Nos. 21-0130 & 21-0133 (Consolidated)

In the Supreme Court of Texas

THE STATE OF TEXAS,
Petitioner,
v.
VOLKSWAGEN AKTIENGESELLSCHAFT,
Respondent.

THE STATE OF TEXAS,
Petitioner,
v.
AUDI AKTIENGESELLSCHAFT,
Respondent.

On Petition for Review
from the Third Court of Appeals, Austin

BRIEF ON THE MERITS FOR PETITIONER

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Statement of the Cases

Nature of the Cases:	The State of Texas brought this civil enforcement action against several affiliated automobile companies for violations of the Texas Clean Air Act arising from their tampering with the emissions control systems of vehicles sold in Texas. 1.CR.1303-31; 2.CR.1373-1401. These petitions concern whether the trial court has personal jurisdiction over Volkswagen Aktiengesellschaft ("VW Germany") and Audi Aktiengesellschaft ("Audi Germany"), which directed the installation of emissions-defeating software into vehicles recalled in Texas.
Trial Court:	Both cases arise from the 353rd Judicial District Court, Travis County, the Honorable Tim Sulak presiding.
Dispositions in the Trial Court:	In both cases, following jurisdictional discovery and argument, the trial court denied the special appearance. 1.CR.1999; 2.CR.2383.
Parties in the Court of Appeals:	In No. 20-0130, VW Germany was appellant, and the State of Texas was appellee. In No. 20-0133, Audi Germany was appellant, and the State of Texas was appellee.
Disposition in the Court of Appeals:	The divided court of appeals reversed the trial court's order and rendered judgment dismissing the claims against VW Germany and Audi Germany. *Volkswagen Aktiengesellschaft v. State*, *Audi Aktiengesellschaft v. State*, Nos. 03-19-00453-CV, 03-20-00022-CV, 2020 WL 7640037, at *9 (Tex. App.—Austin Dec. 22, 2020, pets. filed) (mem. op.) (Rose, C.J., joined by Smith, J.) (consolidating cases for memorandum opinion but issuing separate judgments); *see also id.* (Triana, J., dissenting).

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a).

Issues Presented

VW Germany and Audi Germany twice directed the installation in their "clean diesel" vehicles of software designed to defeat emissions testing, in violation of state and federal law. The live claims in this case focus on the installation of tampering software in vehicles that had already been sold—referred to herein as the "recall tampering." In total, VW Germany and Audi Germany directed recall-tampering activities on nearly 24,000 vehicles that were in-use in Texas. VW Germany and Audi Germany profited from the recall tampering, which allowed them to avoid mounting warranty costs that were associated with the original tampering.

The issue presented is whether the court of appeals erred in finding that the Texas courts lack specific personal jurisdiction over VW Germany and Audi Germany.

To the Honorable Supreme Court of Texas:

VW Germany and Audi Germany were the architects of a scheme to defeat vehicle emission standards by installing tampering software in their "clean diesel" vehicles. The live claims in this case concern recall tampering that occurred post-sale, on vehicles that had already been put on the roads in Texas. That recall tampering was the second time VW Germany and Audi Germany had tampered with these particular vehicles. The first round of tampering had taken place before the vehicles were sold and had caused the warranty problems that prompted VW Germany and Audi Germany to undertake the recall tampering.

VW Germany and Audi Germany directed the recall-tampering activities down to the details, having retained significant day-to-day control over the activities of subsidiary VW America under the terms of their Importer Agreements with that entity. VW Germany developed the tampering software, and Audi Germany tested it for compatibility with its vehicles. VW Germany and Audi Germany delivered the tampering software electronically via a synchronized server connected to local dealership platforms VW Germany had developed. VW Germany and Audi Germany dictated how the new software should be explained to dealers and customers, identified cars to be recalled, and financed the installation of the new software. And VW Germany and Audi Germany benefited financially from their participation in the Texas market—not only by making millions selling these cars in the forum, but also by reducing, via the recall tampering, certain warrantied hardware failures for which VW Germany and Audi Germany were financially responsible. Because the recall tampering activities were carried out on cars that had already been sold in Texas,

VW Germany and Audi Germany were on notice that they were reaching into the Texas market—not just the United States market in the abstract—at the time they undertook to direct those recall activities.

VW Germany and Audi Germany purposefully availed themselves of the Texas market, and their conduct related to recall tampering provides the requisite "minimum contacts" with Texas to support specific personal jurisdiction here. The court of appeals erred in holding that VW Germany and Audi Germany are insulated from the jurisdiction of Texas courts simply because they directed tampering with vehicles on a nationwide scale. That result is not, as the majority believed, compelled by *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877-78 (2011) (plurality op.). The court of appeals further erred by not giving effect to this Court's holding, in *Spir Star AG v. Kimich*, that "purposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)." 310 S.W.3d 868, 874 (Tex. 2010). It also failed to recognize the significance of the financial benefits that flowed to VW Germany and Audi Germany from their contacts with Texas.

As the dissent below correctly recognized, VW Germany's and Audi Germany's roles in directing tampering on cars recalled in Texas satisfy both the "minimum contacts" and "fair play and substantial justice" prongs of the personal jurisdiction test. This Court should grant the petitions, reverse the court of appeals' judgments, and render judgments denying VW Germany's and Audi Germany's special appearances.

Statement of Facts

The court of appeals correctly stated the nature of the case. *See supra* p. vii.

I. Factual Background

In 2006, Audi Germany developed "the original concept" of "dual-mode, emissions cycle-beating software," which its parent company VW Germany then "borrowed" to develop the tampering software that was installed across the "clean diesel" fleet. 1.CR.1405-06; 2.CR.957-58, 960. The software detected whether a vehicle was being operated in an emissions-testing mode or a street-driving mode and changed the operation of the cars' emissions control systems based on that information. 1.CR.1405-06; 2.CR.957-58. Street mode caused the cars' emissions to exceed standards but reduced wear and tear on the diesel particulate filter, which could crack in high temperatures if heavily used. 1.CR.1530; 2.CR.340. The filter was "an expensive part" to replace, costing "over a thousand dollars," and was covered by the vehicle's warranty. 1.CR.1531-32; 2.CR.341-42. Vehicles equipped with this software began developing hardware failures in 2012 because they were not switching to street mode as intended. 1.CR.1407; 2.CR.963. As a result, VW Germany and Audi Germany's warranty costs for filters were "up to $525,000 per month." 1.CR.1621; 2.CR.1718.

On the hook for those warranty bills, VW Germany developed new software in 2013 to further tamper with the vehicles to reduce wear and tear on the filters. 1.CR.1408-09, 1449; 2.CR.965. The new software contained two new modes of evading emissions standards: the Start Function, which caused the vehicles to start in street mode and stay there unless the software detected emissions testing, and the

Steering Wheel Angle Recognition Function, which detected testing by recognizing when the steering wheel was not being turned. 1.CR.1408-09; 2.CR.964-65. Audi Germany tested the software's compatibility with Audi vehicles. 2.CR.2203-04.

Beginning in November 2014, VW Germany and Audi Germany directed the installation of the new tampering software on vehicles that were already on the road in Texas. 1.CR.1447, 1523; 2.CR.2139-43. VW Germany and Audi Germany "jointly" decided that the new software would be installed on existing Audi vehicles in the United States, including Texas vehicles. 2.CR.2139-43.

