No. 17-1227

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 Colorado Supreme Court

RESPONDENT BOUSTRED'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257 to review an interlocutory state court ruling on personal jurisdiction that remanded for further proceedings and expressly allows Petitioner to renew its challenge to personal jurisdiction at any time before the end of trial.

2. Whether a case with an underdeveloped evidentiary record that was decided on a motion to dismiss, where Respondents were only required to make a prima facie showing that Petitioner purposefully availed itself of the forum state, is an appropriate vehicle to decide the proper approach to stream of commerce jurisdiction.

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INTRODUCTION AND SUMMARY

Petitioner Align Corporation Limited ("Align") is a foreign corporation located in Taiwan that avails itself of the American marketplace by engaging U.S. distributors to sell its products to domestic retailers, which in turn sell its products to American consumers.

Align manufactures remote controlled helicopters and remote-controlled helicopter replacement parts. One of Align's replacement part products—a main motor rotor holder—was purchased by Respondent Allister Mark Boustred ("Boustred") from a hobby store in Colorado. This product malfunctioned in Colorado and caused Boustred serious permanent injury there. Boustred filed suit against Align in Colorado state court, seeking damages for his injuries. Even though Boustred purchased and was injured by Align's product in Colorado, and even though Align's distributors have sold hundreds of thousands of dollars worth of its products in Colorado, Align argues it would violate due process to allow it to be sued in that state.

The Court should deny certiorari for three reasons:

First, the decision below is not final, leaving this Court without jurisdiction. *See* 28 U.S.C. § 1257. The Colorado's Supreme Court's decision is an interlocutory ruling, leaving multiple issues of state and federal law still to be litigated in state court. Beyond that, the decision is not a final ruling even as to personal jurisdiction because, under Colorado law, Boustred was merely required to make a prima facie showing to withstand Align's motion to dismiss, and the lower court specifically ruled that Align may renew its motion any time prior to the end of trial, in which case Boustred will have to meet a higher burden of showing jurisdiction over Align. App. 21 n.5.

Second, and relatedly, this case is a poor vehicle for addressing Align's Question Presented because the factual record is underdeveloped. Considering that Boustred was required to make only a prima facie showing to defeat jurisdiction, and the trial court was required to construe all facts in Respondents' favor, Respondents took very limited jurisdictional discovery. As a result, although there is evidence that over $350,000 of Align products made their way into Colorado during the relevant time period, the record is undeveloped as to the nature and extent of Align's *overall* contact with the U.S. and Colorado, including its marketing and advertising efforts and the degree of control it asserted over its distributors and their sales efforts.

To make matters even more complicated, Align hotly contested Boustred's interpretation of the facts throughout the lower court proceedings, insisting—based on its *own* documentary evidence—that Align had "no contact whatsoever" with Colorado, save the fact that one of its defective products happened to find its way to Colorado via the allegedly unilateral actions of an independent distributor.

Align argues this case is an "excellent vehicle" for deciding its Question Presented (Pet. at 25) only by ignoring both the dearth of evidence concerning its intent to sell products in Colorado and its consistent position that the lower court erred in its treatment of the limited facts currently known to the parties. If review is granted, this Court will be in the untenable position of having to decide a tricky jurisdictional issue based on an undeveloped and uncertain factual record. That alone makes this case a poor vehicle to decide Align's Question Presented.

Moreover, granting review would likely not clarify the proper approach to stream-of-commerce jurisdiction. In his concurring decision in *J. McIntyre Machinery, Ltd., v. Nicastro*, 564 U.S. 873 (2011) ("*J. McIntyre*"), Justice Breyer stated that, "because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." *Id.* at 890.

This case is an "unsuitable vehicle" for exactly the same reasons. Not only does the factual record leave many open questions (as explained above), but it does not implicate those "modern concerns" identified by Justice Breyer, as the defective product did not make its way to Colorado via an extensive internet marketing campaign or a web-based sale. Instead, the product was delivered to a retail store in the forum state by Align's American distributor. Accordingly, to use Justice Breyer's words, this is not a proper vehicle to "refashion basic jurisdictional rules" rules on stream of commerce jurisdiction. *Id.*

Third, and finally, putting aside any issues related to the incomplete record, the decision below was correct. The lower court grounded its reasoning in longstanding precedent from this Court recognizing that a nonresident defendant that places its products into the stream of commerce with the expectation they will be sold in a particular state is subject to jurisdiction when a consumer is injured by a defective product purchased in that forum. In reality, it is Align whose proposed rule would represent a dramatic break from this Court's precedent, allowing foreign corporations

to evade liability for their illegal conduct by hiding behind their U.S. distributors. That is not and should not be the law.

COUNTERSTATEMENT OF THE CASE

A. This Lawsuit. In 2012, Boustred, a Colorado resident, purchased a replacement main rotor holder for his radio-controlled helicopter from a retailer in Fort Collins, Colorado. App. 3. The main rotor holder was manufactured by Align, a Taiwanese corporation, and distributed by Respondent Horizon Hobby, Inc. ("Horizon"), a Delaware-based corporation. App. 3-4.

