No. 13-214

In the Supreme Court of the United States

NOVO NORDISK A/S,

Petitioner,

v.

SUZANNE LUKAS-WERNER AND
SCOTT WERNER,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of the State of Oregon for the County of Multnomah

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 107 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. A list of PLAC's corporate members is appended to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases that raise issues affecting the development of product liability law and litigation. This is such a case. Because many of PLAC's members are named as defendants in lawsuits involving products that are distributed in interstate and international commerce, PLAC has a vital interest in the proper and fair interpretation of the rules governing *in personam* jurisdiction in this recurring setting.

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[1] Letters of consent from all parties to the filing of this brief have been lodged with the Clerk. Pursuant to S. Ct. Rule 37.2, PLAC states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

STATEMENT

This case concerns an important area of constitutional law that is frequently litigated: the limits the Due Process Clause places on the power of a state, through its long-arm statute, to exercise *in personam* jurisdiction over a nonresident defendant. For decades, that issue has spawned enormous confusion, and deep conflict, in state and lower federal courts – especially in product liability actions based on injuries occurring within the forum state arising from products that traveled there through the "stream of commerce" but were manufactured (and sold to distributors and other intermediaries) *outside* the forum state by a "foreign (sister-state or foreign-country) corporation[]." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011). In *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780 (2011), this Court granted review to address this precise issue, which "arises with great frequency," and to clarify "rules and standards" that "have been unclear because of decades-old questions left open in" this Court's fractured 4-1-4 decision in *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102 (1987). *Nicastro*, 131 S. Ct. at 2785 (plurality).

Unfortunately, this Court's splintered decision in *Nicastro* did not produce a majority opinion. As petitioner shows (Pet. 19-22), and the lower courts and commentators have recognized, there remains substantial confusion and conflict in the lower courts over the meaning of *Nicastro* and the principles that should govern the due process inquiry in this recurring setting. Only this Court can clarify *Nicastro* and bring uniformity, predictability, and

clarity to this significant area of federal law. This case is an ideal vehicle for doing so.

1. *The Initiation Of This Litigation And Petitioner's Motion To Dismiss.* This case involves claims of medical malpractice and products liability arising out of the use by respondent Suzanne Lukas-Werner of Activella®, a hormone replacement drug prescribed by her physician in Oregon but manufactured in Denmark by petitioner Novo Nordisk A/S ("NN A/S"). After she developed breast cancer, Ms. Lukas-Werner (and her husband, respondent Scott Werner) filed suit in the Circuit Court for Multnomah County, Oregon, naming as defendants her physician, petitioner NN A/S, and Novo Nordisk Inc. ("NNI"), an indirect subsidiary of NN A/S that distributes Activella® in the United States.

In response to the complaint, petitioner entered a special appearance and moved to dismiss for lack of personal jurisdiction, arguing that it lacked minimum contacts with Oregon. Among other things, NN A/S pointed out that it is a Danish public limited liability company with headquarters and manufacturing facilities in Denmark (and no manufacturing facilities in the United States); it has no agents or employees in Oregon; it has no business, physical presence, property, or bank accounts in the state; it is not licensed or registered to conduct business in Oregon, and does not solicit business or advertise there; and it has no contracts with (and does not sell its products directly to) any distributor, retailer, or consumer in Oregon. Pet. App. 2, 67-69. Petitioner manufactures and sells Activella® in Denmark to NNI, a wholly owned, indirect subsidiary that is the U.S. distributor

of the drug. *Ibid.* NNI is incorporated in Delaware and has its principal place of business in New Jersey. *Ibid.* Petitioner ships its Activella® tablets to NNI's third-party logistics provider in Indiana. *Id.* at 135; see also Pet. 5.

