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No. 20-0558

IN THE
SUPREME COURT OF TEXAS

EXXON MOBIL CORPORATION,
Petitioner,

v.

CITY OF SAN FRANCISCO, et al.,
Respondents

RESPONDENT MATTHEW PAWA'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

The identity of parties and counsel in the appellant's opening brief is correct, except that Respondent Matthew Pawa is now represented solely by the attorneys listed on the front cover of this brief (*i.e.*, neither by the McKool Smith firm nor the Stanley Law Group).

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ABBREVIATIONS AND RECORD REFERENCES

App.	Items in the Appendix to this brief, by number.
CR	Clerk's Record.
Exxon Br.	Petitioner's Brief on the Merits.
FOF/COL	Findings of Fact/Conclusions of Law (included as Tab D to Exxon's brief on the merits).
Op.	Court of Appeals' opinion (included as Tab A to Exxon's brief on the merits).
RR	Reporter's Record (transcript).
SCR	Supplemental Clerk's Record.

STATEMENT OF THE CASE

Nature of the Case	Exxon filed a Rule 202 petition seeking pre-suit discovery from multiple California cities and counties, their officials, and Matthew Pawa (collectively "Respondents"). 1CR6. Pawa is a Massachusetts attorney who once represented two of these municipalities. FOF/COL ¶ 4. Exxon sought discovery to investigate claims that a subset of the Respondents ("potential defendants") violated Exxon's rights by filing lawsuits in California against Exxon and many other energy firms around the world. 1CR6. These California lawsuits are still pending. The Respondents filed special appearances challenging personal jurisdiction. 1CR1802, 1843, 1916.
Trial Court and Judge Signing Appealed Order	The Honorable R.H. Wallace, Jr., Presiding Judge (now retired), 96th District Court of Tarrant County, Texas.
Trial Court's Disposition of the Case	The trial court denied all special appearances. 5CR7210. The trial court identified certain statements by Exxon as "targeted" by the California lawsuits, and it concluded that Texas courts have jurisdiction over the potential defendants because the personal defendants filed the California lawsuits with the intention to "chill and affect" speech and related conduct in Texas by Exxon and other, unidentified Texas firms. FOF/COL ¶¶ 29-31, 50. Other than the filing of California lawsuits with this intention, the trial court identified no other Texas contacts by Respondents.
Parties in the Court of Appeals	Appellants: Respondents here, potential defendants below. Appellee: Exxon Mobil Corporation, plaintiff below.
District of the Court of Appeals	Second District Court of Appeals, in Fort Worth.
Court of Appeals' Justices; Citation of Opinion.	Justice Elizabeth Kerr, author, joined by Chief Justice Bonnie Sudderth and Justice Wade Birdwell. Chief Justice Sudderth concurred. *City of San Francisco v. Exxon Mobil Corp.*, No.

	02-18-00106-CV, 2020 WL 3969558, at *1, 20 (Tex. App.—Fort Worth June 18, 2020, pet. filed) (mem. op.) .
Court of Appeals' Disposition	In a memorandum opinion, the court of appeals reversed and rendered judgment denying Exxon's Rule 202 Petition, finding no personal jurisdiction over Respondents. Op. *20. No motion for rehearing was filed.

ISSUES PRESENTED

1. Is there personal jurisdiction over a Massachusetts attorney when his only alleged "contacts" with Texas are that he filed lawsuits in California against a Texas resident and attended meetings in California and New York with the mere intent to cause effects on the Texas resident and the record is devoid of any evidence or allegation of actual effect?

2. Is it consistent with "fair play and substantial justice" for Texas courts to entertain a countersuit against a foreign opposing counsel based on his involvement with pending cases in California?

INTRODUCTION

Although Exxon says it is merely requesting this Court to "confirm" existing Texas personal jurisdiction law, Exxon seeks much more than mere error-correction. The Fort Worth Court of Appeals saw Exxon's arguments for what they are: a rewrite of "settled legal principles." *City of San Francisco v. Exxon Mobil Corp.*, No. 02-18-00106-CV, 2020 WL 3969558, at *20 (Tex. App. June 18, 2020) ("Op."). The court went on to hold that "the law simply does not permit us to agree with Exxon's contention" that the minimum contacts standard was satisfied. *Id.* Indeed, Chief Justice Sudderth observed in her concurrence that to rule in Exxon's favor would require a wholesale reconsideration of "the minimum-contacts standard that binds us." *Id*. This Court, too, should decline Exxon's implicit invitation to effectively upend long-settled and basic principles of personal jurisdiction law.

This matter arises from lawsuits filed in California by seven California municipalities and counties against Exxon and other energy companies located all over the country and the world. Exxon filed this Rule 202 petition in Texas state court against the California local governments, their high-ranking officials, and a Massachusetts attorney who formerly represented two of the cities. It seeks discovery in Texas of its opponents on the theory that the California lawsuits might violate its First Amendment rights and constitute an abuse of process. Review

should be denied because Exxon's arguments contravene settled jurisprudence in several ways.

First, no review is necessary to determine that "effects jurisdiction" does not exist under the precedents of this Court and the U.S. Supreme Court where there is no record of any effect. Exxon says it seeks protection against effects on free speech, energy production, and public policy in Texas, but it introduced no evidence of any such effect. Nor did it ever allege such effects. The district court's findings are also entirely devoid of such effects. Those findings identified a mere *intent* to cause effects in Texas, *i.e.*, by filing lawsuits in California that "target" the defendants in those cases, some of whom happen to be based in Texas. Exxon now asks this Court to rule that out-of-state conduct that merely "targets" or is "aimed at" or is "intended" to have effects on a Texas firm nevertheless satisfies the legal standard required to establish minimum contacts. Petitioner's Brief on the Merits ("Exxon Br.") 1-2. But long-settled Texas jurisprudence is to the contrary. This Court's jurisprudence squarely holds that the issue of "what the parties thought, said, or intended" goes to the merits of the underlying tort claims and is not a jurisdictional contact. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 791 (Tex. 2005). The Court has repeatedly adhered to this rule and expressly declined to reconsider it. *Old Republic Nat'l Title Ins. v. Bell*, 549 S.W.3d 550, 560 (Tex. 2018); *Searcy v. Parex Res.*, 496 S.W.3d 58, 71 (Tex. 2016). Exxon's request for a new,

extreme version of "effects jurisdiction"—one requiring no effects to actually have occurred and based solely on intent—is directly at odds with this settled law.

Second, Exxon seeks to upend this Court's blackletter law that only the defendant's contacts with the forum are relevant and cannot be based on the unilateral activity of the plaintiff or another party. Here, the only activity in Texas described in the findings is petitioner Exxon's own conduct and speech. The court of appeals recognized the obvious—that the potential defendants' out-of-state actions "were directed at Exxon, not Texas," and that jurisdiction cannot be based on directing a tort at a Texas resident. Op. at *16-17 (citing *Michiana*, 168 S.W. 3d at 790-92).

Third, Exxon argues that the court of appeals improperly limited its analysis to consideration of physical contacts, but that argument misstates the decision below. The court of appeals expressly stated that "the nonresident's conduct need not actually occur in Texas." Op. at *15. Exxon lost in the court of appeals not because the court limited its analysis to physical contacts, but because Exxon sought to base jurisdiction only on an intent to harm Exxon in defiance of the long-standing jurisprudence of this Court. Undaunted, Exxon again points only to conduct that, in its own words, is merely "intended to" have non-physical effects in Texas, which has long been precluded by both Texas and federal jurisprudence. *See Old Republic*, 549 S.W.3d at 565.

Fourth, even if there *were* effects in this case, this Court has held that in-state effects alone (even in cases where they exist) are not enough: the *defendant* must have *some* contact with Texas. As this Court said in *Old Republic*: "the 'effects test' is not an alternative to our traditional 'minimum contacts' analysis." *Id.* The court of appeals faithfully applied this settled law meant when it emphasized that, beyond "targeting" Exxon, Pawa and the California local governments had engaged in no "additional conduct" in Texas similar to the business activity this Court found decisive in *TV Azteca v Ruiz*. Op. at *15-16; *TV Azteca v. Ruiz*, 490 S.W.3d 29, 46-47 (Tex. 2016). The court of appeals was right: effects alone are not contacts, much less mere intentions to have effects.

At bottom, Exxon seeks a rule granting certain litigants special access to Texas courts based upon the size, power, and importance of their industry. If adopted by other states, such a rule would invite similar home-turf countersuits against the Texas Attorney General anytime he files suit in Texas against any influential firm based in a sister state. But as the court of appeals properly held, favoritism toward a forum state industry, even one that is "vital" to the state, has no place in our legal system. Lady Justice does not peek out from under her blindfold.

STATEMENT OF FACTS

I. California local governments file lawsuits in California against energy companies worldwide; Pawa is counsel in two of the seven lawsuits.

In 2017, California cities and counties filed lawsuits under California law against energy companies located all over the world. Exxon treats these lawsuits as a single course of conduct, but they fall into two discrete sets. In one set of cases, *i.e.*, those brought by San Francisco and Oakland, there are five defendants: one based in California, two in Europe, and two in Texas (*i.e.*, Exxon and ConocoPhillips). Matt Pawa, a lawyer who has resided and worked in Massachusetts since 2001 and who is not a member of Texas bar, was one of several lawyers who filed the San Francisco and Oakland cases. 1CR1861.[1] Pawa's law practice entails representing state and local governments in environmental litigation. 1CR1865; *State of New Hampshire v. Exxon Mobil Corp.*, 126 A.3d 266, 273 (2015) (affirming judgment for state in groundwater contamination case).

The other set of cases (the "San Mateo cases") are five cases filed by other California counties and cities against up to 37 energy companies. Those 37 companies include Exxon and 17 other energy firms that are based in Texas; the remaining 19 companies are based across the country and all over the world. *See* FOF/COL ¶ 27 (Exxon plus 17 other Texas defendants); 1CR593-94 (Imperial

[1] Pawa no longer represents San Francisco or Oakland (or any other client in any climate change tort case).

Beach complaint: 37 total defendants); 1CR701-02 (same, Marin County); 1CR813-14 (same, San Mateo County). Although Exxon repeatedly seeks to tie Pawa to the San Mateo cases and thus to their longer list of defendants, Exxon has never attempted to contradict Pawa's sworn statement that he had "no involvement" in the San Mateo cases. *See, e.g.*, Exxon Br. 4 (potential defendants are "California municipalities and officials whom Pawa recruited"); *see also id.* at 10 & 20 (similar); 1CR1863, ¶ 13.[2] Similarly, the district court made no finding that Pawa was in any way responsible for bringing the San Mateo cases.

All of the California lawsuits seek to recover the costs of climate adaptation, such as building sea walls, under theories of public and private nuisance.[3] Under California law, a plaintiff can sue a product seller for causing a public nuisance if the plaintiff alleges that the product was improperly promoted. *See County of Santa Clara v. Atl. Richfield*, 137 Cal. App. 4th 292, 310 (2006). Consistent with this law, the California complaints identify a series of misleading statements made by the

[2] While the San Francisco and Oakland cases are virtually identical to one another, they differ from the San Mateo cases in their pleaded facts, legal claims and outside counsel teams. *Compare* 1CR813 (San Mateo complaint) *with* 1CR924 (Oakland complaint) & 1CR972 (San Francisco complaint).

[3] The San Mateo cases plead a variety of claims in addition to nuisance. 1CR815-16.

energy companies—and Exxon in particular—in marketing their fossil fuels. *See, e.g.*, 1CR948-950, ¶¶ 69-71, 74-76 (Oakland complaint).

The California complaints do not, in any way, single out Texas. As already noted, the defendants in those lawsuits are located all over the world, and the cases attribute liability based on the defendants' worldwide production and marketing of fossil fuels. *See, e.g.*, 1CR929-30, ¶ 10, 1CR819, ¶ 7. Exxon itself told the California court hearing the San Francisco and Oakland lawsuits that those lawsuits "depend on Defendants' nationwide and global activities." 1CR1846, n.7. The San Francisco and Oakland complaints seek only monetary relief, and expressly disavow any attempt "to restrain Defendants from engaging in their business operations," whether in Texas or anywhere else. *See* 1CR930, ¶ 11; 1CR978, ¶ 11; *cf.* 1CR914 (San Mateo lawsuits similarly seek nuisance abatement and damages, not injunctions against fossil fuel production).

After Exxon and its co-defendants removed the San Francisco and Oakland cases to federal court, Exxon informed the court that it planned to bring counterclaims. 1CR1877.[4]

[4] The district court upheld removal and dismissed these cases but the Ninth Circuit reversed. *See City of Oakland v. BP PLC*, 969 F.3d 895, 911 (9th Cir. 2020) (rejecting ground of removal asserted by district court, but remanding for consideration of defendants' other jurisdictional theories).

II. Exxon files this Rule 202 petition in Texas against the California governments, their officials, and Pawa—without alleging any effects.

Instead of bringing those counterclaims in California, however, Exxon brought this petition for pre-suit discovery under Texas Rule of Civil Procedure 202 in Tarrant County against Pawa, the California cities and counties, and their top government officials (collectively "the local governments and Pawa" or "potential defendants").[5] Exxon's petition seeks discovery from its opponents to support potential or anticipated claims of abuse of process and violation of First Amendment rights.

Exxon's only allegation on personal jurisdiction in its Rule 202 petition was that the out-of-state actions by the local governments and Pawa "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." 1CR18, ¶ 32. In its Petition, there is no allegation of any effect on Exxon of any kind caused by the potential defendants' actions, whether in Texas or elsewhere.

III. The special appearances establish no contact with Texas; Exxon responds with information solely on tortious intent.

All the potential defendants filed special appearances contesting personal jurisdiction and attesting to their lack of contacts with Texas. Exxon never challenged this evidence. It is thus undisputed that the potential defendants have no

[5] Exxon is based in Irving, and it has never explained why it filed in Tarrant County.

employees, offices, bank accounts, real property, or agents in Texas, no contracts with anyone in Texas (beyond retaining Texas counsel in this matter), and that neither they nor their employees made visits to Texas or sent or received communications to or from Texas that were related to any subject at issue in Exxon's petition. 1CR1839-41, 1861-63, 1912-14; 5CR7115-17.[6]

At the special appearance hearing, Exxon submitted some 5,000 pages of documents all going to the merits of the potential claims underlying its Rule 202 petition, *i.e.*, on the potential defendants' allegedly tortious and unconstitutional intent. 2CR2067-4CR7066. The potential defendants pointed out to the district court that, under the due order of pleading rules, they were not permitted to address the merits in a special appearance and were thus "constrained not to respond to the factual arguments that were proffered by Exxon." RR72:9-10. Exxon conceded that tortious intent is irrelevant to jurisdiction:

> 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?

[6] The five San Mateo complaints (but not the San Francisco and Oakland complaints) were served on Exxon's registered agent in Texas. FOF/COL ¶¶ 26-27. Exxon previously argued that service constituted a relevant contact with Texas, but the court of appeals rejected this argument, *see* Op. *18, and Exxon has dropped it in this Court.

RR105:3-11 (emphasis added). Despite this admission, Exxon did not submit any evidence of an effect on any Texas energy company, itself included.

To prove intent, Exxon relied on four connections between Pawa and people and events in New York and California.

1. Exxon quoted statements that Pawa and various other people made at a meeting that Pawa attended in 2012 in La Jolla, California. 1CR84.
2. Exxon quoted a draft agenda for a meeting at the Rockefeller Family Fund offices in New York City that Pawa (and many others) received by email. 1CR143.
3. Exxon emphasized Pawa's meeting with several state attorneys general on the same day that the New York and Massachusetts AGs made public remarks about investigating Exxon for securities and consumer fraud. 1CR146, 178. This meeting also occurred in New York City.
4. Exxon relied on a legal memo Pawa wrote and sent from his office in Massachusetts to an attorney and a scientist at a California non-profit organization (NextGen America). 1CR131. The memo analyzed a potential case by the State of California—not by the party municipalities. The California case under discussion was never filed.

In all four instances, the only connection to Texas was that the memo, agenda, or meeting discussed Exxon; there was no evidence of any other Texas connection.[7]

IV. The district court denies the special appearances based solely on the potential defendants' state of mind and Exxon's own contacts with Texas; the court of appeals reverses.

