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 WASHINGTON LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: September 16, 2013

QUESTION PRESENTED

Oregon courts assert the right to exercise personal jurisdiction over Petitioner, a foreign corporation that lacks any physical presence in the State. Oregon asserts that exercise of jurisdiction is consistent with due process standards because an unspecified number of pharmaceuticals manufactured by Petitioner are sold in Oregon, thereby purportedly creating "minimum contacts" among Petitioner, the forum, and the underlying product liability lawsuit.

Amici address only the second of the two Questions Presented in the Petition:

Even if Respondents can establish the requisite "minimum contacts," is exercise of personal jurisdiction consistent with "traditional notions of fair play and substantial justice" when (1) the defendant is a foreign corporation that has delegated to an indirect subsidiary full responsibility for obtaining marketing approval of its prescription drugs within the United States, as well as for all such marketing; and (2) the forum State's interest in protecting its consumers can be fully vindicated by authorizing a suit against the fully solvent subsidiary, which maintains a substantial presence within the State?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Constitutional Provisions:

Statutes and Regulations:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts in cases involving personal jurisdiction issues, to support defendants seeking to avoid being subject to a court's coercive powers when assertion of jurisdiction does not comply with traditional notions of fair play and substantial justice. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Mother Doe v. Al Maktoum*, 632 F. Supp. 2d 1130 (S.D. Fla. 2007).

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of *amici*'s intent to file.

the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs.

The Court has been reluctant to establish broad rules governing when courts may, consistent with due process, exercise jurisdiction over defendants that lack "continuous and systematic" contacts with the forum State. While *amici* understand why such due process determinations frequently must turn on the unique facts of each case, *amici* are concerned that businesses are being provided inadequate guidance regarding the sorts of conduct that may render them liable to suit within any or all of the 50 States. In the absence of such guidance, businesses are unable to respond appropriately; *e.g.*, altering their conduct to eliminate litigation risks or, alternatively, including the costs of those risks in their pricing structure.

Amici believe that this case offers the Court an excellent vehicle for providing much-needed guidance regarding due process limits as applied to one frequently-recurring factual situation: suits against foreign corporations that sell products into the American market but that rely on subsidiaries to undertake all such marketing. In those situations, U.S.-based consumers alleging injury caused by use of the product virtually always can obtain full redress of grievances by filing suit against the subsidiary corporation. Particularly where, as in the prescription

drug industry, the American subsidiary is the party responsible for working out with federal regulatory authorities the terms of marketing, the subsidiary will be fully answerable for any deficiencies in product design or labeling. Under such circumstances, *amici* believe, there is considerably reduced constitutional justification for subjecting a foreign corporation whose contacts with the United States are minimal to the burdens of litigation in American courts.

Oregon's courts have adopted the position that they may assert personal jurisdiction over a foreign corporation whenever more than a small handful of the corporation's products end up being offered for sale in Oregon, without regard to whether those claiming injury can be adequately compensated by a suit against the corporation's subsidiary. *Amici* are concerned that such unnecessary expansion of litigation exposure will discourage foreign investment in American health care.

STATEMENT OF THE CASE

This case involves an Oregon state-law personal injury suit that seeks recovery of damages from Petitioner Novo Nordisk A/S ("NN A/S") for injuries allegedly sustained by Respondent Suzanne Lukas-Werner following four years of treatment with Activella®, a prescription hormone therapy medicine manufactured in Denmark by NN A/S. Activella is distributed in the United States by Novo Nordisk Inc. (NNI), an indirect subsidiary of NN A/S. Respondents have asserted identical claims against both NN A/S and NNI and have not suggested any scenario under which they might recover damages from NN A/S but not from NNI.

NN A/S is not registered to do business in Oregon. It has no place of business, employees, or bank accounts in Oregon. It does not design, manufacture, or advertise Activella or any of its other products in Oregon. It does not solicit business in Oregon or itself sell or ship drugs to Oregon pharmacies. Nonetheless, it is uncontested that some number of products manufactured by NN A/S (Respondents have submitted no evidence regarding how many) are sold each year in Oregon.

