No. 15-933

In The
Supreme Court of the United States

EXXON MOBIL CORPORATION ET AL.,
Petitioners,

v.

STATE OF NEW HAMPSHIRE,
Respondent.

On Petition for Writ of Certiorari to the New Hampshire Supreme Court

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS EXXON MOBIL CORPORATION ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar (DRI) is an international organization that includes more than 21,000 members involved in the defense of civil litigation. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because it calls on this Court to address a situation that DRI's members often encounter: lawsuits in which state courts permit plaintiffs suing in a representative capacity to employ a "Trial by Formula" in which the plaintiffs rely on statistical evidence to prove their case based on extrapolations from a subset of the individual interests they represent, thereby eviscerating defendants' constitutional right to present individualized defenses.

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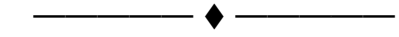
[1] This brief was authored by *amicus curiae* and its counsel, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. More than ten days prior to the due date, *amicus curiae* notified the parties of its intention to file this brief. All parties provided written consent to the filing of this *amicus curiae* brief. Petitioners' written blanket consent is on file with this Court; the letter indicating respondent's consent is being submitted with this brief.

The United States Constitution grants defendants the due process right to present every available defense, including the right to do so in representative actions. Yet DRI's members routinely defend clients in state court representative actions in which plaintiffs eviscerate this due process right by using the Trial by Formula methodology. This case is of enormous interest to DRI's members because it provides an opportunity for this Court to decide whether its disapproval of Trial by Formula in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011)—which involved a representative class action in federal court—applies with equal force to lawsuits brought in a representative capacity in state court.

DRI and its members seek to promote a level playing field and the fundamental fairness necessary to resolve disputes efficiently, equitably, and predictably. That is not possible under the decision below because the state courts allowed the respondent, suing in a representative capacity, to use statistical evidence to prove its case in contravention of due process. This Court should grant certiorari.



SUMMARY OF ARGUMENT

Ordinarily, plaintiffs can sue only for their own injuries and not for injuries suffered by others. Modern jurisprudence has developed certain exceptions to this general rule, allowing plaintiffs to bring representative actions in narrowly defined circumstances using procedural mechanisms that

permit plaintiffs to sue in a representative capacity—but without investing such representatives with any substantive rights or authorizing them to abridge a defendant's substantive rights. This approach protects the parties' rights under the United States Constitution, including the defendant's due process right to present every available defense.

Increasingly, however, courts are permitting those suing in a representative capacity to sidestep crucial due process limitations through aggregate proof methods such as statistical sampling or surveys. Courts too often allow the use of statistical methodologies to extrapolate information from a mere subset of the represented interests to establish liability, damages, or both for the remainder of those the named plaintiff represents. This relieves the representative of his or her obligation to prove, in conformance with substantive law, that *every individual interest* the plaintiff represents merits relief and overcomes affirmative defenses. Consequently, far from adhering to their narrow role as mere procedural mechanisms that cannot curtail a defendant's substantive rights, many representative actions have been transformed into devices that improperly curb defendants' due process right to defend themselves.

Recently, this Court disapproved of "Trial by Formula" in *federal* court representative actions where the plaintiffs' reliance on statistical evidence threatened to frustrate the defendant's right to litigate defenses to individual claims. *Dukes*, 131 S. Ct. at 2561. This Court did not, however, expressly decide if the same holds true where, as here, the representative action is brought in *state* court. Lower courts sharply

disagree over the extent to which due process permits the use of Trial by Formula in state court representative actions.

This Court should grant certiorari to resolve this conflict. Due process is one of the most essential rights protected by the Constitution. The Court's review is necessary to provide guidance on the "important question" of the extent to which a state court representative action "may constitutionally reduce the normal requirements of due process." *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers).

ARGUMENT

I. IN FEDERAL COURT REPRESENTATIVE ACTIONS, THE RULES ENABLING ACT PROHIBITS TRIAL BY FORMULA WHERE THE REPRESENTATIVE'S RELIANCE ON STATISTICAL EVIDENCE CURTAILS THE DEFENDANT'S RIGHT TO PRESENT INDIVIDUALIZED DEFENSES.

Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, "'the usual rule'" requires "'litigation [to be] conducted by and on behalf of the individual named parties only.'" *Dukes*, 131 S. Ct. at 2550 (citation omitted). But narrow exceptions to this rule have emerged, permitting plaintiffs to bring representative actions based on the

injuries of those who are not themselves the named parties. *See id.*

Increasingly, the named representatives in such lawsuits have relied on aggregate proof methods (typically, statistical sampling) to establish liability, damages, or both. *See* Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 468-71, 479-82 (2012). Reliance on aggregate evidence focuses on extrapolation—in other words, on "extracting the results from a small subset and applying them to a much larger universe." *Id.* at 497. This methodology selects a sample of the represented interests, applies the substantive law solely to the sample set, and then resolves the entire lawsuit based on how the substantive law applies to the sample. *See Dukes*, 131 S. Ct. at 2561.

Such use of aggregate evidence "has been characterized as trial by formula." Ghoshray, *supra*, at 498. Although some tout this methodology as allowing plaintiffs to resolve representative actions efficiently, Trial by Formula sacrifices due process. *See id.* at 468-71. Reliance on aggregate proof methods denies defendants an "opportunity to defend against" the individual interests represented by the plaintiffs. *Id.* at 498-99.

"The elaborate set of discovery and evidentiary rules under which the American [legal] system operates is premised on the idea that each side will develop its case against the other side through the uncovering of specifics." John C. Massaro, *The*

Emerging Federal Class Action Brand, 59 Clev. St. L. Rev. 645, 676 (2011). This system allows the parties "to test the other sides' assertions in the crucible of real world facts" and "to develop and reveal lines of argumentation that are independent of the assertions made by the other side." *Id.* at 676-77. Although aggregate evidence "does not in any way diminish" a representative plaintiff's "ability to do these things," it "can threaten the ability of defendants to do so." *Id.* at 677. Aggregate evidence methods such as statistical sampling put a defendant on trial without testing whether each interest represented by the named plaintiff "meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence." *Id.*

Unfortunately, aggregate proof trumped due process for years as "[t]he seduction of procedural efficiency" led many courts to accept the Trial by Formula methodology in representative actions. Ghoshray, *supra*, at 468-71. But this Court recently disapproved Trial by Formula in *Dukes*.

There, the plaintiffs brought a federal class action seeking to represent 1.5 million of the defendant's current and former employees, alleging the defendant committed sex discrimination in violation of Title VII. *Dukes*, 131 S. Ct. at 2547-48. The named representative sought damages in the form of backpay. *Id.* at 2547. The substantive law governing the lawsuit required the plaintiffs to show that the defendant engaged in sex discrimination. *See id.* at 2560-61. Conversely, the law permitted the defendant to show that individual employees were not eligible for backpay

if employment opportunities were denied for lawful reasons. *Id.*

The Ninth Circuit concluded that the lawsuit should proceed as a class action because the named representatives could satisfy the action's substantive legal requirements through aggregate evidence. *Id.* at 2561. "A sample set of class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." *Id.*

This Court, however, "disapprove[d]" this "Trial by Formula." *Id.* The class action procedure affords no substantive rights. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 402 (2010); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Moreover, the Rules Enabling Act "forbids" federal class action procedure from "abridg[ing], enlarg[ing], or modify[ing] any substantive right." *Dukes*, 131 S. Ct. at 2561 (citation omitted). *Dukes* rejected Trial by Formula because the plaintiffs' reliance on statistical evidence to establish "liability" and "backpay" would prevent the defendant from litigating its "defenses to individual claims"—defenses the employer was "entitled" to pursue under substantive law. *See id.*

II. IN STATE COURT REPRESENTATIVE ACTIONS, THE DUE PROCESS CLAUSE LIKEWISE PROHIBITS TRIAL BY FORMULA FROM INTERFERING WITH A DEFENDANT'S ABILITY TO PRESENT INDIVIDUALIZED DEFENSES.

Although *Dukes*' disapproval of Trial by Formula constituted "a substantial step towards reining in the unbridled use of statistics in class action litigation," Ghoshray, *supra*, at 509, it did not end the debate over the role of aggregate proof in representative actions. Among the most significant questions left unresolved by *Dukes* is whether, under the protections afforded by the Due Process Clause, its proscription against Trial by Formula extends to state court representative actions.

Dukes based its rejection of Trial by Formula on the Rules Enabling Act, *Dukes*, 131 S. Ct. at 2561, which applies only to federal courts, *see* 28 U.S.C. § 2072(a) (2012). Deprived of the safeguards provided by this federal law, defendants in state court representative actions generally derive "federal protection" for their substantive rights solely from "the constraints [that] the Due Process Clause" places on the states. *Scott*, 131 S. Ct. at 4.

