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

In the Supreme Court of Texas

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

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

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

REPLY BRIEF ON THE MERITS FOR PETITIONER

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To the Honorable Supreme Court of Texas:

VW Germany and Audi Germany's contacts with Texas support specific personal jurisdiction in the Texas courts. *After* placing emissions-defeating "clean-diesel" vehicles into the stream of commerce using their distributor, VW America, and *after* over 42,000 of these cars actually had been sold in Texas, VW Germany and Audi Germany directed *further* tampering on a specified list of those very cars. At that point Respondents knew, with certainty, that tens of thousands of the affected cars were in Texas. And beyond merely knowing that affected cars were in Texas, VW Germany and Audi Germany intended that the recall-tampering be carried out on all affected cars—identifying the cars that were to receive the recall-tampering software, dictating how the new software should be explained, and electronically delivering the recall-tampering software, through a series of automatic server transfers, to the point that all that remained to install it in Texas vehicles was for dealership personnel to click a download button.

That scenario is entirely unlike cases where personal jurisdiction turns on *pre-sale* indicia of whether the defendant meant for its products to be sold in the forum State, such as whether the defendant marketed to or designed the product for that State in particular. If the live claims in this case were about the initial sales of emissions-defeating cars, those cases would be on all fours and those considerations applicable. But the live claims in this case are about *post-sale* recall-tampering, at which point there was no question that Respondents' direction of tampering with pre-identified cars nationwide would target Texas in specific. This Court should grant the

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

ARGUMENT

I. VW Germany and Audi Germany Have Minimum Contacts with Texas Such That Maintenance of This Suit Does Not Offend Traditional Notions of Fair Play and Substantial Justice.

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

Texas has sued multinational car manufacturers VW Germany and Audi Germany for violations of state anti-tampering laws. The live claims in this case are not for defects that existed in the cars before they were placed into the "stream of commerce," but rather for tampering that occurred post-sale, on cars that were already in Texas. At that point, VW Germany and Audi Germany had full knowledge that Texas was the second biggest market for this type of vehicle, with nearly over 42,000 cars present in the State and $425 million in revenue generated from those sales. 1.CR.1451, 1617-18; 2.CR.2148, 2150. When VW Germany and Audi Germany orchestrated *further* tampering on vehicles sold in the United States, they could claim no surprise or ignorance that they would be directing those actions into Texas specifically. By the time Respondents entered their guilty plea for the original tampering in 2017, they had directed tampering on nearly 24,000 vehicles in Texas: 23,319

Volkswagen vehicles and at least 486 Audi vehicles, 1.CR.1413-16; 2.CR. 298, 2138-42, 2150, 2232-34,

Just as contemplated in their Importer Agreements with subsidiary VW America, 1.CR.1484-86; 2.CR.1581-83, VW Germany and Audi Germany were in the director's seat for the recall tampering. VW Germany developed the tampering software, and Audi Germany tested it for compatibility with its vehicles. 1.CR.1408-09, 1449; 2.CR.965, 2203-04. VW Germany and Audi Germany dictated how the new tampering software should be explained to dealers and customers. 1.CR.1413-16, 1418, 1518, 1587-92; 2.CR.1967-68, 2202.[1] They financed the installation of the new software. 1.CR.1627-30; 2.CR.1724. VW Germany provided a list of every vehicle that was to be included in the recall campaigns. 1.CR.1457, 1581 ("When initiating a recall campaign, then Volkswagen AG would specify in a specific system each and every VIN number of those vehicles that are affected by the recall."); *see also* 1.CR.1582 (witness confirming that it is "correct" to say that the "decision to institute a recall is solely Volkswagen AG's"). By directing that installation of their recall-tampering software be carried out on all pre-identified cars, Respondents evinced a clear intent to tamper with the 42,000 Texas cars that were on that list.

[1] Petitioner's statement in its opening brief (at 6) that VW Germany provided example letters to send to customers, more accurately put, is that "the information in [the example] customer letter comes from Volkswagen AG," having come from a "campaign data sheet" that was "drafted by Volkswagen AG." 1.CR.1590-92 (witness replying "[c]orrect" to those questions).

