No. 16-559

IN THE
Supreme Court of the United States

KONINKLIJKE PHILIPS N.V. A/K/A ROYAL PHILIPS, PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD., SAMSUNG SDI AMERICA, INC., SAMSUNG SDI BRASIL LTDA., SHENZHEN SAMSUNG SDI CO., LTD., AND TIANJIN SAMSUNG SDI CO., LTD.,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

Respondent does not deny that courts have divided over an important constitutional issue, but instead challenges this Court's jurisdiction and asserts that this case is an imperfect vehicle. Respondent is wrong on both counts. This Court should grant certiorari to finally dispel the chaos surrounding the stream-of-commerce theory of personal jurisdiction.

I. THIS COURT HAS JURISDICTION

Respondent spends ten pages contesting this Court's certiorari jurisdiction under 28 U.S.C. § 1257—but to no avail. The judgment below is a "final judgment" under

§ 1257, and this Court's jurisdiction is secure.

A. Wright & Miller reflects the settled law that governs this case: "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., Fed. Prac. & Proc. Civ. § 4010 n.49 (3d ed. 2006). Indeed, this Court routinely reviews state-court personal-jurisdiction decisions in interlocutory postures indistinguishable from the present case's, devoting (at most) a footnote to invoke the fourth *Cox* category. 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). Discussion of certiorari jurisdiction is often omitted altogether. 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); *Asahi Metal Indus. Co.* v. *Superior Court of Cal.*, 480 U.S. 102, 106-108 (1987) (same); *Rush* v. *Savchuk*, 444 U.S. 320, 324 (1980) (reviewing state court's denial of motion to dismiss for lack of personal jurisdiction); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 288-290 (1980) (reviewing state court's interlocutory denial of challenge to 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). No more is needed here.

B. The judgment below is "plainly final on the federal issue and is not subject to further review in the state

courts." *Cox*, 420 U.S. at 485. As in the above-cited cases, the Washington Supreme Court denied a motion to dismiss based on its application of federal law. Respondent avers that petitioners might seek jurisdictional discovery and renew their personal-jurisdiction challenge again on remand. BIO 11, 20. But this Court regularly reviews personal-jurisdiction questions at the motion-to-dismiss or analogous preliminary stages, even though defendants may renew jurisdictional challenges at later stages. Cf. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 412-413 (1984) (successful personal-jurisdiction appeal after trial, where defendant had lost on motion to dismiss). Unsurprisingly, respondent cannot cite any authority holding that the mere chance of petitioners obtaining jurisdictional discovery triggers a bright-line rule barring this Court's jurisdiction. Such a rule would contravene both precedent and this Court's "pragmatic approach * * * in determining finality." *Cox*, 420 U.S. at 486.

Regardless, respondent neglects to mention that only one of the six petitioners here "may be" eligible for jurisdictional discovery to defeat the State's pure stream-of-commerce theory. Pet. App. 15a. The remaining five never disputed that they placed CRTs into the stream of commerce and never sought jurisdictional discovery. *Ibid.* There is no risk of "piecemeal review," BIO 21; for at least those five petitioners, the jurisdictional ruling below is unquestionably dispositive. Thus, even if the speculative possibility of jurisdictional discovery were relevant to this Court's jurisdiction—and it is not—that would still not prevent the Court from considering the petition as to five of the six petitioners.

C. Respondent (BIO 17-18) wrongly disputes that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" as to petitioners. See *Cox*, 420 U.S. at 482-

483, 486 n.13. Neither respondent nor the court below has proffered any theory *other than* the pure stream-of-commerce approach challenged here. See Pet. 4-5, 7-9. Indeed, the dissent below agreed that the trial court properly *dismissed the case* upon concluding that respondent's stream-of-commerce theory was unconstitutional. Pet. App. 45a, 79a-84a. "[T]he federal issue having been decided, arguably wrongly, and being determinative of the litigation if decided the other way, the finality rule [is] satisfied." *Cox*, 420 U.S. at 486 n.13.