Boustred installed the rotor holder on his helicopter and was injured in Colorado when the blades held by the rotor holder released and struck him in the eye, which was destroyed and ultimately removed. In 2013, he filed strict liability and negligence claims against Align and several of Align's U.S. and Canadian distributors, including Respondent Horizon, in Colorado state court. App. 4.[1]

B. Align's Motion to Dismiss. Align moved to dismiss Boustred's claims early in the case, prior to any discovery, on the ground that Colorado lacked personal jurisdiction over it. Based on the factual affidavits attached to its motion (which Respondents subsequently contested), Align argued the company "has no contacts with the State of Colorado whatsoever, save the fact that Align products may be sold in Colorado through indirect means—hobby shop sales

[1] The other distributors were subsequently dismissed from the suit, as it was discovered that Horizon had the exclusive right to distribute the allegedly defective product.

to the public."[2]

C. The Limited Jurisdictional Discovery. In response to a motion from Horizon, the district court granted the parties a 10-week extension to allow for limited jurisdictional discovery related to Align's motion to dismiss. Because Respondents were required to make just a prima facie showing of personal jurisdiction, *see Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1192 (Colo. 2005), and the court was required to construe all jurisdictional allegations in their favor, neither Horizon nor Boustred took any discovery from Align itself, which is located in Taiwan. Respondents instead took discovery of two non-party U.S. distributors of Align—Assurance and Align Aerial—in order to bolster their contention that Align has ample contacts with the United States and Colorado.[3]

D. Respondents' Oppositions. Based on this discovery, both Horizon and Boustred filed oppositions to Align's motion to dismiss, in which they con-

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[2] Align's Limited Mot. to Quash Service and to Dismiss for Lack of Personal Jurisdiction (March 9, 2015), Case No.: 2013cv 03164 (D. Ct. Larimer Cty. Colo.), at 2.

[3] Respondents' approach of conducting discovery of only Align's U.S. distributors is consistent with Colorado procedure. *See Archangel*, 123 P.3d at 1192 (quoting *Foster–Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 145 (1st Cir.1995)) ("The purpose of the light prima facie burden of proof at this early stage of litigation is simply to screen out 'cases in which personal jurisdiction is obviously lacking, and those in which the jurisdictional challenge is patently bogus.'").

tested Align's contention that it has no direct connection with the U.S. or Colorado.[4]

Among other things, Horizon presented evidence that, from 2006 to 2013, Horizon sold over $5 million of Align products throughout the U.S. and over $350 thousand in Colorado in particular. *Id*. at 15.[5]

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[4] *See* Horizon's Resp. to Align's Mot. to Dismiss for Lack of Personal Jurisdiction (June 4, 2015), Case No.: 2013cv03164 (D. Ct. Larimer Cty. Colo.) ("Horizon Resp."), at 8. Horizon was motivated to show the court it could exercise personal jurisdiction over Align because Horizon believed such exercise might relieve it of any liability. *See* Colo. Rev. Stat. § 13-21-402(2) ("If jurisdiction cannot be obtained over a particular manufacturer of a product ... alleged to be defective, then that manufacturer's principal distributor ... over whom jurisdiction can be obtained shall be deemed, for the purposes of [Colorado's Product Liability Act], the manufacturer of the product.").

[5] Horizon further asserted, based on facts gleaned in discovery, that throughout this period:

- Align itself actively marketed its products throughout the U.S. *See* Horizon Resp. at 15.
- Align set a minimum advertised price for all its distributors. *Id*.
- Align's representatives attended trade shows throughout the United States called "Fun Fly" events, where Align employees market Align products to event attendees. *Id*.
- Align advertises its products on a website that is operated in the U.S. by a Michigan company. *Id*. at 17.
- Align's team of professional remote-control helicopter pilots is "present at remote control fly events throughout the U.S. and actively market[s] Align's products at those events and through social media in the U.S." *Id*. at 16.
- Align sells products to consumers throughout the U.S., including to consumers in Colorado, through Amazon.com. *Id*. at 17.

Boustred repeated many of the facts asserted by Horizon. He argued that these facts, coupled with the allegations in his complaint, were sufficient to establish jurisdiction over Align at this early stage of the case.

E. Align's Reply. In its reply, Align asked the court to disregard Respondents' facts and arguments in favor of Align's assertion that it "has never visited Colorado, never marketed specifically to Colorado, nor sold a product to a customer, dealer, or distributor located in Colorado."[6] Align further argued that the trial court should not accept Respondents' contrary allegations as true, because they were "merely conclusory" and there was no "actual evidence to support exercising specific jurisdiction over Align." *Id.* at 4. Align ultimately argued that because it employs a distribution network that keeps it from *directly* selling products to Colorado consumers, it "cannot be said to have taken *any* action which could reasonably be interpreted as availing itself of the privilege of acting within Colorado." *Id.* (emphasis added).

F. The Trial Court's Ruling. The trial court denied Align's motion to dismiss, concluding that Boustred had made the requisite prima facie showing of personal jurisdiction under Colorado's long-arm statute and the U.S. Constitution. App. 46-55.

The court began by observing that due process requires that a defendant have sufficient minimum contacts with a forum state "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." App. 50 (quoting *Goettman v. N.*

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[6] Align's Reply in Supp. of Motion to Quash Service and to Dismiss for Lack of Personal Jurisdiction (June 26, 2015), Case No.: 2013cv03164 (D. Ct. Larimer Cty. Colo.), at 2.

Fork Valley Rest., 176 P.3d 60, 67 (Colo. 2007) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))). Under this standard, a determination of personal jurisdiction requires, among other things, a finding that the defendant "purposely avail[ed]" itself of the forum state. App. 51.