And it was VW Germany and Audi Germany that initiated the electronic delivery of recall-tampering software into Texas. Once they placed the software on their server in Germany (the "German Mirrorserver2"), the next steps happened automatically: the software automatically synchronized to a U.S. server (the "U.S. Mirrorserver2"), 1.CR.1465-66, 1992-93; 2.CR.2203-04; from there, the "software updates [we]re then available to be installed into specific vehicles for which the software was designed" through "an automated download from U.S. Mirrorserver2" to the ordinary service platform (also designed by VW Germany); and that platform was used by VW America technicians in local dealerships to install software. 1.CR.1465-66, 1533-36, 1564, 1593, 1930, 1992-93; 2.CR.2150, 2203-04, 2234.

Respondents attempt to sever this chain by using misleadingly active terms to describe these automatic transfers. Resp. BOM 16 (stating that they "distributed [the software] to VW America" and then that "VW America distributed the software to VW America's network of independent franchise dealers") (emphasis omitted). But the software's progress through other servers was automatic and it was Respondents themselves who "set the system up this way," ensuring that the software would be delivered to the Texas cars they had identified, as well as to other identified cars throughout the nation. *See uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 428 (7th Cir. 2010) (finding automatic internet-based transactions in the forum were purposeful). Physical entry into the State may be "either by the defendant in person or through an agent, goods, mail, or some other means." *Walden v. Fiore*, 571 U.S. 277, 285 (2014). Purposeful availment remains the touchstone for the analysis, and "[d]ifferent results should not be reached simply because business is conducted

over the Internet." *Zippo Mfg. Co. v. Zippo DOT Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (mem. op.); *see also Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005) (purposeful availment is the "touchstone" of the jurisdictional due process inquiry).

This course of conduct by VW Germany and Audi Germany satisfies this Court's three-prong test for establishing purposeful availment. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338-39 (Tex. 2009).[2]

First, when VW Germany and Audi Germany reached into Texas to tamper with cars that had already been put on the road in the State, those acts were "purposeful" and cannot reasonably be considered "fortuitous" or "random." *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150-51 (Tex. 2013). At the point the recall-tampering took place (if not also at the point of initial sales), the recall-tampering was "intended to serve the Texas market." *TV Azteca v. Ruiz*, 490 S.W.3d 29, 46-47 (Tex. 2016); *see also Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007). VW Germany and Audi Germany's involvement in the recall-tampering shows that they maintained a relationship with the cars post-sale, when the cars were in the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Moncrief*, 414 S.W.3d at 151.

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[2] Respondents state in their recitation of facts (at 7) that discovery "confirmed that none of the conduct . . . was directed to Texas." That legal conclusion is incorrect and is based on Respondents' incorrect premise that its nationwide tortious conduct insulates it from accountability for the portion of that conduct that was specifically directed at Texas.

Second, Respondents' own contacts are sufficient to subject them to personal jurisdiction in Texas courts. VW Germany and Audi Germany transmitted recall-tampering software through an electronic system of their own creation with the intent that the software reach Texas and be installed in tens of thousands of pre-identified cars there. *See Walden*, 571 U.S. at 285 (physical entry may be through "other means" than a person's presence). Those contacts are not properly attributed to VW America alone; "using a distributor-intermediary" to click a download button for the tampering software they created and transmitted "provides no haven from the jurisdiction of a Texas court." *Spir Star AG v. Kimich*, 310 S.W.3d 868, 874 (Tex. 2010).

Finally, VW Germany and Audi Germany derived "benefit, advantage, [and] profit" from the Texas market at every turn, *see Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 67 (Tex. 2016)—both from the initial sales of these cars in Texas and from avoiding mounting warranty costs for the nearly 24,000 Texas cars on which recall-tampering software was successfully installed. 1.CR.1530-32, 1621; *see TV Azteca*, 490 S.W.3d at 34-35. VW Germany and Audi Germany "continuously and deliberately exploited [Texas's] market." *Searcy*, 496 S.W.3d at 68 & n.31 (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 (1984)). It was VW Germany and Audi Germany that were responsible for funding warranty claims, so the financial benefit of the recall-tampering accrued to those entities. 1.CR.1621; 2.CR.1718.

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

Germany's and Audi Germany's contacts with Texas "justify a conclusion that the defendant could reasonably anticipate being called into a Texas court." *Retamco*, 278 S.W.3d at 338. And, as Respondents have conceded by declining to brief the issue in response, exercising personal jurisdiction over VW Germany and Audi Germany is otherwise consistent with "traditional notions of fair play and substantial justice." *See* Pet. BOM 35-38.

