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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
SHELDON GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Additional Counsel
Listed On Inside Cover

JOHN H. BEISNER
Counsel of Record
JESSICA D. MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7000
john.beisner@skadden.com

JAMES M. SPEARS
MELISSA B. KIMMEL
PHARMACEUTICAL
RESEARCH AND
MANUFACTURERS OF
AMERICA
950 F Street, NW
Suite 300
Washington, DC 20004

Attorneys for Amici Curiae

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BRIEF BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber") and The Pharmaceutical Research and Manufacturers of America ("PhRMA") respectfully submit this brief as *amici curiae* in support of petitioners Exxon Mobil Corporation and ExxonMobil Oil Corporation.[1]

STATEMENT OF INTEREST

Amicus curiae the Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as amicus curiae in cases involving issues of national concern to American business, such as this one.

The Chamber's members operate in nearly every industry and business sector in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that all parties, upon timely receipt of notice of intent to file this brief, have consented to its filing.

These members have an interest in vindicating bedrock principles of due process and ensuring that defendants are afforded the opportunity to present every available defense in aggregate litigation.

PhRMA is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures. Member companies have invested over $450 billion in research and development into medical innovations since 2005, and approximately $51.2 billion in 2014 alone.[2]

Both the Chamber and PhRMA have a strong interest in this case because the state court's decision authorizes the imposition of hundreds of millions of dollars of liability based purely on an abstract statistical exercise that papers over complicated questions of causation and harm. The use of such evidence effectively thwarts the right of defendants to present individualized defenses to all elements of liability, and it is a recurring problem in state-initiated enforcement actions against a broad array of companies, including pharmaceutical manufacturers. This Court's intervention is necessary to ensure that de-

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[2] See PhRMA, 2015 Profile: Biopharmaceutical Research Industry 1, available at http://www.phrma.org/sites/default/files/pdf/2015_phrma_profile.pdf (Key Facts 2015) (last visited Feb. 2, 2016). These research and development investments led to 51 new medicines being approved in 2014 alone. See *id.*

fendants have the constitutionally guaranteed opportunity to present a complete defense to such claims – and that any liability is based on real-world conditions, not statistical guesswork.

INTRODUCTION

The New Hampshire Supreme Court's decision abrogates a cornerstone tenet of due process: that a defendant has a right to present every available defense at trial. The court upheld an award of more than $235 million in damages resulting from the purported contamination of 5,830 wells – a conclusion that was extrapolated from a finding that *a mere six wells* had been contaminated. By sanctioning such extreme statistical speculation, under which the percentage of contaminated wells in a tiny sample set was used to predict the number of all potentially affected wells in the State, the court deprived petitioners of their right to present a defense as to liability and damages for the purported contamination of each of 5,824 wells.

Just five Terms ago, this Court registered its clear disapproval of such a "Trial by Formula," citing the provision of the Rules Enabling Act that procedural rules cannot abridge substantive rights. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). The Court should now confirm that due process affords similar protections against the use of trial-by-formula theories of liability that operate to deprive defendants of the right to present individualized defenses to liability.[3] Review is particularly

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[3] *Amici* note that a similar question concerning the applicability of due-process protections in *class actions* in state courts is presented by the pending petition in *Wal-Mart Stores, Inc. v. Braun*, Nos. 14-1123 & 14-1124. As the Chamber set forth in its *amicus*

important in this context because the State brought the underlying suit as a *parens patriae* action, in which the plaintiff is permitted to pursue de facto aggregated claims, while out-of-state defendants are deprived of critical procedural safeguards that govern class litigation in federal courts and face the prospect of a hostile state court deciding whether to award the State hundreds of millions of dollars. For these and other reasons outlined below, the Court should grant the petition and reverse the judgment below.

ARGUMENT

I. The Court Should Grant Review To Confirm That Due Process Forbids Trial By Formula.

In *Dukes*, this Court rejected the use of extrapolation from a small sample set to establish proof of liability and damages for an entire class. The Court of Appeals in *Dukes* had authorized a procedure under which "[a] sample set of . . . class members" seeking damages for Wal-Mart's alleged gender discrimination in pay and promotions "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." 131 S. Ct. at 2561. "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

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brief in support of review in *Braun*, the issues presented by the use of Trial-by-Formula techniques continue to arise, underscoring the need for this Court's review. See Br. of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Supp. of Pet'rs at 14 n.4, *Wal-Mart Stores, Inc. v. Braun*, Nos. 14-1123 & 14-1124 (filed Apr. 16, 2015).

backpay awards in the sample set to arrive at the entire class recovery." *Id.* Throughout the process, Wal-Mart would be limited to "'present[ing] individual defenses'" only in the "'randomly selected sample cases.'" *Id.* at 2550 (citation omitted).