2. *The* Nicastro *Decision.* While the motion to dismiss was pending, this Court held in *Nicastro* that due process barred the New Jersey courts from exercising personal jurisdiction over a British company that manufactured scrap metal machines in the United Kingdom. That case involved a product liability action arising out of an injury occurring in New Jersey to the operator of one of the machines. The British manufacturer's connection to New Jersey was slight: (1) it sold its machines to an independent distributor incorporated and located in Ohio, which in turn distributed the products in the U.S.; (2) its officials attended annual conventions of the scrap recycling industry in various states but not in New Jersey; and (3) "no more than four machines (the record suggests only one[])" ended up in New Jersey. *Nicastro*, 131 S. Ct. at 2786 (plurality). The decision in *Nicastro* was fractured, comprising a plurality opinion for four Justices, a two-Justice opinion concurring in the result, and a three-Justice dissent.

3. *The Trial Court's Ruling.* The parties submitted supplemental briefing after *Nicastro*, and the Oregon trial court granted the motion to dismiss. Pet. App. 3, 5-6, 15-17.

At the hearing on the motion, the judge observed that "[t]he more times I read the *Nicastro* opinions, the less clear it becomes to me." Pet. App. 15. Still, she explained that "the focus here really has to be on the concurring opinion, the narrowest grounds on

which the decision was reached, and not the . . . plurality opinion." *Ibid.*[2] "[T]he more I read" the concurrence, the trial judge explained, the more it appears to embody an approach that is "even more restrictive" than Justice O'Connor's opinion for four Justices in *Asahi*. *Ibid.* Because of the "absence of a showing that NN A/S *targeted Oregon*, even through NNI," respondents had failed to demonstrate minimum contacts and purposeful availment. *Id.* at 17 (emphasis added).

In a later opinion, the court summarized its findings of fact and conclusions of law underlying this ruling. Under the *Nicastro* concurrence, the court explained, "plaintiffs must establish purposeful availment of Oregon by NN A/S directly or indirectly as to Activella." Pet. App. 6. "The record," however, was "devoid of evidence that NN A/S itself targeted Oregon, or that it intended its subsidiary NNI to target Oregon, as to the labeling, marketing, design or manufacturing of Activella." *Ibid.*

4. *The* Willemsen *Decision*. Shortly after the trial court's ruling, the Oregon Supreme Court decided *Willemsen* v. *Invacare Corporation*, 282 P.3d 867 (2012), 133 S. Ct. 984 (2013), a case involving product liability and negligence claims against a Taiwanese manufacturer of battery chargers. The battery chargers were supplied to an Ohio wheelchair

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[2] The "narrowest grounds" reference was a nod to the so-called "*Marks* doctrine." See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .") (internal quotation marks omitted).

manufacturer, which in turn sold (directly or through a distributor) the wheelchairs and chargers throughout the United States, including in Oregon. Relying on the *Marks* doctrine (see note 2, *supra*), the Oregon Supreme Court interpreted the *Nicastro* concurrence as standing for the proposition that *if there had been* a "regular" flow or course of sales of the product in New Jersey, *that alone* would have been sufficient to uphold the exercise of personal jurisdiction (effectively, the position taken by Justice Brennan for four Justices in *Asahi*). See 282 P.3d at 873-74 & n.8. Because the record in *Willemsen* showed that "over a two-year period . . . 1,102 motorized wheelchairs" with the chargers were sold in Oregon, the court reasoned that it "need look no further than *Nicastro* to conclude that Oregon courts may exercise" personal jurisdiction over the Taiwanese manufacturer. *Id.* at 874-75 & n.9.

5. *The Trial Court's Revised Ruling*. The Oregon trial court then reconsidered its ruling in this case. Pet. App. 12. "Applying *Willemsen*'s analysis," the court reversed itself and denied the motion to dismiss. *Id.* at 2, 8-9, 11. The court explained that, consistent with *Willemsen*,

> [t]he record shows not merely an isolated single sale in Oregon – which the *Willemsen* decision concludes was pivotal to Justice Breyer's controlling opinion in *Nicastro* – but rather a *significant volume of sales* in Oregon of Activella pills manufactured by NN A/S. . . . Given the facts found by this Court and the holding in *Willemsen*, *the flow of the product* into the state *amounts to, perhaps, for some, in a metaphysical sense*, *purposeful availment*. For that reason, purposeful

> availment exists here, because there was *a sufficient volume or flow* of NN A/S' product into Oregon to satisfy the standard for purposeful availment.[3]

Id. at 8-9 (emphasis added).

