FILED
21-0130
6/9/2021 2:13 PM
tex-54256032
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0130

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

PATRICK K. SWEETEN
Deputy Attorney General for
Special Litigation

NANETTE DINUNZIO
Associate Deputy Attorney General for
Civil Litigation

LISA A. BENNETT
Assistant Solicitor General
State Bar No. 24073910
Lisa.Bennett@oag.texas.gov

Counsel for Petitioner

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Argument

I. The Court Should Grant Review to Ensure that a Corporation Cannot Escape Accountability for Conduct in Texas Merely Because Texas Was Not the Only State Targeted.

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

Neither *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877-78 (2011) (plurality op.), nor this Court's precedent requires that VW Germany's Texas contacts be set aside merely because they were replicated across the country.

VW Germany's reliance on the *Nicastro* plurality is misplaced. The concurrence provides the "narrowest grounds" for the judgment and, thus, controls. *Marks v. United States*, 430 U.S. 188, 193 (1977); *Nicastro*, 564 U.S. at 887-93 (Breyer, J., joined by Alito, J., concurring); *see also, e.g.*, *Zoch v. Magna Seating (Germany) GmbH*, 810 F. App'x 285, 290 (5th Cir. 2020) ("Justice Breyer simply applied existing Supreme Court precedent to the specific facts presented in that case."); *Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy*, 508 S.W.3d 569, 580 (Tex. App.—El Paso 2016, no pet.) ("*Nicastro* is controlled by the concurring opinion."). This Court has never adopted the *Nicastro* plurality's reasoning, and post-*Nicastro* cases like *TV Azteca* have continued to apply the *Asahi* plurality's reasoning that "'additional conduct' must demonstrate 'an intent or purpose to serve the market in the forum State.'" *TV Azteca v. Ruiz*, 490 S.W.3d 29, 46 (Tex. 2016) (quoting *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (plurality op.)). The *TV Azteca* Court's "*see also*" reference to *Nicastro* after that settled proposition, *id.*, does not demonstrate adoption of VW Germany's interpretation, Resp. 10.

Not even the plurality opinion in *Nicastro* leads to VW Germany's preferred outcome. The plurality stressed that the defendant did "not have a single contact with New Jersey short of the machine in question ending up in this state." 564 U.S. at 886. The fortuitous arrival of a product in a State is a "situation[] far different from a worldwide based manufacturer who creates a United States subsidiary to sell product wherever the product can be sold, and which in fact succeeds to a significant extent in Texas." *Semperit*, 508 S.W.3d at 580. And it is *especially* distinct from the situation here—where not only were thousands of tampered cars *sold* in Texas, but also VW Germany later reached into Texas where those cars had been sold to tamper a second time with those particular cars. Because VW Germany's "purposeful contacts with [the State]" satisfy purposeful availment, nothing in the *Nicastro* plurality suggests that Texas's ability to hold VW Germany to account should be stripped because VW Germany reached into *other* States for post-sale tampering, too. *See* 564 U.S. at 886.

Moreover, VW Germany's overbroad reading of *Nicastro*—which the majority below erroneously adopted, *Volkswagen Aktiengesellschaft v. State*, Nos. 03-19-00453-CV, 03-20-00022-CV, 2020 WL 7640037, at *5-7 (Tex. App.—Austin Dec. 22, 2020, pet. filed) (mem. op.)—conflicts with a parallel Minnesota decision and would place Texas at a comparative disadvantage in its ability to hold VW Germany accountable for post-sale tampering within its borders. *See State by Swanson v. Volkswagen Aktiengesellschaft*, No. A18-0544, 2018 WL 6273103, at *4 (Minn. Ct. App. Dec. 3, 2018). While VW Germany attempts to distinguish *Swanson* based on procedural posture, Resp. 11 n.7, the Minnesota court unequivocally rejected VW

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." *Swanson*, 2018 WL 6273103, at *4.

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 River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007) (same). VW Germany relies, Resp. 9, on *Spir Star*'s statement that personal jurisdiction exists when a defendant "intentionally targets Texas as the marketplace for its products," *Spir Star AG v. Kimich*, 310 S.W.3d 868, 871 (Tex. 2010), but nothing in *Spir Star* suggests that such intentional targeting of Texas requires *exclusive* targeting of Texas. To the contrary, *Spir Star* favorably cited a Sixth Circuit decision that held the opposite—that a foreign manufacturer's distribution agreement with a United States distributor for a defined territory that included all fifty States constituted the additional conduct needed to satisfy purposeful availment in one of those States. *Id.* at 875-76 (citing *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 533-34 (6th Cir. 1993)).

B. VW Germany did target Texas.

VW Germany "targeted the forum," 564 U.S. at 882, when it directed post-sale tampering on Texas cars. VW Germany faults Texas for "summarizing *only* the Texas-related portion" of nationwide conduct, Resp. 14, but that is the conduct that

is relevant to the Court's determination here. The question whether VW Germany directing tampering specifically on *Texas* cars is sufficient for purposeful availment is precisely the "forum-by-forum, or sovereign-by-sovereign, analysis" that even the *Nicastro* plurality recognized as the proper scope of the analysis. *Nicastro*, 564 U.S. at 884.

