No. 15-933

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
PETITIONERS
v.
STATE OF NEW HAMPSHIRE

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN PETROLEUM INSTITUTE, AND THE AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities III

Interests of *Amici Curiae* 1

Summary of Argument 2

Argument 3

I. The Decision Below Cannot Be Reconciled With Bedrock Principles Of Due Process That Protect Defendants At Trial 3

A. The Due Process Clause Guarantees The Right To Present Every Available Defense At Trial And Protects Against Arbitrary Deprivations Of Property 5

B. The Decision Below Violates These Basic Guarantees Of Due Process 6

C. The Decision Below Also Widens Splits Over Whether The Due Process Clause Permits "Trial by Formula" 9

II. This Case Is An Ideal Vehicle For The Court To Clarify That The Due Process Clause Forbids The Kind Of "Trial By Formula" This Court Has Previously Condemned 12

A. This Case Squarely Presents The Due Process Issue Underlying "Trial By Formula" 12

B. Addressing The Constitutional Implications Of "Trial By Formula" In The Context Of A *Parens Patriae* Suit

Is Important Given The Rise Of Such Suits 14

III. This Court's Review Is Also Necessary Because "Trial by Formula" Distorts Outcomes And Encourages Speculative Litigation 20

Conclusion 24

TABLE OF AUTHORITIES

Cases

American Sur. Co. v. *Baldwin*,
287 U.S. 156 (1932) 5, 8

Ashwander v. *Tennessee Valley Auth.*,
297 U.S. 288 (1936) 13

BMW of N. Am., Inc. v. *Gore*,
517 U.S. 559 (1996) 4

Bouaphakeo v. *Tyson Foods, Inc.*,
765 F.3d 791 (8th Cir. 2014) 11

Braun v. *Wal-Mart Stores, Inc.*,
24 A.3d 875 (Pa. Super. Ct. 2011) 10

Castano v. *American Tobacco Co.*,
84 F.3d 734 (5th Cir. 1996) 22

Dow Chem. Co. v. *Industrial Polymers, Inc.*,
No. 14-1091 (filed Mar. 9, 2015) 11

Duran v. *U.S. Bank Nat'l Ass'n*,
325 P.3d 916 (Cal. 2014) 9

Eisen v. *Carlisle & Jacquelin*,
479 F.2d 1005 (2d Cir. 1973) 19

Foster v. *Illinois*,
332 U.S. 134 (1947) 4

Freeman v. *Blue Ridge Paper Products, Inc.*,
551 F.3d 405 (6th Cir. 2008) 15

Goldberg v. *Kelly*,
397 U.S. 254 (1970) 5

Grannis v. *Ordean*,
234 U.S. 385 (1914) 5

Cases—continued: **Page(s)**

Hurtado v. *California*,
110 U.S. 516 (1884) 4

In re Fibreboard Corp.,
893 F.2d 706 (5th Cir. 1990) 11

In re Grand Jury Proceedings,
616 F.3d 1186 (10th Cir. 2010) 13

In re MTBE Prods. Liab. Litig.,
209 F.R.D. 323 (S.D.N.Y. 2002) 7

In re Urethane Antitrust Litig.,
768 F.3d 1245 (10th Cir. 2014) 11

Lindsey v. *Normet*,
405 U.S. 56 (1972) 5

McLaughlin v. *American Tobacco Co.*,
522 F.3d 215 (2d Cir. 2008) 5, 11

Millett v. *Atlantic Richfield Co.*,
No. CV-98-555, 2000 WL 359979 (Me. Super. Mar. 2, 2000) 7

Mississippi ex rel. Hood v. *AU Optronics Corp.*,
134 S. Ct. 736 (2014) 15, 16

Mullins v. *Direct Digital, LLC*,
795 F.3d 654 (7th Cir. 2015) 5, 8

Ortiz v. *Fibreboard Corp.*,
527 U.S. 815 (1999) 4

Philip Morris USA v. *Williams*,
549 U.S. 346 (2007) 5

Phillips Petroleum Co. v. *Shutts*,
472 U.S. 797 (1985) 4

Cases—continued: **Page(s)**

Richards v. *Jefferson Cty.*,
517 U.S. 793 (1996) 4

Sacred Heart Health Sys., Inc. v. *Humana Military Healthcare Servs., Inc.*,
601 F.3d 1159 (11th Cir. 2010) 13