II. VW Germany and Audi Germany Cannot Escape Personal Jurisdiction in Texas Merely Because Texas Was Not the Only State Targeted.

A. Respondents' authorities are not analogous because the claims here involve additional conduct that took place post-sale.

The parties agree that this Court "[f]ollow[s] Justice O'Connor's plurality opinion in *Asahi*," which "require[s] additional conduct evincing an intent or purpose to serve the market in the forum State, whether directly or indirectly." *Luciano*, 625 S.W.3d at 10 (internal quotation marks omitted); Pet. BOM 23-24; Resp. BOM 21.[3]

The *Asahi* framework was created for a common fact pattern: a manufacturer sells a product to a third party without any particular intention about where it will wind up and is then haled into court in a forum where a plaintiff happens to be injured

[3] Respondents incorrectly state that Texas's argument "favors Justice Breyer's concurrence because Justice Breyer declined to adopt Justice O'Connor's purposeful availment standard from *Asahi*." Resp. Br. 23. Texas has not argued against the application of the *Asahi* plurality standard—which this Court has unequivocally adopted, *see Luciano*, 625 S.W.3d at 10—but rather has urged that *Nicastro* should not be read to narrow the personal jurisdiction standard to the forsake-all-others standard Respondents have urged.

by that product. *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality op.). In such situations, the *Asahi* plurality instructed that the plaintiff must show "[a]dditional conduct" beyond merely having placed the product into the "stream of commerce" that "may indicate an intent or purpose to serve the market in the forum State." *Id.* That is also the basic fact pattern in *Nicastro*, where the only contact with the one forum State was the fortuitous arrival of one of the defendant's machines in the State, and the Court considered whether any additional conduct evinced an intent to sell to that particular State. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011) (plurality op.); *see also Luciano*, 625 S.W.3d at 9-10 (spray foam product was placed into the stream of commerce and question was whether additional conduct showed intent to serve the forum State); *TV Azteca*, 490 S.W.3d at 46-47 (broadcast was, by analogy, placed into the stream of commerce, and issue was whether the broadcaster had an "intent or purpose to serve the market in the forum State"). In that posture, appropriate considerations include whether the product was designed for the market in the forum State and advertised in the forum State. *See Asahi*, 480 U.S. at 112.

But VW Germany and Audi Germany are not in such a posture here. The stream of commerce had already deposited the relevant cars—over 42,000 of them—in Texas *before* the recall-tampering activities that are at issue here. So the primary question is not whether the sales of cars in Texas were accompanied by enough "additional conduct" to evince an intent by VW Germany and Audi Germany to *sell* cars in Texas through their distributor (though Texas believes sufficient "additional conduct" existed even by that stage, Pet. BOM 15). Rather, the primary question is

whether VW Germany and Audi Germany's *second* course of conduct regarding those cars—directing that recall-tampering be conducted on cars it unequivocally knew to be in Texas—makes this case unlike any of Respondents' authorities.

To put it simply, if a defendant in the *Asahi* fact pattern has taken one step—putting a product in the stream of commerce that ends up in the forum State—then Respondents here have taken two—putting a product in the stream of commerce that ends up in the forum State *and* subsequently directing tampering on that very product in the forum State. Respondents' arguments focus on "step 1," arguing that they "were 'not aware at any point prior to [their] sale of a vehicle to [VW America] of what state that vehicle will be sold in the United States specifically,'" Resp. BOM 10, and providing a laundry list of sales-related contacts that they did not have in Texas, *id.* at 32-33. Respondents then rely (at 34) on *Spir Star*'s holding that "a seller's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." 310 S.W.3d at 873 (internal quotation marks omitted). But it is not reasonable to accept Respondents' characterization that the stream of commerce just happened to sweep the recall-tampering software into Texas, when that software was designed and its rollout targeted to *all* the cars of that certain make, model, and year, including over 42,000 such cars in Texas.

VW Germany cites two lower-court decisions for the proposition that there can be no purposeful availment of the Texas market absent "evidence that the product at issue was designed 'for the Texas market'" alone or Texas-specific advertising.