To carry out the recall tampering, VW Germany and Audi Germany used their power under their Importer Agreements to dictate the actions of subsidiary VW America. 1.CR.1484-86; 2.CR.1581-83. The Importer Agreements give VW Germany and Audi Germany a say in every important business decision for VW America—often, the final say. VW Germany and Audi Germany played an active role in developing a Texas customer base and profited from selling products to Texas residents. *See* 1.CR.1472; 2.CR.1569, 2168 (requiring VW America to "exhaust fully all market opportunities" in the United States); *see also* 1.CR.1744-45; 2.CR.1841-42 (noting Texas's "importance" in the United States market). The Agreements require VW Germany and Audi Germany's assent for "annual sales objectives and delivery schedules" and create a system to collect sales data that includes individual dealer data. 1.CR.1480-81, 1564-66; 2.CR.2171-72, 2178. That means VW Germany and Audi Germany would have been aware of the cars that had been sold in Texas specifically.

With respect to warranty and recall activities, the Importer Agreements provide that VW Germany and Audi Germany will both direct and pay for warrantied repairs, including "recall costs." 1.CR.1484-86; 2.CR.2178. VW Germany and Audi Germany retain authority to "require campaign inspections and/or corrections whenever [they] deem[] such inspections and/or corrections to be necessary and may direct such campaigns to be carried out." 1.CR.1484-85; 2.CR.2174-75. Further, "[a]ll maintenance work and/or repairs carried out shall be in accordance with [VW Germany's and Audi Germany's] instructions, guidelines and/or procedures." 1.CR.1484-85; 2.CR.2174-75. Audi Germany even reserved the right to deploy personnel in the recall context. 2.CR.2188. And any VW America-prepared communications to dealers, consumers or the media "shall be based upon information provided by [Audi Germany]" and may be distributed only after VW America "obtain[s] [Audi Germany's] prior approval." 2.CR.2189.

For software updates, including the software update that was used to conduct the recall tampering, VW Germany and Audi Germany can upload software to their server in Germany that is synchronized with a server in the United States. 1.CR.1465-66; 2.CR.2203-04. From the U.S. server, the software automatically downloads to the proprietary platform that VW Germany had developed and installed at dealerships worldwide for technicians to install software on vehicles. 1.CR.1465-66, 1564, 1593; 2.CR.2203-04, 2026-27.

VW Germany admits that it directed the recall campaigns carried out by VW America—exactly as envisioned in the Importer Agreement—for 60 Texas dealerships and 23,319 Texas vehicles. 1.CR.1413-16. Audi Germany admits that it directed

the recall campaigns carried out by VW America—exactly as envisioned in the Importer Agreement—for 12 Texas dealerships and either 486 or 487 Texas vehicles. 2.CR.298-301, 2138-42, 2150, 2231-34.

VW Germany's specific actions as to recall-tampering in Texas include:

- VW Germany directed VW America to install recall-tampering software it had developed. 1.CR.1408-09, 1453.
- VW Germany electronically delivered its software to dealerships in Texas and other States via synchronized servers from which the software automatically downloaded. 1.CR.1466, 1564, 1930.
- VW Germany provided dealers in Texas with instructions for installing the new software. 1.CR.1456.
- VW Germany developed information and materials for VW America, explaining the problems addressed by the recalls. 1.CR.1587-92.
- VW Germany provided examples of letters to send to Texas customers, and it provided false information that VW America included in letters to the owners of recalled vehicles. 1.CR.1413-16, 1418, 1518.
- VW Germany provided a list of every vehicle included in the recall campaigns—including vehicles in Texas. 1.CR.1457, 1581.
- VW Germany paid for at least 23,262 installations that occurred in Texas, reimbursing Texas dealers $1,233,609. 1.CR.1627-30; *see also* 1.CR.1486-87 (discussing reimbursements, warranties, invoices, and audits).
- VW Germany tracked the progress of the recall campaigns. 1.CR.1585.

- VW Germany financially benefited from the recall tampering by avoiding mounting warranty costs—up to $525,000 per month—from wear and tear on the emissions-control systems caused by VW Germany's original tampering. 1.CR.1530-32, 1621.

Audi Germany's specific actions as to recall tampering in Texas essentially mirror VW Germany's, and include:

- Audi Germany directed VW America to install recall-tampering software. 2.CR.2138-42, 2234.
- Audi Germany electronically delivered software to dealerships in Texas and other States via synchronized servers from which the software automatically downloaded. 2.CR. 2203-04.
- Audi Germany provided dealers in Texas with instructions for installing the new software. 2.CR.2202.
- Audi Germany approved customer letters explaining the problems addressed by the recalls. 2.CR.1967-68, 2202.
- Audi Germany, jointly with VW Germany, identified affected vehicles. 2.CR.2198.
- Audi Germany paid for each of the installations that occurred in Texas, reimbursing Texas dealers $29,590. 2.CR.1724.
- Audi Germany tracked the progress of the recall campaigns. 2.CR.2179.
- Audi Germany financially benefited from the recall tampering, saving the proportion of "up to $525,000 per month" on warranty claims

attributable to Audi vehicles, from wear and tear on the emissions-control systems caused by the original tampering. 2.CR.1718.

The scale of the recall-tampering activities in Texas—23,319 installations of tampering software on Volkswagens and 486 installations of tampering software on Audis—reflects the scale of VW Germany's and Audi Germany's marketing and sale of the affected vehicles to Texas residents through VW America and its franchise dealers. 1.CR.1472, 1744-45; 2.CR.298-301, 2138-42, 2150, 2233-34. The affected Texas vehicles were model years 2010 to 2014, corresponding to calendar years 2009 to 2015, during which VW Germany made $413,532,076 and Audi Germany made $12,348,922 in gross revenue from sales of these vehicles in Texas. 1.CR.1451; 2.CR.2148.

II. Procedural Background

Texas sued VW Germany and Audi Germany, as well as VW America and other related entities, for violations of state environmental statutes and rules. 1.Supp.CR.3, 8-11, 17-18; 1.CR.394-95 (amended petition adding VW Germany); 2.CR.4-5 (original petition), 440 (amended petition adding Audi Germany), 1373 (live petition). Under Rule 13 of the Texas Rules of Judicial Administration, those proceedings, along with related suits by Texas counties, were transferred to two multidistrict litigation (MDL) actions. 2.CR.18-20.

This litigation is based on state-law claims that are separate from the federal criminal claims to which VW Germany and Audi Germany pleaded guilty, 1.CR.1401-03; 2.CR.945-75, and other federal, state, and private civil claims. The Volkswagen entities in the MDL proceeding urged that the state-law claims were

preempted by federal law, and the trial court agreed as to claims relating to the original pre-sale tampering, granting partial summary judgment in favor of the defendants. 1.CR.1131-32; 2.CR.1177-78. But the trial court held that the present claims based on recall-tampering activities were *not* preempted by federal law and denied summary judgment on those claims. 1.CR.1131-32; 2.CR.1177-78.The trial court's summary-judgment rulings are not before the Court in these petitions.

Rather, the only issue in these petitions is VW Germany's and Audi Germany's special appearances. 1.CR.1281-83, 1332; 2.CR.1429. After an evidentiary hearing, 1.RR.1-53; 2.RR.1-63 (vol. 3), the trial court denied VW Germany's and Audi Germany's special appearances, 1.CR.1999; 2.CR.2383. VW Germany and Audi Germany each filed an interlocutory appeal. 1.CR.2000-01; 2.CR.2379-80.

