

No. 21-195

**In The
Supreme Court of the United States**

BELMORA LLC AND JAMIE BELCASTRO,

Petitioners,

v.

BAYER CONSUMER CARE AG AND BAYER
HEALTHCARE LLC,

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

**BRIEF OF NATIONAL HISPANIC MEDICAL
ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

BRUCE L. CAMPBELL

Counsel of Record

IVÁN RESENDIZ GUTIERREZ

MILLER NASH LLP

111 SW Fifth Ave., Ste. 3400

Portland, Oregon 97204

(503) 224-5858

bruce.campbell@millernash.com

ivan.resendiz@millernash.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. Federal trademark protection fosters competition.....	6
II. This Court should grant the Petition because the questions presented are important and the Hispanic community would benefit from more competition between businesses.....	8
A. Hispanics are the country’s second largest racial or ethnic group and second fastest growing population, but they face unique health-related issues.....	8
B. Hispanics have significant purchasing power and companies with creative bilingual marketing efforts have an advantage over foreign-based companies with monolingual strategies	12
C. The questions presented are important and this Court’s guidance could affect Hispanics who would benefit from more competition between businesses.....	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>B & B Hardware, Inc. v. Hargis Indus., Inc.</i> , 575 U.S. 138 (2015)	6
<i>Belmora LLC v. Bayer Consumer Care AG</i> , 987 F.3d 284 (4th Cir. 2021), <i>reh’g</i> <i>denied</i> , Mar. 16, 2021, and <i>Belmora LLC</i> <i>v. Bayer Consumer Care AG</i> , 819 F.3d 697 (4th Cir. 2016).....	4
<i>Belmora LLC v. Bayer Consumer Care AG</i> , 819 F.3d 697 (4th Cir. 2016)	4, 16, 17
<i>Belmora LLC v. Bayer Consumer Care AG</i> , 2015 WL 3424738 (4th Cir. May 26, 2015).....	16
<i>Industria de Alimentos Zenú S.A.S. v.</i> <i>Latinfood U.S. Corp.</i> , 2017 WL 6940696 (D.N.J. Dec. 29, 2017)	17
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017)	6
<i>Paleteria La Michoacana, Inc. v. Productos</i> <i>Lacteos Tocumbo S.A. De C.V.</i> , 743 F. App’x 457 (D.C. Cir. 2018)	17, 18
<i>PTO v. Booking.com B.V.</i> , 140 S. Ct. 2298 (2020)	6

**TABLE OF AUTHORITIES
(Continued)**

	Page(s)
<i>San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.</i> , 483 U.S. 522 (1987)	7
<i>United Drug Co. v. Theodore Rectanus Co.</i> , 248 U.S. 90 (1918)	6
Statutes	
Lanham Act, § 1 <i>et seq.</i> , 12 U.S.C. § 1051 <i>et seq.</i>	2, 4, 5, 6, 7
Other Authorities	
Nicole Acevedo, <i>Even amid ‘trying times,’ Latinos are nation’s growth engine, Nielsen report finds</i> , NBC NEWS (Aug. 12, 2019 6:00 AM PDT), https://www.nbcnews.com/news/latino/ev-en-amid-trying-times-latinos-are-nation-s-growth-engine-n1041236	9, 12
Maren J. Coffman, et al., <i>Self-Prescription Practices in Recent Latino Immigrants</i> , 25 PUBLIC HEALTH NURSING, no. 3 (2008), https://doi.org/10.1111/j.1525-1446.2008.00697.x	10