Citing this Court's plurality opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (O'Connor, J.), the trial court observed that "a question remains as to what constitutes purposeful availment in the context of non-resident manufacturers." *Id.* The trial court noted that, although a majority of this Court held, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), that jurisdiction exists over a nonresident manufacturer that injects "products into the stream of commerce with the expectation that they will purchased by consumers in the forum state," this Court subsequently held, in *Asahi*, that "the defendant must indicate *some intent or purpose* to serve the forum state in order for personal jurisdiction to be proper." App. 51 (citing *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality op.)) (emphasis in original).

Against this backdrop, the trial court appeared to conclude that Colorado could exert jurisdiction over Align under *either World-Wide Volkswagen*'s pure stream of commerce test *or* the *Asahi* plurality's stricter "stream of commerce plus" test. It noted, first, that "Boustred's Second Amended Complaint alleges that Align is in the business of designing, manufacturing, distributing, and marketing remote controlled helicopters and components throughout the U.S. and Colorado." App. 52. These allegations, the trial court further observed, "are supported by documents that

purportedly show that Align provided marketing materials to its distributors, attended trade shows in the U.S. where Align actively marketed its products, and established channels through which consumers could receive assistance with their Align products." App. 52.

All told, the trial court held: "Boustred's allegations and supporting documents show that Align injected a substantial number of products into the stream of commerce knowing that these products would reach Colorado. Additionally, Align took steps to market its products in the U.S. and Colorado." App. 52-53.

G. The Court of Appeals' Decision. A division of the Colorado Court of Appeals accepted Align's petition for interlocutory review and affirmed. App. 24-31. On appeal, Align argued that the trial court improperly ignored *J. McIntyre*, 564 U.S. 873, where a plurality of this Court found, subsequent to *Asahi*, that placing a product into the stream of commerce with awareness that it will reach the forum state is insufficient to establish jurisdiction over a non-resident defendant; instead, the defendant must have specifically "targeted the forum." *J. McIntyre*, 564 U.S. at 882 (Kennedy, J., plurality op.). Rejecting that argument, the Court of Appeals determined that, under *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Kennedy's plurality opinion in *J. McIntyre* was not binding on Colorado courts and that Justice Breyer's narrower concurrence instead controlled. App. 32.

Interpreting that concurrence, as well as Justice Brennan's concurrence in *Asahi* (which was the narrowest of the *Asahi* rulings), the Court of Appeals held that this Court's decision in *World-Wide Volkswagen*,

444 U.S. at 297-98, remains the prevailing law articulating the stream of commerce doctrine. App. 36. Applying that doctrine, the Court of Appeals agreed with the trial court that Boustred had made a sufficient prima facie showing of specific personal jurisdiction over Align in Colorado. App. 36-37.[7]

H. The Petition for Review. Align sought review by the Colorado Supreme Court, arguing in its Petition that "[i]rrespective of whether the 'stream-of-commerce' or 'stream of commerce-plus' test is applicable, the facts presented in this case stand on all fours with those of *McIntyre*[,] where the exercise of jurisdiction was found to be in violation of the U.S. Constitution even by the concurrence's … application of *World-Wide Volkswagen*'s holding." Align Petition for Certiorari (June 4, 2016), Case No. 2016-SC-448 (Colo.), at 14. This case is akin to *J. McIntyre*, argued Align, because just like *J. McIntyre*, where only one of the defendant's machines was sold via a distributor in the forum state (and thus jurisdiction was deemed lacking by both the plurality and the concurrence), "only one Align rotor holder is known to have been placed in Colorado." *Id.*

In opposing review, Respondents disputed that this case "stands on all fours" with the facts of *J. McIntyre*, pointing to the "millions of dollars of sales

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[7] In so ruling, the court of appeals declined to decide whether the trial court was correct in finding that the facts of this case satisfy *both* the "stream-of-commerce" and the "stream-of-commerce-plus" approaches, ruling that "[b]ecause we conclude that the proper analysis is the stream-of-commerce test articulated in *World-Wide Volkswagen* …, and not Justice O'Connor's 'stream of commerce plus test' [in *Asahi*], we need not address this issue." App. 35-36.

of Align products by its distributors throughout the U.S., including Colorado ($355,107.57 of sales of Align products in Colorado by Horizon alone and with Align's knowledge)," as well as evidence that Align "facilitat[es] sales of [its] products in Colorado."[8]

I. The Colorado Supreme Court's Decision.

The Colorado Supreme Court granted review and affirmed. The court held, first, that the Court of Appeals was correct in finding that *World-Wide Volkswagen* supplies the governing approach to stream-of-commerce jurisdiction. App. 16-17.

The court then affirmed the trial court's factual finding that Boustred made a sufficient prima facie showing to withstand Align's motion to dismiss. App. 18. In so doing, the Colorado Supreme Court placed particular emphasis on Respondents' allegations that "Align placed no limitations on where Horizon could distribute [its products] [a]nd specifically, over $350,000 worth of Align products were sold in Colorado." App. 20. "Given this," the court concluded, "Align should have reasonably anticipated being haled into court in Colorado." App. 21 (citing *World-Wide Volkswagen*, 444 U.S. at 297).[9]

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[8] Horizon's Opp. to Petition for Certiorari (July 1, 2016), Case No. 2016-SC-448 (Colo.), at 12. *See also* Boustred Opp. to Petition for Certiorari (June 14, 2016), Case No. 2016-SC-448 (Colo.), at 4 (noting that "[t]he sale of Align products in the U.S. is both consistent and voluminous.").