The court of appeals consolidated for consideration" the interlocutory appeals. *Volkswagen*, 2020 WL 7640037, at *1. The court of appeals reversed and rendered judgments dismissing the claims against VW Germany and Audi Germany, finding that VW Germany and Audi Germany "did not purposefully avail [themselves] of the privilege of conducting activities in Texas." *Id.* at *9. The court held that, while "VW Germany directed recall-tampering conduct toward the United States as a whole," its conduct was not purposefully directed at "Texas specifically" and stated the same for Audi Germany. *Id.* at *5, *7 (citing *Nicastro*, 564 U.S. at 886 (plurality op.)). The court also concluded that the recall-tampering activities were "more properly characterized as the activities of VW America, not VW Germany" and "not Audi Germany." *Id.* at *5, *8. It did not directly address whether VW Germany's

and Audi Germany's control over VW America constituted indirect purposeful availment under *Spir Star*, 310 S.W.3d at 874.

In dissent, Justice Triana concluded that VW Germany and Audi Germany "cannot evade personal jurisdiction in Texas merely because the recall-tampering activities, which they controlled, were directed to the United States instead of solely to Texas." *Volkswagen*, 2020 WL 7640037, at *10. The dissent also found that VW Germany's and Audi Germany's "control of the recall-tampering conduct directed at Texas establishes purposeful availment carried out indirectly through VW America and its franchise dealers" and that VW Germany and Audi Germany financially benefited from their contacts with Texas. *Id.* at *12. Proceeding to the second prong of the personal-jurisdiction test, the dissent also concluded that exercising jurisdiction over VW Germany and Audi Germany is consistent with "traditional notions of fair play and substantial justice." *Id.* at *13.

Summary of the Argument

VW Germany and Audi Germany have "minimum contacts" with Texas, having purposefully availed themselves of the Texas market by: instituting formal and informal recalls to facilitate the installation of new tampering software in vehicles in Texas; electronically distributing the new tampering software for installation in Texas vehicles; providing messaging for customers and dealers in Texas about the new tampering software; reimbursing the cost to install the new tampering software in each Texas vehicle; and benefiting financially from the new tampering software by avoiding mounting warranty costs for those Texas vehicles.

The court of appeals erred in concluding that these extensive contacts with Texas are irrelevant because they were not *unique* to Texas. VW Germany and Audi Germany purposefully reached into the Texas market to tamper with Texas vehicles in a manner neither isolated nor fortuitous when they required market exhaustion, tracked sales of each vehicle, and then directed recall tampering of vehicles known to have been sold in Texas. The plurality opinion in *Nicastro*, 564 U.S. at 886, does not require that those contacts be set aside just because they were replicated in other States. The court of appeals also wrongly concluded that the contacts were attributable only to VW America and failed to effectuate this Court's instruction in *Spir Star* that both direct and indirect contacts may establish purposeful availment. 310 S.W.3d at 871. Moreover, the court failed to adequately consider the financial gain to VW Germany and Audi Germany, from both the original sales of the affected cars in Texas and the recall-tampering activities themselves.

Exercising jurisdiction over VW Germany and Audi Germany is also consistent with traditional notions of fair play and substantial justice. Texas's interest in adjudicating this case in its state courts is especially strong here, given VW Germany's and Audi Germany's intentional violation of the State's laws.

Standard of Review

Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law subject to de novo review. *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018). The plaintiff "bears the initial burden" to allege facts showing that the court can properly exercise personal jurisdiction over the nonresident defendant. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 & n.5 (Tex. 2016) (citing

Retamco Operating, Inc. v. Republic Drilling Co., 278 S.W.3d 333, 337 (Tex. 2009)). Then, the burden shifts to the defendant to "negat[e] all potential bases for personal jurisdiction that exist in the plaintiff's pleadings." *Id.* at 66. When, as here, a trial court does not issue findings of fact or conclusions of law, the court of appeals "presume[s] that all factual disputes were resolved in favor of the trial court's ruling." *Spir Star*, 310 S.W.3d at 871-72.

ARGUMENT

A Texas court may exercise personal jurisdiction over a nonresident defendant if the Texas long-arm statute grants jurisdiction and the exercise of jurisdiction comports with due process. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 36 (Tex. 2016). Texas's long-arm statute extends jurisdiction to the limits of due process, so "federal due process requirements shape the contours of Texas courts' jurisdictional reach." *Searcy*, 496 S.W.3d at 66.

Due process is satisfied here because VW Germany and Audi Germany have "established 'minimum contacts' with the forum state such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 8 (Tex. 2021) (quoting *Int'l Shoe Co. v. Wash. Off. of Unemp't Comp. & Placement*, 326 U.S. 310, 316 (1945)).

VW Germany's and Audi Germany's contacts support specific personal jurisdiction in Texas courts for this suit. General jurisdiction—which is not asserted here—exists where a nonresident defendant's "affiliation with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *TV Azteca*, 490 S.W.3d at 37 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

Specific jurisdiction, in contrast, "'covers defendants less intimately connected with a State, but only as to a narrower class of claims.'" *Luciano*, 625 S.W.3d at 8 (quoting *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1024 (2021)). A defendant has the minimum contacts necessary to establish specific personal jurisdiction where "the defendant purposefully avails itself of the privilege of conducting activities in the forum state, and the suit "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Id.* (citing *Nicastro*, 564 U.S. at 877-78 (plurality op.); *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 576 (Tex. 2007)).

I. VW Germany's and Audi Germany's Contacts with Texas Establish Purposeful Availment.

Purposeful availment is the "touchstone" of the jurisdictional due process inquiry. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). When a defendant "purposefully avails itself of the privilege of conducting activities within the forum state," it "invoke[es] the benefits and protections of its laws" and thereby "consents to suit." *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150, 154 (Tex. 2013) (quoting *Retamco*, 278 S.W.3d at 338).[1] The defendant's activities "must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Retamco*, 278 S.W.3d at 338.

[1] For the same "clean diesel" tampering scheme, a Minnesota court has held that VW Germany purposefully availed itself of that State—where fewer vehicles were recalled than in Texas. *State ex rel. Swanson v. Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *4 (Minn. Ct. App. Dec. 3, 2018).

The Court considers three factors, whether: (1) the forum contacts are "purposeful" as opposed to "random, fortuitous, or attenuated"; (2) the forum contacts are those of the defendant, as opposed to the "unilateral activity of another party or a third person"; and (3) the defendant "seek[s] some benefit, advantage or profit by availing itself of the jurisdiction." *Id.* at 339. The court of appeals erred in its consideration of each of those factors.

A. VW Germany's and Audi Germany's contacts with Texas were "purposeful," and they may not evade jurisdiction by also directing activities to other States.

1. VW Germany and Audi Germany made purposeful contacts with Texas.

When VW Germany and Audi Germany reached into Texas to tamper with cars that had already been put onto the road in the State, those acts were "purposeful." *Moncrief Oil*, 414 S.W.3d at 150. It was not merely "fortuitous" or "random" that tampering took place in Texas. *Id.* at 151.