Because *Dukes* discussed the application of the Rules Enabling Act to a federal class action, the decision did not expressly resolve whether its rationale for disapproving Trial by Formula applies equally to state court representative actions. Some therefore assert that state courts can continue to allow Trial by Formula notwithstanding *Dukes*. *See, e.g.*, Jay

Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459, 1476 (2015); Kimberly A. Kralowec, *Dukes and Common Proof in California Class Actions*, 21 No. 2 Competition: J. Antitrust & Unfair Comp. L. Sec. St. B. Cal. 9, 13 (2012). They are mistaken.

Dukes reasoned that the Rules Enabling Act prohibits Trial by Formula because the representative action there could not be employed to abridge any substantive rights, and the use of aggregate proof methods (like statistical sampling) to determine "liability" and "backpay" would frustrate the defendant's substantive right to present its "defenses to individual claims." *Dukes*, 131 S. Ct. at 2561. This rationale likewise bars Trial by Formula in state court representative actions, because the Due Process Clause also protects a defendant's right to present individualized defenses.

Due process requires, at a minimum, that the defendant be afforded "'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Representative actions cannot deprive defendants of this due process right because, like the class action in *Dukes*, they afford nothing more than a "procedural" mechanism for the "litigation of substantive claims," *Roper*, 445 U.S. at 332—a device that does not itself furnish any substantive rights but instead provides "only the procedural means by which the remedy may be pursued," *Shady Grove*, 559 U.S. at 402 (majority opinion). Such a procedural device "leaves the parties' legal rights and duties intact and the rule of decision unchanged." *Id.* at 408 (plurality opinion). Thus, just as the Rules Enabling Act bars the

procedural class action mechanism from curtailing substantive rights, *Dukes*, 131 S. Ct. at 2561, so too does constitutional "due process" prohibit the procedural device of representative actions "from abridging the substantive rights of any party." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010); *see also, e.g.*, *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (due process mandates that representative actions "not be used to diminish the substantive rights of any party to the litigation").

Therefore, much like the Rules Enabling Act prevented the representative plaintiffs in *Dukes* from using the procedural class action mechanism to employ statistical sampling and thereby deprive the defendant of its right to litigate "defenses to individual claims," *Dukes*, 131 S. Ct. at 2561, due process equally protects a defendant against the "eviscerat[ion]" of its "right to raise individual challenges and defenses to claims" by means of representative action procedures, *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). "The opportunity to adequately and vigorously present material defenses lies at the very core of the adversarial process," and it "may not be disregarded for reasons of convenience or economy" in contravention of due process. *Stonebridge*, 236 S.W.3d at 205; *see also, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-33 (2d Cir. 2008) (under Due Process Clause, "'defendants have the right to raise individual defenses against each class member'" and therefore they cannot be deprived of the right "to challenge the allegations of individual plaintiffs" (citation omitted)).

Dukes' disapproval of Trial by Formula is therefore grounded not only in the Rules Enabling Act but also in the Due Process Clause. *See, e.g.*, *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 35, 325 P.3d 916, 935 (2014) (*Dukes*' determination that the class action mechanism cannot curtail a defendant's right to litigate individual defenses "derive[s] from both class action rules and principles of due process"); *see also* Ghoshray, *supra*, at 488 ("[T]h[is] Court's overture in Dukes is indeed a rightful course correction—a reminder that fundamental notions of due process still play a major role in class action certification."); Massaro, *supra*, at 677 ("[T]he logic of *Dukes* applies to all situations in which individualized proof is completely foreclosed.").

"State[s] may not deprive individual litigants" of due process. *Richards v. Jefferson County*, 517 U.S. 793, 803-04 (1996). While states may set their own laws, "'they must, in so doing, accord the parties due process of law.'" *Id.* at 804 (citation omitted). Because *Dukes*' rejection of Trial by Formula is grounded in due process, it applies with full force to representative actions brought in state court.

