**NO. 21-0130**
**NO. 21-0133**

**IN THE SUPREME COURT OF TEXAS**

**STATE OF TEXAS,**

*Petitioner*,

**v.**

**VOLKSWAGEN AKTIENGESELLSCHAFT,**

*Respondent*.

**STATE OF TEXAS,**

*Petitioner*,

**v.**

**AUDI AKTIENGESELLSCHAFT,**

*Respondent*.

**Petitions for Review from the Court of Appeals**
**Third District of Texas, Austin, Texas**
**Cause No. 03-19-00453-CV**
**Cause No. 03-20-00022-CV**

# RESPONDENTS' BRIEF ON THE MERITS

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## STATEMENT OF THE CASE

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| *Nature of the Case:* | The State of Texas ("Petitioner") brought claims against Volkswagen Aktiengesellschaft ("VW Germany") and Audi Aktiengesellschaft ("Audi Germany"; together, the "German Respondents"), car manufacturers headquartered in Germany, along with their U.S. distributor, Volkswagen Group of America, Inc. ("VW America"), a New Jersey corporation headquartered in Virginia, alleging violations of the Texas Clean Air Act. (VW.CR.1303-31; Audi.CR.1373-1401.) [1] The petitions for review ("Petitions") concern whether Texas courts may exercise specific personal jurisdiction over the German Respondents on the remaining claims in this action. After Petitioner filed separate Petitions concerning the same issue, this Court consolidated the Petitions on July 15, 2021. |
| *Trial Court:* | The trial court has not yet been assigned. The pretrial proceedings were consolidated in the 200th Judicial District Court, Travis County, Texas; Honorable Tim Sulak, Presiding Judge (the "MDL Court") (previously of the 353rd Judicial District Court). |
| *Trial Court's Disposition:* | The trial court has not yet been assigned. The MDL Court denied VW Germany's and Audi Germany's special appearances without specifying its reasoning. (VW.CR.1999; Audi.CR.2383.) |
| *Court of Appeals:* | The Third District Court of Appeals in Austin. The Court of Appeals consolidated VW Germany's and Audi Germany's separate appeals from separate identical orders by the MDL Court denying their special appearances. Memorandum opinion by Chief Justice Jeff Rose, joined by Justice Edward Smith. *Volkswagen Aktiengesellschaft v. State*, Nos. 03-19-00453-CV, 03-20- |

[1] Record citations are to VW Germany's Reporter's Record ("VW.RR") and Clerk's Record ("VW.CR"), and Audi Germany's Reporter's Record ("Audi.RR") and Clerk's Record ("Audi.CR").

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| | 00022-CV, 2020 WL 7640037 (Tex. App.—Austin Dec. 22, 2020, pet. filed) (mem. op.) (hereinafter, "*Volkswagen*"). Dissenting opinion by Justice Gisela Triana. *Id.* |
| *Court of Appeals' Disposition:* | The Court of Appeals reversed the MDL Court's order denying VW Germany's and Audi Germany's special appearances and rendered judgment dismissing the claims against them for lack of specific personal jurisdiction. |

## ISSUE IN RESPONSE

After reviewing the voluminous evidentiary record, the Court of Appeals correctly found no evidence that VW Germany and Audi Germany purposefully directed any conduct toward Texas. Instead, VW Germany developed software *in Germany* for implementation in nationwide and model-wide emissions recall campaigns, and VW Germany's and Audi Germany's U.S. distributor (VW America, a New Jersey corporation headquartered in Virginia), provided that software to independent franchise dealers throughout the United States, including in Texas, for installation in hundreds of thousands of customers' vehicles nationwide. Based upon those findings, did the Court of Appeals correctly apply the settled law this Court announced in *Spir Star* and *TV Azteca* (and reaffirmed just months ago in *SprayFoam*) to conclude that Texas courts do not have specific personal jurisdiction over the German Respondents in this action, because, unlike their U.S. distributor, they did not purposefully avail themselves of the Texas market?

**TO THE HONORABLE SUPREME COURT OF TEXAS:**

Petitioner brought this case against VW America and the German Respondents in connection with software installed during nationwide recall campaigns in 2014 and 2015 on vehicles throughout the United States, including in Texas. Petitioner contends that the installation of this software in approximately 23,000 vehicles while at VW America's independent franchise dealers in Texas violated the State of Texas's anti-tampering regulations, even though the software's overall effect was to *reduce* emissions. VW America has *not* challenged the trial court's personal jurisdiction over it and is vigorously defending itself against Petitioner's claims. Petitioner and VW America are currently engaged in discovery in the MDL court.

As the Court of Appeals correctly concluded, VW Germany and Audi Germany are *not* subject to Texas courts' jurisdiction in this action. Neither German Respondent had any nexus whatsoever with Texas in connection with the conduct challenged by Petitioner in this suit. The closest connection that Petitioner can show is that VW Germany developed the recall software *in Germany* and uploaded that software to its server *in Germany*, which server was synchronized to a U.S.-based server maintained by VW America outside of Texas. After examining the extensive factual record, the Court of Appeals correctly concluded that the German Respondents' conduct was, at all times, "directed at the United States

market as a whole," not Texas. *Volkswagen*, 2020 WL 7640037, at *6, *8. As a result, under settled law, there is no basis for subjecting the German Respondents to Texas courts' jurisdiction.

## STATEMENT OF FACTS

Petitioner seeks substantial penalties from VW Germany and Audi Germany for software designed by VW Germany in Germany and installed in Volkswagen- and Audi-branded vehicles by VW America's independent franchise dealers as part of a series of nationwide and model-wide emissions recalls. The German Respondents did not install any of the software in any of the vehicles, nor does either one have a dealer network in the United States. The dealer network is overseen by VW America.

Relying entirely on public admissions made in connection with settlements with the U.S. Environmental Protection Agency ("EPA") and the California Air Resources Board ("CARB") over VW Germany's installation of "defeat device" software in diesel vehicles that masked excess emissions of nitrogen oxides ("NOx"),[2] Petitioner alleges that, as a result of the post-sale updates to that software,

[2] VW Germany, Audi Germany and VW America ultimately entered into a series of highly-publicized consent decrees and settlement agreements resulting in massive fines and relief designed to remediate both environmental and consumer harm. Texas and its residents were allocated over $209 million in environmental mitigation funds and over $1 billion in consumer relief. *See Volkswagen*, 2020 WL 7640037, at *2.

VW America (headquartered in Virginia and incorporated in New Jersey), VW Germany and Audi Germany "tamper[ed]" with vehicles used on Texas roadways in violation of Texas's anti-tampering regulations ("Recall Tampering Claims"). (VW.CR.386-89; VW.CR.424-25; Audi.CR.471-73.) Until this lawsuit, Petitioner had *never* attempted to enforce Texas's anti-tampering regulations against vehicle manufacturers, much less foreign manufacturers with no connection to Texas, for the installation of factory-installed defeat devices or post-sale updates to that software.

In seeking to recover substantial penalties based on unprecedented alleged violations of Texas law, Petitioner relies on a legally flawed "indirect-availment" theory of personal jurisdiction (barred by this Court's precedents) to try to show that the German Respondents, which have no presence whatsoever in Texas, somehow purposefully availed themselves of the Texas market. After one year of extensive jurisdictional discovery, Petitioner has identified no evidence that VW Germany and Audi Germany purposefully availed themselves of the Texas market. Among other things, the record demonstrates that:

- the German Respondents manufactured vehicles *in Europe* and did *not* create any vehicle specifically for the Texas market;

- the German Respondents did *not* themselves market or sell any vehicles in the United States, nor did they require VW America to market or sell any vehicles in Texas specifically;
- the German Respondents did *not* send employees to Texas and did *not* maintain offices in Texas;
- VW Germany developed the software updates challenged in this action *in Germany* for VW America to implement in nationwide and model-wide recall campaigns; and
- VW America distributed the software updates to VW America's independent franchise dealers throughout the United States for installation in customers' vehicles.

These uncontroverted facts, detailed below, establish that the German Respondents did not engage in any conduct specifically targeted at the State of Texas.

After examining the extensive factual record, the Court of Appeals recognized Petitioner's overreach and correctly held that the German Respondents were not subject to personal jurisdiction in this case, because their "recall-tampering activities were not purposefully directed at Texas," and they "did not purposefully avail [themselves] of the privilege of conducting activities within Texas." *Volkswagen*, 2020 WL 7640037, at *7, *9.

### A. Petitioner Sued the German Respondents Initially Only After It Became Clear that Petitioner's Original Claims Were Preempted.

In 2015, Petitioner first sued VW America (but not the German Respondents) for claims that were later dismissed. More than two years later, Petitioner first added the Recall Tampering Claims and named the German Respondents (along with VW America) as defendants. (VW.CR.362-93; Audi.CR.408-39; VW.CR.386-89; VW.CR.424-25; Audi.CR.471-73.)

Petitioner based its Recall Tampering Claims entirely on public admissions that VW Germany made in various settlements with U.S. regulators, including in a Statement of Facts annexed to VW Germany's January 2017 plea agreement with the U.S. Department of Justice. Citing this Statement of Facts, Petitioner alleged that the German Respondents engaged in "additional tampering on Affected Vehicles, first, by means of a field fix or an emissions service action performed on customers' cars when they were brought in for service that installed new tampering software parts and, second, in a 2014-2015 recall on the Affected Vehicles." (VW.CR.424-25; Audi.CR.472.)[3]

VW Germany developed the challenged software updates *in Germany* for model-wide installation in vehicles throughout the United States. Under the U.S.

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[3] Only 27 vehicles in Texas received challenged software as part of the limited field fix that preceded the formal recall campaigns. (VW.CR.1413.)

Clean Air Act, VW Germany was obligated to remedy any emissions defects or nonconformities under warranties for emissions-control systems in its vehicles sold in the United States. *See, e.g.*, 42 U.S.C. § 7541(b), (c); 40 C.F.R. §§ 86.1848-01(c)(2), 86.1805-04, 86.1805-12 & 86.1805-17 (requiring manufacturers to ensure "compl[iance] with all [EPA] certification and in-use emission standards" for a vehicle's useful life, including remediation of non-conformities in emissions controls). Notably, in coordination with EPA, CARB[4] performed testing that determined the challenged software updates installed during the recalls *reduced* NOx emissions.[5]

**B. Petitioner Conducts More Than a Year of Jurisdictional Discovery.**

VW Germany and Audi Germany filed special appearances on May 7, 2018 and October 1, 2018, respectively, in the MDL Court. (VW.CR.1281-1302; Audi.CR.1349-72.) Extensive, year-long jurisdictional discovery—including hundreds of pages of written discovery, extensive document productions and a

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[4] Congress allowed the State of California, through CARB, to implement its own mobile emissions standards. 42 U.S.C. §§ 7543(b), 7507.