It is undisputed that VW Germany and Audi Germany manufactured vehicles with factory-installed tampering software and placed them into the stream of commerce, and that nearly 24,000 of those cars were sold in Texas. 1.CR.1405, 1413-16, 1472; 2.CR.298-301, 2138-42, 2150, 2231-34. The question is whether there were "plus" factors or "additional conduct" (using stream-of-commerce language) or efforts to "continuously and deliberately exploit[] the Texas market" (using purposeful-direction or tort language) that establish purposeful availment in Texas. *See TV Azteca*, 490 S.W.3d at 46-47 (noting that the two tests are analogous).

Sufficient "plus" factors exist even for the initial sales.[2] VW Germany and Audi Germany contractually required VW America to "exhaust fully all market opportunities" in the United States, 1.CR.1472; 2.CR.2168, which plainly includes Texas, the second largest market for the affected vehicles, 1.CR.1617-18; 2.CR.1714-15; *see* 1.CR.1744-45; 2.CR.1841-42 (acknowledging Texas's "importance" in United States market). *Cf. Moki Mac*, 221 S.W.3d at 577 (stating that although "the mere sale of a product to a Texas resident will not generally suffice to confer specific jurisdiction upon our courts," personal jurisdiction is established when "the facts alleged . . . indicate that the seller intended to serve the Texas market"). And VW Germany earned gross revenues of $413,532,076 from Texas sales of vehicles that were subsequently recalled for further tampering. 1.CR.1451. Audi Germany earned gross revenues of $12,348,922 from Texas sales of vehicles that were subsequently recalled for further tampering. 2.CR.2148.

But VW Germany's and Audi Germany's contacts did not end there. Each maintained a continuing relationship with the cars after sale. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Moncrief*, 414 S.W.3d at 151. Their Importer

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[2] Sales of the tampered cars in Texas "relate to" Texas's instant recall-tampering claims: the post-sale recall tampering was done precisely because VW Germany and Audi Germany needed to avoid mounting warranty costs caused by the original tampering. *See Ford*, 141 S. Ct. at 1025. The "actionable conduct" that forms the basis of liability—recall tampering on Texas vehicles—occurred in Texas, and "additional conduct" demonstrating that VW Germany and Audi Germany "tapped into the Texas market" need not be the direct basis for the claim to be relevant to the specific jurisdiction analysis. *See Luciano*, 625 S.W.3d at 18 (discussing *Ford*, 141 S. Ct. at 1026; *TV Azteca*, 490 S.W.3d at 53).

Agreements with VW America create a tracking system for car sales, reserve to VW Germany or Audi Germany authority to "direct" inspections or corrections, and require maintenance and repairs to be carried out according to VW Germany's or Audi Germany's instructions. 1.CR.1480-81, 1484-86, 1564-66; 2.CR.2174-75, 2179, 2180-81, 2188. This is hardly a case where a defendant has "'structure[d] [its] primary conduct' to lessen or avoid exposure" to jurisdiction in the Texas courts. *Ford*, 141 S. Ct. at 1025. While a nonresident defendant may "purposefully avoid" a particular jurisdiction "by structuring its transactions so as neither to profit from the forum's laws nor be subject to its jurisdiction," a "truly interstate business may not shield itself from suit by a careful, but formalistic structuring of its business dealings." *Luciano*, 625 S.W.3d at 9 (quoting *Michiana*, 168 S.W.3d at 785); *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437 (Tex. 1982).

When warranty costs skyrocketed because of failures in the original tampering software, VW Germany and Audi Germany directed more tampering on 23,319 Volkswagen vehicles in Texas and at least 486 Audi vehicles in Texas, 1.CR.1413-16; 2.CR. 298, 2138-42, 2150, 2232-34, using software VW Germany had developed, 1.CR.1408-09, 1453. VW Germany admitted that it "direct[ed]" the "recall campaigns and service actions" and "caused the software updates . . . to be installed in the vehicles." 1.CR.1447, 1453.

By this point, VW Germany and Audi Germany could not colorably claim non-specific national targeting or that they did not intend that the recall tampering be performed on Texas cars. VW Germany even provided a list of every vehicle to be included in the recall campaigns, which included the Texas cars. 1.CR.1457, 1581.

The decisions by VW Germany and Audi Germany to direct post-sale tampering on Texas cars were "the defendant[s'] own choice and not 'random, isolated, or fortuitous.'" *Ford*, 141 S. Ct. at 1025 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

VW Germany and Audi Germany conducted the recall tampering by placing the software on an electronic server that automatically synchronized onto a server in the United States. 1.CR.1465-66; 2.CR.2203-04. From that server, the software automatically downloaded onto the VW-Germany-created service platform used by VW America technicians in sixty Texas Volkswagen dealerships and twelve Texas Audi dealerships for seamless installation of the tampering software on Texas vehicles. 1.CR.1465-66, 1533-36, 1564, 1593, 1930; 2.CR.300, 2150, 2203-04, 2234; *see uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 428 (7th Cir. 2010) (finding automatic internet-based transactions in the forum were "purposeful" where the defendant "itself set the system up this way"). The record contains evidence that Texas technicians expended no effort to download or install the software that had automatically appeared on their ordinary service platform; to the contrary, VW America asserts that it did not independently evaluate its parent entities' instructions when installing the software in the vehicles on VW Germany's list. *See* 1.CR.1533-36.

The "electronic delivery of the software to VW America for installation on vehicles in Texas is a physical entry into Texas" that is a "relevant jurisdictional contact with the forum." *Volkswagen*, 2020 WL 7640037, at *12 (Triana, J., dissenting) (citing *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). Physical entry into the State may be "either by the defendant in person or through an agent, goods, mail, or some other

means." *Walden*, 571 U.S. at 285; *Burger King*, 471 U.S. at 476 ("[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."); *Moncrief*, 414 S.W.3d at 152 ("Physical presence in the state is not required."). Such electronic entry into a State implicates evolving issues of personal jurisdiction in the internet age. *See, e.g.*, *Ford*, 141 S. Ct. at 1035 (Gorsuch, J., concurring); *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."). Several federal circuits, including the Fifth Circuit, have adopted a "sliding scale" test based on the interactivity of a website, first developed in *Zippo Manufacturing Co. v. Zippo DOT Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).[3] *See Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (adopting *Zippo* test). The *Zippo* case describes a spectrum of internet-based conduct that, on one end, involves "knowing and repeated transmission of computer files over the Internet," in which case "personal jurisdiction is proper," and at the opposite end, a "passive Web site" where a defendant "has simply posted information . . . which is accessible to users in foreign jurisdictions," in which case personal jurisdiction would be improper. *Zippo*, 952 F. Supp. at 1124 (comparing *CompuServe, Inc. v.*

[3] This test is unrelated to the "sliding scale" test for "relatedness" that was rejected in *Bristol-Myers*, 137 S. Ct. at 1781. That sliding scale test allowed for a weaker connection between a defendant's forum contacts and the claim if the defendant had extensive forum contacts that were unrelated to the claim. *Id.*

Patterson, 89 F.3d 1257 (6th Cir. 1996), *with Bensusan Rest. Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)). The *Zippo* test recognizes that purposeful availment remains the touchstone for the analysis, and "[d]ifferent results should not be reached simply because business is conducted over the internet." *Id.* Here, the parent company VW Germany created the system that would allow for the electronic delivery of software to local dealerships in Texas and then electronically delivered the tampering software to that system. To find purposeful availment requires a representative of VW Germany or Audi Germany to come to Texas and click the download button ignores the realities of how tampering can be conducted in the digital age, *Burger King*, 471 U.S. at 476, and requires a physical presence that contravenes this Court's precedent, *Moncrief*, 414 S.W.3d at 152.

