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 WRIT OF CERTIORARI TO
THE NEW HAMPSHIRE SUPREME COURT

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation comprised of a broad range of American and international manufacturers.[2] PLAC seeks to develop and reform the law, with particular emphasis on product liability, so that it is fair and reasonable. To that end, PLAC submits *amicus* briefs in cases raising important legal issues to present the perspective of product manufacturers. PLAC's briefs have been accepted in over 1075 cases, including in this Court.

The issues raised by the petition are of great concern to PLAC's members. Cases that aggregate numerous individual claims, including actions by states as *parens patriae* as well as private class actions, threaten product manufacturers with enormous liabilities. In such cases, it is paramount that defendants' right to defend fully against each individual claim, as guaranteed by the Due Process Clause, be preserved. In addition, product manufacturers frequently confront state law tort claims that conflict with governing federal statutory or regulatory schemes. In such instances, the

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[1] Pursuant to S. Ct. Rule 37.2(a), PLAC states that all parties' counsel of record received timely notice of PLAC's intent to file this brief, and all parties consented. Pursuant to S. Ct. Rule 37.6, PLAC also states that no counsel for a party wrote this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person or entity other than PLAC has made such a monetary contribution.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Supremacy Clause demands that the claims be preempted when the impossibility of complying with both state and federal law is shown by the *facts*, as much as by simply comparing the state and federal laws' terms.

STATEMENT OF THE CASE

PLAC adopts generally the Statement of the Case contained in Exxon's petition, but highlights the following as particularly relevant to the issues of concern to PLAC:

A. The Trial By Formula

The $236 million judgment below was for the costs to identify and remediate Exxon's allegedly tortious MTBE[3] contamination of existing and future *private* drinking water wells in New Hampshire. While under New Hampshire law the private well owners had the right to make "reasonable use" of the groundwater under their lands, including for drinking purposes, *In re Town of Nottingham*, 153 N.H. 539, 548 (2006), the State was granted standing to sue in its *parens patriae* capacity not for any cause of action of its own, *State v. Exxon Mobil Corp.*,126 A.3d, 266 312 (N.H. 2015), but only if it could prove tortious "injury to a substantial segment of its population," *id.* at 290.

The purportedly tortious conduct on which the judgment was based was Exxon's negligence and strict liability in selling MTBE-containing gasoline

[3] The full chemical name of MTBE is methyl tertiary butyl ether.

at its gas stations from 1988 through 2005, and failing to warn users of the water-contamination and health risks of MTBE. Verdict Form—Part 1 at 5 (claim period 1988-2005); 126 A.3d at 274 (verdict based on negligence, strict liability—design defect and strict liability—failure to warn); *id.* at 290 (failure-to-warn claim based on inadequate warning to the user, *i.e.*, "if ExxonMobil had provided an adequate warning, MTBE gasoline would not have been used or would have been used differently," not failure to warn the State as sovereign); *id.* at 299 (finding no error in permitting jury to hold Exxon "liable for its percentage of the supply market").

Although the State contended Exxon had acted tortiously in selling and failing to warn of the risks of MTBE-containing gasoline, the State did not assert that Exxon's own actions contaminated any groundwater. Rather, contamination was caused by "spills and leaks" by third parties such as the owners of gasoline storage tanks and automobile junkyards. *Id.* at 304-05.

Indeed, at trial the State's experts were able to identify "1,584 specific sites where MTBE has been known to leak and has contaminated the subsurface," *id.* at 302, and noted the United States Environmental Protection Agency ("EPA")'s conclusion that thereafter the MTBE would travel almost as fast as the groundwater itself, *id.* at 274. The State also identified 358 specific wells that had been demonstrated to be contaminated with MTBE above the maximum permissible level of 13 parts per billion, *id.* at 308, and its experts tested two small samples of wells in different clusters of counties and thereby identified two wells in one cluster and four

in the other that were contaminated, *see* Tr. 967-75, 982; N.H.App.853-60, 1158.