**TABLE OF AUTHORITIES
(Continued)**

	Page(s)
FDA Adverse Events Reporting System (FAERS) Public Dashboard, https://fis.fda.gov/sense/app/d10be6bb-494e-4cd2-82e4-0135608ddc13/sheet/45beeb74-30ab-46be-8267-5756582633b4/state/analysis (data as of June 30, 2021)	15
Thomas J. Dilworth, Dave Mott, and Henry Young, <i>Pharmacists' communication with Spanish-speaking patients: A review of the literature to establish an agenda for future research</i> , 5 RESEARCH IN SOCIAL AND ADMINISTRATIVE PHARMACY, no. 2 (June 2009), https://doi.org/10.1016/j.sapharm.2008.05.005	10, 11, 12
Christine Haight Farley, <i>Lost Unfair Competition Law</i> , 110 Trademark Rep 739 (2020)	16
Christine Haight Farley, <i>No Trademark, No Problem</i> , 23 B.U. J. Sci. & Tech. L. 304, 317 (2017)	17

**TABLE OF AUTHORITIES
(Continued)**

	Page(s)
Sean Hopwood, <i>Three Ways Your Company Can Target The Hispanic Market</i> , FORBES (Dec. 13, 2019, 8:00 AM (EST), https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2019/12/13/three-ways-your-company-can-target-the-hispanic-market/?sh=4fdeb91e40d4	13
Jens Manuel Krogstad and Lusi Noe-Bustamente, <i>Key facts about U.S. Latinos for National Hispanic Heritage Month</i> , PEW RESEARCH CENTER, Sept. 9, 2021, https://www.pewresearch.org/fact-tank/2020/09/10/key-facts-about-u-s-latinos-for-national-hispanic-heritage-month/	8, 9
Jens Manuel Krogstad, <i>Hispanics have accounted for more than half of total U.S. population growth since 2010</i> PEW RESEARCH CENTER, July 10, 2020, https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/	8

**TABLE OF AUTHORITIES
(Continued)**

	Page(s)
Arch G. Mainous, III, Vanessa A. Diaz, and Mark Carnemolla, <i>Factors Affecting Latino Adults' Use of Antibiotics for Self- Medication</i> , 21 JOURNAL OF AMERICAN BOARD OF FAMILY MEDICINE, no. 2 (March-April 2008), https://doi.org/10.3122/jabfm.2008.02.070 149.....	10, 15
Arun Mohan, et al., <i>Development of a Patient-Centered Bilingual Prescription Drug Label</i> , NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, Oct. 4, 2013, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3815084/	10, 11
Luis Noe-Bustamente, et al., <i>For U.S. Latinos, COVID-19 Has Taken a Personal and Financial Toll</i> , PEW RESEARCH CENTER, July 15, 2021, https://www.pewresearch.org/race-ethnicity/2021/07/15/for-u-s-latinos-covid-19-has-taken-a-personal-and-financial-toll/	11

**TABLE OF AUTHORITIES
(Continued)**

	Page(s)
Luis Noe-Bustamente, et al., <i>U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed</i> , PEW RESEARCH CENTER, July 7, 2020, https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/	9
Sujit S. Sangsiry, Surupa Chanda, and Gauri S. Shringarpure, <i>Impact of bilingual product information labels on Spanish-speaking adults' ability to comprehend OTC information</i> , 3 RESEARCH IN SOCIAL AND ADMINISTRATIVE PHARMACY, no. 4 (Dec. 2007), https://pubmed.ncbi.nlm.nih.gov/18082876/	12
U.S. Department of Health and Human Services, Office of Minority Health, <i>Profile: Hispanic/Hispanic Americans</i> (last modified Apr. 5, 2021), https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=64	9

**TABLE OF AUTHORITIES
(Continued)**

	Page(s)
U.S. Translation Company, <i>Hispanic Buying Power and How to Reach It</i> , <a href="https://ustranslation.com/blog/hispanic-
buying-power/">https://ustranslation.com/blog/hispanic- buying-power/	13

INTEREST OF *AMICUS CURIAE*¹

Amicus the National Hispanic Medical Association (“NHMA”) is a 501(c)(6) non-profit organization that exists to improve the health of Hispanic Americans.² It supports more than 50,000 licensed Hispanic physicians in the United States in their efforts to improve the health of Hispanic and other underserved populations in collaboration with Hispanic state medical societies, residents, medical students, and other public- and private-sector partners.