Concerning the details of the recall campaign, the Importer Agreements provide that recall campaigns are to be carried out according to VW Germany's and Audi Germany's "instructions, guidelines and/or procedures." 1.CR.1484-85; 2.CR.2174-75. The evidence shows that approach was followed here. VW Germany drafted information about the recall campaign that was sent to Texas dealers and customers. *See* 1.CR. 1455-57, 1587-92. VW Germany drafted example letters to send to customers, including customers in Texas, *see* 1.CR.1518, 1576-77, 1590-92, and sent VW America a list of vehicles affected by the recalls, including vehicles in Texas, *see* 1.CR.1457, 1581. Audi Germany reviewed and approved a customer letter VW America had drafted explaining the problems addressed by the recalls. 2.CR.2202. VW America and VW Germany corporate representatives testified that VW Germany alone was responsible for the false messaging sent to sixty Texas

dealers and 28,898 customers. *See* 1.CR.1413-16, 1517 ("[W]e are basically a passthrough department given information by [VW Germany] . . . "); 1.CR.1527-28, 1592, 1870-71 (corporate representatives acknowledging that customer letters stating that "the vehicle engine's management software has been improved to assure your vehicle's tailpipe emissions are optimized and operating efficiently, well beyond given governmental standard" were untrue).

Altogether, VW Germany directed recalls that were carried out through sixty Texas dealerships and affected 23,319 Texas vehicles. 1.CR.1413-16.[4] Audi Germany directed recalls that were carried out through twelve Texas dealerships and affected at least 486 Texas vehicles. 2.CR.298, 2138-42, 2150, 2233-34. This widespread tampering shows that VW Germany and Audi Germany "continuously and deliberately exploited the [forum state's] market." *Searcy*, 496 S.W.3d at 68 (quoting *Keeton*, 465 U.S. at 781).

VW Germany reimbursed VW America, which reimbursed Texas dealers, $1,233,609 for the recall tampering. 1.CR.1627-30; *see also* 1.CR.1448, 1454 (admitting to reimbursing VW America for recall actions performed within Texas on the Start Function and Steering Wheel Angle Recognition Function), 1486-87. Audi Germany reimbursed $29,590. 2.CR.1724. Those reimbursements were required under the Importer Agreements. The agreements state that VW Germany and Audi

[4] In discovery responses, VW Germany admitted it caused the installation of the software on 23,319 Texas vehicles and that it paid the costs of 23,262 installations. *Compare* 1.CR.1630, *with* 1.CR.1413-16.

Germany "shall reimburse to [VW America] the warranty costs it has expended . . . including recall costs . . . and service action costs." 1.CR.1486; 2.CR.2178.

By maintaining relationships with the vehicles that they sold in Texas—particularly by retaining control over the recall and warranty activities for those vehicles, which gave rise to the claims in this litigation—VW Germany and Audi Germany "created 'continuing obligations' between [themselves] and residents of the forum." *Burger King*, 471 U.S. at 476; *see Ford*, 141 S. Ct. at 1023 (considering relevant Ford's maintenance and repair services, which "foster[ ] an ongoing relationship between Ford and its customers"); *Moncrief*, 414 S.W.3d at 151; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985) (per curiam) (holding that specific jurisdiction was proper under a stream-of-commerce theory where the foreign manufacturer, among other things, provided "after-sales service" to its customers). Where, as here, the defendant has "deliberately" engaged in significant activities within a state, he "manifestly has availed himself of the privilege of conducting business there." *Burger King*, 471 U.S. at 475-76. And because such activities are shielded by the "benefits and protections" of the forum's laws, it is "presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 476.

2. The "targeting" standard is not a forsake-all-others standard.

Neither the Supreme Court's plurality opinion in *Nicastro* nor this Court's precedent requires that VW Germany's or Audi Germany's Texas contacts be set aside just because they were replicated across the country. The court of appeals majority acknowledged that "the evidence in the record establishes that VW Germany

directed recall-tampering conduct toward the United States as a whole," but it held that Texas courts lacked jurisdiction because that conduct was not uniquely directed toward Texas. *Volkswagen*, 2020 WL 7640037, at *5. It acknowledged the same for Audi Germany. *Id.* at *7. That holding rested on an overbroad reading of the plurality opinion in *Nicastro*. *See id.* at *5-7.

As an initial matter, the *Nicastro* plurality is not binding authority. The concurrence provides the "narrowest grounds" for the judgment and, thus, controls. *Marks v. United States*, 430 U.S. 188, 193 (1977); *Nicastro*, 564 U.S. at 887-93 (Breyer, J., joined by Alito, J., concurring); *see also, e.g.*, *Zoch v. Magna Seating (Germany) GmbH*, 810 F. App'x 285, 290 (5th Cir. 2020) ("Justice Breyer simply applied existing Supreme Court precedent to the specific facts presented in that case."); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014); *Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy*, 508 S.W.3d 569, 580 (Tex. App.—El Paso 2016, no pet.) ("*Nicastro* is controlled by the concurring opinion.").

But not even the plurality opinion in *Nicastro* leads to VW Germany's and Audi Germany's preferred outcome. The plurality stressed that the defendant did "not have a single contact with New Jersey short of the machine in question ending up in this state." 564 U.S. at 886. The fortuitous arrival of a product in a State is a "situation[] far different from a worldwide based manufacturer who creates a United States subsidiary to sell product wherever the product can be sold, and which in fact succeeds to a significant extent in Texas." *Semperit*, 508 S.W.3d at 580. And it is *especially* distinct from the situation here—where not only were thousands of tampered cars *sold* in Texas, but also VW Germany and Audi Germany later reached into

Texas where those cars had been sold to tamper a second time with those cars. Because VW Germany's and Audi Germany's "purposeful contacts with [the State]" satisfy purposeful availment, nothing in the *Nicastro* plurality suggests that Texas's ability to hold those defendants to account should be stripped because they reached into *other* States for post-sale tampering, too. *See* 564 U.S. at 886.

VW Germany and Audi Germany "targeted the forum," *id.* at 882, when they directed VW America to install tampering software on previously sold cars including those they knew to be on the road in Texas. The majority below recognized that the evidence showed *both* that VW Germany and Audi Germany "*directed* VW America to install the tampering software on vehicles in the United States" *and* that VW Germany and Audi Germany were "aware that some of the vehicles included in its nationwide recall would be located in Texas." *Volkswagen*, 2020 WL 7640037, at *5-8 (emphasis added). That adds up to purposeful direction to, or targeting of, Texas.

This Court has cited the *Nicastro* plurality opinion, but not as support for narrowing the test for purposeful jurisdiction. Post-*Nicastro* cases like *Luciano*, *TV Azteca*, and *Moki Mac*, have continued to apply the *Asahi* plurality's reasoning. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality op.). In the recent *Luciano* decision, the Court again confirmed that it "[f]ollow[s] Justice O'Connor's plurality opinion in *Asahi*" to "require additional conduct evincing an intent or purpose to serve the market in the forum State, whether directly or indirectly." *Luciano*, 625 S.W.3d at 10 (internal quotations omitted). Likewise, in *TV Azteca*, the Court quoted *Asahi* for the test that "'additional conduct' must

demonstrate 'an intent or purpose to serve the market in the forum State.'" 490 S.W.3d at 46 (quoting *Asahi*, 480 U.S. at 112); *see Moki Mac*, 221 S.W.3d at 577 (same).