The Oregon Supreme Court denied review. Pet. App. 18-19.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid judgment against a nonresident defendant. *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978); *Pennoyer* v. *Neff*, 95 U.S. 714, 732-33 (1878). A state court may exercise *in personam* jurisdiction over a nonresident only if the defendant has "certain minimum contacts" with the forum, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). Moreover, "[a]s a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Nicastro*, 131 S.

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[3] Although it speculated that "the flow of Activella sales into Oregon *may* be less attenuated" than in *Willemsen* because the distributor here (NNI) was a wholly owned subsidiary of the foreign manufacturer, the trial court explained that Activella®'s arrival in Oregon "through a complex distribution scheme is *not* a significant factor under *Willemsen*." Pet. App. 9 (emphasis added).

Ct. at 2785 (plurality) (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958)).

In both *Nicastro* and *Goodyear*, this Court rejected potentially far-reaching applications of the stream-of-commerce "metaphor." *Goodyear*, 131 S. Ct. at 2854-55; *Nicastro*, 131 S. Ct. at 2785 (plurality). In *Goodyear*, the Court unanimously rejected a North Carolina court's attempt to assert "general" (or all-purpose) personal jurisdiction over a foreign manufacturer based in part on the fact that some of the company's products flowed into the state. Although "[f]low of a manufacturer's products into the forum . . . may *bolster* an affiliation germane to *specific* jurisdiction," the Court explained, it cannot constitute the type of "'continuous and systematic'" activities within the forum required for general (or all-purpose) jurisdiction. 131 S. Ct. at 2855-56 (first emphasis added). In *Nicastro*, this Court considered the far more common setting of *specific* jurisdiction (where the plaintiff's claim arises out of or relates to the defendant's forum contacts). *Nicastro* rejected the New Jersey Supreme Court's decision to uphold jurisdiction based on "a single isolated sale" of the product in the state, made by an independent U.S. distributor located in another state, where the British manufacturer's only "sales effort" involved attendance at several industry conferences located outside of New Jersey. 131 S. Ct. at 2792 (plurality).

I. Although the result in *Nicastro* was clear, the case did not produce a majority opinion. Justice Breyer's opinion, joined by Justice Alito, concurred in the result only, and it purported to rest narrowly on the facts as found by the state court and on this Court's existing precedents (while at the same time

expressing certain views about the positions taken by the plurality, the dissent, and the New Jersey Supreme Court). As this case starkly illustrates, the lower courts have had great difficulty understanding *Nicastro* and discerning, in its wake, the principles that should guide the jurisdictional inquiry, especially in run-of-the-mill product liability cases (such as this) involving foreign manufacturers and the stream-of-commerce metaphor. See, *e.g.*, *State* v. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 729 (Tenn. 2013) ("Like one of Dr. Rorschach's amorphous ink blots," the *Nicastro* concurrence "is susceptible to multiple interpretations").

This case illustrates the rampant confusion. The Oregon trial court initially interpreted *Nicastro* as going beyond even Justice O'Connor's approach in *Asahi*. But it reversed course when the Oregon Supreme Court in *Willemsen* adopted a radically different – and manifestly incorrect – reading, an approach that mirrors Justice Brennan's more lax approach in *Asahi*. These are but two of at least *three* competing interpretations of the *Nicastro* concurrence that have been endorsed by the lower courts. And part of the problem may be confusion over the meaning of *Marks* (see note 2, *supra*), which to the lower courts "sometimes seems like a Rubik's cube." *United States* v. *Duvall*, No. 10-3091, slip op. 20 (D.C. Cir. Aug. 13, 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc).

This Court should grant review to resolve this widespread and widely recognized confusion. This disagreement is all the more serious because it exists alongside a preexisting division in the lower courts about the meaning of the stream-of-commerce

metaphor that traces back to the dueling opinions in *Asahi*. It is imperative that this Court grant review now to bring greater uniformity to this important area of law.

