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SUPREME COURT OF TEXAS
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NO. 21-0130

IN THE SUPREME COURT OF TEXAS

STATE OF TEXAS,

Petitioner,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT,

Respondent.

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

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case: The State of Texas ("Petitioner") has brought claims against Volkswagen Aktiengesellschaft ("VW Germany") and Audi Aktiengesellschaft ("Audi Germany"), German car manufacturers headquartered in Germany, along with their U.S. distributor, Volkswagen Group of America, Inc. ("VW America"), and others, alleging violations of the Texas Clean Air Act. (CR1303-30.)[1] The petition for review ("Pet." or "Petition") concerns whether Texas courts may exercise specific personal jurisdiction over VW Germany on the claims asserted in this action. Petitioner has filed a separate petition concerning the same issue as to its claims against Audi Germany.

Trial Court: Trial court has not yet been assigned. Pretrial proceedings have been 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: Trial court has not yet been assigned. The MDL Court denied VW Germany's special appearance but did not specify its reasoning. (CR1999.)

Court of Appeals: Third District Court of Appeals in Austin ("Court of Appeals"). Memorandum opinion by Chief Justice Jeffrey Rose, joined by Justice Edward Smith. *Volkswagen Aktiengesellschaft* v. *State*, Nos. 03-19-00453-CV, 03-20-00022-CV, 2020 WL 7640037 (Tex. App.—Austin Dec. 22, 2020, pet. filed) (mem. op.) (hereinafter, "*Volkswagen*"). Dissenting opinion by Justice Gisela Triana. *Id.*[2]

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[1] Record citations are to the Reporters Record ("RR"), Clerk's Record ("CR"), and Supplemental Clerk's Record ("SCR").

[2] The Court of Appeals consolidated for consideration VW Germany's and Audi Germany's separate appeals from separate identical orders by the MDL Court denying their special appearances.

Court of Appeals' Disposition:	The Court of Appeals reversed the MDL Court's order denying VW Germany's special appearance and rendered judgment dismissing the claims against VW Germany for lack of specific personal jurisdiction.

RESPONSE TO STATEMENT OF JURISDICTION

This Court should decline jurisdiction because this fact-bound appeal presents no question of law "important to the jurisprudence of the state." Tex. Gov't Code § 22.001(a)-(b). Petitioner does not even attempt to make that required showing or otherwise address the factors governing this Court's discretionary review. *See* Tex. R. App. P. 56.1(a).

This Petition identifies no novel or jurisprudentially significant legal issues; instead, it raises a series of factual disputes. The Court of Appeals correctly applied the purposeful availment analysis that this Court articulated in *Spir Star AG* v. *Kimich*, 310 S.W.3d 868 (Tex. 2010); *TV Azteca* v. *Ruiz*, 490 S.W.3d 29 (Tex. 2016); and other cases. This case closely resembles *Anchia* v. *DaimlerChrysler AG,* 230 S.W.3d 493 (Tex. App.—Dallas 2007, pet. denied), where the Court of Appeals held that a German car manufacturer was not subject to specific personal jurisdiction merely because its U.S. subsidiary was doing business in Texas.

The record here contains *no* evidence that VW Germany targeted Texas. To the contrary, this action seeks to penalize VW Germany for developing software *in Germany*, and providing that software to VW America *in Germany* for installation by *VW America* through VW America's nationwide network of independent dealers for a *nationwide* emissions recall governed by regulations under the federal Clean

Air Act ("CAA") and overseen by the federal Environmental Protection Agency ("EPA").[3]

As Petitioner conceded below, "all agree" that merely "[d]emonstrating that a nationwide distribution network exists [and] that products have ended up in a given state" does "not establish purposeful availment." (Appx.A-11.) To make this seem like a case worthy of this Court's discretionary review, Petitioner seeks to relitigate questions in the factual record after more than a year of jurisdictional discovery. For example, Petitioner's main factual dispute (Pet.1-2, 4, 15) is a disagreement with how the Court of Appeals interpreted a 1995 Importer Agreement between VW Germany and VW America. This Court should not grant review to resolve such factual disputes.

In any event, the Court of Appeals' decision was correct. The Court of Appeals applied this Court's and the U.S. Supreme Court's well-established purposeful availment standard and correctly determined that VW Germany engaged

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[3] The United States and EPA have already punished VW Germany and its affiliates for their conduct, including through the imposition of almost $4.3 billion in fines and penalties *in addition to* almost $3 billion in environmental remediation for every state in the United States, including nearly $210 million that the EPA specifically allocated to the State of Texas. *See* First Partial Consent Decree ¶ 7 & Appendix D-1, *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 15-md-2672 ("*VW MDL*") (N.D. Cal. Oct. 25, 2016), Dkt. No. 2103-1; Second Partial Consent Decree ¶ 6 & Mitigation Allocation Appendix, *VW MDL* (N.D. Cal. Dec. 20, 2016), Dkt. No. 2520-1. As the Court of Appeals noted, "Texas and its residents stand to recover more than $1.35 billion from the federal actions." *Volkswagen*, at *2.

in no conduct targeting Texas. Petitioner's attempts to depict the decision below as conflicting with this Court's jurisprudence rely on both a misreading of *Spir Star* and *TV Azteca* and a distortion of the factual record in this case. But Petitioner cannot credibly dispute that, since *Spir Star* and *TV Azteca*, *no* Texas court has held that personal jurisdiction extends to a non-resident defendant whose challenged conduct occurred on a nationwide basis and was not targeted at Texas. That Petitioner must try to rewrite this Court's decisions to support jurisdiction confirms the decision below was correct and unworthy of this Court's discretionary review.

ISSUE IN RESPONSE

Should this Court exercise its discretionary jurisdiction to decide whether the Court of Appeals correctly reviewed the factual record and applied *Spir Star* and *TV Azteca* to conclude that Texas courts do not have specific personal jurisdiction over VW Germany when no evidence exists that VW Germany purposefully directed any conduct toward Texas, but directed its recall campaigns, which were governed by federal law and overseen by the EPA, to the United States as a whole?

STATEMENT OF FACTS

Beginning in 2016, VW Germany and its affiliates entered into a series of settlements with EPA for violating federal law by equipping vehicles sold nationwide with federally prohibited "defeat devices" and later modifying those defeat devices through nationwide recall campaigns overseen by EPA. *Volkswagen*, at *1. These settlements, which addressed the exact conduct Petitioner challenges in this action, resulted in massive fines and relief designed to completely remediate environmental and consumer harm in all 50 states. Texas and its residents received over $209 million in environmental mitigation funds and over $1 billion in consumer relief. *Id*. at *2. Nevertheless, the State and 33 Texas counties brought unprecedented pile-on actions seeking billions of dollars more in cumulative penalties under state law for the same nationwide conduct. Although EPA has decades of enforcement experience prosecuting defeat device cases against car manufacturers, no State, including Texas, has *ever* attempted to do so before this case. In four other states (Alabama, Minnesota, Missouri, and Tennessee), courts have dismissed parallel claims as preempted by the federal CAA. Litigation remains pending in Texas and four additional states (Illinois, Montana, Ohio, and a federal MDL in the Northern District of California, as to which a petition for certiorari is pending before the U.S. Supreme Court on the issue of federal preemption).