[9] Although the Colorado Supreme Court ruled that Respondents had alleged sufficient facts to support jurisdiction under the stream-of-commerce test set forth in *World-Wide Volkswagen*, it did not decide whether the facts as alleged would satisfy the "stream of commerce plus" tests articulated in this Court's more recent, plurality decisions of *Asahi* and *J. McIntyre*.

The lower court was careful to note, however, that "this showing only allows Boustred to survive Align's motion to dismiss." App. 21 n.5. At a later stage of the case, "the plaintiff must establish jurisdiction by a preponderance of the evidence if the defendant raises the challenge again prior to the close trial." *Id.* (quoting *Goettman*, 176 P.3d at 66, n.3). Thus, "as the case proceeds, Boustred may have to meet a higher burden to definitely establish that Colorado may exercise jurisdiction over Align." App. 21.

REASONS FOR DENYING REVIEW

I. This Court Lacks Jurisdiction Over This Case.

This Court lacks jurisdiction to grant the writ because the state court decision is not a final judgment or decree as required by 28 U.S.C. § 1257, and none of the exceptions to the finality requirement applies.

A. This Court's Jurisdiction is Limited to Review of Final State Court Decisions.

The finality requirement of 28 U.S.C. § 1257 limits this Court's review to final state court judgments. *See Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997) ("To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.") (internal quotes and citation omitted). Finality serves to "avoid[] piecemeal review of state court decisions," to "avoid[] giving advisory opinions in cases," and to "limit[] review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota State Bd. of*

Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

The finality requirement is especially critical "when the jurisdiction of this Court is invoked to upset the decision of a State court." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In such cases, the Court is "in the realm of potential conflict between the courts of two different governments." *Id.*

B. The State Court Has Not Issued a Final Judgment or Decree.

The Colorado state court's decision is not final in at least two respects. First, the decision is not "an effective determination of the litigation," but rather decides "merely interlocutory or intermediate steps therein." *Jefferson*, 522 U.S. at 81. A ruling that a court may assert personal jurisdiction is plainly interlocutory, as it merely allows the merits of the case to proceed. *See* 15A Charles Alan Wright et al., *Fed. Prac. & Proc. Juris.* § 3914.6 (2d ed. WL).

Second, the decision below does not finally resolve even whether Colorado will assert personal jurisdiction over Petitioner because it is subject to "further review or correction[.]" *Jefferson*, 522 U.S. at 81. In affirming the trial court's decision, the Colorado Supreme Court emphasized that Align could raise its jurisdictional defense *at any time* prior to the end of trial, recognizing that, after further discovery of pertinent jurisdictional facts, the trial court may still reject personal jurisdiction over Align. App. 21 n.5.

C. This Case Does Not Fit the Categories in *Cox Broadcasting Corp.* where this Court Deemed a State Decision Final on a Federal Issue.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court summarized four categories of cases where a state court decision subject to further state court proceedings is considered a final judgment on a federal issue for jurisdictional purposes under 28 U.S.C. § 1257. Despite their obligation to address this issue, Petitioner never explains how this case meets one of these categories.[10] While it is prejudicial for Boustred to have to address this issue before knowing what Align will claim, it is clear that none of the *Cox* exceptions applies.

1. The first *Cox* category concerns cases where "further proceedings—even entire trials—[are] yet to occur in the state courts but where … the federal issue is conclusive or the outcome of further proceedings preordained," such that "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479 (emphasis added). "In these circumstances," the *Cox* Court wrote, "because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." *Id.*

This case is nowhere near to being "for all practical purposes concluded" and the decision below does render[ ] the outcome of the case "preordained." *Id.*

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[10] *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice*, 156 (10th ed. 2013) ("*Supreme Court Practice*") (the petitioner is "obliged by [Rule 14.1(g)(i)] to discuss such a finality problem in the certiorari petition").

Align not only remains free to challenge personal jurisdiction at any time before the end of trial (App. 21 n.5), it will also have the opportunity to litigate other defenses and the underlying merits.

2. The second *Cox* category is where federal issues are "finally decided by the highest court in the State" but the issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. This category applies where further proceedings will not "foreclose or make unnecessary decision on the federal question," *id.*, and the federal issue is "separable and distinct from the subsequent proceedings, so much so that the federal issue will be unaffected and undiluted by the later proceedings." *Supreme Court Practice* at 165.

The opposite is true here. Align might prevail on the merits or win in some other way that obviates any need for this Court's review. Indeed, after full jurisdictional discovery, Align might even prevail as to personal jurisdiction on a fuller record, obviating a need to review the current decision on the sufficiency of the allegations.

3. The third *Cox* category concerns cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. That is obviously not this case; under the lower court's ruling, Petitioner can raise the issue later in the case. App. 21 n.5. And if Align ultimately prevails on jurisdiction in state court, one or both Respondents can seek review.

4. The fourth *Cox* category concerns cases where the state court has "finally decided" a federal issue,

where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and where "refusal immediately to review the state court decision might seriously erode federal policy[.]" *Id.* at 482-83. This category has no application for three reasons.

First, as shown above, the state courts have not "finally decided" the federal issue of whether personal jurisdiction is appropriate.