Despite having this evidence, however, the State refused to attempt to prove that Exxon's tortious conduct had actually contaminated the wells of any actual private landowners, either through spills or leaks at the 1,584 identified contamination sources or otherwise. The State asserted it would take too many "resources" to test all potentially affected wells for contamination, 126 A.3d at 300, even if that were done "tracing MTBE found in a contaminated well all the way back to the refiner is virtually impossible," *id.* at 301, and "a contaminated well, many times, cannot [even] be traced to a particular retailer," *id.* [4]

As a result, and with the permission of the state courts, the judgment for the State was based solely on generalized evidence and statistical projections that involved no *actual* identified wells, corresponding responsible contamination sources, causative groundwater flow paths or the like. The State's experts simply took the percentage of wells from each of the two sample sets found to be contaminated with MTBE above 13 parts per billion, and applied those percentages to the total number of wells in the respective county clusters (which together contained all the private wells in the state) to conclude that 5,543 unidentified private wells "were likely contaminated with MTBE exceeding 13 ppb." NH Brief, NH S.Ct., 14. The experts also

[4] As noted above, Exxon's liability was ultimately based on its status as a retailer, not refiner.

opined that 50,000 unidentified wells were likely to be dug over the next twenty years, and that of these some 287 were likely at some point to become contaminated with excessive MTBE. *Id.*[5]

Because the State was not required to prove claims with respect to any actual well, Exxon was not able to present evidence as to actual third parties—including owners of spill or leak sources, other gasoline retailers, wholesalers and other refiners—who tortiously contributed to the contamination of specific wells, either for the purpose of negating Exxon's own causation or to allocate fault under New Hampshire's proportionate liability statute. When Exxon sought to identify certain specific possible contributing parties, the trial court rejected this because Exxon could not "link . . . non-litigant fault to at least one of the claims asserted by the state." 126 A.3d at 303.[6] While Exxon's expert was permitted to describe "typical spill and leak scenarios for the various categories of alleged faulty nonparties," *id.* at 305, the jury found that this hypothetical proof was not

[5] In accordance with and indeed compounding the purely hypothetical trial proof, the ultimate dollar judgment against Exxon was based on the total remediation costs statistically projected for existing and future wells, multiplied by Exxon's 28.94% share of New Hampshire's retail gasoline market under a "market share" liability standard. 126 A.3d at 275.

[6] As the State's claims were purely hypothetical or statistical in nature, it obviously was not possible to link concrete conduct of actual persons to such hypothetical claims.

sufficient to support allocation of responsibility by category, *id.*[7]

B. The Impossibility or Infeasibility of Complying With Both Federal And New Hampshire Law

The 1990 Federal Clean Air Act amendments mandated inclusion of an oxygenate in gasoline sold in areas of the country that did not meet clean air standards, as such oxygenates would reduce gasoline emissions. The act did not mandate the use of any particular oxygenate, nor did the EPA in its Reformulated Gasoline ("RFG") program regulations that implemented the act.

The EPA did, however, recognize that there were only six known oxygenates, and of these only two would be practicable for refiners—MTBE and ethanol. *See* Proposed Guidelines for Oxygenated Gasoline Credit Programs Under Section 211(m) of the Clean Air Act as Amended, 56 Fed. Reg. 31,154, 31,164 (July 9, 1991); Regulation of Fuel & Fuel Additives, 57 Fed. Reg. 47,849, 47852 (Oct. 20, 1992).

