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,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court Of Colorado

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, directly representing 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, and has participated as *amicus curiae* in numerous cases addressing the permissible scope of specific personal jurisdiction.[1] See, *e.g., Bristol-Myers Squibb Co.* v. *Superior Court,* 137 S. Ct. 1773 (2017); *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014); *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873 (2011); *Goodyear Dunlop Tires Operations*, *S.A.* v. *Brown*, 564 U.S. 915 (2011).

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of this brief's filing at least 10 days prior to the due date. All parties consented to the filing of the brief.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM has filed *amicus* briefs in personal jurisdiction cases before this Court. See, *e.g.*, *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549 (2017).

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important liability issues.

This case is vitally important to the huge number of product manufacturers that sell their products through independent distributors. For decades, this Court and lower courts have grappled with the question of when, if ever, a manufacturer may be subject to specific jurisdiction in a particular forum on the ground that it put its products into the "stream of commerce." The decision of the Colorado Supreme Court demonstrates that, without clear guidance from this Court, some state courts will take an ex-

pansive view of their authority to exercise personal jurisdiction over foreign defendants on a "stream of commerce" theory. Indeed, under the rationale of the decision below, a product manufacturer is subject, in practical terms, to specific jurisdiction for all product-related claims in every State where its products are sold. *Amici* file this brief to explain why this expansive "stream of commerce" approach to jurisdiction would impose new and costly burdens on American and international businesses and eviscerate the due process limits on personal jurisdiction long recognized by this Court. See, *e.g.*, *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case affects an enormous number of businesses across the country and around the world. In the modern economy, numerous businesses sell products across state and international borders—including indirect sales through third-party distributors and other supply-chain partners. Under the approach to specific jurisdiction adopted by the Colorado Supreme Court below, any manufacturer that engages in this commonplace practice is potentially subject to specific jurisdiction in any forum in which its products are sold. This Court's immediate review is warranted for two reasons.

First, the question presented has tremendous practical importance. Many foreign manufacturers do business in the United States by contracting with domestic distributors who sell their products to retailers. Many of these manufacturers, like petitioner (a Taiwanese corporation), do not restrict the regions in which a distributor may sell their products. Under

the Colorado Supreme Court's approach, these foreign companies are subject to specific personal jurisdiction wherever their products are sold by a retailer—potentially in all fifty States. The risk of being subjected to unpredictable litigation in courts across the country will surely deter these companies from making their products available to American consumers without imposing geographic restrictions on third-party distributors.

The issues described above are not unique to foreign manufacturers. As members of this Court have recognized, the consequences of this stream-of-commerce approach "are no less significant for domestic producers," who likewise sell products through distributors rather than directly marketing and selling them in particular geographic areas. *Nicastro*, 564 U.S. at 885 (plurality opinion). Justice Kennedy's plurality opinion in *Nicastro* illustrated the problem: "The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town." *Ibid*. Thus, American companies are similarly harmed by the broad rule of specific jurisdiction adopted below.

The importance of the question presented is underscored by the frequency with which it arises. Specific jurisdiction is a potential issue in every case filed outside a defendant's place of incorporation or principal place of business. For that reason, this Court has twice granted certiorari in "stream of commerce" cases. See *Asahi Metal Indus. Co.* v. *Superior Court,* 480 U.S. 102 (1987); *J. McIntyre Mach.,*

Ltd. v. *Nicastro*, 564 U.S. 873 (2011). But neither of these cases produced a majority opinion, resulting in a morass of conflicting lower court opinions that vary considerably in their approach to specific jurisdiction in this context. Some courts—recognizing that the specific-jurisdiction inquiry involves "notion[s] of defendant-focused fairness" (*Nicastro*, 564 U.S. at 891 (Breyer, J., concurring))—require affirmative targeting of the forum state. Other lower courts—like the Colorado Supreme Court—hold that even a passive "expectation" that a manufacturer's products may be sold in the forum State can render a defendant subject to jurisdiction. See Pet. at 14-17. This entrenched confusion in the lower courts cries out for this Court's intervention.

Second, the decision below is wrong. The so-called "pure" stream-of-commerce approach to specific jurisdiction followed by the court below, which permits the assertion of specific jurisdiction over a manufacturer in any forum in which it "expect[s]" that its products may be sold, would deprive most manufacturers of the ability to anticipate where, and to what extent, they might be haled into court on product liability claims. That would destroy the predictability that due process requires for jurisdictional rules.