The district court summarily denied the special appearances and invited the parties to propose findings of fact and conclusions of law. 5CR7210. The district court then adopted, with a few minor changes, Exxon's proposed findings and conclusions. *Compare generally* FOF/COL *with* 5CR7218-7233. The finding of "contacts" with Texas were that all of the potential defendants had filed lawsuits in California that "expressly target speech and associational activities in Texas." FOF/COL ¶ 28. The findings described the specific speech and associational activities in Texas by Exxon that the potential defendants "targeted" in their California lawsuits; these included Exxon's website, an Exxon internet

[7] Exxon emphasizes statements made by third parties at the La Jolla meeting, in the Rockefeller draft agenda, and at the AGs' press conference. *See* Exxon Br. 5-8. The implication is apparently (a) that Pawa agrees with these statements because he attended the meeting in question, or received the draft agenda, and (b) that all the other potential defendants agree with these statements as well, merely because Pawa represented two of the seven cities and counties. Exxon's brief augments this technique in its brief with new allegations about the Bloomberg Philanthropies, *see* Exxon Br. 17, but this material is not in the record, and it does not involve any connection between any potential defendant and Texas. Exxon's brief also describes a "raft" of recent lawsuits against it by other cities, counties and states, Exxon Br. 16, but never draws any connection between these lawsuits and Pawa or the other potential defendants.

advertisement, and a speech by an Exxon executive at a shareholders' meeting in Texas. FOF/COL ¶ 29. With respect to Pawa, the findings of "contacts" also included that he "targeted ExxonMobil's speech" at the La Jolla and Rockefeller Fund meetings by discussing an "'Exxon campaign," FOF/COL ¶ 9-11, and that the attorneys general of New York and Massachusetts had issued a subpoena or civil investigative demand that "targets ExxonMobil's speech and associational activities" in Texas. FOF/COL ¶¶ 20-21.

These findings in turn led to the key conclusion of law: that all the potential defendants "initiated contact and created a continuing relationship with Texas" by "… 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." FOF/COL ¶ 50.[8] The court also concluded that Pawa participated in the meetings in La Jolla, California and New York City (with the Rockefeller Family Fund and the attorneys general) in order to "target Texas-based speech." FOF/COL ¶ 49.

Notwithstanding the passing reference to "other" Texas firms, the district court's findings did not identify any targeted speech, activities, or property of anyone

[8] The district court's inclusion of "property" referred solely to Exxon's documents to be obtained in discovery. The court of appeals rejected Exxon's argument for jurisdiction based on document discovery, Op. *17, and Exxon has abandoned the argument in its briefing in this Court.

other than Exxon. The district court also made no finding of effects of any kind—*e.g.*, no effects on Exxon or other would-be speakers, no effects on policymakers or other potential listeners, and no effects on any other Texas sovereign interest.

The court of appeals reversed. The justices "confess[ed] to an impulse to safeguard an industry that is vital to Texas's economic well-being." Op. at *20. But the court concluded that "the law simply does not permit" sustaining Exxon's argument. *Id.* Chief Justice Sudderth issued a brief special concurrence stating that, although this result followed from "abiding by the rules," she believed that this Court should "reconsider the minimum-contacts standard that binds us." *Id.* The concurrence did not explain what that alternative to the minimum contacts legal standard might be.

V. Exxon's prior attempt to establish jurisdiction in Texas fails; Exxon's free-speech claim is rejected elsewhere, multiple times.

This matter is Exxon's second attempt to invoke jurisdiction in Texas on the same theory, and one of multiple, unsuccessful attempts by Exxon to convince courts that Pawa *et al.* have improperly sought to limit its free speech. Exxon's discussion of these cases fails to disclose their most notable features: relevant rulings rejecting arguments that Exxon makes here and admissions that Exxon made in these parallel lawsuits that contradict its positions in this Court.

In 2016—two years before it brought this Rule 202 petition—Exxon filed suit in Texas federal court against the New York and Massachusetts attorneys general

and alleging a First Amendment violation. The allegations in Exxon's federal lawsuit are identical to Exxon's allegations here: they rely on the same documents, the same meetings in La Jolla and New York City, and the same conspiracy theory involving Pawa. *See, e.g.*, Appx. A, Proposed Second Amended Complaint, *Exxon Mobil v. Schneiderman*, No. 1:17-cv-02301-VEC , ¶¶ 43-59 (S.D.N.Y. Jan. 12, 2018) (describing Pawa's "playbook," the La Jolla conference, the Rockefeller agenda, the AGs' meeting, the NextGen America memo, etc.).[9] The attorneys general moved to dismiss for lack of personal jurisdiction. Exxon argued that jurisdiction existed based solely on the attorneys' general mere intent to cause Exxon to alter its speech.[10] After "careful consideration" of Exxon's argument, the Texas federal court transferred venue of the case to New York. 1CR249.

In addition, in Exxon's federal case against the attorneys general, it has made various admissions at odds with its positions here. In its proposed amended complaint in that case—filed just ten days after Exxon filed its Rule 202 petition here alleging that it needed discovery on a potential free speech claim relating to its

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[9] In response to a collateral estoppel argument below based upon *Schneiderman*, Exxon did not deny that the issues were identical. 5CR7082-83 & nn.9-12.

[10] *See, e.g.*, Appx. B, Exxon Mobil Corporation's Brief in Support of this Court's Personal Jurisdiction, *Exxon Mobil v. Schneiderman*, No. 4:16-cv-00469-K (N.D. Tex. Feb. 1, 2017) at 1, 11 (arguing that jurisdiction exists in Texas because "ExxonMobil exercises its First Amendment right to free speech … in Texas," and because the AGs "seek to deter ExxonMobil from participating" in a "national dialogue" on climate policy).

speech on climate change—Exxon affirmatively stated that it "intends … to continue to advance its perspective in the national discussions over how best to respond to climate change. . . ." Appx. A, ¶ 124. Exxon's federal case, including its First Amendment claim, was then dismissed on the merits. *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 709 (S.D.N.Y. 2018) (Exxon's "evidence falls short of an inference that [Pawa and others]—to say nothing of the AGs—do not believe that there is a reasonable basis to investigate Exxon for fraud."), *appeal pending sub nom*., *Exxon Mobil Corp. v. Healey* (2d Cir. No. 18-1170). In its appeal to the Second Circuit, Exxon has stated that its speech had been "singled out" by Pawa and the attorneys general, which is very different from its contention here—that Pawa *et al.* have targeted the entire Texas energy industry. *Compare* Appx. C, Brief and Special Appendix for Plaintiff-Appellant, *Exxon Mobil Corp. v. Healey*, No. 18-1170, at 1 (2d Cir.), *with* Exxon Br. 32.[11]

Exxon contends here, without citation, that Pawa is "an outspoken advocate of misusing government power to limit free speech," Exxon Br. 4, but does not disclose that it has repeatedly lost its First Amendment argument in other courts. For example, in a case by the New York attorney general for securities fraud, Exxon

[11] Exxon has sought discovery of Pawa in its federal case since 2016 when it served him with a subpoena. Pawa has moved to quash on First Amendment grounds and Exxon has cross-moved to compel; those motions remain pending in Massachusetts federal court while Exxon pursues its appeal. 1CR1864-65, ¶¶ 17-20.

again presented its First Amendment theory, this time in a series of affirmative defenses. In this Court, Exxon emphasizes its victory at trial on the New York AG's securities fraud claim and even that the presiding judge ultimately found the AG's lawsuit to be "hyperbolic" and "ill-conceived." Exxon Br. 9. But Exxon does not mention that this same judge directly ruled on Exxon's First Amendment defenses, dismissing them on the merits before trial. *See* Appx. D, Appellants' Response to Exxon's Post-Submission Brief, at 4-5 & Exh. 2-6.[12] These defenses were based once again on the same documents, the same Pawa-based conspiracy theory, and the same meetings in California and New York as here. *Id.* at 4-5 & Exh. 2-6. Exxon did not appeal those rulings, which are now final.

OVERVIEW TO THE ARGUMENT

Unfortunately, this case features a naked attempt by Exxon to elevate the importance of its industry, and its status as a major player in that industry, over firmly-established jurisprudence. This Court and the U.S. Supreme Court have been in lock-step regarding personal jurisdiction jurisprudence—consistently and

[12] Exxon also emphasizes that the Massachusetts attorney general sued Exxon, *see* Exxon Br. 9, but fails to mention that Massachusetts courts have rejected Exxon's First Amendment argument because it cannot be adjudicated without first deciding whether Exxon's underlying speech was deceptive. *See e.g., In re CID No. 2016-EPD-36*, No. SUCV20161888F, 2017 WL 627305, at *4 n. 2 (Mass. Super. Jan. 11, 2017), *aff'd*, 94 N.E.3d 786 (Mass. 2018) ("If the [Massachusetts] Attorney General's investigation reveals that Exxon's statements were misleading or deceptive, Exxon is not entitled to any free speech protection.").

uniformly holding that the plaintiff's connections to a state cannot substitute for the defendant's lack of connections. Even a court of appeals that was openly sympathetic to Exxon was unable to hold otherwise under this long-standing jurisprudence.

The most that any member of the court of appeals could do was to urge this Court to alter personal jurisdiction law, as current Texas rules flatly preclude ruling for Exxon. Exxon now urges this Court to rule in its favor as a one-off, keeping controlling jurisprudence unchanged for less-important defendants.

Moreover, Exxon refuses to admit to the judicial activism that would be required for it to prevail, posturing all of its proposed rulings as "confirming" Texas law—even when those proposed rulings would dramatically change and even reverse long-standing Texas law. Under current Texas law, the potential defendants' contacts with Texas are the key consideration, but their only "contacts" with Texas were suing Exxon along with other oil companies in a California court and attending meetings in California and New York. For Exxon to prevail and succeed in transferring discovery from the courts of California to the courts of Texas via Rule 202, this Court would have to flip the jurisprudential script and make Texas minimum contacts jurisprudence all about Exxon—the petitioner and would-be *plaintiff* in this case.

Nevertheless, Exxon disingenuously requests that this Court "confirm" never-before-existing principles of law, such as 1) "effects on a defendant" taking the place of "contacts by a plaintiff," 2) "intent" substituting for "proved effects," and 3) the "prominence" of a particular plaintiff elevating it to the status of a "sovereign." For all of Exxon's posturings of this case as merely "confirming" Texas law, applying equally to corporation and individuals alike, it occasionally reveals its true position—that Exxon is "in an industry vital to the Texas economy," Exxon Br. xviii, and is thus uniquely entitled to special jurisdiction rules.

This Court should reject Exxon's inappropriate entreaties, arguments that necessarily made the court of appeals blanch. The same law that applied to plaintiffs in cases like *Michiana*, *TV Azteca*, and *Old Republic* should equally apply to Exxon, no matter its claimed importance, and no matter the influence it, its industry, or any other players wield in Texas.

ARGUMENT

I. There was no "purposeful availment" of Texas.

Exxon's petition for pre-suit discovery can be heard only if Texas courts have personal jurisdiction over the potential defendants. *In re Doe*, 444 S.W.3d 603, 610 (Tex. 2014). "Personal jurisdiction is proper when the nonresident defendant has established minimum contacts with the forum state, and the exercise of jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Moki Mac*

River Expeditions v. Drugg, 221 S.W.3d 569, 575 (Tex. 2007) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "Minimum contacts are sufficient for personal jurisdiction when the nonresident defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). As this Court recently stated in *Old Republic*, any showing of purposeful availment must meet three requirements: (1) "only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person," (2) "the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated," and (3) "the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction." *Old Republic*, 549 S.W.3d at 559 (quotation marks omitted).

Exxon distorts what *Old Republic* says about this three-part test for purposeful availment and then spends most of its brief applying that wrong language. Most notably, Exxon turns this Court's "contacts with the forum" into conduct "aimed at the forum," in order to support jurisdiction based on state of mind. Exxon Br. 25. Pawa will apply this Court's definition of purposeful availment, not Exxon's.

A. The potential defendants had no contacts with Texas (prong #1).

Pawa and the other potential defendants have no relevant contacts with Texas: no relevant offices, sales, visits, emails, letters, or other Texas activity. 1CR1862.

Exxon's argument that it can make up for this fundamental defect with an argument about the potential defendants' state of mind and intent fails.

1. What Pawa and the other potential defendants "thought, said or intended" is not a contact—but intent is all Exxon has.[13]

Exxon falsely accuses the court of appeals of demanding a physical contact. Exxon Br. 2. To the contrary, the court of appeals plainly stated that "the nonresident's conduct need not actually occur in Texas." Op. *15. Exxon's fatal problem is not that the court limited its analysis to physical contacts but that there is no record evidence or trial court finding of any effect on Exxon or anyone else, whether physical or non-physical. Exxon focused its evidence, and the district court its findings, on state of mind and intent.

The findings say the potential defendants "targeted" Exxon's speech from afar, but never say that this "targeting" has had any effect on Exxon's speech (or anyone else's speech), whether in Texas or elsewhere. FOF/COL ¶ 50. In fact, as noted, Exxon has told the federal court in New York that actions by Pawa *et al*. have *not* affected Exxon, *i.e.*, the company has insisted that it will keep speaking its mind on climate change. Appx. A ¶ 124. In this Court, Exxon contends that actual effects "are not required," *see* Exxon PFR Reply 8,[14] and merely addresses what the

[13] This section addresses arguments in section II of Exxon's opening brief—as well as gaps in Exxon's jurisdictional argument that its brief never addresses.

[14] In support of this legal conclusion, Exxon cited only the district court's own conclusions of law and *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir.

potential defendants "meant," "sought," "intended," or "aimed" to change about Exxon's speech, without asserting that its speech (or anyone else's) has actually been affected. *See* Exxon Br. 1 ("aimed at"); *id.* at 2 ("intended"); *id.* at 12, 32, 45 (targeting); *id.* at 25 (referring to potential defendants' "plan"); *id.* at 26, 27 ("meant to"); *id.* at 27 (harm "will be felt"); *id.* at 30 ("aiming to chill"); *id.* at 31 ("seek to"); *id.* at 32 ("intended … effects"); *id.* at 44 ("efforts to suppress"); *id.* at 51 (potential defendants "intentionally aim to suppress" speech). In other words, it is common ground in this appeal that the district court's findings that the California lawsuits "target" speech are just another way of saying that the lawsuits were filed in California with a particular tortious intent.

This gap between intentions and effects is fatal to Exxon's argument. This Court said unequivocally in *Michiana* that contacts should not turn on what the defendant "thought, said, or intended," which is an inquiry that goes to the merits of the underlying claims. *Michiana*, 168 S.W.3d at 791. The Court has repeated this point several times since *Michiana*, and it recently rejected a request to change this rule, saying it "remains good law and binds us today." *Searcy*, 496 S.W.3d at 71; *see also Cornerstone Healthcare Group Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 73 (Tex. 2016) (quoting this part of *Michiana*); *Moncrief Oil Int'l Inc.*

2020)—a case where there were significant actual effects as well as conduct in the forum, as discussed below.

v. OAO Gazprom, 414 S.W.3d 142, 147 (Tex. 2013) (same); *Old Republic*, 549 S.W.3d at 562 (whether nonresident's money transfer into Texas were intended to defraud creditors or were "innocent in nature" was irrelevant to jurisdictional inquiry).[15] Even Exxon has admitted that this part of *Michiana* was correct. It told the district court that "intent doesn't matter" for effects jurisdiction, just before it submitted proposed findings that nonetheless relied entirely on intentions to try to connect potential defendants to Texas. RR105:3-11 (Exxon's attorney: "Their [the potential defendants'] intent doesn't matter. What matters is: what effect did those lawsuits have on energy companies in Texas?"). Now, Exxon's merits brief in this Court says nothing about this "bind[ing]" rule from *Michiana* that negates Exxon's jurisdictional theory.

