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SUPREME COURT OF TEXAS
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No. ___

In the Supreme Court of Texas

THE STATE OF TEXAS,
Petitioner,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT,
Respondent.

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

PETITION FOR REVIEW

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Statement of the Case

Nature of the Case:	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. CR.1303–31. This petition concerns whether the trial court has personal jurisdiction over Volkswagen Aktiengesellschaft ("VW Germany"), which directed the installation of emissions-defeating software into vehicles recalled in Texas.
Trial Court:	353rd Judicial District Court, Travis County The Honorable Tim Sulak
Disposition in the Trial Court:	Following jurisdictional discovery and argument, the trial court denied VW Germany's special appearance. CR.1999.
Parties in the Court of Appeals:	VW Germany was appellant. 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. *Volkswagen Aktiengesellschaft v. State*, Nos. 03-19-00453-CV, 03-20-00022-CV, 2020 WL 7640037, at *9 (Tex. App.—Austin Dec. 22, 2020) (mem. op.) (Rose, J., joined by Smith, J.); *see also id.* (Triana, J., dissenting).

Statement of Jurisdiction

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

Issue Presented

On two separate occasions, VW Germany directed the installation in its "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 directed recall tampering activities on over 23,000 vehicles that were in-use in Texas. VW Germany profited from the recall tampering, which allowed it 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.

To the Honorable Supreme Court of Texas:

VW Germany was the architect, two times over, of a scheme to defeat vehicle emission standards by installing tampering software in its "clean diesel" vehicles. The first round of tampering, which took place before the vehicles were sold, is not at issue in this petition. Rather, the live claims in this case concern the second round of tampering, in which vehicles that had already been sold in Texas were recalled so that *further* tampering software could be installed.

VW Germany directed the recall-tampering activities down to the detail, having retained significant day-to-day control over the activities of its subsidiary VW America under the terms of its Importer Agreement with that entity. VW Germany developed the tampering software, delivered it electronically to local dealership platforms, 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 benefited financially because the recall tampering reduced certain warrantied hardware failures for which VW Germany was financially responsible. Because the recall tampering activities were carried out on cars that had already been sold in Texas, VW Germany was on notice that it was reaching into the Texas market—not just the United States market in the abstract—at the time it undertook to direct those recall activities.

VW Germany purposefully availed itself of the Texas market, and its 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 is insulated from the jurisdiction of Texas courts simply because

it 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 failing to give 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 from its contacts with Texas.

As the dissent below correctly recognized, VW Germany's role in directing tampering on cars recalled in Texas satisfies both the "minimum contacts" and "fair play and substantial justice" prongs of the personal jurisdiction test. This Court should grant the petition, reverse the court of appeals' judgment, and render judgment denying VW Germany's special appearance.

Statement of Facts

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

I. Factual Background

In 2006, VW Germany designed software for its "clean diesel" vehicles to defeat American emissions standards. CR.1405-06. 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. *Id.* 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. CR.1530. The filter was "an expensive part" to replace, costing "over a thousand dollars," and was covered by the vehicle's warranty. CR.1531–32. Vehicles equipped with this software began developing hardware failures in 2012 because they were not switching to street mode as intended. CR.1407. As a result, VW Germany's warranty costs for filters were "up to $525,000 per month." CR.1621.

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. CR.1408-09, 1449. 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. CR.1408-09. Beginning in November 2014, VW Germany directed the installation of the new tampering software on vehicles that were already on the road in Texas. CR.1447; CR.1523.

To carry out the recall tampering, VW Germany used its power under its Importer Agreement to dictate the actions of its subsidiary VW America. CR.1484-86. The Importer Agreement gives VW Germany a say in every important business decision for VW America—often, the final say. VW Germany played an active role in developing a Texas customer base and profited from selling products to Texas residents. *See* CR.1472 (requiring VW America to "exhaust fully all market opportunities" in the United States); *see also* CR.1744–45 (stating Texas's "importance" in the United States market). The Agreement requires VW Germany's assent for

"annual sales objectives and delivery schedules" and creates a system to collect sales data that includes individual dealer data. CR.1480-81, 1564-66. That means VW Germany would have been aware of the cars that had been sold in Texas specifically.

With respect to warranty and recall activities, the Importer Agreement provides that VW Germany will both direct and pay for warrantied repairs, including "recall costs." CR.1484-86. VW Germany retains authority to "require campaign inspections and/or corrections whenever it deems such inspections and/or corrections to be necessary and may direct such campaigns to be carried out." CR.1484-85. Further, "[a]ll maintenance work and/or repairs carried out shall be in accordance with [VW Germany's] instructions, guidelines and/or procedures." *Id.*

VW Germany admits that it directed the recall campaigns carried out by VW America—exactly as envisioned in the Importer Agreement—with respect to 60 Texas dealerships and 23,319 Texas vehicles. CR.1413-16. 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. 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. CR.1466, 1564, 1930.
- VW Germany provided dealers in Texas with instructions for installing the new software. CR.1456.
- VW Germany developed information and materials for VW America, explaining the problems addressed by the recalls. CR.1587-92.

- VW Germany provided examples of letters to send to Texas customers, and provided false information that VW America included in letters to the owners of recalled vehicles. CR.1413-16, 1518.
- VW Germany provided a list of every vehicle included in the recall campaigns—including vehicles in Texas. CR.1457, 1581.
- VW Germany paid for at least 23,262 installations that occurred in Texas, reimbursing Texas dealers $1,233,609. CR.1627-30; *see also* CR.1486-87.
- VW Germany tracked the progress of the recall campaigns. 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. CR.1530-32, 1621.

The scale of the recall-tampering activities in Texas—23,319 installations of tampering software—reflects the scale of VW Germany's marketing and sale of the affected vehicles to Texas residents through VW America and its franchise dealers. CR.1472, 1744-45.

II. Procedural Background

Texas sued VW Germany, as well as VW America and other related entities, for violations of state environmental statutes and rules. 1.Supp.CR.3-5, 8-12, 17-18; CR.394-95 (amended petition adding VW Germany). 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.Supp.CR.3-6.

This litigation is based on state-law claims that are separate from the federal criminal claims to which VW Germany pleaded guilty, CR.1401-03, 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. CR.1131-32. 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. *Id.* The trial court's summary-judgment rulings are not before the court in this appeal.

Rather, the only issue in this petition is VW Germany's special appearance. CR.1281-83, 1332. After taking evidence and conducting a hearing, RR.1-53, the trial court denied VW Germany's special appearance, CR.1999. VW Germany filed an interlocutory appeal. CR.2000.

The court of appeals reversed and rendered judgment dismissing the claims against VW Germany, finding that VW Germany "did not purposefully avail [itself] of the privilege of conducting activities in Texas."[1] 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." *Id.* at *5 (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

[1] The court of appeals "consolidated for consideration" VW Germany's appeal and Audi Germany's similar appeal. *Volkswagen*, 2020 WL 764003,7 at *1. Texas files a separate petition for review in that case.

America, not VW Germany," *id.*, and did not directly address whether VW 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 "cannot evade personal jurisdiction in Texas merely because the recall-tampering activities, which [it] 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 "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 financially benefited from its 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 is consistent with "traditional notions of fair play and substantial justice." *Id.* at *13.

Summary of the Argument

VW Germany satisfies the "minimum contacts" prong of this Court's personal-jurisdiction analysis, having purposefully availed itself of the Texas forum by: instituting formal and informal recalls to facilitate the installation of new tampering software on vehicles in Texas; electronically distributing the new tampering software for installation onto 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 benefitting 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 purposefully reached into the Texas market to tamper with Texas vehicles in a manner neither isolated nor fortuitous when it required market exhaustion, tracked sales of each vehicle, and then directed recall tampering on 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 merely 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 give effect to 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 give due consideration to the financial gain to VW Germany, not just from the original sales of cars in Texas, but also from the recall-tampering activities themselves.

Exercising jurisdiction over VW 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 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).

Argument

Texas's long-arm statute extends jurisdiction to the limits of due process. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016). Due process is satisfied here because VW Germany has "minimum contacts" with the State and the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (quoting *Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)). VW Germany's contacts give rise to specific jurisdiction in Texas courts because the recall-tampering claims arise from and relate to VW Germany's contacts with Texas. *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575–76 (Tex. 2007); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005).