[5] *See, e.g.*, VW.CR.716 (EPA September 18, 2015 Notice of Violation stating that "testing showed only *a limited benefit to the recall*" (emphasis added)); VW.CR.1129 (CARB September 18, 2015 letter to Volkswagen stating that "testing showed that the recall calibration did *reduce the emissions* to some degree" (emphasis added)); VW.CR.751-52 (EPA October 7, 2016 complaint stating that "on-road and laboratory testing showed limited *reduction* in the rates of emission of NOx from the recalled vehicles" (emphasis added)).

corporate representative deposition—confirmed that none of the conduct by VW Germany or Audi Germany that Petitioner alleged in support of its unprecedented Recall Tampering Claims occurred in or was directed to Texas. Instead, much of Petitioner's discovery (and current arguments) centered around 20-year-old importer agreements between each German Respondent and VW America that concern general matters regarding VW America's business throughout the entire United States. Those importer agreements, including their negotiations, had no connection to Texas specifically.

### 1. None of the German Respondents' Alleged Conduct Occurred in Texas or Specifically Targeted the Texas Market.

As jurisdictional discovery demonstrated, the challenged software updates were performed as part of recall campaigns that were not specifically targeted to the State of Texas or vehicles sold in Texas. (VW.CR.1453-54.) VW Germany's Research Technical Development department developed the software updates *in Germany*. (VW.CR.1992-93.) Audi Germany confirmed the software's compatibility with the relevant subset of Audi vehicles *in Germany*. (Audi.CR 2203.) VW Germany then "provide[d] the software to [VW America's] Diagnosis Team in Auburn Hills, Michigan for compatibility testing purposes." (VW.CR.1992.) After "successful testing, [VW America's] Consumer Protection Department then provide[d] information regarding the details of the software release

to the [After Sales Technic Department] in Germany, including the timing of issuance of the software to dealers and the dealers to receive the updates." (VW.CR.1992-93.)

After completion of those steps, the German Respondents provided the software updates to VW America by uploading the software to servers *in Germany*, which synchronized to a server in the United States maintained by VW America (outside of Texas). (VW.CR.1993; Audi.CR.2203-04.) VW America in turn made the updates available to VW America's network of independent franchise dealers throughout the United States for installation in vehicles. (VW.CR.1413, 1992-93; *see also* VW.CR.1861 (VW Germany "developed centrally" the software and then VW America "would make it available to the dealer network").) The record contains no evidence that either German Respondent ever communicated with any dealers in VW America's network, let alone any dealers in Texas.

### 2. The German Respondents Did Not Conduct Activities in Texas or Target the Texas Market.

Because the transmission of the software from VW Germany's server to VW America's server indisputably had no connection with Texas, Petitioner seeks to expand the analysis to encompass the German Respondents' supposed overall role in the marketing, advertising and sale of cars throughout the United States. But even if such general involvement in the sales and marketing of vehicles nationwide had any relevance to whether the German Respondents are subject to personal

jurisdiction on Petitioner's Recall Tampering Claims, such evidence still would not help Petitioner, because neither German Respondent targeted Texas for either sales or marketing.

***Importer Agreements.*** Over 20 years ago, the German Respondents each entered into importer agreements with VW America that generally addressed how VW America would sell and advertise vehicles throughout the United States, including VW America's subsequent distribution, sale and repair activities on those vehicles. Although including the general requirement that VW America "exhaust fully all market opportunities" in the United States, the importer agreements provide no details on how that marketing should be done and never identify Texas as a targeted market. (VW.CR.1472; Audi.CR.2168.) As VW Germany's corporate representative explained, while "the basic principles that are described [in the importer agreements] are implemented," those importer agreements do not (and could not) address the day-to-day realities of how VW America's business was run. (VW.CR.1847-48; *see also* VW.CR.1301 ¶ 4; Audi.CR.1371 ¶ 4.)

***No Distribution or Sale of Vehicles.*** The German Respondents did not market, advertise or sell any vehicles in Texas. After purchasing vehicles from the German Respondents in Europe and importing those vehicles to the United States (VW.CR.1300-01 ¶¶ 2, 5-6; Audi.CR.1370-71 ¶¶ 2, 5-6), VW America was exclusively responsible for the marketing, sale and distribution of the vehicles

throughout the United States. (VW.CR.1807 ("[T]he responsibility is with [VW America] to do dealer development" throughout the entire United States); VW.CR.1301 ¶ 5 ("VW America has the exclusive right to import, distribute, market, advertise and sell" throughout the United States the vehicles manufactured by the German Respondents); Audi.CR.1371 ¶ 5.) The German Respondents did "not sell vehicles in the United States," through independent franchise dealers or otherwise. (*See* VW.CR.1301 ¶ 5; Audi.CR.1371 ¶ 5.)

Nor did the German Respondents require VW America to sell vehicles or set up independent franchise dealers in *any* particular U.S. state, including Texas. Instead, "VW America has complete and exclusive decision-making authority, control, discretion, and oversight concerning which of the vehicles VW America purchased from VW Germany [or Audi Germany] will be exported to Texas, marketed in Texas, or sold to Texas dealerships." (VW.CR.1301 ¶ 6; Audi.CR.1371 ¶ 6.) The German Respondents 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." (VW.CR.1666; Audi.CR.2161-62.) Nor did the German Respondents "set or negotiate Texas-specific sales objectives" or have any "knowledge . . . of any sales objectives specific to the State of Texas." (VW.CR.1670; *see also* Audi.CR.2200.)

***No Marketing or Advertising in the United States.*** VW Germany did not create, develop or fund any "marketing material, advertising material, or any other promotional device" used to market vehicles in Texas during the relevant period. (VW.CR.1666-67.) Instead, with respect to its various distributors (including VW America), VW Germany merely played "a coordination role to make sure that the markets are talking to each other and that they're made aware of each other's activities for synergy purposes." (VW.CR.1837.) Similarly, there is no evidence that an Audi Germany "employee provided training, consultation, or guidance to [VW America] or a Texas Dealer regarding the sale or marketing of a product or service within the State of Texas." (Audi.CR.2152-53; *see also* Audi.CR.1371 ¶ 5 ("Audi Germany . . . does not implement or control any . . . marketing strategy, or marketing campaign in the United States.").)

### C. The MDL Court Denies the German Respondents' Special Appearances Without Setting Forth Its Reasoning.

In light of these uncontroverted facts, the German Respondents filed Special Appearances arguing they were not subject to personal jurisdiction in this action. (*See* VW.CR.1281-1302, 1332-58; Audi.CR.1349-72, 1429-55.) On May 17, 2019, Petitioner filed its Response to VW Germany's First Amended Special Appearance. (*See* VW.CR.1359-1630.) On June 11, 2019, the MDL court heard oral argument. (VW.RR.1-53.) Three days later, the MDL court denied VW Germany's special appearance without articulating the reasons for its denial. (VW.CR.1999.)

On November 7, 2019, Petitioner filed its Response to Audi Germany's First Amended Special Appearance. (Audi.CR.2097-2275.) On December 16, 2019, the MDL court heard oral argument (Audi.RR.1-63) and denied Audi Germany's special appearance, again without setting forth its reasoning (Audi.CR.2383).

The German Respondents timely appealed the denials of their special appearances. (VW.CR.2000-04; Audi.CR.2379-83.)

### D. The Court of Appeals Reverses the MDL Court.

On December 22, 2020, in a 20-page carefully reasoned opinion, the Court of Appeals examined the extensive factual record and correctly held that because the German Respondents' "recall-tampering activities were not purposefully directed at Texas," they "did not purposefully avail [themselves] of the privilege of conducting activities within Texas," and thus were not subject to jurisdiction in this case. *Volkswagen*, 2020 WL 7640037, at *7, *9.

In particular, the Court of Appeals reviewed the extensive evidentiary record and determined that "[Petitioner] does not allege any facts or present any evidence that" the German Respondents:

- "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 in Texas or specifically for vehicles sold or driven in Texas"; or
- "directly reimbursed Texas dealers for the costs of the recall."

*Id*. at *5; *see also id.* at *7. The Court of Appeals correctly found that many of the "activities relied on by the State for purposes of specific personal jurisdiction are more properly characterized as the activities of VW America, not [the German Respondents]." *Id*. at *5, *8.

Justice Triana dissented and would have found that Texas courts have personal jurisdiction over the German Respondents because the German Respondents "directed" the "[recall] activities to the United States as whole," thus "necessarily direct[ing] those activities to Texas." *Id*. at *9-10.

## SUMMARY OF THE ARGUMENT

The Court of Appeals carefully examined the extensive factual record, applied settled law and concluded that the German Respondents did not purposefully avail themselves of the Texas market by specifically directing any conduct toward Texas. In trying to find error, Petitioner distorts both the law and the record. The Court of Appeals' fact-bound reversal of the trial court's orders was correct and is unworthy of this Court's review for multiple reasons.

*First*, this Court has long held that the "touchstone of jurisdictional due process is purposeful availment" of the forum by the nonresident defendant. *Luciano* v. *SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 9 (Tex. 2021) (quotations omitted) (quoting *Spir Star AG* v. *Kimich*, 310 S.W.3d 868, 873 (Tex. 2010)). As this Court has held, "the relevant contacts are those of the *defendant*," who "must seek some benefit, advantage, or profit by 'availing' itself of the jurisdiction." *Searcy* v. *Parex Res., Inc.*, 496 S.W.3d 58, 67 (Tex. 2016) (emphasis added). Under this Court's settled law, Petitioner must show that the German Respondents "targeted" Texas specifically, as opposed to the United States as a whole. *Spir Star*, 310 S.W.3d at 876; *SprayFoam*, 625 S.W.3d at 11-12, 13; *see also Moki Mac River Expeditions* v. *Drugg*, 221 S.W.3d 569, 577 (Tex. 2007) (nonresident defendant must "intend to serve the Texas market," such as through "purposefully direct[ing] marketing efforts to Texas" and "regularly advertis[ing] in Texas"). In fact, in its

recent decision in *SprayFoam*, this Court emphasized *four different times* that a nonresident defendant's targeting of Texas is required for jurisdiction, *see infra* Argument pt. A.2. Targeting a specific state is essential to a court's just and fair exercise of personal jurisdiction, because conduct targeting the entire United States does not "manifest an intention to submit to the power of a [state]." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 881-82 (2011). The Court of Appeals correctly applied this established legal standard.