Resp. BOM 28-29 (citing *Skylift, Inc. v. Nash*, No. 09-19-00389-CV, 2020 WL 1879655, at *5-8 (Tex. App.—Beaumont Apr. 16, 2020, no pet.) (mem. op.); *Warren Chevrolet, Inc. v. Qatato*, No. 03-17-00298-CV, 2018 WL 6729855, at *5 (Tex. App.—Austin Dec. 21, 2018, no pet.) (mem. op)). But those particular forms of "additional conduct," while relevant to the *Asahi*-type fact pattern—where the inquiry is whether the defendant intended to direct its product into the forum State—are not necessary here. Texas can point to a list generated by VW Germany of the specific cars it wanted tampered with via recalls, and that list included over 42,000 cars in Texas. On these facts, VW Germany and Audi Germany need not have "developed the software updates at issue in Texas or specifically for the vehicles sold or driven in Texas," *Volkswagen Aktiengesellschaft v. State*, Nos. 03-19-00453-CV, 03-20-00022-CV, 2020 WL 7640037, at *5 (Tex. App.—Austin Dec. 22, 2020, pet. filed) (mem. op.), as Respondents argue (at 13).

B. The forum-targeting concept is essentially a restatement of the *Asahi* test.

VW Germany and Audi Germany now appear to concede that the inquiry into whether the defendant "intentionally targets" Texas is equivalent to the *Asahi* plurality's requirement that a plaintiff show "act[s] of the defendant purposefully directed toward the forum State." Resp. BOM 21 (citing *Asahi*, 480 U.S. at 112; *Spir Star*, 310 S.W.3d at 371) (emphasis omitted); *see also id.* at 22 (equating the *Nicastro* plurality's "targeted the forum" language with the test in *Asahi*). As this Court explained in *TV Azteca*, "a plaintiff can establish that a defamation defendant targeted Texas by relying on other 'additional conduct' through which the defendant

'continuously and deliberately exploited' the Texas market." 490 S.W.3d at 47 (citing *Keeton*, 465 U.S. at 781).

As in *Asahi*, then, courts considering whether a forum has been "targeted" have contrasted that concept with mere foreseeability or predictability that a defendant's product will end up on the forum. For instance, in *Luciano*, this Court explained that personal jurisdiction exists "when the defendant targets the forum, not when the defendant merely foresees his product ending up there." 625 S.W.3d at 13. In *TV Azteca*, this Court likewise contrasted defendants who "can be said to have targeted the forum" with those that "might have predicted that [their] goods will reach the forum State." 490 S.W.3d at 46. Likewise, the U.S. Supreme Court's plurality opinion in *Nicastro* contrasted situations where the "defendant can be said to have targeted the forum" with situations where "the defendant might have predicted that its goods will reach the forum State." 564 U.S. at 882.

As the language from those cases demonstrates, asking whether a defendant has targeted the forum is another expression of the core question whether a defendant's contacts with the forum were "purposeful" as opposed to isolated, fortuitous, or random. *Moncrief Oil*, 414 S.W.3d at 150-51. VW Germany's and Audi Germany's contacts with the forum—especially those post-sale contacts that arose through Respondents' direction of recall-tampering—were purposefully directed at the State of Texas because they were targeted at individual cars in Texas, among a broader list of cars. *See supra* Part I. It was not merely foreseeable that Texas cars might be tampered with—it was required in order to carry out the objective of installing the recall-tampering software on all the affected cars.

Respondents suggest that other cases have dealt with "similar 'defeat device' allegations and nationwide recalls," Resp. BOM 15-16, but those cases all concerned initial defects with the product sold and did not implicate a second course of conduct where the defendant reached into the forum to tamper again with the product. *See Anchia v. DaimlerChrysler AG*, 230 S.W.3d 493, 501 (Tex. App.—Dallas 2007, pet. denied) (finding no personal jurisdiction over manufacturer in action for defective bumper); *Thornton v. Bayerische Motoren Werke AG*, 439 F. Supp. 3d 1303, 1311 (N.D. Ala. 2020) (mem. op.) (finding no personal jurisdiction over manufacturer in action for defective airbag, where recall was forthcoming but had not occurred and did not enter into jurisdictional analysis); *Rickman v. BMW of N. Am. LLC*, No. 18-04363, 2021 WL 1904740, at *4-7 (D.N.J. May 11, 2021) (finding personal jurisdiction over foreign automobile manufacturer).