I. The Court Should Grant Review and Hold That VW Germany Has Minimum Contacts with Texas.

A defendant "establishes minimum contacts with a forum when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013) (quoting *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009)).[2] 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. The Court considers three factors,

[2] 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 by Swanson v. Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *4 (Minn. Ct. App. Dec. 3, 2018) (mem. op.).

whether: (1) the forum contacts are "purposeful" as opposed to "random, fortuitous, or attenuated"; (2) the forum contacts are the defendant's, as opposed to the "unilateral activity of another party or 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. Those errors warrant review.

A. Foreign defendants may not evade jurisdiction for their purposeful contacts with Texas by also directing activities to other States.

When VW Germany reached into the Texas forum 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. Rather, the recall-tampering activities were done on vehicles that VW Germany knew to be present in Texas. VW Germany knew this because it generated a list of each vehicle affected by the recall, including Texas vehicles, CR.1457, 1581, and because VW Germany required VW America to exhaust the U.S. market, CR.1472, and regularly provide sales data, including Texas sales data, to VW Germany, CR.1564. In total, VW Germany directed recalls that were carried out through 60 Texas dealerships and impacted 23,319 Texas vehicles. CR.1413-16. By maintaining a relationship with the vehicles that it sold in Texas—particularly by retaining control over the recall and warranty activities for those vehicles, which gave rise to the claims in this lawsuit—VW Germany "created 'continuing obligations' between [it]self and residents of the forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Moncrief*, 414 S.W.3d at 151.

The majority acknowledged that "the evidence in the record establishes that VW Germany directed recall-tampering conduct toward the United States as a whole" but held that Texas courts lacked jurisdiction because that conduct was not uniquely directed toward Texas. *Volkswagen*, 2020 WL 7640037, at *5. 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 precedent. *See Nicastro*, 564 U.S. at 910 (Ginsberg, J., dissenting). Under *Marks v. United States*, 430 U.S. 188, 193 (1977), the concurrence provides the "narrowest grounds" for the judgment, and therefore controls. *See Nicastro*, 564 U.S. at 887 (Breyer, J., concurring, joined by Alito, J.); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014). The concurrence applied the existing legal framework without change, explaining that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" to establish minimum contacts. *Id.* (citing opinions in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987)). Here, there was not a single, isolated sale but over 23,000 recalls of known Texas vehicles.

Even if it applies, the *Nicastro* plurality's reasoning does not support the decision below. The plurality rejected a New Jersey court's exercise of personal jurisdiction over a nonresident defendant where the defendant had an "intent to serve the U.S. market" but "[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 (plurality op.). To avoid allowing the "stream-of-commerce metaphor" to "supersede" traditional due-process

considerations, the plurality stated that "it is petitioner's purposeful contacts with [the State], not with the United States, that alone are relevant." *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 v. Ruiz*, 490 S.W.3d 29, 44-45 & nn.9–10 (Tex. 2016). Texas's claims easily satisfy the *Nicastro* plurality's standard: They concern recall tampering on thousands of cars already known to be in Texas—not the fortuitous arrival of a handful of products in Texas via the stream of commerce. VW Germany "targeted the forum," *id.* at 882, when it directed VW America to install tampering software on a list of previously sold cars including those it knew to be on the road in Texas. The majority recognized that the evidence showed *both* that "VW Germany *directed* VW America to install the tampering software on vehicles in the United States" *and* that VW Germany "was aware that some of the vehicles included in its nationwide recall would be located in Texas," *Volkswagen*, 2020 WL 7640037, at *5-6 (emphasis added). Those pieces add up to purposeful direction to Texas, not "[m]ere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state." *Searcy*, 496 S.W.3d at 68.

This Court has never applied *Nicastro* to a fact pattern like this one—where there are extensive contacts with Texas but the defendant targeted its activities toward multiple (or all) States. But other instances when it has applied *Nicastro* are consistent with the State's view. *See TV Azteca*, 490 S.W.3d at 34 (considering whether Texas courts had jurisdiction in a defamation suit over "Mexican citizens

who broadcast television programs on over-the-air signals that originate in Mexico but travel into parts of Texas"); *Searcy*, 496 S.W.3d at 62 (considering whether Texas courts had jurisdiction in a suit for tortious interference).

The majority's repeated references to VW Germany's federal settlement suggests that it may have been viewing those proceedings as preclusive of Texas's exercise of personal jurisdiction. *Volkswagen*, 2020 WL 7640037 at *2, *6, *9. But that question goes to the merits, and this Court has "cautioned" against "determin[ing] the underlying merits in order to answer the jurisdictional question." *Old Republic*, 549 S.W.3d at 562.

VW Germany's continuing relationship with vehicles that had been sold in Texas, and specifically its 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 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 tortious acts across the nation immunized it from suit here.

B. *Spir Star* confirms that purposeful availment may be indirect.

The majority also erred when it held VW Germany was immunized from suit in Texas because the tortious acts in question were most directly attributable to its subsidiary, VW America. The State agrees that a defendant's *own* conduct—and not the

unilateral activity of a third party or the plaintiff—drives the purposeful availment analysis. *See Burger King*, 471 U.S. at 475; *Moncrief*, 414 S.W.3d at 152. But a defendant's direct *or indirect* conduct may supply the requisite forum contacts.

This Court explained in *Spir Star* 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 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. 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 id.* 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; *see also Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70-71 (Tex. 2016) (finding personal jurisdiction over a parent company for directing an transaction that was consummated by a subsidiary); *TV Azteca*, 490 S.W.3d at 36 (finding personal jurisdiction where parent company itself deliberately sought to serve the Texas market and benefitted from its defamatory TV signals that strayed from Mexico into Texas).

While the majority acknowledged the indirect-availment principle, it did not expressly address whether VW Germany's control of VW America's recall activities constituted indirect purposeful availment. *Volkswagen*, 2020 WL 7640037, at *6.

Instead, it pivoted back to its conclusion that VW 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.* (citing *Nicastro*, 564 U.S. at 885 (plurality opinion)).

In the purposeful availment analysis, 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." *Retamco*, 278 S.W.3d at 338 (quoting *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002)). The electronic delivery of the software to VW America for installation on vehicles in Texas is a physical entry into Texas. *Walden*, 571 U.S. at 285 ("[P]hysical entry into the State—either by the defendant in person or through an agent, goods, mail or some other means—is certainly a relevant contact."). And VW Germany's direction of recall tampering on Texas vehicles, while originating outside of Texas, constitutes indirect purposeful availment of the Texas forum.

C. Nonresident defendants that profit from their contacts with Texas are subject to the jurisdiction of Texas courts.

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 Oil*, 414 S.W.3d at 150. This factor also supports a finding of jurisdiction. VW Germany has profited from sales in the Texas market—the second biggest market for the affected vehicles in the United States—earning gross revenues of $413,532,076 from the sales of the vehicles that were subsequently recalled for

further tampering in Texas. CR.1451, 1617-18. VW Germany also benefitted financially from the recall tampering itself, saving "up to $525,000 per month" on warranty claims that *it*—not VW America—was responsible for funding. CR.1621. Accordingly, the dissent was correct to conclude that VW Germany "undeniably profited by availing [itself] of the Texas market." *Volkswagen*, 2020 WL 7640037 at *10.

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

The dissent was also correct that exercising jurisdiction would comport with traditional notions of fair play and substantial justice. "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 Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 231 (Tex. 1991)); *see also Moncrief*, 414 S.W.3d at 154–55.

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.

Texas's interest in adjudicating the dispute in its courts deserves particular weight here. "[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

(citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984)). This Court has explained 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." *Guardian Royal*, 815 S.W.2d at 229. This Court's statement in *Guardian Royal* that the minimum-contacts prong may be marginally relaxed upon a strong showing of a State's regulatory interest is not given effect if, as the majority stated below, this consideration "only comes into play after the purposeful-availment test has been met." *Volkswagen*, 2020 WL 7640037, at *6.

The other factors also weigh in favor of exercising jurisdiction. Any burdens to VW Germany are minimized by the fact that it shares counsel with VW America in this suit. Texas is the only forum where these state-law claims may be brought. *See* Tex. Water Code § 7.105(c). Because VW America claims it had no knowledge of the tampering efforts, leaving only VW Germany to answer for the injuries caused by the recall tampering, the State's interest in obtaining convenient and effective relief is implicated. CR.1436. 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 petition, reverse the court of appeals' judgment, and render judgment denying VW Germany's special appearance.