*Second*, the extensive jurisdictional record confirms that none of the German Respondents' alleged conduct relevant to the Recall Tampering Claims targeted Texas. "[O]nly . . . *the defendant*'s contacts with the *forum*" are relevant in assessing whether a defendant has "target[ed]" Texas, *SprayFoam*, 625 S.W.3d at 9, 13 (emphases added), and "the contacts of distinct legal entities, including parents and subsidiaries, must be assessed separately," *Cornerstone Healthcare Grp. Holding, Inc.* v. *Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016). Applying these legal principles, courts in Texas and elsewhere routinely decline to exercise jurisdiction over non-U.S. auto manufacturers absent evidence of state-specific targeting, including in cases involving similar "defeat device" allegations and nationwide recalls. *See, e.g.*, *Anchia* v. *DaimlerChrysler AG*, 230 S.W.3d 493, 501 (Tex. App.—Dallas 2007, pet. denied); *Thornton* v. *Bayerische Motoren Werke AG*, 439

F. Supp. 3d 1303, 1311 (N.D. Ala. 2020); *Rickman* v. *BMW of N. Am. LLC*, 2021 WL 1904740, at *4-8 (D.N.J. May 11, 2021).

It is undisputed that the German Respondents did not send employees to Texas or maintain offices in Texas. Nor was there anything Texas-specific about the development or installation of the challenged software updates: VW Germany developed the software *in Germany* and distributed it to *VW America* (outside of Texas), and VW America distributed the software to VW America's network of independent franchise dealers throughout the United States. (*See* VW.CR.1454-55, 1992-93; Audi.CR.2203-04.) The German Respondents thus did nothing to target Texas specifically in connection with the challenged software updates.

To try to save its claims against the German Respondents, Petitioner urges this Court to ignore the black-letter rule that "we only look to the defendant's contacts with the forum," *SprayFoam*, 625 S.W.3d at 9, by citing *Spir Star* as support for an unprecedented "indirect-availment" theory of personal jurisdiction not requiring the nonresident defendant to target the forum state. (Pet. Br. at 27, 30.) But Petitioner misconstrues *Spir Star* and ignores its core holding that personal jurisdiction requires targeting of the forum state *by the nonresident defendant*. 310 S.W.3d at 874. The German Respondents here did not "indirectly" target Texas through a subsidiary's direct contacts with Texas, because the German Respondents did *not* target Texas at all—their conduct was directed to the United States as a whole

through VW America, their U.S. distributor. Every case that Petitioner claims adopted "indirect-availment" involved evidence demonstrating that the nonresident defendant *specifically targeted the Texas market*—the essential showing that Petitioner cannot make after a year of jurisdictional discovery.

To try to prove targeting, Petitioner distorts the over 20-year-old importer agreements. Those agreements nowhere mention Texas or the Texas market at all, but instead speak only to VW America's business throughout the entire United States. In citing these agreements to ostensibly establish targeting, Petitioner repeatedly conflates the German Respondents' conduct with that of VW America, which will remain a defendant in this case irrespective of this Court's disposition of these Petitions. As extensive discovery has shown, VW America, not the German Respondents, disseminated the challenged software updates throughout the United States (including in Texas), and VW America's independent franchise dealers installed the updates on vehicles nationwide (including in Texas). The German Respondents' mere knowledge that these nationwide-recalled vehicles were located in every state, including Texas, cannot establish the required purposeful availment of Texas. *See Searcy*, 496 S.W.3d at 67-69. And any financial benefit the German Respondents received from the software updates was on a nationwide basis.

This Court should deny the Petitions. The Court of Appeals' decision correctly applied settled law by analyzing VW Germany's and Audi Germany's

contacts separately, and correctly concluded that neither had targeted Texas. This Court's further review of this fact-intensive decision is unwarranted.

## ARGUMENT

### A. The Decision Below Applied the Correct and Settled Legal Standard.

In its recent *SprayFoam* decision, this Court reiterated two principles previously discussed at length in a trilogy of personal jurisdiction decisions issued by this Court in 2016: *Cornerstone*, *TV Azteca* and *Searcy*. Application of those same two principles here conclusively resolves this case.

*First*, absent veil piercing (which Petitioner does not allege (Pet. Br. at 29)), the conduct of legally separate entities must be treated separately in analyzing purposeful availment. *See, e.g.*, *SprayFoam*, 625 S.W.3d at 9; *Cornerstone*, 493 S.W.3d at 71-72 (holding that the subsidiary's contacts "could not . . . subject [parent] companies . . . to Texas's jurisdiction"); *Searcy*, 496 S.W.3d at 67 ("[T]he relevant contacts are those of the defendant.").

*Second*, to be subject to jurisdiction in Texas, a nonresident defendant must have purposefully *targeted* the Texas market. *See, e.g.*, *SprayFoam*, 625 S.W.3d at 11, 13; *Searcy*, 496 S.W.3d at 67 ("Purposeful availment involves contacts that the defendant purposefully directed into the forum state." (quotation omitted)). Thus, in *TV Azteca* v. *Ruiz*, this Court found purposeful availment of Texas where, unlike here, "Petitioners physically 'entered into' Texas to produce and promote their

broadcasts, derived substantial revenue and other benefits by selling advertising to Texas businesses, and made substantial efforts to distribute their programs and increase their popularity in Texas." 490 S.W.3d 29, 47-52 (Tex. 2016).

Petitioner does not claim that any confusion exists among Texas courts over the proper legal standard to apply under this Court's clear and consistent precedents. Instead, Petitioner disagrees about how the Court of Appeals interpreted the facts of *this* case, including the Court of Appeals' conclusion that the activities Petitioner principally relies on "for purposes of specific personal jurisdiction are more properly characterized as the activities of VW America." *Volkswagen*, 2020 WL 7640037, at *5. Petitioner is wrong, and, in any event, the parties' factual dispute does not warrant this Court's discretionary review.

### 1. Due Process Requires the Assessment of Personal Jurisdiction on an Entity-by-Entity Basis.

It is "settled law that the contacts of distinct legal entities, including parents and subsidiaries, must be assessed separately for jurisdictional purposes unless the corporate veil is pierced." *Cornerstone*, 493 S.W.3d at 71; *see also SprayFoam*, 625 S.W.3d at 9 ("When assessing minimum contacts, we look only to the defendant's contacts with the forum."). As the U.S. Supreme Court has explained, "a state court's assertion of jurisdiction exposes defendants to the State's coercive power," so the exercise of jurisdiction "is subject to review for compatibility with the Fourteenth Amendment's Due Process Clause, which limits the power of a state

court to render a valid personal judgment against a nonresident defendant." *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1779 (2017) (citations and quotations omitted).

The U.S. Supreme Court and this Court have also made clear that "'the [due process] requirements of [personal jurisdiction] must be met *as to each defendant* over whom a state court exercises jurisdiction.'" *Id.* at 1783 (quoting *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added)). And this Court has rightly recognized that treating U.S. subsidiaries separately from their non-U.S. parents is of particular importance for non-U.S. defendants—such as the German Respondents—"[b]ecause of the unique and onerous burden placed on a party called upon to defend a suit in a foreign legal system." *BMC Software Belgium, N.V.* v. *Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). As a result, "[s]o long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other." *PHC-Minden, L.P.* v. *Kimberly-Clark Corp.*, 235 S.W.3d 163, 172 (Tex. 2007).

Petitioner's unprecedented "indirect-availment" theory, addressed in more detail below, is not some exception to this black-letter rule. There is no "indirect-availment" theory in this Court's jurisprudence: a Westlaw search for the phrase "indirect availment" across all decisions from this State—or even all state and federal court opinions in the United States—yields zero results. Instead, Petitioner

cites cases standing for the unremarkable proposition that a nonresident defendant that intentionally targets a forum by acting through a subsidiary (*i.e.*, using the subsidiary as the principal's agent) cannot escape jurisdiction. But those cases do not relieve Petitioner of the burden of showing that the nonresident defendant specifically targeted Texas. Instead, they *reaffirm* that it is "not the actions of the Texas intermediary that count, *but the actions of the foreign manufacturer*." *Spir Star*, 310 S.W.3d at 874 (emphasis added). Petitioner is wrong in claiming a conflict between the Court of Appeals' decision and *Spir Star*, and the Court of Appeals correctly found no evidence of purposeful availment of Texas by the German Respondents, whether through VW America or otherwise.

### 2. Nonresident Manufacturers Can Be Subject to Jurisdiction in Texas Courts Only If They Specifically Targeted Texas.

This Court reaffirmed in *SprayFoam* the fundamental principle that personal jurisdiction requires specific "targeting" of Texas. 625 S.W.3d at 11-13, 18. Texas has long recognized the purposeful availment standard adopted in *Nicastro* and *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 112 (1987): "Texas follows Justice O'Connor's plurality opinion in *Asahi*," *Spir Star*, 310 S.W.3d at 873, which requires a plaintiff to show "*act[s] of the defendant purposefully directed toward the forum State*" to satisfy the purposeful availment standard, *Asahi*, 480 U.S. at 112; *see Spir Star*, 310 S.W.3d at 371 (describing Justice O'Connor's *Asahi* opinion as requiring an inquiry of whether the defendant "intentionally targets" Texas).

The U.S. Supreme Court most recently articulated the purposeful availment standard in Justice Kennedy's 2011 plurality opinion in *Nicastro*, where he (like this Court in *Spir Star*) explained that, "consistent with Justice O'Connor's opinion in *Asahi*," a nonresident "defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted the forum*." 564 U.S. at 882, 885 (emphasis added). Justice Kennedy's opinion elaborated that "it is [the defendant's] purposeful contacts with [the forum state], not with the United States, that alone are relevant," *id.* at 886, and that it is *insufficient* to establish jurisdiction to show that a defendant "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states," *id.* at 879.