NNI, on the other hand, has a substantial presence in Oregon and throughout the United States. NNI submitted a new drug application (NDA)[2] for Activella to the Food and Drug Administration (FDA), which in April 2000 approved the sale of Activella in the United States for the prevention of osteoporosis and other symptoms associated with Menopause. For the past 13 years, NNI has actively marketed Activella within the United States and has worked closely with FDA to ensure that Activella's product labeling reflects all relevant safety information.

Respondents conceded in the trial court that NNI and NN A/S are separately operated corporations and that "corporate veil piercing principles" do not apply. App. 74. Nor do Respondents contend that NN A/S conducts "continuous and systematic" activity in Oregon sufficient to justify Oregon's assertion of general jurisdiction over NN A/S. *Id.*

At a June 1, 2012 hearing on NN A/S's motion to

---

[2] *See* 21 U.S.C. § 355(b).

dismiss for lack of personal jurisdiction, the trial court stated that it was granting the motion in light of this Court's decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). App. 15-17. Soon afterwards, however, the Oregon Supreme Court issued a decision that interpreted *Nicastro* as authorizing assertion of specific jurisdiction over a corporation if more than a small handful of its products is sold within the forum State. *Willemsen v. Invacare Corp.*, 352 Or. 191, 203-04 (2012), *cert. denied*, 133 S. Ct. 984 (2013).

Based explicitly on its understanding of the *Willemsen* decision, the trial court reversed its position and issued an order denying NN A/S's motion to dismiss. App. 1-11. The trial court explained:

> The record shows not merely an isolated single sale in Oregon – which the *Willemsen* decision concludes was pivotal in Justice Breyer's controlling opinion in *Nicastro* – but rather a significant volume of sales in Oregon of Activella pills manufactured by NN A/S. The evidence also shows that the sales of Activella in Oregon were not fortuitous. . . . [T]he Court concludes that the sales of NN A/S's drug Activella were not attenuated. The fact that the Activella pills themselves arrived in Oregon through a complex distribution scheme is not a significant factor under *Willemsen*.

App. 9. The trial court concluded that NN A/S's contacts with the forum State should be deemed stronger than were those of the defendant in *Willemsen* because although NN A/S itself played no role in marketing its products in Oregon, one of its indirect

subsidiaries (NNI) did. *Id.*

After finding that NN A/S had the requisite "minimum contacts" with Oregon, the trial court went on to conclude that exercise of personal jurisdiction over NN A/S would not "offend traditional notions of fair play and substantial justice." App. 9-10. In support of that conclusion, the trial court cited evidence that: (1) "NN A/S anticipated the need to defend itself against this very sort of claim" in any State in which "the flow of sales might result in a lawsuit against it"; and (2) as a large corporation, NN A/S had sufficient assets to defend the lawsuit without "undue hardship." *Id.* at 10.

NN A/S thereafter sought review of the trial court's order by petitioning the Oregon Supreme Court for a writ of mandamus. The Oregon Supreme Court denied the writ without an opinion on May 16, 2013. App. 18-19. NN A/S's certiorari petition seeks review both of the trial court's order denying the motion to dismiss and of the Oregon Supreme Court's denial of the petition for a writ of mandamus.

SUMMARY OF ARGUMENT

Because no single opinion garnered the support of a majority of the justices, *Nicastro* provides little if any additional guidance to lower courts regarding due process limitations on assertion of specific jurisdiction over foreign corporations. In his opinion concurring in the judgment, Justice Breyer explained that because (in his view) "the outcome of this case is determined by our precedents," he declined to "announce a rule of broad applicability without full consideration of the

modern-day consequences." *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring in the judgment). As a result, lower courts continue to struggle to reach consistent results in an area of the law in which the guidance from this Court is quite thin.

