COLORADO SUPREME COURT
2 East 14th Avenue, Denver, Colorado 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA1869

ALIGN CORPORATION LIMITED,
Defendant-Appellant,

v.

ALLISTER MARK BOUSTRED,
Plaintiff-Appellee

And

HORIZON HOBBY, INC., D/B/A HORIZON HOBBY,
Defendant-Appellee.

Case No.: 2016SC448

Attorneys for amicus curiae
The Chamber of Commerce of the United States of America
Daniel D. Domenico, Atty. Reg. # 32038
Kittredge LLC
3145D Tejon Street
Denver, Colorado 80211
720-460-1432 | ddomenico@kittredgellc.com

Michael Francisco, Atty. Reg. #39111
MRDLaw
3301 West Clyde Place
Denver, Colorado 80211
303-325-7843 | michael.francisco@MRD.law

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLANT

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,662 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words). [Amicus limited to 4,750 words, for half of the principal brief]

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

____/s____Michael Francisco____

Table of Contents

Table of Authorities

CASES

OTHER AUTHORITIES

Interest of Amicus Curiae

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly represents the interests of three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of vital concern, including the *Goodyear* and *Daimler* cases that provide the legal rules that govern the disposition of the core jurisdictional issue presented by the petition in this case. (*See J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011); *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014)). The Chamber has also participated in cases before this Court as amicus curiae. *See, e.g., Magill v. Ford Motor Company*, 2016 CO 57 (Sept. 12, 2016); *Oasis Legal Finance Grp. v. Coffman,* 2015 CO 63 (Nov. 16, 2015).

This case presents the Court with an important opportunity to bring clarity to an area of law that has vexed lower courts, litigants, and those hoping to advise businesses about litigation risks. The court of appeals decision shows

that the lack of clarity about Colorado courts' assertions of specific personal jurisdiction can upset reasonable expectations and conflict with the U.S. Constitution's Due Process Clause protections. For decades, plaintiffs have sought to rely on the so-called "stream-of-commerce" theory to establish personal jurisdiction over business defendants, both foreign and domestic, in a variety of industries. The U.S. Supreme Court recently issued a substantial opinion clarifying the constitutional limits on the "stream-of-commerce" theory of specific jurisdiction in *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011).

The court below misread *Nicastro* and other U.S. Supreme Court precedent in a way that would increase confusion in Colorado's lower courts about the appropriate test for specific jurisdiction. This confusion deprives companies of essential guidance on the jurisdictional consequences of decisions about how to sell their products, whether across international boundaries or state lines. It has forced them to contest personal jurisdiction under vague standards and to bear the burdens of costly jurisdictional discovery. The U.S. Chamber is uniquely positioned to explain the cross-industry implications of the important question of constitutional law presented by this case.

ARGUMENT

I. Colorado courts should follow the *Nicastro* standard for requiring purposeful availment activities to be directed to the forum state to establish specific jurisdiction over out-of-state defendants.

For nearly a century and a half, the Supreme Court has emphasized that the Due Process Clause constrains the exercise of jurisdiction by a state court over a nonresident defendant. *See Pennoyer v. Neff*, 95 U.S. 714 (1878); *see also Magill*, 2016 CO 57 (2016) (reviewing constitutional due process requirements for general personal jurisdiction).

Since the Supreme Court's seminal decision in *International Shoe Corporation v. Washington*, 326 U.S. 310 (1945), those constraints have been analyzed in terms of the nonresident defendant's "contacts" with the forum. For contacts "related" to the plaintiff's claims (i.e., specific jurisdiction), the Supreme Court's post *International Shoe* jurisprudence has set forth two requirements. *First*, the defendant must undertake "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *Second*, if this purposeful availment requirement is satisfied, any exercise of jurisdiction also must be deemed "reasonable" by reference to various factors such as the burden on the defendant. *See Asahi Metal Indus. Co. v. Superior Court of Cal.,*

Solano Cnty., 480 U.S. 102, 113-16 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