Respondent nonetheless half-heartedly asserts that if this Court reverses, it might seek to amend its complaint or seek jurisdictional discovery to assert facts that support jurisdiction under the stream-of-commerce plus test urged by petitioners. BIO 18. Parties cannot so easily thwart this Court's jurisdiction to resolve squarely presented federal questions by speculating that they might change course after reversal to assert some other theory. In fact, the trial court denied the State's request for jurisdictional discovery as immaterial precisely because the State pleaded exclusively a pure stream-of-commerce theory (and never sought to amend its complaint), and petitioners (with one exception) did not dispute that they placed CRTs into the stream of commerce. See Pet. App. 44a n.16.[1]

D. Under the fourth *Cox* category, this Court will decide the federal issue "if a refusal immediately to review the state-court decision might seriously erode federal policy." 420 U.S. at 483. Thus, this Court reviews interlocutory arbitration rulings because "delay[ing] re-

[1] Contrary to respondent's mistaken citation, the Washington Supreme Court did not hold the State was entitled to jurisdictional discovery. See BIO 18 (citing Pet. App. 13a). The court below had no reason to reach that question because it held that the State's pure stream-of-commerce allegations defeated the motions to dismiss.

view * * * until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate"—avoiding litigation in court—and thus thwart an important federal policy. *Southland Corp.* v. *Keating*, 465 U.S. 1, 7-8 (1984).[2] This Court's consistent certiorari practice reflects that the Fourteenth Amendment's protections for non-residents serve a similar interest—protecting them from litigation in courts that have no constitutional authority over them. 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"). That concern is especially acute here, where the majority's test allows component manufacturers the world over to be haled into foreign courts based on bare pleading that they placed products into the stream of commerce with awareness that they would reach the forum in substantial numbers.

* * * *

"[A]s both the majority and [the] dissent [below] show, the jurisdictional question in this case is a legal question on essentially undisputed facts." Pet. App. 44a n.16. That the question presented arises at the pleading stage is no jurisdictional deficiency. To the contrary, it makes this case an ideal vehicle for deciding whether a pure stream-of-commerce theory is constitutional. Respondent's fig-leaf jurisdictional arguments should not be allowed to prolong the confusion over this important issue.

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[2] Accord *Local No. 438 Const. & Gen. Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 550 (1963) (reviewing temporary-injunction ruling where delay would require petitioner to "face further proceedings in the state courts which the state courts have no power to conduct").

II. THIS CASE IS A GOOD VEHICLE

Respondent does not dispute that the proper jurisdictional test to apply when a nonresident defendant sells products (or components) into the stream of commerce that ultimately reach the forum state has been the subject of a deep and intractable split *for decades*. Nor can it gainsay that this important constitutional question arises in myriad cases. Instead, respondent urges the Court to allow the nationwide confusion to persist while awaiting some more ideal vehicle.

A. The alleged vehicle problems are illusory. Respondent quibbles with the wording of the question presented, yet cannot obscure the key fact: that numerous lower courts and two different four-Justice blocs of this Court have squarely held that stream-of-commerce jurisdiction requires that the foreign manufacturer has specifically targeted the forum through concrete acts such as marketing, advertising, or design. See Pet. 11-17. By contrast, many lower courts and the four signers of Justice Brennan's *Asahi* opinion would uphold jurisdiction *without* such tangible indicia of targeting, requiring only that the defendant expects that the stream of commerce will carry a significant volume of its products into the forum state. See *ibid.*

Respondent consistently urged the Washington Supreme Court to adopt the latter test, always abjuring any attempt to allege that defendants targeted the forum in any concrete way. See Pet. 4-5, 23-24. The court of appeals and the majority below obliged, premising jurisdiction solely on petitioners' alleged knowledge that a substantial volume of their CRTs would end up in the forum. See *id.* at 6-7, 17-18. The majority declined to require any allegation that petitioners took actions to target the forum. See *ibid.* The dissent, by contrast, would have denied jurisdiction because petitioners did not target the forum, refusing to premise jurisdiction on even entirely

foreseeable acts of third parties who sold finished products into the forum. See *id.* at 7-9, 19.

Given this backdrop, respondent's claim that the majority took no position on the stream-of-commerce split rings hollow. To be sure, the majority purportedly based its approach on *World-Wide Volkswagen* and Justice Breyer's concurrence in *J. McIntyre*. But it read *J. McIntyre* as permitting jurisdiction "where a substantial volume of sales took place in a state as part of the regular flow of commerce." Pet. App. 11a. The dissent thus aptly characterized the majority as having misread "*J. McIntyre* [to] silently adopt Justice Brennan's *Asahi* concurrence." *Id.* at 26a. This Court can review the opinion below and decide for itself whether that charge was accurate.