Indeed, it would make no sense to construe *Dukes* as proscribing Trial by Formula solely in federal court representative actions. Plaintiffs' use of aggregate proof methods threatens to deprive defendants of their due process right to present individualized defenses in state court representative actions no less than in federal lawsuits. But constitutional due process protections—on which *Dukes*' proscription is grounded—apply equally to the federal government and the states. *See Bolling v.*

Sharpe, 347 U.S. 497, 498-500 (1954). Consequently, *Dukes*' prohibition against Trial by Formula should apply to all representative actions, regardless whether they arise in state or federal courts. A contrary conclusion would flout the Due Process Clause and encourage plaintiffs to evade *Dukes* by resorting to state courts to file their representative actions—which is the type of "'forum shopping'" this Court has sought to discourage in the past. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (citation omitted).

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT REGARDING WHETHER DUE PROCESS PROHIBITS TRIAL BY FORMULA IN STATE COURT REPRESENTATIVE ACTIONS.

A. Lower courts disagree over whether due process constrains the use of Trial by Formula in state court representative actions.

Both before and after *Dukes*, state appellate courts have determined that due process prevents the named plaintiff in a state court representative action from employing aggregate proof methods where doing so would abridge the defendant's right to litigate individualized defenses. *See, e.g.*, *Duran*, 59 Cal. 4th at 35, 50, 325 P.3d at 935-36, 946 (affirming reversal of judgment in favor of named plaintiffs following trial in state court representative action because defendant's due process right to litigate individualized defenses was violated by statistical sampling methodology

employed in trial court); *Sw. Refining Co. v. Bernal*, 22 S.W.3d 425, 437-38 (Tex. 2000) (refusing to permit plaintiffs to proceed with representative action based on their plan to use models, formulas, and extrapolation to try the case because a representative action is a procedural device that cannot diminish a party's substantive rights and defendant would therefore be "entitled to challenge the credibility of and its responsibility for" each represented person's "claim individually").

But not all state courts share this view. Some permit Trial by Formula in state court representative actions. For example, in *Braun v. Wal-Mart Stores, Inc.* (*Braun I*), 24 A.3d 875, 883 (Pa. Super. Ct. 2011), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1123), plaintiffs brought a state court class action alleging that the defendant had committed wage and hour violations. At trial, the plaintiffs relied heavily on statistical sampling and extrapolation. *See id.* at 887-88. The defendant appealed following an adverse judgment, asserting that the Trial by Formula had deprived it of due process by eviscerating its right to present individualized liability defenses. *Id.* at 889-90, 947, 950-51. Pennsylvania's intermediate appellate court rejected this position. *Id.* at 947-51. The court refused to conclude that the defendant had a due process right to contest liability as to each individual employee, reasoning that the named plaintiffs had satisfied the state's requirement for class treatment. *See id.* at 950-51.

In effect, the court endorsed the use of Trial by Formula—even where doing so foreclosed the defendant's ability to present individualized defenses—

by looking to nothing more than whether the named plaintiffs had satisfied the *state* law requirements for a representative action. The Pennsylvania court signaled that, in its view, the Due Process Clause did not constrain the use of Trial by Formula in state court, even where doing so curbed the extent to which a defendant could litigate individualized issues. In other words, the Pennsylvania court permitted the use of Trial by Formula under circumstances where *Dukes* subsequently disapproved the use of such statistical evidence in a federal class action.[2] *See also, e.g.*, *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 227-28 (Mo. 2007) (permitting named plaintiffs to resolve damages issues in state court representative action through statistical sampling and concluding that due process did not constrain this methodology).

The opinion below exacerbates this split of authority, siding with courts that disagree that the Due Process Clause proscribes Trial by Formula in state court representative actions where—as in

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[2] Subsequently, the defendant sought discretionary review in the Pennsylvania Supreme Court, asking it to decide whether Trial by Formula violated the defendant's due process rights under *both* the federal *and* state constitutions. Petition for Writ of Certiorari at 10, *Wal-Mart Stores, Inc. v. Braun* (U.S. Mar. 13, 2015) (No. 14-1123), http://goo.gl/rdJgX2. The state's high court, however, limited its discretionary review solely to whether Trial by Formula violated state law. *Braun v. Wal-Mart Stores, Inc.* (*Braun II*), 106 A.3d 656, 659 (Pa. 2014), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1124). The court nonetheless discussed *Dukes* at length and indicated that *Dukes* did not apply to state court representative actions alleging wage and hour violations. *See, e.g., id.* at 667 n.11.

