No. _____

In The

Supreme Court of the United States

ALIGN CORPORATION LIMITED,

Petitioner,

v.

ALLISTER MARK BOUSTRED and
HORIZON HOBBY, INC. d/b/a HORIZON HOBBY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Colorado's Supreme Court held that it could exercise jurisdiction over Petitioner Align Corporation Limited ("Align") based on Align's selling goods into the national stream of commerce and allowing them to be distributed in Colorado. That decision adds to a deep, decades-old division of authority among the state and federal courts about how the Due Process Clause of the Fourteenth Amendment applies to businesses that sell goods throughout the country. This Court has twice sought to resolve that division but its divided opinions in *Asahi Metal Industry Company v. Superior Court of California*, 480 U.S. 102 (1987), and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), have not provided a uniform, national standard. The question presented is:

> If a nonresident defendant places goods into the stream of commerce in the United States, is it subject to specific personal jurisdiction in any state where it allows its products to be sold by a distributor?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Align Corporation Limited was a defendant in the trial court below, appellant in the court of appeals, and petitioner in the Colorado Supreme Court.

Alister Mark Boustred was the plaintiff in the trial court, appellee in the court of appeals, and respondent in the Colorado Supreme Court.

Horizon Hobby, Inc. d/b/a/ Horizon Hobby was a defendant in the trial court below, an appellee in the court of appeals, and a respondent in the Colorado Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Align Corporation Limited states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Colorado Supreme Court's opinion (App., *infra*, 1-23a) is reported at 405 P.3d 1148. The court of appeals' opinion (App., *infra*, 24-39a) is not reported but is available in public domain format 2016 COA 67. The trial court's orders (App., *infra*, 42-55a) are unreported.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the Colorado Supreme Court was filed on November 13, 2017, and the federal issue of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not subject to further review in the Colorado courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975); *see also BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 922 (2011) (review of state court denial of motion to dismiss regarding federal jurisdiction).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1, provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

Few, if any, fundamental constitutional questions arise as frequently in "the routine course of litigation" as that presented here. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). The power of state court systems to exercise jurisdiction over people or entities that have no presence in the forum state or other relationship with it beyond having sold goods into the stream of commerce implicates important foundational Due Process protections. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

After this Court first addressed personal jurisdiction based on placing products in the stream of commerce in *World-Wide Volkswagen*, 444 U.S. at 298, this Court again faced the question of stream-of-commerce jurisdiction in *Asahi Metal Industry Company v. Superior Court of California*, 480 U.S. 102 (1987), where the Court unanimously found jurisdiction lacking, but no opinion garnered majority support. This Court then faced the question in *Nicastro*, where the Court again found stream-of-commerce jurisdiction lacking, but no majority opinion emerged.

These two split decisions have resulted in widespread confusion in lower state and federal courts over how to apply the Due Process Clause limitations on

forum state jurisdiction over nonresident defendants. Some lower courts have applied the stream-of-commerce test as articulated by plurality opinions in *Asahi* and *Nicastro* to require something more than mere distribution of products into the stream of commerce. Others have followed concurring opinions in *Asahi* and *Nicastro* to allow jurisdiction based merely on distribution through the stream of commerce. Lower courts are thus deeply divided over how to apply personal jurisdiction in these circumstances. This case presents an ideal opportunity for this Court to resolve the split of authority and end the confusion caused by years of lower courts attempting to divine the proper test for stream-of-commerce jurisdiction based on five different non-majority opinions offered by this Court.

Despite the importance of the constitutional issue, and the frequency with which courts and litigants must confront it, this Court has not yet developed a uniform national standard governing it. *See Nicastro*, 564 U.S. at 881 (discussing "imprecision arising from *Asahi*") (Kennedy, J.); *see also id.* at 887 ("I think it unwise to announce a rule of broad applicability. . . .") (Breyer, J., concurring). The split of authority is wide, deep, and persistent. *See* 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1067.4 (4th ed. 2017) ("Trying to determine what the diverging opinions mean to counsel in the coming years presents a bit of a mystery.").

