No. 20-0558

IN THE
Supreme Court of Texas

EXXON MOBIL CORPORATION,
PETITIONER,

V.

CITY OF SAN FRANCISCO, ET AL.,
RESPONDENTS.

OPPOSITION TO PETITIONER'S PETITION FOR REVIEW

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

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ISSUES PRESENTED

1. Whether the due-process guarantees of the United States and Texas Constitutions authorize Texas state courts to exercise specific personal jurisdiction over California public entities and officials, based on a Texas-headquartered company's allegation that the public entities' California court lawsuits against the company, seeking California-specific remedies for violations of California law, were wrongfully intended to "chill" the company's future speech in Texas.
2. Whether, for the purposes of specific personal jurisdiction, a claim against a New Jersey-incorporated company that is headquartered and does business in Texas is equivalent or identical to a claim against the State of Texas itself, merely because the company operates in an industry it characterizes as "vital" to the State's economy.

SUMMARY OF ARGUMENT

Exxon's petition for review does not lack for boldness. It makes the breathtaking argument that California state court lawsuits filed by California cities and counties under California state law must be treated as lawsuits against the State of Texas itself for purposes of specific personal jurisdiction, simply because Exxon and several of its co-defendants in those California lawsuits operate in an industry Exxon characterizes as "vital to Texas's economic well-being." Pet. 15, 20. No

court—state or federal—has ever adopted such a radical theory of specific personal jurisdiction, and the court of appeals appropriately rejected Exxon's arguments as irreconcilable with the well-established minimum contacts requirements of the Due Process Clause. There is no basis for further review by this Court.

Exxon's unprecedented due-process analysis fails for many reasons. It ignores the actual allegations in the California lawsuits, which focus on each company's allegedly misleading and deceptive efforts to increase the sales and use of their products through a deliberate campaign of disinformation—not where they operate or what future speech they may plan. It inappropriately focuses on speculative and attenuated second- or third-tier litigation effects, such as the possibility that, if liability were established, Exxon might make different business decisions or choose to speak differently about matters of public concern going forward (like *any* defendant could assert in *any* damages action). And it not only requires the Court to equate Exxon and the other California-lawsuit defendants with the entire "oil-and-gas industry" (which includes hundreds of companies operating in every state and country throughout the world), but it then requires the Court to equate that ill-defined worldwide industry with Texas itself. That last leap is particularly illogical and counter-factual where, as here, the majority of the companies sued by the California public entities are not Texas-based.

Exxon's theory of personal jurisdiction is transparently designed to circumvent this Court's and the Supreme Court's uniform rejection of "effects"-based and "direct-a-tort" jurisdiction. *See City of San Francisco v. Exxon Mobil Corp.*, 2020 WL 3969558, at *15, *16 (Tex. App.—Fort Worth June 18, 2020) (opinion below). Under Exxon's theory, any company operating in an industry a defendant alleges to be "vital" to a state's economy would be constitutionally authorized to bring a home-state countersuit against any party that files an out-of-state lawsuit against it, simply by alleging the out-of-state filing (otherwise protected by the litigation privilege) was wrongfully intended to chill future speech. Exxon's argument would also enable any *other* state's courts to assert personal jurisdiction over claims against any defendant—including Texas-based defendants—solely because the plaintiffs asserting those claims operate in an industry prominent in their state. Consider the entertainment and tech industries of California, the insurance industry of Connecticut, the automobile industry of Michigan, or the financial industry of New York. Under Exxon's approach, all would be empowered to initiate retaliatory, home-state lawsuits against any Texas resident who sued them for wrongful conduct. Moreover, those self-appointed vital industries would be able to claim they are suing *as* California, Connecticut, Michigan, or New York.

STATEMENT OF FACTS

Between July and September of 2017, seven California public entities filed civil lawsuits in California state court against Exxon and other energy companies, most of which are neither incorporated nor headquartered in Texas.[1] The lawsuits alleged that, over the past 50 years, those companies engaged in advertising and communications campaigns to falsely promote the use of fossil-fuel products as safe and environmentally responsible, while deliberately concealing their knowledge of the harms and risks of global warming to the public infrastructure of those entities' coastal communities.