Exxon has not cited even one case in which a mere "intention" to have effects in the forum sufficed to create jurisdiction. Exxon heavily relies on *Calder v. Jones*, where the Supreme Court upheld jurisdiction over the authors of an allegedly libelous article that was alleged to have caused injury to the plaintiff in California, where she lived and worked. *Calder v. Jones*, 465 U.S. 783, 785 (1984). But it was a given in *Calder* that the defendants had caused an actual "tortious injury." And this Court has expressly interpreted *Calder* to require more than "mere knowledge"

[15] *Michiana* is a seminal decision that has been cited more than 600 times by Texas courts.

that effects will occur in the forum (even in cases where there *are* actual effects in the forum):

> The Supreme Court later clarified, however, that the test laid out in *Calder* requires that the "effects" of the alleged tort must connect the defendant to the forum state itself, not just to a plaintiff who lives there. *Walden*, 571 U.S. at 288. Thus, our interpretation of *Calder* aligns with the Supreme Court's: "Mere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Searcy*, 496 S.W.3d at 68-69 (citing *Walden*, 571 U.S. at 287).

Old Republic, 549 S.W.3d at 564-65 (citing *Walden v. Fiore*, 571 U.S. 277 (2014)). If knowing infliction of actual harm on a Texas resident is insufficient to confer jurisdiction, *a fortiori* an unfulfilled intention to have an effect is doubly insufficient.

Exxon also emphasizes *Defense Distributed v. Grewal*, a case in which the defendant sent a cease-and-desist letter into Texas that caused a popular Texas website to completely shut down. *Grewal*, 971 F3d. at 492 (plaintiff's claims were "based on injuries stemming solely and directly from Grewal's cease-and-desist letter" sent into Texas); *id*. at 489 (defendant's actions "have caused Defense Distributed to cease publication of its materials"); *see also Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 484 (5th Cir. 2008) (contacts must be "known," not "hypothetical"). These actual, major effects in the forum (coupled with forum-based

acts, *see* § I.A.2) were what established minimum contacts and jurisdiction in *Grewal* and *Calder*—not mere intentions.[16]

There are compelling reasons for a rule against basing jurisdiction on mere intentions. If the jurisdictional analysis shifts from tortious acts done *in* the forum to tortious intentions *aimed a*t the forum, then trial judges would be forced to resolve complex fact disputes over a central merits issue on a special appearance. This merits inquiry would contradict the whole point of protecting nonresidents from protracted fact litigation in courts that may lack jurisdiction and usurp the jury's prerogatives to decide the key merits issues. The Court made this point forcefully in *Michiana*:

> If purposeful availment depends on whether a tort was directed toward Texas, then a nonresident may defeat jurisdiction by proving there was no tort. Personal jurisdiction is a question of law for the court, even if it requires resolving questions of fact. But what if a judge and jury could disagree? May a trial judge effectively grant summary judgment in a local jurisdiction by deciding contested liability facts in favor of the defendant? And if a jury absolves a defendant of tort liability, is the

[16] In fact, Exxon's only case asserting jurisdiction based on intended effects is an unpublished trial court decision from California. *See Twitter, Inc. v. Paxton*, No. 21-CV-01644, 2021 WL 1893140, at *2 (N.D. Cal. May 11, 2021). The entire jurisdictional analysis in *Twitter* is a single, conclusory sentence that cites *Calder*, without any other discussion. *Id.* The district court went on to dismiss the case as unripe. *Id.* at *4. Twitter's appeal is currently pending in the Ninth Circuit (No. 21-15869); the Texas Attorney General (who did not join Gov. Abbott's letter in support of Exxon's petition for review) has argued on appeal that lack of personal jurisdiction is an additional basis to affirm. In any event, a decision by a California federal district court is obviously not binding on this Court, and since it is essentially without any reasoning at all, it should have no persuasive authority either.

> judgment void because the court never had jurisdiction of the defendant in the first place?
>
> Business contacts are generally a matter of physical fact, while tort liability (especially in misrepresentation cases) 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 790-91 (footnotes omitted).

This case presents a good example of what *Michiana* warned against—and what might happen if Exxon's proposed rule were to become law. In the trial court, Exxon submitted thousands of pages of documents on the potential defendants' intent. The potential defendants did not respond in kind because of this Court's instructions to "focus[] … on lack of *contacts* rather than lack of *culpability*"—with the result that the district court (improperly) treated the intent issue as uncontested. *Michiana*, 168 S.W.3d at 791. But if the merits ever are teed up in this case, tortious intent *will* be hotly contested. Deciding these fact issues as part of the threshold jurisdictional inquiry would turn a special appearance into a general bench trial—even though the defendant is forbidden by the "due order of pleading" rules from arguing the merits. Doing that is doubly inappropriate in a Rule 202 petition, where the plaintiff claims to need discovery before it can even file its potential claims.

And if it's fair for Exxon to delve into the merits-based issue on a special appearance, then so too it must be fair for the local governments and Pawa to delve into all the many reasons Exxon's potential claims should fail on the merits. Should

a special appearance analyze the law holding that an abuse of process claim fails where it alleges no more than the filing of a complaint? *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."). Or into federal constitutional law forbidding inquiries into the subjective motivations of government officials and lawyers—rules intended to protect them from corporations with their enormous "financial and legal resources" and "strong incentive[s] to counter-attack" and "seek vengeance in the courts"? *See, e.g., Butz v. Economou*, 438 U.S. 478, 515 (1978) (government lawyer absolutely immune from damages claim that administrative action was brought to chill speech); *see also Hartman v. Moore*, 547 U.S. 250, 263 (2006) (requiring objective showing that allegedly retaliatory prosecution lacked probable cause). If constitutional law goes to extraordinary lengths to protect potential defendants from merits litigation about their intent, it would be a travesty to require them to engage in jurisdictional litigation over these same intentions. The law is crystal clear that this is not how special appearances are supposed to work: "we look only to [the defendant's] contacts with the state of Texas, taking care not to turn a jurisdictional inquiry into an analysis of the underlying merits." *Old Republic*, 549 S.W.3d at 562. For all

these reasons, the court of appeals was correct when it concluded that "the trial court's findings regarding the Potential Defendants' intent in filing the California lawsuits are irrelevant to our personal-jurisdiction analysis." Op. *15.

2. Even if there had been any effects in Texas, they would not make up for the lack of "additional conduct," *i.e.*, actual contacts, by the local governments and Pawa.[17]

Even if there had been actual effects on Exxon or others (and there are not), Exxon must still show that the local governments and Pawa engaged in some Texas activity or other traditional contact with Texas. It is undisputed that such traditional jurisdictional contacts are completely absent from this case.

Old Republic stated this Court's rule categorically: "the 'effects test' is not an alternative to our traditional 'minimum contacts' analysis, and it does not displace the [three-part test] we look to in determining whether a defendant purposefully availed itself of the state." *Old Republic*, 549 S.W.3d at 565 & n.5 (emphasis added).[18] *Old Republic* went on to reject jurisdiction over a nonresident who "directed a conspiracy at Texas" because of a lack of traditional contacts. *Old Republic*, 549 S.W.3d at 560, 565. Similarly, in *TV Azteca v. Ruiz,* the Court upheld claimed jurisdiction over a Mexican TV station—but only because it obtained

[17] This section addresses arguments in sections II and III of Exxon's opening brief.

[18] Once again, Exxon's brief simply ignores binding language from this Court that directly rejects its jurisdictional theory.

millions of dollars in ad revenue through over a hundred contracts with Texas advertisers, hired an agent in Texas, sent employees to meet with the agent, and maintained an office in Texas. *TV Azteca*, 490 S.W.3d at 49-50.[19] A third example is *Kelly v. General Interior Construction*, where this Court rejected jurisdiction over a nonresident contractor because it lacked contacts constituting a "substantial presence" in the State. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 661 (Tex. 2010). The Court described "substantial presence" as the key to jurisdiction, even under "effects" cases like *Calder*: "'on one occasion the United States Supreme Court found specific jurisdiction based on alleged wrongdoing intentionally directed at a forum resident,' [but] the defendant's conduct in that case still 'constituted a substantial presence in the state.'" *Id.* (quoting *Michiana*, 169 S.W.3d at 789). As *Michiana* observed, it is only through traditional contacts with Texas (visits, sales, offices, meetings) that a nonresident relies on the "benefits and protection" of Texas law—a reliance that does not occur where the defendant has merely directed torts at Texas residents. *Michiana*, 168 S.W.3d at 787.

[19] Exxon argues that *TV Azteca* is inapplicable because it analyzes defamation rather than civil rights torts, Exxon Br. 40, but it never explains why this difference should matter. Exxon's objection to *TV Azteca* is also hypocritical: it heavily relied on the case below and in fact *TV Azteca* was one of only two cases cited by the district court in its conclusions of law, which Exxon wrote. FOF/COL ¶ 52.

Exxon's favorite cases also confirm this basic point. As noted above, *Calder* featured contacts well beyond the plaintiff's injury in the forum: the defendants worked for a newspaper that sold 600,000 copies each week in California, and the libelous article was written based on multiple phone calls to California sources. *Calder*, 465 U.S. at 785. This Court has emphasized that the newspaper sales in *Calder* were what created a "substantial presence" in California attributable to the defendants, and that such a presence in the forum is required in "effects" cases. *See Michiana*, 168 S.W.3d at 789 (quotation marks omitted); *accord id.* ("the important factor" in *Calder* and its companion case "was the extent of the defendant's activities"); *Searcy*, 496 S.W.3d at 69 ("In *Calder*, the circulation of the defendant's article was enough to create a substantial presence in the forum state" (quotation marks omitted)); *TV Azteca*, 490 S.W.3d at 41-42 (stating that subsequent decisions have emphasized the California sources and California newspaper sales in *Calder*; "overly simplistic" to make *Calder* dependent on the plaintiff's California contacts); *Kelly*, 301 S.W.3d at 661 (in *Calder* the defendants' conduct "constituted a substantial presence in the state"; rejecting jurisdiction due to lack of such presence) (quotation marks omitted).

Grewal similarly emphasized that the defendant had traditional contact with Texas. The New Jersey attorney general filed a lawsuit in another state against a website publisher, and it sent a cease-and-desist letter into the forum ordering the

website to shut down. *Grewal*, 971 F.3d at 489. In the district court, the publisher called the cease-and-desist letter "the keystone conduct" that created personal jurisdiction. *Defense Distributed v. Grewal*, 364 F. Supp. 3d 681, 689 (W.D. Tex. 2019) (quoting the publisher's brief). The Fifth Circuit squarely agreed. It emphasized that "Grewal intentionally mailed the cease-and-desist letter into Texas, a contact *Walden* specifically mentioned as relevant to the personal jurisdiction inquiry." *Grewal* , 971 F.3d at 495. The Fifth Circuit also emphasized that the website shutdown was "attributable to … the cease-and-desist letter" rather than the out-of-state "enforcement action," and that "when the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." *Id.* at 493-94 (quoting *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999)), 495-96 & n. 10.[20] In other words, the letter sent by the New Jersey AG to Texas that ordered the plaintiffs to shut down their website was *the* decisive jurisdictional contact, not the out-of-state lawsuits by him and several other (dismissed) defendants. The application to this appeal is clear,

[20] According to Exxon, when *Grewal* said "this alone constitute purposeful availment," it was referring to the ideological advantage the New Jersey attorney general obtained "in the marketplace of ideas." *See* Exxon Br. 36. But quotation of the full sentence from *Grewal* shows that "this alone" referred to the cease-and-desist letter.

because there is no similar letter or other action in Texas. Under *Grewal*, that is not enough.

Exxon attempts to create a distinction between knowing and intentional torts and argues that only the latter may give rise to jurisdiction based upon effects alone, even if there is no "additional conduct" in Texas (*i.e.*, no actual contact with Texas beyond tortious intent). Exxon Br. 38, 39-42. This attempted distinction runs contrary to settled law. In *Old Republic*, this Court was faced with an intentional tort (fraud), and directly held that the effects test does not displace the traditional minimum contacts test. *Old Republic*, 549 S.W.3d at 565 & n.5. Intentional conduct was also at issue in *Michiana* and *Kelly*, yet in both cases the Court required contacts beyond intended effects. *See Michiana*, 168 S.W. 3d at 790 (rejecting "directed-a-tort jurisdiction"); *id.* at 794 (Medina, J., dissenting) (defendant "intentionally defraud[ed]" the plaintiff); *Kelly*, 301 S.W.3d at 656 (fraud claim directed at Texas resident). Whether these required contacts should be referred to as "additional conduct" or whether that phrase should (as Exxon contends) be used only in stream-of-commerce and defamation cases, such as *TV Azteca*, is a question of mere semantics. *TV Azteca*, 490 S.W.3d at 47-52 (extensive contacts with Texas constituted "additional conduct" beyond in-state effects). The key point is that this Court's precedents clearly hold that in-state effects alone (even in cases where they

exist) are not enough: the defendant must have *some* contact with Texas. Here the potential defendants have none.

In short, this Court has repeatedly held that *Calder* does *not* create an end-run around identifying traditional contacts—that effects jurisdiction is (as *Old Republic* put it) "not an alternative" to the traditional minimum contacts analysis. So even if the local governments and Pawa *had* created effects in Texas (and there is no evidence or finding that they have), Exxon still would have to identify some other contact by them with Texas, sufficient to give them the sort of "substantial presence" that this Court has repeatedly required in purported "effects" cases. There is no such presence here, which is another reason to reject jurisdiction.

3. Even if there had been effects in Texas, the effects would have been limited to Exxon—and this Court has previously rejected that sort of "effects jurisdiction."[21]

A final defect in Exxon's assertion of "effects jurisdiction" is that the only potentially affected entity is Exxon—and not (as Exxon asserts) "the entire Texas energy industry." Exxon Br. 32.

The U.S. Supreme Court confirmed this point in *Walden*: "We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the

[21] This addresses an argument that appears throughout Exxon's opening brief. *See, e.g.*, Exxon Br. 32, 35.

forum State." *Walden*, 571 U.S. at 284. This is based on the fundamental rule of purposeful availment, which is that "only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person." *Old Republic*, 549 S.W.3d at 559 (quotation marks omitted). Although there are occasional cases where actions in Texas by the defendant's agents or allies are attributed to the defendant, *see Retamco Operating v. Republic Drilling*, 278 S.W.3d 333, 340 (Tex. 2009); *Cornerstone*, 493 S.W.3d at 73,[22] what is categorically forbidden is going across the "v." to tag the defendant with the actions in Texas by the *plaintiff* and its allies—the quintessential "third person" or "unilateral" actor when it comes to evaluating a defendant's contacts.

The classic application of this principle is *Michiana*, where this Court held that deliberately directing a tort at a Texas resident from afar was not a sufficient contact with Texas. *Michiana*, 168 S.W.3d at 790. This rule has been applied in more than a dozen cases that are essentially identical to this one. In those cases, courts rejected jurisdiction over lawyers, litigants, and public officials who "filed suit … with the intent of causing negative consequences" in the forum, or who undertook a "campaign" to use baseless litigation against one or more forum

[22] Exxon says these two cases show that Texas courts can assert jurisdiction even if the defendant has no activity in the forum, Exxon Br. 40, but in both cases the defendant sent agents or allies into the forum to do its bidding.

residents.[23] This is precisely what Exxon contends is sufficient to establish jurisdiction, despite the uniform law to the contrary.

