No. 13-214

IN THE
Supreme Court of the United States

NOVO NORDISK A/S,

Petitioner,

v.

SUZANNE LUKAS-WERNER ET VIR.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Statutes

INTRODUCTION

Undeniably profound confusion exists among lower courts regarding the meaning of the "stream of commerce metaphor" and its application to contact-based specific personal jurisdiction. This case presents an ideal vehicle to finally resolve the confusion. Respondents' effort to avoid review by this Court speaks volumes. Given their strategy of avoidance at all costs, it is clear that Respondents do not want this case considered on the merits. Tellingly, Respondents cannot explain away lower courts' unequivocal statements that the divided opinion in *Nicastro* "provided no clear guidance regarding the scope and application of the theory, leaving little uniformity among the many different federal and state courts decisions." *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18, 25 (N.M. App. 2012). Nor have Respondents addressed the critical chasm between this overwhelming state of confusion and the Court's consistent holding that the Due Process Clause requires fair notice to defendants of the conduct that will subject them to personal jurisdiction.

The requirement that a foreign defendant have sufficient minimum contacts with the forum state serves the dual purpose of protecting the defendant from the burden of litigation and ensuring that the states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in our federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Respondents also fail to address the substance of NN A/S's argument that the regulatory regime applicable to the U.S. sponsor of a prescription medication, which is far more exacting than that generally applicable to product manufacturers and

distributors in general, renders it not only unnecessary, but constitutionally unreasonable to subject to personal jurisdiction a foreign drug manufacturer that has been found not to have purposefully targeted the forum state.

As is often true with questions of personal jurisdiction, the trial court denied petitioner's motion to dismiss for lack of personal jurisdiction and the Oregon Supreme Court refused to afford relief to review that erroneous ruling. Respondent argues that this procedural posture deprives this Court of jurisdiction. It does not. This Court has accepted personal jurisdiction cases in this and similar procedural postures, because the very nature of the questions presented require intervention before trial and final adjudication. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). It is axiomatic that a litigant should not be required to defend itself in a court where personal jurisdiction is lacking. Thus, "there should be no trial at all." *Id.* Respondents argue that there is no final judgment. To the contrary, the Oregon Supreme Court's denial of the writ of mandamus constitutes a final judgment as to that writ. *See World-Wide Volkswagen*, 444 U.S. at 289-90.

Respondents urge the Court to defer review of petitioner's jurisdictional challenge for years, until after the conclusion of litigation and a futile appeal in the Oregon courts. Such an approach asks this Court to embrace a direct denial of Due Process. Respondents would not hesitate to subject Petitioner to costly and intrusive litigation in violation of the Due Process Clause. This Court should make clear that is no answer at all, and accordingly, the petition should be granted.

REPLY TO RESPONDENTS' "FACTUAL BACKGROUND"

Respondents misstate the undisputed facts in an effort to avoid the inevitable conclusion that the Oregon courts' ruling is a "radical" departure from this Court's precedents. *See* Brief of *Amici Curiae* the Chamber of Commerce of the United States of America ("U.S. Chamber of Commerce") and the Pharmaceutical Research and Manufacturers of America ("PhRMA") at 13; Brief of *Amicus Curiae* the Product Liability Advisory Council, Inc. ("PLAC") at 9. After correctly noting that it was NN A/S's indirect U.S. subsidiary Novo Nordisk Inc. ("NNI"), not NN A/S, that employed an "Oregon-based sales force" and marketed Activella® in the United States, Respondents make the unsupported statement that "NNAS sold roughly 1,000 Activella prescriptions . . . in Oregon." Opp. Br. at 3. It is clear, as found by the trial court, that NN A/S did not purposefully avail itself of the forum State of Oregon. The undisputed facts establish that it was NNI, not NN A/S, which made any sales of Activella® in the U.S. or in Oregon. Respondents' baseless attempts to attribute NNI's conduct to NN A/S are not only wholly unfounded, but likewise fail to alter the clear legal issue presented.

ARGUMENT

I. THE COURT CAN AND SHOULD CONSIDER THE MERITS OF THE PETITION.

A. THIS COURT GRANTS PETITIONS FOR WRIT OF CERTIORARI PRESENTING PERSONAL JURISDICTION QUESTIONS IN A SIMILAR PROCEDURAL POSTURE.

Contrary to Respondents' assertion, the Oregon Supreme Court's denial of the petition for mandamus postures this matter for this Court's review under 28 U.S.C. § 1257(a), and there is no "jurisdictional flaw" in the petition. The Court's recent decisions in *J. McIntyre Machinery Ltd. v. Nicastro,* 131 S. Ct. 2780 (2011), and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), arose in a similar interlocutory posture (prior to trial in state courts) on similar personal jurisdiction issues. Moreover, this Court granted a GVR in *China Terminal & Elec. Corp. v. Willemsen*, 132 S. Ct. 75 (2011) in exactly the same procedural posture.

It is imperative that the question be decided at the earliest possible opportunity, because requiring one to defend a case in a forum in violation of the Due Process Clause is a significant injury that cannot be adequately remedied by eventual appeal years later, after final judgment. Because the Oregon courts have erred in their determination of the issue of personal jurisdiction, "there should be no trial at all." *See Cox*, 420 U.S. at 485.