In *TV Azteca*, this Court surveyed various purposeful availment tests and again reconfirmed that Texas courts should apply the standard set forth in Justice O'Connor's *Asahi* plurality opinion and Justice Kennedy's *Nicastro* opinion: namely, that the "'additional conduct' must demonstrate 'an intent or purpose to serve the market in the forum State,'" and that "'[t]he defendant's transmission of goods permits the exercise of jurisdiction only *where the defendant can be said to have targeted the forum*; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.'" 490 S.W.3d at 46

(emphasis added) (quoting Justice O'Connor's *Asahi* opinion and Justice Kennedy's *Nicastro* opinion).

Lest there be any doubt, just a few months ago, in *SprayFoam*, this Court reiterated *four times* that a nonresident defendant must intend to target Texas *specifically*:

- a nonresident manufacturer must "specifically target[] Texas," 625 S.W.3d at 11;
- the defendant must "evince [its] intent or purpose to target the Texas market," *id.* at 12;
- the nonresident defendant must "target[] the forum, not . . . merely foresee[] [its] product ending up there," *id.* at 13; and
- "conduct demonstrat[ing] an intent or purpose to serve the market in the forum State" is required "to ensure that the nonresident defendant has purposefully targeted the Texas market," *id.* at 18 (all quotations omitted).

Citing Fifth Circuit precedent, Petitioner suggests that the Court of Appeals improperly relied on Justice Kennedy's plurality opinion in *Nicastro* rather than Justice Breyer's concurring opinion (Pet. Br. at 22-23), even though, as shown above, this Court has repeatedly looked to Justice Kennedy's reasoning in *Nicastro* when deciding issues of personal jurisdiction. *See, e.g.*, *SprayFoam*, 625 S.W.3d at

9, 13 (citing Justice Kennedy's *Nicastro* opinion four times and Justice Breyer's opinion zero times); *TV Azteca*, 490 S.W.3d at 46 (relying on Justice Kennedy's reasoning in *Nicastro* and never referring to Justice Breyer's reasoning). Petitioner favors Justice Breyer's concurrence because Justice Breyer declined to adopt Justice O'Connor's purposeful availment standard from *Asahi*, which—as shown above and admitted by Petitioner—this Court has repeatedly and expressly endorsed. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014) ("Justice Breyer's concurring opinion, however, did not explicitly embrace Justice O'Connor's stream of commerce plus theory."). But *this* Court has never adopted Justice Breyer's concurrence. Unlike the Fifth Circuit—which has recognized that its decisions are "in tension" with Justice Kennedy's plurality opinion by "not requiring that the defendant target the forum," *Ainsworth* v. *Moffett Eng'g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013)—this Court adopted the requirement of state-specific targeting in *Spir Star*, even before *Nicastro* was decided. *See Spir Star*, 310 S.W.3d at 871.

The U.S. Supreme Court's recent decision in *Ford Motor Co.*—which Petitioner cites extensively (*see* Pet. Br. at 13, 15-18, 21, 27)—is irrelevant to the purposeful availment prong at issue in these Petitions. There, unlike in this case, Ford "*conceded* 'purposeful availment' of the two States' markets." *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1028 (2021) (emphasis

added).[6] Thus, the U.S. Supreme Court's analysis focused solely on the "arise out of or relates to" prong of specific personal jurisdiction, which is not at issue here. *See, e.g.*, *Nomad Glob. Commc'n Sols., Inc.* v. *Hoseline*, 2021 WL 1400983, at *4 (D. Mont. Apr. 14, 2021) ("To the extent *Ford Motor Co.* affects this Court's analysis, it *only pertains to the relatedness element* of the constitutionality prong of specific jurisdiction." (emphasis added)).

Further resisting the requirement of specific and intentional targeting of the forum state, Petitioner claims that, because it has a supposed regulatory interest in bringing this suit, it has somehow "bolster[ed] the reasonableness of subjecting the defendants to the jurisdiction of Texas courts" by merely asserting that "the nature of defendants' conduct was tortious and violated a state law." (Pet. Br. at 32-33.) But Petitioner's theory ignores this Court's warnings against "determin[ing] the underlying merits in order to answer the jurisdictional question." *Old Republic Nat'l Title Ins. Co.* v. *Bell*, 549 S.W.3d 550, 562 (Tex. 2018). And before this lawsuit, Texas had never expressed a regulatory interest—even once—in enforcing its laws

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[6] As the Montana Supreme Court had previously noted, the evidence was clear that Ford had "intent to serve the market in Montana," because Ford "registered to do business in Montana," "operates subsidiary companies in Montana," "has thirty-six dealerships in Montana," "has employees in Montana," sells "automobiles" and "parts in Montana," and "provides automotive services in Montana." *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 395 Mont. 478, 488 (Mont. 2019), *aff'd*, 141 S. Ct. 1017.

against a manufacturer's post-sale software updates installed in nationwide and model-wide emissions recalls coordinated with EPA and CARB.

Nevertheless, and even assuming Texas could have a legitimate interest in regulating such software updates, that interest bears only on the considerations of "fair play and substantial justice" and would not justify a more lenient standard for purposeful availment. Misinterpreting this Court's 30-year-old decision in *Guardian Royal Exch. Assur., Ltd.* v. *Eng. China Clays, PLC*, 815 S.W.2d 223 (Tex. 1991), Petitioner argues that jurisdiction may be established upon a "'lesser showing of minimum contacts.'" (Pet. Br. at 33, 37 (quoting *Guardian Royal*, 815 S.W.2d at 229).) But Petitioner ignores that *Guardian Royal* considered that regulatory interest only when analyzing the "fair-play-and-substantial-justice" prong, expressly noting that "a state's regulatory interest alone is not in and of itself sufficient to provide a basis for jurisdiction," and ultimately *declining* to exercise jurisdiction over the defendant notwithstanding the State's interest in regulating the insurance market. 815 S.W.2d at 229-33. As the Court of Appeals correctly recognized in rejecting Petitioner's argument, "*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." *Volkswagen*, 2020 WL 7640037, at *14 (citing *Nicastro*, 564 U.S. at 885; *Searcy*, 496 S.W.3d at 67; *TV Azteca*, 490 S.W.3d at 38).

As even Petitioner admits (Pet. Br. at 32), the Court of Appeals' holding is fully consistent with this Court's precedents on this question. In *Moncrief Oil*, this Court held that, "[a]lthough a forum's interest in protecting against torts may operate to enhance the substantiality of the connection between the defendant and the forum, *it cannot displace the purposeful availment inquiry*." *Moncrief Oil Intern., Inc.* v. *OAO Gazprom*, 414 S.W.3d 142, 152 (Tex. 2013) (emphasis added). The purposeful availment requirement is a Due Process protection for nonresident defendants that cannot be diluted just because the Texas Attorney General is bringing claims on behalf of the State.[7]

### 3. The Court Below Did Not Embrace a "Forsake-All-Others Standard."

Foreclosed by this Court's personal-jurisdiction precedents, Petitioner mischaracterizes the Court of Appeals' decision as adopting a "forsake-all-others

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[7] Petitioner also points to dicta in *Nicastro* suggesting that "in *some cases*, as with an intentional tort, the defendant *might* well fall within the State's authority by reason of his attempt to obstruct its laws." (Pet. Br. at 33 (emphases added).) But even Petitioner concedes that *Nicastro* "did not further probe" or expound on this statement, because *Nicastro* did not involve an intentional tort (*id.*), and nothing in Justice Kennedy's opinion suggests that the same purposeful availment targeting standard would not apply to hypothetical intentional torts. Thus, notwithstanding this dicta, this Court in *TV Azteca*—an intentional tort case involving defamation—relied upon *Nicastro* and applied the targeting standard *without* placing any thumb on the scale due to the defendant's alleged intentional conduct. 490 S.W.3d at 45-47.

standard." (Pet. Br. at 21.) That is a strawman. The German Respondents have never argued, and the Court of Appeals did not hold, "that a corporation must target Texas to the exclusion of other States in order to be subject to Texas courts' jurisdiction." (Pet. Br. at 24.) The Court of Appeals properly held that although a nonresident need not target *only* the forum state in isolation, it must nonetheless *specifically target* that state, as opposed to the United States as a whole. In other words, "a manufacturer is subject to specific personal jurisdiction in Texas when it intentionally targets Texas as the marketplace for its products." *Spir Star*, 310 S.W.3d at 871; *see TV Azteca*, 490 S.W.3d at 29 (quoting *Nicastro*, 564 U.S. at 882 (specific personal jurisdiction exists "only where the defendant can be said to have targeted the forum")).

Because this principle is so clear, Petitioner offers nothing to suggest that other courts in Texas are confused about its application. To the contrary, the recent decision in *Skylift, Inc.* v. *Nash* confirms this well-settled rule. There, the Beaumont Court of Appeals held, like here, that the plaintiff failed to establish personal jurisdiction because: (1) there was no evidence that the product at issue was designed "for the Texas market as opposed to other locations in the United States"; (2) the defendant's advertisements circulated nationally, not solely in Texas; (3) the defendant did not serve Texas customers by establishing continuing communications with them; and (4) the defendant did not control its distributor so extensively as to

make it an agent under *Spir Star*. No. 09-19-00389-CV, 2020 WL 1879655, at *5-8 (Tex. App.—Beaumont Apr. 16, 2020, no pet.) (mem. op.); *see also 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.) (where nonresident dealer advertised vehicles through nationwide websites, there was no jurisdiction absent evidence that the dealer "specifically target[ed] Texas residents, as opposed to the residents of any other state").[8] Petitioner cannot establish purposeful availment merely by showing that VW Germany knew Texas would be one of the 50 states, even if a large one, where a nationwide and model-wide recall would be implemented.