Respectfully submitted.

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Certificate of Service

On February 5, 2021, this document was served on William S. Snyder, lead counsel for Appellant Volkswagen Aktiengesellschaft, via wsnyder@bradley.com.

/s/ Lisa A. Bennett
Lisa A. Bennett

Certificate of Compliance

Microsoft Word reports that this document contains 4,458 words, excluding exempted text.

/s/ Lisa A. Bennett
Lisa A. Bennett

No. ___

In the Supreme Court of Texas

The State of Texas,
Petitioner,

v.

Volkswagen Aktiengesellschaft,
Respondent.

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

APPENDIX

Tab

1. Trial Court Judgment Denying VW Germany's Special Appearance, June 14, 2019 .... A
2. Trial Court Judgment Denying Audi Germany's Special Appearance, December 16, 2019 .... B
3. Court of Appeals' Memorandum Opinion, December 22, 2020 C
4. Court of Appeals' Dissenting Opinion, December 22, 2020 .... D
5. Court of Appeals' Judgment Dismissing VW Germany, December 22, 2020 .... E
6. Court of Appeals' Judgment Dismissing Audi Germany, December 22, 2020 .... F

Tab A: Trial Court Judgment Denying VW Germany's Special Appearance, June 14, 2019

Filed in The District Court
of Travis County, Texas
JUN 14 2019 JC
At 1:48 P M.
Velva L. Price, District Clerk

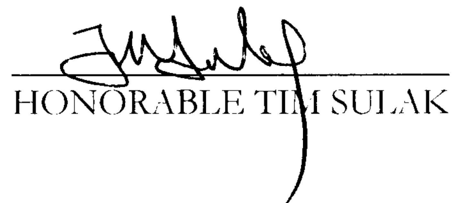
Master File No. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASE	§ § § §	**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353RD JUDICIAL DISTRICT**
ALL ACTIONS		

ORDER DENYING VOLKSWAGEN AKTIENGESELLSCHAFT'S FIRST AMENDED SPECIAL APPEARANCE

On this day, came to be considered Defendant Volkswagen Aktiengesellschaft's First Amended Special Appearance filed November 20, 2018. After consideration of the responses, replies, evidence, authorities, and arguments of counsel, the Court DENIES Volkswagen Aktiengesellschaft's First Amended Special Appearance.

SIGNED this 14th day of June, 2019.



HONORABLE TIM SULAK

Tab B: Trial Court Judgment Denying Audi Germany's Special Appearance, December 16, 2019

Filed in The District Court
of Travis County, Texas
DEC 16 2019
At 1:44 P M.
Velva L. Price, District Clerk

Master File No. D-1-GN-16-000370

IN RE VOLKSWAGEN CLEAN DIESEL LITIGATION: TCAA ENFORCEMENT CASE	§ § § §	**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353RD JUDICIAL DISTRICT**
ALL ACTIONS		

ORDER DENYING AUDI AKTIENGESELLSCHAFT'S FIRST AMENDED SPECIAL APPEARANCE

On this day, came to be considered Defendant Audi Aktiengesellschaft's First Amended Special Appearance filed November 20, 2018. After consideration of the responses, replies, evidence, authorities, and arguments of counsel, the Court DENIES Audi Aktiengesellschaft's First Amended Special Appearance.

SIGNED this 16th day of December, 2019.

HONORABLE TIM SULAK

Tab C: Court of Appeals' Memorandum Opinion, December 22, 2020

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00453-CV

Volkswagen Aktiengesellschaft, Appellant

v.

The State of Texas and Travis County, Texas, Appellees

NO. 03-20-00022-CV

Audi Aktiengesellschaft, Appellant

v.

The State of Texas and Travis County, Texas, Appellees

FROM THE 353RD DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-16-000370, THE HONORABLE TIM SULAK, JUDGE PRESIDING

MEMORANDUM OPINION

Volkswagen Aktiengesellschaft (VW Germany) and its subsidiary Audi Aktiengesellschaft (Audi Germany) are car manufacturers headquartered in Germany that installed "defeat device" software in diesel cars to evade compliance with the United States' federally mandated emissions standards and subsequently updated that software to resolve hardware failures being caused by the defeat devices. When the fraud was revealed, VW

Germany and its subsidiaries, including Audi Germany, Porsche Aktiengesellschaft, Volkswagen Group of America, Inc. (VW America), Volkswagen Group of America Chattanooga Operations, LLC, Audi of America, LLC (Audi America), and Porsche Cars North America, Inc. (Porsche America), (collectively, VW entities) became the target of a federal criminal case, multiple federal and state civil-enforcement actions, and numerous private lawsuits. The VW entities settled the EPA's criminal and civil actions for over $20 billion but did not obtain a release of liability from state and local governments. This appeal arises from the State of Texas's civil-enforcement action against VW Germany, VW America, Audi Germany, Audi America, and Porsche America for violations of the Texas Clean Air Act stemming from the installation of the defeat-device software and the subsequent updates to that software on cars in Texas.[1] *See* Tex. Health & Safety Code §§ 382.001–.510. In these interlocutory appeals, which we have consolidated for consideration, VW Germany and Audi Germany appeal from the trial court's orders denying their special appearances, and the sole issue is whether a Texas court may, consistent with due process, exercise specific jurisdiction over these foreign corporations under the facts of this case. Because VW Germany and Audi Germany did not purposefully avail themselves of the privilege of conducting activities in Texas, we reverse the trial court's orders and render judgment dismissing the claims against VW Germany and Audi Germany.

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[1] Multiple Texas counties intervened in the State's suit and others filed their own Texas Clean Air Act enforcement actions. All the Texas Clean Air Act enforcement cases, including the State's, were consolidated into a pre-trial MDL proceeding in Travis County district court. *See In re Volkswagen Clean Diesel Litig.*, 557 S.W.3d 78, 81 (Tex. App.—Austin 2017, orig. proceeding). For simplicity, we use "trial court" to refer to the pre-trial MDL court.

Background[2]

In 2006, after concluding that some of their diesel-engine cars would not meet newly established U.S. emissions standards while still operating at a performance level appealing to customers, VW Germany and Audi Germany developed defeat-device software that enabled their cars to pass the U.S. emissions tests, even though those cars could not actually meet the emissions standards while being driven. *See* 42 U.S.C. §§ 7521, 7525 (Clean Air Act (CAA) provisions requiring that new motor vehicles comply with federal emissions standards); *see also id.* §§ 7521(a)(4)(A), 7522(a)(3)(B) (prohibiting defeat devices).[3]

Between 2009 and 2015, VW Germany and Audi Germany installed the defeat-device software in more than 500,000 new vehicles that were manufactured in Germany and sold in the United States, including in Texas (affected vehicles). VW America, which has the exclusive right to import, distribute, market, advertise, and sell Volkswagen and Audi vehicles in the United States, purchased the affected vehicles in Germany and then sold the cars to its independent authorized franchise dealerships throughout the United States, including in Texas.[4] Those dealerships sold the affected vehicles to consumers throughout the United States, including in Texas.

In 2012, vehicles equipped with the defeat-device software developed hardware failures. Suspecting that the failures were caused by the defeat-device software, VW Germany

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[2] We take the background facts, which are undisputed, from the parties' briefs and from *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 959 F.3d 1201, 1205 (9th Cir. 2020) (relying on the facts stipulated to by VW Germany in its plea agreement with the federal government in *United States v. Volkswagen AG*, No. 16-cr-20394-SFC-APP-8, Dkt. 68 (E.D. Mich. Mar. 10, 2017)).

[3] For a detailed explanation of the defeat devices and subsequent updates see *In re Volkswagen*, 959 F.3d at 1206–08.

[4] VW America sells the Audi-branded vehicles through its subsidiary Audi America.

developed new software to correct the problem. Audi Germany did not participate in the development of the updated "tampering" software, but it did test the new software for compatibility with Audi vehicles. VW Germany and Audi Germany provided the updated software to VW America by uploading it to their servers in Germany, which were synchronized with VW America's server in the United States. From VW America's server, the software automatically downloaded to a platform used by Volkswagen and Audi dealerships worldwide, allowing technicians to install the software in affected vehicles. VW Germany and Audi Germany directed VW America to install the new software through a series of voluntary recalls and software fixes. The software was also updated when customers brought their affected vehicles in for normal maintenance. The actual purpose of the software updates was not disclosed.

