh. S45, App. 822 - 828, ECF Dkt. 252-13
Email from Lemuel Srolovic, Bureau Chief, Envtl. Prot. Bureau, Office of the N. Y. Attorney Gen., to Peter Frumhoff, Dir. of Sci. & Policy, Union of Concerned Scientists (Mar. 30, 2016 1:27 PM)	Exh. 97, 1 CR 1688	Exh. S36, App. 754 - 755, ECF Dkt. 252-12