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[8] *See also D'Jamoos* v. *Pilatus Aircraft*, 566 F.3d 94, 104 (3d Cir. 2009) (nonresident defendant's "efforts to exploit a national market necessarily included Pennsylvania as a target, but those efforts simply do not constitute the type of deliberate contacts within Pennsylvania that could amount to purposeful availment of the privilege of conducting activities in that state," because "any connection of [defendant] to Pennsylvania merely was a derivative benefit of its successful attempt to exploit the United States as a national market"); *State* v. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 755 (Tenn. 2013) ("[A] nationwide distribution agreement is not evidence of a specific intent or purpose to serve the Tennessee market . . . . [M]erely shipping goods to Tennessee at the request of a national distributor . . . d[oes] not confer jurisdiction." (quotations omitted)); *Hernandez* v. *City of Beaumont*, 2014 WL 6943881, at *4-5 (C.D. Cal. Dec. 8, 2014) (ultimately concluding jurisdiction was proper only because defendant's executive trained personnel within the forum state).

The targeting requirement is not just a matter of this Court's binding precedent; it is a question of constitutionally required fairness. Those who "operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter." *Nicastro*, 564 U.S. at 881-82. It would be unjust to premise jurisdiction on conduct targeting the United States as a whole, because nationwide activities do not "manifest an intention to submit to the power of a [state]." *Id.*

#### 4. Petitioner's Complaints of a "Comparative Disadvantage" or a "Jurisdictional Loophole" Are Misplaced.

Having no other choice, Petitioner doubles down on the unsupported argument—which even the dissenting opinion below did not embrace—that a Minnesota court's denial of a motion to dismiss against VW Germany for lack of personal jurisdiction on the pleadings requires this Court to reach the same result, or else "Texas [would be] at a comparative disadvantage in its ability to hold these entities accountable for post-sale tampering within its borders." (Pet. Br. at 25.) As the court below correctly observed, the Minnesota court's decision was based "on *allegations*, which Minnesota law required the court to accept as true"—not on the *facts* established after a year of extensive jurisdictional discovery, as occurred in this case. *See Volkswagen*, 2020 WL 7640037, at *7 (emphasis added).

In any event, because personal jurisdiction is a "forum-by-forum" analysis, *Nicastro*, 564 U.S. at 884, it is unsurprising that a defendant may be subject to

jurisdiction in certain states but not others. For example, a court found that VW Germany was subject to personal jurisdiction in Virginia because (unlike in Texas) VW Germany's employees traveled to Virginia, where VW America is headquartered. *See Volkswagen "Clean Diesel" Litig.*, 2018 WL 4850155, at *3 (Va. Cir. Ct. Oct. 4, 2018). The German Respondents undisputedly had no similar presence or conduct in Texas. *See infra* Argument pt. B. And Petitioner's apparent theory—that just because another state exercised jurisdiction over one or both German Respondents, Texas also has jurisdiction over them—ignores this Court's holding that although Texas is "certainly a large state," Texas courts "must recognize our own limits and those of our coequal sovereigns." *Michiana Easy Livin' Country, Inc.* v. *Holten*, 168 S.W.3d 777, 793 (Tex. 2005). The U.S. Supreme Court has repeatedly observed that the states are "coequal sovereigns in a federal system," and the "sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp*. v. *Woodson*, 444 U.S. 286, 292-93 (1980).

Petitioner's additional policy argument that the decision below "creat[es] a jurisdictional loophole somehow allowing defendants to evade liability by committing wrongful acts in multiple jurisdictions" lacks logic or legal support. (Pet. Br. at 38.) The German Respondents have been subject to jurisdiction in Virginia and California for the same conduct at issue in this case, and *thousands* of

plaintiffs have sought to impose staggering liability on them in those forums. Any notion that German Respondents have "evad[ed] liability" is demonstrably untrue, given the many billions of dollars they have already paid—much of which has already been distributed to the State of Texas and its residents. *See supra* note 2. And, most importantly, VW America will remain a defendant in this lawsuit regardless of the outcome of this jurisdictional dispute.

### B. The Decision Below Correctly Held that Petitioner Failed To Establish that the German Respondents Intentionally Targeted Texas, Rather than the United States as a Whole.

Petitioner and the German Respondents provided a significant record to the Court of Appeals, containing more than a thousand pages of deposition testimony, extensive written discovery and affidavits. That record showed that the German Respondents:

- did not maintain any offices, plants or other facilities in Texas (VW.CR.1358 ¶ 9; Audi.CR.1455 ¶ 9);
- did not design any vehicles specifically for the Texas market (VW.CR.1358 ¶ 8; Audi.CR.1455 ¶ 8);
- did not sell vehicles in Texas or decide which or how many of the vehicles it manufactured would be sold in Texas by VW America or VW America's independent franchise dealers (VW.CR.1357 ¶¶ 5-6; Audi.CR.1454 ¶¶ 5-6);

- did not market vehicles in Texas or direct VW America's marketing of the vehicles in Texas (VW.CR.1666-67; Audi.CR.2203; *see also* VW.CR.1357-58 ¶¶ 5, 7; Audi.CR.1454-55 ¶¶ 5, 7);
- did not set or have any knowledge of VW America's Texas-specific sales objectives, if any (VW.CR.1670, 1764-66, 1843; *see also* VW.CR.1357 ¶ 6; Audi.CR.1454 ¶ 6);
- did not send any of its employees to Texas to effectuate the installation of the software updates at issue in this litigation (or for any other business purpose) (VW.CR.1668, 1673-74; Audi.CR.2148-49, 2152-53);
- did not have any contacts or communications with VW America's independent franchise dealers in Texas, much less contacts or communications about the relevant software updates (VW.CR.1668, 1673-74; Audi.CR.2148-50, 2153-54);
- did not have any involvement in developing, implementing or approving VW America's independent franchise dealer network in the United States, let alone in Texas specifically (VW.CR.1669-71; *see also* VW.CR.1357 ¶¶ 4-6; Audi.CR.1454 ¶¶ 4-6);
- did not establish channels for providing regular advice to customers residing in Texas; and

- did not develop the software updates at issue in this litigation either in the State of Texas or specifically for vehicles sold or driven in Texas (VW.CR.1674-75, 1992-93; Audi.CR.2203-04).

In short, substantial jurisdictional discovery established, at most, that *VW America's* independent franchise dealers (1) sold Volkswagen-branded vehicles in Texas and 49 other states, and (2) installed the software updates nationwide, including on some vehicles in Texas. Because this record does not establish that *the German Respondents* specifically or intentionally targeted the State of Texas with regard to the challenged software updates, the Court of Appeals correctly held that VW Germany and Audi Germany did not purposely avail themselves of the benefits of doing business in Texas for purposes of this action. As this Court has recognized, "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." *Spir Star*, 310 S.W.3d at 873 (quotation and citations omitted).

To try to find jurisdiction, Petitioner has misrepresented the record to both this Court and the Court of Appeals. The dissent below erroneously based its holding on statements that either are unsupported by the record, conflate the conduct of VW America with that of the German Respondents, or relate only to conduct directed at the United States as a whole: (1) "through VW America and its franchise

dealers, [the German Respondents] marketed and sold the affected vehicles to Texas residents on a large scale"; (2) the German Respondents "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"; (3) the German Respondents "both electronically distributed the tampering software to VW America for installation on vehicles in the United States, including in Texas"; (4) the German Respondents "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"; (5) the German Respondents "each reimbursed VW America for the costs of implementing the recall"; and (6) "under the Importer Agreements . . . [the German Respondents] retained a significant degree of control over the recall-tampering activities in Texas and elsewhere." *Volkswagen*, 2020 WL 7640037, *12.

These statements, derived from Petitioner's prior briefing and now repeated in its brief submitted to this Court, are addressed below.

### 1. The German Respondents Did Not Target Texas by Conducting Any Marketing or Sales.

This is a case about specific software installed in specific vehicles through recalls. Because the record is so clear that the German Respondents had no contacts with Texas related to that software or those recalls, Petitioner changes the subject to the German Respondents' general involvement in the initial sale of new vehicles

(*not* the installation of recall software). To that end, Petitioner wrongly asserts, without citation to the record, that "VW Germany and Audi Germany have an active role in VW America's marketing and sales planning generally." (Pet. Br. at 29; *see also id.* at 8 (number of vehicles receiving the recall software "reflects the scale of VW Germany's and Audi Germany's marketing and sale of the affected vehicles to Texas residents").) There is no evidentiary basis whatsoever for this assertion.

To begin, "VW America has the *exclusive* right to import, distribute, market, advertise and sell [German Respondent]-manufactured vehicles in the United States," including in Texas. (VW.CR.1301 ¶ 5; Audi.CR.1371 ¶ 5 (emphasis added); *see also* VW.CR.1472-73 (VW America has "responsibility for the importation, distribution, marketing, and sale of" vehicles throughout the United States).) VW Germany "manufactures vehicles" in Germany and "relies on local importers to distribute its vehicles worldwide," including VW America, which is "the exclusive importer of VW-brand vehicles for the United States." (VW.CR.1368-69; VW.CR.1742.) In fact, VW Germany's corporate representative testified that VW Germany intentionally arranges its business operations so that VW America has "independent" authority over the U.S. market, so that VW America can, "based on [its] own judgment," "set[] up the sales structures, including the dealer network." (VW.CR.1747, 1805-07).

Despite Petitioner's unsupported suggestions, the jurisdictional discovery record confirmed VW Germany did not "tell" VW America "how to structure, how to handle, [or] how to influence the dealer network." (VW.CR.1747, 1806-07.) In fact, VW America is not required to sell vehicles in Texas *at all*. (VW.CR.1670 ("VW Germany . . . does not set or negotiate Texas-specific sales objectives and has no knowledge . . . of any sales objectives specific to the State of Texas."); Audi.CR.2200 (explaining that the language in the importer agreements that VW America will "exhaust fully all market opportunities" is "merely an aspirational statement" and that "Audi Germany does not require VW America to sell Audi-brand vehicles in any particular state").) Because VW America was solely responsible for selling vehicles throughout the United States, no "marketing material, advertising material, or any other promotional device" was "created, developed [or] funded" by VW Germany and used to market vehicles in Texas during the relevant period. (VW.CR.1666-67; Audi.CR.2093.)

The same is true for Audi Germany. Discovery established that Audi Germany "does not implement or control any . . . marketing strateg[ies] or marketing campaign[s] in the United States." (Audi.CR.1371 ¶ 5.) After vehicles are sold to VW America in Europe, "Audi Germany has neither authority nor control over VW America's decisions concerning which vehicles it will allocate . . . or sell."