After an independent study revealed that certain Volkswagen vehicles emitted air pollutants well beyond permissible limits, the EPA began an investigation, and in August 2015, a Volkswagen whistleblower informed federal regulators about the defeat devices. Soon thereafter, VW Germany disclosed the entire tampering scheme to federal regulators. The EPA subsequently filed a criminal action against VW Germany, which ultimately pleaded guilty and agreed to pay a $2.8-billion criminal fine to the United States. The EPA also filed a civil-enforcement action against the VW entities, alleging that they had violated the CAA by equipping vehicles sold nationwide with federally prohibited defeat devices and by later installing software updates to the defeat devices in new and existing vehicles. The civil action was resolved through consent decrees that covered all civil claims for relief under the CAA for any conduct described in the EPA's complaints against the VW entities. The consent decrees imposed on the VW entities various injunctive remedies and multi-billion-dollar monetary

penalties, including $209 million specifically allocated to the State of Texas for environmental remediation, $1.45 billion in relief for Texas consumers, and more than $92 million to compensate Texas dealers. According to VW Germany, Texas and its residents stand to recover more than $1.35 billion from the federal actions.

Several states, local governments, and consumer groups also brought lawsuits against the VW entities in both state and federal courts in connection with the use of the defeat devices and related software updates. This appeal arises from the State of Texas's state-court suit against VW Germany, VW America, Audi Germany, Audi America, and Porsche America for violations of the Texas Clean Air Act.

The State's original petition, which named only VW America and Audi America as defendants, asserted that the factory installation of defeat devices on affected vehicles in Texas violated the Texas Clean Air Act. *See* Tex. Health & Safety Code § 382.085(b) (prohibiting violations of Texas Clean Air Act and TCEQ rules); Tex. Water Code § 7.101 (prohibiting violation of statute or TCEQ regulation); 30 Tex. Admin. Code §§ 101.3 (TCEQ, Circumvention), 114.20 (TCEQ, Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions from Motor Vehicles). These allegations are referred to as "original tampering" claims because they are based on the installation of the defeat-device software in the affected vehicles before their sale to consumers.

In August 2017, the judge overseeing the federal multi-district litigation of the Volkswagen diesel-emissions scheme held that federal law preempted the original-tampering claims brought by the state of Wyoming. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1045, 1057 (N.D. Cal. Aug. 31, 2017). In response, the State amended its pleadings in the underlying case to add "recall tampering"

claims—i.e., allegations that after the affected vehicles had been sold to consumers, the VW entities tampered with those vehicles through software updates to the defeat devices that were installed at dealerships as part of nationwide recall campaigns or when cars were brought in for servicing. *See* Tex. Water Code § 7.101; Tex. Health & Safety Code § 382.085(b); 30 Tex. Admin. Code § 114.20(b), (e). The State also added Porsche America as a defendant. VW America, Audi America, and Porsche America moved for summary judgment, asserting, among other matters, that the federal CAA preempted the State's claims against them, *see* 42 U.S.C. § 7543 (preempting state and local laws regulating emissions from new motor vehicles), and that the vehicle-manufacturing conduct at issue in the case was not subject to the Texas Clean Air Act and related regulations asserted by Texas. The trial court granted summary judgment on the original-tampering claims, but denied summary judgment on the recall-tampering claims.

During this time, the State added VW Germany and Audi Germany to its suit. VW Germany and Audi Germany filed special appearances after the trial court rendered summary judgment against the State on its original-tampering claims. Both argued that they were not subject to personal jurisdiction in this proceeding because they did not have the required minimum contacts with Texas. After a year of jurisdictional discovery and a hearing on the issue, the trial court denied the special appearances. Both VW Germany and Audi Germany appealed from the trial court's interlocutory ruling, *see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7) (authorizing appeal from interlocutory order granting or denying special appearance under Tex. R. Civ. P. 120a), and we have consolidated the appeals for consideration. At issue is whether the trial court erred in concluding that it had personal jurisdiction over VW Germany and Audi Germany and in denying their special appearances.

Personal Jurisdiction

Texas courts have personal jurisdiction over a nonresident defendant when the Texas long-arm statute provides for it and the exercise of jurisdiction is consistent with federal and state due-process guarantees. *See Old Republic Nat'l Title Ins. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018) (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 149 (Tex. 2013); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007)). Due-process requirements are satisfied if the nonresident defendant: (1) has established minimum contacts with the forum state, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Id.* (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Moncrief Oil*, 414 S.W.3d at 150).

A defendant's minimum contacts with the forum may give rise to either general or specific jurisdiction. General jurisdiction is established when the defendant's contacts "are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'' *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Old Republic*, 549 S.W.3d at 559 (citing *Moncrief*, 414 S.W.3d at 151). "It involves a court's ability to exercise jurisdiction over a nonresident defendant based on any claim, including claims unrelated to the defendant's contacts with the state." *PHC–Minden, LP v. Kimberly–Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007). Here, we are concerned only with whether the nonresident defendant's alleged minimum contacts gave rise to specific jurisdiction, which is triggered when the plaintiff's cause of action arises from or relates to those contacts. *Old Republic*, 549 S.W.3d at 559 (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 795 (Tex. 2005)); *see Moki Mac*, 221 S.W.3d at 575–76 (explaining that a specific-jurisdiction analysis requires review of the "relationship among the defendant, the forum[,] and the litigation" (alteration in original) (citation omitted)).

Specific jurisdiction must be established on a claim-by-claim basis unless all the asserted claims arise from the same forum contacts. *Moncrief*, 414 S.W.3d at 150–51.

A defendant establishes minimum contacts with a state when it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) (citations omitted). "Purposeful availment involves contacts that the defendant 'purposefully directed' into the forum state." *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 67 (Tex. 2016) (quoting *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991)); *see J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885–86 (2011) (plurality opinion) (holding that New Jersey lacked jurisdiction over foreign defendant because that defendant had not "engaged in conduct purposefully directed at New Jersey"); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality opinion) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*."); *TV Azteca v. Ruiz*, 490 S.W.3d 29, 38 (Tex. 2016) ("To constitute purposeful availment, the defendant's contacts must be 'purposefully directed' to the state"); *Moki Mac*, 221 S.W.3d at 569 (noting that due process requires that a non-resident defendant "must take action that is purposefully directed toward the forum state . . . and must result from the defendant's own 'efforts to avail itself of the forum'"). Three principles guide the purposeful-availment analysis: (1) "only the defendant's contacts with the forum" are relevant—not the unilateral activity of another party or third person; (2) the defendant's acts must be "purposeful" and not "random, isolated, or fortuitous"; and (3) the defendant "must seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction" such that it impliedly

consents to suit there. *Michiana*, 168 S.W.3d at 785 (citations omitted). "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Retamco*, 278 S.W.3d at 338 (citation omitted).

Texas law presumes that separate corporations are distinct entities. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 798 (Tex. 2002). Because of this presumption of corporate separateness, a parent company is not subject to jurisdiction in a state simply because the subsidiary is carrying on business in the forum state. *PHC-Minden*, 235 S.W.3d at 172. Instead, each defendant's contacts with the forum state must be assessed individually. *Id.*[5]

Analysis

The principal question we must address in this appeal is whether VW Germany's and Audi Germany's recall-tampering activities satisfy the purposeful-availment requirement for personal jurisdiction. More specifically, we must determine whether VW Germany and Audi Germany purposefully directed recall-tampering activity toward Texas and, thus, necessarily invoked the benefits and protections of its laws and is subject to Texas's jurisdiction for claims arising from those activities. *See Searcy*, 496 S.W.3d at 66–67.

VW Germany's Contacts

The State contends that VW Germany purposefully availed itself of the benefit of conducting activities in Texas when it:

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[5] There are exceptions to recognizing the corporate form in personal-jurisdiction analysis, including veil piercing or alter ego, *see, e.g.*, *PHC–Minden, LP v. Kimberly–Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007), but the State specifically disavows reliance on such theories in this case.