In this Court's recent *Magill* decision Colorado jurisprudence was conformed to the U.S. Supreme Court's most recent precedent addressing personal jurisdiction, namely general personal jurisdiction from *Daimler A.G. v. Bauman*, 134 S. Ct. 746 (2014). There, as here, a lower court had found jurisdiction based on relatively sparse contacts with Colorado. *See* 2016 CO 57, ¶ 20 (noting trial court found jurisdiction based on Ford's marketing activity in the state and having a registered agent). Here, the lower court found jurisdiction based on attending trade shows elsewhere in the United States and marketing efforts. *Boustred v. Align Corp. Ltd.*, 2016 COA 67, ¶ 26-27 (2016). In both cases lower courts too eagerly found jurisdiction based on limited connection to Colorado. Due process requires more for general or specific personal jurisdiction.

A. Under both Justice Kennedy's and Justice Breyer's plurality opinions in *Nicastro*, it is relevant whether a defendant "purposefully avails" itself of a forum.

In holding that Justice Breyer's two-justice plurality opinion in *Nicastro* was "controlling," the lower court fundamentally misread the difference between the Justice Breyer's two-justice opinion and the four-justice opinion by Justice Kennedy. *Boustred*, 2016 COA 67, at ¶ 34. The lower court is

correct that the holding of a "fragmented" Court opinion is determined by the Justices "who concurred in the judgments on the narrowest grounds." 2016 COA 67, ¶ 17 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977). But there is no need for this Court to determine which *Nicastro* opinion controls, because jurisdiction could not be exercised over the defendant under *either* Justice Kennedy or Justice Breyer's opinion—regardless of which opinion is the narrowest.

Factually, *Nicastro* is very similar to this case: a foreign manufacturer of finished products sold goods to an independent distributor in the United States that subsequently resold those goods to the New Jersey company where the plaintiff was employed. In an erroneous interpretation of *Asahi* that is very similar to the lower court's reasoning in this case, the New Jersey Supreme Court held that the exercise of personal jurisdiction was constitutional because the foreign manufacturer "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." *Nicastro v. McIntyre Mach. America, Ltd.*, 987 A.2d 575, 592 (N.J. 2010), rev'd sub nom. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 863 (2011).

All of the justices in the *Nicastro* majority agreed on at least two fundamental points. First and foremost, all of the justices in the majority

agreed that the manufacturer could not be haled into New Jersey court under the lower court's "knew or should have known" theory. *Nicastro*, 564 U.S. at 886 (Kennedy, J. plurality); *Nicastro*, 564 U.S. at 890 (Breyer, J. concurring). Second, all of the justices agreed that it is at least relevant whether a defendant has "purposefully availed" itself of a forum. Justice Kennedy's four-justice plurality explicitly endorsed Justice O'Connor's test from *Asahi*, 564 U.S. at 885, expressly requiring that a defendant must "purposefully avail" itself of a forum, evidenced by extensive acts such as keeping an office in the state; paying taxes or owning property in the state'; directly advertising in the state; or sending employees into the state. *Id.* at 886. Justice Breyer's plurality opinion also suggested that a plaintiff must prove that a defendant "purposefully avail[ed] itself of the privilege of conducting activities" in the forum." 564 U.S. at 889 (no evidence that Mr. Nicastro showed that the British Manufacturer purposefully availed itself of New Jersey).

The core difference between the Kennedy and Breyer opinions is simply that the Breyer opinion declined to "announce a rule of broad applicability" because the case did not present more modern commercial issues such as "when a company targets the world by selling products from its Web site" or "through an intermediary (say, Amazon.com) who then receives and fulfills the orders" or "markets its products through popup advertisements." 564

U.S. at 890. Breyer's justification for declining to announce a "broad" rule is significant, because this case does not present any of those "modern" issues, either. Indeed, as discussed above, the facts of this case are strikingly similar to the facts in *Nicastro*.