It is also problematic. Beyond adding to the cost and time required in what might otherwise be "routine" litigation, the lack of national clarity means manufacturers and others considering engaging in

commercial activity in the United States must either risk running a gauntlet of inconsistent rules of law, pay for legal analysis of all 50 states, or simply limit where it does business. *Nicastro*, 564 U.S. at 892 ("It may be fundamentally unfair to require a small Egyptian shirt/maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors to respond to products-liability tort suits in virtually every State in the United States . . . ") (Breyer, J., concurring). The Court has found it necessary to address related aspects of state court jurisdiction over out-of-state defendants in recent years. *E.g.*, *BNSF Ry.*, 137 S. Ct. 1542; *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017). On the issue presented in this case, litigants and state and federal courts should not be required to continue to guess at the proper rules to apply to such a fundamental issue. Only this Court can provide the national uniformity and clarity such an important constitutional matter requires. This case presents the opportunity to do so.

STATEMENT

I. Background

This case arises from a products liability claim in Colorado. Align is a Taiwanese corporation that manufactures and sells remote controlled helicopters and parts. Align has no physical presence in the United States. Align has engaged with distributors in the

United States, including co-defendant Horizon Hobby, which sells products to retailers in various states, including Colorado.

Plaintiff Boustred was injured in 2012 when a replacement part for a remote control helicopter failed, resulting in a helicopter blade striking him in the eye. The replacement part in question was purchased in Colorado at a retailer supplied by distributor Horizon Hobby.

II. Procedural History

Boustred sued both Align and Horizon Hobby in Colorado state court based on claims of product liability and negligence. After being served in Taiwan, Align moved to dismiss in the trial court based on Colorado courts' lack of personal jurisdiction over Align. The district court denied the motion and concluded that the Plaintiff made a sufficient *prima facie* showing of personal jurisdiction based on the Colorado long-arm statute and subject to the limitations of the Due Process Clause of the U.S. Constitution. In exercising jurisdiction, the district court found the Plaintiff's allegations "show that Align injected a substantial number of products into the stream of commerce knowing that those products would reach Colorado." App. 37a. Align successfully sought certification of the personal jurisdiction question for appeal under Colorado Appellate Rule 4.2. App. 40a, 42a.

The Colorado Court of Appeals accepted the appeal and affirmed the district court's finding of

personal jurisdiction based largely on the court's determination that Justice Kennedy's plurality opinion in *Nicastro* was not binding, that Justice Breyer's concurrence controlled, and that the Plaintiff had made a sufficient showing to establish personal jurisdiction over Align. The Colorado Supreme Court granted Align's certiorari appeal and affirmed the lower court's claim of jurisdiction.

III. Colorado's Supreme Court adopts broad view of stream-of-commerce jurisdiction

The Colorado Supreme Court reviewed the fractured opinions in *Asahi* and *Nicastro* and declined to follow any of them. *See* App. 17a. The court first decided that Justice Brennan's opinion in *Asahi* and Justice Breyer's in *Nicastro* were decided on the narrowest grounds, and that under *Marks v. United States*, 430 U.S. 188, 193 (1977), therefore, those were the operative opinions of this Court. *Id.* The court then read those opinions as doing no more than pointing them to the 1980 decision in *World-Wide Volkswagen*, which it held is controlling. *Id.*

The court thus adopted the broad, "pure stream-of-commerce" reading of *World-Wide Volkswagen*. In applying its interpretation of that test, it held that "the requisite minimum contacts may be established by showing that the defendant placed goods into the stream of commerce with the expectation that the goods will be purchased in the forum state." App. 19a.

According to the Colorado Supreme Court, the Plaintiff's allegations showed Align manufactured the replacement part that caused the Plaintiff's eye injury. App. 4a. Align had distributorship deals to sell products in the United States, including the deal with Horizon Hobby. App. 19a. The distributor sold more than $350,000 of Align products in Colorado. *Id.* Align "placed no limitations on where Horizon could distribute products in the United States." App. 21a. Align's website advertised the relationship with distributors, including Horizon Hobby. App. 20a. And Align attended trade shows "in the United States" (but not in Colorado). *Id.*

Taking allegations and documentary evidence in favor of the Plaintiff, the Colorado Supreme Court found personal jurisdiction based on Align's placing its goods into the stream of commerce and allowing them to be sold in Colorado. It held that a nonresident defendant may be haled into state court whenever a plaintiff "allege[s] sufficient facts to support a reasonable inference that a defendant placed goods into the stream of commerce with the expectation that the products will be purchased in the forum state." App. 19a. As in *Nicastro* itself, the state court did not rely on anything other than limited sales, through a nationwide distributor, of the defendant's products and component parts in the forum. *Id*. The court emphasized that "Align placed no limitations on where [its nationwide distributor] could distribute." App. 21a.