II. Review is also warranted because the meaning of the stream-of-commerce metaphor arises with great regularity in routine product liability cases in the state and federal courts. *Nicastro* already has been cited almost three hundred times by lower federal and state courts (according to Westlaw's database, which may not reflect every unpublished decision). Even before *Nicastro*, the issue of personal jurisdiction – a threshold issue in many product liability and other kinds of cases – had "become one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531-32 & n.5 (1995) (more than 2,300 cases involving "minimum contacts" test in 1990-95). Now more than ever, clarification is needed to provide "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 or will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). For several reasons, this case is an ideal vehicle for bringing that much-needed clarity to this large and important category of litigation in American courts.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE DEEP CONFLICT AND CONFUSION OVER THE MEANING OF *NICASTRO* AND THE STREAM-OF-COMMERCE "METAPHOR"

A. The Stream-of-Commerce Metaphor And The Fractured Decision In *Asahi*

First articulated in *Woodson*, the stream-of-commerce metaphor posits that a state "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98. At the same time, *Woodson* squarely rejected the notion that a seller's "amenability to suit would travel with [its] chattel." *Id.* at 296. In *Asahi*, this Court sought to clarify the stream-of-commerce concept, but offered several different conceptions of purposeful availment.

Writing for a four-Member plurality, Justice O'Connor took the view that the "placement of a product into the stream of commerce, without more, is *not* an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.) (emphasis added). In her view, "something more" – some "[a]dditional conduct of the defendant" and in particular "an action of the defendant purposefully directed toward the forum State" (such as advertising in the forum) – must be shown. *Id.* at 111-12 (emphasis omitted).

Justice Brennan, writing for another bloc of four Justices, took the contrary view that mere placement

of a product into the stream of commerce is enough to satisfy due process – as long as the manufacturer was aware that the "regular and anticipated flow" of the stream of commerce would carry the product into the forum state. *Asahi*, 480 U.S. at 116-17 (Brennan, J.).

Finally, Justice Stevens wrote an opinion concurring in part and concurring in the judgment (joined by Justices White and Blackmun, who had also joined the Brennan opinion). Justice Stevens argued that it was unnecessary to reach the issue of minimum contacts, because jurisdiction in any event would offend "'fair play and substantial justice.'" *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment).

As petitioner demonstrates (Pet. 17-18), a deep conflict developed after *Asahi* in state and lower federal courts, with some jurisdictions following the O'Connor approach, others the Brennan approach, and at least one jurisdiction purporting to apply both. As the plurality acknowledged in *Nicastro*, the "decades-old questions left open in *Asahi*" had produced jurisdictional "rules and standards" that were "unclear." 131 S. Ct. at 2785-86.

B. The Splintered Decision In *Nicastro*

Against this backdrop, this Court issued its decision in *Nicastro*. Both the four-Justice plurality and the two-Justice concurrence rejected the New Jersey Supreme Court's expansive use of the stream-of-commerce metaphor. That court had concluded that jurisdiction was proper because a British manufacturer (1) "knew or reasonably should have known 'that its products are distributed through a nationwide distribution system that might lead to

those products being sold in any of the fifty states'"; and [2] "failed to 'take some reasonable step'" to prevent the product from being sold in New Jersey. *Id.* at 2786 (quoting lower court's opinion); see also *id.* at 2791, 2793 (Breyer, J., joined by Alito, J., concurring in the judgment). In so ruling, six Members of this Court reaffirmed the longstanding principle that a plaintiff must establish a defendant's purposeful availment of the benefits and protections of a state's law. *Id.* at 2785, 2787-88 (plurality); see also *id.* at 2793 (concurrence).

The plurality emphasized the importance of demonstrating purposeful availment with respect to the particular state in question, criticized Justice Brennan's approach in *Asahi* for "discard[ing] the central concept of sovereign authority in favor of considerations of fairness and foreseeability," and explained that a defendant's "transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum." 131 S. Ct. at 2788 (emphasis added); see also *ibid.* ("[A]s a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."). The plurality also reasoned that personal jurisdiction "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *Id.* at 2789.