None of the Respondents own, rent, or lease any real or personal property in the State of Texas. None have bank accounts in Texas, engage in business in Texas, employ persons who reside in or regularly travel to Texas, or maintain an office or registered agent in Texas. Nor have any of them entered into any contracts in Texas having any connection with those California state court lawsuits. *See* CR1823-25, 1831-33, 1839-41, 1861-63, 1912-14,1955-95, 7115-17, 7172-73.

[1] *See California v. B.P. p.l.c.*, 17-cv-06012-WHA (N.D. Cal.); *City of Oakland v. BP p.l.c.*, 17-cv-06011-WHA (N.D. Cal.); *Cnty. of San Mateo v. Chevron Corp. et. al.*, 3:17-cv-0492-VC (N.D. Cal.); *City of Imperial Beach v. Chevron Corp. et. al.*, 3:17-cv-04934-VC (N.D. Cal.); *Cnty. of Marin v. Chevron Corp. et. al.*, 3:17-cv-04935-VC (N.D. Cal.).

On January 8, 2018, Exxon filed a Rule 202 petition in Tarrant County District Court. Exxon's petition sought to obtain pre-suit discovery "to investigate potential claims of abuse of process, civil conspiracy, and constitutional violations" potentially committed by Respondents in filing and prosecuting the California lawsuits. Although Exxon acknowledged it could have asserted those threatened claims as compulsory counterclaims in the California actions, CR1877, it elected instead to burden the Texas court system with its pre-litigation discovery demands.

Respondents timely contested whether the trial court's exercise of personal jurisdiction would violate the due-process guarantees of the United States and Texas constitutions. The trial court summarily rejected those arguments, CR7210, and the court of appeals appropriately reversed, 2020 WL 3969558, at *9-*10, *19-*20. Although the court of appeals acknowledged conceptual discomfort with the California lawsuits, it candidly recognized that those considerations had no bearing on its obligation "to follow settled legal principles [governing personal jurisdiction] set out by higher courts." *Id.* at *20. Bound by those precedents, the court concluded that "federal due process requirements" for haling an out-of-state entity into Texas court had not been satisfied: Respondents' "out-of-state actions were directed at Exxon, not Texas," and Respondents simply did not "have the purposeful contacts with our state needed to satisfy the minimum-contacts standard

that binds us." *Id.* at *16, *20. In a separate concurrence agreeing with the analysis and result, Chief Justice Sudderth "urge[d]" this Court "to reconsider th[at] minimum-contacts standard," but did not identify which specific aspect of the federal constitutional standard warranted reconsideration. *Id*. at *20 (Suddereth, C.J., concurring).

ARGUMENT

I. The exercise of personal jurisdiction over any Respondent would violate Due Process.

A prospective plaintiff like Exxon may obtain pre-filing discovery from an out-of-state prospective defendant under Rule 202 only if it can establish personal jurisdiction over each such party. *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014) (orig. proceeding).

A state cannot constitutionally exercise specific personal jurisdiction over an out-of-state defendant—even one that allegedly "directed a tort" against an in-state resident or reasonably foresaw its actions would have in-state "effects" on that resident—unless the moving party makes three separate and independent showings. First, the moving party must demonstrate each out-of-state defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality op.) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *Michiana Easy Livin' Country, Inc. v.*

Holten, 168 S.W.3d 777, 784-85, 788-91 (Tex. 2005). Second, it must establish that its lawsuit or threatened lawsuit "arise[s] out of or relate[s] to [each nonresident] defendant's contacts with the *forum*," not just with the in-state resident. *Bristol-Meyers Squibb Co.*, 137 S. Ct. 1773, 1780 (2017); *accord Walden v. Fiore*, 571 U.S. 277, 288, 289 (2014). Third, it must show that the court's exercise of personal jurisdiction would comport with "traditional notions of fair play and substantial justice" with respect to each claim. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 919, 923 (2011); *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 559 (Tex. 2018). If the plaintiff fails to satisfy any one of these tests, the state cannot constitutionally exercise specific personal jurisdiction over the out-of-state defendant.