One of NHMA’s focal points is promoting healthcare policies aimed at eliminating health disparities in Hispanic populations. NHMA provides policymakers, healthcare providers, and its partners with expert information and support designed to

¹ In accordance with Rule 37.2, counsel of record for all parties received notice of NHMA’s intent to file this brief at least 10 days before the due date, and all parties to the appeal have consented to the filing of this brief. Under Rule 37.6, NHMA affirms that no counsel for a party authored this brief in whole or in part and that no person other than NHMA or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

² Hispanics in the United States describe their identity in many ways, reflecting the diversity of origins in the Hispanic community, the immigrant experience, and geography. Generally, some Hispanics use pan-ethnic terms such as “Hispanic” or “Latino” to describe their identity. Some prefer their family’s Hispanic origin group, for example, Cuban, Mexican, or Puerto Rican. Others use “American” or a combination of American and their family’s Hispanic origin group. More recently, a new pan-ethnic label, “Latinx,” has emerged as a gender-neutral, inclusive alternative. The term is used by some news and entertainment outlets, companies, local governments, and universities to describe the nation’s Hispanic population. This brief uses the term “Hispanic.”

strengthen health service delivery to Hispanic communities across the country. It works closely with the White House, Congress, federal agencies, the private sector, and national Hispanic organizations to carry out its mission of improving health care and health outcomes throughout the Hispanic community. NHMA also partners with companies, academia, media, and coalitions who advocate for improved healthcare delivery, medical education, public health, health policy, and community-based research for Hispanic communities.

Hispanics are at the center of NHMA's work because this diverse community plays an important demographic and economic role in the United States. And in a number of ways, Hispanics are also at the heart of the long-running trademark dispute between Petitioners Belmora LLC and Jamie Belcastro (collectively, "Belmora") and Respondents Bayer Consumer Care AG and Bayer Healthcare LLC (collective, "Bayer"). They have been the main audience of Belmora's long-standing bilingual marketing efforts and a target of Bayer's strategy for promoting its Aleve product.³

NHMA has a substantial interest in at least one of the questions presented here—namely, whether the principle of trademark territoriality, the zone of interests encompassed by Lanham Act §§ 43(a) and 14(3), extends to the foreign owner of a foreign trademark that has neither registered nor used the

³ See Pet. for Writ of Cert. at 9.

mark in the United States. As explained below and in Belmora's petition for a writ of certiorari (the "Petition"), the answer to that question could have a profound impact on how Hispanics purchase over-the-counter medications and other products in this country, which, in turn, could have significant health and welfare implications for Hispanics.

SUMMARY OF ARGUMENT

Belmora LLC is a small, privately owned Virginia-based pharmaceutical company founded in 2001 by Jamie Belcastro, a registered pharmacist. In the early 2000s, Belmora created a new product after learning of U.S. consumers experiencing adverse reactions to non-FDA approved, high-dose pain relief products brought to the U.S. from Mexico.

In 2005, Belmora obtained a U.S. trademark for "FLANAX," an FDA-approved, over-the-counter (i.e., non-prescription) analgesic containing naproxen sodium. Belmora uses the FLANAX name in commerce throughout the United States, particularly in Hispanic communities. For example, Belmora sells its Flanax Pain Reliever Tablets with unique bilingual packaging and labeling for the benefit of Spanish-speaking consumers, including Hispanics.

A Swiss subsidiary of Bayer AG owns a Mexican trademark for "FLANAX" and has been marketing a non-FDA approved, high-dose, over-the-counter version of FLANAX in Mexico since the 1970s. Bayer does not have a U.S. trademark registration for, and

does not otherwise use, the FLANAX name in the United States. Instead, a U.S. subsidiary of Bayer AG, markets naproxen sodium in the United States under its trademarked “ALEVE” brand name.

