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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored 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 other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the nation's business community, including cases involving the constitutional limits on the exercise of personal jurisdiction. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Ops. S.A. v. Brown*, 131 S. Ct. 2846 (2011).

PhRMA is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA has frequently filed *amicus curiae* briefs in cases raising matters of significance to its members. *See, e.g., Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

This case raises matters of vital concern to the nation's business community. 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, including the research-based pharmaceutical industry. Yet five justices of this Court have never agreed on a single opinion setting forth its precise contours in a specific jurisdiction case. Consequently, for more than a quarter-century, confusion has reigned following the issuance of this Court's splintered decisions in *Asahi* and, more recently, *Nicastro*. This confusion has deprived 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. *Amici* are uniquely positioned to explain the cross-industry implications of the important question of constitutional law presented by this case.

SUMMARY OF THE ARGUMENT

The petition should be granted or, at a minimum, held for this Court's decisions in *DaimlerChrysler AG v. Bauman* (No. 11-965) and *Walden v. Fiore* (No. 12-574).

The petition should be granted for two reasons (in addition to those offered by petitioner). *First*, the proper test governing stream-of-commerce cases is an important issue that continues to divide the lower courts. Since this Court's splintered decision in *Asahi*, lower courts have remained hopelessly conflicted over the law governing stream-of-commerce cases. This Court recognized as much when it granted review in *Nicastro*, but the splintered decision in that case has done little to quell the confusion. What was once a three-way disagreement in the wake of *Asahi* has now

morphed into a five-way disagreement in the wake of *Nicastro* caused by confusion over the meaning of Justice Breyer's separate opinion and its relationship with the plurality opinion. That worsening confusion threatens to exert a significant drag on domestic companies, which, just like foreign companies, are regularly subject to forum shopping by plaintiffs seeking to exploit the chaos in the stream-of-commerce jurisprudence. The risk is especially grave when courts, like the court below (following the Oregon Supreme Court), employ tests that tie the availability of personal jurisdiction to the sale of an unspecified volume of products in the forum. Such volume-based tests conflict with the approaches taken by several other federal and state appellate courts. They also are at odds with the underlying purposes of the Due Process Clause identified by this Court—including fair notice to defendants, minimizing conflicts among the sovereign states and promoting an interconnected commercial market.

Second, this case supplies a good opportunity for resolving the disagreements over this important issue. Despite the frequency of litigation involving stream-of-commerce cases, trial courts employing lax tests are the least likely to render appealable final orders. Moreover, as its history demonstrates, this case presents an instance where the outcome turns critically on the proper jurisdictional test: The trial court initially granted petitioner's motion to dismiss but, after an intervening decision of the Oregon Supreme Court, *sua sponte* reversed course and concluded that it had jurisdiction under its state supreme court's new volume-based test.

Finally, even if these reasons do not persuade this Court to grant the petition outright, it should at least

hold the petition pending its decisions in *Bauman* and *Walden*. *Bauman* concerns the extent to which a relationship between a foreign parent company and its domestic subsidiary can justify personal jurisdiction over the foreign parent company. Some of the reasoning contained in the trial court's opinion appears to give jurisdictional significance to a similar relationship between petitioner and its domestic distributor. *Walden* concerns the proper construction of the "effects" test for personal jurisdiction. That test shares certain common features with the so-called stream-of-commerce theory at issue here. Despite these common features with *Bauman* and *Walden*, this case differs in other respects and may not necessarily be affected by the disposition in the cases already on this Court's docket. Consequently, an outright grant is the more prudent course.

REASONS FOR GRANTING THE PETITION

I. THE CONSTITUTIONAL LIMIT OF JURISDICTION BASED UPON THE INJECTION OF GOODS INTO THE STREAM OF COMMERCE REPRESENTS AN IMPORTANT ISSUE TO THE NATION'S BUSINESS COMMUNITY.