Because the Kennedy and Breyer opinions are in concordance in the most important respects, many courts have followed the *Nicastro* plurality without even finding it necessary to even reference Justice Breyer's concurrence. *See ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 392 (4th Cir. 2012) (citing only the *Nicastro* plurality and requiring targeting of the forum). *See also C & K Auto Imports, Inc. v. Daimler AG*, 2013 WL 3186591 (N.J. App. Div. June 21, 2013); *Parker v. Analytic Biosurgical Solutions, No*. 2:12-cv-01744, 2013 U.S. Dist. LEXIS 104753 at *15-16 (S.D. W. Va. July 26, 2013); *S.E.C. v. Compania Internacional Financiera S.A.*, No. 11 CIV 4904 (DLC), 2011 WL 3251813 at *5 (S.D.N.Y. July 29, 2011); *Yentin v. Michaels, Louis & Assocs., Inc.,* No. 11-0088, 2011WL 4104675, at *1 n.1 (E.D. Pa. Sept. 25, 2011).

Assuming arguendo that this Court were to agree that Justice Breyer's opinion is controlling, the lower court's holding is fundamentally incompatible with that two-justice opinion. Justice Breyer's opinion re-affirmed, consistent with Justice Kennedy's opinion, that there must be "regular … flow" or "regular course" of sales into the forum, as well as

"something more … such as special state-related design, advertising, advice, marketing, or anything else" *in the forum*. 564 U.S. at 889. Justice Breyer was explicit that merely "knowing" that a product could end up in a forum could never be sufficient without "anything else." *Id.*

In stark contrast, the lower court here did not find "anything else" other than the limited sales of the defendant's product in Colorado. Specifically, the appeals court relied *exclusively* on three facts:

- "Align provided marketing materials to its distributors, attended trade shows in the United States where Align actively marketed its products, and established channels through which consumers could receive assistance with their Align products.
- "Align injected a substantial number of products into the stream of commerce, knowing that those products would reach Colorado.
- "Align *took steps* to market its products in the United States and Colorado." 2016 COA 67, ¶ 26 (emphasis added).

Nowhere does the appeals court reference any *Colorado-specific* contacts, much less *any* of the types of facts referenced by Justice Breyer: there is no reference in the appeals court's opinion to "special state-related design" *in Colorado*, to any "advertising" *in Colorado*, to any "advice" *in Colorado*, or to any "marketing" *in Colorado*—much less "anything else" *in Colorado*. At most, the appeals court vaguely referenced "steps" that the defendant may have taken to market products in Colorado, but the only marketing the

opinion discusses is limited to marketing brochures *aimed at the United States*, not at Colorado. The lower court remarkably claimed that the defendant's mere "presence at *United States* trade shows and distribution of specifically designed marketing materials in the *United States*" is sufficient to make a *prima facie* case that Colorado may exercise jurisdiction. 2016 COA 63, ¶ 27 (emphasis added). Marketing that is vaguely directed at the United States is a far cry from the specific, concrete, in-forum contacts that Justice Breyer envisioned. *See*, *e.g.*, *Willemsen v. Invacare Corp.*, 282 P.3d 867, 875 (Or. 2012) (reading Justice Breyer's opinion as prohibiting jurisdiction based on a isolated sales into the forum, even if accompanied by efforts to sell the product elsewhere in the United States).

At its core, then, the lower court has adopted the most radical and most expansion version of the "stream of commerce" theory: that a defendant may be subject to specific jurisdiction so long as it has "injected a substantial number of products into the stream of commerce, knowing that those products would reach" the forum. *Boustred*, 2016 COA 67, ¶ 26. None of the justices in the *Nicastro* majority would support that holding. Indeed, the lower court's exceedingly expansive jurisdictional theory is all the more striking given that every decision of the U.S. Supreme Court directly addressing the "stream of commerce" theory has *declined* to uphold the exercise of personal

jurisdiction. In *Asahi*—arguably the first case squarely presenting the issue—all nine justices agreed that the exercise of jurisdiction was improper over a component-parts foreign manufacturer whose product eventually found its way into California. Likewise, in *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011), a unanimous Court held categorically that the mere sale of goods into a forum could not supply a basis for general jurisdiction (that is, jurisdiction based upon contacts unrelated to the claims). And in *Nicastro*, a majority held that New Jersey courts lacked specific jurisdiction over a manufacturer that sold its goods through an independent distributor in Ohio. Given the Supreme Court's reluctance to uphold personal jurisdiction over distant manufacturers, the lower court's extremely expansive stream-of-commerce test for specific jurisdiction is misplaced.