(Audi.CR.1371 ¶ 5.) Like VW Germany, Audi Germany did not set or negotiate any sales targets specific to Texas. (Audi.CR.2161-62.)[9]

Grasping for straws, Petitioner suggests that VW America's nationwide distribution network, together with the nationwide importer agreements with the German Respondents, add up to purposeful availment. In support of this theory, Petitioner says that "*Spir Star* favorably cited a Sixth Circuit decision that held . . . 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." (Pet. Br. at 25 (citing *Tobin* v. *Astra Pharm. Prods., Inc.*, 993 F.2d 528, 533-34 (6th Cir. 1993)).) But in *Spir Star*, this Court merely listed *Tobin* in a lengthy string cite for the unremarkable proposition that "specific jurisdiction over foreign manufacturers is often premised on sales by independent distributors," which, in *Spir Star*, were controlled by the foreign manufacturer, unlike here. 310 S.W.3d at 875-76. This Court did not adopt

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[9] The record reflects that Audi Germany does not have "any decision-making authority, control, discretion [or] oversight over [VW America's] sales network plan." (Audi.CR.2162; *see also* Audi.CR.1371 ¶¶ 5-6.) Nor did Audi Germany approve or provide "marketing or promotional concepts" for "advertising and selling Affected Vehicles" in the United States. (Audi.CR.2203; *see also* Audi.CR.2162.) Thus, there are no instances in which an Audi Germany "employee provided training, consultation, or guidance to [VW America] or a Texas Dealer regarding the sale or marketing of a product or service within the State of Texas." (Audi.CR.2152-53.)

*Tobin*'s analytical framework, and Petitioner elsewhere concedes (Pet. Br. at 25) that personal jurisdiction does not exist merely because a defendant "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." *Nicastro*, 564 U.S. at 891 (citation omitted).[10]

### 2. The German Respondents Did Not Target Texas by Developing or Ordering the Challenged Software Updates.

Petitioner seeks to create the illusion of Texas-specific conduct by attempting to isolate only those software installations that occurred in Texas, while ignoring that the recalls were released nationwide, and then misleadingly attributing that conduct in isolation to the German Respondents. But VW Germany designed the recall software for the United States as a whole, not for any cars or independent franchise dealers in Texas, and VW Germany had no involvement in the distribution

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[10] At least one Texas appellate court and two federal district courts have recognized that *Nicastro* abrogated *Tobin*. *See Trokamed GmbH* v. *Vieira*, No. 01-17-00485-CV, 2018 WL 2436610, at *7 (Tex. App.—Houston [1st Dist.] May 31, 2018, no pet.) (mem. op.) (*Tobin* "predates [*Nicastro*] and conflicts with [*Nicastro*'s] recognition of the principle that 'personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.'" (quoting *Nicastro*, 564 U.S. at 884)); *Crowell* v. *Analytic Biosurgical Sols.*, 2013 WL 3894999, at *5 & n.4 (S.D.W. Va. July 26, 2013) ("*Tobin* runs contrary to the notion that 'personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.'" (quoting *Nicastro*, 564 U.S. at 884)); *LaBarre* v. *Bristol-Myers Squibb Co.*, 2013 WL 144054, at *7 (D.N.J. Jan. 11, 2013) (noting that *Nicastro* "abrogated" *Tobin*), *aff'd*, 544 F. App'x 120 (3rd Cir. 2013).

of the recall software throughout the United States.[11] Petitioner purports to list various jurisdictional "facts," including the number of VW America's independent franchise dealers in Texas that installed the updates and the number of cars in Texas that received them. (Pet. Br. at 5-8.) But again, those facts have no jurisdictional significance over whether *the German Respondents* targeted Texas, because it was *VW America* that sent the updates to *its* independent franchise dealers in Texas to install in cars during a nationwide and model-wide recall—the same type of conduct that Petitioner concedes is insufficient to subject a non-U.S. manufacturer to jurisdiction in Texas. (*Id.* at 25 (conceding that "a nationwide distribution network *alone* would not suffice").)

Petitioner also wrongly asserts that the German Respondents "were on notice that they were reaching into the Texas market—not just the United States market in the abstract—at the time they undertook to direct those recall activities." (*Id.* at 2.) Petitioner repeatedly references a list of recalled cars that VW Germany provided to VW America (*id.* at 6), ignoring that the list included VIN information for *every vehicle* to be recalled *in the United States*, and that the list did *not* identify the states in which those cars were located (VW.CR.1457). Petitioner also relies on the importer agreements to assert that the German Respondents purportedly "retain[ed]

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[11] Audi Germany did not design the recall software at all. (Audi.CR.2203.)

control over the recall and warranty activities" by "maintaining a relationship with the vehicles" after sale in Texas. (Pet. Br. at 21.) But nothing in the importer agreements mentions Texas or any obligation of the German Respondents related to the vehicles that ultimately were sold in Texas. The importer agreements merely lay out the terms of the German Respondents' relationship with VW America and leave to VW America's discretion the decision whether to target any particular state or market. Any ongoing "relationship" that the German Respondents maintain with vehicles sold in Texas is entirely dependent on VW America's independent decision to sell vehicles there or the independent purchase of vehicles by Texas consumers.

In the end, Petitioner's argument boils down to the unsupported theory that VW Germany "directed" VW America to install updates on cars throughout the United States and "knew" some of those cars were in Texas, which somehow "add[s] up to purposeful direction to Texas." (Pet. Br. at 23.) But this Court has already rejected that very theory in *Searcy*: "Even if a nonresident defendant *knows* that the effects of its actions will be felt by a resident plaintiff, that knowledge alone is insufficient to confer personal jurisdiction over the nonresident." 496 S.W.3d at 69.

### 3. The German Respondents Did Not Target Texas Through VW America's Nationwide Distribution of the Software Updates to VW America's Independent Franchise Dealers.

To try to establish some nexus with Texas, Petitioner also asserts that "VW Germany electronically delivered its software to dealerships in Texas." (Pet.

Br. at 6.) The record disproves that contention: After VW Germany developed the recall software *in Germany*, VW Germany "provide[d] the software to [VW America's] Diagnosis Team in Auburn Hills, Michigan for compatibility testing purposes." (VW.CR.1992.) Then, after "successful testing," VW America's "Consumer Protection Department . . . provide[d] information regarding the details of the software release to the [After Sales Technic Department] in Germany, including the timing of issuance of the software to dealers and the dealers to receive the updates." (VW.CR.1992.) Next, the software was "release[d] to a server in Germany maintained by VW Germany," which was then "synchronized onto a server in the United States maintained by" VW America outside of Texas. (VW.CR.1992-93.) Finally, the software from *VW America's* server was downloaded by "technicians at dealerships in the United States." (VW.CR.1993.)[12]

As the court below correctly concluded, *VW America* alone electronically delivered the software on a nationwide and model-wide basis. *See Volkswagen*, 2020 WL 7640037, at *5, *8. That delivery, therefore, did not constitute the German

[12] There is also no evidence—and Petitioner cites nothing in the record—to support its assertion that VW Germany "developed and installed" a "proprietary platform" at "dealerships worldwide." (Pet. Br. at 5.) The record cited by Petitioner simply states that independent franchise dealers in Texas use a tool called the "VW Diagnostic Tester Software Application Offboard Diagnosis Information System" (VW.CR.1465-66) and that this system is used by dealers to install the software (VW.CR.1593).

Respondents' "physical entry into Texas." (Pet. Br. at 15-17). And the German Respondents "*did not direct* [VW America] to carry out these campaigns specifically in the State of Texas." (VW.CR. 1453-54 (emphasis added).) Thus, contrary to Petitioner's assertion, *VW America* distributed the software to *VW America's* independent franchise dealer network *throughout the United States*, including Texas.

This Court has already established the black-letter rule that a defendant's "knowledge that its [broadcasted] programs will be received in another jurisdiction is insufficient to establish that [it] purposefully availed itself of the benefits of conducting activities in that jurisdiction." *TV Azteca*, 490 S.W.3d at 46-47; *see also id.* at 45 ("[T]he mere fact that the signals through which [the defendants] broadcast their programs in Mexico travel into Texas is insufficient to support specific jurisdiction because that fact does not establish that [the defendants] purposefully directed their activities at Texas."). Petitioner's factual dispute with the Court of Appeals' determination that the software's nationwide electronic delivery is attributable to VW America and not the German Respondents is thus irrelevant to the jurisdictional issue here.

#### 4. The German Respondents Did Not Target Texas by Drafting or Disseminating Any Nationwide Recall Campaign Communications.

Petitioner next wrongly claims that the German Respondents took "the lead role in the recall information disbursed to customers and dealers specifically." (Pet.

Br. at 29.) The evidence shows exactly the opposite: "*VW America* is responsible for drafting the communications with dealers and customers for [the] recall campaigns." (Audi.CR.2202 (emphasis added); *see also* VW.CR.1580 at 199:15-19, 1591 at 249:16-18.)

VW America's detailed recall communications included three parts: "(i) step-by-step work procedures that can be followed by [authorized dealers], (ii) a customer letter, and (iii) dealer reimbursement documentation." (Audi.CR.2202.) VW Germany's *only* contribution to these recall communications was "to provide the technical description," which obviously was not directed at Texas customers or dealers specifically. (VW.CR.1922 at 245:11-12.) As such, Petitioner's assertion that VW Germany "provid[ed] examples of letters to send to Texas customers" is misleading and unsubstantiated. (Pet. Br. at 6; *contra* VW.CR.1591 (testifying that it is VW America's "responsibility to draft customer letters" for the recall campaigns).) Nor was there anything specific to Texas about the recall communications more generally. In short, apart from providing the technical description, "VW Germany otherwise *played no role in distributing the software to Texas dealers* or in communications with dealers regarding the implementation of the software updates into the relevant vehicles." (VW.CR.1675 (emphasis added).)

Petitioner further ignores that the "information provided by Audi Germany" to VW America (Pet. Br. at 5) was a standard service manual used nationwide in

"*every recall campaign*" involving a software update—not specific to the recalls at issue and not specific to any particular state. (Audi.CR.2202 (emphasis added); *see also* VW.CR.1675 ("VW Germany provided a service manual to [VW America], which [VW America] used to draft work instructions explaining how dealers in the United States should install the software updates into the relevant vehicles.").) This standard service manual, used nationwide for every recall campaign consistent with the requirements of federal law, comes nowhere close to establishing that Audi Germany targeted Texas. After VW America drafted the recall communications, Audi Germany merely provided "final approval" of the recall campaign, which was part of its standard nationwide approval of all recalls involving Audi-branded vehicles. (Audi.CR.2202.) That is not specific targeting of Texas.