This Court has never held that a corporation must target Texas to the exclusion of other States in order to be subject to Texas courts' jurisdiction. In fact, it just held the opposite in *Luciano*. 625 S.W.3d at 10. There, this Court rejected the nonresident defendant's argument that its extensive contacts with another State made specific jurisdiction in Texas improper. *Id.* The Court explained that "the contacts an entity forms with one jurisdiction do not negate its purposeful contacts with another." *Id.* (citing *Keeton*, 465 U.S. at 779-80). The Court elaborated that "notwithstanding the contacts [defendant] claims to have with Connecticut, its conduct in Texas resulted not in a mere dribble, but in a stream of activity that allowed it to enjoy the benefits of doing business in this state." *Id.* (footnote omitted). The Court considered whether Texas had been "target[ed]," and found that it had been—not because Texas was targeted to the exclusion of other States, but because the facts of the case were unlike a situation where a "defendant merely foresees his product ending up there." *Id.* at 13 (citing *Nicastro*, 564 U.S. at 84; *TV Azteca*, 490 S.W.3d at 46).

The Court's approach in *Luciano* is consistent with its past jurisprudence. *See, e.g.*, *TV Azteca*, 490 S.W.3d at 46-47 (requiring that alleged facts show "the seller intended to serve the Texas market" without referencing intent to serve other States' markets); *Moki Mac*, 221 S.W.3d at 577 (same). In *Spir Star*, the Court found that personal jurisdiction exists when a defendant "intentionally targets Texas as the marketplace for its products," 310 S.W.3d at 871, but did nothing to suggest that

such intentional targeting of Texas requires *exclusive* targeting of Texas. To the contrary, *Spir Star* favorably cited a Sixth Circuit decision that held the opposite—that a foreign manufacturer's distribution agreement with a United States distributor for a defined territory that included all fifty States constituted the additional conduct needed to satisfy purposeful availment in one of those States. *Id.* at 875-76 (citing *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 533-34 (6th Cir. 1993)).

Moreover, VW Germany's and Audi Germany's approach conflicts with a parallel Minnesota decision and would place Texas at a comparative disadvantage in its ability to hold these entities accountable for post-sale tampering within its borders. *See Swanson*, 2018 WL 6273103, at *4. There, the Minnesota court unequivocally rejected VW Germany's and Audi Germany's forsake-all-others understanding of *Nicastro*: "Volkswagen . . . argues that minimum contacts do not exist because the state failed to demonstrate that the company purposefully directed its activities to Minnesota in particular, rather than to the United States generally. We disagree." *Id.*

While a nationwide distribution network *alone* would not suffice under the *Nicastro* plurality opinion, this Court has indicated that a nationwide distribution network is properly considered among other jurisdictional facts. *See TV Azteca*, 490 S.W.3d at 44-45 & nn.9-10 (citing with approval cases that found specific jurisdiction based in part on nationwide broadcasts); *see also Swanson*, 2018 WL 6273103, at *4 (finding purposeful availment based on Volkswagen directing its U.S. affiliates in Minnesota, at ten or more Volkswagen dealerships in Minnesota, to install defeat devices on "more than 11,500 tampered vehicles in Minnesota"); *In re Suboxone Antitr. Litig.*,

No. 13-MD-2445, 2017 WL 4642285, at *4 (E.D. Pa. Oct. 17, 2017) (finding contacts, including a national distribution network, sufficient for personal jurisdiction); *State ex rel. Atty. Gen. v. Grand Tobacco*, 871 N.E.2d 1255, 1264 (Ohio Ct. App. 2007) (same). A factor that alone would not establish purposeful availment is nevertheless "relevant to the analysis and should not be disregarded." *Luciano*, 625 S.W.3d at 13.

VW Germany's and Audi Germany's continuing relationship with vehicles that had been sold in Texas, and specifically their direction of recall tampering on vehicles known to be in Texas, constitutes "purposeful" rather than "isolated or fortuitous" contacts with Texas—regardless of whether VW Germany and Audi Germany had similar contacts with other fora. "To hold otherwise is to hold that by targeting every state, a foreign manufacturer is not accountable in any state." *Volkswagen*, 2020 WL 7640037, at *10 (Triana, J., dissenting). That is, "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Nicastro*, 564 U.S. at 884 (plurality op.). The majority erred when it concluded that VW Germany's and Audi Germany's tortious acts across the nation immunized them from suit here.

B. The asserted contacts are those of VW Germany and Audi Germany, not the unilateral activities of other parties.

VW Germany's and Audi Germany's own conduct—and not the unilateral activity of a third party or the plaintiff—supports finding purposeful availment. *See Burger King*, 471 U.S. at 475; *Moncrief*, 414 S.W.3d at 152; *see also Moki Mac*, 221 S.W.3d at 575-76 (explaining that the specific jurisdiction analysis focuses "on the relationship among the defendant, the forum and the litigation").

1. VW Germany's and Audi Germany's contacts cannot be attributed to VW America alone.

The U.S. Supreme Court recently reiterated:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Ford, 141 S. Ct. at 1027 (emphasis added) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

And this Court has explained that "purposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)." *Spir Star*, 310 S.W.3d at 874. "[U]sing a distributor-intermediary" to take advantage of the Texas market "provides no haven from the jurisdiction of a Texas court." *Id.* at 871; *see also Luciano*, 625 S.W.3d at 9-10; *Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 71-72 (Tex. 2016) (finding personal jurisdiction over a parent company for directing a transaction that was consummated by a subsidiary).

The facts of *Spir Star* are analogous to the facts presented here: The Court found personal jurisdiction over a German hose manufacturer whose subsidiary in Houston distributed its product in Texas, even though title to the products passed in Germany. *See* 310 S.W.3d at 876. The Court explained that the defendant "reaps substantial economic gain through its sales to [the subsidiary], its largest distributor by

far," and that "specific jurisdiction over foreign manufacturers is often premised on sales by independent distributors." *Id.* at 875.

Similarly, in *Luciano*, the Court found personal jurisdiction in a products liability suit over a nonresident defendant that manufactures and sells insulation products. While the nonresident defendant was a Connecticut corporation with its principal place of business and sole office in that State, its activities in Texas—including use of a Texas distribution center, retention of a local sales representative whose job was to "find customers," and selling to Texas-based installers—in "totality" "evince[d] an intent to 'serve the market.'" *Luciano*, 625 S.W.3d at 13-14 (citing *Asahi*, 480 U.S. at 112). The Court acknowledged that the defendant had "placed, processed, and accepted all sales in Connecticut, not Texas," but held that "where title passed is 'beside the point' in the specific-jurisdiction analysis." *Id.* at 11 (quoting *Spir Star*, 310 S.W.3d at 876; *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988)).