- directed VW America to install on vehicles in the United States, including vehicles in Texas, the tampering software that VW Germany alone had developed—VW Germany knew that there were affected cars in Texas when it ordered VW America to install the tampering software through informal and formal recall campaigns;

- electronically distributed the new tampering software for installation onto vehicles in the United States, including vehicles in Texas, at the push of a button—VW Germany uploaded tampering software to its server in Germany, that software automatically synchronized onto a server in the US, and that software automatically downloaded onto the service platform used by VW America technicians in the United States, including Texas;

- provided the technical description of the recall—i.e., the false information regarding the reason for the recall—that VW America used in letters sent to technicians and customers in the United States, including Texas, and sent VW America a list of the vehicles in the United States affected by the recalls, including vehicles in Texas;[6] and

- reimbursed VW America, which reimbursed dealers in the United States, including dealers in Texas, for the cost to install the new tampering software in each vehicle in the United States, including vehicles in Texas.

We disagree that this conduct constitutes purposeful availment.

Purposeful availment requires contacts that the defendant "purposefully directed *toward the forum state*." *Nicastro*, 564 U.S. at 886 (emphasis added); *see Searcy*, 496 S.W.3d at 67 ("Purposeful availment involves contacts that the defendant 'purposefully directed' into the forum state."); *TV Azteca*, 490 S.W.3d at 38 (same). VW Germany's recall-tampering activities were not purposefully directed at Texas. VW Germany developed the tampering software in Germany; it directed VW America to install the tampering software on vehicles in the United States; it provided the technical description of the recall to VW America; it uploaded the

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[6] The State asserts that, in addition to providing the technical information, VW Germany drafted the documents about the recall campaign that were sent to dealers and customers in the United States, including Texas. However, the evidence the State cites to and relies on in support of this contention establishes that VW America, not VW Germany, drafted the recall documents that went to dealers and customers. As such, we do not consider this action. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005) ("[I]t is only the defendant's contacts with the forum that count.").

software to its server in Germany; and it reimbursed VW America on a nationwide basis for the costs of implementing the recall. The State does not allege any facts or present any evidence that VW Germany maintained any offices, plants, or other facilities in Texas; sent any of its employees to Texas for any purpose, including to install the software updates at issue here; had any contacts or communications with VW America's franchise dealers in Texas; had any involvement in developing, implementing, or approving VW America's franchise dealer network in the United States, including in Texas; established channels for providing regular advice to customers residing in Texas; developed the software updates at issue here in Texas or specifically for vehicles sold or driven in Texas; or directly reimbursed Texas dealers for the costs of the recall. At most, the evidence in the record establishes that VW Germany directed recall-tampering conduct toward the United States as a whole, not to Texas specifically. But in determining whether a state court can exercise jurisdiction over a foreign defendant, only the defendant's purposeful contacts with the state, not with the United States, are relevant. *Nicastro*, 564 U.S. at 886 (rejecting non-resident contacts directed at the United States as a whole). Here, the State has failed to establish that VW Germany engaged in conduct purposefully directed at Texas.

Relatedly, the recall-tampering activities relied on by the State for purposes of specific personal jurisdiction are more properly characterized as the activities of VW America, not VW Germany: VW America sold Volkswagen-branded vehicles to its franchise dealers in the United States, including some in Texas; VW America's franchise dealers sold Volkswagen-branded vehicles to customers in the United States, including some in Texas; VW America distributed the technical description of the recalls to its technicians and customers in the United States, including some in Texas; VW America distributed the software updates to its franchise

dealerships nationwide, including some in Texas; VW America's franchise dealerships installed the software updates on vehicles in the United States, including some in Texas; and VW America reimbursed the dealers nationwide for the costs of the recall. But VW America's contacts or its franchise dealers' contacts with Texas are not relevant to our inquiry here. *See Michiana*, 168 S.W.3d at 785 ("[I]t is only the defendant's contacts with the forum that count."); *see also PHC-Minden*, 235 S.W.3d at 172–73 (holding that contacts of distinct legal entities, including parents and subsidiaries, are assessed separately for jurisdictional purposes unless the corporate veil is pierced).

The State argues VW Germany purposefully availed itself of Texas *indirectly* by directing its wholly owned subsidiary, VW America, to carry out recall-tampering activities on VW Germany's behalf. *See Spir Star AG v. Kimich*, 310 S.W.3d 868, 874 (Tex. 2010) ("[P]urposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)."). In support of this argument, the State relies on a 1994 "Importer Agreement" between VW Germany and VW America governing the relationship between those two entities throughout the United States as a whole. But even assuming the agreement is relevant to the recall-tampering claims at issue here, there is no evidence in the record, and the State does not suggest, that any of VW Germany's directives under the agreement were specifically directed at Texas versus being specifically directed at the United States as a whole. *See Nicastro*, 564 U.S. at 885.

The State also argues relatedly that VW Germany's recall-tampering activities were purposefully directed at Texas because, under or because of the importer agreement, VW Germany directed VW America to exhaust all United States market opportunities for Volkswagen-branded vehicles, VW Germany knew that vehicles subject to the software updates

had been sold and were in Texas, and VW Germany tracked the progress of the recalls. But these allegations show only that VW Germany was aware that some of the vehicles included in its nationwide recall would be located in Texas. It is well established, however, that "[m]ere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Searcy*, 496 S.W.3d at 68–69 (citing *Walden v. Fiore*, 571 U.S. 277, 287 (2014)); *Michiana*, 168 S.W.3d at 788. Further, as explained above, the State has not shown that VW Germany's recall-tampering activities were specifically directed at Texas; instead, the record establishes that VW Germany's knowledge and related recall-tampering conduct were directed at the United States market as a whole. *See Nicastro*, 564 U.S. at 886 ("Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.").

The State also argues that, even if it has not met the purposeful-availment test, jurisdiction is proper here because "a state's regulatory interest may establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *See Guardian Royal*, 815 S.W.2d at 229; *Nicastro*, 564 U.S. at 877–78 (noting possible exceptions to purposeful availment, including "intent to obstruct its laws"). However, "a state's regulatory interest alone *is not* in and of itself sufficient to provide a basis for jurisdiction." *Guardian Royal*, 815 S.W.2d at 229 (holding that exercising jurisdiction over non-resident defendant would not comport with fair play and substantial justice). Further, the supreme court's statements regarding regulatory interests in *Guardian Royal* were not made in connection with the purposeful-availment analysis, but in connection with its analysis of the "fair play and substantial justice" prong, which only comes into play after the purposeful-availment test has

been met. *See id.* at 228. Moreover, as VW Germany emphasizes, *Guardian Royal* predates later decisions by the United States Supreme Court and the Texas Supreme Court that make clear that purposeful availment requires that a defendant's contacts be purposefully directed at the forum state. *See, e.g.*, *Nicastro*, 564 U.S. at 885; *Searcy*, 496 S.W.3d at 67; *TV Azteca*, 490 S.W.3d at 38. We also note that the federal consent decrees require VW Germany and the other VW entities to pay several billions in monetary penalties, including $210 million to the State of Texas, $1.45 billion to Texas consumers, and more than $92 million to Texas dealers.

Finally, the State points out that another state appellate court has found personal jurisdiction over VW Germany related to its emissions tampering. *See State by Swanson v. Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *4 (Minn. Ct. App. Dec. 3, 2018) (unpublished). But even assuming it was decided correctly, *Swanson* is distinguishable. Most notably, in holding that VW Germany had purposefully directed activities to Minnesota, the *Swanson* court relied on allegations, which Minnesota law required the court to accept as true, that VW Germany sold and leased cars in Minnesota, marketed its vehicles to Minnesota residents, and transacted business through ten dealerships in Minnesota. *See id.* Relatedly, the *Swanson* court rejected VW Germany's *Nicastro* argument—i.e., that it did not specifically target Minnesota—because VW Germany did not dispute Minnesota's allegations that VW Germany had advertised and marketed its products in Minnesota and that VW Germany "*itself* installed defeat devices in used vehicles in Minnesota." *Id.* at 5. The evidence in the record here establishes—and the State does not allege to the contrary—that VW Germany did not sell or lease vehicles in Texas, did not market vehicles to Texas residents, did not transact business with Texas dealerships, and did not install defeat devices in Texas vehicles. As such, *Swanson* does not inform our decision here.

We hold that because VW Germany's recall-tampering activities were not purposefully directed at Texas, VW Germany did not purposefully avail itself of the privilege of conducting activities within Texas. Accordingly, the trial court may not properly exercise specific jurisdiction over VW Germany.