#### 5. The German Respondents Did Not Target Texas by Reimbursing VW America or Avoiding Warranty Claims.

Petitioner again misses the mark when it criticizes the Court of Appeals' supposed "fail[ure] to address" whether the German Respondents "sought 'some benefit, advantage, or profit by availing itself of the jurisdiction.'" (Pet. Br. at 33-34 (quoting *Moncrief Oil*, 414 S.W.3d at 151).) In fact, the court below considered this argument, but correctly concluded that it did not show targeting of the Texas market because VW Germany "reimbursed VW America on a nationwide basis for the costs of implementing the recall." *Volkswagen*, 2020 WL 7640037, at *15-16.

*First*, to the extent any financial benefit inured to the German Respondents as a result of the software updates, those benefits could not have been Texas-specific. The very evidence Petitioner cites (Pet. Br. at 34) shows exactly that: a VW Germany employee hypothesized in an email that *nationwide* warranty costs could potentially reach $525,000 per month, without any state-by-state breakdown or attribution of those theoretical costs to the German Respondents (VW.CR.1621). And the German Respondents' reimbursements to VW America did not occur in Texas—they occurred in Germany or in Virginia (where VW America is headquartered).

*Second*, Petitioner's related claims that VW Germany "reimburs[ed] Texas dealers $1,233,609" and that Audi Germany "reimburs[ed] Texas dealers $29,500" (Pet. Br. at 6-7) also distort the record. As support for this assertion, Petitioner cites *VW America's* discovery responses showing reimbursements VW America made to its own independent franchise dealers in Texas. (VW.CR.1627-30.) Although the German Respondents reimbursed VW America, these reimbursements were on a *nationwide basis* and were never specific to any independent franchise dealer in Texas.[13] (VW.CR.1672-73; Audi.CR.2152.)

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[13] Audi Germany itself bore no financial responsibility for the warranty claims or recall costs. After reimbursing VW America on a nationwide, aggregate basis, VW Germany reimbursed Audi Germany for the recall software updates. (*See* Audi.CR.2152.)

This Court has previously made clear that such incidental benefits from nationwide activity are insufficient to support personal jurisdiction over a nonresident defendant, explaining that "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable *contact with that State.*" *Michiana*, 168 S.W.3d at 788 (quoting *World-Wide Volkswagen*, 444 U.S. at 299 (emphasis added)). Thus, to be jurisdictionally relevant, any financial benefit to the German Respondents must derive from their own conduct that specifically targeted Texas. Such conduct is absent here.

Moreover, federal law obligates the German Respondents to conduct recalls and fulfill warranty claims on a *nationwide basis*. Car manufacturers must perform recalls and updates when required as a condition for their vehicles to be certified for sale in the United States. *See, e.g.*, 42 U.S.C. § 7541(b), (c); 40 C.F.R. §§ 86.1848-01(c)(2), 86.1805-04, 86.1805-12 & 86.1805-17. And any warranty payment VW Germany made to VW America for implementing these nationwide recalls also would have been done on a nationwide basis. Taken to its logical conclusion, Petitioner's theory would mean that every vehicle manufacturer would subject itself to the jurisdiction of every state every time its U.S. distributor conducted a nationwide recall or software update to comply with federal law. That makes no sense, particularly when software updates have become increasingly common in

modern, computerized auto-emissions systems that the EPA regulates on a nationwide basis.[14]

As shown above, Petitioner's secondary claim that the German Respondents "have profited from sales of vehicles in the Texas market" (Pet. Br. at 34) ignores the evidence that the German Respondents did *not* sell cars anywhere in the United States (VW.CR.1301 ¶ 5; Audi.CR.1371 ¶ 5). Instead, they leave it to VW America's exclusive discretion whether to sell vehicles in any particular state *at all*. (Audi.CR.2200.)[15]

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[14] Manufacturers now apply post-sale updates to, on average, six million cars every year through nationwide emissions recalls overseen by EPA. EPA, *2014-2017 Progress Report: Vehicle & Engine Compliance Activities* (Apr. 2019), at 7, https://tinyurl.com/EPARecallReport (manufacturer recalls affected over 24 million cars between 2014 and 2017).

[15] Because the German Respondents did not sell or market cars in the United States at all, let alone through an ecommerce website, Petitioner's lengthy discussion of direct-to-consumer internet cases has no bearing on this case. (*See* Pet. Br. at 18-19 (citing *Zippo Mfg. Co.* v. *Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997); *uBID, Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421 (7th Cir. 2010)).) The "sliding scale" developed by a Pennsylvania district court in *Zippo*, when the internet was in its "infant stages," *Zippo Mfg. Co.*, 952 F. Supp. at 1123, "does not amount to a separate framework for analyzing internet-based jurisdiction"—instead, "traditional statutory and constitutional principles remain the touchstone of the inquiry," *Best Van Lines, Inc.* v. *Walker*, 490 F.3d 239, 252 (2d Cir. 2007). The sliding scale is merely a "heuristic" to help courts analyze the level of commercial activity that a nonresident defendant conducts with the forum via customer-facing websites. *See, e.g.*, *Shrader* v. *Biddinger*, 633 F.3d 1235, 1242 n.5 (10th Cir. 2011). Likewise, Petitioner's citation to *GoDaddy* is unavailing because the defendant there conducted significant advertising in the forum state and made "millions of dollars" from direct sales to "hundreds of thousands" of the forum

### 6. The German Respondents Did Not Target Texas in 2014-2015 Merely Because They Entered into Importer Agreements with VW America 20 Years Earlier.

Without proof of actual contacts with Texas, Petitioner relies on its own litigation-driven reading of the German Respondents' 1994 and 1995 importer agreements with VW America as a basis for jurisdiction. (*See, e.g.*, Pet. Br. at 1, 5, 15-16, 19-21.) Neither of those agreements has anything to do with the Recall Tampering Claims, and even if they did, they do not support Petitioner's position for two independent reasons.

*First*, as the court below correctly held, the importer agreements that set forth the generic framework for VW America's importation of vehicles into the entire United States cannot demonstrate the German Respondents' purposeful availment of the Texas market. *Volkswagen*, 2020 WL 7640037, at *6, *8. Those agreements nowhere mention Texas and do not require VW America (let alone the German Respondents) to conduct any activities in Texas at all. That distinguishes this case from *Burger King Corp.* v. *Rudzewicz*, where the U.S. Supreme Court found personal jurisdiction was proper because the "dispute grew directly out of a

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state's residents over the internet. *GoDaddy*, 623 F.3d at 427-28. Again, to whatever extent relevant, VW America, not the German Respondents, controlled the marketing and sales for cars throughout the United States and distributed the challenged software updates to independent franchise dealers nationwide.

[franchise] contract which had *substantial* connection with that State," including that the counterparty was based in that state and the "carefully structured 20-year" contract "envisioned continuing and wide-reaching contacts . . . in [that state]." 471 U.S. 462, 479-80 (1985) (quotation and citations omitted); *see also Michiana*, 168 S.W.3d at 787 ("A long-term franchise agreement may establish minimum contacts because, though it stems from a single contract, it involves many contacts over a long period of time."). The facts here also contrast sharply with this Court's *Cornerstone* decision, which found purposeful availment of the Texas market where the "money [the nonresident defendant] invested . . . was *contractually required* to be used for [the] . . . purchase of the [Texas] hospitals" and the nonresident defendant had "newly created" Texas subsidiaries "to complete the transaction." 493 S.W.3d at 72. Unlike the agreements in *Burger King* and *Cornerstone*, the importer agreements have no specific connection to Texas and thus cannot be the basis for exercising personal jurisdiction in Texas over the German Respondents.

*Second*, the record evidence directly refutes Petitioner's assertion (Pet. Br. at 1) that the German Respondents "hav[e] retained significant day-to-day control over the activities of subsidiary VW America under the terms of their Importer Agreements." (*See* Audi.CR.1371 ¶ 4 ("Audi Germany does not exercise day-to-day control over VW America."); VW.CR.1301 ¶ 4 ("VW Germany does not exercise day-to-day control over VW America.").) In fact, the importer agreements

have no day-to-day practical significance for how the German Respondents interact with VW America. As VW Germany's corporate representative testified, the VW Germany importer agreement with VW America does not—and could not—govern the daily interaction between VW Germany and VW America over two decades after it was signed.[16] Employees do not have "the [i]mporter [a]greement in front of [them]" when engaging in day-to-day activities. (VW.CR.1847-48; *see also*, *e.g.*, Audi.CR.2196 (acknowledging that under Article 6.b of the agreement, Audi Germany "may theoretically commission market surveys . . . but den[ying] that Audi Germany has ever done so").) Whatever the German Respondents contracted for in 1994 or 1995 cannot serve as evidence of what actually occurred over two decades later, in Texas or anywhere else.

### C. Both Texas and Federal Courts Have Found No Personal Jurisdiction in Cases with Analogous Facts.

This case closely resembles several others where courts applied ordinary principles of purposeful availment jurisprudence to find non-U.S. manufacturers not subject to jurisdiction for the actions of their U.S. subsidiaries absent specific contacts between the non-U.S. manufacturer and the forum state. In all of these cases, a German car manufacturer sold vehicles to a U.S. distributor that in turn

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[16] Petitioner has no evidence about the effect of the Audi Germany-VW America importer agreement because Petitioner chose not to depose Audi Germany.

served the U.S. market nationwide. It is a common structure in the industry. And, in *all* of these cases, the courts correctly concluded that the nationwide conduct of the U.S. distributor was insufficient to justify jurisdiction.