In 1991, New Hampshire opted into the RFG program, thus requiring inclusion of an oxygenate in gasoline sold in the state. At that time, however, and continuing through 2005, MTBE was the *only*

[7] The relevant jury question was worded somewhat oddly in that it asked whether Exxon had proved "that some or all of *its* fault," rather than all identified sources of responsibility, should be allocated to the hypothetical categories. *Id.*

oxygenate that Exxon or other retailers could feasibly have included in New Hampshire gasoline. Ethanol, the only potential alternative, was not widely available outside the Midwest. Tr. at 5521:5–20, 5523:5–17, 5525:20–5527:5; Tr. at 5604:10–17, 5605:12–19; Tr. at 6805:13–18; Tr. at 7180:21–7182:14, 7252:23–7258:4, 7305:16–21, 7320:6–7323:15. The supply of ethanol was generally inadequate and its continuing reliability risky due to reliance on government subsidies. Tr. at 1937:20–1938:1, 1995:19–1996:6; Tr. at 5521:5–20, 5523:5–17, 5525:20–5527:5; Tr. at 5604:10–17, 5605:12–19; Tr. at 6804:8–6805:18; Tr. at 7180:21–7182:14, 7252:23–7258:4,7289:17–7291:13, 7294:16–7297:1, 7304:17–7306:23, 7312:6–7314–7, 7320:6–7323:15,7322:15–7323:15. Further, the use of ethanol was incompatible with the Northeast's then-existing gasoline transportation and storage systems, which involved interdependent facilities of different entities so that any individual supplier such as Exxon could not decide to use ethanol while others, as they uniformly were, were using MTBE. Tr. at 6805:7–12, 6880:14–16, 6887:6–19, 7081:12–7082:6, 7104:19–7107:7, 7108:12–7109:8; Tr. at 7305:16–21; Tr. at 5509:23–5510:21, 5518:12–5520:14, 5521:21–5522:3, 5522:11–5523:4, 5524:10–14, 5525:20–5527:5; Tr. at 5664:2–5665:5; Tr. at 7107:8–7108:8.

In addition, even if Exxon had been able to switch to ethanol gasoline in New Hampshire at some time after 1988, this would only have *increased* gasoline emissions as the commingling in vehicle fuel tanks of that gasoline with other suppliers' MTBE gasoline would have increased fuel volatility. EPA Analysis of New York's Request for Waiver of the Reformulated Gasoline Oxygen Content

Requirement for New York Covered Area, EPA420-R-05-009, p. 22.[8] Indeed, the State itself recognized the non-feasibility and counterproductive effect of any individual retailer's switch to ethanol when it enacted a statute in 2004 that banned the use of MTBE, but provided that the ban would not take effect until January 1, 2007 to allow transportation and storage systems to be modified and all retailers to comply. N.H. Rev. Stat. Ann. § 146-G:12.

SUMMARY OF ARGUMENT

The $236 million judgment below was based on precisely the type of "trial by formula" rejected by this Court in *Wal-Mart Stores v. Dukes* as violating due process and Fed.R.Civ.P. 23 in federal class actions. The State of New Hampshire purported to aggregate the MTBE contamination claims of numerous private well owners and to prove those claims by statistical projection. The State identified no actual wells that were actually contaminated, depriving defendant of its state law rights to contest both actual injury and causation, and to prove affirmative defenses of comparative negligence and allocated third-party responsibility. The lower courts are divided as to whether *Dukes* was based on due process or merely Rule 23, and many state court class actions, and all *parens patriae* actions, are not removable to federal court so only due process, not Rule 23, governs. Moreover, the lower courts are divided as to whether due process actually prohibits trial by formula in aggregated claims, and *parens*

[8] Available at http://www3.epa.gov/otaq/regs/fuels/rfg/420r05009.pdf

patriae suits are becoming more prevalent. This Court should grant review to clarify the requirements of due process in *all* aggregated claims.