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[23] For Texas cases, *see OZO Capital, Inc. v. Syphers*, 2018 WL 1531444, *10 (Tex. App.—Fort Worth Mar. 29, 2018, no pet. h.) (improper conduct by nonresident litigants against two Texas residents); *Stanton v. Gloersen*, 2016 WL 7166550, *11 (Tex. App.–Dallas Nov. 30, 2016, pet. denied) (rejecting jurisdiction over nonresident lawyer who maliciously prosecuted a Texas resident and made false statements to Texas agencies); *Estate of Hood*, 2016 WL 6803186, at *7 (Tex. App.—Fort Worth, Nov. 17, 2016, no pet.) (rejecting jurisdiction over opposing counsel who tried to extort seven Texas residents involved in Texas probate proceeding: "to the extent [plaintiffs] argue that specific jurisdiction exists in this case because [the lawyer] directed a tort at a Texas resident, that argument is foreclosed by *Michiana*"); *Tang v. Garcia*, No. 13-06-00367-CV, 2007 WL 2199269, *6 (Tex. App.—Corpus Christi-Edinburg Aug. 2, 2007, pet. denied) (memo. op.) (rejecting jurisdiction over nonresident lawyers who allegedly initiated "a campaign of abuse and harassment" against Texas residents and filed baseless legal claims filed in Texas courts). For federal cases, *see Walden*, 571 U.S. at 284 (unconstitutional law enforcement aimed at forum residents); *Morrill v. Scott Finc'l Corp.*, 873 F.3d 1136, 1140, 1149 (9th Cir. 2017) (rejecting jurisdiction over lawyers and litigants who used abusive litigation as part of "campaign to harm" two forum residents); *Harmer v. Colom*, 650 F. App'x 267, 272 (6th Cir. 2016) (rejecting jurisdiction over lawyer who "filed suit in Mississippi with the intent of causing negative consequences in Tennessee"); *Stroman Realty*, 513 F.3d at 486 (rejecting jurisdiction over nonresident public official who allegedly violated constitutional rights of forum resident); *Allred v. Moore & Peterson*, 117 F.3d 278, 283 (5th Cir. 1997) (rejecting jurisdiction over lawyers and a litigant who brought abusive claims against a forum resident); *Wallace v. Herron*, 778 F.2d 391, 394-95 (7th Cir. 1985) (rejecting jurisdiction over lawyers and a litigant who brought abusive litigation against a forum resident); *SpaceCo Bus. Sols., Inc. v. Mass Engineered Design, Inc.*, 942 F. Supp. 2d 1148, 1154 (D. Colo. 2013), *aff'd*, 553 F. App'x 1008 (Fed. Cir. 2014) (rejecting jurisdiction over litigants who brought abusive litigation); *Claro v. Mason*, No. H-06-2398, 2007 WL 654609, at *10 (S.D. Tex. Feb. 27, 2007) (rejecting personal jurisdiction over nonresident who initiated malicious prosecution against a Texas resident); *Diddel v. Davis*, No. CV H-04-4811, 2005 WL 8164061, at *6-7 (S.D. Tex. June 2, 2005) (no jurisdiction over lawyers and litigant who allegedly conspired to harm a Texas resident through baseless litigation and bar complaints filed in Texas). *See also Midwest Mfg., Inc. v. Ausland*, 273 P.3d 804,

Exxon is aware of the rule and the cases, which is why it repeatedly asserts that this case is not about itself or a few other Texas firms, but the "entire Texas energy industry." Exxon Br. 32. This facile phrase purportedly converts two lawsuits aimed at two Texas companies and three non-Texas companies into an extraordinary attack on "the State itself." Exxon Br. 26.[24] In this way, the Texas flag is misappropriated by Exxon to escape the basic rule that "only the defendant's contacts with the forum are relevant."

A similar argument was made in *Western Fuels v. Turning Point Project*, which concerned statements about global warming allegedly aimed at destroying the Wyoming coal industry. *Western Fuels Assoc., Inc. v. Turning Point Project*, No. 00-CV-074-D, at *5-6 (D. Wy. Mar. 31, 2001) (attached as Appx. E). A coal industry group sued environmental organizations and argued that jurisdiction and venue were proper in Wyoming because Wyoming was the dominant U.S. source of coal, sufficient to make attacks on coal an attack on the entire state. *Id.* at *2. But the court rejected this argument: "Although Plaintiff contends that the target of Defendants' advertising campaign is Wyoming coal, Plaintiff makes no *specific*

811 (Kan. App. 2012) (rejecting jurisdiction over two litigants and a lawyer who brought abusive litigation elsewhere); Op. *17-18 (relying on many of these cases).

[24] The San Mateo complaints name more defendants, fewer than half of which (eighteen) are headquartered in Texas and, in any event, the undisputed evidence is that Pawa had "no involvement" in those cases. 1CR1863, ¶ 13.

connection between the coal located in Wyoming and the allegedly false and misleading statements." *Id.* at *6. *Western Fuels* thus rejected an argument identical to Exxon's attempt to equate lawsuits about fossil fuels with an attack on the entire state.[25]

Beyond the absence of legal merit in Exxon's unprecedented theory, the factual findings do not support it. They show that this case is really about the speech of one Texas firm: Exxon. Although the district court's conclusions of law include two passing references to litigation against "the Texas energy industry," FOF/COL ¶¶ 49, 59, the underlying factual findings tell a different story. These findings state that Pawa and the two cities he represented filed suit against five companies, only two of which are based in Texas. FOF/COL ¶ 26.[26] And when it comes to improperly targeted speech—*i.e.*, the targeted speech that is supposed to provide the key jurisdictional contact—these findings are all exclusively about Exxon. Every one of the "targeted" statements listed in the findings is a statement by Exxon alone, including Exxon's Outlook for Energy report, its Lights Across America ad, its

[25] Although the court dismissed the case for improper venue without reaching the objections to personal jurisdiction, it pointed out that the venue standard was "generally the same" as the standard used to evaluate personal jurisdiction. *Id.* at *3.

[26] Notably, in the underlying California complaints, Exxon's statements are heavily emphasized, whereas Conoco's are barely mentioned. *Compare* 1CR944-46, 948-50 (detailed discussion of Exxon's statements) *with* 1CR952 ¶ 78(e) (one subparagraph about Conoco).

CEO's statements to shareholders, its 1988 memo on the "potential greenhouse effect," and its 2007 Corporate Citizenship Report. FOF/COL ¶¶ 29, 30.[27] The same findings also say that the potential defendants plotted to "target" Exxon specifically—*e.g.*, at the La Jolla conference, where Pawa supposedly hatch a plan to "target[] ExxonMobil's speech," and at the Rockefeller meeting, which further developed an "Exxon campaign" to "delegitimize ExxonMobil." FOF/COL ¶¶ 9-10. It was this very "Exxon campaign" that supposedly led to the California lawsuits.

In fact, Exxon and its allies sometimes drop their fiction about the "entire Texas energy industry." Exxon has told a federal appellate court that Exxon's speech has been "singled out" by Pawa and his alleged allies—the opposite of targeting the entire industry. Appx. C at 1 (Pawa and the AGs have "singled out" Exxon's speech). The Texas Oil & Gas Association ("TXOGA"), which one would expect is here as an amicus for the express purpose of trying to show that the California lawsuits have chilled speech by Texas firms *besides* Exxon, has instead

[27] Exxon also tries to make this case look more broadly "Texan" by asserting that the subject matter or audience of Exxon's speech was "uniquely Texa[n]." Exxon Br. 27. The record again shows the opposite. The only speech cited in the findings (*see* FOF/COL ¶¶ 29, 30) was speech on energy and global warming generally, directed to a national or even global audience of consumers or shareholders; the findings do not have a single example of speech about Texas or directed specifically to Texans.

filed an amicus brief that does the opposite. Instead of emphasizing any chill on its members' speech, TXOGA says that "Texas conduct *by Exxon Mobil"* is the "focal point" of the California lawsuits, and that potential defendants are trying "to exercise control over what *Exxon Mobil* is saying in Texas." TXOGA Amicus Br. at 7-8 (emphasis added); *see also id.* at 4 ("TXOGA's other members, as well as the oil and gas industry in general, *may* become victims of the same type of targeting to which Exxon Mobil has been subjected.") (emphasis added). TXOGA goes on to speculate that potential defendants "or others" may someday attack "other members of TXOGA and the oil and gas industry in general"—which is effectively a statement that speech by these "other members of TXOGA" is *not* currently targeted by the California lawsuits. *Id.* at 8.

In short, there is no basis in the record for Exxon's argument that the potential defendants' "Exxon campaign" was somehow an attack on the entire State. The court of appeals candidly admitted to an impulse to "safeguard" the Texas energy industry but could not accept this counter-factual spin. Op. *17 ("the Potential Defendants' alleged Texas contacts … are not contacts with Texas, but with a Texas resident"); *id.* at *20 ("impulse to safeguard"). Nor should this Court. The findings in this case merely show potential impacts on Exxon alone, which manifestly cannot support jurisdiction.

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In sum, Exxon's search for a minimum contact violates three fundamental rules and their adoption would require fundamental changes to minimum contacts jurisprudence. 1) There are no actual effects in Texas, so Exxon improperly relies only what defendants "thought, said or intended"—contradicting *Michiana*. 2) There are no contacts by defendants with Texas (comparable to *Calder*'s newspaper sales or *Grewal*'s cease-and-desist letter), so Exxon proposes using would-be effects as "an alternative to our traditional 'minimum contacts' analysis"—contradicting *Old Republic*. 3) The would-be effects extend only to Exxon itself—contradicting *Walden*'s rule against relying on contacts between the plaintiff and the forum. Exxon's argument would convert intentions into effects, effects into contacts, and itself into the State. The Court should reject Exxon's invitation to engage in legal alchemy.

B. Any contacts would be "fortuitous" rather than "purposeful" (prong #2).[28]

Even if the potential defendants' intent did constitute a sufficient contact with Texas, this contact would be "fortuitous" rather than "purposeful," *Old Republic*, 549 S.W.3d at 559 (quotation marks omitted)—which means that Exxon fails to meet the second part of the three-part test for purposeful availment. The district

[28] This section addresses arguments in section I.A of Exxon's opening brief.

court's conclusions of law on this point are thin. There is a boilerplate conclusion that the potential defendants' "contacts were deliberate and purposeful, and not random, fortuitous, or attenuated." FOF/COL ¶ 51. Exxon's theory is apparently that this standard is met because the potential defendants intended to suppress speech of Exxon and "other" Texas-based firms, and because "Texas is where these energy companies, including ExxonMobil, issue publications, hold shareholder meetings, and make corporate decisions." Exxon Br. 26; FOF/COL ¶ 50 (reference to "other" firms).

But the connection between Texas and the potential defendants' intentions is obviously fortuitous. Specifically, it is a "fortuity" that Exxon is based in Texas; certainly there is no finding that Exxon or any other firm was sued in California *because* of its Texas location. Nor could there be such a finding, when the energy companies named in the California suits are based mostly *outside* Texas. This fortuity makes this case similar to *Searcy*. The defendant in *Searcy* bought foreign property from a Texas-based seller, but this Court rejected jurisdiction because it found that the seller "could, quite literally, have been based anywhere in the world, and [the defendant] would presumably have interacted with it in the same way." *Searcy*, 496 S.W.3d at 74-75. So too here: the potential defendants would have sued Exxon regardless of the state in which it was fortuitously based, just as potential

defendants sued non-Texas energy companies in the very same case. Any contact with Texas was fortuitous, not purposeful.

C. There was no "benefit" or "availment" by Pawa (prong #3).[29]

Exxon's final "purposeful availment" problem is the third prong of this Court's jurisprudence: "the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction." *Old Republic*, 549 S.W.3d at 559 (quotation marks omitted). Exxon attempts to satisfy this requirement with a cursory assertion that Pawa seeks an "advantage in the marketplace of ideas surrounding climate change," and that he did so "[b]y suppressing the speech of ExxonMobil and seventeen other Texas energy companies." Exxon Br. 36.[30] The only support Exxon offers for this argument is that *Grewal* was supposedly referring to this sort of fuzzy ideological advantage when it said "[t]his alone constitutes purposeful availment.'" Exxon Br. 36 (quoting *Grewal*, 971 F.3d at 494). But Exxon's argument is mistaken, for four reasons.

First, Exxon's argument mischaracterizes *Grewal*, which actually said: "When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." *Grewal*, 971 F.3d

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[29] This section addresses arguments in section I.C of Exxon's opening brief.

[30] This statement is misleading on two levels: Pawa filed suit against two Texas-based energy companies (not seventeen), and the Exxon-drafted findings deliberately avoid stating that any speech has been suppressed.

at 493-94 (emphasis added, quotation marks omitted). In other words, the cease-and-desist letter constituted purposeful availment—*i.e.*, the very letter that is absent here. *Grewal* is the only case Exxon cites on purposeful availment but Exxon's favorite passage from *Grewal*, when quoted in full, puts a finger on the key factor that distinguishes that case from this one.

Second, this Court's cases on purposeful availment contradict Exxon's proposed rule. The "benefit, advantage or profit" derived from Texas in the caselaw is typically an asset with financial value—*e.g.*, trade secrets in *Moncrief Oil*, or the Texas real property in *Retamco*. The undersigned counsel is not aware of a single Texas case where the "benefit, advantage or profit" was something as amorphous and conjectural as an "advantage in the marketplace of ideas." The potential for abuse in Exxon's proposed rule is obvious, because *any* criticism of a Texas resident would automatically create a similarly theoretical "advantage in the marketplace of ideas." For example, if Exxon were correct, anyone who has ever accused Exxon of deceptions about fossil fuels have obtained the same "advantage" from Texas as potential defendants—even though these accusations (whether true or false) are protected speech. The same would be true of nonresidents who criticize Governor Abbott or Jerry Jones, to name just two prominent Texans. Easy assertions about unfair advantages in public debate are not the sort of "benefit, advantage or profit" that this Court has ever recognized before.

Third, the district court's findings do not support Exxon's requested holding. The district court's findings are silent about any benefit, advantage, or profit having been obtained; and they certainly do not talk about any "undue advantage" having been obtained in any "marketplace of ideas." The underlying findings also do not say that any speech has been "suppressed," let alone speech by "seventeen other Texas energy companies." In fact, as noted, Exxon has told the federal court in New York that it continues to speak its mind on climate change—*i.e.*, *denying* that speech has been suppressed. There is no finding that Pawa or anyone else has gained an advantage in the marketplace of ideas.

Fourth, and more fundamentally, even if Pawa had obtained some real benefit from criticizing Exxon, this benefit has not come through any use or "availment" of Texas. The heart of personal jurisdiction "is premised on notions of implied consent—that by invoking the benefits and protections of a forum's laws, a nonresident consents to suit there." *Michiana*, 168 S.W.3d at 785 (citations omitted); *see also id.* at 787 (availment occurs where the defendant "enjoy[s] the benefits and protection of the laws" of the forum) (quoting *International Shoe*, 326 U.S. at 319); *Moncrief Oil*, 414 S.W.3d at 154 (similar). Reliance on the protections of Texas law is obvious in any case involving a physical visit, or the purchase of Texas property. *See, e.g., Moncrief Oil*, 414 S.W.3d at 154 (by visiting Texas and obtaining trade secrets in meetings here, the defendant "sought out Texas and the

benefits and protections of its laws."); *Retamco*, 278 S.W.3d at 340 (describing defendant's reliance on Texas property law); *cf. Searcy*, 496 S.W.3d at 74-75 (rejecting purposeful availment in dispute over the sale of a foreign corporation, but noting that the outcome would have been different if the assets were Texas-based). But any notion of implied reliance on Texas law is totally absent here. This deficiency makes this case like *Michiana*, where this Court said it was "hard to imagine how [the defendant] would have conducted its activities any differently if Texas had no law at all." *Michiana*, 168 S.W.3d at 787. Even if Pawa had obtained some sort of benefit from accusing Exxon, he has not done it through any availment of Texas or Texas law.

For all these reasons, there is no benefit or availment. This constitutes another reason to reject jurisdiction.

II. "Issues of sovereignty" are no substitute for purposeful availment.[31]

Because Exxon cannot satisfy the existing "purposeful availment" legal requirement, it proposes a new, alternative standard. According to Exxon, "[i]ssues of sovereignty and federalism provide an alternative basis for reversal." Exxon Br. 33. In pursuing its argument for this "alternative" to minimum contacts, Exxon relies on Justice Kennedy's plurality opinion in *J. McIntyre Machinery v. Nicastro* for the proposition that attempting to obstruct the forum's laws (*e.g.*, on energy

[31] This section addresses arguments in section I.B.2 of Exxon's opening brief.

production or free speech) "might" suffice to create personal jurisdiction. *See* Exxon Br. 34 (citing *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011)).[32] But Exxon's argument distorts the law and the facts, in four ways.