But whether the majority below expressly adopted Justice Brennan's approach is beside the point. What matters is that the court took a position *on the question that divides the lower courts*. The majority held that jurisdiction may be based on a predictable flow of products into the forum state via the stream of commerce, regardless of whether defendants targeted the forum through any concrete acts like those identified by Justice O'Connor. By deciding whether that holding is consistent with the Constitution, this Court can resolve a conflict that has long bedeviled American law.[3]

B. Attempting another vehicle argument, respondent asserts that it is "not at all clear" that jurisdiction would be lacking even under Justice O'Connor's *Asahi* test.

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[3] Respondent notes that the Court denied certiorari in a case presenting the stream-of-commerce split, BIO 29 n.8, but that case involved a finished-product manufacturer who had engaged a U.S. distributor—the same context that had precluded a majority opinion in *J. McIntyre* two years before. See *Ainsworth* v. *Moffett Eng'g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013).

BIO 29.[4] That supposed lack of clarity in no way diminishes the need for this Court's resolution of the legal question, which would allow Washington courts—and courts across the country—to apply the correct law going forward.

Nonetheless, respondent now claims that it alleged that petitioners evinced an "intent or purpose to serve the market in the forum state." BIO 30 (quoting *Asahi*, 480 U.S. at 112 (O'Connor, J.)). But respondent conveniently ignores Justice O'Connor's description of *how* forum-serving intent is revealed: There must be "*an action* of the defendant purposefully directed toward the forum State," such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112 (emphasis added). The four-Justice plurality in *J. McIntyre* agreed that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 882 (2011). Forum targeting is shown by "*conduct* purposefully directed at [the forum,]" such that it "reveal[s] an intent to serve the [forum] market." *Id.* at 886 (emphasis added).

Respondent does not allege—nor did the majority find—that petitioners took any such concrete action to serve Washington when they sold their components to

[4] The proceedings below amply rebut this equivocal assertion. Respondent urged the courts below to reject Justice O'Connor's approach, devoting only a single footnote to suggesting that her "something more" test "does not necessarily preclude jurisdiction here." Wash. S. Ct. Supp. Br. 11 n.4.

others outside the United States. Cf. Pet. App. 25a & n.5. Respondent makes only boilerplate assertions that petitioners "sold CRTs into international streams of commerce with the knowledge, intent and expectation that such CRTs would be incorporated into CRT Products to be sold to consumers throughout the United States, including in Washington State." BIO App. 17a-18a; see Pet. App. 2a.[5] The majority accepted these allegations as sufficient for jurisdiction, inferring purposeful availment solely from petitioners' knowledge of the volume of products that reached the forum through the stream of commerce, rather than requiring forum-targeting acts by petitioners. Pet. App. 7a-8a, 12a.[6]

As the dissent below explained, respondent's approach is nothing more than slapping a "targeting" label on pure stream-of-commerce allegations, which would satisfy Justice Brennan's test alone. Pet. App. 25a-26a. Under Justice O'Connor's test, by contrast, "awareness that some of the [components] would be incorporated into [finished products] sold in [the forum]"—even in large numbers—does "*not* demonstrate[] any *action* by [the defendant] to purposefully avail itself of the [forum]." *Asahi*, 480 U.S. at 112 (emphasis added).[7]

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[5] Contrary to respondent's claim (BIO 21, 27), respondent's allegations are indistinguishable from Asahi's sale of components to a manufacturer "it *knew* was making regular sales of the product in California." 480 U.S. at 121 (emphasis added).

[6] The majority quoted respondent's brief to declare that "the presence of millions of CRTs in Washington * * * was a fundamental attribute of [petitioners'] businesses." Pet. App. 12a-13a. But this is just a restatement of the majority's (and respondent's) view that placing products into the stream of commerce equals targeting the forum. It does not purport to identify any concrete action by petitioners that targeted the forum.