This Court flatly rejected the Ninth Circuit's approach, making clear that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay." *Id.* at 2560. Criticizing the Ninth Circuit's "novel project" as "Trial by Formula," the Court held that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561.

Although the holding in *Dukes* was grounded in the Rules Enabling Act and involved a class action, the Court should now make clear that the Due Process Clause likewise requires that a defendant be able to present individualized defenses to each claim of injury.

As this Court has held, "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (citation omitted); see also *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'") (citation omitted). And although this Court has not had occasion to address this due-process protection in the context of class actions or other aggregated claims and injuries, two circuits have concluded that a defendant in such cases "has a due process right to raise individual challenges and

defenses to claims." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) ("A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage."); see also *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3-4 (2010) (Scalia, J.) (granting stay and finding it "significantly possible that the judgment below will be reversed" on the ground that the judgment violated defendants' "due-process right to 'an opportunity to present every available defense'" where the "apparent consequence" of the state court's ruling was that "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' . . . ") (citation omitted).

State and federal district courts likewise have recognized that due-process protections extend to the right to present individualized defenses during the litigation of aggregated claims of injury. The California Supreme Court, for instance, drew on due-process principles and this Court's decision in *Dukes* to reject the trial court's "decision to extrapolate classwide liability from a small sample." *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014). The trial court had barred the defendant from introducing individualized evidence to challenge liability as to the 239 plaintiffs who were not part of a sample set of 21 plaintiffs. *Id.* at 920. Declaring that "[t]he injustice of this result is manifest," the court explained that "statistical methods" such as representative testimony and sampling "cannot so completely undermine a defendant's right to present relevant evidence." *Id.* at 936. Similarly, a federal district court held that "[t]ruly individual issues . . .

must be adjudicated individually and not by statistical inference." *Bustillos v. Bd. of Cnty. Comm'rs of Hidalgo Cnty.*, 310 F.R.D. 631, 660 (D.N.M. 2015). According to the court in *Bustillos*, "trials by formula" "violate[] the defendant's right to have (i) each element of (ii) each claim asserted against it by (iii) each class member specifically proven." *Id.*; see also *id.* at 660 n.9 (noting due-process concerns raised by "trials by statistics").

Commentators have likewise noted the due-process underpinnings of the rule against proving aggregate liability by way of formula or statistics. "[T]he linkage between a plaintiff's harm and a defendant's causal contribution to that harm is the only justification for redistribution from a defendant to a plaintiff." Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459, 1470 (2015). But "[e]xcept for the sampled cases, trial by statistics eliminates the proof on both sides of this connection: the defendant's causal act and the plaintiff's consequent injury," leading to the "sacrifice" of a defendant's "ability to contest its liability to each plaintiff" and a consequent violation of due process. *Id.* at 1470-72, 1477; see also Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After* Wal-Mart v. Dukes, 62 DePaul L. Rev. 659, 661 (2013) ("A defendant must be able to adequately defend itself from individual claims whose aggregation may mask important distinctions and available defenses."); Mac R. McCoy & D. Matthew Allen, *Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011*, 2012 Bus. L. Today 1, 2 (explaining that the rejection of Trial by Formula "reaffirms the constitutional due process rights of class action defendants to litigate any and

all legitimate defenses they may have to individual class members' claims").

The same problems attended the use of statistical evidence here. Indeed, eliminating the State's burden of proof in this matter was particularly problematic because, as courts have recognized, discerning the source of water contamination – and, concomitantly, the extent of liability and damages – is exceedingly complex. See, *e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 344 (S.D.N.Y. 2002) (noting the "differences in the level of contamination . . . , the source of the contamination, how the contamination affects each plaintiff, and the nature of relief that each will require" and observing that each site of alleged contamination "requires investigation to characterize the source or sources of the gasoline"). Yet, despite the "far-ranging investigation" that is required before both the presence and cause of contamination can be assigned as to *each* well, see *id.*, the New Hampshire Supreme Court allowed the State to bypass this difficult showing and to deprive petitioners of any realistic opportunity to develop their own evidence rebutting the State's claims of broad contamination.