The Colorado Supreme Court did not reference or rely on any Colorado-specific contacts between Align

and Colorado to establish jurisdiction. There were no allegations that Align targeted Colorado. There was no claim that Align engaged in special state-related design in Colorado, nor any claim that Align advertised *in Colorado*, other than a generic listing of distributors on Align's website. And there was no claim that Align did any Colorado-specific marketing, or attended any trade show in Colorado or had any other direct contact with the forum state. The Colorado Supreme Court adopted the broadest reading of this Court's decision in *World-Wide Volkswagen*. It then found jurisdiction in Colorado based on Align's activity directed at the United States market as a whole, through attending a trade show outside Colorado and through use of a distributor that it did not prohibit from selling Align products in Colorado.

REASONS FOR GRANTING THE PETITION

I. The state and federal courts are profoundly divided about the proper test to apply to assertions of jurisdiction over foreign defendants under this Court's "stream-of-commerce" doctrine.

Among the longest standing rules of Constitutional law is the Due Process Clause constraint on state court claims of jurisdiction over a nonresident defendant. *See Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1878) (limiting state court jurisdiction by citing Joseph Story, *Conflict of Laws*, and noting "States are of equal dignity and authority, and the independence of

one implies the exclusion of power from all others."). How this applies in the commercial context, however, has vexed this Court and other federal and state courts for generations.

Plaintiffs have frequently invoked the "stream-of-commerce" theory to establish jurisdiction over foreign businesses in states where the foreign business has little to no contact. The state courts themselves have an inherent incentive to view their own powers expansively. This Court thus has often been called upon to enforce the constitutional limitations of the Due Process Clause on claims of jurisdiction over nonresident defendants.

This Court's most recent attempts to do so, however, resulted in fractured opinions that have not provided the clarity needed by lower courts, litigants, or those engaged in or considering engaging in interstate commerce. As the plurality in *Nicastro* recognized, the "rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi*[.]" 564 U.S. at 877 (Kennedy, J.). Rather than providing needed clarity, however, the fractured *Nicastro* opinions have only deepened the courts' division.

A. The Due Process Clause requires more than mere distribution and sales in a state.

1. The fundamental principles of personal jurisdiction.

The Due Process Clause limits state court power to "render a valid personal judgment against a nonresident defendant." *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 290. Those constraints have been analyzed in terms of a nonresident defendant's "minimum contacts" with a forum (*e.g.*, a state) ever since the seminal decision in *International Shoe Corporation v. Washington*, 326 U.S. 310, 316 (1945).

In the absence of physical presence in a forum state, the "constitutional touchstone" of whether specific personal jurisdiction comports with due process "remains whether the defendant purposefully established minimum contacts in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *see also Asahi*, 480 U.S. at 108-09. Courts must look to minimum contacts focused "on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). The defendant must have undertaken "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The predictability and consistency of the rules of jurisdiction quickly disappear, however, when these general principles are applied to the specific facts of the

modern international marketplace. State courts frequently face claims of jurisdiction over nonresident business defendants based on the putative defendants having placed goods in the stream of commerce and those goods or products flowing into a state where a plaintiff claims an injury occurred related to the product. *See World-Wide Volkswagen Corp.*, 444 U.S. at 292, 298 (acknowledging "stream-of-commerce" theory of jurisdiction while rejecting jurisdiction over nonresident defendant despite foreseeability of product flowing into the forum state). That a nonresident defendant could predict or foresee that a product may end up being purchased in a given state has therefore never been sufficient to support personal jurisdiction. *See Nicastro*, 564 U.S. at 886 (Kennedy, J., plurality); *see also id.* at 890 (Breyer, J., concurring).

2. The Court's attempts to resolve the division over the meaning of "stream-of-commerce" jurisdiction.

Just what is required to establish minimum contacts with a foreign state by means of the "stream of commerce" has remained an open question for decades. Twice since *World-Wide Volkswagen* this Court has taken cases that could have clarified the stream-of-commerce doctrine; neither case, however, produced a majority opinion to guide state and lower courts.