State Farm Mut. Auto. Ins. Co. v. *Campbell*,
538 U.S. 408 (2003) 5, 8

TXO Prod. Corp. v. *Alliance Res. Corp.*,
509 U.S. 443 (1993) 4

United States v. *Armour & Co.*,
402 U.S. 673 (1971) 5, 8

Wal-Mart Stores, Inc. v. *Dukes*,
131 S. Ct. 2541 (2011) 3, 12, 13

Wal-Mart Stores, Inc. v. *Lopez*,
93 S.W.3d 548 (Tex. App. 2002) 10

Statutes

27 U.S.C. § 2072..... 10, 12

28 U.S.C. § 1332..... 15

28 U.S.C. § 1711..... 15

Rules

Fed. R. Civ. P. 23 .....passim

Miscellaneous

Amy J. Wildermuth,
Why State Standing in Massachusetts v. EPA Matters, 27 J. Land Resources & Envtl. L. 273 (2007)..... 17

Miscellaneous—continued: **Page(s)**

Ann Woolhandler & Michael G. Collins,
State Standing,
81 Va. L. Rev. 387 (1995) 17

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No. 14-1146 (Aug. 14, 2015) 2

David A. Dana,
Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae *Litigation by Contingency Fee*,
51 DePaul L. Rev. 315 (2001) 19

Donald G. Gifford
Impersonating the Legislature: State Attorneys General and Parens Patriae *Product Litigation*,
49 B.C. L. Rev. 913 (2008) 17

Edward Brunet,
Improving Class Action Efficiency by Expanded Use of Parens Patriae *Suits and Intervention*,
74 Tul. L. Rev. 1919 (2000) 17

Miscellaneous—continued: **Page(s)**

Joseph B. Prater, Comment,
West Virginia's Painful Settlement: How the OxyContin Phenomenon and Unconventional Theories of Tort Liability May Make Pharmaceutical Companies Liable for Black Markets,
100 Nw. U. L. Rev. 1409 (2006) 18

Kristen L. Wenger, Note,
The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation,
38 Fla. St. U. L. Rev. 679 (2011)..... 22

Margaret H. Lemos,
Aggregate Litigation Goes Public: Representative Suits by State Attorneys General,
126 Harv. L. Rev. 486 (2012) 14, 17, 18, 19

Mark Moller,
The Anti-Constitutional Culture of Class Action Law,
30 Regulation 50 (Summer 2007) 22

Patrick Hayden, Comment, *Parens Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of* Mississippi ex rel. *Hood v. AU Optronics Corp.*, 124 Yale L.J. 563 (2014)..... 15

Richard P. Ieyoub & Theodore Eisenberg,
State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae,
74 Tul. L. Rev. 1859 (2000) 17

Miscellaneous—continued: **Page(s)**

Sarah Rajski, Comment, In re Hydrogen Peroxide*:*
Reinforcing Rigorous Analysis for Class Action Certification,
34 Seattle U. L. Rev. 577 (2011) 22

State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,
114th Cong. 6 (Feb. 27, 2015) 23

The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation (2015) 20

Thomas H. Koenig & Michael L. Rustad,
Reconceptualizing the BP Oil Spill as Parens Patriae *Products Liability*,
42 Hous. L. Rev. 291 (2012) 18

Timothy Meyer, Comment,
Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism,
95 Cal. L. Rev. 885 (2007) 18

Victor E. Schwartz & Cary Silverman,
The Rise of 'Empty Suit' Litigation. Where Should Tort Law Draw the Line?,
80 Brook. L. Rev. 599 (2015) 21

Miscellaneous—continued: **Page(s)**

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major industry sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The American Petroleum Institute ("API") is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API's more than 650 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a

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[1] Petitioners have filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs. Respondent has consented to the filing of this brief. A letter evidencing its consent has been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund its preparation or submission. No person other than *amici*, their members, and their counsel made any monetary contribution to its preparation and submission. All parties received timely notice of this filing. The notice letters have been lodged with the Clerk of this Court.

growing grassroots movement of more than 30 million Americans.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is an $801 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for fourteen percent of all U.S. exports.

Amici have a profound interest in ensuring that their members—and defendants in all industries—receive their full measure of due process protection at trial, and are not subject to results-oriented shortcuts such as "Trial by Formula." To this end, *amici* have filed briefs *amicus curiae* in other cases addressing similar issues. See, *e.g.*, Brief of *Amici Curiae* National Association of Manufacturers, Alliance of Automobile Manufacturers, Association of Home Appliance Manufacturers, American Tort Reform Association, American Petroleum Institute, and Metals Service Center in Support of Petitioner, *Tyson Foods, Inc. v. Bouaphakeo et al.*, No. 14-1146 (Aug. 14, 2015).