The concurring opinion in *Nicastro* contained two sections. In Section I, Justice Breyer explained that he would decide the case narrowly based on the precise facts found by the New Jersey courts and on application of this Court's precedents. As for the facts, they showed that (1) the British manufacturer's American distributor, located and incorporated in Ohio, had sold and shipped one machine to New

Jersey; (2) the manufacturer wanted its U.S. distributor to sell its machines to anyone in the country willing to buy them; and (3) the manufacturer sent representatives to attend trade shows in some states, but not in New Jersey. As for the law, Justice Breyer explained that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the sales effort indicated here, is sufficient" to allow the exercise of personal jurisdiction; rather, the Court's prior cases "suggest the contrary." 131 S. Ct. at 2792. Justice Breyer then discussed, in turn, *Woodson* and each of the three opinions in *Asahi*. *Ibid*.

In Section II, Justice Breyer explained why he "would not go further" than this narrow ruling. 131 S. Ct. at 2792. Because the case did not implicate the "many recent changes in commerce and communication" (such as development of the Internet), it was "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." *Id.* at 2791, 2793. Nevertheless, Justice Breyer disagreed with the New Jersey Supreme Court's "absolute approach" to personal jurisdiction, explaining that it "abandon[s]" the "heretofore accepted inquiry of whether, focusing upon the relationship between the defendant, the *forum*, and the litigation, it is fair in light of the defendant's contacts *with that forum*, to subject the defendant to suit there." *Id.* at 2793 (internal quotation marks omitted; emphasis added). Justice Breyer criticized the state court's approach for its inconsistency with "the constitutional demand for 'minimum contacts' and 'purposefu[l] avail[ment],' each of which rests upon a particular notion of defendant-focused fairness." *Ibid.* And he explained that special care

must be taken where, as in *Nicastro*, the defendant is a non-U.S. entity. *Id.* at 2793-94. Justice Breyer also expressed disagreement with the plurality's "seemingly strict no-jurisdiction rule." *Id*. at 2793.

C. The Serious Confusion Over *Nicastro*

1. As the petition demonstrates (Pet. 19-22), the lower courts have adopted vastly divergent interpretations of *Nicastro*. This case provides a telling illustration. The Oregon trial court candidly observed during a hearing that "[t]he more times I read the *Nicastro* opinions, the less clear it becomes to me." Pet. App. 15. As explained above, she then focused carefully on the *Nicastro* concurrence, applied the *Marks* rule, and – pointing to various statements in Justice Breyer's opinion – concluded that it embodies an approach that is "even more restrictive" than Justice O'Connor's opinion in *Asahi*. See pages 4-5, *supra*. Indeed, so strong was her conviction that this reading of *Nicastro* was correct that the trial judge initially dismissed the case even while acknowledging that she agreed with the *Nicastro* dissenters. Pet. App. 16.

As described above (at pages 5-6), the Oregon Supreme Court adopted a vastly different interpretation. Also relying on the *Marks* doctrine, that court read the *Nicastro* concurrence as standing for the proposition that, *if there had been* a "regular" flow or course of sales of the product in New Jersey, *that alone* would have been sufficient to uphold the exercise of personal jurisdiction (the position taken by Justice Brennan in *Asahi*). 282 P.3d at 873-74 & n.8. Not surprisingly, when it reconsidered its ruling in light of *Willemsen*, the Oregon trial court reversed itself and denied the motion to dismiss. Pet. App. 2,

8-9, 11.

