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 Supreme Court Of Colorado

REPLY BRIEF

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ARGUMENT

The thousands of words in the Respondents' responses cannot overcome the two central points for the Court's certiorari consideration: First, the question decided by the Colorado Supreme Court and presented by the petition – whether a nonresident defendant constitutionally may be haled into a state's courts based on the sort of general commercial activity alleged here – is one on which the country's courts are undeniably divided and is precisely the sort of question that warrants this Court's attention, as the Court itself has already recognized. *J. McIntyre Machine v. Nicastro*, 564 U.S. 873 (2011). Second, the Court also has frequently established that cases in this posture are effective vehicles for resolving jurisdictional matters. Those two facts warrant the grant of the petition.

I. The time has come to resolve this issue.

Respondents cannot and do not contest that the question actually presented by the petition is an important constitutional question on which state and federal courts are widely divided. Ensuring that the Constitution of the United States applies equally throughout the United States is one of the most fundamentally important functions of the Court. *See* Rule 10. That is not now the case as to stream-of-commerce jurisdiction, and the petition presents an ideal opportunity to bring such consistency to one of the most frequently litigated constitutional disputes.

A. The split among state and lower courts is deep and growing.

Boustred argues that the Court need not resolve the issue presented here because "a majority" of courts since *Nicastro* have agreed with the Colorado court that they should apply *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) to stream-of-commerce situations. Boustred BIO at 22. Of course, as Boustred admits, even since 2011 the courts have split in three different directions on that question. *See id.* at 22-23. And more to the point, this Court has already twice recognized that the issue deserves its attention and that state and lower federal courts (not to mention litigants and those considering doing business around the country) are in need of a consistent resolution. The Court of course, has not been able to resolve the confusion, and that the split has grown since 2011 only makes certiorari more appropriate.

It is not necessary that lower courts be "floundering," in order to grant review. The reason to resolve the issue is instead to provide the country with a single rule governing a frequently-disputed constitutional right and to avoid the constant need for litigating these questions through state appellate courts. Align need not paint a "dramatic portrait" of lower court's lacking settled guidance. *Cf.* Boustred at 23. Others, including respected commentators and this Court itself have made the problem abundantly clear. *See, e.g., Nicastro*, 564 U.S. at 877 (plurality opinion) (noting "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*"); 4 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.").

B. The result need not be "all or nothing" jurisdiction.

As the petition explains, the effect of the pure stream-of-commerce approach is effectively to create nationwide jurisdiction, perhaps with an unworkable opt-out opportunity. Pet. at 20. At least unless a manufacturer affirmatively prohibits its products from being sold in a particular state, the approach below would subject producers to jurisdiction in most, if not all, states of the union merely by entering the U.S. market. This is inconsistent even with *World-Wide Volkswagen*, and so Respondents seek to create the impression that any other result will lead to the opposite: exempting foreign defendants from jurisdiction in any state. *See* Horizon BIO at 33. There is, however, no reason to believe this is the case in those states that have adopted the more stringent "stream-of-commerce plus" test. *E.g.*, *Vargas v. Hong Jin Crown Corp.*, 636 N.W.2d 291, 298 (Mich. Ct. App. 2001).

But even if it were true, as Justice Kennedy has explained, "a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution."

Nicastro, 564 U.S. at 886 (Kennedy, J., plurality). This, though, "would be an exceptional case," *id.*, and the facts here show why. Align does business with Horizon's offices in Illinois and ships most of its products from Asia to ports in California. Align does not dispute that under the proper constitutional tests, it is likely subject to jurisdiction in those states. *Cf. id.* at 885 (Kennedy, J., plurality) ("[F]oreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.").[1]

Nor would the allegedly injured party, Boustred, be without a remedy in the event Align cannot be sued in Colorado. State law ensures that any plaintiff injured in a case like this can recover fully from the distributor even if the manufacturer is not in court. *See generally* Colo. Rev. Stat. § 13-21-401. Thus, this dispute is really one between manufacturers and distributors, not injured individuals. Sophisticated companies like Horizon are fully capable of assessing the risks of doing business with a particular manufacturer. Consumers have little to fear from adopting the O'Conner/*Nicastro*-plurality approach. On the flip side, the broad ruling below coupled with general disagreement among the states on this constitutional question undermines the rule of law and settled expectations that are so important to our system. *See* Amicus Br. of Chamber of Commerce at 7-9.

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[1] Justice Kennedy also points out that if this were truly a significant problem, Congress likely could provide for federal jurisdiction. *Nicastro*, 564 U.S. at 885.