In *Asahi*, the Court faced the question when a Japanese corporation challenged the jurisdiction of California courts in a products liability lawsuit involving a

motorcycle tire with a valve from the Japanese company. The Court unanimously found jurisdiction lacking, but no majority opinion agreed on the underlying reasoning. Justice O'Connor's plurality opinion held that "something more" was required than "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State." *Id.* at 111-12.

Justice Brennan's concurring opinion, on the other hand, found jurisdiction lacking not because of how *Asahi* placed goods in the stream of commerce but because jurisdiction under the facts would not comport with "fair play and substantial justice," *Int'l Shoe Co.*, 326 U.S. at 320; *Asahi*, 480 U.S. 116-18 (Brennan, J., concurring). With no majority opinion, courts continued to struggle to apply the Due Process Clause's limits on stream-of-commerce jurisdiction.

In *Nicastro*, this Court again confronted the question when New Jersey courts asserted jurisdiction over a foreign corporation based on the stream-of-commerce theory. This Court's fractured decision found no jurisdiction. A four-Justice plurality opinion by Justice Kennedy noted the "rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi*[.]" *Id.* at 877 (Kennedy, J.).

The plurality rejected stream-of-commerce jurisdiction when the nonresident defendant did not advertise in the state, send goods into the state, or target

the state for sales. *Id.* The foreign defendant's activity to direct marketing and sales to the United States, writ large, was insufficient to support personal jurisdiction. Justice Breyer's two-Justice opinion, likewise, found jurisdiction lacking, but the decision rested on existing precedent and the facts of the case where a nonresident defendant made a single isolated sale in the forum state. *Id.* at 888 (Breyer, J., concurring). As Justice Breyer's opinion stated:

> But though I do not agree with the plurality's seemingly strict no-jurisdiction rule, I am not persuaded by the absolute approach . . . [where] a producer is subject to jurisdiction for a products-liability action so long as it '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.' [citation omitted] (emphasis added).

Id. at 890-91. The concurrence also expresses a view that *Asahi*'s separate opinions stand for a rule of jurisdiction that does not permit the simplistic application of the stream-of-commerce theory of jurisdiction. *Id.* at 888-89 (citing all three *Asahi* opinions).

B. The fractured opinions in *Asahi* and *Nicastro* have led to more than thirty years of uncertainty and inconsistency in the state and federal courts.

World-Wide Volkswagen was decided nearly four decades ago, and *Asahi* over three. As this Court

recognized in *Nicastro*, the various opinions in *Asahi* resulted in "imprecision" in the stream-of-commerce doctrine, as "courts have sought to reconcile" the differing approaches. *Id*. at 881-83; *see also* 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1067.4 (4th ed. 2017) ("[T]he *Asahi* Court's four to four division on the scope of the stream-of-commerce principle left matters in somewhat of a muddle," with "[e]ach approach find[ing] considerable representation in lower federal court decisions."). The lack of a controlling decision in *Asahi* was only exacerbated by the similarly splintered outcome in *Nicastro*, which again failed to provide definitive guidance to state courts.

Many courts have followed the approach taken in Justice Kennedy's plurality opinion, without referencing Justice Breyer's concurring opinion in *Nicastro*. *See ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 392 (4th Cir. 2012) (citing only the *Nicastro* plurality and requiring targeting of the forum); *Smith v. Teledyne Cont'l Motors, Inc.*, 840 F. Supp. 2d 927, 929 (D.S.C. 2012) (discussing how "at least five Justices" support a "stream-of-commerce plus rubric enunciated in an opinion by Justice O'Connor in *Asahi*."); *S.E.C. v. Compania Internacional Financiera S.A.*, No. 11 CIV 4904 (DLC), 2011 WL 3251813, *5 (S.D.N.Y. July 29, 2011); *Yentin v. Michaels, Louis & Assocs., Inc.*, No. 11-0088, 2011 WL 4104675, *1 n.1 (E.D. Pa. Sept. 25, 2011); *C & K Auto Imports, Inc. v. Daimler AG*, 2013 WL 3186591, *4 (N.J. App. Div. June 21, 2013) ("the broader theory of 'stream of commerce' suggested by

World-Wide Volkswagen that was rejected by the Supreme Court in *McIntyre* . . . ").