A. Petitioner Asserts "Original Tampering Claims" Against VW America.

In September 2015, EPA issued a Notice of Violation to VW Germany and VW America stating that certain Volkswagen vehicle models were equipped with defeat devices in violation of §§ 203(a)(1) and 201(a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(3)(B), 7522(a)(1). Several weeks later, Petitioner sued VW America (not VW Germany), alleging that VW America violated Texas environmental laws by installing defeat device software in new vehicles *before* their sale to consumers (the "Original Tampering Claims"). (SCR3-16.) Thirty-three Texas counties filed separate enforcement lawsuits against VW America asserting Original Tampering Claims. On January 19, 2016, the actions were consolidated into a statewide MDL before Judge Tim Sulak.

B. To Attempt To Avoid Federal Preemption, Petitioner Adds "Recall Tampering Claims."

More than two years *after* commencing litigation, Petitioner amended its pleadings and named VW Germany (and Audi Germany) as additional defendants. (CR362-93.) Petitioner did so to try to find a way around the federal MDL court's dismissal of a suit by the State of Wyoming, which determined that the CAA preempted Wyoming's Original Tampering Claims. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1045, 1057 (N.D. Cal. 2017). Petitioner's amendment added so-called "Recall Tampering

Claims," alleging that, after vehicles with defeat device software had been sold to consumers, Defendants "tampered" with the vehicles by conducting nationwide, model-wide recall campaigns to update their emissions-control software. (CR418-19.) Until now, Petitioner had invoked these "tampering" laws only to bring actions against individual car owners and mechanics.

On December 8, 2017, VW America moved for summary judgment in the MDL below, arguing that the CAA preempted Petitioner's claims. (CR477-78.) On April 11, 2018, the MDL Court granted summary judgment on Petitioner's Original Tampering Claims, but denied summary judgment on the Recall Tampering Claims. (CR1131-32.) The MDL Court declined to certify its decision for interlocutory review. The Recall Tampering Claims are thus the only remaining claims for purposes of the present jurisdictional dispute.

C. The MDL Court Denies VW Germany's Special Appearance.

On May 7, 2018, VW Germany specially appeared. (CR1281-1302.) After more than a year of jurisdictional discovery, the evidence established that:

- VW Germany manufactured vehicles in Germany and sold them to VW America in Germany, with VW America taking title in Germany (CR1357 ¶ 6);
- VW Germany did not manufacture any vehicle specifically for the Texas market (CR1358 ¶ 8);

- after purchasing the vehicles from VW Germany, VW America alone determined where in the United States to sell them, without VW Germany's knowledge (CR1666);
- VW America alone marketed the vehicles in the United States (CR1357 ¶ 5);
- VW Germany developed the challenged software updates *in Germany* for VW America to implement in nationwide recall campaigns (CR1992-93);
- the software updates were sent from a VW Germany server *in Germany* to a VW America server in the United States (*id.*); and
- VW America distributed the software updates to VW America's independent franchise dealerships across the United States for installation by those dealers in customer cars (*id.*).

Even though these uncontroverted facts confirmed that VW Germany did not engage in any conduct purposefully directed at, or targeted toward, Texas, the MDL Court denied VW Germany's special appearance without setting forth its reasoning. (CR1999.) On July 3, 2019, VW Germany appealed. (CR2000-02.)

D. The Court of Appeals Reverses the MDL Court.

On December 22, 2020, in a well-reasoned, 20-page opinion, the Court of Appeals examined the factual record and correctly held that "because VW

Germany's recall-tampering activities were not purposefully directed at Texas, VW Germany did not purposefully avail itself of the privilege of conducting activities within Texas." *Volkswagen*, at *7.

In particular, the Court of Appeals determined that "[Petitioner] does not allege any facts or present any evidence that" VW Germany:

- "maintained any offices, plants, or other facilities in Texas";
- "sent any of its employees to Texas for any purpose, including to install the software updates at issue here";
- "had any contacts or communications with VW America's franchise dealers in Texas";
- "had any involvement in developing, implementing, or approving VW America's franchise dealer network in the United States, including in Texas";
- "established channels for providing regular advice to customers residing in Texas";
- "developed the software updates at issue 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. The Court of Appeals correctly recognized 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 VW Germany." *Id*.

Justice Gisela Triana dissented and would have found that Texas courts have personal jurisdiction over the claims against VW Germany. *Id*. at *9.

SUMMARY OF THE ARGUMENT

The Court of Appeals examined an extensive factual record and applied settled legal principles, correctly concluding that, because VW Germany did not direct any conduct to Texas specifically, it had not purposefully availed itself of the Texas market. This uncontroversial, fact-bound result is unworthy of this Court's discretionary review. Petitioner's attempts to generate a conflict distort both the law and the record.

First, under *Spir Star*'s well-settled purposeful availment analysis, a plaintiff must show that a non-resident defendant "targeted" Texas, not the United States as a whole. *Spir Star*, 310 S.W.3d at 876; *see also TV Azteca*, 490 S.W.3d at 46. The Court of Appeals correctly applied this settled legal standard.

Second, the extensive jurisdictional record underscores that none of VW Germany's conduct targeted Texas. Nothing about the development or installation of the challenged software updates was Texas-specific: the software was developed *in Germany*, provided to VW America *in Germany*, and distributed by *VW America*

alone to VW America's independent authorized franchise dealers *throughout the United States*. (CR1992-93.) To avoid these dispositive facts, Petitioner conflates VW Germany with VW America—VW Germany's Virginia-based distributor (which will remain a Defendant in this case irrespective of the Petition's disposition). VW America, not VW Germany, oversaw the dissemination and installation of the software updates throughout the United States, and VW Germany's mere knowledge that some of the nationwide recalled vehicles were located in Texas (like every other state) cannot establish purposeful availment. Nor were VW Germany's contributions to the recall communications in any way Texas-specific, and any financial benefit VW Germany received from the software updates was on a nationwide basis, not specific to Texas.

Third, the decision below does not conflict with *Spir Star*. Below, Petitioner "specifically disavow[ed]" any "exceptions to recognizing the corporate form in personal-jurisdiction analysis, including veil piercing or alter ego." *Volkswagen*, at *4 n.5. To sidestep the black-letter rule that "only the defendant's contacts with the forum are relevant," *Cornerstone Healthcare Grp. Holding, Inc.* v. *Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016), Petitioner now distorts *Spir Star* to argue an "indirect-availment" theory of personal jurisdiction. (Pet.14.) But VW Germany did not "indirectly" target Texas through a subsidiary because VW Germany did not target Texas at all—its conduct was directed to the United States as a whole. In

short, *every* case Petitioner cites requires some showing of "targeting" Texas—a showing Petitioner has failed to make even after more than a year of extensive jurisdictional discovery that included hundreds of pages of written discovery, extensive document production, and a corporate representative deposition.