[7] Nor does respondent dispute that courts applying Justice O'Connor's approach have rejected jurisdiction over identical allega-

To be consistent with the Constitution, any test this Court adopts must require some forum-directed conduct by the defendant, not merely an alleged mental state of intent or knowledge that products will ultimately reach the forum state. "[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *J. McIntyre*, 564 U.S. at 883 (plurality). Respondent's approach is unworkable and would dilute protections for nonresidents, improperly allowing them to be haled into court—as here—based on the actions of third parties who target the forum state.

Indeed, respondent's approach would be far more expansive than that of the *J. McIntyre* dissenters, who relied on the defendant's forum-targeting acts, rather than alleged intent or knowledge that the stream of commerce would bring its product to the forum. *Id.* at 905, 908 (Ginsburg, J., dissenting) (distinguishing *Asahi* because "defendant himself" took actions to "target[] a national market"). Premising jurisdiction on amorphous allegations of "intent" to serve the forum—absent any concrete action to target the forum—is particularly meaningless in the case of a component manufacturer, which has "little control over the final destination of its products once they [are] delivered into the stream of commerce." *Id.* at 908.[8]

C. To support its post hoc effort to show forum tar-

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tions that defendants intentionally fixed prices on products that they knew would ultimately be sold into U.S. markets. See Pet. 23-24; Pet. App. 39a-40a (collecting cases).

[8] While respondent's single-conveyor-belt analogy might resemble a finished-product manufacturer who employs a distributor to target the forum, it is inapt here. BIO 33. Component manufacturers place their products on multiple conveyer belts when they sell to finished-product manufacturers. Those finished-product manufacturers then independently operate numerous conveyor belts leading, at their discretion, to myriad forum markets (often by way of middleman distributors who operate their own conveyor belts).

geting, respondent emphasizes its assertion that some of petitioners' component sales were made to corporate affiliates (and alleged co-conspirators), who in turn sold finished products throughout the United States (including Washington). But respondent never argued that the forum contacts of corporate affiliates or co-conspirators should be imputed to petitioners.[9] Nor is this a case where a finished-product manufacturer engaged a distributor to sell its own products in the forum. Cf. BIO 31. Thus, this is merely another prohibited attempt to invoke the forum contacts of a third party to assert jurisdiction over a defendant that never targeted the forum itself. See Pet. 18-19 (discussing *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014)); cf. *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 758-760 (2014).

Respondent fears that Justice O'Connor's approach would allow "multinational corporations" to "structure their businesses" to "avoid personal jurisdiction" "so long as a business only contacts the United States through its subsidiaries or affiliates." BIO 3, 36. But this cry of alarm is already uncontroversial black-letter law: "[T]he mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent * * * . There is a presumption of corporate separateness that must be overcome by clear evidence that the parent in fact controls the activities of the subsidiary." *Negron-Torres* v. *Verizon Commc'ns, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007); see n.9, *supra*. And this

[9] See *Goodyear*, 564 U.S. at 930 (noting that respondent waived any attempt to "urge disregard of petitioners' discrete status as subsidiaries" by failing to raise it below or in brief in opposition); 4 Wright, et al., Fed. Prac. & Proc. Civ. § 1069.4 (4th ed. 2015) ("[P]ersonal jurisdiction over the parent corporation may not be acquired simply on the basis of the local activities of the subsidiary company."); see also *id.* § 1069.4 n.2 (collecting cases demonstrating the rigorous showing required to impute a subsidiary's contacts to its parent).

Court favors clear jurisdictional rules precisely because they allow businesses to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985); see Pet. 20.

Respondent also implies that an approach that requires forum targeting *by the defendant* would leave plaintiffs with no responsible defendant to sue. Not so—the members of the corporate family that sell products into the forum (or otherwise target the forum) will remain subject to jurisdiction. That is true in this very case, as respondent elsewhere acknowledges. BIO 5-6; Pet. 5 nn.2-3 (noting that Philips Electronics North America and multiple Samsung SDI entities are subject to personal jurisdiction below). Indeed, as Justice Ginsburg noted in dissent, "[i]t was important to the Court in *Asahi* that 'those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law.'" *J. McIntyre*, 564 U.S. at 908. Justice O'Connor's approach thus balances the rights of plaintiffs with the due-process protections accorded to non-residents who do not themselves target the forum.

The Court should grant certiorari to finally answer the stream-of-commerce question that has plagued U.S. courts and litigants the world over.

Respectfully submitted.

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