Dukes—aggregate proof would prevent a defendant from presenting individualized defenses. In this case, the State of New Hampshire brought a *parens patriae* action "seeking damages for groundwater contamination allegedly caused by MTBE." Pet. App. 4, 87. As explained more fully in section IV below, *parens patriae* is "a standing doctrine" that permitted the State to sue as a "'representative'" on "behalf of the residents of New Hampshire." Pet. App. 38, 87 (citation omitted). The lawsuit proceeded to trial on claims for design defect, failure to warn, and negligence. Pet. App. 4.

Under the State's substantive law, individuals asserting such claims must demonstrate they were injured. *See, e.g.*, *Trull v. Volkswagen of Am., Inc.*, 145 N.H. 259, 264, 761 A.2d 477, 481-82 (2000); *Chellman v. Saab-Scania AB*, 138 N.H. 73, 77-79, 637 A.2d 148, 150-51 (1993); *Smith v. Cote*, 128 N.H. 231, 239-40, 513 A.2d 341, 346 (1986). Consequently, parties have the right to defend themselves by demonstrating that the individuals suing them have not met their burden to show injury.

Here, much as in *Braun*, the trial court permitted the State to use "'statistical evidence and extrapolation'" to "'prove injury-in-fact and damages,'" and New Hampshire's high court affirmed the use of Trial by Formula because state law permitted the use of statistical evidence. Pet. App. 38, 58, 65, 87. Moreover, like Pennsylvania's courts in *Braun*, the New Hampshire courts gave no hint that the petitioners' constitutional right to litigate individualized defenses in accordance with the Due Process Clause constrains the use of aggregate proof

methods in state court representative actions. This sharply differs from the conclusions reached by courts in other states, such as California and Texas, which recognize that the due process right to present individualized defenses *does* limit a plaintiff's ability to rely on aggregative proof methods in state court representative actions.

These divergent approaches to whether the Due Process Clause limits reliance on aggregate proof methods in state court representative actions by themselves demonstrate the need for guidance from this Court.

B. Lower courts also disagree over whether due process constrains the use of statistical evidence to establish liability only, damages only, or both.

Review is especially warranted in this case because the manner in which the New Hampshire courts permitted the State to utilize statistical evidence aggravates another fundamental conflict among lower courts regarding the extent to which the law permits Trial by Formula in *any* representative action, irrespective of whether the lawsuits proceed in a federal or state forum.

The courts in this case allowed the State to use statistical evidence and extrapolation to prove *both* an element of liability (injury) *and* damages. *See* Pet. App. 58, 65. But other lower courts disagree about whether *Dukes*' rationale for disapproving Trial by Formula bars the use of statistical evidence to prove liability, damages, or both.

Some courts have decided that *Dukes*' proscription against Trial by Formula applies solely to the evidence necessary in a representative action to prove liability. *See, e.g.*, *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256-57 (10th Cir. 2014) (*Dukes* disapproved use of statistical sampling to determine "the merits" of claims in representative action, but "does not prohibit" use of such evidence "to calculate damages"), *petition for cert. filed*, 83 U.S.L.W. 3725 (U.S. Mar. 9, 2015) (No. 14-1091); *George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 181-83 (D. Mass. 2012) (*Dukes* disapproved Trial by Formula where statistical sampling would curb defendant's right to present individualized defenses to contest liability, but did not prevent formulaic evidence to establish damages); *Braun II*, 106 A.3d at 664-65 (*Dukes* rejected use of statistical sampling only for adjudication of liability).

But other courts have determined that *Dukes*' prohibition applies only to damages issues. *See, e.g.*, *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167-68 (9th Cir. 2014) (*Dukes* does not foreclose use of "statistical sampling and representative testimony" as "long as the use of these techniques is not expanded into the realm of damages").

Still others have decided that *Dukes* does not preclude the use of statistical evidence to prove liability *or* damages, and instead insist that it forecloses only the specific statistical methodology at issue in *Dukes*. *See, e.g.*, *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 798-800 (8th Cir. 2014) (*Dukes* does not preclude named plaintiffs from using statistics or sampling to prove liability in representative proceeding

"as a whole" or to prove damages, and instead prevents plaintiffs from using Trial by Formula "to prove liability only for a sample set of class members"), *cert. granted*, 135 S. Ct. 2806 (June 8, 2015) (No. 14-1146).

