No. 15-933

In The Supreme Court of the United States

EXXON MOBIL CORPORATION and
EXXONMOBIL OIL CORPORATION,

Petitioners,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Petition For A Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. 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 cost. These general concerns are implicated by the New Hampshire Supreme Court's decision.

The IADC also has a particular interest in the fair and efficient administration of class actions, which are increasingly global in reach, and which share many important characteristics with *parens patriae* actions like the one here. Foreign plaintiffs often seek class action relief in federal court for

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[1] This brief was authored by the IADC and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than the IADC or its counsel has made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties were timely notified more than 10 days prior to filing this brief. Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this *amicus curiae* brief. Letters indicating the parties' consent have been submitted to the Court.

alleged wrongs committed on foreign soil. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1567 (2007) ("Since few other countries have group or representative litigation devices, foreign victims often avail themselves of the class action device in order to bring their claims in U.S. courts. As a result, U.S. federal judges increasingly entertain motions to certify mixed U.S.-foreign claimant classes."); *see also In re Parlamat Sec. Litig.*, 497 F. Supp. 2d 526, 531, 540 (S.D.N.Y. 2007) (dismissing the claims of a class of Italian investors who alleged fraud against an Italian food and dairy company because "all of the U.S. conduct was clearly peripheral to the fraud itself").

Moreover, despite longtime skepticism about American class actions, several countries have begun to adopt their own class action procedures. Australia, Canada, and the European Union now provide some form of class relief. *See* Valerie Scott, *Access to Justice and Choice of Law Issues in Multi-Jurisdictional Class Actions in Canada*, 43 Ottawa L. R. 233 (2011-2013) (discussing class action cases and reform in Canada); Roald Nashi, *Italy's Class Action Experiment*, 43 Cornell Int'l L.J. 147 (2010) (analyzing Italy's class action regime, instituted in 2010); S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 Ariz. St. L.J. 233 (2013) (discussing the issues facing the European Union's

adoption of collective action); R. Mulheron, *The Class Action in Common Law Systems* 5 (Hart Publishing: Oxford 2005) (noting that Australia, British Columbia and Canada all have their own versions of class action procedures); Susan M. Sharko, et al., *Global Strategies and Techniques for Defending Class Action Trials: Defending the Global Company in Multinational Litigation*, 77 Def. Couns. J. 295 (2010). Other countries routinely look to the United States for guidance in developing their own class action mechanisms. *See* Strong, *supra*, 45 Ariz. St. L.J. at 234 (discussing the United States' role as a pioneer of class action cases, and the subsequent international acceptance of collective redress); Nashi, *supra*, 43 Cornell Int'l L.J. at 157 (comparing Rule 23 requirements with the Italian model). Other countries may also look to *parens patriae* actions in crafting their approaches to class and collective actions.

SUMMARY OF THE ARGUMENT

Exxon Mobil Corporation and ExxonMobil Oil Corporation (collectively, Exxon) raise important issues regarding the due process implications of statistical proof (or "Trial by Formula") in *parens patriae* lawsuits in their petition. In this *amicus curiae* brief, the IADC explores how *parens patriae* actions have transformed over time to achieve the same effects and implicate the same concerns as private class actions, and explains that as a result it makes little sense for them to be governed by different standards of due

process and fair play. This Court's class action precedent, embodied in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) and its progeny, forbids the type of statistical proof that the New Hampshire courts allowed here. The IADC urges the Court to make clear that the same principles apply equally in the *parens patriae* context.

ARGUMENT

I. *Parens Patriae* Actions Have Evolved into the Functional Equivalent of Private Class Actions, But Without the Procedural and Substantive Safeguards of Class Actions.

This case arises out of a *parens patriae* action brought by the state of New Hampshire against Exxon. *Parens patriae*, which literally means "parent of the country," is a doctrine of standing derived from centuries-old common law that provides the state with the authority to take legal responsibility for those without the capacity to represent themselves, such as children or the mentally infirm. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982). Over time the doctrine evolved to encompass the state litigating on behalf of sovereign or "quasi-sovereign" interests. *Id.* at 601. A state's sovereign interests include lawmaking authority and the ability to maintain its borders. *Id.* (quoting *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945)) (discussing constitutional litigation over the State's sovereign "power to create and enforce a legal

code, both civil and criminal," and the Supreme Court's role as a means for a state to peacefully "demand . . . recognition from other sovereigns" in matters such as border disputes). A state's "quasi-sovereign" interests cannot be so easily defined. *Alfred L. Snapp & Son*, 458 U.S. at 601. As this Court has noted, it is only through reference to past cases that the boundaries of a State's quasi-sovereign interests can be sketched out. *Id.* at 602 (noting that "the vagueness of this concept [of a quasi-sovereign interest] can only be filled in by turning to individual cases").