First, Exxon lacks the fact record to support its argument. Exxon asserts that its speech is necessary to "allow[] our state legislature to make informed decisions." Exxon Br. 34. But there are no findings of fact and no evidence in the record establishing that anyone has been deprived of any speech by Exxon—on the contrary, Exxon has said the opposite to the federal court in New York. And as noted above, the only "targeted" speech cited in the findings (*see* FOF/COL ¶¶ 29, 30) was speech on energy and global warming generally, directed to a national or even global audience of consumers or shareholders; the findings do not have a single example of speech directed specifically to Texans or Texas legislators. There is also no evidence or finding that Texans in particular follow Exxon's corporate statements, or that California municipal officials filed lawsuits in California as part of some bizarre attempt to affect the Texas legislature. Exxon's argument also proves too much: every forum resident accused of any sort of misstatement can always lay claim to a similar statewide impact, because criticizing speech by even

[32] It takes some chutzpah for Exxon to invoke "issues of sovereignty and federalism" to aid its blatant end-run around a pending lawsuit in California. But this is what Exxon has asked this Court to accept.

one speaker on any topic has a theoretical effect on all the forum residents who might have heeded the plaintiff's words.

Second, Exxon is citing a plurality opinion by Justice Kennedy that has never won the support of a majority of the U.S. Supreme Court. *Plixer Int'l v. Scrutinizer GmbH*, 905 F.3d 1, 9 (1st Cir. 2018) (*Nicastro* plurality opinion "did not command a majority on the Court and so is not binding here"). Moreover, the snippet that Exxon cites on "obstruction" was dicta on stilts: it was totally unconnected to resolving the case before the Court and refers to jurisdiction that only "might" exist.[33] Justice Kennedy did not explain under what circumstances obstructing laws "might" suffice to create jurisdiction, and Exxon provides no examples where other courts have developed his hypothesis. That Exxon relies on such a thin reed is telling.

Third, to the extent Exxon claims that "issues of sovereignty" can create jurisdiction where minimum contacts are lacking, *Nicastro* says the opposite. "Personal jurisdiction, of course, restricts judicial power not as a matter of

[33] The *holding* of *Nicastro* is distinctly unhelpful to Exxon. The *Nicastro* plurality rejected the idea that jurisdiction could be based on the defendant's knowledge that its products would enter the stream of commerce and cause harm in the forum. "[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Nicastro*, 564 U.S. at 883. This focus on actions contradicts Exxon's position, since in this case there are no actions in Texas by anyone besides Exxon.

sovereignty, but as a matter of individual liberty, for due process protects the individual's right to be subject only to lawful power." *Nicastro*, 564 U.S. at 884 (quotation marks omitted); *accord Walden*, 571 U.S. at 284 ("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties."). *Nicastro* in no way supports Exxon's claim that individuals are entitled to less due process when they offend powerful interests in another State. And here again is the "implied consent" that justifies personal jurisdiction: no amount of sovereignty talk can make it fair to assert power over someone who has not acted in reliance on the benefits and protections of the forum.

Fourth, lawsuits by their nature do not obstruct the law. Extraordinary actions taken *outside* of court that obstruct Texas law might be imagined—*e.g.*, sabotaging Exxon's Texas oil wells, intimidating Exxon's lobbyists in Austin, or, perhaps, bribing the judges in California to disregard Texas law. But seeking to apply the law *inside* a court is the opposite of obstruction.

Finally, Exxon's proposed "obstruction jurisdiction" argument proves too much: under Exxon's novel theory, *every* tort committed against a forum resident could be treated as an attempt to obstruct that forum's law. For example, the RV seller in *Michiana* could be treated as attempting to obstruct Texas anti-fraud law, and so too could the Louisiana co-conspirator in *Old Republic*. Similarly, all the

cases involving "campaigns" to bring baseless litigation against forum residents could similarly be construed as attempts to interfere with forum laws. *See supra* n. 23. But these cases were seen for what they were: improper attempts to convert injuries to a few forum residents into the defendant's contacts. The same is true here, where only two Texas residents have been sued by Pawa's former clients, and the only speech improperly targeted by anyone is Exxon's.[34]

For all these reasons, Exxon's sovereignty "alternative" to minimum contacts should be rejected. Talk about Texas sovereignty is no substitute for actual contacts with Texas (see § I.A) that are purposeful and not fortuitous (see § I.B) and that constitute an availment of the benefits of Texas law (see § I.C)—all requirements that are not met here.

III. Exxon's jurisdictional theory is not just bad law—it is also bad legal policy.

Exxon's arguments on purposeful availment are not just bad law. They are equally bad legal policy.

Although Exxon suggests that this case is "unique," Exxon Br. 24, the truth is that Exxon's jurisdictional recipe would be easy for any large corporate plaintiff, in any state, to copy: (1) any lawsuit against my company identifying allegedly

[34] Exxon's brief again conjectures that the potential defendants have deprived the Texas legislature of its ability to make "informed decisions," Exxon Br. 34, but this is just more spin. The findings of fact say nothing about Texas lawmakers, let alone the legislature's decision-making.

misleading statements threatens to chill my speech (2) my industry is "vital" to the state, (3) ergo, anyone who has sued my company with a complaint that identifies a misleading statement can be sued in the courts of my home state. Under Exxon's radical rule, high-tech companies could and would countersue in California, investment banks could and would countersue in New York, automotive companies could and would countersue in Michigan, and so on.[35] Exxon's proposal would invite these countersuits against the Texas Attorney General anytime he sues companies that could be said to be important to a sister state's economy.[36]

In this way, Exxon's proposed rule threatens to expand conflicting litigation over allegedly deceptive statements before multiple judges, in different states. It would also make the original accuser's rights vary with the size of his or her corporate opponent, which is directly contrary to how due process and the rule of law are supposed to work. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437-38 (2019) (Gorsuch, J., concurring) (when "the powerful, well-heeled, popular, and connected can wheedle favorable outcomes" from courts, the "rule of law begins to bleed into the rule of men."). And it would drag trial courts into imponderable inquiries into

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[35] As Pawa pointed out in his response to the petition for review there are at least eight industries employing more Texans than the oil and gas industry. *See* Pawa PFR Response 18 n.11. So even in Texas, it is not just oil and gas companies who could make Exxon's "I am the State" argument.

[36] For example, the Texas AG has recently brought litigation accusing major firms in the pharmaceutical, medical device, and technology sectors of deceptive conduct.

which companies and which industries are sufficiently "vital" to the State to merit this special "sovereignty" protection—actually encouraging judges to indulge what the Fort Worth Court of Appeals described as an "impulse to safeguard" a local industry that it refused to allow to influence it. Op. *20.

In sum, Exxon's proposed changes in long-settled law would multiply conflict between courts in different states and would invite rulings that have no place in a neutral and fair system of justice.

IV. Jurisdiction here would contradict "fair play and substantial justice."[37]

Even if there were "minimum contacts" in this case, jurisdiction would still be inconsistent with "traditional notions of fair play and substantial justice." *Moncrief Oil*, 414 S.W.3d at 150. This is a separate basis for rejecting jurisdiction that Pawa and other potential defendants raised below, but which the court of appeals did not reach. In analyzing the five factors relevant to this determination, *see* Exxon Br. 46-47; *Retamco*, 278 S.W.3d at 341,[38] the district court addressed none of the unrebutted evidence that potential defendants submitted on each factor; instead, it

[37] This section addresses arguments in section IV.B of Exxon's opening brief.

[38] Where (as here) there is no underlying factual finding that is disputed, the district court's conclusions of law on these five factors are legal questions that this Court reviews *de novo*. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *cf. Guardian Royal Exch. Assur., Ltd. v. Eng. China Clays, P.L.C.*, 815 S.W.2d 223, 233 (Tex. 1991) (reviewing "fair play and substantial justice" analysis, without applying any deference). Exxon does not contend otherwise.

adopted the boilerplate conclusions proposed by Exxon (*e.g.*, it "would not be burdensome" for potential defendants to litigate in Texas). FOF/COL ¶ 55. These factors show that Exxon's counter-litigation against opposing counsel from a pending lawsuit is about as far from "fair play and substantial justice" as it gets.

Burden on the defendant. Exxon says that Pawa submitted "no sufficient evidence" of a burden, and suggests that the burden on them is the same as it would be for any other nonresident. Exxon Br. 47 (citing *Moncrief Oil*, 414 S.W.3d at 455). Not so. Pawa's unrebutted testimony was that 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." 1CR1865, ¶ 21. Moreover, Pawa is an opposing counsel, from whom discovery is categorically viewed as extraordinarily burdensome and normally inappropriate. *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).[39] A leading case concludes that taking discovery from opposing counsel "disrupts the adversarial system and lowers the standards of the profession," distracts counsel from devoting time to the case "without fear of being interrogated by his or her opponent." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). A similar rule has been applied to discourage attempts to take depositions from high-ranking municipal officials. *See Coleman v. Schwarzenegger*, No. CIV S–90–0520 LKK JFM P, 2008 WL 4300437, at *2 (E.D. Cal. Sept. 15, 2008); *Rodriguez v. City of Los Angeles*, No. CV 11–01135 DMG (JEMx), 2013 WL 12212435, at *1 (C.D. Cal. Oct. 30, 2013). Here the burden is obvious and extraordinary.[40]

Interests of the forum. The trial court concluded that Texas has an interest in adjudicating the dispute because it involves "constitutional torts committed in Texas against Texas residents." FOF/COL ¶ 56. But "Texas's interest in protecting its citizens against torts" is not sufficient to create jurisdiction over a nonresident who

[39] 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).

[40] More so here because of Exxon's record of scorching the earth in discovery. For example, in Exxon's lawsuit against the AGs, "Exxon served on the [Massachusetts] 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* Appx. F, Petition for a Writ of Mandamus, *In re Healey*, at 10 (5th No. 16-11741, Dec. 9, 2016) (internal footnotes omitted).

has allegedly "directed a tort from outside the forum against a resident." *Moncrief Oil*, 414 S.W.3d at 152. Exxon argues that Pawa has, by suing two Texas firms, attempted to regulate speech by all Texans, but this is mere spin; as noted above, the only potential impacts the district court identified were on Exxon alone. Texas has no extraordinary interest in this case.

Exxon's interest in convenient and effective relief. 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 California cases overcome motions to dismiss, Exxon would be required to bring any claims against 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).[41] And even if the California cases are dismissed, then Exxon's claims would die with them—abuse of process requires misconduct after the filing of the complaint, *see Preston Gate,* 248 S.W.3d at 897, and the constitutional claims would be dead because Exxon has already stated that its speech

[41] If the California cases are remanded to state court, California law has a rule on compulsory counterclaims similar to Federal Rule 13(a). *See* CAL. CODE CIV. PROC. § 426.30.

is not chilled. The idea that Exxon has brought this petition in Tarrant County because of convenience, rather than hard-ball tactics, is utterly implausible.

Interests of the interstate judicial system. This factor heavily favors the potential defendants. Exxon talks about how convenient it would be for Exxon to bring its claims against Pawa in Texas. Exxon Br. 49. But Exxon's interests are not the system's interests, which Exxon's planned countersuit does nothing to advance. A ruling in Texas on whether Pawa's participation in California lawsuits is abusive or unconstitutional "could lead to a multiplicity of inconsistent verdicts on a significant constitutional issue." *Stroman Realty*, 513 F.3d at 488. Even apart from the potential for inconsistency, Exxon's proposed rule would encourage other corporate countersuits against nonresident officials charged with protecting the public, filed in the company's home state, before the company's original fraud or other misconduct has been adjudicated. *Id. at* 488 (countersuits against officials from another State "greatly diminish the independence of the states"). Exxon's hyper-aggressive tactics are an obvious threat to the "interstate judicial system."[42]

Substantive social policies. The California lawsuits allege that portions of coastal California could be flooded by the conduct of Exxon and several other global

[42] It bears repeating that the U.S. Supreme Court has deplored the threat to prosecutorial independence posed by corporations inclined to "counter-attack" government lawyers who bring administrative litigation against them. *Butz*, 438 U.S. at 515-17.

energy firms—an allegation that, true or false, California has an obvious interest in adjudicating. By contrast, Texas's only possible interest is in protecting one of its residents from constitutional violations allegedly directed at it by conduct outside the state—an interest this Court expressly rejected in *Michiana* and subsequent cases. If Texas is to avoid becoming a haven for the worst kind of forum shopping, jurisdiction in cases like this one should be rejected.

In short, the five factors show that jurisdiction would be inconsistent with fair play and substantial justice.

CONCLUSION

Exxon's petition for review should be denied. If the Court accepts review, then the decision by the court of appeals should be affirmed.

December 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because, according to the Microsoft Word word-count function, it contains 13,727 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and Times New Roman 14-point font in footnotes.

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CERTIFICATE OF SERVICE

A copy of this brief has been electronically served on December 1, 2021, on counsel as follows:

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Appendix

Excerpts from Proposed Second Amended Complaint,
Exxon Mobil v. Schneiderman, No. 1:17-cv-02301-VEC
(S.D.N.Y. Jan. 12, 2018) ..... Appx. A

Excerpts from Exxon Mobil Corporation's Brief in Support of this Court's
Personal Jurisdiction, *Exxon Mobil v. Schneiderman*,
No. 4:16-cv-00469-K (N.D. Tex. Feb. 1, 2017)..... Appx. B

Excerpts from Brief and Special Appendix for Plaintiff-Appellant,
Exxon Mobil Corp. v. Healey, No. 18-1170 (2d Cir.) ..... Appx. C

Excerpts from Appellants' Response to Exxon's Post-Submission Brief..... Appx. D

Western Fuels Assoc., Inc. v. Turning Point Project,
No. 00-CV-074-D (D. Wy. Mar. 31, 2001)..... Appx. E

Excerpts from Petition for a Writ of Mandamus, *In re Healey*,
No. 16-11741 (5th Cir. Dec. 9, 2016)..... Appx. F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON MOBIL CORPORATION,

Plaintiff,

v.

ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity,

Defendants.

No. 17-CV-2301 (VEC) (SN)

EXXONMOBIL'S SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Exxon Mobil Corporation ("ExxonMobil") brings this action seeking declaratory and injunctive relief against Eric Tradd Schneiderman, the Attorney General of New York and Maura Tracy Healey, the Attorney General of Massachusetts. Attorneys General Schneiderman and Healey have joined together with each other, as well as others known and unknown, in an unlawful agreement to impose their viewpoint on climate change by abusing their law enforcement authority under state law. To coerce ExxonMobil into embracing their viewpoint on a matter of public concern, the Attorneys General launched pretextual investigations of ExxonMobil in clear violation of the First Amendment. Attorney General Schneiderman issued multiple subpoenas to ExxonMobil, and Attorney General Healey issued a civil investigative demand ("CID") to ExxonMobil that went so far as to name the groups promoting a viewpoint the Attorneys General oppose. ExxonMobil seeks an injunction barring these unconstitutional investigations and a declaration that they violate ExxonMobil's rights.