ARGUMENT

I. The Decision Below Applied the Correct Legal Standard.

The Court of Appeals applied settled Texas law that personal jurisdiction requires some form of "targeting" of Texas. "Texas follows Justice O'Connor's plurality opinion in *Asahi*," *Spir Star*, 310 S.W.3d at 873, in which a plaintiff must show "act[s] of the defendant *purposefully directed* toward the forum State" to satisfy the purposeful availment standard. *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 112 (1987). The U.S. Supreme Court's most recent articulation of the purposeful availment standard comes from Justice Kennedy's plurality opinion in *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873 (2011), in which he explained that "consistent with Justice O'Connor's opinion in *Asahi*," the "defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted the forum*." *Id*. at 882, 885 (emphasis added). The opinion elaborated that "it is [the defendant's] purposeful contacts with [the State], not with the United States, that alone are relevant." *Id.* at 886.

It is likewise "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. "[A] nonresident may purposefully avoid a particular jurisdiction by structuring its transactions so as neither to profit from the forum's laws nor be subject to its jurisdiction." *Michiana Easy Livin' Country, Inc*. v. *Holten*, 168 S.W.3d 777, 785 (Tex. 2005). The U.S. Supreme Court recently reaffirmed the same principle—that a "defendant can . . . structure its primary conduct to lessen or avoid exposure to a given State's courts." *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021).[4]

The decision below applied these settled principles to an extensive factual record. Petitioner does not identify any conflict between that decision and the relevant decisions of this Court or the U.S. Supreme Court. *See*, *e.g.*, *Spir Star*, 310 S.W.3d at 871 (a foreign manufacturer "is subject to specific personal jurisdiction in Texas when it *intentionally targets Texas* as the marketplace for its products").[5] Nor is there any conflict between the Court of Appeals' decision and decisions of other

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[4] *Ford* is otherwise inapposite to this case. There, Ford "*conceded* 'purposeful availment' of the two States' markets." 141 S. Ct. at 1028 (emphasis added). 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 in the Petition.

[5] Petitioner incorrectly asserted in the court below that "[t]he Texas Supreme Court . . . has not required Texas-specific targeting" (Appx.A-20), which ignores *Spir Star*'s holding.

Texas courts of appeals, which have applied a Texas-specific targeting standard consistent with *Asahi* and *Nicastro*. *See*, *e.g.*, *Warren Chevrolet, Inc.* v. *Qatato*, 2018 WL 6729855, at *5 (Tex. App.—Austin Dec. 21, 2018, no pet.) (no jurisdiction absent evidence that non-resident defendant "specifically target[ed] Texas residents, as opposed to the residents of any other state"); *Skylift, Inc.* v. *Nash*, 2020 WL 1879655, at *5 (Tex. App.—Beaumont Apr. 16, 2020, no pet.) (no jurisdiction absent evidence that product was designed "for the Texas market as opposed to other locations in the United States").[6]

Petitioner's criticism of the Court of Appeals for relying on Justice Kennedy's plurality opinion in *Nicastro* (Pet.11-13) ignores that *this* Court has affirmatively relied on that same opinion as articulating the correct legal standard. In *TV Azteca*, this Court explained that a "defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum." 490 S.W.3d at 46 (quoting *Nicastro*, 564 U.S. at 882) (Kennedy, J., concurring). Despite citing *TV Azteca*, Petitioner ignores this aspect of the opinion and instead insists that Justice Breyer's concurrence in *Nicastro* controls. (Pet.11.) That is plainly wrong—Justice Breyer's concurrence departed from Justice O'Connor's test

[6] Without citing any authority, Petitioner argues that the supposed "importance" of the Texas market is relevant to the jurisdictional question. (Pet.3.) But this argument would inappropriately give Texas courts more power than the courts of its sister states simply because of Texas's population. *See Michiana*, 168 S.W.3d at 793 ("[Texas] is certainly a large state, but we must recognize our own limits and those of our coequal sovereigns.").

in *Asahi*, which this Court has repeatedly adopted. *See AFTG-TG, LLC* v. *Nuvoton Tech. Corp.*, 689 F.3d 1358, 1365 (Fed. Cir. 2012) ("Justice Breyer did not . . . endorse Justice O'Connor's reasoning in *Asahi*."). Notably, this Court has never adopted Justice Breyer's concurrence, which expressed reservations about "strict rules that limit jurisdiction where a defendant . . . cannot be said to have targeted the forum." *Nicastro*, 564 U.S. at 890 (Breyer, J., concurring). In fact, state-specific targeting was a requirement under Texas law under *Spir Star* even ***before*** *Nicastro*. 310 S.W.3d at 871.

Petitioner's strawman attack—that it would be unfair to hold that "by targeting every state, a foreign manufacturer is not accountable in any state" (Pet.13 (quoting *Volkswagen*, at *10 (Triana, J., dissenting)))—ignores that the court below did not find that VW Germany targeted "every state." Conduct broadly directed at the United States as a whole, as occurred here, is not "targeting" every state. *See Nicastro*, 564 U.S. at 886 ("[I]t is [a defendant's] purposeful contacts with [the forum state], not with the United States, that alone are relevant.").[7] But even so, Petitioner's exaggerated argument that VW Germany will not be accountable in any

[7] Petitioner wrongly asserts that a court in Minnesota found that VW Germany was subject to personal jurisdiction there, suggesting the same must be true in Texas. (Pet.9 n.2 (citing *Swanson* v. *Volkswagen Aktiengesellschaft*, 2018 WL 6273103 (Minn. Ct. App. Dec. 3, 2018)).) As the decision below correctly held in rejecting this argument, the *Swanson* court "relied on allegations, which Minnesota law required the court to accept as true" on a motion to dismiss, not the *facts established* by jurisdictional discovery in this action. *Volkswagen*, at *7.

state is belied by the fact that other courts (on very different jurisdictional facts) have held that they have personal jurisdiction over VW Germany.[8]

Moreover, the possibility that a foreign defendant might be accountable to the United States but not to any particular state was not lost on Justice Kennedy, who acknowledged in *Nicastro* that, like here, "a litigant may have the requisite relationship with the United States Government but not with the government of any individual State." 564 U.S. at 884. This case is the quintessential example because the software updates at issue were implemented during a nationwide recall governed by federal law, overseen by a federal agency, and based upon a federally-required emissions warranty.[9]

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[8] For example, a court found that VW Germany was subject to personal jurisdiction in Virginia because (unlike in Texas) VW Germany employees traveled to Virginia, where VW America is headquartered. *Volkswagen "Clean Diesel" Litigation*, 2018 WL 4850155, at *3 (Va. Cir. Ct. Oct. 4, 2018). Similarly, VW Germany did not contest personal jurisdiction in California over similar Recall Tampering claims, where employees of VW Germany traveled to California to obtain regulatory approvals from the California Air Resources Board of the challenged software updates. *VW MDL*, Dkt. No. 6238 (N.D. Cal. May 1, 2019). No approval by any Texas regulator was required for such updates.