For nearly a century and a half, the Due Process Clause has constrained the exercise of judicial jurisdiction by a state court over a nonresident defendant. *See Pennoyer v. Neff*, 95 U.S. 714 (1878). Since this Court's 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. At least with respect to contacts "related" to the plaintiff's claims (*i.e.*, specific jurisdiction), this Court's post-

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).

Against this familiar framework, the "stream-of-commerce" concept occupies a strange place in the annals of American constitutional jurisprudence. The term might serve as a useful "metaphor," *Nicastro*, 131 S. Ct. at 2785 (plurality opinion), to describe a particular course of conduct—to wit, a defendant manufactures a good (whether a component part or finished product) in one forum that by some means (whether sale of the component part to a downstream manufacturer or sale of the finished good to a distributor) ends up in another forum. But nothing in the metaphor requires—much less suggests—an abandonment or dilution of the two requirements described above.

Consistent with rigorous standards governing specific jurisdiction cases, every decision of this Court directly addressing the "stream-of-commerce" metaphor has declined to uphold the exercise of personal jurisdiction. In *Asahi*, arguably the first case squarely presenting the issue,[2] all nine justices agreed that the

[2] Some lower courts have read this Court's decisions in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) and *Woodson*, 444 U.S. 286, to address the issue. *Rudzewicz* did not involve jurisdiction

exercise of jurisdiction was improper over a foreign component-part manufacturer whose product was incorporated into a motorcycle tire that eventually found its way into California. In *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (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). Most recently, in *Nicastro*, a splintered majority of this Court held that New Jersey courts lacked specific jurisdiction over a foreign manufacturer that sold its goods through an independent distributor in Ohio.

A. Continued confusion over the stream-of-commerce metaphor has generated a five-way disagreement over the constitutional standard.

Despite its treatment in this Court, lower courts have not simply employed "stream of commerce" as a metaphor. Instead, they have developed a confusing—and conflicting—array of tests to support the exercise of personal jurisdiction over non-resident defendants without attempting to reconcile those tests with the twin requirements for specific jurisdiction.

The confusion traces to this Court's decision in *Asahi*. That case presented one paradigmatic situation captured by the stream-of-commerce metaphor—a component-part manufacturer sells its product to

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over a manufacturer based on a product but, instead, jurisdiction over nonresident franchisees based upon their relationship with a Florida-based franchisor. *Woodson* did involve an effort to exercise jurisdiction over a nonresident distributor and dealer of automobiles, but the Court held that personal jurisdiction did not lie over those nonresident defendants who did not sell products in the forum state.

another company that incorporates it into its own product which ends up in yet another finished product. Different members of the Court, while agreeing unanimously that jurisdiction did not lie, offered competing views on the proper rule. Four justices, in a plurality opinion authored by Justice O'Connor, required, in addition to placing a good into the marketplace, some "additional conduct" such as designing the product for the forum, advertising in the forum, or employing a distribution network in the forum. 480 U.S. at 112. This approach fit most comfortably within the above-described requirement of "purposeful availment." Four other justices, in a separate opinion by Justice Brennan, declined to require "additional conduct" and, instead, required that the defendant either "know" that its product entered the forum state or, at least, that this result be foreseeable. *Id.* at 117. Finally, Justice Stevens, writing only for himself, took the view that the constitutional standard depended on the "volume, the value and the hazardous character of the components" placed in the stream of commerce. *Id.* at 122.

Asahi triggered rampant confusion among the lower courts over the meaning of the "stream-of-commerce" metaphor and its interplay with the ordinary requirements for specific jurisdiction. Lower courts adopted three different approaches. Some courts followed Justice O'Connor's "additional conduct" test. Others followed Justice Brennan's test. A third group decided that *Asahi* did not announce any binding rule. *See generally* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 151-52 (5th ed. 2011) (collecting post-*Asahi* cases in the lower courts).

A quarter-century later, *Nicastro* offered an opportunity to clear up the confusion. Factually, *Nicastro* differed from *Asahi* and presented another paradigmatic situation for the stream-of-commerce metaphor—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. Echoing Justice Brennan's opinion from *Asahi*, 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*, 131 S. Ct. 2780 (2011).