"[p]utting the [b]rakes" on ExxonMobil's alleged "[d]isinformation [c]ampaign" on climate change.[77]

43. Matthew Pawa hosted the second presentation on the topic of "climate change litigation."[78] Pawa previously sued ExxonMobil and 23 other energy companies for allegedly contributing to global warming and flooding.[79] Mr. Pawa had hoped the lawsuit would serve as "a potentially powerful means to change corporate behavior."[80] The court rebuffed Mr. Pawa's gambit, however, finding that the regulation of greenhouse gas emissions is "a political rather than a legal issue that needs to be resolved by Congress and the executive branch rather than the courts."[81]

44. Frumhoff and Pawa have sought for years to initiate and promote litigation against energy companies in the service of their political agenda and for private profit. In June 2012, a collection of special, private interests gathered in La Jolla, California, to participate in a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies."[82] Frumhoff and Naomi Oreskes, then a professor at the University of California, San Diego, "conceived" of this workshop and invited Pawa as a featured speaker.[83] The workshop's goal was to consider "the viability of diverse strategies, including the legal merits of targeting carbon producers (as opposed to carbon emitters) for U.S.-focused climate mitigation."[84] During the conference, attendees accused energy companies, including ExxonMobil, of "attempting to manufacture uncertainty about

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77 *Id.* at App. 166.
78 Ex. E at App. 70.
79 *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).
80 Ex. C at App. 41.
81 *Id.*
82 *Id.* at App. 30.
83 *Id*. at App. 41.
84 *Id.* at App. 33.

global warming,"[85] and they discussed a wide variety of legal strategies to combat the industry's alleged "efforts to defeat action on climate change."[86]

45. The 2012 workshop's attendees discussed at considerable length "Strategies to Win Access to Internal Documents" of energy companies like ExxonMobil.[87] Many participants noted that "pressure from the courts offers the best current hope for gaining the energy industry's cooperation in converting to renewable energy."[88] In addition, "lawyers at the workshop" suggested that "a single sympathetic state attorney general might have substantial success in bringing key internal documents to light."[89] They also saw civil litigation as a vehicle for accomplishing their goals, with one commentator observing, "[e]ven 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."[90] The conference's attendees were "nearly unanimous" regarding "the importance of legal actions, both in wresting potentially useful internal documents from the fossil fuel industry and, more broadly, *in maintaining pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming*."[91]

46. Oreskes, Frumhoff, and Pawa—key architects of the La Jolla strategy—encouraged the Attorneys General to implement their plan of imposing burdens on the energy industry to coerce it to adopt their climate agenda. In June 2015, Oreskes met with New York Attorney General Eric Schneiderman to discuss the purported "history of

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85 *Id.* at App. 34–35.
86 *Id.* at App. 35.
87 *Id*. at App. 40–41, 56.
88 *Id.* at App. 56–57.
89 *Id.* at App. 40.
90 *Id.* at App. 42.
91 *Id.* at App. 56 (emphasis added).

misinformation" of the energy industry, a theme she has been promoting since at least 2010.[92] Oreskes and members from Frumhoff's Union of Concerned Scientists attended a similar meeting in Boston with the staff of attorneys general offices from a number of states.[93] At that meeting, Oreskes noted that there were "factual presentations about climate science, history of climate disinformation and also a presentation by Sharon Eubanks who had led the US Department of [J]ustice prosecution of tobacco industry under the RICO statues."[94]

47. In July 2015—just a few months before the New York Attorney General commenced his investigation—Frumhoff boasted to fellow activists that he was exploring "state-based approaches to holding fossil fuel companies legally accountable" and anticipated "a strong basis for encouraging state (e.g., AG) action forward."[95] Even after the press conference, Frumhoff continued to provide support and counsel to the Attorneys General in this unlawful enterprise.[96]

48. During this time, Pawa implemented another strategy in the La Jolla playbook—encouraging municipalities to commence public nuisance litigation against energy companies like ExxonMobil. Specifically, in March 2015, Pawa sent a legal memorandum encouraging California to pursue public nuisance litigation against ExxonMobil and other energy companies to NextGen America, an organization founded by California billionaire Tom Steyer to promote his political agenda.[97] In that memorandum, Pawa claimed "to know that certain fossil fuel companies (most

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92 Ex. S7 at App. 546; Oreskes is the co-author of *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (2010).
93 *Id.* at App. 544.
94 *Id.* at App. 546.
95 Ex. S8 at App. 548.
96 Ex. S9 at App. 551.
97 Ex. S10 at App. 553; Ex. S11 at App. 555.

notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming."[98] Acknowledging the ulterior purpose motivating his proposed litigation against energy companies, Pawa wrote, "simply proceeding to the discovery phase of a global warming case would be significant . . . . Just as obtaining such documents gave the Tobacco litigation an unstoppable momentum, here too obtaining industry documents would be a remarkable achievement that would advance the case and the cause."[99]

49. Consistent with Pawa's memorandum, a number of California municipalities filed lawsuits in July 2017, asserting public nuisance claims against ExxonMobil and other energy companies.[100] Pawa represents San Francisco and Oakland, and, as public records released in December 2017 show, his firm stands to gain a multi-billion dollar contingency fee as his agreement with the City of San Francisco—released through public records requests—entitles his firm to 23.5% of any net monetary recovery.[101]

50. It is no surprise that Pawa sent his legal strategy for California to Steyer, who has repeatedly encouraged the federal government and state attorneys general to investigate ExxonMobil.[102] Steyer also has long bankrolled campaigns promoting the policies favored by the Attorneys General.[103]

51. Evidence suggests that Attorney General Schneiderman communicated with Steyer about campaign support in connection with his investigation of

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98 Ex. S12 at App. 567.
99 *Id.* at App. 573.
100 Ex. S13 at App. 577.
101 Ex. S14 at App. 587.
102 Ex. S16 at App. 611; Ex. S17 at App. 615 (job listing by Fahr LLC, an organization owned by Tom Steyer).
103 Ex. S19 at App. 649; *see also* Ex. S20 at App. 653; Ex. S21 at App. 660.

ExxonMobil.[104] Attorney General Schneiderman's office emailed Steyer's scheduler, Erin Suhr, to follow up "on conversation re: company specific climate change information" a mere five days after it subpoenaed ExxonMobil's climate change research.[105] In March 2016, Attorney General Schneiderman also allegedly tried to arrange a meeting with Steyer. The *New York Post* reports that this communication reads, "Eric Schneiderman would like to have a call with Tom regarding support for his race for governor . . . regarding Exxon case."[106]

52. In January 2016, Pawa and a group of climate activists, including La Jolla participant Sharon Eubanks, met at the Rockefeller Family Fund offices to discuss the "[g]oals of an Exxon campaign."[107] The goals included:

- To 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.
- To delegitimize [ExxonMobil] as a political actor.
- To 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.
- To drive divestment from Exxon.
- To drive Exxon & climate into [the] center of [the] 2016 election cycle.[108]

This agenda to restrict and impair ExxonMobil's freedoms of speech and association cannot be legitimate objectives of any bona fide government-directed investigation or litigation.

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104 Ex. S22 at App. 664.
105 *Id.* at App. 666.
106 Ex. S24 at App. 674.
107 Ex. D at App. 67.
108 *Id.*; *see also* Ex. U at App. 192–94.

53. At the meeting, the activists also discussed "the main avenues for legal actions & related campaigns," including "AGs," "DOJ," and "Torts."[109] Among these options, they considered which had the "best prospects" for (i) "successful action," (ii) "getting discovery," and (iii) "creating scandal."[110]

54. Shortly after this meeting, Pawa attempted to implement the "AGs" plan. At least twice, he emailed the Vermont Attorney General's Office news articles criticizing ExxonMobil for purportedly deceiving the public about the effects of climate change, including an opinion piece written by a member of the Rockefeller family in which she explains why she donated her inherited ExxonMobil stock to support efforts to combat global warming.[111]

55. After the January 2016 meeting, the Rockefeller Family Fund also continued its efforts to "delegitimize" ExxonMobil. In March 2016, the Fund announced that it would divest from all fossil fuel holdings, including ExxonMobil.[112] The Fund singled ExxonMobil out for purportedly "morally reprehensible conduct" and claimed that "the company worked since the 1980s to confuse the public about climate change's march."[113]

56. Public records also reveal that the Rockefeller Family Fund repeatedly communicated with the New York Attorney General's Office about climate change and its investigation of ExxonMobil before the January 2016 meeting. In February 2015, the New York Attorney General's Office exchanged a dozen emails with the Fund

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109 Ex. S1 at App. 479.
110 *Id.* at App. 480.
111 Ex. S25 at App. 677; Ex. S26 at App. 679; Ex. S27 at App 681.
112 Ex. S28 at App. 684.
113 *Id.*

concerning the "activities of specific companies regarding climate change."[114] The Fund's persistent lobbying paid off, which prompted the daughter of a Rockefeller Family Fund's director to announce on Twitter the day after Attorney General Schneiderman issued his subpoena to ExxonMobil that she was "[s]o proud" of her father "for helping make this happen #ExxonKnew."[115] (As her Twitter account shows,[116] the director's daughter worked for Steyer's NextGen, the organization that received Pawa's legal memorandum encouraging government litigation against ExxonMobil and other energy companies in March 2015).[117]

57. Over a year later, in December 2016, the director of the Rockefeller Family Fund finally admitted, after initially denying the connection, that the Fund had financed the so-called investigative journalism that would later provide a pretext for the Attorneys General's improper investigations of ExxonMobil.[118] This supposed investigative journalism by *Inside Climate News* and the *Los Angeles Times*—which the Attorneys General have used as pretextual support for their investigations[119]—selectively interpreted documents ExxonMobil had made publicly available in the archives of the University of Texas-Austin.[120] While the Attorneys General have suggested these documents show ExxonMobil had advance, secret knowledge of climate change decades ago, the documents in fact demonstrate that ExxonMobil's climate research contained

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114 Ex. S29 at App. 688.
115 Ex. S30 at App. 695.
116 *Id*.
117 *See* Paragraph 48.
118 Ex. S31 at App. 704.
119 Attorney General Healey has essentially admitted that this reporting spurred her investigation and has long cited it to support her claim that the investigation is valid. *See* ECF No. 43. Attorney General Schneiderman has not so directly cited this reporting, but it was reported in late 2015 that these articles prompted the New York investigation. Ex. L at App. 123.
120 Ex. S33 at App. 720; Ex. S59 at App. 1293–94 (*InsideClimate News* admitting ExxonMobil's projections were in the "mid-range" of what scientists predicted).

myriad uncertainties and was aligned with the research of scientists at leading institutions at the time, including scientists at the Massachusetts Institute of Technology, the National Academy of Science and the Environmental Protection Agency.[121]

58. The Rockefeller Family Fund also acknowledged that, before the Attorneys General commenced their investigations, it had "informed [unnamed] state attorneys general of [its] concern" about ExxonMobil's statements on climate change and was "encouraged by [Attorney General] Schneiderman's interest."[122] On January 8, 2018, *New York Magazine* reported that the Rockefeller Family Fund director met with Attorney General Schneiderman's office in 2015 specifically to discuss ExxonMobil's purported climate deception and liability under the Martin Act.[123]

59. The investigations by the New York and Massachusetts Attorneys General and the Green 20 press conference represented the culmination of Frumhoff, Pawa, Oreskes, Steyer, the Rockefeller Family Fund, and other's collective efforts to enlist state law enforcement officers to join them in a quest to coerce political opponents to adopt preferred policy responses to climate change and to obtain documents for private lawsuits.

60. The attorneys general in attendance at the press conference understood that the participation of Frumhoff and Pawa, if reported, could expose the private, financial, and political interests behind the announced investigations. The day after the conference, a reporter from *The Wall Street Journal* contacted Pawa.[124] Before

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[121] *See* Ex. S60 at App. 1302; Ex. S3 at App. 494 (EPA Report from 1983 noting the possibility of a 5°C increase by 2100); Ex. S4 at App. 519 (NAS report from 1983 stating that "temperature increases of a couple degrees or so" were projected for the next century).

[122] Ex. S34 at App. 729 (emphasis omitted); *see also* Ex. S35 at App. 740.

[123] Ex. S63 at App. 1333.

[124] Ex. F at App. 80.

achieved because "the transition to lower carbon energy sources will . . . take time."[239] ExxonMobil has stated that "renewable sources, such as solar and wind, despite very rapid growth rates, cannot scale up quickly enough to meet global demand growth while at the same time displacing more traditional sources of energy."[240] According to ExxonMobil, "[f]actors limiting further penetration of renewables include scalability, geographic dispersion, intermittency (in the case of solar and wind), and cost relative to other sources."[241] The company further clarified that, accounting for current and future taxes on carbon emissions—which are embedded into energy demand projections that appear in the *Outlook for Energy*—did not change its perspective that the "cost limitations of renewables are likely to persist."[242]

124. While Attorneys General Schneiderman and Healey and the other members of the Green 20 are entitled to disagree with ExxonMobil's position on the proper policy responses to climate change, no member of that coalition is entitled to target one side of that discussion (or the debate about any other important public issue) to alter its viewpoints through baseless investigations and burdensome subpoenas. ExxonMobil intends—and has a constitutional right—to continue to advance its perspective in the national discussions over how best to respond to climate change and the likely future mix of energy sources. Its right to do so should not be violated through this exercise of government power.

125. As a result of the improper and politically motivated investigations launched by Attorneys General Schneiderman and Healey, ExxonMobil has suffered,

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239 Ex. S56 at App. 1150, 1152.
240 *Id.* at 1152–53.
241 *Id.* at App. 1148–1149.
242 *Id.* at 1149.

Appx. B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	§ § § § § § § § § § § § § §	No. 4:16-CV-469-K

EXXON MOBIL CORPORATION'S BRIEF IN SUPPORT OF
THIS COURT'S PERSONAL JURISDICTION OVER THE DEFENDANTS

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Exxon Mobil Corporation ("ExxonMobil") respectfully submits this brief in support of this Court's exercising personal jurisdiction over Defendant Attorneys General Eric Tradd Schneiderman and Maura Tracy Healey (together, the "Attorneys General").

PRELIMINARY STATEMENT

The Attorneys General find themselves before this Court because they have committed and are committing constitutional torts in this judicial district. They have no good cause to complain about being here. ExxonMobil exercises its First Amendment right to free speech and its Fourth Amendment right to be free from unreasonable searches and seizures in Texas. Those rights are now under siege by a conspiracy that stretches north into New York and Massachusetts. The Attorneys General of those states, acting in concert with others known and unknown, have launched pretextual investigations of ExxonMobil because they disagree with its perceived views on climate change policy and seek to deter ExxonMobil from participating in this debate over public policy. However far-flung that conspiracy might be and wherever the coconspirators might reside, the object of the conspiracy is squarely focused on Texas: The Attorneys General endeavor to silence speech occurring in Texas and to unreasonably search and seize papers located in Texas. The exercise of personal jurisdiction over those who commit such tortious conduct is entirely consistent with constitutional principles and statutory requirements, which boil down to a rule of thumb that guides federal courts in this state: "[I]f you are going to pick a fight in Texas, it is reasonable to expect that it be settled there." *McVea* v. *Crisp*, No. SA-07-CA-353-XR, 2007 WL 4205648, at *2 (W.D. Tex. Nov. 5, 2007) (citation omitted) (internal quotation marks omitted), *aff'd*, 291 F. App'x 601 (5th Cir. 2008).

There is no question that the Attorneys General intended to pick a fight in Texas. The compulsory process they issued confirms as much: The New York subpoena is addressed to ExxonMobil's offices in Texas and the Massachusetts civil investigative demand refers

employees who have worked for the company here, in Texas.[40] By contrast, it appears that no documents have been produced from the custodial files of ExxonMobil employees based in New York or Massachusetts.[41] The CID is directed at the same universe of materials, only broader. For there to be compliance with the subpoena and CID, a large volume of material must be collected in Texas and transmitted to New York and Massachusetts.

C. The National Dialogue on Climate Policy Includes Diverse Viewpoints.

The Attorneys General believe that there is "no dispute" about the correct policy outcomes when it comes to climate change.[42] Even if that were true (or close to it) in their home states of New York and Massachusetts, where little energy is produced,[43] it assuredly is not elsewhere. For many others, the proper policy response to climate change is not settled and rigorous public discourse is encouraged. That is why the top law enforcement officers of eleven states, including Texas (the leading state for energy production), filed an amicus brief in support of ExxonMobil's application to enjoin the abusive investigations launched by the Attorneys General. (Dkt. 63-2.) Those officials contest the view of the Attorneys General "that the scientific debate regarding climate change is somehow settled, along with the related and equally important public policy debate on how to respond to what science has found." (*Id.* at 6.) They consider it vital to democracy that free and open debate about climate policy continue, and that all voices, including ExxonMobil's, be allowed to participate freely in that dialogue.

ARGUMENT

The Attorneys General have unlawfully reached into the State of Texas to violate the constitutional rights of a prominent Texas-based corporation by suppressing its speech in Texas

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40 Anderson Declaration ¶ 3.
41 *Id.*
42 Ex. A at App. 3.
43 Ex. P at App. 239-40 (N.Y. #23 and Mass. #45).

Appx. C

18-1170

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION,

Plaintiff-Appellant,

—against—

MAURA TRACY HEALEY, In her official capacity as ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS, BARBARA D. UNDERWOOD, ATTORNEY GENERAL OF NEW YORK, in her official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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I. PRELIMINARY STATEMENT

Climate change and climate policy are important. They are matters of significant public concern that elicit viewpoints from diverse speakers in political, academic, non-profit, religious, and business communities, including Exxon Mobil Corporation ("ExxonMobil"). The First Amendment, which contemplates that those viewpoints will often be at odds with one another, ensures that the public can consider all viewpoints and make informed choices about public policy.