Since 2007, Bayer has pursued Lanham Act actions against Belmora. The FLANAX litigation between Bayer and Belmora has a long and complicated procedural history over 14 years, which Belmora has addressed in the Petition.

In August 2021, Belmora filed its petition for writ of certiorari from the two Fourth Circuit opinions in this protracted litigation. *See* Pet. for Writ of Cert., *Belmora LLC, et al. v. Bayer Consumer Care AG, et al.*, No. 21-195 (Aug. 11, 2021) (seeking review of *Belmora LLC v. Bayer Consumer Care AG*, 987 F.3d 284 (4th Cir. 2021), *reh’g denied*, Mar. 16, 2021, and *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697 (4th Cir. 2016)). The Petition explains that this “appeal presents the Court with an ideal opportunity to address two fundamental questions of trademark law that continue to divide the circuits, create significant legal and commercial uncertainty for owners of U.S. trademarks, and expose American businesses to anticompetitive Lanham Act attacks by foreign corporations.” Pet. for Writ of Cert. at 3.

This brief deals with the first question presented in the Petition:

whether the owner of a foreign trademark that has deliberately chosen *not* to use or register the mark in the

United States—here, the name FLANAX—is entitled to bring false association and false advertising (i.e., unfair competition) claims under Lanham Act § 43(a), 15 U.S.C. § 1125(a), and to file a trademark cancellation petition under § 14(3), 15 U.S.C. § 1064(3), on the theory that its foreign trademark has been damaged by a U.S. company that has followed the procedures to obtain a U.S. registration for the same mark and uses that mark to sell products exclusively in the United States.

More specifically, the brief sheds light on the need for product competition and consumer choice in Hispanic and other underserved communities, especially in connection with over-the-counter medications. *See* Pet. for Writ of Cert. at 39 (“Further, were Bayer ultimately to succeed, the nation’s large and expanding Hispanic population would be deprived of an FDA-approved, bilingually packaged and labeled alternative to higher-priced Aleve.”).

The Court should grant Belmora’s Petition to (1) answer the questions plaguing at least four Circuit Courts, the Second, Fourth, Ninth, and Federal Circuits; (2) provide trademark owners with much-needed guidance on Sections 14(3) and 43(a) of the Lanham Act; and (3) help ensure that Hispanic and other underserved communities have access to a diverse array of products.

ARGUMENT

I. Federal trademark protection fosters competition.

“Trademark law has a long history, going back at least to Roman times. The principle underlying trademark protection is that distinctive marks . . . *can help distinguish a particular artisan's goods from those of others.*” *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 142 (2015) (emphasis added and citations omitted). Among other things, a trademark “designate[s] the goods as the product of a particular trader,” *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918), and “helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid.” *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (citing *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 212 (2000)).

As noted in Belmora’s Petition, the Lanham Act is the “foundation of current federal trademark law.” *Matal*, 137 S. Ct. at 1752. “Though federal law does not create trademarks, Congress has long played a role in protecting them.” *B & B Hardware*, 575 U.S. at 142 (internal citation omitted). “[F]ederal trademark protection, supplementing state law, ‘supports the free flow of commerce’ and ‘foster[s] competition.’” *PTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2302 (2020) (quoting *Matal*, 137 S. Ct. at 1752) (emphasis added).

“This Court has recognized that [n]ational protection of trademarks is desirable . . . because

trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 531 (1987) (quoting *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 198 (1985) (“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.”) (citing S. Rep. No. 1333, 79th Cong., 2d Sess., 3, 5 (1946))).

This case provides an opportunity to recognize the special harm (e.g., real economic impact) that U.S. trademark owners and consumers—especially underserved communities who benefit from, among other things, creative and inclusive bilingual communications—face due to the anticompetitive trademark efforts, either foreign or domestic. For example, here, competition led a U.S.-based company to adopt a creative and inclusive marketing strategy to better serve the Hispanic community. But if the Fourth Circuit decisions stand, that community will be deprived of a product they know and understand.