[9] A foreign manufacturer's obligations to conduct recalls and fulfill warranty claims on emission equipment are imposed by *federal* law and fulfilled on a *nationwide* basis. Manufacturers also 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.*, 40 C.F.R. §§ 86.1848-01(c)(2), 86.1805-04, 86.1805-12 & 86.1805-17 (conditioning certification on manufacturers "comply[ing] with all [EPA] certification and in-use emission standards" for vehicle's useful life, including remediation of non-conformities in emissions controls).

II. The Court of Appeals Correctly Held that the Record Does Not Establish that VW Germany Intentionally Targeted Texas as Part of the Challenged Recalls.

VW Germany's conduct here was not purposefully directed at Texas, and this Court need not wade into the factual disputes Petitioner raises. VW Germany developed the challenged software *in Germany* and provided it *in Germany* to VW America for installation broadly across the United States. (CR1992-93.) VW America then directed its independent authorized franchise dealerships across the United States to install the software updates in a series of recall campaigns. (*Id.*) As Petitioner conceded below, directing a product toward the United States as a whole through a nationwide distribution network does not subject a non-U.S. manufacturer to jurisdiction. (Appx.A-11 ("Demonstrating that a nationwide distribution network exists is the same as demonstrating that products have ended up in a given state; all agree that this demonstration alone does not establish purposeful availment.").)

This case closely resembles *Anchia* v. *DaimlerChrysler AG*, 230 S.W.3d 493 (Tex. App.—Dallas 2007, pet. denied), which held that Texas lacked personal jurisdiction over a German car manufacturer that sold vehicles in the United States exclusively through its U.S. subsidiary. Like VW Germany, the non-resident manufacturer in *Anchia* did not (i) "sell [its] automobiles in Texas"; (ii) "advertise in Texas"; (iii) "contact any customers in Texas"; (iv) "maintain an office, agency, or representative in Texas"; (v) "have officers, employees, or agents stationed to

work in Texas"; (vi) "design[] any . . . vehicle specifically for the Texas market"; or (vii) "exercise day-to-day control over [the subsidiary] or over any . . . retail dealer in Texas." *Id.* at 502.

Because the law is clear, Petitioner's principal arguments boil down to a fact-bound dispute over whether particular conduct should be attributed to VW Germany versus VW America, and whether particular actions were directed toward Texas versus the United States as a whole. Wading into these fact-bound disputes is unworthy of this Court's discretionary review. In any event, Petitioner ignores the evidence developed in written discovery, document discovery, and deposition testimony, and instead presents a selective reading of various provisions of a 1995 Importer Agreement between VW Germany and VW America in an effort to impute activities conducted by VW America to VW Germany. (*See*, *e.g.*, Pet.1-2, 4, 15.)

A. The Software Updates Were Not Developed for or Directed Toward Texas Specifically.

Petitioner seeks to create the illusion of Texas-specific conduct by summarizing *only* the Texas-related portion of VW America's nationwide conduct and baselessly attributing that conduct to VW Germany. Pages 4-5 of the Petition, for example, list various "facts," including the number of VW America's independent authorized franchise dealerships in Texas that installed the updates and the number of cars in Texas that received them. But VW Germany developed the software updates in Germany for the United States as a whole—not for any cars or

dealers in Texas—and *VW America* sent the updates to its independent authorized franchise dealers *nationwide* for installation in cars *nationwide* during a *nationwide* recall. Petitioner's repeated reference to a list of cars to be included in the recalls that VW Germany provided to VW America, which "includ[ed] those it knew to be on the road in Texas" (Pet.5, 10-12), ignores that the list included VIN information for *every vehicle* to be recalled *in the United States*, and did ***not*** identify the states in which those cars were located. (CR1457.)

Petitioner's citations to the 1995 Importer Agreement do not alter the legal analysis. Petitioner cites this agreement for the proposition that VW Germany purportedly "retain[ed] control over the recall and warranty activities" by "maintaining a relationship with the vehicles" after sale in Texas. (Pet.10.) But the 1995 Importer Agreement governs the relationship between VW Germany and VW America *throughout the United States*. Petitioner's entire argument is that because VW Germany "directed" VW America to install the updates on cars throughout the United States and "knew" some of those cars were in Texas, that somehow "add[s] up to purposeful direction to Texas." (Pet.12.) But this Court rejected Petitioner's logic in *Searcy* v. *Parex Resources*: "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 58, 69 (Tex. 2016) (emphasis added).

B. VW America, Not VW Germany, Provided VW America's Independent Authorized Franchise Dealers with the Software Updates Nationwide.

Petitioner's assertion that "VW Germany electronically delivered its software to dealerships in Texas" is demonstrably false. (Pet.4.) After VW Germany developed the recall software *in Germany*, VW Germany then uploaded the software to a server *in Germany*, which was accessed by a VW America server from the United States. (CR1992-93.) *VW America*, in turn, distributed the software to VW America's authorized franchise dealer network throughout the United States. (*Id.*) VW America's delivery of the software to VW America's dealers was in no way "a physical entry into Texas" by VW Germany. (Pet.15.) Even assuming that electronic delivery of software is a "physical entry," the entry was made in Texas by *VW America*.[10] This is exactly the sort of fact-bound dispute not warranting of this Court's discretionary review.

C. VW Germany's Role in Nationwide Recall Communications Does Not Show Targeting of Texas.

To try to generate another factual dispute, Petitioner misstates that "VW Germany provided examples of letters to send to Texas customers." (Pet.5.) Again, the record unambiguously shows that VW America, not VW Germany, drafted the

[10] Petitioner's argument that VW Germany had an *unexercised* contractual right under the 1995 Importer Agreement to deploy personnel to VW America to assist with recall campaigns is irrelevant. (Pet.4.) Despite extensive discovery, there is no evidence that any VW Germany employees ever traveled to Texas.

recall communications to customers and dealers. (CR1580 at 199:15-19; 1591 at 249:16-18.) VW Germany's *only* contribution to the recall communications was "to provide the technical description" of the software updates to VW America. (CR1922 at 245:11-12.) There is no evidence that anything about the technical description, or the customer communications more broadly, was targeted toward Texas.

D. VW Germany Neither Sought Nor Derived Texas-Specific Financial Benefits Through the Software Updates.

Petitioner's criticism of the Court of Appeals' supposed "fail[ure] to address" whether VW Germany "sought 'some benefit, advantage, or profit by availing itself of the jurisdiction'" misses the mark. (Pet.16 (quoting *Moncrief Oil Int'l Inc.* v. *OAO Gazprom*, 414 S.W.3d 142, 151 (Tex. 2013)).)[11] To the extent any financial benefit inured to VW Germany as a result of the software updates, it could not have been Texas-specific. The very evidence Petitioner cites for this point shows exactly that: VW Germany estimated that *U.S.* warranty costs could potentially reach an estimated $525,000 per month. (Pet.16.)

Petitioner's related claim that VW Germany "reimburs[ed] Texas dealers $1,233,609" (Pet.5) is another record distortion. As "support," Petitioner cites *VW*

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[11] Petitioner claims "VW Germany has profited from sales of vehicles in the Texas market" (Pet.16), when the record shows VW Germany does *not* sell cars in the United States, let alone Texas. (CR1301.) In any event, all Original Tampering Claims have been dismissed, and Petitioner's flawed factual argument is therefore irrelevant to the jurisdictional analysis here.