2. Three different readings of *Nicastro* have emerged. The first interpretation focuses on Justice Breyer's statement that he was resting his decision to concur only in the result on the precise facts found by the New Jersey courts and on application of this Court's existing precedents. Under this reading, the *Nicastro* concurrence did not change the law or take any position, explicitly or implicitly, on the various competing approaches to the stream-of-commerce metaphor articulated in *Asahi*. See, *e.g.*, *AFTG-TG LLC* v. *Nuvoton Technology Corp.*, 689 F.3d 1358, 1363, 1365-66 (Fed. Cir. 2012); *Ainsworth* v. *Cargotec USA, Inc.*, 2011 WL 4443626, at *7 (S.D. Miss. 2011) ("At best, [*Nicastro*] is applicable to cases presenting the same factual scenario. . . . This is not such a case."), aff'd, 716 F.3d 174, 179 (5th Cir. 2013) (same); *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 758 (*Nicastro* "merely preserves the doctrinal status quo") (citing multiple federal district court decisions taking this position); *Russell* v. *SNFA*, 987 N.E.2d 778, 793-94 (Ill. 2013).

Not surprisingly, courts in this camp have typically adhered to the pre-*Nicastro* position taken in that jurisdiction concerning the stream-of-commerce metaphor. See, *e.g.*, *AFTG-TG*, 689 F.3d at 1363-65 (adhering to Federal Circuit's pre-*Nicastro* approach, which includes not choosing between the *Asahi* approaches); *Ainsworth* v. *Moffett Eng'g, Ltd.*, 716 F.3d 174, 177-78 (5th Cir. 2013) (adhering to Fifth Circuit's pre-*Nicastro* approach, which resembles Justice Brennan's in *Asahi*, while conceding that this approach is inconsistent with the *Nicastro* plurality); *Lindsey* v. *Cargotec USA, Inc.*,

2011 WL 4587583, at *7 (W.D. Ky. Sept. 30, 2011) (because *Nicastro* was inconclusive, "the Court will continue to adhere to the Sixth Circuit's analysis of purposeful availment").[4] This first, "neutral" reading of *Nicastro* has thus perpetuated much of the pre-*Nicastro* confusion.

The second and third interpretations are decidedly *not* neutral. The second interpretation reads the *Nicastro* concurrence as either endorsing or going beyond Justice O'Connor's approach in *Asahi*, or at least rejecting Justice Brennan's approach. That was the Oregon trial court's original reading in this case. It has also been adopted by a number of federal district courts. See, *e.g.*, *Smith* v. *Teledyne Continental Motors, Inc.*, 840 F. Supp. 2d 927, 929 (D.S.C. 2012) (the "common denominator" of the *Nicastro* plurality and concurrence is Justice O'Connor's "stream-of-commerce-plus rubric") (internal quotation marks omitted); *Northern Ins. Co. of New York* v. *Construction Navale Bordeaux*, 2011 WL 2682950, at *5 (S.D. Fla. July 11, 2011) (same); *Windsor* v. *Spinner Industry Co.*, 825 F. Supp. 2d 632, 638 (D. Md. 2011) ("[*Nicastro*] clearly rejects foreseeability as the standard for personal jurisdiction."); see also *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 758 (citing additional cases). This interpretation has also been adopted by several individual appellate court judges. See, *e.g.*, *AFTG-TG*, 689 F.3d at 1367-68 (Rader, C.J., concurring);

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[4] Courts in at least one state – New Mexico – have concluded that since *both Nicastro* and *Asahi* were inconclusive, New Mexico trial courts will continue to follow *Woodson*. See *Sproul* v. *Rob & Charlies, Inc.*, 304 P.3d 18, 26, 33 (N.M. Ct. App. 2012).

Russell, 987 N.E.2d at 799-800 (Garman, J., dissenting).

These courts and judges have pointed to various language in Section II of the *Nicastro* concurrence, including the statement that a single sale in the forum is insufficient "even if that defendant places his goods in the stream of commerce, *fully aware (and hoping)* that such a sale will take place." *AFTG-TG*, 689 F.3d at 1367 (concurring opinion of Rader, C.J.) (quoting 131 S. Ct. at 2792). "By acknowledging a defendant's intent and awareness," Chief Judge Rader concludes, "Justice Breyer's concurrence departs from evaluating and establishing jurisdiction on mere 'forseeability[]'" and "applies Justice O'Connor's approach." *Ibid.*