II. This Court should grant the Petition because the questions presented are important and the Hispanic community would benefit from more competition between businesses.

A. Hispanics are the country's second largest racial or ethnic group and second fastest growing population, but they face unique health-related issues.

In the last decade, the Hispanic share of the total U.S. population increased from 16 percent (about 50.7 million) to 18 percent (about 60.6 million).⁴ Over this period, Hispanics accounted for about 52 percent of all U.S. population growth.⁵ As of 2018, Hispanics of Mexican origin account for a little more than 60 percent (about 37 million) of the country's overall Hispanic population.⁶

⁴ Significantly, in 1970, Hispanics made up just 5 percent of the U.S. population. Jens Manuel Krogstad and Luis Noe-Bustamente, *Key facts about U.S. Latinos for National Hispanic Heritage Month*, PEW RESEARCH CENTER, Sept. 9, 2021 (“Key facts”), <https://www.pewresearch.org/fact-tank/2020/09/10/key-facts-about-u-s-latinos-for-national-hispanic-heritage-month/>.

⁵ Jens Manuel Krogstad, *Hispanics have accounted for more than half of total U.S. population growth since 2010*, PEW RESEARCH CENTER, July 10, 2020, <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/>.

⁶ Krogstad, *Key facts*, *supra*.

Hispanics are the country's second largest racial or ethnic group, behind White non-Hispanics,⁷ and the country's second-fastest-growing racial or ethnic group, after Asian-Americans.⁸ The U.S. Census projects that the country's Hispanic population will reach 109 million by 2059.⁹

Despite their growing presence in this country, Hispanics are faced with substantial barriers to education, wealth, and health. One of those barriers is language—in particular, English fluency. “Language fluency varies among Hispanic subgroups who reside within the mainland United States. Census 2019 data shows that . . . 28.4 percent of Hispanics state that they are not fluent in English.”¹⁰

⁷ Luis Noe-Bustamente, et al., *U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed*, PEW RESEARCH CENTER, July 7, 2020, <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/>.

⁸ Krogstad, *Key facts, supra*.

⁹ Nicole Acevedo, *Even amid ‘trying times,’ Latinos are nation’s growth engine, Nielsen report finds*, NBC NEWS (Aug. 12, 2019, 6:00 AM PDT) (“Trying times”), <https://www.nbcnews.com/news/latino/even-amid-trying-times-latinos-are-nation-s-growth-engine-n1041236>.

¹⁰ U.S. Department of Health and Human Services, Office of Minority Health, *Profile: Hispanic/Hispanic Americans* (last modified Apr. 5, 2021), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=64>

This matters because “Hispanic health is often shaped by factors such as language/cultural barriers, lack of access to preventive care, and the lack of health insurance.”¹¹ Regarding language and cultural barriers,¹² limited English proficiency can make navigating the complex U.S. healthcare system particularly challenging for Hispanics.¹³ As a result,

¹¹ *Id.*; see also Maren J. Coffman, et al., *Self-Prescription Practices in Recent Latino Immigrants*, 25 PUBLIC HEALTH NURSING (Boston, Mass.), no. 3, at 203-211 (2008), <https://doi.org/10.1111/j.1525-1446.2008.00697.x> (finding that the Latino immigrant population experience significant barriers to accessing health care, which forces them to engage in self-prescription practices and seek treatment alternatives including the purchase and use of drugs manufactured in México).

¹² Cultural barriers or differences include (1) Hispanics “are more likely than non-Latino whites to believe that antibiotics are necessary for their child’s or their illness”; (2) some Hispanics suggest “self-medicating with antibiotics was preferable to going to the doctor”; and (3) “a high level of importation of antibiotics into, and the acquisition of antibiotics without a prescription in, the United States.” Arch G. Mainous, III., Vanessa A. Diaz, and Mark Carnemolla, *Factors Affecting Latino Adults’ Use of Antibiotics for Self-Medication*, 21 JOURNAL OF AMERICAN BOARD OF FAMILY MEDICINE, no. 2, at 128 (March-April 2008) (“Factors Affecting”), <https://doi.org/10.3122/jabfm.2008.02.070149>.