This petition provides the Court with an excellent opportunity to establish guidance in a frequently recurring factual setting: suits against foreign corporations that do not market their products in this country but whose products nonetheless reach American consumers through the marketing efforts of fully capitalized subsidiaries. The facts of this case are largely undisputed and reflect marketing practices that mirror those employed by virtually all other foreign-based pharmaceutical manufacturers.

In each instance, the manufacturer is fully aware that its subsidiaries are marketing its products within the United States. Once the flow of products into a State becomes sufficiently large, it is at least arguable that a foreign manufacturer can be deemed to have "minimum contacts" with the State even when the manufacturer plays no role in the marketing effort.[3] But even so, this Court has consistently held that due process does not permit a State to exercise specific jurisdiction over a defendant unless the State can also surmount a second hurdle: a determination that exercise of personal jurisdiction over NN A/S would not "offend traditional notions of fair play and substantial

---

[3] It is not clear whether NN A/S has reached that "critical mass" level of product flow into Oregon because Respondents have introduced no evidence regarding how many of NN A/S's products are sold in Oregon each year.

justice." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

The Court has identified a number of factors relevant to this "fairness" determination, including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Id.* Of course, a State's interests in providing a forum for its injured consumers and the consumers' interests in obtaining relief against the foreign corporation are greatly reduced when, in cases of this sort, their interests can be fully vindicated by a suit against the American subsidiary whose potential liability is at least as great as the foreign corporation's. Conversely, litigation in American courts can be a severe burden on foreign corporations. *Id.* at 114 (stating that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

In most instances in which a tort plaintiff sues both a foreign pharmaceutical manufacturer and the American subsidiary that is fully responsible for marketing and regulatory approval, the motivation is readily apparent. Counsel for plaintiff is not acting for the purposes of maximizing the client's potential recovery. Rather, counsel realizes that suing both corporations increases both the funds and executive man-hours that the defendants will be forced to devote to the lawsuit—thereby increasing the likelihood that the defendants will feel forced to settle the lawsuit without regard to its underlying merits. Review is warranted to determine whether such gamesmanship

is consistent with "traditional notions of fair play and substantial justice."

The standards adopted by the Oregon courts in making the "fair play and substantial justice" determination are in clear conflict with this Court's standards. The trial court determined that exercise of jurisdiction over NN A/S was "fair" based solely on findings that: (1) NN A/S anticipated that it might be sued in Oregon; and (2) NN A/S is a large corporation and thus could afford to defend itself in an Oregon court without "undue hardship." App. 10. If those are the only criteria examined in connection with the "fairness" determination, then that determination will never serve as an independent check on a State's exercise of personal jurisdiction over a foreign corporation. Given the realities of modern litigation, *every* foreign corporation contemplates that it may be sued in any jurisdiction to which the stream of commerce takes one of its products. Moreover, this Court has never suggested that the burdens of litigation in an unfamiliar jurisdiction are relevant only if the foreign corporation is small. Accordingly, review is also warranted to resolve the conflict between this Court's understanding of "fair play and substantial justice" (as explained in *Asahi*) and the lower courts' cramped understanding of that concept.

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional importance to the international business community. Foreign corporations find themselves sued with increasing frequency in American jurisdictions in which they do not regularly conduct any business,

based on claims that one of their products reached the jurisdiction and caused injury to a local consumer. Very often, they find themselves sued in conjunction with an American subsidiary that marketed the product in question, that does not question that it is subject to the American court's jurisdiction, that acknowledges that its potential liability is at least as broad as the parent corporation's, and that has more than sufficient resources to satisfy any tort judgment. When a foreign corporation's connection with the forum is found to meet the "minimum contacts" threshold yet those contacts are still *minimal*, there is good reason to question whether, under the circumstances described above, permitting American courts to exercise personal jurisdiction over the corporation is consistent with limitations imposed by the Due Process Clause. Review is warranted to provide the lower courts with guidance on this important and frequently recurring question.