The Supreme Court and this Court have repeatedly held that personal-jurisdiction analysis must focus on the nature and extent of the non-resident's contacts with *the forum*, "not just [its contacts with] a plaintiff who lived there." *Walden*, 571 U.S. at 288. "[C]ourts cannot base specific jurisdiction merely on the fact that the defendant 'knows that the brunt of the injury will be felt by a particular resident in the forum state.'" *TV Azteca v. Ruiz*, 490 S.W.3d 29, 43 (Tex. 2016) (quoting *Michiana*, 168 S.W.3d at 788); *Old Republic*, 549 S.W.3d at 562, 565. Nor does it matter whether the non-resident intended or reasonably foresaw

that its conduct would harm an in-state resident. *Michiana*, 168 S.W.3d at 789; *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 68-69 (Tex. 2016).

The court of appeals correctly held that Exxon failed to meet its burden, which is why Exxon largely rests its petition on a novel but wholly unworkable due process theory, which ignores the critical constitutional difference between a lawsuit against a resident of a state and a lawsuit against the State itself. Exxon's efforts to establish personal jurisdiction under this theory present no basis for this Court's review.

A. No Respondent "purposefully availed" itself of the privilege of conducting activities within Texas.

In evaluating purposeful availment, "only the defendant's contacts with the forum are relevant," and those contacts "must be purposeful rather than random, fortuitous, or attenuated." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 576 (Tex. 2007); *see also Walden*, 571 U.S. at 286; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985).

Here, the only "contacts" with Texas that Exxon alleges are that California public entities brought lawsuits in California against Exxon and other Texas-based defendants and later served process on those defendants' agents in California or in Texas. Exxon does not identify *any* other contact by Respondents with Texas itself, and each of the litigation-related activities identified by Exxon in its Rule 202

Petition occurred exclusively out-of-state (i.e., in California, New York, and Massachusetts). *See, e.g.*, CR19-25; 3SUPPCR116-23.

Those events do not come close to constituting purposeful availment, because they are "random, fortuitous, isolated, [and] attenuated." *Searcy*, 496 S.W.3d at 67 (citing *Burger King*, 471 U.S. at 475):

> • Random and fortuitous, because the California public entities sued more than 30 oil-and-gas companies worldwide, without regard to where they operated or were headquartered;
>
> • Isolated, because each lawsuit was served on Exxon's agents only once; and
>
> • Attenuated, because there is no evidence in the record of any litigation-related conduct by any Respondent that had any effects on the State itself.

In an effort to evade this settled constitutional standard, Exxon asserts that a private company can manufacture otherwise non-existent specific personal jurisdiction by alleging someone filed an out-of-state lawsuit against it, not to achieve the relief requested in that lawsuit, but with an unstated, ulterior motive that was secretly intended to wrongfully harm that company in one of the jurisdictions where it does business. *See* CR2030-43. The law is clear, though, that whether the California public entities filed their lawsuits with unlawful intent, as Exxon alleges, is irrelevant to the due-process analysis. *Michiana*, 168 S.W.3d at 790-91; *Old Republic*, 549 S.W.3d at 560-61.

Exxon's double-bank shot, *in*direct-effects theory of specific personal jurisdiction is foreclosed by *Walden.* There, a Nevada court had exercised personal jurisdiction over Georgia police officers, based on a claim by Nevada residents that the officers improperly searched them in the Atlanta airport and later prepared a "false probable cause affidavit" that foreseeably caused them to suffer harm in their home state of Nevada. 571 U.S. at 282 (citation omitted). Despite the allegation that the officers intended to deprive plaintiffs of their rights in Nevada, the Supreme Court held that the lower court impermissibly focused on the defendant's contacts with the *plaintiffs* (Nevada residents) rather than on its contacts with the *forum* (Nevada itself). *Id.* at 289. For the "effects" of tortious conduct to be constitutionally relevant, the Court emphasized, those effects must connect the defendants' conduct to *the forum* and "not just to a plaintiff who lived there." *Id.* at 288.

Thus, the fact that Exxon may be headquartered and doing business in Texas (and may, as a result, formulate certain litigation strategies and public responses to the California litigation here) does nothing to establish actual contacts between the California plaintiffs and the State of Texas, as required for specific personal jurisdiction.

Exxon's approach is not only precluded by U.S. and Texas Supreme Court precedent, but it also runs headlong into the Fifth Circuit's decision in *Stroman*

Realty, Inc. v. Wercinski, 513 F.3d 476 (5th Cir. 2008). Stroman, a Texas-based real estate company, received from the Commissioner of the Arizona Department of Real Estate a cease-and-desist letter stating that its unlicensed brokering of transactions involving Arizona real estate constituted a felony under Arizona law. *Id.* at 480. Stroman sued the Commissioner in the Southern District of Texas, alleging that her letter discriminated against Stroman in violation of the Commerce Clause and caused it to suffer harm in Texas. *Id.* at 481.