Instead, the proper approach is the test endorsed by four Justices in both *Asahi* and *Nicastro*. That test is easy to apply, provides predictability for defendants in this context (domestic as well as foreign businesses), and best comports with this Court's long-standing approach to specific jurisdiction.

ARGUMENT

I. The Question Presented Has Tremendous Importance For Foreign And Domestic Corporations Alike.

The question presented in this case recurs with great frequency and cries out for this Court's clear and authoritative guidance. Because this Court has never answered the "stream of commerce" question definitively, lower courts have long taken differing positions regarding whether and when a nonresident defendant whose products are sold in a forum State through a distributor is subject to specific personal jurisdiction. Some courts—like the court below—apply a "pure" stream-of-commerce approach, in which foreseeability that a defendant's products could be sold in the forum State and generalized marketing efforts are considered sufficient minimum contacts to justify specific jurisdiction. Others apply the "stream-of-commerce-plus" test of the plurality opinions in *Asahi* and *Nicastro*.[2] And still others take a fact-driven approach that analyzes specific jurisdiction on a case-by-case basis. See Pet. 14-17.

This legal confusion is problematic for businesses and courts alike. Indeed, the Court has acknowledged the importance of the question presented here

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[2] The approach taken by Justice O'Connor's plurality opinion in *Asahi*, which guided the plurality in *Nicastro*, "has come to be known as the 'stream of commerce "plus"' theory." *Bridgeport Music, Inc.* v. *Still N The Water Publ'g*, 327 F.3d 472, 479 (6th Cir. 2003); see also, *e.g.*, 4 Charles Alan Wright et al., *Federal Practice & Procedure* § 1067.1 (4th ed.) (explaining that the *Asahi* plurality's approach "is often called the 'stream of commerce plus' theory"). For ease of reading, *amici* employ that shorthand in this brief.

by twice granting certiorari to decide it—but failing each time to provide definitive guidance. This case presents an appropriate opportunity to resolve the issue clearly and give lower courts the guidance that they need to determine whether specific personal jurisdiction exists on a "stream of commerce" theory under a uniform standard that is consistent with due process.

A. Overly Expansive Approaches To Stream-Of-Commerce Jurisdiction Impose Great Uncertainty On Businesses.

This Court has repeatedly recognized the important role played by the Constitution's limits on the exercise of personal jurisdiction in enabling businesses and other parties to anticipate and manage the forums in which they are subject to litigation. These limitations "give[] 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 Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980); see also *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 n.17 (1985) (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)).

This "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). For example, "[i]f a business entity chooses to enter a state on a minimal level, it knows that under the relationship standard, its potential for suit will be limited to suits concerning the activities that it initiates in the

state." Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness"*, 58 S.M.U. L. Rev. 1313, 1346 (2005).

B. The "Pure" Stream-Of-Commerce Approach To Specific Jurisdiction Creates Substantial Uncertainty For Foreign And Domestic Manufacturers.

The "pure" stream-of-commerce approach adopted by the court below erodes, rather than fosters, the predictability that businesses need. If manufacturers that enter into agreements with distributors in certain States can nonetheless be sued in any location where those distributors happen to sell products, manufacturers' ability to predict where they are subject to specific jurisdiction—and tailor their conduct to limit the forums in which they can be sued—will be drastically reduced. Under this approach, the only way for a manufacturer to avoid potentially being subject to specific jurisdiction in a particular forum is to forbid sales of its product in the forum by contract—and even that might not be sufficient, depending on the analysis a court applied.

This troubling prospect affects countless manufacturers and other businesses in today's global economy. Technological advancements and decreased shipping costs have enabled many more foreign companies to sell their goods in the United States than ever before, and have empowered more American businesses (both large and small) to enter into transactions with distributors who sell their products in other States. Under the jurisdictional test adopted below, every one of these companies is potentially subject to specific personal jurisdiction in every State

in which distributors or other partners happen to sell its products.