A majority of this Court disagreed, but, as in *Asahi*, five justices failed to coalesce around a single opinion. Four justices, in a plurality opinion by Justice Kennedy, rejected the New Jersey Supreme Court's test and, instead, explicitly endorsed Justice O'Connor's test from *Asahi*. 131 S. Ct. at 2790. The plurality opinion in *Nicastro* also observed that the constitutional constraints depended on the identity of the sovereign—that is, the Fourteenth Amendment's Due Process limitations on the judicial jurisdiction of state courts differed from the Fifth Amendment's Due Process limitations on the judicial jurisdiction of the federal courts. *Id.* at 2789. Two justices, in an opinion by Justice Breyer, agreed with the plurality's rejection of the New Jersey Supreme Court's test but declined, in their words, to "announce a rule of broad applicability." *Id.* at 2791.

As several courts have recently recognized, this "Court's most recent cases have provided no clear guidance regarding the scope and application of the [stream-of-commerce] theory, leaving little uniformity among the many different federal and state court decisions." *Sproul v. Rob & Charles, Inc.*, 304 P.3d 18, 25 (N.M. App. 2013); *see also Tennessee v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 747 (Tenn. 2013) (observing that *Nicastro* "did little to resolve the lingering questions left by *Asahi*"); *AFTG-TG LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1362 (Fed. Cir. 2012) (per curiam) ("The Supreme Court has yet to reach a consensus on the proper articulation on the stream of commerce theory."). Instead, *Nicastro* has only added to the "cratered battlefield of plurality jurisprudence," *Sproul*, 304 P. 3d at 36 (Kennedy, J., dissenting), a reality acknowledged by the trial court in this case, *see* Pet. App. 15 ("The more times I read the *Nicastro* opinions, the less clear it becomes to me."). Whereas the pre-*Nicastro* case law generated a three-way disagreement, the post-*Nicastro* case law has generated a five-way disagreement in which courts routinely reject each other's views:

- *First*, one set of courts follows the *Nicastro* plurality without reference to 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).[3] *Compare*

[3] *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*

Ainsworth v. Moffett Eng'g Ltd., 716 F.3d 174, 178 (5th Cir. 2013) (explicitly noting the "tension" between the *Nicastro* plurality and Fifth Circuit precedent but declining to follow the plurality opinion).

- *Second*, another set of courts reads the *Nicastro* plurality and Justice Breyer's concurrence to embrace Justice O'Connor's test from *Asahi*. *See, e.g., Dow Chem. Can., ULC v. Superior Ct. of Los Angeles Cnty.*, 202 Cal. App. 4th 170, 179 (Cal. Ct. App. 2011) ("Due process requires that [the defendant] have engaged in additional conduct, directed at the forum, before it can be found to have purposefully availed itself of the privilege of conducting activities within California.").[4] *Compare Russell v. SNFA*, 987 N.E.2d 778, 794 (Ill. 2013) ("[W]e cannot say that Justice Breyer intended to endorse, or otherwise adopt, Justice O'Connor's narrow construction of the stream-of-commerce theory.").

- *Third*, in direct contrast to the preceding two views, another set of courts continues to apply Justice Brennan's standard from *Asahi*. *See, e.g., Jacobsen v. Asbestos Corp.*, No. 12-CA-655, 2013 WL 2350442, at *9 (La. Ct. App. May 30, 2013). *Compare NV Sumatra*, 403 S.W.3d at 758 ("[W]e do not read Justice Breyer's opinion as creating a Supreme Court majority

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& Assocs., Inc., No. 11-0088, 2011WL 4104675, at *1 n.1 (E.D. Pa. Sept. 25, 2011).

[4] *See also Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F. Supp. 2d 501, 516 (D.N.J. 2011); *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632, 638 (D. Md. 2011).

that favors Justice Brennan's version of the stream of commerce test from *Asahi*.").