Audi Germany's Contacts

The State contends that Audi Germany purposefully availed itself of the benefit of conducting activities in Texas when it:

- benefitted from the original sales of the affected vehicles in Texas, which later required further recall tampering due to failures caused by the original tampering;

- ordered VW America to install the tampering software on Audi vehicles in the United States, including in Texas, to correct the problems caused by original defeat-device software—Audi Germany knew that there were affected Audi vehicles in Texas when it ordered VW America to install the tampering software through informal and formal recall campaigns;

- electronically distributed the tampering software for installation onto Audi vehicles in the United States, including Texas—after testing the new tampering software for compatibility with Audi vehicles, Audi Germany uploaded the software to its server in Germany, that software automatically synchronized onto server in the US, and that software automatically downloaded onto the service platform used by VW America technicians in the United States, including Texas;

- approved messaging for customers and dealers about the new tampering software—Audi Germany Provided information to VW America about the software update, required VW America to draft communications based on the provided information, required VW America to obtain Audi Germany's approval for the draft communications, and directed VW America to notify Audi customers and dealers in the United States, including in Texas, about the software updates using the approved communications;

- paid to have the software installed in each vehicle—as required by its agreement with VW America, Audi Germany reimbursed VW America, which in turn reimbursed dealers, for the cost of installing the new tampering software on vehicles in the United States, including in Texas.

- benefitted from the new tampering software by avoiding mounting warranty costs for those Texas vehicles; and

- reimbursed VW America, which reimbursed dealers in the United States, including dealers in Texas, for the cost to install the new tampering software in each vehicle in the United States, including vehicles in Texas.

For reasons similar to those explained above, we disagree that this conduct constitutes purposeful availment.

As explained above, purposeful availment requires contacts that the defendant "purposefully directed *toward the forum state*." *Nicastro*, 564 U.S. at 886 (emphasis added); *see Searcy*, 496 S.W.3d at 67 ("Purposeful availment involves contacts that the defendant 'purposefully directed' into the forum state."); *TV Azteca*, 490 S.W.3d at 38 (same). Audi Germany's recall-tampering activities were not purposefully directed *toward Texas*: Audi Germany tested the software (created by VW Germany) in Germany; it directed VW America to notify its authorized Audi dealers and customers in the United States about the software updates using messaging approved by Audi Germany; it uploaded the software to a server in Germany, which software was transmitted to a U.S. server maintained and controlled by VW America for use nationwide; it directed VW America to install the tampering software on Audi vehicles in the United States; and it reimbursed VW America for the recall costs. The State does not allege any facts or present any evidence that Audi Germany maintained any offices, plants, or other facilities in Texas; sent any of its employees to Texas for any purpose, including to install the software updates at issue here; had any contacts or communications with VW America's franchise dealers in Texas; had any involvement in developing, implementing, or approving VW America's franchise dealer network in the United States; established channels for providing regular advice to customers residing in Texas; developed the software updates at issue in Texas or specifically for vehicles sold or driven in Texas; or directly reimbursed Texas dealers for the

costs of the recall. At most, the evidence in the record establishes that Audi Germany directed its recall-tampering conduct toward the United States as a whole, not to Texas specifically. But in determining whether a state court can exercise jurisdiction over a foreign defendant, only the defendant's purposeful contacts with the state, not with the United States, are relevant. *Nicastro*, 564 U.S. at 886 (rejecting non-resident contacts directed at the United States, versus at New Jersey, as a whole). Here, the State has failed to establish that Audi Germany engaged in conduct purposefully directed at Texas.

Relatedly, the recall-tampering activities relied on by the State for purposes of specific personal jurisdiction are more properly characterized as the activities of VW America, not Audi Germany: VW America distributed the technical description of the recalls to its technicians and customers in the United States, including some in Texas; VW America distributed the software updates to its Audi franchise dealerships nationwide, including some in Texas; VW America's Audi franchise dealerships installed the software updates on vehicles in the United States, including some in Texas; and VW America reimbursed the dealers nationwide for the costs of the recall. But VW America's contacts or its franchise dealers' contacts with Texas are not relevant to whether Audi Germany purposefully availed itself of the privilege of conducting activities in Texas. *See Michiana*, 168 S.W.3d at 785 ("[I]t is only the defendant's contacts with the forum that count."); *see also PHC-Minden*, 235 S.W.3d at 172–73 (holding that contacts of distinct legal entities, including parents and subsidiaries, are assessed separately for jurisdictional purposes unless the corporate veil is pierced).

The State argues that the original-tampering conduct—i.e., the factory installation of the defeat-device software—has relevance to our purposeful-availment inquiry here because the original- and recall-tampering scheme are inextricably linked given that the need for the

recall tampering would not exist but for the original tampering. But a non-resident defendant can only be subject to specific personal jurisdiction if its "*suit-related conduct* . . . create[s] a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (emphasis added). In this case, because the trial court has rendered summary judgment that the original-tampering claims are preempted by federal law, only recall-tampering conduct can be said to be "suit-related conduct."

The State argues Audi Germany purposefully availed itself of Texas *indirectly* by directing VW America to carry out recall-tampering activities on Audi Germany's behalf. *See Spir Star*, 310 S.W.3d at 874 ("[P]urposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors.)"). In support of this argument, the State relies on a "Importer Agreement" between Audi Germany and VW America governing the relationship between those two entities throughout the United States as a whole. For example, the State emphasizes that, under the agreement, Audi Germany planned to have a role in sales-network planning and dealership agreements and that Audi Germany intended to maintain a high degree of control over any recall process. But even assuming that the agreement is relevant to the recall-tampering claims at issue here and, importantly, assuming that Audi Germany actually engaged in the conduct described in the agreement, Audi Germany's conduct under the agreement was directed at the United States as a whole, not at Texas. *See Nicastro*, 564 U.S. at 885.

The State also argues relatedly that Audi Germany's recall-tampering activities were purposefully directed at Texas because, under the importer agreement, Audi Germany directed VW America to exhaust all United States market opportunities for Audi-branded vehicles, Audi Germany knew that vehicles subject to the software updates had been sold and

were located in Texas, and Audi Germany tracked the progress of the recalls. But these allegations show only that Audi Germany was aware that some of the vehicles included in its nationwide recall would be in Texas. It is well established, however, that "[m]ere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state is insufficient to confer specific jurisdiction." *Searcy*, 496 S.W.3d at 68–69 (citing *Walden v. Fiore*, 571 U.S. 277, 287 (2014)); *Michiana*, 168 S.W.3d at 788. Further, as explained above, the State has not shown that Audi Germany's recall-tampering activities were specifically directed at Texas; instead, the record establishes that Audi Germany's knowledge and related recall-tampering conduct were directed at the United States market as a whole. *See Nicastro*, 564 U.S. at 886 ("Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.").

The State also argues that, even if it has not met the purposeful-availment test, jurisdiction is proper here because "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*, 815 S.W.2d at 229; *see Nicastro*, 564 U.S. at 877–78 (noting possible exceptions to purposeful availment, including "intent to obstruct its laws"). However, "a state's regulatory interest alone *is not* in and of itself sufficient to provide a basis for jurisdiction." *Guardian Royal*, 815 S.W.2d at 229 (holding that exercising jurisdiction over non-resident defendant would not comport with fair play and substantial justice). Further, the supreme court's statements regarding regulatory interests in *Guardian Royal* were not made in connection with the purposeful-availment analysis but in connection with its analysis of the "fair play and substantial justice" prong, which only comes into play after the purposeful-availment test has

been met. *See id.* at 228. We also note that the federal consent decrees require the various VW entities to pay several billions in monetary penalties, including $210 million to the State of Texas, $1.45 billion to Texas consumers, and more than $92 million to Texas dealers, and that VW America, Audi America, and Porsche America remain as defendants in this action.

We hold that because Audi Germany's recall-tampering activities were not purposefully directed at Texas, Audi Germany did not purposefully avail itself of the privilege of conducting activities within Texas. Accordingly, the trial court may not properly exercise specific jurisdiction over Audi Germany.

Conclusion

Because VW Germany's and Audi Germany's recall-tampering activities were not purposefully directed at Texas, we hold that VW Germany's and Audi Germany's contacts with the State of Texas are insufficient to confer specific jurisdiction over these entities as to the State's Texas Clean Air Act recall-tampering claims. Therefore, the trial court erred in denying VW Germany's and Audi Germany's special appearances. We reverse the trial court's orders denying the special appearances and render judgment dismissing the State's claims against VW Germany and Audi Germany.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Triana and Smith
Dissenting Opinion by Justice Triana

Reversed and Rendered

Filed: December 22, 2020

Tab D: Court of Appeals' Dissenting Opinion, December 22, 2020

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00453-CV

Volkswagen Aktiengesellschaft, Appellant

v.