This Court has previously addressed Due Process challenges to personal jurisdiction on writs of

certiorari from mandamus proceedings in the state courts. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), defendant filed a motion to dismiss on personal jurisdiction grounds, which was denied by the trial court. *Id.* at 608. The state court of appeals also denied mandamus relief, following which this Court granted certiorari. *Id.* The Court also granted certiorari in the very same procedural posture as this case, following a trial court's ruling and the state supreme court's denial of a writ of mandamus, in *World-Wide Volkswagen*, 444 U.S. at 289-290. In *World-Wide Volkswagen*, the Court reviewed the state supreme court's denial of the writ of mandamus. *Id.* Mandamus is an independent legal proceeding whose termination constitutes a "final decision" of the state courts within the meaning of 28 U.S.C. § 1257(a). *See Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916).

In fact, this Court has previously issued a GVR order in precisely the same procedural posture as presented in this case, involving the same Oregon courts, on a personal jurisdiction issue, in *China Terminal & Elec. Corp. v. Willemsen*, 132 S. Ct. 75 (2011). Petitioner urges the Court to grant the petition and consider this case with one or more pending petitions that present similar "stream of commerce" jurisdictional issues, *SNFA v. Russell* (No. 13-104) and *Moffett Engineering, Ltd. v. Ainsworth* (No. 13-329).

It is noteworthy that this Court has taken an "intensely 'practical' approach" to finality for purposes of review. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Without question, it serves the pragmatic policy of 28 U.S.C. § 1257(a) to determine at

this juncture the dispositive federal question. That is, whether the Due Process Clause protects a foreign corporation, which did not purposefully avail itself of the benefits of Oregon law, from the "long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Cox*, 420 U.S. at 484.

Respondents' self-serving argument is that there will be supposedly adequate means to correct the errors committed below in this case, at a much later date, only after NN A/S has incurred enormous expense in defending and trying this matter. As demonstrated by the petition, any such opportunity is patently inadequate because it will come too late: it is the very *maintenance* of the litigation that impairs NN A/S's constitutional Due Process rights. This Court has consistently considered personal jurisdiction issues on interlocutory review because an improper assertion of personal jurisdiction is an abuse of the court's power over a nonresident, which cannot be remedied after the fact. *See Nicastro*, 131 S. Ct. at 2791 (Due Process protects a defendant's right to be subject only to lawful authority).

B. FURTHER APPEAL IN OREGON WOULD BE FUTILE.

There is nothing more to be accomplished in the Oregon state courts. The Oregon trial court initially determined that it lacked jurisdiction over NN A/S applying *Nicastro*, but reversed itself following the Oregon Supreme Court's decision in *Willemsen*. Its hands were tied. The Oregon Supreme Court denied NN A/S's petition for mandamus. Any

further review by the Oregon appellate courts is governed by *Willemsen*, which held that the placement of anything more than a single product into the "stream of commerce" that brought a product to Oregon was sufficient to subject a foreign defendant to personal jurisdiction in Oregon. Because *Willemsen* is binding precedent in Oregon regarding the application of the "stream of commerce" theory to personal jurisdiction (*State ex rel. Circus Circus Reno, Inc. v. Pope*, 854 P.2d 461, 464 (Or. 1993)), appeal of this matter following final judgment will result in nothing more than the application of *Willemsen* to sustain the present finding of personal jurisdiction.

The effect of the Oregon Supreme Court's denial of the writ of mandamus is twofold: (1) it leaves NN A/S, which is not properly subject to specific personal jurisdiction in the Oregon courts, to spend years defending litigation in a forum where it should not be a party, and (2) upon the final adjudication of that litigation, the Oregon courts will certainly apply the *Willemsen* decision to declare NN A/S subject to personal jurisdiction. Following final adjudication, NN A/S will still be required to seek this Court's review of the denial of its Due Process rights.

Respondents do not dispute the futility of further proceedings on this issue in Oregon's state courts. Respondents' cited cases, in fact, establish the urgent need for this Court's review of the Due Process arguments in this case. The Oregon Supreme Court has notoriously declined even to rule on the constitutional limits of personal jurisdiction following trial on the merits. In the *Guarisco* case cited by Respondents, the Oregon Supreme Court's refusal to issue a writ of mandamus on a personal

jurisdiction question required defendant to engage in seven years of litigation. *North Pacific Steamship Co. v. Guarisco*, 647 P.2d 920, 922 n.2 (Or. 1982). Even when the matter was finally appealed after final judgment, the Oregon Supreme Court would not rule on defendant's federal Due Process challenge. *Id.* at 924, n. 4. In light of *Guarisco*, no credit is due Respondents' erroneous contention that an appeal following final judgment would result in a meaningful review of the federal questions presented here. It would not.

C. NN A/S PRESERVED THE CONSTITUTIONAL DUE PROCESS QUESTION BELOW, AND IS PERMITTED TO EXPLORE ADDITIONAL ARGUMENTS IN SUPPORT OF THAT CONSTUTIONAL CLAIM IN THIS COURT.