It is without doubt that VW Germany manufactured vehicles with factory-installed tampering software and placed them into the stream of commerce, and that over 20,000 of those cars were sold in Texas. CR.1405, 1413-16, 1472. The question is whether there were "plus factors" or "additional conduct" (using stream-of-commerce language) or efforts to "continuously and deliberately exploit[] the [Texas] market" (using purposeful direction or tort language) that establish purposeful availment in Texas. *See TV Azteca*, 490 S.W.3d at 46 (noting that the two tests are analogous).

Sufficient "plus" factors exist even with respect to the initial sales.[1] VW Germany contractually required VW America to "exhaust fully all market opportunities" in the United States, CR.1472, which plainly includes Texas, the second largest market for the affected vehicles. CR.1617-18; *see also* CR.1744-45 (acknowledging Texas's "importance" in United States market). And VW Germany earned gross

[1] Sales of the tampered cars in Texas "relate to" Texas's instant recall-tampering claims: the post-sale recall tampering was done precisely because VW Germany needed to avoid mounting warranty costs caused by the original tampering. *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1025 (2021).

revenues of $413,532,076 from Texas sales of vehicles that were subsequently recalled for further tampering. CR.1451.

But VW Germany's contacts did not end there. It maintained a continuing relationship with the cars after sale. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 151 (Tex. 2013). The Importer Agreement creates a tracking system for car sales, reserves to VW Germany authority to "direct" inspections or corrections, and requires maintenance and repairs to be carried out according to VW Germany's instructions. CR.1480-81, 1484-86, 1564-66. This is hardly a case where a defendant has "structure[d] [its] primary conduct to lessen or avoid exposure" to jurisdiction in the Texas courts, *Ford*, 141 S. Ct. at 1025, as VW Germany asserts, Resp. 9.

When warranty costs skyrocketed because of failures in the original tampering software, VW Germany directed further tampering on 23,319 Texas vehicles, CR.1413-16, using software it had developed, CR.1408-09, 1453. By this point, VW Germany could not colorably claim nonspecific national targeting or that it did not intend that the recall tampering be done on Texas cars. VW Germany even provided a list of every vehicle to be included in the recall campaigns, which included the Texas cars. CR.1457, 1581. VW Germany's decision to direct post-sale tampering on Texas cars was "the defendant's own choice and not 'random, isolated, or fortuitous.'" *Ford*, 141 S. Ct. at 1025 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

VW Germany then placed the software on an electronic server that automatically synchronized onto a server in the United States. CR.1465-66. From that server,

the software automatically downloaded onto the VW-Germany-created service platform used by VW America technicians in sixty Texas dealerships for seamless installation of the tampering software on Texas vehicles. *Id.*; CR.1533-36, 1564, 1593. The "electronic delivery of the software to VW America for installation on vehicles in Texas is a physical entry into Texas" that is a "relevant jurisdictional contact with the forum." *Volkswagen*, 2020 WL 7640037, at *12 (Triana, J., dissenting) (citing *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). Such electronic entry into a State implicates evolving issues of personal jurisdiction in the internet age that have troubled the U.S. Supreme Court, *see, e.g., Ford*, 141 S. Ct. at 1035 (Gorsuch, J., concurring), and warrant this Court's attention.

Lastly, VW Germany's statement that it neither "sought nor derived Texas-specific financial benefits through the software updates," Resp. 17 (alterations omitted), is inconsistent with the clear financial benefit it derived both from initial sales and from avoiding mounting warranty costs for Texas cars, CR.1530-32, 1621; *see TV Azteca*, 490 S.W.3d at 34-35. VW Germany "undeniably profited by availing [itself] of the Texas market." *Volkswagen*, 2020 WL 7640037, at *10 (Triana, J., dissenting). A corporation that not only sells cars in Texas through a distributor, but then 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.

C. The claims are for violating Texas law, not federal law.

VW Germany's argument that this case is a "quintessential example" of when a foreign defendant "might be accountable to the United States but not to any particular state," Resp. 12, both misapprehends the nature of the active claims as based

in federal rather than state law and improperly conflates the personal-jurisdiction inquiry with the merits of its preemption defense.

Texas does not bring a claim against VW Germany for "fulfill[ing] warranty claims" required by federal law. *Id.* at 12 n.9. The claims are for violations of state statutes and rules and are based on VW Germany's role in tampering with Texas cars when they were brought into Texas dealerships for service. 1.Supp.CR.3-5, 8-12, 17-19; CR.394-95. Texas is the only forum in which these state-law claims may be brought. *See* Tex. Water Code § 7.105(c). The claims are not "governed by federal law and overseen by the EPA," Resp. xv, and thus the nature of the claims lends no support to VW Germany's theory that personal jurisdiction would exist only in a federal forum with the United States as plaintiff. Indeed, by acknowledging that personal jurisdiction is proper in suits brought by at least *some* States, *id.* at 12 n.8, VW Germany necessarily admits that personal jurisdiction over it for violations of state post-sale anti-tampering laws is not exclusively limited to a federal enforcement action.