The judgment below was also based on a state law duty of defendant not to use MTBE in gasoline when MTBE in fact was the only feasible oxygenate available to comply with the Clean Air Act's requirements. This Court should grant review because the judgment here is immense, and the question of preemption of MTBE claims by the Act controls many cases currently and to be brought over the next decades. Moreover, the lower courts do not understand that this Court's decision in *Wyeth v. Levine* permits defendants to demonstrate the impossibility of complying with both state and federal law as a matter of *fact* instead of solely on the face of the respective legal schemes, and are unclear whether factual impossibility must be proved by a heightened standard of proof and whether it should be submitted to the judge or jury.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT DUE PROCESS FORBIDS THE "TRIAL BY FORMULA" OF AGGREGATED INDIVIDUAL CLAIMS

A. The "Trial By Formula" of Thousands of Individual Claims Aggregated in a *Parens Patriae* Action Violated Exxon's Due Process Rights

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this Court noted that a putative

employment discrimination class action seeking injunctive relief plus backpay as "incidental" to that relief would have to be "consistent with . . . . Rule 23(b)(2) . . . and . . . comply with the Due Process Clause." *Id.* at 2560. Under established law, any individual plaintiff in order to recover would be required to introduce *prima facie* proof of discrimination, after which the employer would have "the right to raise any individual affirmative defenses . . . , and to demonstrate that the individual . . . was denied an employment opportunity for lawful reasons." *Id.* at 400. Plaintiffs proposed to substitute a class action "Trial by Formula" in which both liability and backpay would be determined for "[a] sample set of the class members," and "[t]he 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." *Id.* Because the Rules Enabling Act forbade abridging any substantive right, however, class certification under this approach was improper as depriving defendant of its right "to litigate its statutory defenses to individual claims." *Id.*

This part of the Court's opinion in *Dukes* seems clearly to hold that at least Fed.R.Civ.P. 23 cannot be used consistent with due process to deprive a defendant of its right to defend individually against each class member's claim. Indeed, the Court had previously made clear that due process *always* requires that before a defendant is deprived of his property, plaintiff must prove every element of the claim and defendant must be given "'an opportunity to present every available

defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (rules that "creat[e] a presumption which operates to deny a fair opportunity to rebut it violate[] the due process clause") (internal quotation marks and citation omitted).

The instant case aggregated thousands of present and future claims not under Fed.R.Civ.P. 23, but under New Hampshire's *parens patriae* doctrine, which did not give the State its own cause of action but rather required proof Exxon had tortiously caused injury to a "substantial number" of individual New Hampshire citizens, here private well owners.

Under established New Hampshire law, the individual well owners' claims required proof of specific elements, and defendant had the right both to refute those elements and prove affirmative defenses. For example, in addition to proving defendant's negligence or sale of a defective and unreasonably dangerous product, an individual well owner would be required to prove that his own well was actually contaminated with excessive MTBE, *e.g. Vautour v. Body Masters Sports Industries, Inc.*, 147 N.H. 150 (2001) (design defect plaintiff must prove "injury to the user or the user's property"), and that defendant's tortious conduct was a substantial contributing factor in causing that contamination, *e.g. Estate of Joshua T. v. State*, 150 N.H. 405, 408, 840 A.2d 768 (N.H. 2003) (negligence claim requires proof defendant's conduct caused or contributed to plaintiff's harm); *Roberts v. Wal-Mart Stores, Inc.*, 2010 N.H. Super. LEXIS 65, *5-6 (N.H. Super. Ct. 2010) (upholding defense verdict absent proof

defendant's negligence was substantial contributing factor to plaintiff's injury); *see also Reid v. Spadone Mach. Co.*, 119 N.H. 457 (1979) (third party's misconduct is defense to negligence claim if it is sole proximate cause of plaintiff's harm).

Even if a private well owner successfully demonstrated those elements in the face of any contrary evidence from defendant, defendant would then be entitled to prove the well owner himself acted tortiously in a manner that contributed to his own harm, N.H. Rev. Stat. Ann § 382-A:2-725 (recovery reduced by plaintiff's percentage of fault up to 50%, and precluded for fault exceeding 50%), and/or to identify other actors whose tortious conduct also contributed so that the jury could allocate responsibility among all actors, N.H. Rev. Stat. Ann § 507-d; *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 153 N.H. 793 (N.H. 2006) (defendant entitled to offer evidence to apportion fault to other persons, including non-parties).[9]