Stroman's compliance with the cease-and-desist order unquestionably would have caused adverse economic effects and chilled speech in Texas (where Stroman would be prohibited from continuing to prepare and post its advertising materials). *Id.* Nonetheless, applying binding Supreme Court precedent, the Fifth Circuit held the exercise of personal jurisdiction would violate due process. Even though the Commissioner physically mailed her cease-and-desist letter to Texas (Respondents made no similar contact here), and even though that letter ordered Stroman to cease engaging in the challenged speech in Texas (Respondents made no similar order here), the Fifth Circuit held the Commissioner had not purposefully availed herself of the privilege of operating in Texas. "Arizona [was] simply attempting to uniformly apply its laws," and the entity that broke them just happened to be located within Texas's borders. *Id.* at 486. Just like here.

Exxon contends that this case is more akin to *Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020), *petition for cert. filed* (U.S. Jan. 25, 2021) (No. 20-984), than to *Stroman*—a case-specific, factual contention that would not warrant review even if correct. Although both *Grewal* and *Stroman* involved an out-of-state public entity sending a cease-and-desist letter to a Texas-based plaintiff, the letter in *Grewal*—unlike the letter in *Stroman*—ordered the company to stop advertising and selling its products *anywhere* and was not limited to enforcing the public entity's laws on behalf of that public entity's residents only. That distinction made all the difference.

The New Jersey Attorney General's cease-and-desist letter in *Grewal* threatened legal action unless Defense Distributed, a Texas company that produced and distributed "information related to the 3D printing of firearms," "cease[d] publication of their materials generally," not just to New Jersey residents. *Id.* at 488, 492. Defense Distributed responded by suing the Attorney General in the Western District of Texas, alleging that the New Jersey cease-and-desist letter infringed on the company's First Amendment freedoms. *Id.* at 489. After *reaffirming* the holding and analysis in *Stroman*, the Fifth Circuit distinguished the two cases factually, based on the Attorney General's attempt to prohibit speech he had no authority to regulate. Instead of "simply attempting to uniformly apply [New Jersey] laws" to those who happened be in Texas when they caused harm to

New Jersey residents, as in *Stroman*, 513 F.3d at 486, the New Jersey Attorney General in *Grewal* "asserted a pseudo-national executive authority" beyond any particularized state law enforcement interest. *Grewal*, 971 F.3d at 493.

This case is far closer to *Stroman* (even though, again, in contrast to both *Stroman* and *Grewal*, Respondents never sent any cease-and-desist letter or other similar communication to Texas). Here, the California public entities' lawsuits seek to impose liability on dozens of companies—incorporated, headquartered, and operating throughout the country and the world—for conduct that violates California law (and only California law) and only to the extent it affects those California public entities and their residents and property. *See supra* n.1. That Exxon is currently headquartered in Texas (while incorporated in New Jersey and operating in California and elsewhere) is not enough to establish purposeful availment.

Grewal is also inapposite because the Attorney General's cease-and-desist letter specifically sought to prohibit the Texas company's future speech, i.e., its publications relating to 3D firearm printing. The impact on defendant's speech was not just a potential, indirect byproduct of a narrowly targeted enforcement campaign. Rather, the whole point of sending a cease-and-desist letter to Texas was to impose a nationwide prohibition against the company's speech, and the company responded by in fact ceasing production and thereby reducing Texas

residents' access to its materials. 971 F.3d at 488-89, 493, 496. Here, by contrast, Exxon has not alleged that any specific speech has been or will be chilled. And while it speculates that it *might* choose to speak differently on matters of public concern if found liable in California (like any defendant sued for damages might do in almost any case), nothing in the public entities' lawsuits seeks or requires that result. *See* CR18.

If Exxon were right that long-established limitations on personal jurisdiction could be evaded by the simple expedient of alleging that a finding of liability might affect future business decisions, *any* out-of-state defendant faced with *any* tort involving speech—say, defamation—could secure home-turf advantage in a retaliatory lawsuit simply by asserting that the out-of-state plaintiff filed its lawsuit with the intent not only to redress harms caused by past conduct, but also to chill future speech. The Due Process Clause cannot tolerate that result.