The State of Texas and Travis County, Texas, Appellees

NO. 03-20-00022-CV

Audi Aktiengesellschaft, Appellant

v.

State of Texas and Travis County, Appellees

FROM THE 353RD DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-16-000370, THE HONORABLE TIM SULAK, JUDGE PRESIDING

DISSENTING OPINION

VW Germany and Audi Germany installed defeat-device software to evade compliance with state and federal emissions standards in cars that they manufactured in Germany for sale in the United States, including Texas. After vehicles equipped with the defeat-device software developed hardware failures, VW Germany and Audi Germany provided updated "tampering" software to VW America to correct the hardware problems on their

vehicles in order to continue to evade compliance with emissions laws. VW Germany and Audi Germany directed VW America to install the new tampering software by conducting a series of voluntary recall campaigns and by also installing the software on vehicles brought in for regular maintenance. Ultimately, the software was installed on 23,319 Volkswagens at 60 Volkswagen dealerships in Texas and at least 486 Audis at 12 Audi dealerships in Texas. The Court has concluded that VW Germany and Audi Germany lack the requisite minimum contacts with Texas required for Texas courts to exercise jurisdiction over them because these "recall-tampering activities" were directed to the United States as a whole and so could not be purposefully directed to Texas. *See TV Azteca v. Ruiz*, 490 S.W.3d 29, 36 (Tex. 2016) ("[A] state court can exercise jurisdiction over a nonresident defendant only if (1) the defendant has established 'minimum contacts' with the state and (2) the exercise of jurisdiction comports with 'traditional notions of fair play and substantial justice.'" (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))); *see also Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) ("A defendant establishes minimum contacts with a state when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))). Because I cannot agree with this conclusion, I dissent.

Instead, I would conclude 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. By directing those activities to the United States as a whole, they necessarily directed those activities to Texas, a state where they required VW America to install software on thousands of vehicles. To hold

otherwise is to hold that by targeting every state, a foreign manufacturer is not accountable in any state.

I. VW Germany and Audi Germany purposefully availed themselves of the United States market as a whole, and the Texas market in particular, thus establishing minimum contacts with Texas

When a court conducts a minimum-contacts analysis to determine whether a defendant has purposefully availed itself of the privilege of conducting activities within that state, "[t]he defendant's activities, whether they consist of direct acts within Texas *or conduct outside Texas*, must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Retamco*, 278 S.W.3d at 338 (emphasis added) (quoting *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002)). Specific jurisdiction arises when (1) the defendants' contacts with the forum state are purposeful, and (2) the cause of action arises from or relates to the defendants' contacts. *Spir Star AG v. Kimich*, 310 S.W.3d 868, 873 (Tex. 2010). "A court has specific jurisdiction over a defendant if its alleged liability arises from or is related to an activity conducted within the forum." *Id.* In this case, I would conclude that the alleged liability of VW Germany and Audi Germany arises from the purposeful recall-tampering activities that they controlled by directing VW Germany's wholly owned subsidiary VW America to install the tampering software in Texas and elsewhere.[1]

"Purposeful availment" is "the touchstone of jurisdictional due process," and in my view, the recall-tampering conduct of VW Germany and Audi Germany satisfies the three guiding principles for finding that defendants have purposefully availed themselves of a forum.

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[1] As noted in the Court's opinion, Audi Germany is a subsidiary owned by VW Germany.

Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 784-85 (Tex. 2005). First, VW Germany and Audi Germany directed VW America's contacts with Texas—both the initial acts of marketing and sales of affected vehicles in Texas and the later suit-specific recall-tampering activities. Those indirect contacts by VW Germany and Audi Germany with Texas through VW America are not solely "the result of . . . the 'unilateral activity of another party or a third person.'" *Id.* at 785 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Second, the recall-tampering activities were "purposeful" contacts with Texas residents, not "random, isolated or fortuitous." *Id.* (explaining that "[s]ellers who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to the jurisdiction of the latter in suits based on their activities" (quoting *Burger King*, 417 U.S. at 473)). Third, VW Germany and Audi Germany undeniably profited by availing themselves of the Texas market, albeit indirectly through their relationships with VW America and its franchise dealerships, relationships that VW Germany and Audi Germany controlled through the Importer Agreements. *Id.*; *see also Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007) ("In determining whether the defendant purposefully directed action toward Texas, we may look to conduct beyond the particular business transaction at issue . . . .").

The Court's opinion acknowledges that "the evidence in the record establishes that VW Germany [and Audi Germany] directed [their] recall-tampering conduct towards the United States as a whole," but it concludes that the conduct is insufficient to establish specific jurisdiction over them because the conduct was not directed "to Texas specifically." Slip op. at 11, 17. The Court's opinion adopts the reasoning in the United States Supreme Court's plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), and concludes that absent evidence in the record that VW Germany and Audi Germany directed their conduct

specifically toward Texas, as opposed to the United States market as a whole, the recall-tampering conduct does not satisfy the purposeful-availment test. However, the *Nicastro* "plurality opinion does not speak for the Court," as the dissenting opinion pointed out. *See id.* at 910 (Ginsburg, J., dissenting). And the Texas Supreme Court has not adopted its reasoning in any case with a fact pattern similar to this one involving foreign manufacturers who "exclude[] no region or State from the market they wish[] to reach," *see id.* at 893, and who directed their conduct toward the United States market as a whole, including Texas.[2] I would not adopt the *Nicastro* plurality's reasoning in this case; instead, for the reasons explained below, I would conclude that under established jurisprudence, the State has shown that VW Germany and Audi Germany have purposefully availed themselves of the benefits of the Texas market and are therefore subject to the jurisdiction of Texas courts.[3] Accordingly, I would affirm the trial court's orders denying their special appearances.

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[2] The only two Texas Supreme Court cases that cite *Nicastro* did not involve jurisdictional facts similar to the ones here. *See generally TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016); *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58 (Tex. 2016). In *TV Azteca*, the supreme court considered whether Texas courts could exercise jurisdiction in a defamation suit over "Mexican citizens who broadcast television programs on over-the-air signals that originate in Mexico but travel into parts of Texas." 490 S.W.3d at 34. In *Searcy*, the supreme court considered whether Texas courts could exercise jurisdiction in a suit arising out of a failed business transaction in which a Texas entity sued a Canadian entity and a Bermudian shareholder for tortious interference with a share purchase agreement and sued a Bermudian owner of Colombian oil-and-gas operations for fraud. 496 S.W.3d at 62. Neither case involved jurisdictional allegations against an entity that targeted its activities toward all states, or even multiple states.

[3] The Fifth Circuit has explained that "[c]ircuit courts interpreting *McIntyre* have concluded that under *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Breyer's concurring opinion 'furnished the narrowest grounds for the decision and controls.' . . . [T]he narrowest ground, as expressed in Justice Breyer's concurrence, is that the law remains the same after *McIntyre*, and that circuit courts may continue to attempt to reconcile the Supreme Court's competing articulations of the stream of commerce test." *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014) (quoting *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013)).

The crux of my disagreement with the Court's analysis is that it concludes that the State has failed to establish that VW Germany and Audi Germany engaged in conduct purposefully directed at Texas because that conduct was directed to the United States as a whole. The Court's opinion also concludes that some of the recall-tampering activities relied on by the State are more properly characterized as the activities of VW America, not VW Germany or Audi Germany. Although the Court's opinion acknowledges that a nonresident's purposeful availment of a local market may be indirect—"through affiliates or independent distributors"—*Spir Star AG*, 310 S.W.3d at 874, and that VW Germany and Audi Germany retained a significant degree of control over the recall-tampering activities carried out by VW America, the Court does not find persuasive the State's argument that VW Germany and Audi Germany indirectly purposefully availed themselves of Texas by directing VW America to carry out the recall-tampering activities on their behalf in Texas. I do.