II. This Court has jurisdiction to review the Colorado Supreme Court's decision.

This Court routinely reviews decisions of state courts in similar interlocutory postures. For example, in both *World-Wide Volkswagen Corp.* and *Asahi*, two leading personal jurisdiction decisions, this Court took up interlocutory appeals from state courts. *See World-Wide Volkswagen*, 444 U.S. at 289; *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 107 (1987).

The Court's two most recent cases on the subject likewise both reviewed interlocutory review of denials of defense motions. *See BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (consolidated cases, one granting, one denying motions to dismiss); *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1778 (2017) (motion to quash service). This was no impediment to the Court's deciding those cases because the question for this Court there, just as it is here, was whether the state courts had adopted the correct rule of decision, not whether the given facts satisfied that test. Neither Respondent acknowledges the interlocutory posture of these cases.

It is uncontroversial that such state decisions are final and fully within this Court's jurisdiction: "Denial of an objection to state court jurisdiction that is not subject to review in a higher state court prior to trial is a final judgment on the federal issue." 16B Wright, et al., Federal Practice and Procedure § 4010 n.49 (3d ed. 2006). Interlocutory appeal challenging state court

claims of broad personal jurisdiction are the norm, not the exception.

Indeed, jurisdiction over such cases is so common that it is rarely even mentioned. Besides *World-Wide Volkswagen*, *Asahi*, *Bristol-Myers Squibb*, and *BNSF*, *see, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920-921 (2011) (reviewing state court's denial of a motion to dismiss for lack of personal jurisdiction joined by three of four defendants); *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 608 (1990) (reviewing state court's denial of motion to quash service); *Rush v. Savchuk*, 444 U.S. 320, 324 (1980) (reviewing state court's denial of motion to dismiss for lack of personal jurisdiction); *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 88-90 (1978) (reviewing state court's denial of motion to quash service). This Court has thus reviewed personal jurisdiction challenges in the preliminary stages of litigation, without discussion of the defendants' ability to renew a jurisdictional challenge later in the litigation.

The Colorado Supreme Court resolved the sole federal issue being raised here: the legal rule that applies to stream-of-commerce jurisdiction. On that, the only relevant matter here, the decision is "plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975).

On the central legal question the Colorado court declared this "case presents the first opportunity for this court to address the impact of two U.S. Supreme

Court plurality opinions – *Asahi* and *J. McIntyre* – on Colorado's stream of commerce jurisprudence." 2017 CO 103, ¶ 7. The court went on to determine that the test in *World-Wide Volkswagen*, not the fractured decisions in *Asahi* or *Nicastro*, control stream-of-commerce analysis in Colorado. That decision is plainly final and not subject to re-litigation in Colorado, and it is that ruling that is the sole subject of the petition. Law of the case doctrine would surely bar Align from arguing for a different legal rule later in the litigation.

Respondents seek to avoid this obvious conclusion by overstating the meaning of footnote 5 in the Colorado opinion. *See* Boustred BIO at 18. The issue in this case is not whether Align could "renew a challenge to personal jurisdiction" later in the litigation. *Cf.* Horizon BIO at 18-19; Boustred BIO at 18 (same claim). That footnote simply means that under Colorado's newly- (and erroneously-) adopted stream-of-commerce test, Align might have an opportunity to disprove certain facts alleged to create jurisdiction. But that is true of most interlocutory appeals, where, for example, the Court reviews a case in which a motion to dismiss was denied, *e.g., Lawson v. FMR LLC*, 571 U.S. 429 (2014), or a preliminary injunction was at issue. *E.g., American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

In fact, by rule, the only issue that was before the Colorado Court on interlocutory appeal was a clean, "unresolved question of law." *See* Colo. App. Rule 4.2(b)(2). The footnote simply recognizes that the court was resolving the legal issue before it, not the entire case.

The same is true in every interlocutory appeal, and as shown above, this Court frequently does the same.[2]

Respondents' position would prevent the Court from hearing any case if there is a chance of additional discovery about jurisdiction later in the litigation. No case of this Court has so held. And the claim cannot be squared with the multiple cases decided at both the motion to dismiss phase as well as the motion to quash service of a subpoena phase. *See* supra pp. 5-6 (discussing cases). Respondents' position is contrary to past practice in taking interlocutory cases about jurisdiction and contrary to the "pragmatic approach . . . in determining finality" of judgments for review. *Cox*, 420 U.S. at 486.