These courts join a number that have required more than simply showing that a defendant placed its product in the flow of commerce and that it was foreseeable that products would be sold or used in the forum state, thereby rejecting the "pure" stream-of-commerce theory. *See Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007); *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550-51 (7th Cir. 2004); *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690, 693-94 (5th Cir. 2003); *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 480 (6th Cir. 2003) ("[W]e make clear today our preference for Justice O'Connor's stream of commerce 'plus' approach, for the reasons set forth in that opinion, and conduct the remainder of our analysis accordingly."); *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946-47 (4th Cir. 1994); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990); *Vargas v. Hong Jin Crown Corp.*, 247 Mich. App. 278, 636 N.W.2d 291, 297-98 (Mich. App. 2001); *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.*, 924 S.W.2d 907, 912 (Tenn. App. 1996); *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 374 (Mo. App. 1997).

In contrast, other courts have found jurisdiction is proper based largely on general marketing efforts and foreseeability: a "pure" stream-of-commerce approach. *See Taishan Gypsum Co. v. Gross* (*In re Chinese-Manufactured Drywall Prods. Liab. Litig.*), 753 F.3d

521, 541 (5th Cir. 2014) (applying 11th Circuit precedent); *Ainsworth v. Moffett Eng'g, Ltd*., 716 F.3d 174, 179 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 644 (2013); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994); *Washington v. LG Elecs., Inc.*, 375 P.3d 1035, *cert. denied sub nom*. *Koninklijke Philips N.V. a/k/a Royal Philips v. State of Washington*, Jan. 9, 2017 (No. 16-559); *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 340 (W. Va. 2016); *State v. Atl. Richfield Co.*, 142 A.3d 215, 222 (Vt. 2016); *Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 592 (Iowa 2015); *Russell v. SNFA*, 987 N.E.2d 778, 794 (Ill. 2013) (affirming jurisdiction based on nationwide distribution after *Nicastro*); *Ex Parte Lagrone v. Norco Indus., Inc.*, 839 So. 2d 620, 627-28 (Ala. 2002); *Kopke v. A. Hartrodt S.R.L.*, 629 N.W.2d 662, 674 (Wis. 2001), *cert. denied*, 534 U.S. 1079 (2002); *A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1362-64 (Ariz. 1995), *cert. denied*, 516 U.S. 906 (1995); *Grange Ins. Assoc. v. State*, 757 P.2d 933, 938 (Wash. 1988), *cert. denied*, 490 U.S. 1004 (1989); *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609, 616 (W. Va. 1992), *cert. denied*, 508 U.S. 908 (1993).

A third group of courts have addressed stream-of-commerce jurisdiction on a more fact-based analysis without looking to either *Asahi* or *Nicastro* for guidance. *See Old Republic Ins. Co. v. Continental Motors Co*. 877 F.3d 895, 909 n.21 (10th Cir. 2017) (noting that the jurisdictional issue would be analyzed differently if case had been based on allegedly defective products rather than defective instruction manuals accompanying

defendants' products);[1] *Williams v. Romarm, S.A.*, 756 F.3d 777, 784 (D.C. Cir. 2014); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1362 (Fed. Cir. 2012) ("The Supreme Court has yet to reach a consensus on the proper articulation of the stream-of-commerce theory. In the absence of such a consensus, this court has assessed personal jurisdiction premised on the stream-of-commerce theory on a case-by-case basis by inquiring whether the particular facts of a case support the exercise of personal jurisdiction."); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243-44 (2d Cir. 1999); *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 203-05 (3d Cir. 1998); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993); *Parker v. Analytic Biosurgical Sols.*, 958 F. Supp. 2d 675, 680 (S.D.W. Va. 2013); *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F. Supp. 2d 501, 511 (D.N.J. 2011); *Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 889-90 (La. 1999), *cert. denied*, 528 U.S. 1019 (1999); *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 572 (Minn. 2004); *CMMC v. Salinas*, 929 S.W.2d 435, 439-40 (Tex. 1996).