The unpredictable jurisdictional regime that results from the "pure" stream-of-commerce approach creates significant problems for businesses that end up harming American consumers who purchase those businesses' products. See *Nicastro*, 564 U.S. at 885 (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible"). The "pure" stream of commerce approach will force businesses to take burdensome steps—through contract or otherwise—if they wish to prevent their products from being sold in particular States. Moreover, because those efforts are unlikely to prevent *all* sales in forums that businesses wish to avoid, businesses will also be required to understand the tort and other laws of every jurisdiction in the United States—including those in which they have attempted not to operate.

As Justice Breyer has recognized, under the "pure" stream-of-commerce approach, potential defendants have to learn "not only the tort law of every State, but also the wide variance in the way courts within different States apply that law." *Nicastro*, 564 U.S. at 892 (Breyer, J., concurring). Faced with these potential costs, U.S. manufacturers may deal with fewer or smaller distributors in order to exert greater control over where their products are sold, and foreign manufacturers may do the same or even avoid selling their products to U.S. distributors altogether. And the higher costs borne by those businesses that do not curtail their operations will likely be passed on to consumers, resulting in higher prices and more restricted consumer choices.

II. The Decision Below Is Wrong.

This Court's review is warranted for the additional reason that the decision below does not comport with the due process principles that underlie the limitations on specific personal jurisdiction.

The court below relied on this Court's decision in *World-Wide Volkswagen* in holding that specific jurisdiction is proper whenever a defendant has "placed goods into the stream of commerce with the expectation that the products will be purchased in the forum state." Pet. App. 19. But that approach finds little support in *World-Wide Volkswagen* itself, and in any event, this Court has long held that specific jurisdiction must be based on the *defendant*'s own contacts with the forum State—not those of third parties. The view that the court below espoused—the "pure" stream-of-commerce approach—would permit assertions of specific jurisdiction over virtually all manufacturers in every State in the country, destroying the predictability that specific jurisdiction is meant to provide. That approach should not be allowed to stand.

A. This Court Has Consistently Held That Specific Jurisdiction Requires Purposeful Activity By The Defendant Directed At The Forum State.

The Court has long held that, in order for a State to exercise personal jurisdiction over a nonresident defendant, the plaintiff must show that the defendant engaged in purposeful activity directed at the State. See, *e.g.*, *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails

itself of the privilege of conducting activities within the forum State.").

The need for purposeful conduct by the *defendant itself* is at the core of specific personal jurisdiction, which is distinct from all-purpose general jurisdiction in that it permits courts to exercise authority over defendants not physically present or otherwise resident in a State. As this Court explained in *International Shoe*, this kind of personal jurisdiction is justified because "*to the extent that a corporation exercises the privilege of conducting activities within a state*, it enjoys the benefits and protection of the laws of that state." 326 U.S. at 319 (emphasis added).

Time and time again, the Court has held that purposeful conduct *by the defendant* that is *directed towards* the forum State is an essential prerequisite for specific jurisdiction.[3] It follows that personal jurisdiction may *not* be exercised solely because it was foreseeable to a defendant that its products could be sold in the forum State. That is why this Court made clear in *World-Wide Volkswagen* that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the *defendant's conduct and connection* with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297 (emphasis added).

Similarly, the plurality opinions in *Asahi* and *Nicastro* explained that defendants that do nothing

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[3] See, *e.g.*, *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781; *Walden*, 134 S. Ct. at 1121-22; *Burger King Corp.*, 471 U.S. at 474; *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980).

more than place goods into the stream of commerce cannot be subjected to specific jurisdiction in a forum where those goods happened to be sold, even if it was foreseeable to the defendants that the goods might be sold in those forums. See *Asahi*, 480 U.S. at 112 ("The 'substantial connection[]' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.") (citations omitted); *Nicastro*, 564 U.S. at 883 ("This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.").

That principle required dismissal of this case for lack of personal jurisdiction. The plaintiff never adduced evidence of *any* specific conduct by petitioner directed at Colorado; the most that he could show was that petitioner had sold some $350,000 worth of products in Colorado through a nationwide distributor. Pet. App. 19-20. As in *Nicastro*, therefore, petitioner did not "engage in any activities in [the forum State] that reveal an intent to invoke or benefit from the protection of its laws." 564 U.S. at 887.