SUMMARY OF ARGUMENT

The New Hampshire Supreme Court departed from well-settled due process principles by upholding the $236 million damage award that the State of New Hampshire obtained against Exxon Mobil Corporation ("Exxon"). Here, the trial court permitted the State to establish that Exxon was liable for contami-

nation involving the gasoline additive MTBE[2] in private wells across the State, including non-existent but potential future wells, based only on evidence from a small sample of wells and some statistical extrapolation by an expert witness. This was the kind of "Trial by Formula" that the Court condemned as inconsistent with the Due Process Clause in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011).

The state court's holding contravenes the bedrock principles that defendants in a civil trial must be permitted to raise every available defense and may not be arbitrarily deprived of property. The holding also deepens the split among the circuits and state courts over whether "Trial by Formula" is constitutionally permissible. The Court's review is necessary to resolve that split, and to prevent *parens patriae* suits filed in state court from becoming a convenient avenue for States to avoid the protections afforded to defendants in conventional class actions. Finally, the Court's review is needed to curb the abusive and speculative litigation that stems from the use of "Trial by Formula," whether in class actions or *parens patriae* suits.

ARGUMENT

I. The Decision Below Cannot Be Reconciled With Bedrock Principles Of Due Process That Protect Defendants At Trial

The New Hampshire Supreme Court failed to apply longstanding and fundamental principles of due

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[2] Methyl tertiary butyl ether increases the fuel's octane levels to help it burn more efficiently and cleanly. Pet. App. 2.

process, thereby conflicting with precedents of this Court and subjecting Exxon to unconstitutional limitations on its defense at trial.

The Due Process Clause imposes basic guarantees of fair procedure in a civil trial where the plaintiff seeks money damages from the defendant. See *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 453-454 (1993). The Clause requires that trials conform to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hurtado* v. *California*, 110 U.S. 516, 535 (1884); see also *Richards* v. *Jefferson Cty.*, 517 U.S. 793, 797-798 & n.4 (1996) (holding that state-law rules may not trench on fundamental federal rights, such as due process); *Foster* v. *Illinois*, 332 U.S. 134, 136 (1947) (explaining that the Clause imposes "a conception of fundamental justice").

These protections apply fully to even the most complex of civil trials, including collective actions. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846-848 (1999); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (emphasizing that the "Due Process Clause * * * requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Moreover, these basic due process protections extend to every civil defendant, even "a large corporation." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996).

A. The Due Process Clause Guarantees The Right To Present Every Available Defense At Trial And Protects Against Arbitrary Deprivations Of Property

The core protection of due process "is the opportunity to be heard." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)). That opportunity must be "meaningful." *Ibid.* The Court has repeatedly recognized, in the context of civil trials, that this requirement is satisfied only if the defendant has "an opportunity to present every available defense." *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932); *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (same); *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (same). Indeed, a defendant in a civil trial has a "right to litigate the issues raised, a right guaranteed to him by the Due Process Clause." *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971).

The Court has also recognized that a damage award violates the Due Process Clause if the award "constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003). A damage award is arbitrary where it "furthers no legitimate purpose." *Ibid.* One such instance of arbitrary deprivation is where the award exceeds the defendant's actual liability. See, *e.g.*, *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) ("[A] defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability."), petition for cert. pending, No. 15-549 (filed Oct. 26, 2015); *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) ("Roughly estimating the

gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability.").

B. The Decision Below Violates These Basic Guarantees Of Due Process

The "Trial by Formula" approach permitted in this case allowed the State to make sweeping claims based on a small sample, while hamstringing Exxon's ability to defend against those claims. The State was allowed to present expert testimony about a handful of wells as the basis for claims involving thousands of existing wells and hundreds of *potential* future wells. See Pet. 9-10, 12; Pet. App. 4-5, 58-65. In contrast, Exxon was not permitted to raise every available defense to challenge its liability for those thousands of wells, because the "Trial by Formula" allowed the State to claim damages without even identifying any particular wells. Specifically, Exxon was not able to argue that a third party had caused the contamination in a particular well, or even to deny that a particular well was contaminated with MTBE. Those limitations on Exxon's defense turned the trial into a mockery because of the role causation plays in trials involving allegations of MTBE contamination.