¹³ Thomas J. Dilworth, Dave Mott, and Henry Young, *Pharmacists’ communication with Spanish-speaking patients: A review of the literature to establish an agenda for future research*, 5 RESEARCH IN SOCIAL AND ADMINISTRATIVE PHARMACY, no. 2, at 108-120 (June 2009) (“Pharmacists”), <https://doi.org/10.1016/j.sapharm.2008.05.005>; Arun Mohan, et

Hispanics may be marginalized in the U.S. healthcare system,¹⁴ which affects their overall health.¹⁵ To illustrate, a study “examined adverse events in 6 U.S. hospitals and found that almost half of the adverse events experienced by Limited English Proficiency (LEP) patients (49.1%) involved physical harm compared to only 29.5% of those experienced by English-speaking patients.”¹⁶

Language, however, is not an insurmountable barrier. Because product information labels are often “the most important source of information when consumers make decisions regarding product selection,” bilingual or Spanish labeling and communications offers many benefits for the country’s

al., *Development of a Patient-Centered Bilingual Prescription Drug Label*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, Oct. 4, 2013, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3815084/> (last visited Sept. 9, 2021).

¹⁴ *Id.*

¹⁵ For example, “Hispanics have been at a higher risk of hospitalization or death from COVID-19 than some other racial and ethnic groups in the U.S., according to data compiled by the U.S. Centers for Disease Control and Prevention.” Luis Noe-Bustamente, et al., *For U.S. Latinos, COVID-19 Has Taken a Personal and Financial Toll*, PEW RESEARCH CENTER, July 15, 2021, <https://www.pewresearch.org/race-ethnicity/2021/07/15/for-u-s-latinos-covid-19-has-taken-a-personal-and-financial-toll/>.

¹⁶ Dilworth, et al., *Pharmacists’*, *supra*.

growing Spanish-speaking population.¹⁷ And companies like Belmora occupy an important role by using bilingual packaging, as well as marketing and education that is accessible and appealing to the Spanish-speaking portion of the U.S. population.

B. Hispanics have significant purchasing power and companies with creative bilingual marketing efforts have an advantage over foreign-based companies with monolingual strategies.

While Hispanics may face unique health issues, they are by no means powerless; Hispanics have significant purchasing power in this country. By 2023, the Hispanic population's purchasing power is expected to reach *\$1.9 trillion*, “which is higher than the domestic gross product of countries such as Australia, Spain and Mexico.”¹⁸

Various companies have been trying to figure out the consumer habits of Hispanics. Recent reports shed some light on this issue: “*bilingualism* and family ties are fundamental to understand” Hispanics and their

¹⁷ Dilworth, et al., Pharmacists', *supra.*; Sujit S. Sansgiry, Surupa Chanda, and Gauri S. Shringarpure, *Impact of bilingual product information labels on Spanish-speaking adults' ability to comprehend OTC information*, 3 RESEARCH IN SOCIAL AND ADMINISTRATIVE PHARMACY, no. 4, 410-425, at 411 (Dec. 2007), <https://pubmed.ncbi.nlm.nih.gov/18082876/>.

¹⁸ Acevedo, Trying times, *supra.*

buying habits.¹⁹ This means that companies that implement or have implemented bilingual marketing efforts will be at a clear advantage with Hispanics:

Marketing to this sector in its preferred language could give you an upper hand against your competitors. This isn't just a guess: A 2018 report from Magna Global and Univision Communications assessed the efficacy of language-targeted ads as double that of ads in English among the 6,000 Hispanic customers studied. And a Nielsen study from the same year confirmed that ads in Spanish -- particularly those developed, not just translated into, Spanish -- are at a clear advantage when it comes to brand memorability and likability.