Two additional groups of courts read Justice Breyer's separate opinion to announce the "narrowest" ground for decision and, invoking the principle from *Marks v. United States*, 430 U.S. 188 (1977), rely solely on that decision. *See, e.g., Ainsworth*, 716 F.3d at 178; *AFTG*, 689 F.3d at 1363. Yet, as the Tennessee Supreme Court recently recognized, Justice Breyer's opinion is "susceptible to multiple interpretations." *NV Sumatra*, 403 S.W.3d at 759. Consequently, even when courts agree that Justice Breyer's opinion announced the narrowest ground, they disagree over its meaning and worsen the already wide split:

- *Fourth*, some courts take the view that Justice Breyer's opinion literally did not make any new law and, therefore, "the law remains the same after [*Nicastro*]." *AFTG*, 689 F.3d at 1363. These courts then apply their own pre-*Nicastro* precedents to "stream-of-commerce" cases without giving any weight to this Court's decisions. *See id.*; *NV Sumatra*, 403 S.W.3d at 756-59; *Monge v. RG Petro-Mach. (Group) Co.*, 701 F.3d 598, 619-20 (10th Cir. 2012).

- *Fifth*, a group of courts, such as those in Oregon and Illinois, read Justice Breyer's opinion to stand for the proposition that a "single isolated sale" into the forum, even if accompanied by efforts to sell the product elsewhere in the United States, cannot constitutionally support the exercise of judicial jurisdiction. This reading has given rise to the view that sales of some unspecified *volume* of products can constitutionally support the exercise of judicial jurisdiction by the forum

> state courts. *See, e.g., Russell*, 987 N.E.2d at 792; *Willemsen v. Invacare Corp.*, 282 P.3d 867, 875 (Or. 2012) ("Following [Justice Breyer's opinion in *Nicastro*], we hold that the volume of sales in this case was sufficient to show a 'regular course of sales' and thus establish sufficient minimum contacts for an Oregon court to exercise specific jurisdiction over [defendant].").

Far from being the "narrowest ground" for decision, this last view is the most radical. It departs from this Court's precedents—none of which tied the constitutional parameters of judicial jurisdiction to a particular quantum of sales. Moreover, it is both subject to manipulation and highly vague. The Tennessee Supreme Court's recent decision in *NV Sumatra* illustrates these pitfalls of volume-based tests. There, the State of Tennessee sought to assert jurisdiction over a foreign cigarette manufacturer based on the sale of its cigarettes, by an independent domestic distributor, into the State. The court noted that the "product" might be characterized by reference to various measures—the number of cigarettes (11.5 million), the number of packages (nearly 580,000), the number of cartons (nearly 58,000) or the number of cases (approximately 1160). Recognizing the manipulability of these numbers, the Tennessee Supreme Court held that "quantity alone is not dispositive," 403 S.W.3d at 762, and, in a conclusion squarely at odds with the decision below (and the Oregon Supreme Court in *Willemsen*), held that the Due Process Clause did not support the exercise of judicial jurisdiction.

B. This disagreement frustrates foreign and interstate commercial activity.

The uncertainty generated by this five-way disagreement undermines the foreign commerce of the United States. 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 Oregon or Illinois 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." *Woodson*, 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 this 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. Cnty. of Los Angeles*, 441 U.S. 434 (1979).

This instability does not just affect foreign manufacturers like petitioner. 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.[5] The cases involving domestic defendants implicate all of the above-described approaches that have arisen in the wake of *Nicastro*.[6]

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.

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[5] *See, e.g., C & K Auto Imports, Inc.*, 2013 WL 3185691; *Jacobsen*, 2013 WL 2350422; *Sage Prods., Inc. v. Primo, Inc.*, No. 12 cv 3620, 2013 U.S. Dist. LEXIS 29805 (N.D. Ill. Mar. 5, 2013); *Atlantis Hydroponics, Inc. v. Int'l Growers Supply, Inc.*, No. 1:12-CV-1206-CAP, 915 F. Supp. 2d 1365 (N.D. Ga. 2013); *Frito-Lay N. Am., Inc. v. Medallion Foods, Inc.*, 867 F. Supp. 2d 859 (E.D. Tex. 2012) (magistrate judge); *Smith v. Teledyne Cont'l Motors, Inc.*, 840 F. Supp. 2d 927 (D.S.C. 2012); *Powell v. Profile Design LLC*, 838 F. Supp. 2d 535 (S.D. Tex. 2012); *Original Creations, Inc. v. Ready Am., Inc.*, 836 F. Supp. 2d 711 (N.D. Ill. 2011); *Dejana v. Marine Tech., Inc.*, No. 10-CV-4029 (JS)(WDW), 2011 WL 4530012 (E.D.N.Y. Sept. 26, 2011); *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465 (5th Cir. 2006).