MTBE is an EPA-approved additive to high-octane gasoline that makes the gas burn cleaner and more efficiently. Pet. App. 2. See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 572, 575 (2006). MTBE does not enter water supplies on its own, or as a result of be-

ing used in an engine. Instead, it enters water supplies when the gasoline containing it is leaked into the ground. Schwartz & Goldberg, 45 Washburn L.J. at 572-573. Crucially, "the major source of [such] leakage is poorly maintained underground storage tanks at gasoline stations," with "[a]dditional pollution com[ing] from leaking above-ground tanks, pipes, farm run-off, and run-off from consumers who spill when filling the gas tanks in their automobiles." *Id.* at 573.

As a result, one of the crucial issues—and usually *the* crucial issue—in a suit alleging MTBE contamination of property is establishing whether the defendant was in fact responsible for the leak. See Schwartz & Goldberg, 45 Washburn L.J. at 576-577. Indeed, the individualized nature of the causation inquiry has consistently led courts to refuse to certify proposed classes of plaintiff-property owners alleging MTBE contamination of their property. See, *e.g.*, *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 344 (S.D.N.Y. 2002) (refusing to certify a class of private well owners based in part on "differences in * * * the source of the contamination"); *Millett* v. *Atlantic Richfield Co.*, No. CV-98-555, 2000 WL 359979, at *13 (Me. Super. Mar. 2, 2000) (denying class certification because causation "cannot be proven on a class-wide basis"). Yet Exxon was prevented from making these crucial inquiries regarding the sources and causation of contamination for the wells in question.

Permitting proof by aggregate statistical evidence not only hampered Exxon's ability to raise its best defenses, but also unjustifiably expanded its liability in two ways. First, it multiplied the scope of Exxon's liability by allowing the State to make predictive ex-

trapolations that resulted in the State receiving money damages for prospective wells that may never be drilled. Second, it forced Exxon to shoulder the sole responsibility for those damages by preventing it from demonstrating that third parties were actually liable for the MTBE contamination. As a result, the damages were effectively rigged to render Exxon liable for more than it owed based on its actual conduct.

By endorsing this "Trial by Formula" approach, the state court's decision deprived Exxon of its constitutional due process rights in two distinct ways. *First*, Exxon was not permitted to raise "every available defense" against New Hampshire's claims. See *American Sur. Co.*, 287 U.S. at 168. It should not have been forced to defend against a form of proof that necessarily prevented it from raising the causation and third-party-liability defenses that went to the heart of the "issues raised." *Armour & Co.*, 402 U.S. at 682. *Second*, the "Trial by Formula" allowed the State to obtain damages that exceeded Exxon's actual liability, which "constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417; *Mullins*, 795 F.3d at 669. The damages awarded to the State were nominally compensatory. See Pet. App. 4-5, 79. Yet the State never proved: (1) that Exxon was responsible for the contamination of specific existing wells; or (2) that the future wells would actually be dug in the future such that they would need to be treated for MTBE contamination. Thus, the "Trial by Formula" violated Exxon's "due process right not to pay in excess of its liability." *Mullins*, 795 F.3d at 669.

C. The Decision Below Also Widens Splits Over Whether The Due Process Clause Permits "Trial by Formula"

This Court's review is also warranted because the New Hampshire Supreme Court's decision—which permitted the State to establish liability and damages based on aggregate, statewide statistical evidence—conflicts with precedents of other courts regarding the constitutionality of "Trial by Formula."

To begin, the decision widens a split among the state courts over whether "Trial by Formula" violates the Due Process Clause. As of now, two courts hold that it does, and two hold that it does not.

The two courts to hold that "Trial by Formula" violates due process have focused on the denial of the defendant's right to present every available defense. The California Supreme Court has held that the Due Process Clause prohibits establishing claims about an entire class of plaintiffs in a state-law wage-and-hour suit by analyzing a "small sample group" and then "extrapolat[ing] the average amount of overtime reported by the sample group to the class as a whole." *Duran* v. *U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 920, 935 (Cal. 2014). That court rightly concluded that allowing such extrapolation violated due process because it "deprived [the defendant] of the ability to litigate its exemption defense." *Ibid.* at 935. Similarly, the Texas courts have held that, where employees bring a class action alleging breaches of their contracts, permitting "statistical evidence" to provide an estimate of the number and extent of the breaches would "preclude any individual inquiry" and thus violate the employer's due process rights. *Wal-Mart*

Stores, Inc. v. *Lopez*, 93 S.W.3d 548, 560-561 (Tex. App. 2002).