Additional development of the issue in lower courts will not resolve the split, and the lower courts are crying out for this Court to clarify the matter. *See,*

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[1] This decision was based on Colorado law and decided one month after the Colorado Supreme Court decision at issue here. Thus, non-Colorado defendants (as well as plaintiffs) seeking to determine whether they may be subject to jurisdiction in Colorado alone are subject to inconsistent decisions.

e.g., *Romarm, S.A.*, 756 F.3d at 784 ("The choppy waters of the Supreme Court's 'stream of commerce' doctrine have plagued lower courts for years."); *AFTG-TG, LLC*, 689 F.3d at 1362 ("The Supreme Court has yet to reach a consensus on the proper articulation of the stream-of-commerce theory."); *Russell*, 987, N.E.2d at 794 ("[W]e will not adopt either the broad or narrow version of the theory without more definitive guidance from a majority of the United States Supreme Court."); *see also* 16 Moore et al., *Moore's Federal Practice* § 108.42[4][b] (3d ed. 2016) ("The three opinions in *Nicastro* provide no more authoritative guidance to the lower courts on the stream-of-commerce question than did the three opinions in *Asahi*."); Jessica Jeffrey, *The Stream of Commerce Flows On*, 46 Suffolk U.L.Rev. 137, Notes (2013) ("While many analysts and litigators hoped for clarification of the law, the Court's decision did little to refine the lines originally blurred in *Asahi*.").

The Colorado Supreme Court has further hardened this split by adopting an expansive version of stream-of-commerce theory of jurisdiction that goes beyond the opinions joined by at least six Justices in *Nicastro*. Colorado read *Marks v. United States* as dictating the two-Justice concurrence in *Nicastro* as the controlling "narrowest grounds," and it then ignored the broad agreement between the plurality and concurring opinions.[2] In fact, the Colorado Supreme Court

[2] This Court will soon hear argument addressing questions regarding the proper application of such split opinions in *Hughes v. United States*, No. 17-155. The Petition for Certiorari in *Hughes*

ultimately applied only this Court's opinion in *World-Wide Volkswagen*, as if *Asahi* and *Nicastro* had never happened. The Colorado Supreme Court claimed personal jurisdiction based on the simple act of placing goods in the stream of commerce with a reasonable expectation that products would be sold in various states. App. 17a.

This deepening split results in inconsistent application of the Due Process Clause limits on forum-state jurisdiction over nonresident defendants, a constitutional question that is of significance in case after case. Indeed, since this Court's split opinions in *Asahi* every federal circuit has faced the legal issue, with several circuits facing it multiple times. *See*, *supra*, p. 14-17. And at least a dozen state high courts have likewise addressed the issue. *Id.* In addition, numerous federal district courts and lower state courts have grappled with the question of stream-of-commerce based jurisdiction. *See generally* 4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1067.4, n.15, 16 (4th ed. 2017) (collecting cases). Only this Court can calm these turbulent waters.

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lists *Nicastro* as an example of a plurality decision where courts struggle to apply fractured opinions. No. 17-155, Petition n.10. Given the intractable split on the substantive question shown above, the state and federal courts, as well as litigants and those engaged in interstate commerce, would all benefit from this Court's taking and resolving the question presented in this Petition.

II. The expansive view of its own jurisdiction adopted by the Colorado court cannot be squared with precedent or Constitutional principles.

A. Given modern realities, the expansive view of pure stream-of-commerce jurisdiction adopted by Colorado and certain other states is in practice one of nationwide jurisdiction.

The result of allowing far-reaching stream-of-commerce jurisdiction to persist is that state courts will continue to claim jurisdiction over almost virtually all nonresident defendants. The concept of specific jurisdiction "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *see also Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893 (1988) (observing that extraordinary assertions of personal jurisdiction by state courts might unconstitutionally interfere with interstate commerce).

If states can assert jurisdiction over nonresidents that do not have any forum-state specific conduct or activity based on the activity of third-party distributors or commonplace activity that is targeted at the United States as a whole, not any specific state, it creates a system of national jurisdiction.

Fundamentally, the Colorado court flipped the burden of establishing jurisdiction from the plaintiff to the defendant by emphasizing that Align did not "prohibit" its national distributor from selling products or parts in Colorado (or any other state). This holding in practice creates a system of opt-out jurisdiction where a foreign manufacturer will be subject to jurisdiction in any state that is not blacklisted from commerce. A system of opt-out jurisdiction risks merging general and specific jurisdiction by allowing states to claim specific jurisdiction so broadly and easily that satisfying this Court's defined limits of general jurisdiction would become largely unnecessary. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014) (holding that if "a plaintiff could sue [an Internet company] anywhere[, s]uch a result would violate the principles on which *Walden* and *Daimler* rest").