[6] *See, e.g., Dejana*, 2011 WL 4530012 at *6 & n. 3 (appearing to follow the *Nicastro* plurality and concluding that jurisdiction did not lie over domestic corporation); *Smith*, 840 F. Supp. 2d at 931-34 (concluding that *Nicastro* adopted Justice O'Connor's approach from *Asahi* and exercising jurisdiction over domestic corporation); *Original Creations*, 836 F. Supp. 2d at 716-17 (concluding that *Nicastro* left Federal Circuit case law undisturbed and exercising jurisdiction over domestic corporation); *Frito-Lay*, 867 F. Supp. 2d at 867-68 (claiming to follow Justice Breyer's opinion from *Nicastro* and exercising personal jurisdiction over domestic companies).

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." *Woodson*, 444 U.S. at 292.

Such conflict is especially unnecessary in the case of domestic companies. By definition, domestic companies are already "at home" and, therefore, subject to general jurisdiction in one, if not two, states—that is the states where they are incorporated and maintain their principal place of business (to the extent the latter is different). *Goodyear*, 131 S. Ct. at 2853-54. They might also be subject to specific jurisdiction in forums where they have purposefully availed themselves of the benefits of doing business there. But the uncertain status of the doctrine in stream-of-commerce cases enhances the risk that additional states will attempt to assert their authority over a nonresident defendant. Clarity in this area of the law, and reaffirmation that the purposeful availment requirement is "essential" in every case—*including those implicating the "stream-of-commerce" metaphor*—mitigates the risk of interstate conflict. *Hanson*, 357 U.S. at 253.

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.[7] 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 the five-way disagreement, 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." *Woodson*, 444 U.S. at 293.

C. Uncertainty in this area of the law subjects companies to costly and burdensome jurisdictional discovery.

Even in cases where the company eventually prevails, the risk of jurisdictional discovery imposes unacceptable costs on defendants, especially small businesses. Though this Court has not extensively

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[7] *See, e.g., Frito-Lay*, 867 F. Supp. 2d at 867*; Tice v. Taiwan Shin Yeh Enter. Co.,* 608 F. Supp. 2d 119, 124 (D. Me. 2009); *Estes v. Midwest Prods., Inc.*, 24 F. Supp. 2d 621, 630 (S.D. W. Va. 1998); *Luv N' Care*, 438 F.3d at 468.

addressed jurisdictional discovery (except in the context of upholding a sanction, *see Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)), such tactics are a reality in many cases where a non-resident company challenges personal jurisdiction. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash. & Lee L. Rev. 489 (2010). 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).

This case exemplifies the problem. Jurisdictional discovery in this case lasted over fourteen months. Pet. App. 5. This included depositions of corporate officers, which in some cases took over nine months to complete due to disputes over whether plaintiffs' questions exceeded the scope of permissible jurisdictional discovery. Pet. App. 4. Plaintiffs initially sought massive quantities of information from petitioner, forcing it to incur the expense of seeking a protective order even before the trial court decided whether jurisdiction was proper. *Id.*

Nor is this case unique. Other decisions involving efforts by plaintiffs to assert jurisdiction on the basis of the stream-of-commerce metaphor have likewise subjected defendants to the substantial costs associated with jurisdictional discovery. A post-*Asahi* lawsuit against a Japanese corporation predicated on

the stream-of-commerce metaphor offers a particularly egregious example:

> The court assumed that limited discovery on the jurisdictional issue would ensue forthwith and proceed diligently. It did not. Rather, the parties filed nine discovery related motions with a bevy of supporting and opposing papers . . . [including] two hundred and twenty-five interrogatories, most with multiple sub-parts. . . . [Defendant was] asked to identify every shipment of goods it made over the past seven years to the United States, the nature and purpose of the shipment, the recipient and the terms of payment. . . . Plaintiff is attempting to force all of the parties to expend substantial time, effort and money in an apparent attempt to contrive a basis for jurisdiction in this district. *Narco Avionics, Inc. v. Sportsman's Market, Inc.*, 1992 U.S. Dist. LEXIS 2024, *3–7 (E.D. Pa. Feb. 20, 1992).

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.

II. THIS CASE PRESENTS A GOOD VEHICLE BY WHICH TO RESOLVE THIS IMPORTANT QUESTION.

Though plaintiffs frequently invoke the stream-of-commerce metaphor, defendants often encounter difficulties seeking this Court's review of the issues left open by *Asahi* and *Nicasatro*. When trial courts exercise personal jurisdiction in reliance on the so-

called stream-of-commerce theory, their decisions typically come in the form of orders denying motions to dismiss. Such orders are interlocutory, so appellate review can be difficult to obtain, especially from decisions employing the most relaxed pro-plaintiff tests. Indeed, despite the high incidence of litigation in the two years following *Nicastro*, only three petitions squarely presenting this issue have reached this Court. Two have been denied, s*ee China Terminal & Elec. Corp. v. Willemsen*, 133 S. Ct. 984 (2013); *Bombardier, Inc. v. Dow Chem. Can., ULC*, 133 S. Ct. 427 (2012), and one is presently pending, *see SNFA v. Russell*, No. 13-104, *petition for certiorari filed* July 17, 2013. Thus, this petition presents an exceptional opportunity for this Court to provide much-needed guidance in this frequently litigated area of the law.

Several additional features of this petition make it a good vehicle. *First*, it presents a paradigmatic case in which stream-of-commerce issues arise—a manufacturer selling finished goods by means of a distributor. In a typical distribution contract, the manufacturer sells a good to the distributor; title and risk pass to the distributor, who is then responsible for reselling the good in a particular market. *See* Ralph H. Folsom *et al.*, International Business Transactions 127-54 (West 2d ed. 2001). Across industries, distribution arrangements are regularly the subject of litigation where personal jurisdiction is asserted on the basis of the stream-of-commerce metaphor.[8]

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[8] *See, e.g., Ainsworth*, 716 F.3d at 177 (heavy equipment); *Barnhill v. Teva Pharms. USA, Inc.*, 2007 U.S. Dist. LEXIS 44771 at *10 (S.D. Ala. Apr. 24, 2007) (pharmaceuticals); *In re Lupron Mktg. & Sales Practices Litig.*, 245 F. Supp. 2d 280, 297 (D. Mass. 2003) (pharmaceuticals); *Formica v. Cascade Candle Co.*, 125 F. Supp. 2d 552, 555 (D.D.C. 2001) (consumer goods); *Clune v.*

Second, the petition offers a case in which the outcome turns on the proper constitutional rule. The history of this case supplies strong evidence about how this case lies squarely at the intersection of the competing approaches. Initially, based on its own reading of *Nicastro*, the trial court concluded that it lacked personal jurisdiction over petitioner. *See* Pet. App. 17 (finding an "absence of a showing that [petitioner] targeted Oregon"). Only after the Oregon Supreme Court announced its volume-based rule in *Willemsen* did the trial court *sua sponte* reverse course and exercise jurisdiction over petitioner. *Id.* at 11-12 (requesting supplemental briefing in light of *Willemsen* and, thereafter, concluding in light of *Willemsen* that personal jurisdiction could be constitutionally exercised).