And in *Cornerstone*, the Court found personal jurisdiction over a parent company who created and funded a subsidiary to acquire Texas hospitals because these acquisitions were part of an overarching transaction initiated by the parent company. 493 S.W.3d at 72. Likewise, the transactions at issue here—the recall tampering—stemmed from the activity of the parent company itself because VW Germany and Audi Germany initiated the recalls and directed VW America's actions in carrying out the specific tasks required by the recall.

The *TV Azteca* Court found personal jurisdiction in a defamation suit, regardless of the parent company using a distributor intermediary, because the parent company

itself made intentional efforts to serve the Texas market and benefited from its TV signals that strayed from Mexico into Texas. 490 S.W.3d at 49. These efforts included producing programs in Texas offices, selling ads to Texas businesses, and making substantial efforts to increase popularity in Texas. Likewise, here, it was no accident that VW Germany and Audi Germany have an active role in VW America's marketing and sales planning generally, and the lead role in the recall information disbursed to customers and dealers specifically. VW Germany and Audi Germany always intended to benefit from the Texas market and they did so by profiting first from the sale of the affected vehicles in Texas and then by saving money on warranty repairs via recall tampering.

Those holdings did not rely on a veil-piercing theory, and it is not necessary for Texas to rely on such a theory here. The Texas contacts outlined above are VW Germany's and Audi Germany's own contacts, not VW America's alone. *See Swanson*, 2018 WL 6273103, at *5 (Volkswagen "acting through its affiliates, *itself* installed defeat devices in used vehicles in Minnesota"). The nature of the entities' relationship here is relevant insofar as the Importer Agreements and the companies' relative roles thereunder elucidate the extent of VW Germany's and Audi Germany's control over the specific recall activities in Texas. *See id.* The majority below erred in holding that these contacts were attributable solely to VW America. *Volkswagen*, 2020 WL 7640037, at *5 ("[T]he recall-tampering activities relied on by the State for purposes of specific personal jurisdiction are more properly characterized as the activities of VW America.").

The State has demonstrated that VW Germany and Audi Germany directed VW America to carry out the conduct that occurred in Texas, giving rise to the contacts in this case. *See Retamco*, 278 S.W.3d at 338 (stating that this Court considers both "direct acts within Texas" and "conduct outside Texas" to determine whether "the defendant could reasonably anticipate being called into a Texas court") (quoting *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002)). This new tampering software had been developed by VW Germany, 1.CR.1408, 1449, 1584, and tested for Audi compatibility by Audi Germany, 2.CR.2203-04. VW America avers that it knew nothing of the new tampering software that was installed on existing vehicles in Texas during the recalls (or of the original tampering during manufacturing). 1.CR.1533-36. The record reflects that, consistent with its Importer Agreements, VW America carried out the software installations on behalf of VW Germany and Audi Germany, in complete deference to their instructions. *Id.* While dealership personnel clicked the button to download the recall-tampering software, VW Germany and Audi Germany cannot claim that they unilaterally did so when parent company VW Germany "itself set the system up this way." *GoDaddy*, 623 F.3d at 428 (explaining that the defendant "cannot now point to" customers in the forum "and tell us, 'It was all their idea'").

While the court of appeals majority acknowledged the indirect-availment principle, it did not expressly address whether VW Germany's and Audi Germany's control of VW America's recall activities constituted indirect purposeful availment. *Volkswagen*, 2020 WL 7640037, at *6, *8. Instead, it pivoted back to its conclusion that VW Germany's and Audi Germany's directives under the Importer Agreement

were not "specifically directed at Texas versus being specifically directed at the United States as a whole." *Id.* at *6 (citing *Nicastro*, 564 U.S. at 885 (plurality opinion)). That premise, as already discussed, should be rejected.

2. VW Germany's and Audi Germany's contacts cannot be attributed to unilateral activities of the plaintiff.

The State did not unilaterally hale VW Germany and Audi Germany into Texas to conduct recall tampering. *Cf. Searcy*, 496 S.W.3d at 68 ("The happenstance of a plaintiff's connection to Texas, then, will not alone suffice to confer specific jurisdiction over a defendant who merely deals with a Texas resident during the course of some unrelated endeavor.").

Several cases from the U.S. Supreme Court and this Court exemplify unilateral activity by the plaintiff. In *World-Wide Volkswagen*, the Court found no jurisdiction over a nonresident automobile distributor whose only tie to the State was a customer's unilateral decision to drive there. 444 U.S. at 299. In *Kulko*, a child support case, the Court found no jurisdiction over a nonresident ex-husband whose former spouse had unilaterally moved to the forum state. *Kulko v. Superior Ct. of Cal., City & County of San Francisco*, 436 U.S. 84, 93-94 (1978). In *Hanson*, the Court found no jurisdiction over a nonresident trustee when the only connection was the settlor's unilateral decision to exercise her power of appointment in the forum state. 357 U.S. at 251-52. In *Michiana*, a Texas resident initiated contact with a recreational vehicle dealer by placing a telephone order for one such vehicle and the dealer's only contacts with Texas were receiving the telephone call and transferring the vehicle to a shipper that the buyer had designated to transport the vehicle to Texas. 168 S.W.3d

at 784, 786-87. There, the Court concluded that the dealer "had no say in the matter" and had not purposefully availed itself of the Texas forum. *Id.* at 787.

In contrast to those cases, the recall tampering transactions with Texas residents were initiated by VW Germany and Audi Germany and cannot be attributed to unilateral activity by the State or its residents. The State has asserted "matter[s] of physical fact" of the defendants' actual contacts with Texas and has not merely relied on the merits of its claim that VW Germany and Audi Germany caused injury to the Texas public, *see id.*, 168 S.W.3d at 791, or that they "kn[ew] that the brunt of the injury will be felt by a particular resident in the forum state," *Searcy*, 496 S.W.3d at 69 n.35.

While directing a tort to the forum "cannot displace the purposeful availment inquiry," several courts have recognized that a state's regulatory interests do matter for purposes of specific jurisdiction. *Moncrief*, 414 S.W.3d at 152 (explaining that a "forum's interest in protecting against torts may operate to enhance the substantiality of the connection between the defendant and the forum"); *Keeton*, 465 U.S. at 776 (explaining that a state has "especial interest in exercising judicial jurisdiction over those who commit torts within its territory" because "torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection"); *Travelers Health Ass'n v. Va. ex rel. State Corp. Comm'n*, 339 U.S. 643, 648 (1950) (recognizing a "state's interest in faithful observance" of its regulatory scheme by nonresidents); *see also TV Azteca*, 490 S.W.3d at 43 ("There is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state.").

Indeed, the Court has explained that "a state's regulatory interest may establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Guardian Royal Exch. Assur., Ltd. v. Eng. China Clays, P.L.C.*, 815 S.W.2d 223, 229 (Tex. 1991). The *Nicastro* plurality suggested the same, stressing that "[a]s a general rule," the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," but noting possible "exceptions, say, for instance, in cases involving an intentional tort." 564 U.S. at 877-78. The *Nicastro* plurality further expounded that "in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws," but it did not further probe this area because this consideration was not applicable "[i]n products-liability cases like this one." *Id.* at 880.

In sum, it is not any unilateral action by Texas or its residents that subject VW Germany and Audi Germany to personal jurisdiction in the State's courts—but rather the defendants' own conduct in directing recall tampering on cars in the State. That the nature of the defendants' conduct was tortious and violated a state law bolsters the reasonableness of subjecting the defendants to the jurisdiction of the Texas courts.