Second, this Court's review and reversal would not necessarily be "preclusive of any further litigation." *Id.* For example, even if the Court reversed and articulated a standard for minimum contacts different than the state court, Colorado law would allow Boustred to seek leave to amend its complaint to allege facts consistent with that ruling. *See* Colo. R. Civ. P. 15(a) (leave to amend pleadings "shall be freely given when justice so requires"). And Boustred would have the right to take discovery of Align at that point to support these allegations. Review at this stage would merely result in an advisory ruling governing the almost inevitable further proceedings without actually resolving the case.

Third, refusal to review the state court decision immediately would not seriously (or even partially) erode federal policy. No federal policy requires rulings on personal jurisdiction without full jurisdictional discovery. Treating this pleading-stage ruling as final under *Cox* would "permit the fourth exception to swallow the rule." *Johnson v. California*, 541 U.S. 428, 430 (2004) (internal quotation marks omitted).

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This Court's prior cases involving state court rulings on personal jurisdiction are distinguishable because there was no further state court review possible. In *J. McIntyre*, for example, the trial court initially dismissed for lack of personal jurisdiction and a New Jersey intermediate appellate court reversed and remanded to allow discovery as to jurisdictional facts. *See Nicastro v. McIntyre Mach. America, Ltd.*, 987 A.2d 575, 578 (N.J. 2010). The defendant did not seek certiorari after the first decision. Instead, it engaged in discovery and renewed its challenge in the trial court. *Id.* at 579. It was only after the New Jersey Supreme Court reviewed that *second* decision—a decision that finally asserted personal jurisdiction based on a developed record—that the defendant sought certiorari and this Court granted review. *J. McIntyre*, 564 U.S. 873.[11]

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[11] Align may invoke *Calder v. Jones*, 465 U.S. 783 (1984), but that case is distinguishable. In *Calder*, the Court found jurisdiction to review a final state court ruling on personal jurisdiction and noted that it had exercised jurisdiction to address personal jurisdiction rulings in a handful of prior cases. *Id.* at 788 n.8. The Court emphasized, however, that it was reviewing a state decision on personal jurisdiction that was "plainly final" and "not subject to further review in the state courts." *Id.* (emphasis added). Moreover, each example in *Calder* involves a state court decision on personal jurisdiction not subject to further state court review. *See Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (defendants whose property was seized were left with choice of "suffering a default judgment or entering a general appearance and defending on the merits" if the state decision was not considered final); *Rush v. Savchuk*, 444 U.S. 320, 325 (1980) (final state court decision about assertion of quasi in rem jurisdiction); *World-Wide Volkswagen*, 444 U.S. at 289 (final state court decision denying writ of prohibition to restrain lower court from exercising in personam jurisdiction); *Kulko v. Superior Court of*

Boustred is aware of no case where this Court exercised jurisdiction to review a state court ruling that addresses the sufficiency of allegations of personal jurisdiction, but where the defendants had the right to renew a challenge to personal jurisdiction after full jurisdictional discovery.

In short, given the Colorado Supreme Court's definite statement that it has made no final ruling to assert personal jurisdiction, App. 21 n.5, the state court decision is not final and this Court lacks jurisdiction.

II. This Case is a Poor Vehicle for Review.

Finality aside, this case is a poor vehicle for review because it is akin to *J. McIntyre* in two pivotal respects. In his concurring decision in *J. McIntyre*, Justice Breyer stated that, "because the incident at issue in this case does not implicate *modern concerns*, and because the factual record leaves many *open questions*, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." 564 U.S. at 890 (emphases added).[12]

California, 436 U.S. 84, 89 (1978) (review of a state court final decision sustaining jurisdiction).

[12] Justice Breyer highlighted his concern in applying the plurality's analysis to a number of web-related situations. *See id.* He questioned the personal jurisdiction standard for a company who markets its products through pop-up advertisements visible in the forum. *See id.* Justice Breyer's concern regarding websites and personal jurisdiction is shared by legal analysts who argue that the case law is conflicting. *See* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. Rev. 925, 939 (1998) (observing internet case law appears "irreconcilable").

Both of these factors are present here. First, just as in *J. McIntyre*, this case does not revolve around internet sales or mass marketing via email. Instead, Align shipped its products to Horizon in Illinois, which in turn shipped them to retailers in Colorado. Thus, this case does not involve the kind of "modern concerns" that were absent in *J. McIntyre*.[13]

Moreover, this case presents many more "open questions" than *J. McIntyre* when it comes to the factual record. As explained above, *J. McIntyre* reviewed a *final* decision that was based on full discovery in the state courts. But here, not only was the challenged decision interlocutory and based on minimal discovery, but a host of facts this Court would likely deem highly relevant remain unknown. Due to the early posture of this litigation there are, for example, no findings as to:

* the amount of control Align exerted over its U.S. distributors and their sales efforts in Colorado;

* what business, if any, Align conducted with Colorado via its website or through Amazon.com; and

* whether any of Align's advertising and marketing efforts were specifically directed at Colorado.[14]

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[13] Although it appears that Align engages in some web-based advertising and sales, the extent and nature of that activity has not yet been fleshed out, and Boustred contends that he purchased the allegedly defective main rotor holder at a brick and mortar hobby store in Fort Collins, Colorado.