B. Expansive state jurisdictional reach is contrary to the principles of fairness and predictability this Court has recognized undergird the Due Process Clause and should be rejected.

Without this Court's clarity on the limits of stream-of-commerce jurisdiction, nonresident defendants will only be able to predictively structure their affairs by engaging in forum-specific prohibitions on activity, opting out, or engaging in burdensome analysis of the differing legal environments of all fifty states

prior to allowing products to enter the United States market. The existing lack of clarity in the doctrine deprives domestic defendants of the necessary predictability of forum.

This lack of clarity prevents the Due Process Clause from "ensure[ing] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.*, 444 U.S. at 292; *Burger King Corp.*, 471 U.S. at 475 n.17 (explaining that due process is violated when a defendant "has had no 'clear notice that it is subject to suit' in the forum and thus no opportunity to 'alleviate the risk of burdensome litigation' there." (quoting *World-Wide Volkswagen*, 444 U.S. at 297)); *see also Daimler*, 134 S. Ct. at 761-62 (2014) (rejecting a theory of personal jurisdiction that "would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit") (quotation omitted).

Due Process requires that jurisdiction be based on the defendant's contacts with the forum state. *See Walden*, 134 S. Ct. at 1118. The defendant must make "efforts . . . to serve directly or indirectly, the market for its product in other States." *World-Wide Volkswagen*, 444 U.S. at 297. Thus, a third party's targeting of the forum cannot create personal jurisdiction over the defendant, even where those third-party actions are foreseeable. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("[U]nilateral activity

of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction."); *World-Wide Volkswagen*, 444 U.S. at 295 ("[F]oreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

By the same token, a defendant's contacts with third parties doing business in the forum – as opposed to contacts with the forum itself – are insufficient: "We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Walden*, 134 S. Ct. at 1122. Disregarding these bedrock jurisdictional principles, the Colorado Supreme Court found personal jurisdiction here even though Align directed no conduct at Colorado other than engaging a nationwide distributor and that did not prohibit it from selling in Colorado. Align's actions, according to the state court, makes it reasonable to foresee being haled into Colorado's courts. On this logic, Align would likewise be subject to jurisdiction in every other state in the union where its distributors may engage in business. *Cf.*, *e.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1783 ("The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.").

The pure stream-of-commerce test improperly shifts the focus from Align's contacts with Colorado to its contacts with a third-party independent distributor

who ultimately transmitted products and replacement parts to Colorado and other states. This is contrary to the Court's holding 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." *World-Wide Volkswagen*, 444 U.S. at 299.

Colorado's emphasis on the fact that Align did not prohibit its distributors from selling products in Colorado makes evident the breadth of this stripped-down stream-of-commerce jurisdiction. Under this claim of jurisdiction, any nonresident manufacturer will be subject to jurisdiction in Colorado, under normal circumstances, unless that manufacturer expressly prohibits third parties from selling products in Colorado. This flips the traditional jurisdictional analysis on its head and makes nonresidents subject to jurisdiction unless they opt-out of economic activity in the state. The Colorado Supreme Court's decision is inconsistent with these fundamental jurisdictional principles, and it is emblematic of a growing divide among state and lower federal courts. It is therefore vital that this Court clarify that Colorado may exercise specific personal jurisdiction over a defendant only if the defendant has purposefully established contacts with the State itself. Those forum-specific contacts are absent in this case.

III. This case cleanly presents important issues of jurisdiction for this Court's review.

The long-simmering split over what activity satisfies the stream-of-commerce theory of jurisdiction can and should be squarely decided by this Court. This case provides an excellent vehicle for doing so.

A. The factual and procedural posture of this case make it ideal for resolving the legal issues that have troubled this and other courts for decades.

The dispositive legal question, not any factual dispute, controls the outcome of this case. The case is an uncluttered appeal addressing the legal standards for stream-of-commerce jurisdiction. That legal question is well-presented below and is the sole basis of the Colorado Supreme Court's decision. The issue was resolved at the motion to dismiss stage, meaning it does not turn on any disputed factual questions.