America's discovery responses, which show reimbursements *VW America* made to VW America's authorized franchise dealerships in Texas. (*Id.* (citing CR1627-1630).) VW Germany in turn reimbursed VW America, on a *nationwide* basis. (CR1672-73.)

III. There Is No Conflict with *Spir Star* or Any Other Decision of This Court.

It is "settled law that the contacts of . . . parents and subsidiaries[] must be assessed separately for jurisdictional purposes unless the corporate veil is pierced." *Cornerstone*, 493 S.W.3d at 71. Accordingly, Petitioner conceded below that it did not seek "to reach VW Germany through its subsidiary VW America" (Appx.A-7), because only "a defendant's own conduct—and not the unilateral activity of a third party . . . drives the purposeful availment analysis." (Pet.13-14; *see Volkswagen*, at *4 n.5.) Notably, the dissent below ignored this concession.

To try to avoid its fatal concession, Petitioner now imagines a conflict between the decision below and *Spir Star* by arguing that the Court of Appeals should have imputed VW America's contacts to VW Germany based upon VW Germany's "indirect (through affiliates or independent distributors)" contacts with the forum. (Pet.14 (quoting *Spir Star*, 310 S.W.3d at 874).) But this "indirect-availment" theory still requires a showing that *VW Germany* targeted *Texas*. *See Spir Star*, 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."). As the *Anchia* court held: "[A] foreign parent company is not subject to jurisdiction in a forum merely because a subsidiary is present or doing business there." 230 S.W.2d at 501.

Petitioner's assertion that "the facts of *Spir Star* are analogous" collapses upon even a cursory review of that decision. (Pet.14.) There, executives of the non-resident manufacturer defendant actually "traveled to Houston, leased office space, and established a Texas distributorship," because the *non-resident defendant* had "decided that Houston would be the *optimal location* for a distributorship." 310 S.W.3d at 871 (emphasis added). Further, the non-resident 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. This Court found personal jurisdiction because the non-resident parent's actions "specifically target[ed]" Texas, even though its actions were performed "indirectly" through its subsidiary. *Id*. at 874.

By contrast, VW Germany did not send employees to Texas and did not maintain offices there. VW Germany set up its distributorship (VW America) in Virginia and incorporated it in New Jersey, for purposes of distribution throughout the entire United States. VW Germany and VW America are governed by separate management teams and observe corporate formalities of separate entities. (CR1301.) If anything, the "facts of *Spir Star*" *support* VW Germany's position that it did not target this State.

Petitioner's other authorities do not support extending personal jurisdiction to VW Germany because the defendants in those cases, unlike VW Germany, took deliberate steps directed to the Texas market. (Pet.15 (citing *TV Azteca*, 490 S.W.3d at 49, 52 (asserting jurisdiction over a non-resident defendant that "purposefully sought to serve the Texas market" and "physically 'entered into' Texas to produce and promote their broadcasts"); *Cornerstone*, 493 S.W.3d at 73 (finding jurisdiction where a non-resident defendant established subsidiaries for the purposes of "target[ing] Texas assets in which to invest")).)

PRAYER

The Petition should be denied.

DATED: May 10, 2021

Respectfully submitted,

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Microsoft Word reports that this response contains 4,499 words, excluding the portions of the response exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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NO. 21-0130

IN THE SUPREME COURT OF TEXAS

STATE OF TEXAS,

Petitioner,

v.

VOLKSWAGEN AKTIENGESELLSCHAFT,

Respondent.

On Petition for Review from the Court of Appeals
Third District of Texas, Austin, Texas
Cause No. 03-19-00453-CV

APPENDIX

No. 03-19-00453-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

VOLKSWAGEN AKTIENGESELLSCHAFT,
Appellant,

v.

THE STATE OF TEXAS AND TRAVIS COUNTY, TEXAS,
Appellees.

On Appeal from the
353rd Judicial District Court, Travis County

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So, in installing the new software, VW Germany sought a benefit. That benefit was to save over half a million dollars every month in warranty costs.

B. The Asserted Contacts are VW Germany's, Not the Unilateral Activity of the Plaintiff or Third Parties.

In accordance with the law of personal jurisdiction, the State relies on contacts that VW Germany *itself* established with the forum state of Texas. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (explaining that unilateral activity of another person cannot create jurisdiction); *Moncrief*, 414 S.W.3d at 152 (same).

1. The State does not rely on its own unilateral activities to show VW Germany's purposeful availment.

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

The Texas Supreme Court has identified several U.S. Supreme Court cases that exemplify unilateral activity by the plaintiff. *See Moncrief*, 414 S.W.3d at 153 & n.9. In *World-Wide Volkswagen Corporation v. Woodson*, the Court found no jurisdiction over a nonresident automobile distributor whose only tie to the state was a customer's unilateral decision to drive there. 444 U.S. 286, 299 (1980). In *Kulko v. California Superior Court*, a child support case, the Court found no jurisdiction over a nonresident ex-husband whose former spouse had unilaterally moved to the forum

state. 436 U.S. 84, 93–94 (1978). In *Hanson v. Denckla*, the Court found no jurisdiction over a nonresident trustee when the only connection was the settlor's unilateral decision to exercise her power of appointment in the forum state. 357 U.S. 235, 251–52 (1958).

And from the Texas Supreme Court itself, the *Michiana* case exemplifies such unilateral activity by a plaintiff. 168 S.W.3d at 786–87. There, a Texas resident initiated contact with a recreational vehicle dealer by placing a telephone order for one such vehicle. *Id.* at 784. The dealer's only contacts with Texas were receiving the telephone call and transferring the vehicle to a shipper that the buyer had designated to transport the vehicle to Texas. *Id.* at 786–87. The *Michiana* court concluded that the dealer "had no say in the matter" and had not purposefully availed itself of the Texas forum. *Id.* at 787.

The facts here are very different. The recall tampering transactions with Texas residents were initiated by VW Germany and cannot be attributed to any unilateral activity by the State.

2. The State does not assert that personal jurisdiction in Texas is automatic when harms are felt in Texas; rather, the State pleads extensive contacts by VW Germany in connection with its claims.

The Texas Supreme Court has "observed that Texas's interest in protecting its citizens against torts is insufficient to *automatically* exercise personal jurisdiction upon an allegation that a nonresident directed a tort from outside the forum against a resident." *Moncrief*, 414 S.W.3d at 152 (discussing *Michiana*, 168 S.W.3d at 790–

91) (emphasis added).[6] As explained in *Moncrief*, "*Michiana* overruled a myriad of court of appeals cases where jurisdiction was predicated *solely* on the receipt of an out-of-state phone call or that analyzed whether the defendant's contacts were tortious rather than examining the contacts themselves." 414 S.W.3d at 152–53 (emphasis added). Indeed, the defendant in *Michiana* had no contacts with Texas aside from a telephone order placed by the Texas plaintiff. 168 S.W.3d at 790–91. The plaintiff's assertion that the seller had directed a tort at Texas by making misrepresentations during the telephone call did not govern the analysis; rather, the lack of Texas contacts attributable to the dealer meant that the Texas forum could not exercise personal jurisdiction. *Id.* "[I]mportantly," however, the *Michiana* court "differentiated cases where the defendant's conduct 'was much more extensive and was aimed at getting extensive business in or from the forum state.'" *Moncrief*, 414 S.W.3d at 153 (quoting *Michiana*, 168 S.W.3d at 789–90 & n.70).