C. VW Germany and Audi Germany profited substantially from their contacts in Texas.

In addition to sidestepping the indirect-availment question, the majority failed to address the third prong of the Court's purposeful-availment analysis: that the defendant has sought "some benefit, advantage, or profit by availing itself of the

jurisdiction." *Moncrief*, 414 S.W.3d at 151. This factor also supports a finding of jurisdiction.

VW Germany and Audi Germany have profited from sales in the Texas market—the second biggest market for the affected vehicles in the United States. 1.CR.1617-18. VW Germany earned gross revenues of $413,532,076 from the sales of the vehicles that were subsequently recalled for further tampering in Texas. 1.CR.1451. Audi Germany earned $12,348,922 in gross revenue from sales of these vehicles in Texas. 2.CR.2148.

VW Germany and Audi Germany also benefited financially from the recall tampering itself. When questioned, a corporate representative for VW America testified that the original tampering software did not work as intended. 1.CR.1525-26, 1530-31. This failure caused a cascade of events that ultimately cracked the vehicle's diesel particulate filter. 1.CR.1530. These filters cost over one thousand dollars each and were covered by warranty claims. 1.CR.1531-32. VW Germany and Audi Germany collectively saved "up to $525,000 per month" on warranty claims that *they*—not VW America—were responsible for funding. 1.CR.1621; 2.CR.1718. While that figure is derived from nationwide warranty costs, Texas was the second-biggest market for the affected cars in the United States. 1.CR.1451, 1617-18; 2.CR.2148.

Based on those figures, VW Germany and Audi Germany derived a clear financial benefit both from initial sales and from avoiding mounting warranty costs for Texas cars. 1.CR.1530-32, 1621; *see TV Azteca*, 490 S.W.3d at 34-35. The dissent below was correct to conclude that the defendants "undeniably profited by availing themselves of the Texas market." *Volkswagen*, 2020 WL 7640037, at *10 (Triana, J.,

dissenting). A corporation that not only sells cars in Texas through a distributor but also later reaches into Texas to direct and profit from further tampering with those very cars can claim no surprise when it is sued in Texas.

II. Exercising Personal Jurisdiction over VW Germany and Audi Germany Comports with Traditional Notions of Fair Play and Substantial Justice.

"Once minimum contacts have been established, we must still consider whether, for other reasons, exercising jurisdiction over the nonresident defendant would nevertheless run afoul of 'traditional notions of fair play and substantial justice.'" *Luciano*, 625 S.W.3d at 18 (quoting *Int'l Shoe*, 326 U.S. at 316). "Only in rare cases . . . will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *Spir Star*, 310 S.W.3d at 878 (quoting *Guardian Royal*, 815 S.W.2d at 231); *see also Moncrief*, 414 S.W.3d at 154-55. The dissent below correctly recognized that exercising jurisdiction would comport with traditional notions of fair play and substantial justice. *Volkswagen*, 2020 WL 7640037, at *13; *see Int'l Shoe*, 326 U.S. at 316.

To determine whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice, courts evaluate: (1) the defendant's burden; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in convenient and effective relief; (4) the broader judicial system's interest in efficient resolution of controversies; and (5) the shared policy interests of other nations or states. *Spir Star*, 310 S.W.3d at 878.

The burden to VW Germany and Audi Germany is not undue. As the Court recently reaffirmed in *Luciano*, "exercis[ing] the privilege of conducting activities within a state" "may give rise to obligations, such as responding to suit, which cannot be said to be undue." 625 S.W.3d at 19 (quoting and citing *Int'l Shoe*, 326 U.S. at 319). "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Asahi*, 480 U.S. at 114. Distance alone ordinarily cannot defeat jurisdiction. "[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Spir Star*, 310 S.W.3d at 879. Moreover, the burden on VW Germany and Audi Germany here is minimized because they are represented by the same attorneys who also represent VW America in this suit. Overall, while resolving the dispute in Texas may be inconvenient to VW Germany and Audi Germany, the State has established that minimum contacts exist and that VW Germany and Audi Germany could "reasonably anticipate" being haled into Texas courts. *World-Wide Volkswagen*, 444 U.S. at 297.

On the other side of the scale, Texas has a strong interest in adjudicating this dispute. "[I]t is beyond dispute that [a forum] has a significant interest in redressing injuries that actually occur within the State." *Moncrief*, 414 S.W.3d at 152 (second alteration in original) (explaining that "torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort")

(citing *Keeton*, 465 U.S. at 776); *see also Luciano*, 625 S.W.3d at 19 ("Texas has a strong interest in exercising jurisdiction over controversies arising from injuries sustained from hazardous chemicals that are purposefully brought into the state and are installed in residential homes and commercial buildings."); *Spir Star*, 310 S.W.3d at 879; *Guardian Royal*, 815 S.W.2d at 229 (holding that while "a state's regulatory interest" alone does not establish jurisdiction, it "may establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."). The Court recently reaffirmed in *Luciano* that where—as here—the State passes a law that forms the source of the claim, it has "demonstrated a special interest in protecting its citizens from the sort of activity" alleged. *Luciano*, 625 S.W.3d at 19 ("[B]y virtue of the Legislature's enactment of the Deceptive Trade Practices Act, the statutory source of one of the Lucianos' claims, Texas has demonstrated a special interest in protecting its citizens from the sort of activity alleged here." (citing *Siskind*, 642 S.W.2d at 437)).

Consideration of the plaintiff's interest in convenient and effective relief also supports exercising jurisdiction here. Because VW America claims it had no knowledge of the tampering efforts, that leaves VW Germany and Audi Germany to answer for the injuries caused by the recall tampering. 1.CR.1436; 2.CR.1533-34.

And crucially, Texas is the only forum where these state-law claims may be brought. *See* Tex. Water Code § 7.105(c) (directing venue within Texas for enforcement of state environmental laws and regulations, including the Texas Clean Air Act). The claims are for violations of state statutes and rules and are based on VW Germany's and Audi Germany's roles in tampering with Texas cars when they were

brought into Texas dealerships for service. 1.CR.394-95; 1.Supp.1.CR.3-5, 8-12; 2.CR.1373-75. It is of no moment that VW Germany and Audi Germany have already paid a large sum to settle a different set of claims with the federal government, and the majority below erred in considering that settlement. *Volkswagen*, 2020 WL 7640037, at *2, *6, *9. VW Germany and Audi Germany obtained no release from state-law claims, and the unprecedented nature of the state-law claims flows from VW Germany's and Audi Germany's "unusual and perhaps unprecedented" conduct. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1210 (9th Cir. 2020) (rejecting post-sale preemption argument).

Regarding the remaining factors, the State's claims against VW America will be litigated in Texas, and it promotes judicial economy to litigate the State's claims against all defendants in a single court—particularly because VW Germany, Audi Germany, and VW America share counsel. And finally, it is in the shared interests of the United States and other nations for defendants to be amenable to trial in jurisdictions where they commit deliberate wrongful acts—and not to create a jurisdictional loophole that allows defendants to evade liability by committing wrongful acts in multiple jurisdictions.

Prayer

The Court should grant the petitions, reverse the court of appeals' judgments, and render judgments denying VW Germany's and Audi Germany's special appearances.

Respectfully submitted.

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