B. Businesses need the clarity and predictability provided by the categorical approach to "purposeful availment" to establish specific jurisdiction.

To the extent this Court feels compelled to determine the "narrowest grounds" of the *Nicastro* "fragmented" opinion, it is clear that all of the *Nicastro* majority justices agree that it is insufficient for a defendant to merely "know" that its product will end up in the forum, and all of the justices agree that it is relevant whether a defendant "purposefully availed" itself of a forum. Based on the experience of the U.S. Chamber and its members, the

"purposeful availment" inquiry provides much-needed clarity and predictability to the business community.

The court of appeals below applied a lax test for specific jurisdiction that undermines foreign commerce in Colorado. A foreign manufacturer selling its goods through a domestic distributor may be subject to very different jurisdictional consequences depending on the state in which its goods enter. For example, the foreign manufacturer might be subject to jurisdiction in the state courts of Colorado or Oregon based on nothing more than the quantum of its products that an independently owned American distributor sends to one of those states. By contrast, the very same manufacturer might not be amenable to jurisdiction in the state courts of Tennessee or California even if the same distributor sent the same quantum of products to one of those states.

Such results undercut one of the core purposes of the Due Process Clause—to allow 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.*, 444 U.S. at 297. Given the chaotic state of the law governing stream-of-commerce cases, companies can enjoy that assurance only by attempting to limit, on a state-by-state basis, the markets in which distributors sell their products. Yet the Supreme Court has never allowed assertions of authority by the states to interfere with the

regulation of foreign commerce, a responsibility that the Constitution vests in the national political branches. *See Japan Line, Ltd. v. Los Angeles Cnty.,* 441 U.S. 434, 448 (1979) ("Foreign commerce is pre-eminently a matter of national concern.").

This instability does not just affect foreign manufacturers like Appellant. It affects domestic companies, too. In countless instances, both before and after *Nicastro*, plaintiffs have advanced—and courts have sometimes accepted—arguments that a court in one state may exercise jurisdiction over a corporation organized in another state based on a corporation's act of placing goods into the stream-of-commerce.

In the domestic context, this confusion badly undermines the purposes of the Due Process limits on judicial jurisdiction. The lack of clarity deprives domestic defendants of the necessary predictability—and can thereby interfere with interstate domestic commerce, just as it interferes with foreign commerce. *See Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893 (1988) (observing that extraordinary assertions of personal jurisdiction by state courts might unconstitutionally interfere with interstate commerce). Moreover, in the domestic context, the lack of clarity undercuts an additional purpose of the clause—namely "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as

coequal sovereigns in a federal system." *Word-Wide Volkswagen Corp.*, 444 U.S. at 292.

Finally, expressly recognizing the central significance of the "purposeful availment" inquiry in *Nicastro* will provide a more perspicuous and thus predictable rule for the lower courts of Colorado to follow. Businesses and courts alike can focus on the nature of activities directed to Colorado in particular, instead of focusing on generic marketing activities, as the lower court did below, without any clear requirement that the jurisdiction-creating conduct have contact with Colorado.

II. The Court of Appeals opinion is dangerous for small businesses that do not have the resources to predict potential liability risks around the country as a result of soft specific jurisdiction requirements.

The problems generated by this confusion in the case law are felt especially by small businesses. Small businesses represent the lifeblood of the American economy. Small businesses "are generally the creators of most net new jobs, as well as the employers of about half of the nation's private sector work force, and the providers of a significant share of innovations, as well as half of the nonfarm, private real gross domestic product." *U.S. Small Bus. Admin., Office of Advocacy, The Small Business Economy: A Report to the President* 1 (2010).

Many of them depend on networks of other companies to sell their products in locales determined by the downstream distributor.

Likewise, small component-part manufacturers might sell their products to downstream manufacturers but then surrender control over where the finished product is distributed. Under the vague, amorphous standards created by lax applications of specific personal jurisdiction in lower courts, these companies have little ability to predict the jurisdictional consequences of their commercial relations with distributors and other companies that bring their products to market. Absent clarification from this Court, such small businesses can ensure jurisdictional predictability only by avoiding certain markets altogether—a result squarely at odds with the "economic interdependence of the States [ ] foreseen and desired by the Framers." *World-Wide Volkswagen Corp.*, 444 U.S. at 293.