C. The contacts VW Germany and Audi Germany formed with other jurisdictions do not negate its purposeful contacts with Texas.

Respondents claim that Texas's characterization of their position and the court of appeals' decision as a "forsake-all-others" standard is a "strawman." Resp. BOM 27-28. But VW Germany and Audi Germany continue to argue for just such a standard. Several of their arguments are illustrative.

First, Respondents argue that the fact that providing a list that specifically included over 42,000 cars in Texas that were to be recalled and further tampered with is not relevant for the sole reason that the list included all the cars across the nation to be tampered with. *Id.* at 40. But Respondents knew those cars to be present in Texas—they knew that because they required VW America to exhaust the U.S.

market, *see* 1.CR.1472, 2.CR.1569, 2168; and because they required VW America to regularly provide U.S. sales data, including Texas sales data, *see* 1.CR.1480-81, 1564-66; 2.CR.2171-72, 2178. To require that the list include *only* Texas cars to the exclusion of cars in other States in order to show that VW Germany and Audi Germany meant the recall tampering to be carried out on the subset of cars located in Texas is irrational.

Second, Respondents accuse Texas of "attempting to isolate only those software installations that occurred in Texas, while ignoring that the recalls were released nationwide." Resp. BOM 39. Because the test for personal jurisdiction is a "forum-by-forum, or sovereign-by-sovereign, analysis," *Nicastro*, 564 U.S. at 884, that is the correct scope of the analysis. And the software installations that took place in Texas should not be ignored simply because they were repeated throughout the nation.

Third, Respondents even argue that they cannot be said to have profited from Texas specifically, because "any financial benefit the German Respondents received from the software updates was on a nationwide basis." Resp. BOM 17, 45; *Volkswagen*, 2020 WL 7640037, at *5-6. But profits are cumulative, and it defies logic to pretend that no specific monetary benefit was derived from avoiding warranty costs on the 24,000 defective cars in Texas that actually received the recall-tampering software.

On VW Germany's and Audi Germany's interpretation, the portion of their contacts that were purposefully directed at Texas should be ignored because they exist within a broader nationwide framework. But this Court has never held that a

corporation must target Texas to the exclusion of other States in order to be subject to this Court's jurisdiction. *See, e.g.*, *TV Azteca*, 490 S.W.3d at 46-47 (requiring that alleged facts show "the seller intended to serve the Texas market" without referencing intent to serve other States' markets); *Moki Mac*, 221 S.W.3d at 577 (same). VW Germany relies, Resp. BOM 56, on *Spir Star*'s statement that personal jurisdiction exists when a defendant "intentionally targets Texas as the marketplace for its products," 310 S.W.3d at 871, but nothing in *Spir Star* suggests that such intentional targeting of Texas requires *exclusive* targeting of Texas.

The Court in *Luciano* flatly rejected the nonresident defendant's argument that its extensive contacts with another State made specific jurisdiction in Texas improper. 625 S.W.3d at 10. The Court explained that "the contacts an entity forms with one jurisdiction do not negate its purposeful contacts with another." *Id.* (citing *Keeton*, 465 U.S. at 779-80). There, the Court explained that "notwithstanding the contacts [defendant] claims to have with Connecticut, its conduct in Texas resulted not in a mere dribble, but in a stream of activity that allowed it to enjoy the benefits of doing business in this state." *Id.* (footnote omitted). The Court considered whether Texas had been "target[ed]," and found that it had been—not because Texas was targeted to the exclusion of other States, but because the facts of the case were unlike a situation where a "defendant merely foresees his product ending up there." *Id.* at 13 (citing *Nicastro*, 564 U.S. at 884; *TV Azteca*, 490 S.W.3d at 46). The same reasoning applies here. Notwithstanding Respondents' nationwide tampering, their conduct in Texas resulted "not in a mere dribble" but in widespread recall-

tampering that allowed them to enjoy the benefits of avoiding warranty costs for nearly 24,000 cars in the State.

Moreover, VW Germany's and Audi Germany's approach conflicts with a parallel Minnesota decision. *See State by Swanson v. Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *4 (Minn. Ct. App. 2018). While VW Germany attempts to distinguish *Swanson* based on procedural posture, Resp. BOM 30, the Minnesota court unequivocally rejected VW Germany's and Audi Germany's forsake-all-others understanding of *Nicastro*: "Volkswagen . . . argues that minimum contacts do not exist because the state failed to demonstrate that the company purposefully directed its activities to Minnesota in particular, rather than to the United States generally. We disagree." 2018 WL 6273103, at *4.