VW Germany's attempt to leverage a preemption defense to defeat the Court's personal jurisdiction should also be rejected. Preemption is a merits question that has nothing to do with whether VW Germany purposefully availed itself of the Texas forum. And in any event, the post-sale preemption argument is meritless, and has been rejected both here, CR.1131-32 (on summary judgment), and in the Ninth Circuit multidistrict litigation, *see In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 959 F.3d 1201, 1205 (9th Cir. 2020).

Relatedly, it is of no moment that VW Germany has already paid a large sum to settle a different set of claims with the federal government, Resp. xiii n.3, and the majority below erred in considering that settlement. *Volkswagen*, 2020 WL 7640037, at *2, *6, *9. VW Germany obtained no release from state-law claims, and the "unprecedented" nature of the state-law claims, Resp. 1, flows from VW Germany's "unusual and perhaps unprecedented" conduct. *In re Volkswagen*, 959 F.3d at 1205, 1210.

II. This Court Should Grant Review to Confirm that Purposeful Availment May Be Indirect.

The U.S. Supreme Court recently reiterated:

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

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

And this Court has explained that "purposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)." *Spir Star*, 310 S.W.3d at 874. "[U]sing a distributor-intermediary" to take advantage of the Texas market "provides no haven from the jurisdiction of a Texas court." *Id.* at 871; *see also 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).

Those holdings did not rely on a veil-piercing theory, and it is not necessary (as VW Germany argues at 7) for Texas to rely on such a theory here. The Texas contacts outlined above are VW Germany's own contacts, not VW America's alone. *See Swanson*, 2018 WL 6273103, at *5 (Volkswagen "acting through its affiliates, *itself* installed defeat devices in used vehicles in Minnesota"). And VW Germany's orchestration of recall-tampering does not "closely resemble[]," Resp. 13, the situation in *Anchia v. DaimlerChrysler AG*, where the lower court held that the defendant parent company did not exercise any control over its subsidiary. 230 S.W.3d 493, 501 (Tex. App.—Dallas 2007, pet. denied).

Ultimately, both VW Germany and the majority below fall back on the idea that VW Germany could not "indirectly" target Texas because "its conduct was directed to the United States as a whole." Resp. 7; *see also Volkswagen*, 2020 WL 7640037, at *6. That premise, as already discussed, should be rejected.

Prayer

The Court should grant the petition, reverse the court of appeals' judgment, and render judgment denying VW Germany's special appearance.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Judd E. Stone II
Solicitor General

Patrick K. Sweeten
Deputy Attorney General
for Special Litigation

Nanette DiNunzio
Associate Deputy Attorney General
for Civil Litigation

/s/ Lisa A. Bennett
Lisa A. Bennett
Assistant Solicitor General
State Bar No. 24073910
Lisa.Bennett@oag.texas.gov

Counsel for Petitioner

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On June 9, 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

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Hollis Duncan on behalf of Lisa Bennett
Bar No. 24073910
hollis.duncan@oag.texas.gov
Envelope ID: 54256032
Status as of 6/9/2021 2:17 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Joshua ARomero		jromero@jw.com	6/9/2021 2:13:58 PM	SENT
Robert L.Sayles		rsayles@bradley.com	6/9/2021 2:13:58 PM	SENT
Samuel T.Acker		sacker@bradley.com	6/9/2021 2:13:58 PM	SENT
Lisa Bennett	24073910	Lisa.Bennett@oag.texas.gov	6/9/2021 2:13:58 PM	SENT
Hollis Duncan		hollis.duncan@oag.texas.gov	6/9/2021 2:13:58 PM	SENT
Heather Roberson		hroberson@bradley.com	6/9/2021 2:13:58 PM	SENT
Patrick Sweeten		Patrick.Sweeten@oag.texas.gov	6/9/2021 2:13:58 PM	SENT
Nanette Dinunzio		Nanette.Dinunzio@oag.texas.gov	6/9/2021 2:13:58 PM	SENT
Nicholas Menillo		menillon@sullcrom.com	6/9/2021 2:13:58 PM	SENT
Alex Treiber		treibera@sullcrom.com	6/9/2021 2:13:58 PM	SENT
William Snyder		wsnyder@bradley.com	6/9/2021 2:13:58 PM	SENT
Madeleine Bourdon		mbourdon@bradley.com	6/9/2021 2:13:58 PM	SENT
Arnaud Camu		CAMUA@sullcrom.com	6/9/2021 2:13:58 PM	SENT
Joseph Mansilla		jmansilla@bradley.com	6/9/2021 2:13:58 PM	SENT
David C.Miller		dmiller@bradley.com	6/9/2021 2:13:58 PM	ERROR
Stacy Lingle		slingle@bradley.com	6/9/2021 2:13:58 PM	ERROR
Jennifer Moss		jmoss@bradley.com	6/9/2021 2:13:58 PM	SENT
Richard Sayles		dsayles@bradley.com	6/9/2021 2:13:58 PM	SENT