[14] Other as-yet unknown facts include:

* the total annual revenue derived from the sale of all Align replacement rotor holders in Colorado (by each distributor and collectively);

The lower court was not troubled by the absence of evidence on these points because it was satisfied that Respondents had raised a reasonable inference of specific jurisdiction over Align under the stream-of-commerce test of *World-Wide Volkswagen*. App. 19-21.[15] But this Court might disagree, either as to the appropriate test or as to the lower court's application of the facts to the law (or both), in which case the Court might find itself frustrated by the same problems that troubled the *J. McIntyre* Court.[16]

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* whether Align had notice of specific sales of replacement rotor holders or other recreational helicopter products in Colorado;

* whether Align ever places geographic restrictions on its distributors' authority to sell replacement rotor holders or other recreational helicopter products in any of the 50 United States;

* why Align maintains an English language website that diverts American users to the websites of its four U.S. distributors; and

* whether and to what extent Align retains any responsibility in its distributor relationships for interfacing with American customers or handling returns or complaints.

[15] "A prima facie showing exists where the plaintiff raises a reasonable inference that the court has jurisdiction over the defendant." *Goettman*, 176 P.3d at 66.

[16] In *World-Wide Volkswagen*, 444 U.S. at 28, in contrast, "Respondent's counsel actually conceded at oral argument … [that] there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case." Likewise, in *Asahi*, the Court knew exactly how many of Asahi tire valve assemblies were sold to the Taiwanese tire manufacturer who sought indemnification from Asahi; exactly how many of these valve assemblies were eventually sold in the forum state; and even how many of the valve stems of the tire tubes sold in one cycle store in Solano Country were manufactured by Asahi. *See Asahi*, 480 U.S. at 106-07. And in another stream of commerce

Align cannot reasonably dispute this point, because it repeatedly contended below that this case is "on all fours" with *J. McIntyre*. Thus, Align argued that, just as in *McIntyre,* there is only evidence of a "single isolated sale" of one of Align's products in the state. *See J. McIntyre*, 564 U.S. at 886-87 (Kennedy, J., plurality op.)*; id.* at 888 (Breyer, J., concurring). Respondents vehemently dispute Align's characterization of the record on this point and assert, as they did below, that from 2006 to 2011, Align manufactured and Horizon purchased and distributed 11,216 packages of component parts for the subject helicopter, all of which contained motor rotor holders. Boustred furthermore disagrees that the prima facie burden requires knowledge of the number of rotor holders sold in Colorado given the amount of revenue derived from the state. But to the extent this Court were to agree with Align, either on the facts or the law (or, again, both), this case would be even more likely than *J. McIntyre* to produce a splintered result.

To avoid this outcome and provide the maximum amount of guidance to the lower courts, it would be far better to select a case where this Court could issue a definitive ruling on both the facts and the law.

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case decided the same year as *J. McIntyre*, although the jurisdictional issue was resolved on a motion to dismiss, the state court made extensive factual findings after what appears to have been full jurisdictional discovery. *See Brown v. Meter*, 681 S.E.2d 382, 385–87 (N.C. App. 2009), *rev'd sub nom., Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846 (2011).

III. There is No Urgent Need to Decide Align's Question Presented.

The only circumstance under which it *might* make sense to grant review of such a flawed vehicle would be if the lower courts were in urgent need of guidance as to the proper approach to stream-of-commerce jurisdiction. Align suggests as much in its Petition, saying the lower courts are "crying out for this Court to clarify the matter." Pet. at 17. But in truth, they are managing just fine.

Since *J. McIntyre* was decided in 2011, the majority of state high courts and federal courts of appeal to decide the issue—including the Colorado Supreme Court in this case—have *agreed* that the *World-Wide Volkswagen* approach to stream-of-commerce jurisdiction is the appropriate standard. *See Ainsworth v. Moffett*, 116 F.3d 174, 177 (5th Cir.), *cert. denied,* 134 S. Ct. 644 (2013); *State v. Atl. Richfield Co.*, 142 A.3d 215, 223 (Vt. 2016); *State ex rel Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 342 (W. Va. 2016); *Book v. DoubleStar Dongfeng Tyre Co.*, 860 N.W.2d 576, 585 (Iowa 2015); *Ex parte Edgetech I.G., Inc.*, 159 So.3d 629, 642 (Ala. 2014); *Russell v. SNFA,* 987 N.E.2d 778, 794 (Ill.), *cert. denied*, 134 S. Ct. 295 (2013).[17]

A number of other courts have deemed it unnecessary to decide which stream of commerce test prevails, either because: (1) jurisdiction would exist even under the most stringent interpretation of this Court's rulings*, see Polar Electro Oy v. Suunto Oy,* 829 F.3d 1343, 1350 (Fed. Cir. 2016); *In re Chinese Drywall Prod.*

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[17] *Cf. Willemsen v. Invacare Corp.*, 282 P.3d 867, 873-75 (Ore. 2012), *cert. denied*, 564 U.S. 1143 (2013) (holding that Justice Breyer's *J. McIntyre* concurrence controlled and finding jurisdiction based on fact-specific analysis).

Liab. Litig., 753 F.3d 521, 541 (11th Cir. 2014); or (2) because jurisdiction would not exist under even the most liberal version of the stream of commerce test. *See Williams v. Romarm*, SA, 756 F.3d 777, 784 (D.C. Cir. 2014); *Noll v. American Biltrite,* 395 P.3d 1021, 1028 (Wash. 2017); *State v. NV Sumatra Tobacco Trading Co.,* 403 S.W.3d 726, 764 (Tenn. 2013).