VW Germany and Audi Germany's recall-tampering conduct targeted cars that were already on the road in Texas, and it thereby subjected itself to personal jurisdiction in Texas courts—and that conclusion is unaffected by the fact that Respondents targeted other States, too. "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).

D. Texas's regulatory interest in enforcing its law is relevant to the personal jurisdiction analysis.

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

Germany's roles in tampering with Texas cars when they were brought into Texas dealerships for service. 1.CR.394-95; 1.Supp.CR.3-5, 8-12; 2.CR.1373-75.

VW Germany and Audi Germany blame the unprecedented nature of this action on Texas, arguing that "before this lawsuit, Texas had never expressed a regulatory interest—even once—in enforcing its laws against a manufacturer's post-sale software updates." Resp. BOM 25-26; *see also id.* at 2. But the unprecedented nature of the state-law claims flows from VW Germany's and Audi Germany's "unusual and perhaps unprecedented" conduct. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1210 (9th Cir. 2020) (rejecting post-sale preemption argument). Moreover, Respondents' characterization of the recall-tampering effort as merely "software updates," Resp. BOM 25-26, ignores the unique gravity of what occurred here.[4] Indeed, the federal MDL court explained that the reason no federal preemption existed for the recall-tampering claims was that "Congress apparently did not contemplate that a manufacturer would intentionally tamper with the emission control systems of its vehicles after sale in order to improve the functioning of a device intended to deceive the regulators." *In re Volkswagen*, 959 F.3d at 1206. Texas law does contemplate and establish a regulatory interest in such

[4] Contrary to Respondents' suggestion that the recall-tampering software was meant to "remedy any emissions defects" (at 6) and "*reduce* emissions" (at 1), the recall-tampering software at issue in this case contained two new modes of *evading* emissions standards: the Start Function, which caused the vehicles to start in street mode and stay there unless the software detected emissions testing, and the Steering Wheel Angle Recognition Function, which detected testing by recognizing when the steering wheel was not being turned. 1.CR.1408-09; 2.CR.964-65.

an action—regardless of whether Texas has, before this, faced conduct so serious as to warrant its enforcement.

It is of no moment that Respondents have already paid a large sum to settle a different set of claims with the federal government, Resp. BOM 31-32, and the majority below erred in considering that settlement. *Volkswagen*, 2020 WL 7640037, at *2, *6, *9. Respondents obtained no release from state-law claims. "The issue is personal jurisdiction, not choice of law." *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).

Texas does not argue that its regulatory interest alone would be a sufficient basis for personal jurisdiction or displace the purposeful availment analysis. But as this Court stated in *Moncrief*, while "it cannot displace the purposeful availment inquiry," "a forum's interest in protecting against torts may operate to enhance the substantiality of the connection between the defendant and the forum." 414 S.W.3d at 152. Far from having been overridden by later decisions like *Nicastro* (*see* Resp. BOM 26, 27 n.7; *Volkswagen*, 2020 WL 7640037, at *4), this Court's statement that "a state's regulatory interest may establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required," *Guardian Royal Exch. Assurance, Ltd. v. Eng. China Clays, P.L.C.*, 815 S.W.2d 223, 229 (Tex. 1991), found purchase in the *Nicastro* plurality opinion itself: "in some cases, as with an intentional tort, the defendant *might* well fall within the State's authority by reason of his attempt to obstruct its laws." 564 U.S. at 880 (emphasis added). Respondents argue only that the Court in *TV Azteca* placed no thumb on the scale in favor of the State's interest—but the conclusion reached there was that the defendant had indeed availed itself of the forum. *TV Azteca*, 490 S.W.3d at 52.

If ever there were a time to consider the State's interest in protecting against torts to "enhance the substantiality of the connection between the defendant and the forum," *Moncrief*, 414 S.W.3d at 152, it is here—where VW Germany's and Audi Germany's special appearances depend on this Court's acceptance that the character of this suit is exclusively nationwide, as opposed to state-specific.