Here, the State has asserted "matter[s] of physical fact" of VW Germany's actual contacts with Texas and has not merely relied on the merits of its claim that VW Germany caused injury to the Texas public. *See Michiana*, 168 S.W.3d at 791 (explaining that sole reliance on a defendant having directed a tort is problematic where analysis would hinge on merits of tort claim, including mental state); *see also*

[6] In the context of upholding personal liability for violations of state environmental laws, Texas courts have construed violations of state environmental laws as "environmental tort[s]." *State v. Morello*, 547 S.W.3d 881, 886–87 (Tex. 2018) (citing with approval *State v. Malone Serv. Co.*, 853 S.W.2d 82, 84–85 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).

3. The State does not rely on the unilateral actions of third parties.

The State shows VW Germany's purposeful availment with actions taken by VW Germany. The State has demonstrated that VW Germany directed its wholly owned subsidiary, VW America, to carry out the conduct that occurred in Texas, giving rise to the contacts in this case. The State's analysis is consistent with the principle that "purposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)." *See Spir Star*, 310 S.W.3d at 874 . Courts apply the same general principle, that jurisdiction is based on the conduct of the defendant, whether the alleged purposeful availment is direct or indirect. *See Anchia v. DaimlerChrysler AG*, 230 S.W.3d 493, 501 (Tex. App.—Dallas 2007, pet. denied) (explaining that when the conduct of affiliated corporate entities is at issue, courts focus on the conduct of the defendant entity as it relates to the forum state). The State's analysis, therefore, properly focuses on the actions taken by VW Germany with respect to the market in Texas, notwithstanding the fact that VW Germany directed VW America to carry the actions out on VW Germany's behalf.

The State does not rely on an alter ego or veil-piercing theory to reach VW Germany through its subsidiary VW America. *See PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 172–73 (Tex. 2007) (holding that contacts of distinct legal entities, including parents and subsidiaries, are assessed separately for jurisdictional purposes unless the corporate veil is pierced).

But the nature of the parent–subsidiary relationship here *is* relevant insofar as the Importer Agreement and the companies' relative roles thereunder elucidate the

stream of commerce purposes. *Semperit Technische Produkte Gesellschaft v. Hennessy*, 508 S.W.3d 569, 579 (Tex. App.—El Paso 2016, no pet.).

3. That VW Germany targeted more than one state does not negate personal jurisdiction in Texas.

Relying primarily on the *Nicastro* plurality opinion, VW Germany argues that specific personal jurisdiction "requires a showing that the defendant purposefully directed activities towards, or targeted, the Texas market, *rather than to the United States as a whole*." Br. 23 (emphasis added). VW Germany arrives at this proposition from the plurality's statement 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." 564 U.S. at 882; Br. 21–22. VW Germany construes this language to mean that a state court may not exercise personal jurisdiction if the nonresident defendant directed its activities to other states, as well as the forum state, using a nationwide distribution network.

VW Germany overreaches. First, no case binding on this Court applies such a rule. Second, even the broadest readings of the rule merely state that a nationwide distribution network alone does not suffice. And third, the weight of authority shows that a nationwide distribution network is properly considered among other jurisdictional facts.

First, neither the Texas Supreme Court nor the U.S. Supreme Court has ever held that a defendant targets the forum state only by targeting that state *more* than it targets the other forty-nine states. VW Germany incorrectly suggests that *Asahi* provides this kind of "forsake all others" standard. *See* Br. 22. In *Asahi*, four justices

provided examples of acts that could rise above mere knowledge of products in the forum state, all of which support the conclusion that a defendant can purposefully avail itself of the forum state while also availing itself of other states. *See* 480 U.S. at 112 (listing, for example, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State").

While the Texas Supreme Court has adopted the test from Justice O'Connor's *Asahi* plurality, no Texas case doing so has applied VW Germany's forsake-all-others standard. *See, e.g.*, *TV Azteca*, 490 S.W.3d at 46–47 (requiring that alleged facts show "the seller intended to serve the Texas market" without referencing intent to serve other states' markets); *Moki Mac*, 221 S.W.3d at 577 (same). VW Germany correctly observes that the U.S. Supreme Court later affirmed the *Asahi* test in *Nicastro*; however, VW Germany incorrectly suggests that by doing so, *Nicastro* affirmed VW Germany's forsake-all-others standard. *See* Br. 21 (citing *Nicastro*, 564 U.S. at 884).

In *Nicastro*, only three facts supported jurisdiction: "The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey." 564 U.S. at 886. The justices in favor of the judgment agreed only that "the single fact of a nationwide distribution network [is not] always . . . sufficient to establish personal jurisdiction in each of the fifty states." *Semperit*, 508 S.W.3d at 578. VW Germany's forsake-all-others standard grossly overreads *Nicastro*; indeed, the plurality stated that it would be "exceptional" if a defendant availed itself of the

U.S. market without availing itself of any individual state's forum. *See* 564 U.S. at 884 ("[A] litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however.").

Further, the meaning of "targeting" for the *Nicastro* plurality—the word on which VW Germany heavily relies for the proposition that Texas must be uniquely affected to the exclusion of other states, Br. 21–25—is explained by its context. The foreign defendant in *Nicastro* had not "advertised in, sent goods to, or in any relevant sense targeted the state," so the "'stream of commerce' metaphor [had] carried the decision far afield." 564 U.S. at 877. These facts failed to meet the established legal standard 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." *Id.* at 882. The legal standard and the application of facts in *Nicastro* are, as the *Nicastro* plurality expressly stated, simply restating and following the test from Justice O'Connor's *Asahi* plurality. *Id.* at 883. Indeed, the Texas Supreme Court in *TV Azteca* cites *Nicastro* in a string of other case citations for the unremarkable proposition that "additional conduct" must demonstrate "an intent or purpose to serve the market in the forum state." 490 S.W.3d at 46; *see also* Br. 23 (characterizing this citation as the Texas Supreme Court's "adoption" of the its reading of *Nicastro* plurality opinion). The State has not argued that VW Germany is subject to personal jurisdiction because VW Germany could have predicted that its vehicles

might end up in Texas. Rather, the State asserts that the Importer Agreement required VW America to sell VW Germany's products in Texas and, even more importantly, that VW Germany subsequently directed recall tampering on vehicles it *knew* to be in Texas. Unlike *Nicastro*—in which the record reflected at most four machines ever sold in the state, and possibly only one machine—here the State has shown additional conduct by VW Germany that constitutes pervasive, intentional contact with the Texas market. This conduct, including over 23,000 tampering acts in Texas at sixty dealerships, and an ongoing relationship between the manufacturer and the machine under the Importer Agreement, meets the requirements of purposeful availment.