B. Exxon's putative claims do not arise out of any contact between respondents and the State of Texas.

Even if Exxon had a plausible argument that the California public entities purposefully availed themselves of the benefits of Texas law by filing lawsuits in California court under California law based on harms experienced in California against companies doing business in California, the case would still not be worthy of review, because Exxon is plainly unable to establish the requisite "substantial connection" between the Respondents' contacts with the state and the "operative

facts of the litigation." *TV Azteca*, 490 S.W.3d at 52-53 (citing *Moki Mac*, 221 S.W.3d at 584, 585). As noted above, none of the Respondents' lawsuit-related conduct involved any constitutionally cognizable contacts with Texas, let alone any activities that occurred in Texas. *See Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 151 (Tex. 2013) (whether jurisdiction exists depends in significant part on the location of meetings where the allegedly tortious action occurred); *TV Azteca*, 490 S.W.3d at 53 (quoting *Moki Mac*, 221 S.W.3d at 585) (courts should determine whether the events that would be "the focus of the trial" and "likely to consume most if not all of the litigation's attention" occurred in the forum state). The California public entities' litigation-related conduct had nothing to do with Texas itself.

C. The exercise of personal jurisdiction would offend notions of fair play and substantial justice.

Exxon's petition also fails to demonstrate how exercising personal jurisdiction over out-of-state persons and entities would "comport with traditional notions of fair play and substantial justice." *Moncrief Oil*, 414 S.W.3d at 155. Aside from the obvious burdens on out-of-state defendants, Exxon's tactics here provide a new blueprint for forum-shopping. If Exxon's approach were accepted, nearly every controversial interstate tort could effectively be litigated twice: first, in the state where the lawsuit was filed; and then, in the state where a resident defendant retaliates with a lawsuit of its own. That outcome would undermine the

interstate judicial system's interest in obtaining efficient resolution of controversies, *see Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex. 2009), and would flout basic principles of interstate comity and state sovereignty, *see Bristol-Myers Squibb*, 137 S. Ct. at 1780; *In re AutoNation*, 228 S.W.3d 663, 670 (Tex. 2007).

II. Exxon Is Not the State of Texas.

Having failed to make a plausible argument under controlling due-process criteria, Exxon urges the Court to grant review to adopt the astonishing, self-aggrandizing theory that due process allows it to sue California public entities and officials in Texas because Exxon operates in an industry that is so "vital" and "core" to the Texas economy that a claim against Exxon or any other oil-and-gas company is a claim against the State of Texas itself. Pet. 15, 20. Exxon has not cited a single case—because none exists or could exist under the Due Process Clause—in which specific personal jurisdiction rested on a company's size, industry, or impact on a state's economy. Nor does Exxon articulate any criteria for determining when an industry is sufficiently "vital" to a state's economy that the companies that comprise it become the equivalent of that state for personal-jurisdiction purposes.

Under the Due Process Clause, there is a "crucial difference between directing a tort at an individual who happens to live in a particular state and

directing a tort at that state." *TV Azteca*, 490 S.W.3d at 43; *Michiana*, 168 S.W.3d at 788-89. Exxon insists, however, that unlike all other Texas-based parties that are bound by *TV Azteca* and *Michiana*, a tort directed against *it* is a tort directed at Texas as a whole and constitutes "an assault against Texas sovereignty." Pet. 13. In effect, Exxon is asking this Court to grant it special jurisdictional privileges that are not available to any individual Texans or to any Texas companies outside the oil-and-gas industry. Due process does not countenance such a two-tiered system of justice.

Respondents do not dispute that the oil-and-gas industry (and the broader energy industry in general) significantly contributes to the Texas economy—and to many other states' economies, too.[2] But other industries also make substantial economic contributions. Since 2010, for example, the health-care and social-assistance industry has produced far more jobs for Texas residents, and at least three industries (manufacturing, professional-and-business services, and real estate) currently contribute more to the State's GDP.[3] To be sure, the oil-and-gas

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

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

industry has a rich and important connection to Texas. But, for due-process purposes, treating an industry (or one or more companies in that industry) as equivalent to the State itself would create the slipperiest of slopes and could lead to unintended consequences.