Respondents both focus on the procedural posture of *Nicastro* as providing a broader factual record before review. While *Nicastro* had a complicated background, it differs from most personal jurisdiction cases. There is no hint or reason that *Nicastro*'s unusual posture should be the *only* permissible means for such issues to reach the Court. And *World-Wide Volkswagen*, *Asahi*, *Bristol-Myers Squibb*, and *BNSF* show that it is not. The petition does not challenge whether the Colorado court correctly assessed the facts. Whether the facts relied on by Colorado's courts to defeat the motion to dismiss are constitutionally sufficient to force Align to

[2] This is often the case in qualified immunity cases, which this court regularly resolves. *See, e.g., White v. Pauly*, 137 S. Ct. 548 (2017). Personal jurisdiction, like qualified immunity, involves "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

appear in its courts is the question. Further factual development is not necessary or helpful to resolving that question. *See, e.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1778 (relying on documentary evidence to decide personal jurisdiction).

Because litigation about personal jurisdiction goes to the courts' power to compel a party to participate in the court process, appeals from lower courts that have asserted jurisdiction too broadly will frequently be interlocutory. *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) ("Although there has not yet been a trial on the merits[,] . . . the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.'") (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975)); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (employing same reasoning).

Respondent Boustred attempts to distinguish *Calder* and the cases cited therein by claiming "there was no further state court review possible." Boustred BIO at 17. Respondent glosses *Calder* as a decision that was "plainly final" and "not subject to further review in state courts." *Id.* n.11. The distinction does not hold. Just as in *Calder*, and *World-Wide Volkswagen* and *Asahi*, the Colorado Supreme Court issued a published decision deciding a legal question about the reach of state court jurisdiction under the Due Process Clause.

Finally, federal policy favors not compelling parties to litigate in jurisdictions without constitutional authority. This Court will decide the federal issue "if a

refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. In a related context, this Court reviewed an interlocutory appeal of an arbitration ruling where lack of review "until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate" contrary to the important federal policy in favor of arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984). The same federal policy holds true for defendants being forced to litigate in courts contrary to the Due Process rights of the Fourteenth Amendment. *See Rosenblatt v. Am. Cyanamid Co.*, 86 S. Ct. 1, 3 (1965) (Goldberg, J., in chambers) (treating denial of personal-jurisdiction motion to dismiss as final to prevent eroding national policy "against subjection to excessive state assertions of in personam jurisdiction"). Especially when state courts take an extremely broad view of their own jurisdiction, protection of the Due Process rights of foreign defendants becomes paramount.

Respondents' arguments prove too much. Their position would prevent this Court from ever taking up a case about personal jurisdiction until after the party who claims to have important federal Constitutional rights violated were forced to suffer primary harm to be protected by the right. That is not how this court treated appeals of litigation in the preliminary stage in *World-Wide Volkswagen*, *Asahi*, or *BNSF* and *Bristol-Myers Squibb*.

III. This case is a good vehicle.

None of Respondents' vehicle arguments stand up to scrutiny. Respondents attempt to deflect from the clean legal issue presented by asserting, for example, that "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" and a "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." Boustred BIO at 2.

But this is precisely the point. The Colorado Supreme Court adopted a rule that such evidence is not necessary to the stream-of-commerce analysis – that nonresidents can be haled into Colorado's courts based simply on the allegations in the complaint that show no more than a national sales effort coupled with a quantum of sales through distributors to Colorado buyers and a "failure" to prohibit sales there. *See* App. 19. The very question presented is whether it was correct to do so, or whether Align was correct to argue that Due Process requires more.

The documentary evidence in this case comports with the factual record in other personal jurisdiction cases involving foreign defendants. *See World-Wide Volkswagen Corp.*, 444 U.S. at 289; *Asahi*, 480 U.S. at 106; *Bristol-Myers Squibb*, 137 S. Ct. at 1778. Of course, it is always true that additional facts in litigation may

come to light that alter a jurisdictional decision. Respondents demand a factual record that does not normally exist in personal jurisdiction litigation, and it is not needed to decide the purely legal question whether the Colorado test comports with the U.S. Constitution.

That the defendant here is not the proverbial Florida farmer or Appalachian potter[3] that might give rise to an idealized hypothetical case is no reason to ignore the powerful reasons to grant the petition. The issues that led the Court to try to resolve this issue in 2011 have only grown more significant in the years since. The facts of this case involve a foreign manufacturer and a distributor, but no legal principle separates them from the small domestic producer. *See* Amicus Br. of the Chamber of Comm. The right of Due Process at issue here applies to all, and in granting the petition the Court can provide certainty and predictability to all such producers who hope to take advantage of modern communication and transportation to serve American consumers. Awaiting a factual scenario that may never reach this Court when the country's courts are intractably decided on a fundamental and frequently-litigated constitutional question deprives everyone – manufacturers, buyers, courts, plaintiffs and defendants – of the certainty and consistency only this Court can provide.

[3] *See Nicastro*, 564 U.S. at 885 (Kennedy, J., plurality); *id.* at 891 (Breyer, J., concurring).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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