Because actually proving a "substantial" number of individual claims in accordance with these elements and defenses would require too many "resources," however, the courts below permitted a $236 million judgment to enter against Exxon without enforcing *any* of them. First, instead of requiring the State to identify a substantial number of *actual* individual wells that were *actually* contaminated with excessive MTBE, the State was

[9] In New Hampshire, a defendant is liable only for the percentage of the judgment represented by his allocation percentage, unless it is 50% or greater. N.H. Rev. State. Ann. § 507:7-e.

permitted to extrapolate the aggregate *number* of wells that statistically *should be* contaminated by applying the percentage of excessively contaminated wells from two sample sets to all the wells in the state. Necessarily, Exxon could not rebut that any individual well was actually contaminated, as no such well was identified.[10]

Second, instead of requiring the State to prove Exxon's defective design or warning was a substantial contributing factor to the contamination of each *actual* individual well, generalized evidence of Exxon's sale of and failure to warn about MTBE gasoline, the existence of third-party spill and leak sites and MTBE's ability to reach well water was allowed to suffice. Again, Exxon could not rebut that any specific site where Exxon gasoline had been spilled or leaked contributed substantially to the contamination of specific wells, as no such specific sites were linked to any specific wells (and, again, no specific wells were even identified).[11]

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[10] By definition, the State could not prove actual injury to the *future* wells on which the judgment below was partially based, as such wells did not yet exist even in a theoretical or statistical sense.

[11] Thus in a case that involved *real* rather than purely hypothetical claims, Exxon might have been able to contest that its own gasoline was even spilled at the specific site, that groundwater flow would have taken such a spill to the specific well or that, in light of all other contributing MTBE gasoline spills, the Exxon spill's causal contribution was substantial. In addition, Exxon might have been able to contest the causal role of its purportedly tortious conduct, *i.e.*, that had Exxon not sold MTBE gasoline the MTBE spill would not have happened (perhaps the spill site owner would have desired and hence purchased MTBE gasoline from a different retailer), or that

Third, because the State did not identify the specific wells that formed the basis of its claims, Exxon was deprived of its right to demonstrate that any well owner's conduct caused or contributed to his own well's contamination, such as if he had negligently caused or permitted a leak or spill that reached the well, so as to negate—or at least reduce—Exxon's liability for that particular well.

Fourth, because the State was not required to identify any specific wells that formed the basis of its claims, Exxon was also deprived of its right to identify other actors near enough to the location of that well, and in an appropriate direction given the groundwater flow, whose tortious conduct likely contributed to the well's contamination. Such evidence could have caused the jury to allocate some percentage of responsibility to such third parties and thereby reduced Exxon' liability for that particular well.

Indeed, the judgment below was predicated on a nearly exact replica of the "Trial by Formula" rejected by *Dukes*: contamination was determined with respect to "[a] sample set of the [state's wells]," and "[t]he percentage of [wells] determined to be [contaminated was] then [] applied to the entire remaining [number of wells], and the number of (presumptively) [contaminated wells] thus derived [was] multiplied by the average [remediation costs] in the sample set to arrive at the entire [aggregate]

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had Exxon given a better warning the MTBE spill would not have happened (perhaps the spill site owner did not read or would not have followed warnings).

recovery." *Dukes*, 131 S. Ct. at 2561. This was a wholesale violation of Exxon's due process rights. *Id.* at 2560-61; *Lindsey*, 405 U.S. at 66; *see also Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (punitive damages based on harm to non-parties violates due process, as "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example . . . that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary").