In *Alfred L. Snapp & Son*, this Court extracted from nearly a century of case law two types of quasi-sovereign interests: (1) the protection of "the health and well-being – both physical and economic" of "a sufficiently substantial segment of [a state's] population"; and (2) the preservation of a state's "rightful status within the federal system." *See id.* at 593. In both instances, the Court held that a state's *parens patriae* authority will lie so long as the interests asserted reflect a general interest of the state on behalf of its citizens. *Id.* at 601-02. A state's *parens patriae* authority does not, however, extend to a proprietary interest of the state (like land ownership or a business venture) or one so tied to the interests of select citizens that the state can only be viewed as being "a nominal party." *Id.*

The cases assessed by this Court in *Alfred L. Snapp & Son* did not involve the recovery of monetary damages for alleged mass torts like the one here.

Id. at 602-07. Indeed, the use of *parens patriae* power in the mass tort arena is a relatively new invention. Jay L. Himes, *State* Parens Patriae *Authority: The Evolution of the State Attorney General's Authority* 12 (2004), available at http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf. Perhaps the most prominent example of this practice would be the Tobacco cases of the late 1990s, in which numerous state attorneys general filed suit against the tobacco companies and ultimately recovered hundreds of billions of dollars in damages. *See, e.g.*, *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (permitting a State of Texas *parens patriae* suit against the tobacco industry to seek Medicaid losses); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10, 18 (La. Ct. App. 4th Cir. 1998) (affirming a trial court's order certifying a medical monitoring class of state residents); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996) (certifying a statewide tobacco class action); *see also* Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront To The Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 588 (Summer 2009) (discussing the $246 billion Tobacco Master Settlement Agreement, and the trial attorneys' receipt of $14 billion nationally in attorney fees).

Since then, states have increasingly relied on their citizens' "health and well-being" as the basis of *parens patriae* claims sounding in tort. *See* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of*

Parens Patriae *Suits and Intervention*, 74 Tul. L. Rev. 1919, 1921 (2000) ("Because of the perceived successful settlement of the state *parens patriae* tobacco cases, states have brought *parens patriae* suits against entire industries, including guns, lead paint, and more recently, health maintenance organizations."). As a result, *parens patriae* claims have begun to look more and more like private class actions under Rule 23. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 499 (2012) ("[*P*]*arens patriae* and other public actions that put money in the pockets of state citizens share much in common with damages class actions."). Just as in Rule 23 class actions, *parens patriae* suits like the one filed by New Hampshire against Exxon in this case purportedly seek to "achieve broad compensation" for a group of injured people. *Id.*; *see also* Brunet, *supra*, at 1922. Both also seek to "deter wrongful conduct by one or more defendants." Brunet, *supra*, at 1922.

These similarities are not accidental. Indeed, a number of scholars have suggested that *parens patriae* actions should replace private class actions altogether, because the state is the more appropriate proponent of the societal benefits that class actions seek to confer. *See, e.g.*, Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 362 (1999) (describing *parens patriae* actions as "an efficient

alternative to consumer class actions"); Jack Ratliff, Parens Patriae*: An Overview*, 74 Tul. L. Rev. 1847, 1847-49 (2000) (recommending an expanded role for *parens patriae* cases involving damages that would otherwise be the subject of a private class action).

This Court's class action jurisprudence imposes requirements on class actions that befit their role as an "exception to the usual rule that litigation is conducted by and on behalf of the named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). But these restrictions have not yet been expressly applied to *parens patriae* claims. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 660 (2012) (arguing that state attorneys general can and should "fill the void left by class actions" because "[*p*]*arens patriae* suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions").[2] This leaves an opening for *parens patriae* actions to be used to achieve the same effects as private class actions, but without a majority of the same procedural and substantive

[2] *See also Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014) (excluding *parens patriae* actions from the reach of the Class Action Fairness Act of 2005 (CAFA) because *parens patriae* actions involve just one named plaintiff (the state) while the class actions involve many named and unnamed plaintiffs).

hurdles. *See* Lemos, *supra*, at 500-01 ("Despite their apparent similarities, damages class actions and *parens patriae* suits are governed by markedly different procedural regimes.").