Respondents mistakenly assert that NN A/S presents its arguments regarding the FDA regulatory scheme for the first time to this Court. In fact, NN A/S consistently argued below that the Oregon trial court's assertion of personal jurisdiction in this matter violated its Due Process rights. *See* App. 5, 9-10, 49-53, 56-64, 130. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

As in *Yee*, NN A/S's second question presented in the petition does not raise a separate *claim*, merely a second argument in favor of its single claim that the Oregon trial court's exercise of personal jurisdic-

tion over Petitioner in this matter violated its Due Process rights. *Id.* at 534-35; *see also Citizens United v. Federal Election Com'n*, 558 U.S. 310, 331 (2010). Having raised the Due Process claim in the state courts, NN A/S is permitted to "formulate[] any argument [it] like[s] in support of that claim here." *Yee*, 503 U.S. at 535.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S RULINGS ON PERSONAL JURISDICTION.

A. THE OREGON COURTS HAVE ESTABLISHED A RADICAL AND EXPANSIVE "TEST" FOR PERSONAL JURISDICTION.

As Respondents concede, it was NNI, not NN A/S, that hired "an Oregon-based Activella sales force." Opp. Br. at 2. It was NNI that promoted Activella in the U.S. Opp. Br. at 2. It was NNI that signed a consulting agreement with Ms. Lukas-Werner's Oregon physician. Opp. Br. at 3. The basis for the Oregon courts' exercise of personal jurisdiction over NN A/S is predicated upon the conduct of a legally-distinct, indirect subsidiary that is not an "alter ego" or mere instrumentality of NN A/S. In fact, Respondents made clear below they were not seeking to pierce the corporate veil with an alter ego theory or claim. App. 74. The contacts of affiliated entities are never imputed to the foreign defendant, barring exceptional circumstances where there is a basis for "piercing the corporate veil," which are not present here. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011). Indeed, even where a subsidiary is formed for the express

purpose of selling a parent's products in a forum, it is improper, under the relevant Due Process standard, to impute the contacts of the subsidiary to the parent. *See Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000).

NN A/S manufactured Activella® in Denmark and provided the medication to its indirect subsidiary based in New Jersey. Respondents do not dispute the trial court's finding that there is no evidence that NN A/S itself engaged in any activities that targeted Oregon, or, indeed, any specific U.S. state or forum. App. 5-6, 16-17. The inevitable conclusion, under this Court's precedents, is that there is no evidence that NN A/S purposefully availed itself of the Oregon forum. The ruling below uses the "stream of commerce metaphor" to obscure the controlling legal standard, which requires proof of purposeful availment by the foreign defendant. *Amicus curiae* PLAC correctly observes that, by virtue of the underlying rulings, the Oregon courts:

> 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. . . . this far-reaching jurisdictional rule was attributed by the Oregon Supreme Court to Justice Breyer's concurrence in *Nicastro*.

Amicus Br. at 21-22 (emphasis original). This is a misreading of the *Nicastro* opinions and of this Court's consistent precedent on personal jurisdiction.

B. IN LIGHT OF THE U.S. INDIRECT SUBSIDIARY'S UNDISPUTED SOLVENCY AND RESPONSIBILITY FOR THE PRODUCT, THERE IS NO REASONABLE BASIS FOR THE EXERCISE OF JURISDICTION OVER THE FOREIGN MANUFACTURER.

Respondents further fail to even address the merits of NN A/S's argument that the fairness standard for the exercise of personal jurisdiction mandates dismissal when a solvent defendant fully answerable as to all claims is a named defendant in the action, as is the case with NN A/S's indirect U.S. subsidiary, NNI. As noted by *amici curiae* Washington Legal Foundation ("WLF") and International Association of Defense Counsel ("IADC"), conspicuously absent from the courts' analysis below has been an examination of the plaintiffs' motivation for naming both NNI and NN A/S in this action, which is sure to "increase[] both the funds and executive man-hours that the defendants will be forced to devote to the lawsuit," thereby attempting to pressure settlement without regard to the merits of the underlying action. Amicus Br. of WLF and IADC at 8. Preventing such misuse of a court's jurisdiction is fundamental to Due Process protections.

"Review is warranted to determine whether such gamesmanship is consistent with 'traditional notions of fair play and substantial justice.'" *Id.* at 8-9. *Amici curiae* correctly observe that "the apparent reason why plaintiff lawyers bringing product liabil-

ity claims routinely sue not only the American company that markets a product but also its foreign parent corporation is precisely because *they seek to impose heavy litigation-related burdens on the defendants*." *Id.* at 16 (emphasis original). The lower courts found that NN A/S should reasonably bear this burden by virtue of its size and wealth. App. 10; Pet. at 39. Such a conclusion is the antithesis of Due Process. Size and wealth have nothing to do with purposeful availment. Having done so constitutes an abuse of the courts' limited power to exercise jurisdiction over foreign defendants, and warrants redress in this Court.

CONCLUSION

The specific personal jurisdiction issues raised by Petitioner are critical to Due Process and call out to be heard by this Court. For the foregoing reasons and those stated in the petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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