I. Review Is Warranted to Consider Whether It Is Unfair to Subject a Foreign Corporation to a Court's Jurisdiction When Suit Against Its American Subsidiary Satisfies the Interests of the Plaintiff and the Forum

The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state court's authority to proceed against a defendant. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). As the Court explained in its *International Shoe* decision, a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] 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) (citations omitted).

Courts often employ a two-step process when applying the *International Shoe* standard in cases involving "specific jurisdiction" claims (*i.e.*, cases arising out of or related to the defendant's contacts with the forum). First, a court examines the nature of the "relationship among the defendant, the forum, and the litigation," *Shaffer*, 433 U.S. at 204, to determine whether the defendant's relationship with the forum is sufficient to constitute "minimum contacts."[4] If the "minimum contacts" standard is satisfied, a court then undertakes a fairness inquiry to determine whether the exercise of personal jurisdiction over the defendant would offend "traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985) (stating that "minimum requirements inherent in the concept of 'fair play and

---

[4] In recent years, the Court has been sharply divided regarding the evidence necessary to establish "minimum contacts." *Compare, e.g., Nicastro*, 131 S. Ct. at 2788 (plurality) ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."), *with id.* at 2793 (Breyer, J., concurring in the judgment) (rejecting both "the plurality's seemingly strict no-jurisdiction rule" and the opposing viewpoint that "a producer is subject to jurisdiction for a products-liability action so long as it 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.") (emphasis in original). In several recent personal jurisdiction cases, no definition of "minimum contacts" has garnered support from at least five justices.

substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposely engaged in forum activities").

The nature of this fairness inquiry is best illustrated by the Court's *Asahi* decision. The Court was badly splintered in addressing the first step of the personal jurisdiction inquiry: whether a Japanese manufacturer of tire valve assemblies (Asahi) had "minimum contacts" with California. Asahi annually sold hundreds of thousands of valve assemblies in Taiwan to Cheng Sin, a Taiwanese company. Cheng Sin then incorporated the assemblies into tire tubes, which it sold throughout the world. A fairly large number of Cheng Shin's tire tubes (most containing Asahi valve assemblies) were sold in California, including one tube that was installed on a motorcycle owned by the plaintiff. After the plaintiff suffered severe injuries in a motorcycle accident, he filed suit against Cheng Shin, alleging that a defective tire tube had caused the accident. Cheng Shin filed a cross-claim against Asahi, asserting that the valve assembly supplied by Asahi was defective and had caused the accident. Subsequently, the parties settled all claims other than Cheng Shin's cross-claim against Asahi.

The issue that remained for the Court: did due process constraints bar California courts from exercising personal jurisdiction over Asahi for the purpose of adjudicating Cheng Shin's cross-claim? The splintered Court could not reach a consensus on the first part of the *International Shoe* inquiry; it was split 4-4 on whether Asahi's knowledge that a Taiwanese company would be shipping numerous tire tubes containing Asahi-manufactured components to

California was sufficient to establish Asahi's "minimum contacts" with California. The justices nonetheless *unanimously* agreed, under the second part of the inquiry, that due process barred the exercise of personal jurisdiction because doing so "would offend traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113-14.

The Court explained that the reasonableness of the exercise of personal jurisdiction in any case "will depend on an evaluation of several factors":

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiffs' interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering substantive social policies."

Id. at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Applying that standard, the Court concluded that due process barred California's adjudication of the cross-claim against Asahi, without regard to whether Asahi maintained "minimum contacts" with the State. While stating that California had a strong interest in providing a forum for the claims of those who were injured within the State, the Court noted that the claims of the injured motorcyclist had already been settled and all that remained was the cross-claim of a Taiwanese corporation against a Japanese corporation based on a sales contract entered into in Asia. *Id.* at

114. Also weighing heavily in the Court's analysis were the "unique burdens" imposed on a foreign corporation when forced to litigate in a jurisdiction with which it had few contacts:

> Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Sin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

Id. at 114. *See also id.* at 115 ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field") (quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). The Court concluded, "Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." *Id.* at 116.