If this Court were to deem Exxon so "vital" to the Texas economy that an out-of-state tort suit against it should be deemed "an assault on Texas's sovereignty" for personal-jurisdiction purposes, Pet. 14, Texas courts would be inundated with Rule 202 petitions from companies in other industries making the same argument. Texas courts would then be forced to answer the many questions Exxon has so carefully skirted, such as: By what specific metric(s) should a court consider a defendant's (or defendants') participation in a particular industry? What weight should be given to such companies' or industry's employment rates, total wages, GDP contributions, tax revenue, or other factors in relation to other companies and industries in that state? Does the prominence of the industry in other states matter?

The Supreme Court has repeatedly stated that "administrative simplicity is a major virtue" in jurisdictional analysis. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Requiring courts to determine whether or why an industry is sufficiently

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https://www.bls.gov/regions/southwest/data/industryemployment current_texasus_table_pdf.pdf.

"vital" to a state's economy that it stands for the sovereign itself, by some as-yet undefined and indefinable analysis, would violate that principle and mire the courts in immensely complicated and indeterminate litigation unrelated to the merits of the controversy, without any meaningful standards to guide them.

The problem will not stop in Texas. If the Due Process Clause permits Exxon to equate itself with Texas because it operates in a particular industry, companies in industries associated with other states will soon follow Exxon's lead. A Texas citizen who files a non-frivolous defamation suit in Texas court against a Hollywood studio, or a non-frivolous nuisance suit against a New York bank, or a design-defect case against a Detroit automaker, could find herself dragged into a retaliatory civil rights action in California or New York or Michigan, with the company alleging (in conclusory terms) that the Texas plaintiff "directed [its] conduct at a core [State]-industry by seeking to suppress [State]-based speech," Pet. at 20, even though the out-of-state company's retaliatory claims could easily be addressed as counterclaims in the Texas litigation.

Exxon invites this Court to create a rule that would give judges nearly unbridled authority to impose their personal beliefs about which industries are sufficiently "vital" to a state's economy to deem a lawsuit against any industry member a lawsuit against the state itself. This Court should decline the invitation.

The Due Process Clause and the protections it affords out-of-state residents cannot be left to depend on such an ambiguous, ill-defined standard.

III. This case is a poor vehicle to address these issues because Exxon's underlying claims are patently frivolous.

The merits of Exxon's underlying claims are irrelevant to the jurisdictional question presented here. Nonetheless, the weakness of those claims is yet another reason why Exxon's petition does not warrant the expenditure of further judicial resources on the due-process issues presented.

First, stating a claim for abuse of process requires showing "an improper use of the process other than the mere institution of [a] civil action" and "damages other than [those] necessarily incident to filing a lawsuit." *Detenbeck v. Koester*, 886 S.W.2d 477, 481 (Tex. App.—Houston [1st Dist.] 1994, writ dism'd) (quoting *Martin v. Trevino*, 578 S.W.2d 769 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)); *see also Tex. Beef Cattle v. Green*, 921 S.W.2d 203, 208 (Tex. 1996); *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997). Nothing in Exxon's Rule 202 Petition alleges any acts undertaken anywhere by any Respondent after the California lawsuits were filed; and the filing of a lawsuit, by itself, cannot constitute abuse of process.

Exxon's threatened First Amendment claim also does not rest on any of Respondents' contacts with Texas. Exxon vaguely asserts that the California lawsuits are intended to discourage it from engaging in constitutionally protected

speech regarding national policies. CR18, 51. But Exxon never even attempts to explain what speech was or will be chilled, in Texas or elsewhere. Nor does Exxon explain how the filing of the California lawsuits could constitute a violation of Exxon's First Amendment rights, because those lawsuits do not seek a court order limiting Exxon's protected speech and would impose liability only for Exxon's past conduct and previous misrepresentations of fact (which are not constitutionally protected, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y*, 447 U.S. 557, 563 (1980)).

Finally, while Exxon also threatens to bring a civil conspiracy claim against certain Respondents, that alleged conspiracy rests entirely on the first two claims and fails for the same reasons.

PRAYER

For the foregoing reasons, Respondents request that Exxon's petition for review be denied.

Dated: March 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, a true and correct searchable PDF electronic copy of the foregoing document was served upon the counsel listed below, who are counsel of record for Petitioner Exxon Mobil Corporation.

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

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Dated: March 5, 2021

/s/ Michael Rubin
Michael Rubin

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