The third approach, taken by the Oregon Supreme Court in *Willemsen* and by the Oregon trial court in its revised ruling here, attributes to Justice Breyer's concurrence something akin to Justice Brennan's approach in *Asahi*. The crucial analytical move underlying this view is to convert (1) the *Nicastro* concurrence's statement that, under each of the *Asahi* opinions, a single isolated sale is not enough for personal jurisdiction, into (2) a blanket rule that a "regular course" or "regular . . . flow" of sales (phrases used in the Brennan and Stevens opinions in *Asahi*) is all that is required to satisfy due process. See *Willemsen*, 282 P.3d at 873-74. The flaw in that leap of logic should be obvious: Even if the *Nicastro* concurrence suggested that under all three *Asahi* opinions, a substantial flow of goods into the forum was a *necessary* precondition for invoking the stream-of-commerce metaphor, that would hardly establish that it was *sufficient* on its own to satisfy due process.

See also Pet. 15. Nonetheless, other courts, individual judges, and commentators agree with this third interpretation of *Nicastro*. See, e.g., *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 773 (Wade, C.J., joined by Lee, J., dissenting); Saetrum, *Righting the Ship: Implications of* J. McIntyre v. Nicastro *and How to Navigate The Stream of Commerce in its Wake*, 55 ARIZ. L. REV. 499, 511-12 (2013) ("The implication of Justice Breyer's multiple references to the limited record . . . is that exercising jurisdiction would be constitutional in a similar situation if a stronger factual record was presented . . . ."); *id.* at 512 n.95 (citing additional cases).

3. This confusion likely stems, at least in part, from different understandings of the *Marks* doctrine. Indeed, this Court has acknowledged this confusion. See *Nichols* v. *United States*, 511 U.S. 738, 745-46 (1994) ("We think it is not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."); see also *State* v. *Kikuta*, 253 P.3d 639, 658 n.14 (Haw. 2011) (*Marks* doctrine "has been discredited"); *United States* v. *Duvall*, No. 10-3091, slip op. 1-2 (D.C. Cir. Aug. 13, 2013) (Rogers, J., concurring in the denial of rehearing en banc) (describing circuit conflict over *Marks*); *id.* at 3-4, 10, 17-20 (Kavanagh, J., concurring in the denial of rehearing en banc) (same); *id.* at 20 (*Marks* doctrine "sometimes seems like a Rubik's cube"). The Oregon courts' reading, under *Marks*, of the *Nicastro* concurrence as adopting the Brennan approach in *Asahi* is difficult, at best, to reconcile with Justice Breyer's expressed intention to avoid "announc[ing] a rule of broad applicability." *Nicastro*, 131 S. Ct. at

2791. See also Pet. 15-16 (discussing *Willemsen*'s misunderstanding of *Marks* doctrine).

4. In the short time since it was decided, *Nicastro* has generated a vast body of commentary (reflecting the practical importance of this area of law). See, *e.g.*, Steinman, *The Meaning of* McIntyre, 18 SW. J. INT'L L. 417 (2012); Hodge, *Minimum Contacts in the Global Economy: A Critical Guide to* J. McIntyre Machinery v. Nicastro, 64 ALA. L. REV. 417 (2012). Several of these commentators have recognized the divergent interpretations, discussed above, given to the *Nicastro* concurrence by the state and lower federal courts. See, *e.g.*, Steinman, *supra*, 18 SW. J. INT'L L. at 433-35 & nn. 91-96; Hodge, *supra*, 64 ALA. L. REV. at 431-35 & nn.126-156. Many commentators and courts have also bemoaned the resulting confusion and uncertainty. See, *e.g.*, Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 224, 228 (2011); Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 760 (2012); Steinman, *supra*, 18 SW. J. INT'L L. at 419; Hodge, *supra*, 64 ALA. L. REV. at 419; *Sproul*, 304 P.3d at 25-26.