Universal jurisdiction over foreign component parts companies would impose unnecessary and excessive costs on those businesses and their consumers by eliminating the stability resulting from predictable jurisdictional rule. The need for stability and certainty in the context of specific personal jurisdiction is especially acute. Due process principles have long drawn a vital distinction between general personal jurisdiction—the broad jurisdiction that a State exercises over its own residents—and specific personal jurisdiction,

which is a much "more limited form of submission" to a State's authority. *See Nicastro*, 564 U.S. at 879.

The concept of specific jurisdiction "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Defendants know that they generally have a "due process right not to be subjected to judgment in [the] courts" of a State other than their home State, unless they have affirmatively established contacts with the State itself that make them subject to specific jurisdiction there. *Nicastro*, 564 U.S. at 879; *see also Walden v. Fiore*, 134 S. Ct. 1114, 1123 (2014). This knowledge enables companies to avoid unwittingly bearing "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292.

The court of appeals' decision would undermine this legal framework by dramatically reducing defendants' ability to control or predict where they are subject to specific jurisdiction. It would allow a State to exercise specific personal jurisdiction over a company based on nothing more than that a company should be vaguely aware that its product could end up in the State—no matter how "distant or inconvenient" it would be for the defendant to litigate in the State. *Id.* Applying specific jurisdiction in such an unpredictable

and indiscriminate manner would be unfair to defendants and irreconcilable with the Due Process Clause. *See Nicastro*, 564 U.S. at 885 (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible"); *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)); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014) (holding that if "a plaintiff could sue [an Internet company] anywhere[, s]uch a result would violate the principles on which *Walden* and *Daimler* [*AG v. Bauman*, 134 S. Ct. 746 (2014)] rest"). In sum, "the advent of advanced technology," such as the Internet, "should [not] vitiate long-held and inviolate principles of … jurisdiction." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000). It is therefore vital that this Court clarify that Colorado may exercise specific personal jurisdiction over a defendant only if the defendant has purposefully established contacts with the State itself. Those contacts are absent in this case.

Furthermore, even in cases where the company eventually prevails, the risk of jurisdictional discovery imposes unacceptable costs on defendants,

especially small businesses. Jurisdictional discovery does not alleviate this problem. Just like merits discovery, jurisdictional discovery can be "expensive." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Unlike merits discovery, jurisdictional discovery is directed entirely at the defendant, so it represents an especially powerful weapon in a plaintiff's arsenal and can "push cost-conscious defendants to settle even anemic cases." *Id.* at 559. Not only do these tactics compound defendants' costs, they also expend "judicial resources." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Only by clarifying this especially unsettled area of the law can this Court begin to limit the "substantial time, effort and money" expended by corporate defendants, both foreign and domestic, to resist the fishing expeditions facilitated by the doctrinal confusion.

CONCLUSION

For the forgoing reasons the Court of Appeals opinion should be reversed.

Dated: November 14, 2016

Kittredge LLC,
_____/s/_____
Daniel D. Domenico

MRDLaw
_____/s/_____
Michael Francisco

Attorneys for the Amicus Curiae *The Chamber of Commerce of the United States of America*

CERTIFICATE OF SERVICE

This is to certify that I have duly served the forgoing upon Plaintiff-Appellee and Defendant-Appellee and Defendant-Appellant via ICCES on November 14, 2016.

Michael O'B Keating
Deirdre E. Ostrowski
Keating Wagner Polidori Free, P.C.
1290 Broadway, Suite 600
Denver, CO 80203
Counsel for Plaintiff

Conor Patrick Boyle
Kenneth H. Lyman
Ryan L Winter
Hall & Evans, LLC
1001 17th Street, Suite 300
Denver, CO 80202
Counsel for Horizon Hobby

Richard A. Waltz
Christopher R. Reeves
The Waltz Law Firm
1660 Lincoln Street, Suite 2510
Denver, Colorado 80264-3103
Counsel for the Defendant

/s/ Michael Francisco