Notably, to our knowledge, only two post-*J. McIntyre* state high or federal appellate courts have disagreed as to the prevailing legal standard, but even there the outcome did not hinge on that determination. In *Rilley v. Money Mutual,* 884 N.W.2d 321, 324 (Minn. 2016), *cert. denied*, 137 S. Ct. 1331 (2017), the Minnesota Supreme Court looked to the Kennedy plurality in *J. McIntyre* as supplying the governing legal standard, but went on to hold that the plaintiffs *met* that standard based on the fact that defendant "sent over 1,000 emails to known Minnesotans, soliciting them to apply for payday loans." *Id.* at 338. And in *State v. LG Electronics*, 375 P.2d 1035 (Wash. 2016), *cert. denied,* 137 S. Ct. 648 (2017), the Court viewed Justice Breyer's *J. McIntyre* concurrence as creating its own unique "something-more" standard between the *Asahi* plurality and concurrence, but seemed to hold that the defendant's activities would have satisfied even the most stringent standard. *See id.* at 181-82 (noting that defendant "sold [its product] into international streams of commerce with the intent that … large quantities would be sold in Washington.").

In short, Align's dramatic portrait of a host of lower courts floundering under the uncertainty created by *Asahi* and *J. McIntyre* and in desperate need of guidance does not square with reality. This Court should wait until a better vehicle presents itself to decide, once and for all, the proper approach to stream

of commerce jurisdiction. Considering the number of personal jurisdiction cases for which this Court has received petitions for certiorari just since *J. McIntyre* was decided, it certainly seems the Court has myriad other (and presumably better) choices on this issue.[18]

IV. The Lower Court's Decision Was Correct.

Finally, review should be denied because the lower court's decision was correct and faithful to this Court's precedents.

First, there is nothing radical or exotic about the lower court's holding that, under *Marks v. United States*, 430 U.S. 188 (1977), *World-Wide Volkswagen* "continues to bind this court in determining" personal jurisdiction over a non-resident defendant. App. 16-17. As stated above, many of the federal courts of appeals and state high courts to decide this issue since *J. McIntyre* have found that *World-Wide Volkswagen* is the governing standard.[19]

Second, the lower court was careful and restrained in its approach to *World-Wide Volkswagen*—and in its

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[18] *See, e.g., State v. LG Electronics*, 375 P.2d 1035 (Wash. 2016), *cert. denied,* 137 S. Ct. 648 (2017); *Rilley v. Money Mutual,* 884 N.W.2d 321 (Minn. 2016), *cert. denied*, 137 S. Ct. 1331 (2017); *Russell v. SNFA,* 987 N.E.2d 778 (Ill.), *cert. denied*, 134 S. Ct. 295 (2013); *Ainsworth v. Moffett*, 116 F.3d 174 (5th Cir.), *cert. denied,* 134 S. Ct. 644 (2013).

[19] Align is wrong in arguing that "the Colorado Supreme Court reviewed the fractured opinions in *Asahi* and [*J. McIntyre*] declined to follow any of them." Pet. at 6. In truth, the court properly followed the narrowest opinion from *J. McIntyre*—Justice Breyer's concurrence—which expressly declined to "refashion basic jurisdictional rules." 546 U.S. at 890. This led the lower court to the narrowest of the *Asahi* opinions—Justice Brennan's concurrence—which, in turn, followed the stream-of-commerce test of *World-Wide Volkswagen*. *See* 480 U.S. at 117-21.

application of the facts to the law. The Colorado Supreme Court recognized that "the mere possibility that a product might end up in a given state cannot constitute the purposeful availment necessary to support personal jurisdiction …" App. 10. Instead, for a plaintiff to establish jurisdiction over a non-resident defendant, it must show that "the presence of the allegedly defective [product in the forum] did not result from 'random, fortuitous, or attenuated' contacts with [the state] and instead was placed into the stream of commerce with the *expectation* that the products will be purchased [there]." App. 20 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98) (emphasis in original). Then, based on this test, the court found that plaintiff made an adequate prima facie showing of jurisdiction, placing particular emphasis on the fact that "over $350,000 worth of Align products were sold in Colorado." App. 21.

Here too, there was nothing controversial or ground-breaking about this conclusion. To the contrary, it would offend even the stingiest notions of substantial justice to find, as Align argued below, that its contacts with four U.S. distributors (authorizing the unlimited sale of products in all 50 states) and the derivation of $350,000 in Colorado-specific sales is not enough to raise a reasonable inference that Align intended to avail itself of the benefits of doing business in the forum state.[20]

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[20] Align badly mischaracterized the lower court's holding when it argued that the Court found personal jurisdiction based solely on the fact that "Align's plac[ed] its goods into the stream of commerce and allow[ed] them to be sold in Colorado." Pet. at 7. *See also id.* (arguing that, "[a]s in [*J. McIntyre*] itself, the state court did not rely on anything other than limited sales, through

Align's insistence that the lower court erred by "adopting an expansive version of the stream-of-commerce theory of jurisdiction that goes beyond the opinions joined by at least six justices in [*J. McIntyre*] is also patently incorrect. Pet. at 18. In making this claim, Align repeatedly argued below that this case is "on all fours with" *J. McIntyre* because "only one Align rotor is known to have been placed in Colorado."[21] Thus, in Align's view, even Justice Kennedy and the other members of the *J. McIntrye* plurality would have rejected jurisdiction over Align.