For example, the Dallas Court of Appeals held that Texas lacked personal jurisdiction over a German car manufacturer that sold vehicles in the United States exclusively through its U.S. subsidiary. *Anchia*, 230 S.W.3d at 501. The plaintiff attempted to show that DaimlerChrysler AG ("Mercedes Germany") purposefully availed itself of the Texas market by "causing automobiles manufactured by [Mercedes Germany] in Germany, including the [vehicle at issue], to be distributed and sold in Texas through its wholly owned subsidiary [Mercedes America] which is controlled by [Mercedes Germany]." *Id.* at 497. The *Anchia* court rejected that argument, holding that Mercedes Germany did not purposefully avail itself of the Texas market because it "did not control [Mercedes America] or the distribution system that brought the [vehicles] to Texas," even though it had corporate control over its U.S. subsidiary as its sole stockholder. *Id.* at 501. The court based its conclusion on testimony that once title to the vehicles passed to Mercedes America in Germany: (1) Mercedes America "ha[d] the exclusive right to import, distribute, and advertise Mercedes-Benz automobiles in the United States and [was] responsible for the distribution of the vehicles in the United States"; (2) the parent and subsidiary "strictly observe[d] all corporate formalities"; (3) Mercedes Germany "d[id] not

exercise any day-to-day control over [Mercedes America], including control with respect to sales of Mercedes-Benz vehicles and component parts in the United States, and does not exercise control over any Mercedes-Benz retail dealer in Texas"; and (4) Mercedes Germany "never created, employed, or controlled any distribution system in Texas," and "did not sell any vehicle to [the plaintiffs]." *Id.* at 501.

To the same effect, a federal district court recently held that Alabama courts lacked jurisdiction over Bayerische Motoren Werke AG ("BMW Germany") for a product recall that was managed by its North American subsidiary, BMW NA. *Thornton*, 439 F. Supp. at 1311. The court acknowledged that "BMW [Germany] targets the United States market for sales of its vehicles" but made clear that such nationwide targeting "is not sufficient to demonstrate . . . that BMW [Germany] purposely availed itself of the privilege of doing business in Alabama." *Id.* (citing *Nicastro*, 564 U.S. at 885-86). The court explained that the plaintiff had failed to offer any evidence that "BMW [Germany] specifically targets Alabama for business, or deliberately engaged in significant activities within the state," *id.* at 1311, emphasizing that BMW Germany had "no contacts whatsoever with Alabama," that it did "not control the distribution of BMW vehicles in the United States," *id.* at 1310, and that "none of the documents [the plaintiff] offered even mention Alabama, other than to state that information regarding the airbag recall would be mailed to customers in the state," *id.* at 1311.

Finally, earlier this year, another federal district court applied the well-settled law of purposeful availment to reject the assertion of jurisdiction over certain foreign manufacturers in a suit about alleged defeat devices. *Rickman*, 2021 WL 1904740, at *4-8. The *Rickman* plaintiffs sued BMW NA and multiple German companies over an alleged defeat device that caused BMW's "clean diesel" vehicles to emit more NOx than was permitted by federal and state emissions standards. *See id.* at *1. Appropriately conducting the settled defendant-by-defendant, sovereign-by-sovereign analysis, the court looked at *each manufacturer*'s contacts with *New Jersey in particular*, rather than the defendants' nationwide contacts as a whole, and found jurisdiction over certain non-U.S. manufacturers but not others. As to BMW Germany, because BMW NA is headquartered in New Jersey, New Jersey was "BMW [Germany]'s gateway to the United States," and that was sufficient to conclude that BMW Germany necessarily availed itself of New Jersey. *Id.* at *5. But the court found no jurisdiction over Bosch GmbH, because Bosch GmbH's involvement with the defeat devices was "inferably in Germany," and to the extent Bosch GmbH had potentially relevant contacts with its U.S. distributor, Robert Bosch LLC, such contacts were "with Michigan—not New Jersey"—because Robert Bosch LLC was "headquartered in Michigan." *Id.* at *2, *6-7. The court explicitly rejected the notion that Bosch GmbH's "general efforts to target a U.S. market"

could "suffice to demonstrate deliberate targeting of New Jersey in particular." *Id.* at *6.

### D. There Is No Basis for Petitioner's "Indirect-Availment" Theory and the Decision Below Thus Does Not Conflict with This Court's Precedents.

Because Petitioner conceded below that it did not seek to exercise jurisdiction over the German Respondents through veil piercing, *Volkswagen*, 2020 WL 7640037, at *4 n.5, only the German Respondents' own conduct—not VW America's—is relevant for purposes of analyzing personal jurisdiction.[17] Petitioner now contrives a conflict between the decision below and this Court's holding in *Spir Star* to argue that the Court of Appeals should have imputed VW America's contacts to the German Respondents based upon their "indirect (through affiliates or independent distributors)" contacts with the forum. (Pet. Br. at 27 (quoting *Spir Star*, 310 S.W.3d at 874).) Petitioner's argument distorts *Spir Star* and the opinion below.

As a threshold matter, Petitioner's statement that the Court of Appeals did not "directly address" whether the German Respondents' "control over VW America constituted indirect purposeful availment under *Spir Star*" (Pet. Br. at 9-10) is not true. As the dissent recognized, the majority opinion "acknowledg[ed] that a

[17] The dissent below ignored this concession.

nonresident's purposeful availment of a local market may be indirect—'through affiliates or independent distributors'"—but ultimately did "not find persuasive [Petitioner's] argument that [the German Respondents] indirectly purposefully availed themselves of Texas." *Volkswagen*, 2020 WL 7640037, at *11.

The Court of Appeals rejected Petitioner's argument because, as this Court explained in *Spir Star*, purposeful availment still requires a showing that *the German Respondents* themselves targeted *Texas*. *See* 310 S.W.3d at 871 ("[A] manufacturer is subject to specific personal jurisdiction in Texas when it intentionally targets Texas as the marketplace for its products."). *Spir Star* found personal jurisdiction only because the nonresident parent's actions "specifically target[ed]" Texas, even though some of its actions were performed indirectly "through a Texas distributor or affiliate." *Id*. at 874. Executives of the nonresident manufacturer defendant actually "traveled to Houston, leased office space, and established a Texas distributorship" because the nonresident defendant had "decided that Houston would be the *optimal location* for a distributorship." *Id.* at 871 (emphasis added). Further, the nonresident defendant and its Texas distributor had the same president, who "spen[t] six months of the year" in Texas conducting business. *Id.* at 871, 879.

Petitioner's assertion that "the facts of *Spir Star* are analogous to the facts presented here" (Pet. Br. at 27) cannot withstand scrutiny. The record evidence here shows that the German Respondents did not send any employees to Texas and did

not maintain offices here. Their U.S. distributor, VW America, is neither headquartered nor incorporated in Texas. The German Respondents sold vehicles in Germany to VW America, leaving the importation and distribution of the vehicles throughout the United States to the discretion of VW America. And unlike the *Spir Star* defendant's overlapping leadership with its distributor, the German Respondents and VW America have separate management teams and observe distinct corporate formalities for each entity. (VW.CR.1301 ¶ 4; Audi.CR.1371 ¶ 4.) If anything, the "facts of *Spir Star*" support the German Respondents' position that they did *not* target Texas.

Petitioner also inaccurately claims that *SprayFoam* supports its argument that the German Respondents' "activities in Texas . . . in totality evinced an intention to serve the market." (Pet. Br. at 28 (citing *SprayFoam*, 625 S.W.3d at 13-14) (quotations and citations omitted).) In *SprayFoam*, this Court found jurisdiction because of a steady "stream of activity" that the nonresident defendant conducted in Texas, *SprayFoam*, 625 S.W.3d at 11, including the "use of a Texas distribution center, retention of a local sales representative whose job was to find customers, and selling to Texas-based installers." (Pet. Br. at 28 (citing *SprayFoam*, 625 S.W.3d at 13-14) (quotations and citations omitted).) That bears no resemblance to the German Respondents, who contracted with a Virginia-based U.S. distributor, VW America, and took no steps directed to the Texas market.

*Cornerstone* also offers no help to Petitioner on the "indirect-availment" theory. There, this Court began with the recognition that a subsidiary's contacts with Texas "could not in and of themselves subject the [nonresident parent] to Texas's jurisdiction," 493 S.W.3d at 72, which is precisely what Petitioner argues should be done here. Personal jurisdiction was, in that case, based on the fact that the nonresident *parent* intentionally targeted Texas by creating a new Texas subsidiary for the specific purpose of acquiring Texas hospitals. *Id.* at 72-73. As with *Spir Star*, that conduct bears no resemblance to the German Respondents' conduct, which was targeted toward the entire United States, rather than any state in particular.

And in *TV Azteca*, jurisdiction was proper because the nonresident defendant's employees "actually physically 'entered into' Texas to produce and promote their broadcasts" as part of "substantial and successful efforts" to "expand their Texas audience." 490 S.W.3d at 49. The nonresident defendant's employee even "traveled to Texas . . . to promote" the allegedly tortious television show, indicating that the broadcasts at issue were "expressly aimed" at Texas. *Id.* at 51-52. As Petitioner itself recognizes, the Mexico-based parent company specifically sought to expand into the Texas market to "benefit[] from its TV signals that strayed from Mexico in Texas." (Pet. Br. at 28-29.) The record here contains nothing similar; the German Respondents never made *any* business decision about the Texas market.

Petitioner also misses the mark when it seeks support in *Ford Motor Co.* (Pet. Br. at 27); again, that decision does not override the requirement of targeting *by the nonresident defendant*—which Petitioner has failed to establish. In *Ford Motor Co.*, the U.S. Supreme Court explained that it was a "[s]mall wonder that Ford has here conceded 'purposeful availment'" because it had targeted the forum states "[b]y every means imaginable," including "billboards, TV and radio spots, print ads, and direct mail," and having dealers that "regularly maintain and repair Ford cars." 141 S. Ct. at 1028. In contrast, the German Respondents did not advertise in Texas and do not have an independent franchise dealer network in Texas. Petitioner cannot draw a viable comparison to *Ford Motor Co.*, because the facts there so clearly established purposeful availment that the nonresident defendant conceded it.

In short, Petitioner has failed to show any conflict between the Court of Appeals' decision and the precedents of this Court or the U.S. Supreme Court. Instead, its arguments amount to a disagreement with the Court of Appeals' interpretation of the evidentiary record. That presents nothing worthy of this Court's review. And in any event, the court below correctly concluded that the German Respondents did not purposefully avail themselves of the State of Texas.

## PRAYER

The Petitions should be denied.

DATED: October 7, 2021

Respectfully submitted,

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