The two other state courts to address the issue have reached the opposite (and erroneous) conclusion. The Pennsylvania courts have held—in direct conflict with the Texas courts—that a class of plaintiff-employees may rely on statistical extrapolations to establish the number of times their employer breached their contracts, as well as to estimate the damages from those breaches. See *Braun* v. *Wal-Mart Stores, Inc.*, 24 A.3d 875, 950-951 (Pa. Super. Ct. 2011) (per curiam), aff'd, 106 A.3d 656 (Pa. 2014), petition for cert. pending, No. 14-1123 (filed Mar. 13, 2015). And here, the court below held that the State could do the same thing in the context of a *parens patriae* suit alleging damage to multiple properties: take a small sample of the properties at issue and use aggregate statistical evidence to draw conclusions about the entire group of properties. See Pet. App. 58-65.

The state court's decision also implicates and exacerbates the split among the federal courts of appeals over the permissibility of "Trial by Formula." The courts to forbid it have relied on additional authority beyond the Due Process Clause itself—with some relying on Federal Rule of Civil Procedure 23 and others on the Rules Enabling Act. See Fed. R. Civ. P. 23(a), (b); 27 U.S.C. § 2072(b). But that additional legal wrinkle does not change the practical reality that calls out for the Court's review: there is a growing rift between courts that (improperly) permit "Trial by Formula" and those that (properly) do not.

At least two circuits have held that "Trial by Formula" violates the Due Process Clause. The Fifth

Circuit has held that it would violate Rule 23(b)(3) and due process to permit a class action in which a putative class of 2,990 asbestos plaintiffs purported to bring claims based on evidence regarding only "41 representative plaintiffs," coupled with statistical extrapolations of what damages could be assigned to the entire class. See *In re Fibreboard Corp.*, 893 F.2d 706, 709-12 (5th Cir. 1990). And the Second Circuit has held that it would violate the Rules Enabling Act and the Due Process Clause to permit a class of plaintiffs to present evidence that would: (1) provide "an initial estimate of the percentage of class members who were defrauded"; and then (2) calculate the total amount of damage to the class "based on this estimate." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

In contrast, at least two circuits have held that "Trial by Formula" is permissible. The Tenth Circuit has held, in the context of an antitrust class action, that statistical evidence can be used to establish "class-wide impact and damages" based on a sampling of the class's members. See *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256 (10th Cir. 2014), petition for cert. pending *sub nom. Dow Chem. Co.* v. *Industrial Polymers, Inc.*, No. 14-1091 (filed Mar. 9, 2015). And the Eighth Circuit has held that an entire class of plaintiff-employees may seek damages based on a statistical average derived from a sample of the class's members. See *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791, 798-800 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (argued Nov. 10, 2015).

Given the importance of the constitutional issue dividing both the state courts and the circuits, it is imperative for this Court to resolve the matter.

II. This Case Is An Ideal Vehicle For The Court To Clarify That The Due Process Clause Forbids The Kind Of "Trial By Formula" This Court Has Previously Condemned

A. This Case Squarely Presents The Due Process Issue Underlying "Trial By Formula"

Here, the State used its *parens patriae* standing to present the kind of aggregate statistical evidence that the Court condemned in *Dukes*. See Pet. App. 58–65; *Dukes*, 131 S. Ct. at 2561. The question this case presents is whether permitting a plaintiff to establish liability and damages based on this kind of aggregate statistical evidence offends the federal Due Process Clause. As explained above, answering that question is necessary to resolve a disagreement among both the state and federal courts. See *supra* pp. 9-11.

In contrast, a federal class action is unlikely to permit the Court to squarely resolve the constitutional due process issue. That is due to the interplay of Federal Rule of Civil Procedure 23, the Rules Enabling Act, and the canon of constitutional avoidance.

To begin, Rule 23 itself was designed to embody the dictates of due process. See Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (noting that Rule 23 was amended "to assure procedural fairness" and designed "to assure the fair conduct of [class] actions"); *ibid.* (note on subd. (b)(3) explaining that Rule 23(b)(3) exists to promote expediency "without sacrificing procedural fairness"). Further, the Rules Enabling Act provides that Rule 23(b) cannot "enlarge or modify any substantive right" of a litigant. 27 U.S.C. § 2072(b). The right to due process

of law is part of "the bundle of rights" protected by the Rules Enabling Act. *In re Grand Jury Proceedings*, 616 F.3d 1186, 1197 (10th Cir. 2010); compare *Sacred Heart Health Sys., Inc.* v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) ("The Rules Enabling Act * * * and due process * * * prevent[] the use of class actions from abridging the substantive rights of any party."). So the Rules Enabling Act provides a statutory avenue for resolving due process problems in a federal class action. Federal courts can hold, based on their statutory duty to preserve parties' substantive rights, that Rule 23 does not permit class certification to be premised on constitutionally problematic procedures or evidence.