And others have construed *Dukes*' prohibition as if it applied to *both* liability *and* damages issues. *See, e.g.*, *Bustillos v. Bd. of Cty. Comm'rs*, 310 F.R.D. 631, 672 (D.N.M. 2015) (holding that *Dukes* "expressly disavowed 'trials by statistics' or 'trials by formula,' either as to liability or damages" (citation omitted)).

In sum, lower courts have arrived at widely diverging interpretations of *Dukes*' prohibition against Trial by Formula. Whether the New Hampshire courts' decision to sanction Trial by Formula here fell afoul of due process therefore depends on which of these irreconcilable views of *Dukes*' proscription is correct. Only a decision by this Court can definitively settle this conflict in the law.[3]

C. Review by this Court is necessary to end these disagreements among lower courts.

Review by this Court is required to resolve the foregoing divisions among the lower courts over the

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[3] In *Bouaphakeo*, this Court has granted certiorari to address the related issue of the extent to which statistical techniques may be employed to determine liability and damages in representative actions. *See* 135 S. Ct. 2806. However, *Bouaphakeo* involves a *federal* court representative action. Therefore, the Court's decision in *Bouaphakeo* might not settle the extent to which the Due Process Clause limits reliance on aggregate proof methods in *state* court representative actions.

interplay between the Due Process Clause and Trial by Formula. Unless this Court steps in to decide if and when the law permits Trial by Formula in representative actions, these stark disagreements will continue to grow.

It is particularly important that this Court resolve these splits of authority because Trial by Formula implicates the critical right to due process. *See* Ghoshray, *supra*, at 493 (the "gaming" of the judicial system through the use of statistical evidence in representative actions "is inconsistent with the ideals of due process" because it threatens the defendant's ability to confront the individual interests represented by the named plaintiff). This constitutional guarantee—which essentially amounts to the defendant's "'right to his day in court'"—is "'basic in our system of jurisprudence.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (citation omitted); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (due process stems from "'our "deep rooted historic tradition that everyone should have his own day in court"'" (citations omitted)). "It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights." *Stuart v. Palmer*, 74 N.Y. 183, 190 (1878). "[T]he constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule," and "[t]his provision is the most important guaranty of personal rights to be found" in the Constitution. *Id.* "This great guaranty is always and everywhere present

to protect the citizen against arbitrary interference with these sacred rights." *Id.* at 191.

Unless this Court intervenes, the crucial protection afforded by this constitutional guarantee will be greatly weakened. In recent years, there has been a "dramatic explosion" in the number of state court representative actions. S. Rep. No. 109-14, at 13 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 13-14, 2005 WL 627977; *accord* H.R. Rep. No. 108-144, at 11-12 (2003), *as reprinted in* 2003 WL 21321526. Until this Court settles the question of whether and to what extent the Due Process Clause prevents Trial by Formula, the diametrically different answers to this question adopted by various lower courts, together with the ever growing flood of state court representative actions employing statistical evidence, will ensure that defendants' ability to invoke the full protections of due process will turn purely on the forum in which they are sued. To safeguard the essential protection of the Due Process Clause in all courts across the country, the Court should grant certiorari now.

IV. A *PARENS PATRIAE* LAWSUIT IS A PROCEDURAL DEVICE, LIKE A CLASS ACTION, THAT CANNOT RESTRICT SUBSTANTIVE RIGHTS WITHOUT VIOLATING DUE PROCESS.

Although the representative action in this case takes the form of a *parens patriae* lawsuit rather than the class action at issue in *Dukes*, this consideration in no way detracts from the need for review. To the

contrary, the nature of *parens patriae* lawsuits further confirms that the Court should grant certiorari here.

Class actions are merely procedural devices: they provide procedural rules permitting a named representative to bring claims on others' behalf to recover pursuant to preexisting substantive laws, without abridging any substantive rights. *See Dukes*, 131 S. Ct. at 2550, 2561; *Shady Grove*, 559 U.S. at 402 (majority opinion); *id.* at 408 (plurality opinion); *Roper*, 445 U.S. at 332.

As explained earlier, this is precisely why due process prevents the named plaintiff in a class action from employing a Trial by Formula where doing so would abridge the defendant's right to present all individualized defenses; the use of aggregate evidence under those circumstances would trump the defendant's substantive rights, contrary to the inherent nature of the class action device as nothing more than a procedural mechanism. In this respect, the *parens patriae* action here is no different than a class action because it too is a procedural device that merely affords a mechanism for a named representative to sue on behalf of others for injuries arising from legal claims that are subject to the ordinary substantive rules applicable in any individual lawsuit for proving liability and damages.