The similarities between the facts here and those in *Asahi* strongly suggest that Oregon has exceeded due process constraints in asserting personal jurisdiction over NN A/S. Oregon undoubtedly has an

interest in providing a forum for the claims of consumers who suffer injury within the State. But neither Respondents nor Oregon have ever explained why that interest is not fully vindicated by permitting a lawsuit against NNI, whose substantial contacts with Oregon are unquestioned. It simply is not plausible that Respondents could assert any claims against NN A/S under Oregon law that they could not also assert against NNI.

As the Petition explains in detail, NNI is solely responsible for the marketing and regulatory approval of Activella within the United States. Pet. 35. Under federal law, it is NNI (not NN A/S) that is responsible for assuring the safety and efficacy of Activella in the U.S.—from clinical development to approval, manufacturing, labeling, and post-approval safety monitoring. *See, e.g.,* 21 C.F.R. Parts 312, 211, and 314. If the design or labeling of Activella was in some way deficient and that deficiency was the proximate cause of Respondent Lukas-Werner's injury, then no party bears greater responsibility than NNI.

A nearly identical relationship between foreign parent and American subsidiary exists with respect to all foreign pharmaceutical manufacturers, and thus the legal issues raised here arise frequently in product liability litigation. As the Court's case law makes clear, product liability suits against pharmaceutical companies virtually always focus on whether the product's labeling adequately warned patients and doctors of the risks inherent in taking the medication. *See, e.g., Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Wyeth v. Levine*, 555 U.S. 555 (2009). It is NNI and other American subsidiaries, not the

foreign parent corporation, upon whom U.S. law places the responsibility for adequate labeling. While NN A/S, as the manufacturer of the product alleged to have caused injury, might be held liable for any labeling deficiencies, any such liability would be derivative of the liability of NNI, the party ultimately responsible for the labeling. Accordingly, it is simply not plausible to assert that Respondents must be permitted to sue NN A/S as well as NNI in Oregon in order to assure that they will be fully compensated.[5]

Moreover, forcing foreign corporations such as NN A/S to defend product liabilities in jurisdictions with which they have, at most, minimal contacts imposes a severe burden. As Petitioner has explained, those burdens are particularly large in this case "given the very different legal systems, regulatory schemes, and privacy law requirements that govern in other nations, including Denmark and the E.U." Petition at 33. Indeed, the apparent reason why plaintiff lawyers bringing product liability claims routinely sue not only the American company that markets a drug but also its foreign parent corporation is precisely because *they seek to impose heavy litigation-related burdens on the defendants*. They are not acting for the purposes of maximizing the client's potential recovery in a court-awarded judgment. Rather, counsel realize that suing

---

[5] Respondents might have a plausible argument in this regard if there were some reason to believe that NNI was undercapitalized and could not satisfy judgments entered against it. But respondents have made no such claim. Moreover, Respondents have explicitly waived any arguments that NN A/S and NNI should not be treated as separate entities or that "corporate veil piercing principles" should be applied. App. 74.

both corporations increases both the funds and executive man-hours that the defendants will need to devote to the lawsuit—thereby increasing the likelihood that the defendants will feel forced to settle the lawsuit without regard to its underlying merits.

The lower courts took none of those considerations into account in determining that assertion of personal jurisdiction over NN A/S did not offend traditional notions of fair play and substantial justice. Rather, the trial court determined that exercise of jurisdiction over NN A/S was "fair" based solely on findings that: (1) NN A/S anticipated that it might be sued in Oregon; and (2) NN A/S is a large corporation and thus could afford to defend itself in an Oregon court without "undue hardship." App. 10. If those are the only criteria examined in connection with the "fairness" determination, then that determination will never serve as an independent check on a State's exercise of personal jurisdiction over a foreign corporation. Given the realities of modern litigation, *every* foreign corporation contemplates that it may be sued in any jurisdiction to which the stream of commerce takes one of its products. Moreover, this Court has never suggested that the burdens of litigation in an unfamiliar jurisdiction are relevant only if the foreign corporation is small. Incurring the costs of defending litigation in Oregon will not bankrupt NN A/S, but that fact does not in any way lessen the tremendous drain on both funds and executive man-hours that the defense will entail.[6] Nor