This statutory avenue makes it unlikely that the Court will reach the ultimate constitutional question whether the Due Process Clause permits "Trial by Formula" in a case that arose in federal court. After all, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). That is why, in *Dukes*, the "serious possibility" that due process requires "notice and opt-out" even where "monetary claims do not predominate" led the Court to conclude that Rule 23(b)(2) did not permit certification of the plaintiffs' claims for backpay. See 131 S. Ct. at 2557-2559. The upshot is that, when this Court hears an appeal from a federal class action that raises a legitimate question as to whether a "Trial by Formula" violated due process, the Court may resolve the issue by applying

Rule 23 or the Rules Enabling Act to avoid the potential due process question.

The Court should therefore grant certiorari here, where the due process question is squarely presented, to ensure that this important and persistent constitutional issue does not continue to divide both the state and federal courts and present unconscionable risks to defendants in state court *parens patriae* actions.

B. Addressing The Constitutional Implications Of "Trial By Formula" In The Context Of A *Parens Patriae* Suit Is Important Given The Rise Of Such Suits

Respondent may try to downplay this case's contribution to the growing split over the constitutionality of "Trial by Formula" by arguing that the *parens patriae* standing on which the State relied here distinguishes it from the class action cases discussed above. See *supra* pp. 9-11. Not so. The trial here was the functional equivalent of a conventional class action brought by a group of private landowners. Furthermore, addressing the phenomenon of "Trial by Formula" in the context of *parens patriae* suits is important given the States' growing use of such suits to avoid federal jurisdiction and the procedural protections of conventional class actions.

This case is part of a recent surge in *parens patriae* suits. The number of reported[3] *parens patriae* ac-

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[3] The actual number of *parens patriae* suits is much higher, but the fact that they tend to settle before any written opinion is issued makes identifying the true number impracticable. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 498 (2012).

tions filed annually in state courts nationwide has risen 93% in recent years—from an average of 77 per year during the period 1997 to 2004, to an average of 148 from the period 2006 to 2013. See Patrick Hayden, Comment, *Parens Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of* Mississippi ex rel. *Hood v. AU Optronics Corp.*, 124 Yale L.J. 563, 569 n.38 (2014).

One major explanation for this recent surge is the passage of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). See Hayden, 124 Yale L.J. at 569 n.38. Congress passed CAFA to combat "abuses of the class action device" in state courts. See 28 U.S.C. § 1711 note, § 2(a)(2). The statute creates federal jurisdiction over any "class action" or "mass action" that involves an aggregate amount in controversy exceeding $5 million. See *id.* § 1332(d)(2), (d)(6), (d)(11). A *parens patriae* suit avoids removal under CAFA because there is only one plaintiff: the State. See Hayden, 124 Yale L.J. at 564, 567. The number of *parens patriae* suits is likely to grow further after the recent decision in *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736, 741-744 (2014), which held that *parens patriae* suits cannot be removed under CAFA.

There is thus a real risk that *parens patriae* suits will continue to multiply as a means for plaintiffs' attorneys to "artificially structur[e] their suits to avoid federal jurisdiction." *Freeman* v. *Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 407 (6th Cir. 2008). That would subvert Congress's purpose in passing CAFA. See *ibid.*; Hayden, 124 Yale L.J. at 568-69. As one member of the Court observed at oral argument in *AU Optronics Corp.*, nothing would "pre-

vent[] attorneys general from around the country sitting back and * * * as private class actions proceed * * * taking the same complaint, maybe even hiring the same lawyers [and then] bring[ing a] parens patriae action." Transcript of Oral Argument at 17, *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736 (2014) (No. 12-1036).

Such a development would significantly impede defendants' ability to fully and fairly litigate the claims against them. Most notably, *parens patriae* suits in state court are not necessarily subject to the kinds of procedural safeguards found in Rule 23. See Fed. R. Civ. P. 23(a), (b). For example, here the court below decided that because the State was the sole plaintiff, it could brush aside concerns about whether the handful of wells in the small sample were typical of, and shared sufficient common features with, the thousands of private wells at issue. See Pet. App. 100-102, 124-126. But those requirements help ensure that permitting aggregation of a group of claims does not unduly prejudice defendants by preventing them from raising relevant defenses. See Fed. R. Civ. P. 23(a)(3).