While the Constitution celebrates diverse viewpoints as a public good, certain state officials object to diversity when it comes to speech about climate policy. In their view, those who question command-and-control responses to carbon emissions and decline to advocate an immediate transition to renewable energy are not just wrong, they are unworthy of being heard. The defendants in this action, the Attorneys General of New York and Massachusetts (the "Attorneys General"), are at the forefront of this effort to cleanse the public square of disfavored speech. They believe that speech about society's continued reliance on conventional sources of energy and market-based responses to carbon emissions has produced political gridlock that stymied their policy goals. To chill that speech, the Attorneys General singled out ExxonMobil, and launched discriminatory and pretextual investigations of the company in violation of the First Amendment.

Appx. D

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

APPELLANTS' RESPONSE TO EXXON'S POST-SUBMISSION BRIEF

This brief is submitted on behalf of all twenty-three appellants in response to the supplemental brief submitted by appellee Exxon Mobil Corp. ("Exxon") on January 10, 2020.

Exxon asks this Court to consider a post-trial decision from a New York state trial court ruling on securities fraud claims against Exxon—a ruling that neither considers, analyzes, nor decides any question of specific personal jurisdiction (the only issues on appeal here), let alone any question remotely related to the disputed jurisdictional issues in *this* case. Additionally, Exxon fails to mention that the New York trial court previously made a series of pretrial rulings that dismissed Exxon's affirmative defenses, rulings that *rejected* the very

See, e.g., City of Oakland Br. at 31-34; Appellants' Reply Br. at 4 n.2 (collecting cases). The New York court's decision does not fix—let alone address—this fundamental defect in Exxon's jurisdictional argument.

***Second*,** not only is the merits-based question of the appellants' motives irrelevant, but Exxon is simply wrong in asserting that the New York court found that "politically motivated state politicians targeted ExxonMobil in a pretextual exercise of state power" in the New York case. Exxon Motion at 2. In pre-trial rulings that Exxon fails to mention, the New York court expressly *rejected* the affirmative defenses pleaded by Exxon in which it alleged that it was wrongfully "targeted" by state officials working in concert with private counsel. *See* App. 1, at 42, ¶ 46 (Exxon Amended Answer).[5]

Exxon originally pleaded five affirmative defenses in the New York case, including defenses based on New York's alleged violations of the First Amendment, official misconduct, selective enforcement, and state and federal due process. *See* App. 2, at 1 (NYAGO brief in support of motion to dismiss defenses, quoting affirmative defenses from Exxon's Answer). Those defenses were based on the same allegations here—in particular, that Exxon was the victim of a conspiracy originating in meetings in La Jolla, California and New York (the same

[5] Appellants attach excerpts of papers from the New York proceedings as Apps. 1 through 6, as listed fully at the end of this brief. "Ex. A" refers to the New York court's post-trial decision, which was attached to Exxon's supplemental brief.

meetings Exxon relies upon here), whose alleged purpose was to suppress Exxon's climate change-related speech. *See* App. 1, at 35-46, ¶¶ 29-59. But the New York court dismissed those affirmative defenses in rulings in June and July 2019.[6] While the New York court referred in dicta in its final ruling in December 2019 to a former New York Attorney General's "politically motivated statements," Ex. A, at 2, the *holding* of the court's prior rulings was that Exxon's First Amendment defenses were nonetheless meritless. The time to appeal all rulings in the New

[6] App. 3, at 35:21–23 ("THE COURT: All of these counterclaims [sic, defenses] with respect to First Amendment, chilling of speech, et cetera, I'm dismissing all of those. The only one that I'm keeping open for the time being is the selective enforcement [defense]."); *id*. at 36:15-18 (Exxon attorney: "[Y]ou're inclined to dismiss the conflict of interest and official misconduct [defenses]? THE COURT: I'm not just inclined to dismiss them; I am dismissing them."); *id*. at 39:16-21 (Exxon attorney: "Well, Judge . . . . you have the authority – the inherent authority to address improper conduct by officials with the state. THE COURT: I haven't seen any yet."); App. 4 (Order June 12, 2019).

At the time of the June 12, 2019 ruling, Exxon had moved to amend its complaint to add substantial detail regarding its theory of a supposed conspiracy by attorney Matthew Pawa and the AGs to target Exxon's free speech rights—the same allegations that Exxon makes here and that were integral to Exxon's remaining affirmative defense of selective enforcement. *See* App. 1, at 46, ¶¶ 55-59; App. 3, at 39:2-3 (Exxon attorney: selective enforcement defense is based on a "motive to suppress speech"); Exxon Reply Brief in Further Support of Its Cross-Motion for Leave to Amend at 3 (April 16, 2019), *available at* https://tinyurl.com/yx48aatg (selective enforcement defense was based upon alleged "intent to inhibit or punish the exercise of constitutional rights, including First Amendment rights") (quotation marks omitted). After dismissing four of Exxon's affirmative defenses, the New York court permitted Exxon to amend, heard argument on June 28, 2019 on this final affirmative defense once again invoking free speech, and dismissed it. *See* App. 5, at 16:2-11 (Transcript June 28, 2019), & App. 6 (Order July 17, 2019).

Appendix 2

Office of the Attorney General's Memorandum of Law in Support of Motion to Dismiss Affirmative Defenses Pursuant to CPLR § 3211(b), or, in the Alternative, for a Protective Order Pursuant to CPLR § 3103(a) (March 4, 2019), *People v. Exxon Mobil Corp.*, Supreme Court New York County, No. 452044/2018 (excerpts), *available at* https://tinyurl.com/w7mbddc.

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

PEOPLE OF THE STATE OF NEW YORK, By LETITIA JAMES, Attorney General of the State of New York, Plaintiff, – against – EXXON MOBIL CORPORATION, Defendant.	Index No. 452044/2018 IAS Part 61 Hon. Barry R. Ostrager Motion Sequence No. 2

OFFICE OF THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AFFIRMATIVE DEFENSES PURSUANT TO CPLR § 3211(b) OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER PURSUANT TO CPLR § 3103(a)

The Office of the Attorney General of the State of New York ("OAG") respectfully submits this memorandum of law in support of its motion to dismiss certain defenses asserted by Exxon Mobil Corporation ("ExxonMobil") pursuant to CPLR § 3211(b), or, in the alternative, for a protective order pursuant to CPLR § 3103(a).

PRELIMINARY STATEMENT

In its Answer (Docket No. 44), ExxonMobil pleads five defenses—Twenty-Nine, Thirty, Thirty-Four, Thirty-Five, and Thirty-Six—that allege that the OAG committed prosecutorial misconduct in commencing and conducting the underlying investigation of ExxonMobil. The defenses read in full as follows:

> Twenty-Ninth Defense: "The claims purportedly asserted by Plaintiff, are barred, in whole or in part, due to official misconduct, conflict of interests, and other official improprieties in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and other clauses of the United States and New York State Constitutions."
>
> Thirtieth Defense: "The claims purportedly asserted by Plaintiff, are barred, in whole or in part, due to selective enforcement of the law in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and other clauses of the United States and New York State Constitutions."
>
> Thirty-Fourth Defense: "The claims purportedly asserted by Plaintiff are barred, in whole or in part, by the Due Process Clause of the Fourteenth Amendment of the United States Constitution."
>
> Thirty-Fifth Defense: "The claims purportedly asserted by Plaintiff are barred, in whole or in part, by the Due Process Clause of the Constitution of the State of New York."
>
> Thirty-Sixth Defense: "The claims purportedly asserted by Plaintiff are barred, in whole or in part, by the First Amendment of the United States Constitution, as incorporated by the Fourteenth Amendment of the United States Constitution."

These defenses, unadorned by any factual allegations, are conclusory and should be dismissed for that reason alone. And even if those assertions are paired with the other unfounded

allegations made by ExxonMobil in other proceedings, they are still without merit and fail to state a defense to the claims asserted by the OAG. The crux of ExxonMobil's defense theory – which we can only infer from assertions made outside of this forum – seems to be that former Attorney General Eric Schneiderman decided to investigate ExxonMobil because of his activist agenda on climate-change. But as the U.S. District Court for the Southern District of New York has already persuasively explained, that assertion, even if true, would not support the theory of prosecutorial misconduct underpinning the challenged defenses here.

To be sure, the OAG has previously asserted in federal court—in response to ExxonMobil's collateral attack on the OAG's investigation—that this Court is the appropriate forum to decide all issues related to the case, including any defenses that ExxonMobil might wish to raise. But the OAG did not concede that ExxonMobil's prosecutorial-misconduct defenses have any merit; it instead explained that New York State courts are the appropriate forum for resolving such issues in the first instance. And while ExxonMobil has now asserted its defenses in the proper forum, those defenses fail on the merits. Dismissal by this Court should therefore follow.

The OAG will endure significant and undue burdens if the Court entertains ExxonMobil's efforts to use those infirm defenses as a platform for a fishing expedition into communications with a long list of third parties that are unrelated to proving or disproving the claims in the Complaint or to any other valid defense. ExxonMobil has rejected the OAG's offer to produce all factual non-privileged material relevant to the allegations in the OAG's Complaint that can be located after a reasonable search. Instead, ExxonMobil requests broad discovery into a wide range of extraneous topics related only to the five infirm defenses. That discovery includes demands that the OAG search the files of dozens of current and former employees who worked on the

Appendix 3

Transcript (June 12, 2019), *People v. Exxon Mobil Corp.*, Supreme Court New York County, No. 452044/2018 (excerpts), *available at* https://tinyurl.com/t5xodqd.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL DIV. : PART 61

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,	:	
Plaintiff,	:	
- against -	:	Index No. 452044/18
EXXON MOBIL CORPORATION,	:	
Defendant.	:	
	:	MOTION

60 Centre Street
New York, New York
June 12, 2019

B E F O R E :

HON. BARRY R. OSTRAGER,
Justice

(Appearances on the following page.)

ROBERT PORTAS, R.P.R., C.R.R.
SENIOR COURT REPORTER

A P P E A R A N C E S :

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PATRICK CONLON, ESQ.
In-House Counsel - Exxon Mobil Corp.
22777 Springwoods Village
Spring, TX 77389

available to you via communications sent by Mr. Schneiderman to his official account.

MR. ANDERSON: Or through a search of the Gmail account. Either forward it or he'll do a search to find -- the Attorney General's office will do a search to find whatever wasn't forwarded.

THE COURT: The Attorney General is going to make a representation to you that anything that referred or related to this investigation that was on Mr. Schneiderman's personal email account has been made available to you.

MR. ANDERSON: That's what we're seeking, Judge. We want confidence that if there's evidence that we have it --

THE COURT: That's what you're entitled to and that's what you're going to get.

MR. MONTGOMERY: May I respond, Your Honor?

THE COURT: Yes.

MR. MONTGOMERY: We are right back where we were in this other district. These are the exact same claims that Exxon made in front of Judge Caproni. And what they're trying to do is use this press conference as the link between a third-party and say, "This third-party's agenda, these communications which may have been unsolicited, we have no evidence that that they were --

there was outgoing communication between these third-parties, but somehow this press conference provides the link." And they give you a slide, as they've done in the past, that takes certain snippets from the press conference.

I would urge this Court to review the entirety of that press conference, and I think you will reach the same conclusion that Judge Caproni did, that read in its entirety, in context, it does not support that link, and it actually shows that Eric Schneiderman expressed a legitimate concern that Exxon may have misled investors. In other words, that he had a basis for investigating Exxon for the very activity that forms the basis of this litigation.

THE COURT: What is the concern here? I said I'm not ordering a forensic review of former Attorney General Schneiderman's emails.

MR. MONTGOMERY: I'm sorry, I was speaking to the merits of the -- the email -- the evidentiary value of the emails and the press conference that that they discussed.

THE COURT: All of these counterclaims with respect to First Amendment, chilling of speech, et cetera, I'm dismissing all of those. The only one that I'm keeping open for the time being is the selective enforcement counterclaim.

MR. MONTGOMERY: Respectfully, Your Honor, the selective enforcement claim is based on this allegation of an attempt to chill speech.

THE COURT: It's not a catchall for everything, it's a separate counterclaim that may go by the wayside. It's not a counterclaim, it's an affirmative defense. But it may go by the wayside once you provide them with the certification with respect to the Schneiderman emails. I think there's just an open issue there that has to be closed.

MR. MONTGOMERY: Understood, Your Honor.

MR. ANDERSON: Judge, with respect to the selective enforcement defense that we wish to raise here: The Court's ruling is that we can proceed on than defense, but you're inclined to dismiss the conflict of interest and official misconduct?

THE COURT: I'm not just inclined to dismiss them; I am dismissing them.

MR. ANDERSON: May I be heard on --

THE COURT: Make your record as you wish.

MR. ANDERSON: -- those two claims?

Judge, first of all, the standard that has been identified by the Attorney General, this idea that we need to negate all bases for their conduct other than the nefarious bases, is not supported by any precedent that

they've identified or that actually exists.

The cases that they reference are taken well out of their context. Like, for instance, Mr. Montgomery kept referring to Hartman against Moore. That's a Bivens suit that was brought against postal inspectors for -- for selective prosecution. The reason the Supreme Court said that there couldn't be -- that there had to be an absence of probable cause is because the agents didn't make the decision to bring the case, the prosecutor did. But the prosecutor has absolute immunity. None of that is relevant here. So Justice Suiter wrote in his decision, that's why, because you don't have the person who made the decision is the defendant in the case. So the idea that that would be the standard that would apply in a civil case where there is no absolute immunity and the people who made the decision are currently employed by the office and were the most senior members of the office, is simply inapplicable, and that decision should be set aside, it's not relevant here.

The same thing with Armstrong. Armstrong is a criminal case about what you have to do to get additional discovery beyond what the federal rules of criminal procedure provide for in a case. That could not be further removed. Discovery of the prosecutor in a criminal case is cabined, it's narrow and it's limited to

certain categories of information that are identified in the rule. That is totally opposite of what happens in a civil case where there is discovery on both sides of any information that's material and relevant. Those standards don't apply.

The other case they cited in their brief was Gaynor, which I don't think Mr. Montgomery referenced here, but in that case, that was a suit in the '60s where the -- where African Americans challenged the state's hiring practices because they kept giving -- the state kept giving work to unions that excluded African Americans. And the Court of Appeals denied that claim because they said, "Well, the entity that's doing the discrimination is the unions, not the state, so the state can't be held responsible here."

These are the cases they're relying on.

We cited to you this case, Kramer, from 2012, which is very similar to the case we have here. It's a civil suit where the state took an action related to issuing a permit and it denied the request for a permit. The applicant for the permit said in his allegation that that was selective enforcement, it was discriminatory, because they were retaliating against him for speech that he had made.

The Court in that case said there are basically

two elements of this, disparate impact, disparate treatment and an improper motive, including a motive to suppress speech. Those are the two elements. There was nothing about you need to show the absence of probable cause or there can't be any other -- any other factor that might have gone into that decision. If that were the requirement there would never be a selective enforcement defense because after three years of investigation you find something --

THE COURT: Hold on. We haven't stricken your selective enforcement defense. What we are striking is the assertion that the Attorney General can't bring a Martin Act claim when it particularizes in ninety paragraphs claims against Exxon Mobil, that in the aggregate, they claim, constitute a Martin Act violation.

MR. ANDERSON: Well, Judge, it is in your power to fashion an appropriate remedy. You -- you are the supervisor of this case, you have the authority -- the inherent authority to address improper conduct by officials with the state.

THE COURT: I haven't seen any yet.

MR. ANDERSON: Let me address the conflict of interest, Judge.

There are two employees of private parties who are currently working in the Attorney General's Office.

Appendix 4

Order (June 12, 2019), *People v. Exxon Mobil Corp.*, Supreme Court New York County, No. 452044/2018, *available at* https://tinyurl.com/wnm6pjf.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARRY R. OSTRAGER
JSC

PRESENT: _____ **PART** 61
Justice

Index Number : 452044/2018
PEOPLE OF THE STATE OF NEW
vs.
EXXON MOBIL CORPORATION
SEQUENCE NUMBER : 002
DISMISS AFFIRMATIVE DEFENSES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, **were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is and cross-motion are determined in accordance with the decision on the record on June 12, 2019. The Court grants Exxon's cross-motion to efile an Amended Answer and also grants the motion of the Office of the Attorney General to dismiss affirmative defenses relating to an alleged conflict of interest and official misconduct allegedly committed by the Office of the Attorney General. Decision is reserved on the defense of selective enforcement pending receipt of additional submissions within one week.