Second, the closest courts have come to adopting VW Germany's forsake-all-others standard is stating that the existence of a nationwide distribution network does not *alone* establish purposeful availment. *See, e.g.*, *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)); *Federated Rural Elec. Ins. v. Kootenai Elec. Co-op.*, 17 F.3d 1302, 1305 (10th Cir. 1994) ("[M]ere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum."). This articulation adds nothing to *Asahi*: Demonstrating that a nationwide distribution network exists is the same as demonstrating that products have ended up in a given state; all agree that this demonstration alone does not establish purposeful availment. *Sumatra* and *Federated* require no

more than *Asahi*, and are distinguishable from this case, because those plaintiffs failed to allege facts beyond knowledge of the product ending up in the forum state. *See Sumatra*, 403 S.W.3d at 764; *Federated*, 17 F.3d at 1305.

Third, the weight of authority—including authority from the Texas Supreme Court—supports the conclusion that a nationwide distribution network is properly considered within a purposeful availment analysis, with the understanding that the existence of the network alone does not suffice. *See, e.g.*, *TV Azteca*, 490 S.W.3d at 44–45 & nn.9–10 (citing with approval cases that found specific jurisdiction based in part on nationwide broadcasts); *State by Swanson*, 2018 WL 6273103, at *4 (finding purposeful availment based on Volkswagen directing its U.S. affiliates in Minnesota, at ten or more Volkswagen dealerships in Minnesota, to install defeat devices on "more than 11,500 tampered vehicles in Minnesota"); *In re Suboxone Antitrust Litig.*, No. 13-MD-2445, 2017 WL 4642285, at *4 (E.D. Pa. Oct. 17, 2017) (finding contacts, including a national distribution network, sufficient for personal jurisdiction); *State ex rel. Atty. Gen. v. Grand Tobacco*, 871 N.E.2d 1255, 1264 (Ohio Ct. App. 2007) (same).

D. VW Germany Profited Substantially from Its Contacts in Texas.

The third consideration in the purposeful availment test applied in Texas is that the defendant "must seek some benefit, advantage, or profit by availing itself of the jurisdiction." *Cornerstone*, 493 S.W.3d at 71.

VW Germany has profited from sales of vehicles in the Texas market. VW Germany earned gross revenues of $413,532,076 from the affected vehicles that received the new tampering software in Texas. CR.1451 (Resp. to Interrog. 1). Texas had the

No. 03-20-00022-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

AUDI AKTIENGESELLSCHAFT,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the
353rd Judicial District Court, Travis County

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over a nonresident automobile distributor whose only tie to the state was a customer's unilateral decision to drive there. 444 U.S. 286, 299 (1980). In *Kulko v. California Superior Court*, a child support case, the Court found no jurisdiction over a nonresident ex-husband whose former spouse had unilaterally moved to the forum state. 436 U.S. 84, 93–94 (1978). In *Hanson*, the Court found no jurisdiction over a nonresident trustee when the only connection was the settlor's unilateral decision to exercise her power of appointment in the forum state. 357 U.S. at 251–52.

And from the Texas Supreme Court, the *Michiana* case exemplifies such unilateral activity by a plaintiff. 168 S.W.3d at 786–88. There, a Texas resident initiated contact with a recreational vehicle dealer by placing a telephone order for one such vehicle. *Id.* at 784. The dealer's only contacts with Texas were receiving the telephone call and transferring the vehicle to a shipper that the buyer had designated to transport the vehicle to Texas. *Id.* at 786–87. The *Michiana* court concluded that the dealer "had no say in the matter" and had not purposefully availed itself of the Texas forum. *Id.* at 787.

The facts here are very different. Audi Germany itself initiated the sales of affected vehicles and the recall tampering transactions with Texas residents—actions that cannot be attributed to any unilateral activity by the State.

2. The State does not rely on the unilateral actions of third parties.

The State also did not rely on the unilateral actions of third parties to establish jurisdiction. Specifically, the State relies on actions by Audi Germany itself, not unilateral actions taken by its fellow subsidiary VW America. The State has demon-

strated that Audi Germany *directed* VW America to carry out the conduct that occurred in Texas, giving rise to the contacts in this case. The State's analysis is consistent with the principle that "purposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)." *See Spir Star*, 310 S.W.3d at 874. Courts apply the same general principle, that jurisdiction is based on the conduct of the defendant, whether the alleged purposeful availment is direct or indirect. *See Anchia v. DaimlerChrysler AG*, 230 S.W.3d 493, 501 (Tex. App.—Dallas 2007, pet. denied) (explaining that when the conduct of affiliated corporate entities is at issue, courts focus on the conduct of the defendant entity as it relates to the forum state). The State's analysis, therefore, properly focuses on the actions taken by Audi Germany with respect to the market in Texas, notwithstanding the fact that Audi Germany directed VW America to carry the actions out on Audi Germany's behalf.

The State does not rely on an alter ego or veil-piercing theory to reach Audi Germany through its fellow subsidiary VW America. *See PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 172–74 (Tex. 2007) (holding that contacts of distinct legal entities, including parents and subsidiaries, are assessed separately for jurisdictional purposes unless the corporate veil is pierced).

But the nature of the companies' relationship here is relevant insofar as the Importer Agreement and the companies' relative roles thereunder elucidate the extent of Audi Germany's control over the specific recall activities in Texas. "[S]ellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on

their activities." *Moncrief*, 414 S.W.3d at 151–52. Audi Germany made the decision to tamper with emissions on in-use Texas vehicles. And Audi Germany directed VW America to install the software, approved campaign literature associated with the recalls including information in the letters directed to Texas customers, and then reimbursed VW America for every software installation performed in Texas.

In *Spir Star*, the Texas Supreme Court held that "using a distributor-intermediary" to take advantage of the Texas market "provides no haven from the jurisdiction of a Texas court." 310 S.W.3d at 871. There, the court found personal jurisdiction over a German hose manufacturer that had established a subsidiary in Houston to distribute the product in Texas and North America, where executives had visited Texas and liked the proximity to oil refineries.

The *Spir Star* court did not find it determinative that title to the goods passed in Europe; likewise, it is not determinative here that title to the vehicles passed in Germany since Audi Germany continued to benefit when VW America pushed recall tampering through to Texas vehicles. *See id.* at 876. The *Spir Star* court explained that the defendant "reaps substantial economic gain through its sales to Limited, its largest distributor by far . . . . Indeed, specific jurisdiction over foreign manufacturers is often premised on sales by independent distributors." *Id.* at 875.

And in *Cornerstone*, the court found personal jurisdiction over a parent company who created and funded a subsidiary to acquire Texas hospitals because these acquisitions were part of an overarching transaction initiated by the parent company. 493 S.W.3d at 72. Likewise here, the transactions at issue—the recall tampering—stemmed from the activity of Audi Germany itself because Audi Germany initiated

the recall and directed VW America's actions in carrying out the specific tasks required by the recall.