The Court's opinion characterizes the following activities as only VW America's activities:

- the sale of affected vehicles to VW America franchise dealers in the United States, including franchise dealers in Texas;
- the sale by VW America franchise dealers of those vehicles to customers in the United States, including customers in Texas;
- the distribution of the technical description of the recalls to VW America technicians and customers in the United States, including technicians and customers in Texas;
- the distribution of the software updates to VW America franchise dealerships in the United States, including franchise dealerships in Texas;
- the installation by VW America franchise dealerships of the software updates on vehicles in the United States, including 23,319 Volkswagens at 60 Texas Volkswagen dealerships and at least 486 Audis at 12 Texas Audi dealerships; and

- the reimbursement of the VW America dealers nationwide for the costs of the recall.

However, under the Importer Agreements between VW Germany and VW America and between Audi Germany and VW America, which govern the relationship between each set of entities throughout the United States as a whole, VW Germany and Audi Germany retained a significant degree of control over the recall-tampering activities in Texas and elsewhere. VW Germany developed the tampering software for Volkswagen vehicles in the United States, deliberately designing it to evade state and federal emissions regulations, and Audi Germany tested it for compatibility with Audi vehicles. They both directed VW America to notify its authorized Volkswagen and Audi dealers and customers in the United States, including those in Texas, about the software updates using messaging they approved. They both electronically distributed the tampering software to VW America for installation on vehicles in the United States, including in Texas. They both directed VW America to install the tampering software on vehicles in the United States, including in Texas. They each reimbursed VW America for the costs of implementing the recall, with VW Germany reimbursing VW America $1,233,609 for its reimbursements to Texas dealers and Audi Germany reimbursing VW America $29,590 for its reimbursements to Texas dealers.

I agree that VW America's contacts and its franchise dealers' contacts cannot be attributed to VW Germany and Audi Germany as direct contacts with Texas, but in my view, the evidence supporting the German entities' control of the recall-tampering conduct directed at Texas establishes purposeful availment carried out indirectly through VW America and its franchise dealers. VW Germany and Audi Germany, through VW America and its franchise dealers, marketed and sold the affected vehicles to Texas residents on a large scale. They

subsequently carried out the recall-tampering activities on the same large scale, knowing that affected vehicles had been sold and were located in Texas and tracking the progress of the recalls. Moreover, the electronic delivery of the software to VW America for installation on vehicles in Texas is a physical entry into Texas that I consider to be a relevant jurisdictional contact with the forum. *See Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("[P]hysical entry into the State—either by the defendant in person or through an agent, goods, mail or some other means—is certainly a relevant contact."); *see also Burger King*, 471 U.S. at 476 (explaining that "an absence of physical contacts" will not defeat personal jurisdiction if nonresident "commercial actor's efforts are 'purposefully directed' toward" forum). The quality and nature of this contact with Texas—the delivery of software designed to allow Volkswagen- and Audi-branded vehicles to evade Texas regulations—further persuades me that VW Germany and Audi Germany, through VW Germany's wholly owned subsidiary VW America, purposefully availed themselves of the privilege of conducting activities in Texas.

This deliberate conduct goes beyond "[m]ere knowledge that the 'brunt' of the alleged harm would be felt—or have effects—in the forum state." *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 68 (Tex. 2016). The recall-tampering conduct was deliberate activity designed by VW Germany and Audi Germany specifically to evade Texas's emission regulations (as well as those of other states and the federal government) after directing VW America to exhaust all United States market opportunities for Volkswagen- and Audi-branded vehicles. While it is true that "a defendant may structure its transactions in such a way as 'neither to profit from the forum's laws nor subject itself to jurisdiction' there," i.e., to "purposefully avoid" jurisdiction, *id.* (quoting *Michiana*, 168 S.W.3d at 785), I would not conclude that a nonresident may purposefully avoid a particular jurisdiction merely by conducting activities directed at every state

in the United States, and by avoiding any special treatment of one state or a few states. On the record before the Court, I would conclude that the State has established that, by engaging in the recall-tampering activities, VW Germany and Audi Germany have purposefully availed themselves "'of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Michiana*, 168 S.W.3d at 784 (quoting *Hanson*, 357 U.S. at 253).

II. Asserting jurisdiction over VW Germany and Audi Germany comports with traditional notions of fair play and substantial justice

Because I would conclude that VW Germany's and Audi Germany's Texas contacts support specific jurisdiction, I must also determine whether the assertion of jurisdiction comports with traditional notions of fair play and substantial justice. *See Spir Star AG*, 310 S.W.3d at 878. "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." *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 232 (Tex. 1991) (citing *Burger King*, 471 U.S. at 477). To evaluate this component, appellate courts consider the defendants' contacts in light of the following factors: (1) "the burden on the defendant"; (2) "the interests of the forum state in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) the interstate or international judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several nations or states in furthering fundamental substantive social policies. *Spir Star AG*, 310 S.W.3d at 878 (citing *Guardian Royal*, 815 S.W.2d at 231).

Generally speaking, "[w]hen a nonresident defendant has purposefully availed itself of the privilege of conducting business in a foreign jurisdiction, it is both fair and just to subject that defendant to the authority of that forum's courts." *Id.* at 872 (citing *Burger King*, 471 U.S. at 475). When a defendant that has directed its activities at a forum seeks to defeat jurisdiction, it "'must present a *compelling case* that the presence of some other considerations would render jurisdiction unreasonable.'" *Guardian Royal*, 815 S.W.2d at 231 (quoting *Burger King*, 471 U.S. at 475 (emphasis added in *Guardian Royal*)). Distance alone will not ordinarily defeat jurisdiction. *Guardian Royal*, 815 S.W.2d at 231. "[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." *Id.* (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957)).

Here, Texas has a strong interest in adjudicating this dispute in which the State alleges that VW Germany's and Audi Germany's tampering scheme violated Texas law. "[A] state's regulatory interest in a certain area . . . is an important consideration in deciding whether the exercise of jurisdiction is reasonable." *Id.* at 229. While a state's regulatory interest alone is not sufficient to establish jurisdiction, "a state's regulatory interest may establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* In addition, the State argues that its interest in obtaining convenient and effective relief is implicated because VW America claims that it had no knowledge of the tampering efforts. It will be more efficient to adjudicate the entire case in the same place, and the State's case against the other defendants will be heard in Texas. *See Spir Star AG*, 310 S.W.3d at 879. While I recognize "the unique and onerous burden placed on a party called to defend a suit in a foreign legal system," *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996)

(citing *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114 (1987)), that burden is minimal in this case and outweighed by the State's interest in adjudicating the case in Texas, *see Spir Star AG*, 310 S.W.3d at 879-80. Accordingly, I would conclude that asserting personal jurisdiction over VW Germany and Audi Germany comports with traditional notions of fair play and substantial justice.

CONCLUSION

For the reasons stated, I would hold VW Germany and Audi Germany answerable in Texas for their recall-tampering activities that were purposefully directed to the United States market as a whole, including to Texas.

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Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Triana and Smith

Filed: December 22, 2020

Tab E: Court of Appeals' Judgment Dismissing VW Germany, December 22, 2020

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED DECEMBER 22, 2020

NO. 03-19-00453-CV

Volkswagen Aktiengesellschaft, Appellant

v.

The State of Texas and Travis County, Texas, Appellees

APPEAL FROM THE 353RD DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE ROSE, JUSTICE TRIANA AND SMITH
REVERSED AND RENDERED -- OPINION BY CHIEF JUSTICE ROSE;
DISSENTING OPINION BY JUSTICE TRIANA

This is an appeal from the interlocutory order signed by the trial court on June 14, 2019. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the court's order. The trial court erred in denying VW Germany's special appearance. Therefore, the Court reverses the trial court's orders denying the special appearance and renders judgment dismissing the State's claims against VW Germany. The appellees shall pay all costs relating to this appeal, both in this Court and in the court below.

Tab F: Court of Appeals' Judgment Dismissing Audi Germany, December 22, 2020

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED DECEMBER 22, 2020

NO. 03-20-00022-CV

Audi Aktiengesellschaft, Appellant

v.

State of Texas and Travis County, Appellees

APPEAL FROM THE 353RD DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE ROSE, JUSTICES TRIANA AND SMITH
REVERSED AND RENDERED -- OPINION BY CHIEF JUSTICE ROSE;
DISSENTING OPINION BY JUSTICE TRIANA

This is an appeal from the interlocutory order signed by the trial court on December 16, 2019. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the court's order. The trial court erred in denying Audi Germany's special appearance. Therefore, the Court reverses the trial court's orders denying the special appearance and renders judgment dismissing the State's claims against Audi Germany. The appellees shall pay all costs relating to this appeal, both in this Court and in the court below.

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