Dated: June 12, 2019

Barry R. Ostrager, J.S.C.
BARRY R. OSTRAGER
JSC

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Appendix 5

Transcript (June 28, 2019), *People v. Exxon Mobil Corp.*, Supreme Court New York County, No. 452044/2018 (excerpts), *available at* https://tinyurl.com/wy62ser.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 61

----------X

PEOPLE OF THE STATE OF NEW YORK,
By LETITIA JAMES, Attorney General of the
State of New York,

Plaintiff, Index No.
452044/2018

-against-

EXXON MOBIL CORPORATION,

Defendant.

----------X

MOTION PROCEEDINGS

60 Centre Street
New York, New York
June 28, 2019

B E F O R E:

HONORABLE BARRY OSTRAGER,

Supreme Court Justice

A P P E A R A N C E S:

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
LETITIA JAMES
Attorneys For the Plaintiff
28 Liberty Street
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BY: KEVIN WALLACE, ESQ.
KIM BERGER, ESQ.
MARC E. MONTGOMERY, ESQ.

(Whereupon, appearances continued on the following page.)

Senior Court Reporter Cheryl-Lee Lorient

(Continued appearances ....)

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BY: THEODORE V. WELLS, JR., ESQ.
JUSTIN ANDERSON, ESQ.
NORA AHMED, ESQ.
DAN TOAL, ESQ.

ALSO PRESENT:
PATRICK J. CONLON
Coordinator of Compliance Litigation and Investigations
Exxon Mobil Corporation

CHERYL-LEE LORIENT
SENIOR COURT REPORTER

Now, with respect to the affirmative defense, I have some questions. Is it the position of Exxon that the affirmative defense of selective enforcement is a complete defense to the Martin Act claim or is this, simply, a vehicle for you to provide local color into the Court or to assure it about meetings with Mr. Pawa and meetings with other attorney generals and meetings with the Rockefeller Foundation?

MR. ANDERSON: Your Honor, the defense would be a complete defense to the charges. They would be a basis for dismissing the complaint in its entirety, because of the impropriety in which the investigation was commenced and because of the improper purposes for which the complaint was filed.

However, it would also be in the Court's discretion to fashion whatever remedy it considered appropriate in light of the violation falling short of outright dismissal of the complaint.

THE COURT: Okay. I don't think that's responsive to the question that I asked, if it's Exxon's position that this affirmative defense is a complete defense to the Martin Act claims that the attorney general has filed.

I've read Judge Caproni's decision, in the Southern District, where you raised these similar

claims. And, she dismissed them.

I've read the proceedings in Texas and Massachusetts where these same type of issues were teed up. And, it's not, in my judgment, a complete defense to the case.

So, I think, based on what you've told me, I'm going to grant the Attorney General's motion to dismiss this affirmative defense. But, I am not going to preclude you, at trial, from questioning people about, within reasonable constraints, the motivation for the filing of the complaint. Understood?

MR. ANDERSON: Yes, Judge. It would be appropriate to inquire with third-party witnesses, and other witness that might be called, as to why the complaint was filed while the investigation was undertaken.

THE COURT: Within narrow bounds, yes.

MR. ANDERSON: Your Honor, may I have just a moment?

THE COURT: Yes.

(Pause in proceedings.)

MR. ANDERSON: Thank you, Judge. We understand the Court's ruling.

THE COURT: All right. Anything from the AG?

Appendix 6

Order (July 17, 2019), *People v. Exxon Mobil Corp.*, Supreme Court New York County, No. 452044/2018, *available at* https://tinyurl.com/rrnrbrw.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

----------X

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

- v -

EXXON MOBIL CORPORATION,

Defendant.

----------X

INDEX NO. 452044/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

SUPPLEMENTAL DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 83, 113, 114, 115, 116, 117, 119, 130, 131, 132, 133, 134, 135, 136, 137, 138, 144, 145, 146, 147, 237, 283, 286, 287

were read on this motion to/for DISMISS DEFENSE.

OSTRAGER, BARRY R., J.S.C.:

The decision and order granting plaintiff's motion in part and reserving decision in part (NYSCEF Doc. No. 237) is hereby supplemented based on the Court's review of additional submissions and further proceedings on the record on June 28, 2019, and defendant's defense of selective enforcement be and hereby is dismissed in accordance with the transcript of proceedings dated June 28, 2019.

7/17/2019
DATE

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
JSC

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

Appx. E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN FUELS ASSOCIATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00-CV-074-D
	)	
TURNING POINT PROJECT, et al.,	)	
	)	
Defendants.	)	

ORDER ON MOTION TO DISMISS FOR IMPROPER VENUE AND LACK OF PERSONAL JURISDICTION

This matter comes before the Court on Defendants' Motion to Dismiss for Improper Venue and Lack of Personal Jurisdiction. The Court, having reviewed the briefs and materials submitted in support of the motion and the Plaintiff's response thereto, having heard oral argument of counsel and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

BACKGROUND

This case involves a claim for commercial defamation brought under Section 43 of the Lanham Act (15 U.S.C. § 1125). (Verified Compl. ¶ 8.) Plaintiff, Western Fuels Association, Inc., is a Wyoming corporation with registered offices in Wyoming and its principal place of business in Colorado. *Id.* ¶ 1. Defendants are several non-profit corporations, three of which are registered in the District of Columbia, two in California and one in Virginia. *Id.* ¶¶ 2-7.

The commercial defamation claim arises from allegedly false and misleading factual representations made by the Defendants through a commercial Internet Web Site maintained by

Defendant Turning Point Project and from an "educational advertisement" contained on the Turning Point Web site and also published in *The New York Times* on December 13, 1999 (the "Global Warning Ad"). The named defendants in this case include the Turning Point Project and certain of the electronic signatories on the Turning Point Web Site and the Global Warming Ad. *Id.* ¶ 14. Plaintiff alleges that the stated goals of Defendant Turning Point Project include the immediate shift away from the use of all fossil fuel and the elimination of the production of electricity from coal-fired plants. *Id.* ¶ 13. In furtherance of this goal, Defendants are continuously publishing, through the Turning Point Web site, their Global Warming Ad in which Defendants make allegedly false and misleading factual representations regarding the negative effects of CO_2 emissions from the burning of fossil fuel, specifically including coal. Plaintiff contends that the purpose of these false and misleading statements is to cast Plaintiff's product (coal for use in coal-fired electric generation) in an unwholesome and unfavorable light, thereby promoting a competing product ("renewable" energy sources for electric generation). *Id.* ¶ 15.

Plaintiff Western Fuels is a non-profit corporation whose member/owners are principally western "generation and transmission" cooperatives who are responsible for the supply of electricity to rural America. (Norrgard Aff. ¶ 3.) The majority of Plaintiff's members are based in the western United States, and Plaintiff supplies the majority of the coal to its members from the coal fields in the Powder River Basin of Wyoming. *Id.* ¶ 4. The Powder River Basin is the nation's largest source of low sulfur coal mandated by the Clear Air Act and, consequently, has become the largest source of coal in the United States (about 1/3 of the U.S. total). (V. Compl. ¶ 10.) Therefore, Plaintiff contends, to the extent Defendants are successful in their campaign to

eliminate the use of coal for the generation of electric power, the target of their campaign is the coal mines in Wyoming. Plaintiff further contends that a successful campaign against coal-fired electricity would devastate the Wyoming economy. *Id.* ¶¶ 10-11.

In addition to damages, Plaintiff seeks an injunction precluding Defendants from continuing to publish false and misleading statements on the Internet and other channels of interstate commercial advertising regarding the impact of burning fossil fuels. Defendants have filed a Motion to Dismiss for Improper Venue and Lack of Personal Jurisdiction pursuant to F.R.C.P. 12(b)(2) and (3) and 28 U.S.C. §§ 1391 and 1406(a). In the alternative, Defendants request this cause of action be transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. §§ 1404 and 1406.

DISCUSSION

The standard governing a motion to dismiss for improper venue is generally the same as that governing a motion to dismiss for lack of personal jurisdiction. *Electronic Realty Assoc. v. Paramount Pictures Corp.*, 935 F. Supp. 1172, 1175 (D. Kan. 1996); *see also Pierce v. Shorty Small's of Branson Inc.*, 137 F.3d 1190, 1192 (10th Cir. 1998). Plaintiff bears the burden of establishing that venue is proper in this forum. When a motion to dismiss for improper venue is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to te extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party. *See id.* (citing *Behagen*

v. Amateur Basketball Ass'n, 744 F.2d 731, 733 (10th Cir. 1984) (addressing standard governing motion to dismiss for lack of personal jurisdiction)).

> In a federal question case such, venue is proper only in
>
> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). The venue statute further provides that "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c).

In its complaint, Plaintiff asserts proper venue pursuant to 28 U.S.C. § 1391(b)(2) and/or (3). Specifically, Plaintiff alleges the Defendants have committed a tort, the natural and direct consequences of which cause damage primarily in the State of Wyoming, and a substantial part of the property which is the subject of this action is located in the State of Wyoming. (V. Compl. ¶ 9.) Plaintiff's brief in response to Defendants' motion to dismiss is focused almost entirely on the issue of whether this Court has personal jurisdiction over the Defendants and does not address whether there is no district in which the action may otherwise be brought.

As stated in the Complaint, Plaintiff's claim arises from the publication of allegedly false and misleading factual representations about the use of fossil fuels. Defendants affidavits establish that all of the events giving rise to this commercial defamation claim occurred outside

of Wyoming and primarily in Washington, D.C. and San Francisco, California.[1] The researching, drafting, and designing of the advertisement was performed in San Francisco. (Mendelson Decl. ¶ 2; Kimbrell Decl. ¶ 2.) An officer for Defendant International Center for Technology Assessment reviewed the advertisement in Washington, D.C. prior to publication. (Kimbrell Decl. ¶ 2). The other Defendants provided some input or simply permission to use their name, all of which occurred in Washington, D.C. or San Francisco. (Passacantando Decl. ¶ 10; Blackwelder Decl. ¶ 18; Knox Decl. ¶ 12; Hayes Decl. ¶ 6.) The advertisement was sent from San Francisco to new York City for publication by the New York Times and loaded onto Defendant Turning Point's website by a Turning Point volunteer in San Francisco. (Mendelson Decl. ¶ 2.) Defendant Turning Point's website host is located in Colorado with a shared web hosting server in Florida. (Mendelson Decl. ¶ 7.)

Plaintiff's allegation that the direct consequences of Defendants' activities cause damage primarily in Wyoming is not sufficient to establish proper venue under subsection (2). The harm to Plaintiff's activities in the District of Wyoming is not an appropriate consideration. In determining what events or omissions give rise to a claim, the "focus [is] on relevant activities of the defendant, not of the plaintiff." *Woodke v. Dahm*, 70 F.3d 983, 985 (9th Cir. 1995). Therefore, it cannot be said that a substantial part of the events or omissions giving rise to Plaintiff's claim occurred in the District of Wyoming.

The Court also does not agree with Plaintiff's characterization that the subject of this action is coal, a substantial part of which is located in Wyoming. This action involves a claim

[1] Defendants' affidavits are uncontroverted on this point.

for commercial defamation brought under the Lanham Act arising from allegedly false and misleading factual representations made by the Defendants. (V. Compl. ¶¶ 8, 14.) Although Plaintiff contends that the target of Defendants' advertising campaign is Wyoming coal, Plaintiff makes no *specific* connection between the coal located in Wyoming and the allegedly false and misleading statements. Furthermore, Plaintiff's claim for commercial defamation cannot be characterized as one centering on any rights, title or interest in real property. *See Monarch Normandy Square Partners v. Normandy Square Assoc. Ltd. Partnership*, 817 F. Supp. 899 (D. Kan. 1993). Plaintiff has submitted no authority or argument supporting a finding to the contrary.

As set forth above, section 1391(b)(3) provides for venue in "a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." By its express terms, this provision is inapplicable where there is another available venue. The record is clear that there are two proper venues where this action could have been brought, the District of Columbia and the Northern District of California. Again, Plaintiff has made no allegation to the contrary. Accordingly, venue in the District of Wyoming is not proper pursuant to section 1391(b)(3).

Finally, in its Complaint, Plaintiff states that the Defendants do not reside in a single State and does not assert proper venue pursuant to section 1391(b)(1). (V. Compl. ¶ 12, 9.) Nevertheless, in its very brief discussion of proper venue in response to the motion to dismiss, Plaintiff asserts that venue is proper in the District of Wyoming because this Court has jurisdiction over the Defendants. Although Plaintiff does not specifically cite subsection (b)(1)

in its response brief, the Court will assume Plaintiff is asserting proper venue under (b)(1).

Plaintiff contends that because its cause of action arises directly from Defendant's contacts with Wyoming residents regarding the commercial advertising campaign, the Court need only address specific jurisdiction. Specific jurisdiction exists in an action arising out of or related to the defendant's contacts with the forum state. *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1418 (10th Cir. 1988). Specific jurisdiction may be exercised only if the defendant purposefully directs its activities toward the forum jurisdiction. *In re Application to Enforce Administrative Subpoenas Duces Tecum*, 87 f.3d 413, 418 (10th Cir. 1996). The defendant's contacts must be established by the defendant itself. *Doe v. Nat'l Medical Serv.*, 974 F.2d 143, 145 (10th Cir. 1992). The unilateral activity of someone claiming a relationship with a nonresident defendant is not sufficient. *Id.*

Plaintiff asserts that the Global Warming Ad can be viewed from the Turning Point Website and that each of the Defendants are electronic signatories to the Ad and participates on the Website. Even so, the Defendants have not directed their activities that gave rise to the alleged Lanham Act claim toward Wyoming. The advertisement campaign at issue was not specifically targeted at Wyoming residents, nor was it *specifically* aimed at Wyoming businesses or activities. In *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), the court held

> no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state. . . . Rather, in each, there has been 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.

Id. at 418 (internal citation omitted). That "something more" is missing in this action. Plaintiff has failed to make a prima facie showing of jurisdiction over all of the Defendants.

Section 1406 provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406. Having found that venue is not proper in the District of Wyoming, this action should be dismissed without prejudice.[2] THEREFORE, it is hereby

ORDERED that the Defendants' Motion to Dismiss for Improper Venue is GRANTED; it is further

ORDERED that this action is DISMISSED without prejudice.

DATED this 31st day of March, 2001.

United States District Judge

[2] Plaintiff has not argued for a transfer in the event the Court found venue to be improper.

Appx. F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re MAURA T. HEALEY, Attorney General for the Commonwealth of Massachusetts, *Petitioner.* ********** EXXON MOBIL CORP. *Plaintiff*, v. ERIC T. SCHNEIDERMAN, Attorney General of New York, in his official, and MAURA T. HEALEY, Attorney General of Massachusetts in her official capacity, *Defendant.*	No. 16-_____ No. 4:16-CV-469-K (N.D. Tex.)

PETITION FOR A WRIT OF MANDAMUS

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December 8, 2016

Attorney General's pending motion to dismiss before allowing Exxon to probe the Attorney General's state-of-mind.[6] In turn, 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,[7] noticed the depositions of New York Attorney General Schneiderman and two of his staff in New York, and subpoenaed eleven third parties. Add-341.[8]

On November 14, 2016, Exxon asked the district court to schedule a status conference on its discovery requests. Add-219. During a November 16 telephonic status conference, both the Massachusetts and New York Attorneys General informed the court that they intended to object to all of Exxon's discovery requests. Add-548-49. In response, the court stated that, with the parties' permission, it would like to redesignate the previously used mediator to a special master to oversee any discovery issues. Add-555. The court also indicated that it would rule on the Attorney General's motion for reconsideration "in due time,"

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[6] Add-230-31 (citing *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574 (1999), and *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000)).

[7] Exxon has since agreed to withdraw without prejudice its notices to depose and subpoenas to the two assistant attorneys general.

[8] Exxon's requests, some of which are set forth at Add-342 illustrate why depositions of high ranking officials are heavily disfavored, since those requests ask the Attorney General to describe matters that are all protected by one or more available privileges. *See infra* pp.27-28 (citing privileges).

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