Attorneys general are no longer the only lawyers to litigate *parens patriae* actions either. Sophisticated class counsel often seek out opportunities to prosecute these actions on behalf of the states. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. Rev. 913, 964-68 (2008) (describing how states' *parens patriae* claims are often prosecuted by "a small cadre of sophisticated plaintiffs' mass products litigation firms"). These private attorneys often enter into contingency-fee agreements with state attorneys general, exchanging their expertise for a cut of the states' recovered damages. *See* Brunet, *supra*, at 1932 (discussing states' practice of hiring private attorneys as "buy[ing] expertise in class actions or the substantive underlying legal area"). The potential problems associated with this practice are well-documented, and include concerns that private attorneys on contingency agreements may seek higher damages rather than better results for a state's citizens.[3] *See, e.g.*, John H. Beisner, Matthew Shors &

[3] This case typifies these concerns. The state and its private counsel stand to recover a fortune from Exxon. Exxon's Pet. for Writ of Cert. Pet. 12. Yet they have more or less no obligation to use that money to benefit the interests they purported to represent. Pet. 13. While one might argue that political accountability will keep the state's expenditures on point, that seems questionable

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Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1455 (2004) (contrasting state attorneys general, who "often settle cases with public policy issues in mind," with private class action attorneys, who "typically have only fees and some recovery by class members in mind").

Even more troublesome – and more relevant to this case – are the very real concerns about private attorneys' reasons for seeking out contingency-fee agreements with states like New Hampshire in the first instance. Privately-litigated *parens patriae* lawsuits offer attorneys an opportunity to make class action claims, and garner class action attorney fees, without having to actually file a class action lawsuit.[4] This insulates them from this Court's class action jurisprudence – jurisprudence set in place to guard against some of the dangers that a collective action can pose to defendants and unnamed members alike. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so

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here, given that the State of New Hampshire does not know exactly whose water supplies have been tainted by MTBE, and therefore it would be difficult for any affected citizens to seek to hold the government accountable. Pet. 25-26.

[4] Indeed, Congress had these same dangers in mind when enacting CAFA. *See* 151 Cong. Rec. S1157, 1163-64 (daily ed. Feb. 9, 2005) (expressing concerns about plaintiffs' lawyers evading CAFA by "persuad[ing] a State attorney general to . . . lend the name of his or her office to a private class action").

increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-27 (1997) (discussing whether unnamed class members' interests would be adequately represented in a certified class).

The dangers that this Court has long recognized in the class action context apply with equal force in the case of *parens patriae* lawsuits. The verdict against Exxon itself demonstrates the existential threat (discussed by this Court in *Coopers*, 437 U.S. at 476) that an aggregated claim asserted under the doctrine of *parens patriae* can pose to defendants. And "[a]lthough the case law on the preclusive effect of public aggregate litigation is surprisingly sparse, the prevailing view is that the judgment in a state case is binding 'on every person whom the state represents as *parens patriae*.'" Lemos, *supra*, at 500 (quoting Farmer, *supra*, at 384); *see also Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) ("When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment."); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 554 (Ga. 2006) (holding that a punitive damages claim filed by decedent's estate against tobacco companies was barred by the master settlement between the tobacco companies and the states acting as *parens patriae*); *Bonovich v. Convenient Food Mart, Inc.*, 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (ruling

that defeat of an antitrust action brought by the attorney general under state law barred a similar action by a private party since "the Attorney General's action . . . was brought on behalf of all the people in the state . . . who were adversely affected by the alleged antitrust violations"). Thus, *parens patriae* actions can implicate the rights of injured citizens to recover damages from a tortfeasor in much the same way that class action judgments affect the rights of unnamed class members, even though the state itself may be the only plaintiff in the suit. *Mississippi ex rel. Hood*, 134 S. Ct. at 739.

II. This Court Should Make Clear That *Parens Patriae* Lawsuits and Private Class Actions Are Subject to the Same Standards, Including Those That Forbid a "Trial By Formula."

This Court forbade the use of "Trial by Formula" in *Wal-Mart* because "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. Although the holding was based on the Rules Enabling Act, it also implicates due process concerns. *See 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."); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims."). The New Hampshire courts'

willingness to accept, in the *parens patriae* context, the very "Trial by Formula" that this Court rejected in *Wal-Mart* punches a hole in an important aggregate-litigation safeguard. In enacting CAFA, Congress recognized the dangers posed to class action defendants in state courts. 151 Cong. Rec. S1157, 1163-64 (daily ed. Feb. 9, 2005). These dangers are likely to multiply where, as here, plaintiffs' counsel wrap themselves in the authority of the state. *See* H.R. Rep. 108-144, *8 (2003) (noting research showing that some state courts harbor "a lax attitude toward class certification standards, a disregard for fundamental due process requirements, and a willingness to 'rubber-stamp' class action settlements that offer little if anything to the class members while enriching their lawyers").

Given the similarities between class action and *parens patriae* lawsuits, it makes little sense for them to be governed by different standards of due process and fair play. Indeed, the due process concerns arising from a "Trial by Formula" apply as much, if not more, in the *parens patriae* context as they do in class actions. This Court should take the opportunity to make that clear.

CONCLUSION

For the foregoing reasons, this petition should be granted and the judgment reversed and remanded.

Respectfully submitted,

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