Under New Hampshire law, *parens patriae* is "simply a standing doctrine." Pet. App. 87; *State v. Hess Corp.*, 161 N.H. 426, 431-32, 20 A.3d 212, 216 (2011). As the New Hampshire Supreme Court explained here, "'[*p*]*arens patriae* does not provide a cause of action,'" and instead merely "provide[s] a

[S]tate with standing" to bring a "'representative'" lawsuit "on behalf of the residents of New Hampshire" where a "substantial segment" of those residents was injured. Pet. App. 38, 87 (quoting *Hess Corp.*, 161 N.H. at 431-33, 20 A.3d at 216-18).

The New Hampshire Supreme Court in this case confirmed that the *parens patriae* doctrine is a purely procedural device that cannot be used to alter rights under substantive law. Pet. App. 83-87. While the trial court had justified imposing a trust on a portion of the damages award by pointing to the *parens patriae* nature of the State's lawsuit, the New Hampshire Supreme Court rejected this analysis, holding that *parens patriae* standing could not alter substantive law, which specified that a lump-sum damages award was the only remedy for the tort causes of action the State had asserted. Pet. App. 86-87.

Like the New Hampshire Supreme Court, other jurisdictions also recognize that a *parens patriae* action is merely a procedural device that affords standing to bring a representative action, and does not itself alter any substantive laws. *See, e.g.*, *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243 n.30 (10th Cir. 2006) ("The doctrine of *parens patriae* is a standing concept rather than one of substantive recovery. . . . The doctrine does not create any cause of action."); *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001) ("[Plaintiffs] fail to show that [*parens patriae*] status eliminates or adequately substitutes for proximate cause. Rather, the doctrine of *parens patriae* is merely a species of prudential standing, . . . and does not create a boundless opportunity for governments to seek

recovery for alleged wrongs against them or their residents."); *see also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 219 (1990) (*parens patriae* provision of federal antitrust statute "did not establish any new substantive liability. Instead, 'it simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under'" federal antitrust law); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 733 n.14 (1977) (same).

By supplying the State with no more than the procedural means to bring a representative lawsuit that cannot abridge substantive laws, the *parens patriae* doctrine is subject to the same prohibition against Trial by Formula as the class action in *Dukes*. Consequently, the need for this Court to grant certiorari to resolve the splits of authority over the extent to which due process curtails Trial by Formula in representative actions is no less acute here than it would be in a class action.[4] In fact, this case

[4] Although several lower appellate courts have held that a state *parens patriae* action does not qualify for removal as a "class action" under the Class Action Fairness Act of 2005 (CAFA), that fact is irrelevant to whether the Due Process Clause applies to foreclose Trial by Formula in *parens patriae* lawsuits. Whether Congress intended to provide for the removal of *parens patriae* lawsuits when it included the statutory term "class action" in CAFA, *see Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847-50 (9th Cir. 2011), has nothing to do with the issue presented here—whether the Due Process Clause applies to proscribe Trial by Formula in *parens patriae* lawsuits. As to this issue, the guiding principle must be that *parens patriae* actions, just like class actions, merely provide a procedural device for asserting representative claims, rather than altering the substantive laws governing those claims. *See Dukes*, 131 S. Ct. at 2561.

demonstrates the need for the Court to settle these conflicts in the law because it illustrates that Trial by Formula deprives defendants of their due process rights in a broad swath of representative actions, regardless whether they bear the formal label of a "class action."

Simply put, a State may not use the procedural device of a *parens patriae* action to evade the Due Process Clause's prohibition against statistical sampling and other aggregate methods of proof that foreclose the presentation of individualized defenses afforded by substantive law. These due process protections apply to *parens patriae* representative actions no differently than they do to class actions.

CONCLUSION

This Court should grant certiorari and hold that the named plaintiffs in state court representative actions cannot prove their cases based on aggregate evidence (such as statistical sampling) where doing so would curtail the defendants' ability to present individualized defenses in accordance with the rights afforded by substantive law. At the very least, this Court should hold this petition for its decision in *Bouaphakeo*, a case which calls on this Court to resolve the related issue of the extent to which statistical techniques may be employed to determine liability and damages in representative actions. *See* 135 S. Ct. 2806.

Respectfully submitted,

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