II. THE STREAM-OF-COMMERCE ISSUE PRESENTED IS IMPORTANT AND RECURRING, AND THIS IS AN IDEAL VEHICLE FOR ADDRESSING IT

Clear rules are a virtue in most areas of the law. They are especially important with respect to personal jurisdiction – a threshold question in many lawsuits that has "become one of the most litigated issues in state and federal courts." Weintraub, *supra,* 28 U.C. DAVIS L. REV. at 531-32 & n.5 (more than

2,300 cases involving "minimum contacts" test in 1990-95). In the past two years, the splintered nature of the *Nicastro* decision has only encouraged litigation of this issue in the large number of product liability cases on state- and federal-court dockets. In just over two years since *Nicastro* was decided, the decision has been cited almost three hundred times by the lower courts (according to the Westlaw database, which may not reflect every unpublished decision). The experience of PLAC's members strongly confirms that there are a very large number of state and federal cases filed every year in which the stream-of-commerce metaphor is invoked.

The issue is vitally important. Clarity is critically important because it provides "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 or will not render them liable to suit." *Woodson*, 444 U.S. at 297. The current state of uncertainty negatively affects not just large multinational corporations, but also small companies – both foreign and domestic – which, in today's global economy, are increasingly likely, even in the absence of efforts to serve the relevant market, to see their products wind up in places far removed from their corporate homes and places of operation.

This case is an ideal vehicle for addressing the pervasive confusion over *Nicastro* and for taking a modest step toward resolving a longstanding issue relating to the stream-of-commerce metaphor. In the decision below and in *Willemsen*, the Oregon courts have adopted a far-reaching and expansive variation of the stream-of-commerce theory. Specifically, they

have ruled that a foreign manufacturer may be subject to personal jurisdiction in Oregon *based on nothing more than* the fact that there has been a "regular" flow of its products into the state. See *Willemsen*, 282 P.3d at 873-75 & n.8 (because record showed that "over a two-year period . . . 1,102 motorized wheelchairs" with the battery chargers were sold in Oregon, "we need look no further than *Nicastro* to conclude that Oregon courts may exercise" personal jurisdiction over the Taiwanese manufacturer). Similarly, the trial court in its revised ruling relied solely on the "significant volume of sales in Oregon of Activella." Pet. App. 9. As the trial court correctly acknowledged, the rule in Oregon now is that "*the flow of the product into the state amounts to*, perhaps, for some, in a metaphysical sense, *purposeful availment*." *Ibid.* (emphasis added). Indeed, the Oregon trial court expressly declined to rely on the fact that NNI, petitioner's U.S. distributor, was a wholly owned subsidiary. *Ibid.* Moreover, this far-reaching jurisdictional rule was attributed by the Oregon Supreme Court to Justice Breyer's concurrence in *Nicastro*. This case accordingly presents a clean legal issue and an excellent vehicle for clarifying the basic outer limits on the stream-of-commerce metaphor.[5]

Finally, this case is a good vehicle because it involves a non-U.S. manufacturer. As this Court explained in *Asahi*, "[g]reat care and reserve should be exercised when extending our notions of personal

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[5] A grant of review would also complement the clarification concerning the attribution rules for forum contacts that this Court will address in *DaimlerChrysler AG* v. *Bauman*, No. 11-965.

jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (internal quotation marks omitted). The international community has long lamented what it has regarded as lax U.S. rules regarding personal jurisdiction. See Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001). If those rules are diluted further by adoption of the Oregon courts' sweeping approach to personal jurisdiction, it is quite possible that other countries will retaliate by making it much easier for U.S. companies to be haled into foreign courts to answer for claims on the same attenuated basis. See Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 29 (1987) ("Because exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, these claims can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields."). Indeed, many nations have enacted reciprocity measures specifically authorizing their courts to exercise jurisdiction over a foreign defendant if that defendant's home country would assert jurisdiction in the same situation. *Id.* at 15. It would be harmful to U.S. product manufacturers (both large and small) if Oregon's far-reaching rule were applied by other countries.

* * *

The Court should take this opportunity to address the stream-of-commerce issue presented. Further percolation will achieve nothing but more confusion and uncertainty. Only this Court can clarify the meaning of *Nicastro* and ensure that the Due Process Clause has a uniform meaning in the Nation's courts.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
AngioDynamics
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
CNH America LLC
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems

Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO

Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
PACCAR Inc.
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation

Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.