B. State and Federal Appellate Courts Are Unclear as to *Dukes* and the Application of Due Process to Aggregated Claims, and Such Claims, Including *Parens Patriae* Actions, Are Increasingly Prevalent

The state and federal appellate courts are unclear whether the holding of *Dukes* was based at least in part on the requirements of due process or solely an interpretation of Fed.R.Civ.P. 23(b)(2). *Compare Duran v. U.S. Bank National Assn.*, 325 P.3d 916, 935 (Cal. 2014) (characterizing *Dukes*' holding, that "a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims," as "deriv[ing] from both class action rules and principles of due process"); *Mullins v. Direct Digitial, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) ("defendant has a due process right . . . to present individualized defenses if those defenses affect its liability," citing *Dukes*); *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," citing *Dukes*) *with Davis v. Cintas*, 717 F.3d 476, 490 (6th Cir. 2013) (interpreting *Dukes*' rejection of trial by formula as based on Rules Enabling Act, and as holding such trial "abridged or modified Wal-Mart's *statutory* right to assert individual defenses to individual awards of backpay") (emphasis added); *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656, 665-66 (Pa. 2014) (rejecting due process challenge to trial by formula based on *Dukes*), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1123); *see also* Kimberly A. Kralowec, *Dukes and Common Proof in California Class Actions*, J. Antitrust & Unfair Competition Law Sec. of State Bar of Cal., No. 2 (Summer 2012) at 9 ("It is therefore error to read *Dukes* either as resting on federal constitutional principles of any kind, or as binding on state courts for that reason. By its plain text, *Dukes* rests on Rule 23, the Rules Enabling Act, and Title VII.").[12]

Moreover, to the extent the Court actually intended *Dukes* to be solely an interpretation of Rule 23(b)(2), that rule does not apply in *numerous* aggregated claims, so the due process issue necessarily arises in those cases. For example, many state court class actions with a state-specific focus are not removable to federal court as "class actions" under the Class Action Fairness Act ("CAFA"). *See,*

[12] This Court is already aware of class actions raising the due process/"trial-by-formula" issue. *The Dow Chemical Co. v. Industrial Polymers, Inc.*, No. No. 14-1091 (petition pending); *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (opinion pending).

e.g., 28 U.S.C.S. § 1332(d)(4). And this Court has already held that *parens patriae* actions brought by a state, such as this case, are not removable as a "mass actions" under CAFA. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744-45 (2014).

Further, the lower courts are divided as to whether due process actually prohibits a "trial by formula" of aggregated claims. [13] *Compare Duran*, 325 P.3d at 935 (Cal. 2014); *Mullins*, 795 F.3d at 669; *Carrera*, 727 F.3d at 307 (all holding trial by formula without right to raise individual defenses violates due process) *with Braun*, 106 A.3d at 665 (holding use of statistical analysis to extrapolate how many employee rest breaks should have been earned and how many had been missed consistent with due process).

Accordingly, if the Court does not address the due process issue presented here, defendants in state court actions, especially but not limited to those brought with all the resources of the state itself, will be left without fundamental protections. This Court has already acknowledged the "*in terrorem*" effect of the aggregation of claims in a class action, which often coerces defendants to settle even non-meritorious claims. *AT&T Mobility LLC v.*

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[13] As before *Dukes*, plaintiffs continue to rely on aggregated statistical analyses to avoid individual issues. *See, e.g., In re Neurontin Marketing and Sales Practice Litig.*, 712 F.3d 21 (1st Cir. 2013) (allowing plaintiff in third-party payor class action to rely on aggregate statistical analysis to prove misleading pharmaceutical marketing caused prescribers to prescribe and hence insurers to overpay for prescription drugs).

Concepcion, 131 S. Ct. 1740, 1752 (2011). Those effects are no less when claims are aggregated through the *parens patriae* mechanism. *See* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 914-15 (2008) ("Few manufacturers . . . are capable and willing to risk trial when the plaintiff is a state . . . that may collect billions of dollars as a result of harms allegedly suffered by millions of its residents").[14]

In addition, while this Court is familiar with the potential abuses of class actions through its many decisions addressing such litigation, *parens patriae* suits are also becoming increasingly prevalent. *Id.* at 914-15 (2008) (listing *parens patriae* actions brought against manufacturers across numerous industries, including guns, automobiles, tobacco products, paint and pharmaceuticals); Alexander Lemann, *Sheep in Wolves' Clothing: Removing Parens Patriae Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122, 132-33 (2011) ("parens patriae . . . has been an increasingly popular vehicle for state attorneys general").