Certainly the Colorado Supreme Court's "pure" stream-of-commerce approach to specific jurisdiction cannot meet the requirements of due process. That approach permits specific jurisdiction whenever the defendant "expect[ed]" that its products could be purchased in the forum State (Pet. App. 19) and a modest amount of sales ultimately occurred; the defendant need not have purposefully targeted the forum State or directed its activities there to any degree. Moreover, the "pure" stream of commerce approach allows for specific jurisdiction when the defendant's distributor or another third party chooses

to sell a product in the forum State and the defendant "placed no limitations on where [the distributor] could distribute products" (*ibid.*)—contravening this Court's repeated admonitions that the contacts supporting specific jurisdiction must be created by the "defendant *himself*." *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 475); see also *Bristol-Myers Squibb Co.*, 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 court below erred in approving a form of specific jurisdiction so radically at odds with this Court's guidance.[4]

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[4] The Colorado court purported to find support for the "pure" stream-of-commerce test in Justice Brennan's concurrence in *Asahi* and Justice Breyer's concurrence in *Nicastro*, which it identified as the controlling opinions in those cases under *Marks* v. *United States*, 430 U.S. 188, 193 (1977). But even assuming that those concurrences are controlling under *Marks*, they offer no support for the lower court's decision. Justice Brennan's concurrence in the judgment in *Asahi* was based on his belief that jurisdiction over Asahi in California would not comport with fair play and substantial justice, not on any aspect of the stream-of-commerce doctrine. See *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment). And Justice Breyer's concurrence in *Nicastro* was based on the fact that the defendant had made only a "single isolated sale" in New Jersey, which would not constitute purposeful availment under any stream-of-commerce test. See *Nicastro*, 564 U.S. at 888-89 (Breyer, J., concurring). Under *Marks*, there was no controlling precedent adopting the approach taken by the lower court.

B. The "Pure" Stream-Of-Commerce Approach Would Amount In Practice To Nationwide Jurisdiction.

The practical consequences of the "pure" stream-of-commerce approach only further confirm its unworkability. Many product sellers today sell their products across state and national borders in partnership with distributors or other supply chain partners. Under the "pure" stream-of-commerce approach, these businesses could be subject to specific jurisdiction in every State—even States where they never intended to do business or make sales. That result resembles the nationwide jurisdiction that this Court squarely rejected in *Daimler AG* v. *Bauman*—and thus would seriously undermine that decision. See 134 S. Ct. 746, 762 n.20 (2014) ("A corporation that operates in many places can scarcely be deemed at home in all of them."). The "stream of commerce" doctrine should not be used as a back door to create the kind of nationwide jurisdiction that this Court has already rejected.

C. The Stream-Of-Commerce-Plus Test Best Comports With This Court's Approach To Specific Jurisdiction.

In place of the "pure" stream-of-commerce approach, this Court should endorse the stream-of-commerce-plus test, which garnered the votes of seven Justices in *Asahi* and *Nicastro*. That test requires a showing of some purposeful conduct by the defendant directed at the forum State beyond simply placing into the stream of commerce products that might foreseeably reach the forum State. Such conduct could include marketing activities in or directed at the State itself, sending employees to the State, or similar activity. See, *e.g.*, *Nicastro*, 564 U.S. at 886

(plurality opinion). Requiring such purposeful conduct as a prerequisite for the exercise of specific jurisdiction would harmonize the analysis in stream-of-commerce cases with the jurisdictional analysis that applies in other contexts. That consistency makes sense: "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures." *Ibid.*

The stream-of-commerce-plus test also enables manufacturers to make effective choices about the forums in which they expose themselves to specific jurisdiction, by assuring them that they will not be haled into court in States in which they have not purposefully established contacts. This added certainty allows businesses to structure their operations efficiently and thus to deliver their products to consumers at lower cost.

Adopting the stream-of-commerce-plus test would *not*, as the court below suggested, "render foreign manufacturers immune from suit in the United States." Pet. App. 21. To the contrary, foreign manufacturers would likely be subject to personal jurisdiction, at a minimum, in the States in which they contracted with U.S. distributors, and they could also be sued in other jurisdictions where they established sufficient minimum contacts.

It is true that the test might sometimes prevent plaintiffs from suing in their preferred forums. But the whole point of constitutional limits on the exercise of specific jurisdiction is to protect defendants from a plaintiff's choice of forum when plaintiffs sue in a State where the defendant lacks constitutionally sufficient minimum contacts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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