The legal issue could hardly be more well-developed, given the decades of what the Court and commentators have recognized as confusion and splintered application of the stream-of-commerce test in lower courts. The Colorado Supreme Court expressly declined to apply both Justice O'Connor's opinion in *Asahi* and Justice Kennedy's opinion in *Nicastro*, App. 15a-17a, and there is little question that application of the reasoning of those plurality decisions would have resulted in Colorado not having jurisdiction over Align.

If, on the other hand, states may exercise jurisdiction merely when a nonresident defendant places products in the national stream of commerce with some foreseeability that those products may be distributed in a state, then Colorado arguably has jurisdiction over Align. In fact, Colorado applied the broadest formulation of stream-of-commerce doctrine. App. 19a ("[A] plaintiff must allege sufficient facts to support a reasonable inference that a defendant placed into the stream of commerce with the expectation that the products will be purchased in the forum state.").

Likewise, if out-of-state sellers must affirmatively refuse to sell into a particular state in order to avoid being haled into that state's courts, then the decision below should stand. But if the Due Process Clause requires more than mere sales by a distributor into a particular state, as opinions of a majority of this Court indicate, then it should be reversed. In either event, the Court has previously recognized the importance of the issue and the question is squarely presented for resolution.

The factual posture of the case likewise makes it an ideal vehicle because Colorado claims jurisdiction based entirely on Align having placed products in the stream of commerce, not based on any Colorado-specific conduct of Align. This is therefore a classic stream-of-commerce case involving a products liability claim against a manufacturer, and thus the case would likely provide broadly applicable guidance for future cases.

As the allegations stand at this stage, while Align did not forbid sales to Colorado retailers or residents, it directed no activity towards Colorado in particular. Rather, it engaged a distributor who had discretion to sell products nationwide, attended a tradeshow in the United States but not Colorado, and advertised its product on a website. Thus, this case presents the court with a clean opportunity to definitively resolve the *Asahi* and *Nicastro* split.

B. The scope of state-court jurisdiction over foreign defendants is particularly in need of this Court's supervision and a uniform nationwide standard.

Our Constitutional structure generally seeks to set up a variety of countervailing pressures to control the natural impulse of any institution to view its own authority broadly. *See* Federalist No. 51 ("Ambition must be made to counteract ambition."). Only this Court, however, is in a position to counteract state courts' expansive views of personal jurisdiction over defendants who are not tied to the state. The Court has thus frequently been required to step into these disputes, as the cases discussed above, including *Burger King*, *World-Wide Volkswagen*, *Asahi*, *Walden*, *Nicastro*, and *Daimler*, as well as even more recent cases such as *BNSF Railway* and *Bristol-Myers Squibb* make quite clear.

If Petitioner is right, many state courts, including Colorado's, are subjecting defendants to jurisdiction

beyond their right "to be subject only to lawful power." *Nicastro*, 564 U.S. at 879. Even if Petitioner is wrong, those doing business in the United States, as well as courts and plaintiffs, deserve to have a clear answer about the reach of lawful state power. Where a plaintiff elects to file suit should not alter the analysis of something so fundamental as Due Process rights. This is "a question that arises with great frequency in the routine course of litigation." *Id.* at 877.

The uncertainty thus raises the costs of what should be routine litigation for everyone, and the potential costs of doing business for manufacturers in particular. As all the opinions in *Nicastro* recognized, an individual or company contemplating doing business in the United States should not have to guess about how its constitutional rights will be applied depending on where its products may end up. As Justice Breyer's concurring opinion noted in *Nicastro*, there are issues of "serious commercial consequences" involving claims of jurisdiction based on use of general website advertising (as Align had), and shipment and fulfillment of products "through an intermediary" (as Align did with a distributor). *Nicastro*, 564 U.S. at 890. The commonly occurring commercial relationship present in this case thus poses critically important legal questions of jurisdiction.

Justice Brandeis once observed that "in most matters, it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). The proper understanding of

stream-of-commerce jurisdiction has been unsettled for over a generation, and the division has only grown in the last seven years. This case presents an ideal opportunity for the Court to both settle that question, and settle it right.

CONCLUSION

The petition should be granted for the reasons stated herein.

Respectfully submitted,

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