E. VW Germany and Audi Germany did not structure their conduct to avoid Texas.

While a nonresident defendant may "purposefully avoid" a particular jurisdiction "by structuring its transactions so as neither to profit from the forum's laws nor be subject to its jurisdiction," a "truly interstate business may not shield itself from suit by a careful, but formalistic structuring of its business dealings." *Luciano*, 625 S.W.3d at 9 (quoting *Michiana*, 168 S.W.3d at 785; *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437 (Tex. 1982)).

The U.S. Supreme Court recently reiterated:

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

Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1027 (2021) (emphasis added) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

And this Court has explained that "purposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through

affiliates or independent distributors)." *Spir Star*, 310 S.W.3d at 874. VW Germany and Audi Germany complain (at 20) that courts have never phrased this concept as "indirect availment," presumably intending to imply that Texas has ignored the "purposeful" element by using that shorthand on two occasions in its opening brief (at 30, 33). Not so. The Texas contacts outlined above are Respondents' own purposeful contacts, not VW America's alone. *See Swanson*, 2018 WL 6273103, at *5 (Volkswagen "acting through its affiliates, *itself* installed defeat devices in used vehicles in Minnesota"). But Respondents—and the court of appeals—improperly attributed the conduct of VW Germany and Audi Germany solely to VW America, in contravention of this Court's instruction that "using a distributor-intermediary" to take advantage of the Texas market "provides no haven from the jurisdiction of a Texas court." *Spir Star*, 310 S.W.3d at 871; *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 a transaction that was consummated by a subsidiary); *TV Azteca*, 490 S.W.3d at 49 (finding personal jurisdiction regardless of the parent company using a distributor intermediary because the parent company itself made intentional efforts to serve the Texas market and benefited from its TV signals that strayed from Mexico into Texas).[5]

Moreover, Respondents argue that they structured their conduct to avoid personal jurisdiction here by passing title to the cars in Germany, and subsequently, by

[5] Those holdings did not rely on a veil-piercing theory, and it is not necessary for Texas to rely on such a theory here.

uploading the software to their server in Germany. But this Court has squarely held that "where title passed is 'beside the point' in the specific-jurisdiction analysis." *Luciano*, 625 S.W.3d at 11 (quoting *Spir Star*, 310 S.W.3d at 876; *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988)). Likewise, Respondents cannot merely wash their hands of the recall-tampering software because it was uploaded in Germany when, as discussed previously, the software's transfer to the U.S. server and, in turn, to the service platform, was automatic.

Finally, the Importer Agreement—the best indication of how Respondents have structured their business despite Respondents' attempts (at 7, 51) to jettison it due to its 20-year-old age—envisions a lasting role by Respondents in overseeing VW America's operations and, specifically, with carrying out warranty recalls. The Importer Agreements with VW America create a tracking system for car sales, reserve to VW Germany or Audi Germany authority to "direct" inspections or corrections, and require maintenance and repairs to be carried out according to VW Germany's or Audi Germany's instructions. 1.CR.1480-81, 1484-86, 1564-66; 2.CR.2174-75, 2179-81, 2188. The agreements state that VW Germany and Audi Germany "shall reimburse to [VW America] the warranty costs it has expended . . . including recall costs . . . and service action costs." 1.CR.1486; 2.CR.2178.

The record reflects that, consistent with its Importer Agreements, VW America carried out the software installations on behalf of VW Germany and Audi Germany, in complete deference to their instructions. 1.CR.1533-36. Indeed, VW America avers that it knew nothing of the new tampering software that was installed on existing vehicles in Texas during the recalls (or of the original tampering during

manufacturing). 1.CR.1533-36. While dealership personnel clicked the button to download the recall-tampering software, VW Germany and Audi Germany cannot claim that they unilaterally did so when parent company VW Germany "itself set the system up this way." *GoDaddy*, 623 F.3d at 428 (explaining that the defendant "cannot now point to" customers in the forum "and tell us, 'It was all their idea'"). Respondents' claim that "VW Germany had no involvement in the distribution of the recall software throughout the United States" cannot withstand scrutiny in the face of the jurisdictional facts here. Resp. BOM 39-40.

Ultimately, Respondents fall back on the idea that they could not "indirectly" target Texas because their "conduct was directed to the United States as a whole." *Id.* at 16-17; *see also Volkswagen*, 2020 WL 7640037, at *8. That premise, as already discussed, should be rejected.

Prayer

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

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