Furthermore, *parens patriae* suits are not only on the rise, but also increasingly resemble the kinds of private class actions that place undue pressure on defendants to settle questionable claims rather than risk economic ruin. Suits like the one against Exxon—brought based on the "quasi-sovereign" interest in the "health and overall economic well-being" of the State's citizens—allow States to allege the kind of individualistic harms that one finds in class actions or other mass-tort suits. See Edward Brunet, *Improving Class Action Efficiency by Expanded Use of*

Parens Patriae *Suits and Intervention*, 74 Tul. L. Rev. 1919, 1922 & n.12 (2000); Lemos, 126 Harv. L. Rev. at 493 ("[S]tate attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action."). Many commentators have recognized that *parens patriae* suits are routinely used as an alternative to private class actions. See Brunet, 74 Tul. L. Rev. at 1922 & n.12; Lemos, 126 Harv. L. Rev. at 499 n.51 (collecting sources); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 512 (1995) ("The *parens patriae* label, however, often merely dresses up actions that private parties could easily bring."); Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA Matters, 27 J. Land Resources & Envtl. L. 273, 300 (2007) ("[T]he emphasis on harm to a substantial segment of the population suggests that this type of [*parens patriae*] suit is similar to a class action.").

The broad nature of the "quasi-sovereign interest" in the citizenry's physical and economic well-being has permitted States to file *parens patriae* suits against manufacturers, service providers, energy producers, and nearly every other industry. Suits against manufacturers have included: landmark multi-billion-dollar suits against tobacco companies[4] and lead paint makers;[5] and multi-million dollar

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[4] See Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 Tul. L. Rev. 1859, 1859-60 & nn.1-3 (2000).

[5] See Donald G. Gifford *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. Rev. 913, 926, 941 n.193 (2008).

suits against pharmaceutical companies[6] and handgun manufacturers.[7] Suits involving service industries have included: multi-million-dollar suits claiming predatory lending practices by mortgage companies; suits against home builders for allegedly "shoddy and incomplete work"; and suits against cable providers for alleged consumer fraud.[8] Further, suits against energy producers have included multi-billion-dollar claims for negligence and other torts based on oil spills,[9] as well as suits against utility companies claiming that global warming is a public nuisance to the States' citizens.[10]

Additionally, *parens patriae* suits are often litigated by private attorneys with a profit motive. States have increasingly adopted the strategy of farming out *parens patriae* suits to private attorneys who litigate the suit on behalf of the State in exchange for a contingency fee. See Lemos, 126 Harv. L. Rev. at 524 & n.159; Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 Cal. L. Rev. 885, 897 (2007). Because of the contingency fee ar-

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[6] See Joseph B. Prater, Comment, *West Virginia's Painful Settlement: How the OxyContin Phenomenon and Unconventional Theories of Tort Liability May Make Pharmaceutical Companies Liable for Black Markets*, 100 Nw. U. L. Rev. 1409, 1410, 1428-29 (2006).

[7] Most of these suits were brought under a *parens patriae* theory, but by cities or counties instead of the state attorney general. See Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the BP Oil Spill as* Parens Patriae *Products Liability*, 42 Hous. L. Rev. 291, 306 n.67 (2012).

[8] See Lemos, 126 Harv. L. Rev. at 498-99 n.50.

[9] See Koenig & Rustad, 49 Hous. L. Rev. at 320-24 & nn.154, 156-57, 163-66.

[10] See *id.* at 306 n.65.

rangement and the profit motive for the private attorney, such suits are usually tried in the manner that maximizes the monetary relief obtained from the defendant—often at the expense of equitable and other non-monetary relief that may better serve the State's quasi-sovereign interest. See David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001).

Because of the overwhelming economic pressure *parens patriae* cases bring to bear, defendants usually settle. See Lemos, 126 Harv. L. Rev. at 498; see also *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973) ("[P]ossible recoveries run into astronomical amounts [and] generate more leverage and pressure on defendants to settle * * * ."), vacated and remanded on other grounds, 417 U.S. 156 (1974). That tendency toward settlement heightens the need for the Court to grant certiorari and clarify the due process limitations on the "Trial by Formula" for three reasons. *First*, the relative rarity of fully-litigated *parens patriae* cases means the Court may not have a similar opportunity to decide this recurring issue any time soon. *Second*, depriving defendants of their due process right to raise every available defense is part of the pressure that forces settlements and keeps many cases beyond review of the courts. Defendants facing an unconstitutional "Trial by Formula" are often forced to waive their right to trial as a matter of economic prudence. *Finally*, as explained below, skewing the litigation process to favor settlement has severe repercussions for the American economy. See *infra* Part III.