Aside from your traditional marketing campaigns, you should also consider making your inbound efforts bilingual.²⁰

¹⁹ *Id.* (emphasis added).

²⁰ Sean Hopwood, *Three Ways Your Company Can Target The Hispanic Market*, FORBES (Dec. 13, 2019, 8:00 AM EST), <https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2019/12/13/three-ways-your-company-can-target-the-hispanic-market/?sh=4fdeb91e40d4>; U.S. Translation Company, *Hispanic Buying Power and How to Reach It*, <https://ustranslation.com/blog/hispanic-buying-power/> (last visited Sept. 8, 2021).

This is particularly true when, as in this case, there is not a significant price difference between competing products.²¹

For years, some companies have understood the importance of bilingualism in the over-the-counter medication space. Belmora is one of those companies; in 2002, Mr. Belcastro, a registered pharmacist, established Belmora LLC “to provide a user-friendly menu of OTC drug products for common ailments to U.S. residents of Hispanic background.” Pet. for Writ of Certiorari, App. 167a. “Given the familiarity with FLANAX among a large subset of consumers in the United States, Belmora saw an opportunity to sell naproxen sodium pain relievers under the FLANAX name to American consumers.” Pet. for Writ of Certiorari, App. 5a. Belmora was motivated, in part, by the illegal importation of high-strength Mexican Flanax—a strength not approved by the FDA for over-the-counter use in the United States—by third parties and the use of that product by Hispanics, who have experienced serious adverse effects. *See* Pet. for Writ of Certiorari, App. 20a (“Given the widespread availability of Bayer’s FLANAX in Mexico, it is small

²¹ Compare <https://www.albertsons.com/shop/product-details.970110848.html> (listing a 24 220 mg caplets package for Aleve at \$4.99) with <https://www.walgreens.com/store/c/flanax-pain-reliever-fever-reducer-tablets/ID=prod6196269-product> (listing a 24 220 mg tablets at \$4.79).

wonder that the product has occasionally made its way across the border.”).²²

Utilizing bilingual—Spanish and English—packaging and labeling and Spanish advertising, Belmora began selling its FDA-approved Flanax Pain Reliever Tablets almost 20 years ago, primarily in neighborhoods with 10 percent or higher minority populations. Pet. for Writ of Cert., App. 5a-6a; 32a. Belmora has continued to sell its products in the United States, using the FLANAX name and bilingual labeling efforts throughout the course of this litigation.

Bayer, on the other hand, has marketed its Flanax in Mexico, where it is a “top-selling pain reliever.” Pet. for Writ of Cert., App. 5a; 168a. Mexican Flanax, however, is sold over-the-counter to Mexican consumers at a high strength—*275 mg per tablet*. This high-strength dose is approved by the FDA only for prescription use in the United States. The FDA has approved non-prescription (over-the-counter) sale and use of Belmora’s Flanax and Bayer’s Aleve at the lower strength of *220 mg per tablet*.

²² See also FDA Adverse Events Reporting System (FAERS) Public Dashboard, <https://fis.fda.gov/sense/app/d10be6bb-494e-4cd2-82e4-0135608ddc13/sheet/45beeb74-30ab-46be-8267-5756582633b4/state/analysis> (data as of June 30, 2021) (listing serious cases involving U.S. consumers’ use of Bayer’s Flanax) (to access the relevant information, search by product for “Flanax Naxopren”); see also Mainous, et al., Factors Affecting, *supra*.

While Bayer represented below that it has no intention of using its FLANAX mark in the United States, its Aleve products compete directly with Belmora's Flanax products. Br. for Appellants at 12, *Belmora LLC v. Bayer Consumer Care AG*, 2015 WL 3424738 (4th Cir. May 26, 2015).

C. The questions presented are important and this Court's guidance could affect Hispanics who would benefit from more competition between businesses.