This argument, once again, mischaracterizes the record. Because Boustred was required to make only a prima facie showing of jurisdiction, neither he nor Horizon has yet taken discovery of Align. Based on this barely developed record, Respondents know that Horizon sold over $350,000 worth of Align's products in Colorado, but they do not yet know the exact com-

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a nationwide distributor, of the defendant's products and component parts in the forum."). In reality, in addition to noting Align's sizable sales *in Colorado*, App. 19, the Colorado Supreme Court's conclusion that the exercise of specific jurisdiction over Align is reasonable was bolstered by: Align's U.S.-based marketing and advertising; Align's attendance at trade shows in the U.S.; and the fact that Align "established channels through which consumers could receive assistance with their products." App. 20. The lower court was careful to note, moreover, that "this showing only allows Boustred to survive a motion to dismiss," and made clear that Align could renew its challenge at a later date, in which event Boustred "may have to meet a higher burden to definitively establish that Colorado may exercise jurisdiction over Align." App. 21 n.5.

[21] Align Petition for Certiorari (June 4, 2016), Case No 2016-SC-448 (Colo.), at 14.

position of those sales. It may well be that a substantial portion (or all) of those sales were made up of the specific product that injured Boustred, but the exact figure remains unknown. Align's argument, based on this incomplete record, that "only one Align rotor is known to have been placed" in Colorado, is misleading, at best.[22]

Align further distorts the record (and mischaracterizes the lower court's ruling) in arguing that the lower court "created a system of national jurisdiction" by finding jurisdiction over Align based on its contacts with the United States, rather than with Colorado. As explained above, the lower court looked to a number of factors, including Align's $350,000-plus sales "*in Colorado*." App. 19 (emphasis added). *See also id.* at 20-21. While the lower court did consider Align's national contacts, it did so only to support its initial conclusion that the regular course and flow of Align's products into the U.S. predictably carried those products to Colorado, where they injured Boustred. That analysis was appropriate. *See World-Wide Volkswagen*, 444 U.S. at 287 (if a manufacturer or distributor endeavors to develop a market for a product in several states, it is reasonable "to subject it to suit in any one of those States if its allegedly defective [product] has been the source of injury.").

Third, and finally, the lower court was correct in rejecting Align's argument that "selling its products through a distributor somehow turns the distribution

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[22] It is interesting to note, moreover, that although Align pressed this "single-sale" argument in the proceedings below, it did not raise it again in its Petition to this Court. This is undoubtedly because, as Align must recognize, if this case truly is on fours with *J. McIntyre*, it makes a poor vehicle for review.

and sale of its products into the unilateral activity of a third party that cannot properly be considered in the minimum contacts analysis." App. 21. As the lower court stated, "[a]dopting such a position would render foreign manufacturers immune from suit in the United States so long as they sell their products in the United States through separately incorporated U.S. based distributors." *Id.* That cannot be the proper approach: it elevates form over substance in the worst sort of way, encourages corporate gamesmanship, and puts domestic companies (who are subject to jurisdiction at least in their home state, *see Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)), at a serious disadvantage vis-à-vis their foreign competitors.

* * *

Stripped to its basics, Align's premise is that foreign manufacturers who do business *everywhere* in America can be held liable nowhere in America. Not only would this approach require this Court to discard the fact-based minimum contacts analysis embraced in every one of this Court's decisions since *International Shoe*, 326 U.S. at 310, it would obligate a court to ignore the breadth of Align's U.S. sales campaign and attribute *no* weight to the fact that Align is a large, sophisticated manufacturer, as opposed to a small, independent business.

Notably, *all* of the Justices in *J. McIntyre* cautioned against overlooking just these types of facts in favor of bright-line jurisdictional rules:

> The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*, does not by itself resolve many difficult questions of jurisdiction that

> will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

J. McIntyre, 564 U.S. at 885 (Kennedy, J., plurality op.). *See also id.* at 892 (Breyer, J., concurring) ("[w]hat might appear fair in the case of a large manufacturer which specifically seeks … an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer…who sells his product … exclusively to a large distributor, who resells a single item … to a buyer from a distant State."); *id.* at 910 (Ginsburg, J., dissenting) ("[a]s to the parties, courts [examining personal jurisdiction] would differently apprise two situations: (1) cases involving a substantially local plaintiff, like Nicastro, injured by the activity of a defendant engaged in interstate or international trade; and (2) cases in which the defendant is a natural or legal person whose economic activities and legal involvements are largely home-based, *i.e.*, entities without designs to gain substantial revenue from sales in distant markets.") (internal quotes and citations omitted).

The present case most certainly involves the former of these two situations, and courts across the country have properly considered a non-resident manufacturer defendant's national contacts in order to fairly characterize the nature and scope of that defendant's American sales campaign to ensure the appropriate application of the minimum contacts analysis. *See id.* at 910-14 (Appendix to dissenting opinion

of Ginsburg, J.) (discussing 12 cases upholding jurisdiction over foreign or out-of-state corporation that, through a distributor, targeted national market).

It would be antithetical to this case law to now conclude that a foreign manufacturer who engaged the use of multiple U.S. distributors to sell its products in every state is not amenable to suit in any state simply because its marketing was part and parcel of a national effort, rather than specifically tailored to each state individually. Here, it is relevant that Colorado was but one of the 50 United States generally targeted by Align, and the lower court committed no error in considering this fact.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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