For all these reasons, there is an acute need for the Court to articulate the due process rights of defendants defending against individual claims that are aggregated in *any* manner.

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[14] This case is a paradigmatic example, as all defendants except Exxon settled. 126 A.3d at 274.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT PREEMPTION APPLIES WHEN IT IS IMPOSSIBLE TO COMPLY WITH BOTH FEDERAL AND STATE LAW AS A MATTER OF FACT

A. The State's Claims Were Preempted Because They Were Premised on a State Law Requirement That Made It Factually Impossible or Infeasible For Exxon to Comply With The Clean Air Act's Oxygenate Mandate

In most of this Court's decisions preempting state law claims based on the "impossibility" form of implied preemption, the impossibility of complying both with the state law requirement on which the claim is based and with federal law has been apparent from a simple comparison of the two legal schemes. *E.g., PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011) (state law failure-to-warn claim against generic pharmaceutical manufacturer preempted because under Food, Drug and Cosmetic Act ("FDCA"), manufacturer could not change its warning from that of the equivalent branded drug).

This Court has previously recognized, however, that determining whether it is impossible to comply with a state law duty without violating federal law sometimes requires consideration of *actual facts*, whether demonstrated by the evidence, contained in a regulatory or administrative record or otherwise. For example, in *Wyeth v. Levine*, 555 U.S. 555 (2008), plaintiff was harmed by an intravenous injection or "push" of the migraine drug Phenergan, and contended the defendant

manufacturer should have strengthened the warning on its FDA-approved label concerning such injections. *Id.* at 559-60. Defendant argued it could not comply with any state law duty to change its label because the FDCA as well as FDA regulations generally require that drug manufacturers obtain FDA approval before making any labeling changes.

In assessing defendant's argument, the Court noted two important factors about the federal regulatory scheme. First, an FDA "changes being effected" ("CBE") regulation allowed a manufacturer to change its label to "add or strengthen a . . . warning" without first obtaining FDA approval if the manufacturer simultaneously applied for such approval. *Id.* at 568. Second, while the manufacturer could make such a change while its application was pending, the FDA retained final authority to approve or reject the change. *Id.* at 571.

In light of these provisions, defendant argued a labeling change was impossible because the regulatory record showed "FDA intended to prohibit it from strengthening the warning about IV-push administration," but this Court noted the state courts had rejected this contention "as a matter of *fact*." *Id.* at 572 (emphasis added). The Court concluded that "absent clear evidence that the FDA would not have approved a change to Phenergan's label," *id.* at 571, it would not reverse the no-preemption ruling,[15] and held defendant had not

[15] Absent "exceptional circumstances," the Court normally accepts the factual findings of state courts whose decision it reviews. *E.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987).

pointed to any such clear evidence in the record, *id.* at 572.

In this case, the New Hampshire Supreme Court rejected Exxon's preemption argument on the ground that as a theoretical legal matter the Clean Air Act did not mandate the use of MTBE but rather permitted any oxygenate to be used. 126 A. 3d at 283. The reality, however, was that the use of MTBE was the *only* feasible method by which Exxon could comply with the Act in New Hampshire during the years in question. *See* pp. 6-8, above. American businesses and other actors who are subject to both federal and state legal requirements do not have the luxury of acting according to purely theoretical notions; rather, they must deal with reality. The State's claims here were preempted, and the judgment below violated the Supremacy Clause.