The *TV Azteca* court found personal jurisdiction in a defamation suit notwithstanding the parent company's use of a distributor intermediary, because the parent company itself made intentional efforts to serve the Texas market and benefited from its TV signals that strayed from Mexico into Texas. 490 S.W.3d at 49. These efforts included producing programs in Texas offices, selling ads to Texas businesses, and making substantial efforts to increase popularity in Texas. Likewise here, it was no accident that Audi Germany has an active role in VW America's marketing and sales planning generally and the recall information distributed to customers and dealers specifically. Audi Germany always intended to benefit from the Texas market, and did so by saving money on warranty repairs via recall tampering.

Audi Germany relies on *Anchia* to argue that a wholly owned subsidiary in Texas is irrelevant for purposes of the parent company's jurisdiction in Texas, and it argues further that Audi Germany is not even the parent company here. Br. 32. But the *Anchia* court found no personal jurisdiction over a parent company because the evidence showed that the parent company "did not create, employ, or control the distribution system" or exercise any control over its United States subsidiary. 230 S.W.3d at 501. The *Anchia* court reviewed a record devoid of evidence that the parent company obligated the subsidiary to exhaust all market opportunities; that the parent company worked with the subsidiary to develop a sales network, sales planning, and marketing materials; that the parent company generated substantial reve-

be uniquely affected to the exclusion of other states, Br. 21–26—is explained by its context. The foreign defendant in *Nicastro* had not "advertised in, sent goods to, or in any relevant sense targeted the State," so the "'stream of commerce' metaphor [had] carried the decision far afield." 564 U.S. at 877. Only three facts supported jurisdiction: "The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey." *Id.* at 886. These facts failed to meet the established legal standard 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." *Id.* at 882. The legal standard and the application of facts in *Nicastro* are, as the *Nicastro* plurality expressly stated, simply restating and following the test from Justice O'Connor's *Asahi* plurality. *Id.* at 883.

Indeed, in a recent case addressing nationwide lawsuits over the drug Plavix, the Supreme Court opined that "the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States." *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017). Specific jurisdiction over the pharmaceutical company in California state court as to the in-state plaintiffs was uncontested. *See id.* at 1779. The Court nowhere suggested that the suit could not be brought by California residents in California state court simply because Plavix had been sold nationwide. *See id.*

The Texas Supreme Court likewise has not required Texas-specific targeting. While the Texas Supreme Court has adopted the test from Justice O'Connor's *Asahi* plurality, no Texas case applying that test has used Audi Germany's forsake-all-others standard. *See, e.g., TV Azteca*, 490 S.W.3d at 46–47 (requiring that alleged facts show "the seller intended to serve the Texas market" without referencing intent to serve other states' markets); *Moki Mac*, 221 S.W.3d at 577 (same). Indeed, the Texas Supreme Court in *TV Azteca* cites *Nicastro* in a string of other case citations for the unremarkable proposition that "additional conduct" must demonstrate "an intent or purpose to serve the market in the forum state." 490 S.W.3d at 46-47.

Nor has *this* Court has required Texas-specific targeting. Audi Germany cites *Warren Chevrolet, Inc. v. Qatato* for this proposition. Br. 23 (citing 2018 WL 6729855, at *4-5 (Tex. App.—Austin Dec. 21, 2018, no pet.)). But it quotes the Court out of context. The Court actually cited *Michiana* for the rule that the defendant has to specifically target Texas *or* show "additional conduct." 2018 WL 6729855, at *4-5. The facts in *Warren* are exactly like *Michiana*, too: a Texas resident tracked down and bought a vehicle from a dealer in another state and arranged for the vehicle to be transported back to Texas. *Id. Warren*, like *Michiana*, had no additional conduct or Texas-specific targeting. Here, there is additional conduct demonstrating intent to exploit the Texas market.

Second, the closest courts have come to adopting Audi Germany's forsake-all-others standard is stating that the existence of a nationwide distribution network does not *alone* establish purposeful availment. *See, e.g., 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)); *Federated Rural Elec. Ins. v. Kootenai Elec. Cooperative*, 17 F.3d 1302, 1305 (10th Cir. 1994) ("[M]ere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum."); *Semperit*, 508 S.W.3d at 578 ("[T]he single fact of a nationwide distribution network [is not] always . . . sufficient to establish personal jurisdiction in each of the fifty states."). This articulation adds nothing to *Asahi*. Demonstrating that a nationwide distribution network exists is the same as demonstrating that products have ended up in a given state; all agree that this demonstration alone does not establish purposeful availment. *Sumatra* and *Federated* require no more than *Asahi*, and are distinguishable from this case, because those plaintiffs failed to allege facts beyond knowledge of the product ending up in the forum state. *See Sumatra*, 403 S.W.3d at 764; *Federated*, 17 F.3d at 1305.

Third, the weight of authority shows that a nationwide distribution network *is* properly considered among other jurisdictional facts, with the understanding that the existence of the network *alone* does not suffice. *See, e.g., TV Azteca*, 490 S.W.3d at 44–45 & nn.9–10 (citing with approval cases that found specific jurisdiction based in part on nationwide broadcasts); *State by Swanson*, 2018 WL 6273103, at *4 (finding purposeful availment based on Volkswagen directing its U.S. affiliates in Minnesota, at ten or more Volkswagen dealerships in Minnesota, to install defeat devices on "more than 11,500 tampered vehicles in Minnesota"); *In re Suboxone Antitrust Litig.*,

No. 13-MD-2445, 2017 WL 4642285, at *4 (E.D. Pa. Oct. 17, 2017) (finding contacts, including a national distribution network, sufficient for personal jurisdiction); *State ex rel. Att'y Gen. v. Grand Tobacco*, 871 N.E.2d 1255, 1264 (Ohio Ct. App. 2007) (same).

In sum, Audi Germany's forsake-all-others standard grossly overreads *Nicastro*. The plurality in that case stated that it would be "exceptional" if a defendant availed itself of the U.S. market without availing itself of any individual state's forum. *See* 564 U.S. at 884 ("[A] litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however."). If Audi Germany were to prevail on its forsake-all-others standard, jurisdiction over *no* State's claims in their own courts would be the *norm*, not the exception.

D. Audi Germany profited substantially from its contacts in Texas.

The third consideration in the purposeful availment test applied in Texas is that the defendant "must seek some benefit, advantage, or profit by availing itself of the jurisdiction." *Cornerstone*, 493 S.W.3d at 71.

Audi Germany has profited from sales of vehicles in the Texas market. Audi Germany earned gross revenues of $12,348,922 from the affected vehicles that received the new tampering software in Texas. CR.2148 (Resp. to Interrog. 1).

In Article 1 of the Importer Agreement, Audi Germany requires VW America to "exhaust fully all market opportunities." CR.2168. And a Volkswagen corporate representative acknowledged that Texas is an important part of the U.S. market. CR.1655–56 (Fischer Dep. 67:16–68:10). VW America dedicated specific lines of its

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