[6] Indeed, if due process permits exercise of personal jurisdiction over NN A/S under the facts of this case, then there is no reason why senior executives of NN A/S living in Denmark

did the lower courts give any consideration to NN A/S's evidence that a suit against NNI would fully vindicate the interests of both Oregon and Respondents.

In sum, the lower court decisions conflict substantially with *Asahi* and other decisions of this Court regarding when exercise of personal jurisdiction over a foreign corporation offends traditional notions of fair play and substantial justice. Review is warranted to resolve that conflict.

II. Review Is Warranted to Provide Litigants with Clearer Guidance Regarding When Exercise of Personal Jurisdiction over Defendants with Minimum Contacts with the Forum Nonetheless Violates Due Process

Review is also warranted to provide both litigants and lower courts with much-needed additional guidance regarding the circumstances under which courts may, consistent with due process, exercise personal jurisdiction over foreign defendants.

We recognize that the due process determination

---

would not be equally amenable to suit in Oregon. After all, those executives were as aware as was NN A/S itself that Activella was likely (through the marketing efforts of others) to reach the Oregon market, and they played as large a role as did NN A/S in placing an allegedly defective product (Activella) into the stream of commerce. If plaintiffs' attorneys are permitted to file suit in Oregon courts against foreign pharmaceutical companies under the facts of this case, one can reasonably expect that they will soon begin routinely naming senior corporate executives as defendants as well.

is often fact-intensive and is not always amenable to the creation of broadly applicable rules. Nonetheless, the Court has long recognized the importance of providing the business community with reasonably clear guidance in this area so that companies can structure their activities in a manner that responds in an economically sensible manner to their potential exposure to litigation in far-away courts. As the Court has explained:

> The Due Process Clause, by ensuring the orderly administration of laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. When a corporation purposely avails itself of the privilege of conducting business within the forum State, . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen, 444 U.S. at 297.

To date, the Court has provided little guidance regarding due process constraints that apply when the defendant has "minimum contacts" with the forum State but the contacts are nonetheless minimal—other than *Asahi*'s recognition of a general presumption that due process concerns are "often" overcome "[w]hen minimum contacts have been established." *Asahi*, 480

U.S. at 114. Oregon has interpreted that statement to mean that those concerns are *always* overcome when the defendant is not a small company and has anticipated that plaintiffs might try to sue it within the forum State. App. 10. If Oregon's interpretation is correct, then foreign corporations need to hear it from this Court. They will then be in a position to respond by either raising their prices of products sold in the United States (to cover the increased litigation costs) or else withdrawing from the American market.

As Justice Breyer has pointed out, "there have been many recent changes in commerce and communications, many of which are not anticipated by our [due process] precedents." *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring in the judgment). One such change has been the increased distribution within the United States of products manufactured by foreign companies but distributed by their American subsidiaries that, under federal law, are fully responsible for ensuring the safety of the products they distribute. The Court's precedents do not directly address whether permitting a State to exercise personal jurisdiction over those foreign companies offends traditional notions of fair play and substantial justice when (1) they arguably have minimum (but still minimal) contacts with the forum State; and (2) the interests of the forum State and the plaintiff can be fully vindicated by maintaining an action against the American subsidiary. Review is warranted to provide much-needed guidance regarding this frequently recurring fact pattern.

CONCLUSION

The Washington Legal Foundation and the International Association of Defense Counsel respectfully request that the Court grant the Petition.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
Washington Legal Found.
2009 Massachusetts Ave, NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

September 16, 2013