B. The MTBE Preemption Issue Will Control Numerous Cases Now Pending And Likely To Be Brought For Decades, And The Lower Courts Are Unclear About Whether And, If So, By What Procedure To Consider Factual Issues in Addressing Impossibility Preemption

The MTBE preemption issue posed by this case is important in its own right. The judgment in this case was extremely large, and the statute on which preemption depends, the Clean Air Act, involves an important federal regulatory scheme capable of generating numerous legal requirements. In addition, not only are multiple other MTBE cases

pending in the courts,[16] the fact that MTBE persists in groundwater for decades, 126 A.3d at 308, means that cases raising the current preemption issue are likely to persist for *at least* that long, if not longer. [17]

Moreover, by rejecting preemption based solely on a facial reading of the state and federal legal requirements at issue, the New Hampshire Supreme Court illustrates that courts do not understand that *Wyeth* requires that they also take into account the actual *facts* "on the ground" in assessing impossibility preemption. This may partly be because *Wyeth* 's reference to the role of the facts in preemption analysis did not involve extended discussion or citation.

Further, there are innumerable other federal regulatory schemes where an actual conflict between state and federal law might arise from real-world facts rather than a simple comparison of the two legal schemes. Indeed, *Wyeth* itself so

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[16] *See, e.g., Pennsylvania v. Exxon Mobil Corp.*, No. 14-cv-06228 (Ct. Com. Pleas docketed June 19, 2014); *N.J. Dep't of Evntl. Prot. v. Atl. Richfield Co.*, No. 08-cv-00312 (N.J. Super. Ct. docketed June 28, 2007); *Orange Cty. Water Dist. v. Unocal Corp.*, No. 04-cv-4968 (Cal. Super. Ct. docketed May 6, 2003).

[17] The peculiar unfairness of this case, in which the State, backed by its powerful resources, sued defendant in the State's own courts, in an aggregated *parens patriae* action having all the "*in terrorem*" effects of a class action, for a purported violation of state law by using MTBE when it was the *State itself* that required defendant to use an oxygenate complying with the Clean Air Act, and the only feasible such oxygenate was MTBE, further counsels that this Court review the preemption issue.

demonstrates, involving as it did federal regulation under the FDCA, not the Clean Air Act. PLAC's own membership, which includes manufacturers of motor vehicles, pharmaceuticals, medical devices, chemicals, tobacco products and ordinary consumer products, among others, are virtually all subject to one or more federal regulatory schemes, as well as product liability suits based on state law requirements.

And beyond all this, even for courts that understand *Wyeth* requires consideration of the actual facts in preemption analysis, *Wyeth* left unclear fundamental aspects as to the *procedure* by which the facts should be assessed, creating confusion in the lower courts. For example, the parties in *Wyeth* did not litigate, and hence the Court did not resolve, whether the factual issues should be submitted to the court or the jury. In *Wyeth* the lower courts made factual determinations which this Court did not disturb, but in the present case Exxon both requested a jury instruction on the feasibility of non-MTBE oxygenates and asked the court to resolve the issues as a matter of law on a directed verdict motion.

Relatedly, some lower courts have misinterpreted the Court's reference to "clear evidence" of facts requiring preemption as articulating a heightened standard of proof beyond the normal "preponderance of the evidence" standard. *See, e.g., Mason v. Smithkline Beecham Corp.*, 596 F.3d 387, 391 (7th Cir. 2010) (describing "clear evidence" as an "exacting" and "stringent standard"); *Forst v. Smithkline Beecham Corp.*, 639 F. Supp. 2d 948, 953 (E.D. Wis. 2009) (under *Wyeth*

"a defendant drug manufacturer faces an exacting burden"). Such decisions fail to recognize that the state courts in *Wyeth* had found against defendant as a matter of *fact*, requiring that this Court not disturb those factual findings absent extraordinary circumstances and hence explaining the Court's (ultimately unavailing) search for "clear evidence" in defendant's favor.

For all these reasons, therefore, the Court should grant review of the preemption issue to clarify the need to take account of factual reality in preemption analysis, as well as the procedures by which the relevant facts should be assessed.

CONCLUSION

For the foregoing reasons, and those stated by petitioner, the Court should grant the petition as to both questions presented.

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APPENDIX A

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