NHMA is not the only party that has followed this case. Leading intellectual property scholars throughout the country have noted that,

In dispensing with use of a mark in the United States as a “condition precedent” to a Section 43(a) claim, *Belmora* is a watershed in the development of unfair competition law. . . .

Belmora's decoupling of unfair competition law from trademark law could enlarge the reach of unfair competition law exponentially. . . .

Christine Haight Farley, *The Lost Unfair Competition Law*, 110 Trademark Rep. 739, 797 (2020). “[T]he major impact of the Fourth Circuit’s decision in *Belmora* is that the principle of territoriality—the notion that trademark rights are national in

character—has essentially been abrogated in unfair competition cases.” Christine Haight Farley, *No Trademark, No Problem*, 23 B.U. J. Sci. & Tech. L. 304, 317 (2017). As a result, the Fourth Circuit’s “decision enables foreign parties, which neither have a U.S. trademark nor use the mark in the U.S., to strip U.S. trademark owners of his or her rights.” *Id.* at 307.

And while this dispute continues, courts are citing the Fourth Circuit’s *Belmora* rulings. *See, e.g., Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 743 F. App’x 457, 468 (D.C. Cir. 2018) (discussing “*Belmora*’s reading of Section 43(a)(1)(A)” in litigation between Mexican and American companies selling similar products in the United States);²³ *see also Industria de Alimentos Zenú*

²³ The *paleta* (Spanish for popsicle) dispute is strikingly similar to this dispute:

Paletas are frozen, fruit-based Mexican-style desserts akin to popsicles. Two vendors of paletas, one based in Mexico and one in the United States, assert conflicting trademark and false-advertising claims over words and images they use in their competing paleta sales in the United States. Productos Lacteos Tocumbo (Prolacto) is a Mexican paleta company whose owners claim their ancestor started the first paleteria in the Mexican state of Michoacán in the 1940s. Paleteria La Michoacana (PLM) is another paleta company, started by two Mexican-American brothers with pushcarts in northern California in the 1990s. Today PLM sells paletas in the United States through major retail outlets. The two companies now find themselves toe-to-

S.A.S. v. Latinfood U.S. Corp., 2017 WL 6940696, at *13 (D.N.J. Dec. 29, 2017) (recognizing that at least one court has questioned the reasoning of the *Belmora* court, but finding the Fourth Circuit’s 2016 opinion “persuasive” and declining to dismiss a Colombian company’s Section 43(a) claims alleging that the U.S. defendant was competing unfairly by registering and using the same company name).

This case provides an excellent opportunity for the Court to settle questions that have led to conflicting decisions in four Circuit Courts—the Second Circuit, the Fourth Circuit, the Ninth Circuit, and the Federal Circuit. Accordingly, the Court should grant review and address both important questions presented.

Finally, certiorari is appropriate under the circumstances of this case. If the Fourth Circuit decisions are allowed to stand, a large, fast-growing community will be legally deprived of a safe, effective

toe, both selling their wares in certain U.S. markets using variants of the name “La Michoacana” (meaning “the Michoacán woman”) and an image of a girl in traditional dress holding a paleta or ice cream cone (the “Indian Girl”). Broadly speaking, the parties dispute whether ProLacto or PLM, if either, owns the contested phrase and image—and, accordingly, which paleta company, if either, unfairly competed or otherwise infringed the other’s trademark rights.

Paletteria La Michoacana, 743 F. App’x at 458-59.

product they know and understand in their native tongue.

CONCLUSION

For the reasons stated above, NHMA respectfully urges the Court to grant Belmora LLC and Jamie Belcastro's Petition for Writ of Certiorari.

Dated: September 10, 2021.

Respectfully submitted,

Bruce L. Campbell

Counsel of Record

Iván Resendiz Gutierrez

MILLER NASH LLP

111 SW Fifth Ave., Ste. 3400

Portland, Oregon 97204

(503) 224-5858

bruce.campbell@millernash.com

ivan.resendiz@millernash.com

Counsel for Amicus Curiae