III. This Court's Review Is Also Necessary Because "Trial by Formula" Distorts Outcomes And Encourages Speculative Litigation

The Court should also grant certiorari and reverse the decision below because permitting "Trial by Formula"—either in a class action or a *parens patriae* suit—encourages plaintiffs to bring weak and inflated claims, resulting in abusive settlements and an unjustifiable drag on the American economy. American businesses already spend $2 billion per year on class actions, with more than 50% of major companies engaged in class actions at any given time. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 3, 6 (2015). Enabling the further growth of "Trial by Formula" will increase this burden even further by (1) permitting plaintiffs to bring costly suits based on weak claims, and (2) allowing plaintiffs to improperly inflate these claims through the use of statistical extrapolation.

1. First, permitting "Trial by Formula" allows plaintiffs to avoid individualized causation inquiries and thereby hold innocent defendants liable for massive damage awards. This case illustrates how the use of aggregate statistical evidence allows plaintiffs to extract damages from defendants that they could not obtain if their claims were tried one-by-one. Because the State was allowed to claim damages to a statistical abstraction instead of to specific wells, it was able to effectively presume that Exxon was solely responsible for MTBE contamination at those thousands of wells. See *supra* p. 7. After all, there was no way for Exxon to identify the particular wells at issue and demonstrate that a third party was responsible

for the leak (or that there was no contamination). If left to stand, this precedent will leave a host of manufacturers open to similar suits. There are "literally thousands of products [that] could cause harm if they are improperly stored." Schwartz & Goldberg, 45 Washburn L.J. at 574. Under the state court's "Trial by Formula," plaintiffs can hold manufacturers liable for harms that were actually caused by third parties' improper storage of those products.

2. Second, permitting plaintiffs to use evidence of a small sample, coupled with statistical extrapolation, to establish liability and damages for all of their claims allows plaintiffs' attorneys to dramatically inflate the damage claims in a lawsuit. With *parens patriae* suits, like the one here, plaintiffs can claim damages to properties without taking the time to establish that those properties were actually damaged at all, let alone damaged as a result of the defendant's alleged wrongful conduct. And in conventional class actions, "Trial by Formula" permits plaintiffs' attorneys to wildly inflate the size of the class by sweeping uninjured individuals into the class. For example, plaintiffs' attorneys have relied on aggregate statistical evidence to successfully recover classwide damages based on alleged defects in front-loading clothes washers and various automobiles, even though many members of the classes did not experience any problems whatsoever with the products. See generally Victor E. Schwartz & Cary Silverman, *The Rise of 'Empty Suit' Litigation. Where Should Tort Law Draw the Line?*, 80 Brook. L. Rev. 599, 633-648 (2015) (describing both categories of "unmanifested product defects" lawsuits).

Allowing plaintiffs to rely on aggregate evidence to establish their claims raises the stakes of a lawsuit and the risk of a massive verdict—as well as the specter of bankruptcy. See Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, 30 Regulation 50, 53 (Summer 2007). Those heightened stakes force defendants to capitulate to legally questionable claims that they might otherwise challenge because of the risk of an astronomical jury verdict. See Sarah Rajski, Comment, In re Hydrogen Peroxide*: Reinforcing Rigorous Analysis for Class Action Certification*, 34 Seattle U. L. Rev. 577, 603, 607 (2011); see also *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting the "insurmountable pressure on defendants" that comes from "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citation omitted)). And, in an ironic and vicious cycle, those settlements encourage more lawsuits, which often rely on even more speculative claims. The end result is harm to honest companies, their shareholders, and their workers, as well as lost economic growth. See Kristen L. Wenger, Note, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 Fla. St. U. L. Rev. 679, 688 (2011) ("Critics of class action litigation have also pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations.").

Furthermore, the aggregation process often works to the disadvantage of the plaintiffs with the gravest injuries because the incentive to gather the largest class possible leads to "lowest common denominator" suits. See *State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 6 (Feb. 27, 2015) (statement of Chairman Goodlatte) (explaining that class members with injures have been "forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert").

In sum, allowing "Trial by Formula" helps a few enterprising plaintiffs' attorneys and state attorneys general, while doing substantial harm to honest companies, their employees, their shareholders, and the American economy. The Court's review—and reversal of the New Hampshire Supreme Court's decision—are therefore sorely needed to curb these abusive and unconstitutional practices.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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