Third, the petition presents no apparent vehicle problems. The case does not contain any alternative grounds for affirmance of the trial court's order. The record on the jurisdictional issues is fully developed and enables the Court to test the application of the possible rules governing cases of this sort. The trial court's order created a clear pathway for interlocutory appeal to the Oregon Supreme Court, and thereby ensures jurisdiction in this Court.

Alimak AB, 233 F.3d 538 (8th Cir. 2000) (construction); *Electro Med. Equip. Ltd. v. Hamilton Med. AG*, CIV A 99-579, 1999 WL 1073636 (E.D. Pa. Nov. 16, 1999) (medical devices); *Unicomp, Inc. v. Harcros Pigments, Inc.*, 994 F. Supp. 24, 28 (D. Me. 1998) (chemicals); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994) (home furnishings); *Tobin v. Astra Pharm. Products, Inc.*, 993 F.2d 528, 544 (6th Cir. 1993) (pharmaceuticals); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1537 (11th Cir. 1993) (automobiles); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1139 (N.J. 1986) (telecommunications).

III. AT A MINIMUM, THE PETITION SHOULD BE HELD FOR THIS COURT'S DECISIONS IN *BAUMAN* AND *WALDEN*.

This Court's argument calendar for the coming term includes two cases involving issues of personal jurisdiction—*Bauman v. DaimlerChrysler AG* (No. 11-965) and *Walden v. Fiore* (No. 12-574). Though neither case directly involves the stream-of-commerce metaphor, both cases potentially implicate legal propositions raised by this case. Thus, if the Court does not grant this petition, it should at least hold this petition for those decisions.

It may be appropriate to hold this petition for this Court's decision in *Bauman*. *Bauman*, calendared for oral argument on October 15, concerns whether (and the extent to which) the jurisdictional contacts of a domestic subsidiary may be attributed to a foreign parent corporation. The Court's resolution of that question in *Bauman* might touch upon the proper resolution of this case. Here, the trial court's analysis of personal jurisdiction rested partly on its finding that the domestic distributor of the product at issue "was a wholly owned subsidiary of [the petitioner], not a completely independent distributor." Pet App. 9. *Bauman* might hold that a parent corporation's mere ownership of a domestic subsidiary does not supply a valid factor in the constitutional analysis of personal jurisdiction over the parent. *See* Brief of the Chamber of Commerce of the United States of America *et al.* in *DaimlerChrysler AG v. Bauman* (No. 11-965) at 29. In that event, the quoted statement from the trial court in this case would be inaccurate, and it would be appropriate to vacate and remand the case.

In other respects, though, this case does not necessarily depend on the result in *Bauman*. *Bauman*

arises in the context of general jurisdiction. By contrast, this case arises in the context of specific jurisdiction. *Bauman* might announce a rule limited to general jurisdiction cases while leaving specific jurisdiction ones untouched.

Regardless of the relationship between this case and *Bauman*, it may also be appropriate to hold this petition for the Court's decision in *Walden*. *Walden*, calendared for oral argument on November 4, concerns the proper construction of the so-called "effects" theory of personal jurisdiction (under which a defendant who engages in certain conduct in one state may be subject to personal jurisdiction in another state where the "effects" of that conduct are felt). *Walden*, like this case, arises in the context of specific jurisdiction. Like the so-called stream-of-commerce theory at issue in this case, the effects theory at issue in *Walden* lacks a deep historical pedigree and, as the Chamber argues in *Walden*, should be narrowly construed. *See* Brief of the Chamber of Commerce of the United States of America in *Walden v. Fiore* (No. 12-574) at 8-15, 19-20. In the event the Court embraced that argument, the capacious approach to stream-of-commerce cases employed by the trial court would be erroneous, and vacatur and remand would be appropriate.

In other respects, though, this case does not necessarily depend on the result in *Walden*. *Walden* turns on the proper construction of the effects test—whether the defendant must intend that his conduct have an effect in the forum state or merely intend that his conduct affect a known forum resident. Simply resolving that disagreement would not necessarily touch upon the trial court's reasoning in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or, alternatively, hold this petition until the Court issues its decisions in *Walden* and *Bauman*.

Respectfully submitted,

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