Notably, although this case is not a class action, the "threats to defendants' rights" inherent in the use of extrapolation to prove liability and damages arise in "[a]ny form of aggregate proof," whether class action, *parens patriae* action, or another mechanism. John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 676 (2011). In the class setting, the threat arises because "[t]he degree to which the factual assertions in the class complaint truly apply to each specific individual in the class will rarely be known," and defendants will not "have

an opportunity to develop through discovery idiosyncratic defenses arising from the specific circumstances of *each plaintiff's* situation." *Id.* at 677 (emphasis added). The same is true in a case like this one, in which the State's claim in reality is an aggregation of many *separate claims* that petitioners contaminated various different wells. After all, an individual lawsuit over a single well would unquestionably require proof that the defendant had contaminated that well specifically. Yet, through the aggregation of many such claims, and with the aid of the New Hampshire Supreme Court's ruling below, the State was able to avoid the burden of proving actual contamination in each well and instead establish liability for each of nearly *6,000* wells solely through extrapolation from *six* of them. In effect, the State enjoyed a *thousand-fold* amplification of liability based on the same proof it would have to proffer to prove liability in a suit involving just six wells – entirely through the magic of extrapolation.

The constitutional infirmities are at least as significant here as in a class action because the State is proceeding under its *parens patriae* authority in state court and seeking to collect hundreds of millions of dollars to put in the State's coffers. See, *e.g.*, Pet. 27. Because a *parens patriae* action may not be removed to federal court, the federal system's statutory and judicially created procedural safeguards that govern aggregate litigation will not apply, and "the constraints of the Due Process Clause will be the only federal protection." *Scott*, 131 S. Ct. at 4 (Scalia, J.). Indeed, *parens patriae* actions have been questioned for just this reason: because they "are largely free from procedural restraint[s]" that typify class actions and "can supplant class actions while avoiding the

elaborate procedures that govern private suits," such suits "often serve as a substitute for private aggregate litigation." Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 491, 499, 511 (2012).

That is precisely what happened here. Shorn of the protections of federal class actions, the *parens patriae* proceeding below forced petitioners to abandon the individualized defenses they could have raised in suits based on individual wells and instead to combat an extrapolation that premised liability for thousands of wells on just six of them. The Court should grant review to clarify that the Due Process Clause forbids such "Trials by Formula" in the *parens patriae* context and reverse the judgment below.

II. Resort To "Trial By Formula" In State-Initiated Enforcement Suits Poses Grave Harm To American Businesses.

Review by this Court is particularly important to rein in abuse of the *parens patriae* device. This Court's recent decisions have helped curb class action abuses by, among other things, expressly holding that the procedural aggregation of claims cannot be used to smother individual defenses by way of "Trial by Formula." As a result, plaintiffs' attorneys have increasingly turned to partnerships with state attorneys general to bring the same types of abusive suits they once brought as private class actions as *parens patriae* actions and thereby circumvent this Court's recent class action decisions. Given the monetary incentives involved for private counsel, these proceedings typically abandon any pretense of prosecutorial restraint and force businesses to settle for

large sums regardless of whether an action has merit, frustrating innovation and passing along costs to U.S. consumers. The Court should intervene to make clear that the rule against "Trial by Formula" applies in the *parens patriae* setting as well.

There is no question that states have engineered an end-run around the protections that this Court has afforded defendants in federal class actions by cloaking de facto class actions in the garb of their *parens patriae* authority. Indeed, commentators have recognized that states can be expected to "step into the void left by private class action attorneys by exploiting their broad parens patriae authority." Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-*Concepcion *Era*, 56 St. Louis U. L.J. 1203, 1226 (2012) (noting that this practice "is both practical and strategic" because "suits brought under parens patriae are not subject to the strictures of Rule 23, as these are not technically class actions"); see also Myriam Gilles & Gary Friedman, *Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 660 (2012) (noting that "state attorneys general . . . have the ability to fill the void left by class actions, primarily through expanded use of the parens patriae powers that are currently on the books in most states" and that "[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"). After all, "[t]he decisions in *Dukes* and *Comcast* le[d] to increased scrutiny of all aspects of Rule 23(a) and 23(b) class certification requirements, making it more difficult for plaintiffs to show commonality and predominance of common questions. A parens patriae proceeding will not only be litigated

in state court but also will not be subject to these federal court class action trends." Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 Emory L.J. 476, 524-25 (2014) (footnote omitted).

This litigation landscape "enhances the incentive for private, contingency-fee counsel to pair with state attorneys general and bring parens patriae actions in state court." *Id.* at 526-27; see also Gilles & Friedman, *supra*, at 675 ("In the wake of *Concepcion*, state AGs will be on the receiving end of vastly more, and better, large-scale litigation opportunities than ever before. Many cases that would previously have been filed as class actions will, instead, be presented to state AGs."). And the incentives for filing such suits have proven irresistible. As one commentator noted in the *Wall Street Journal*:

> Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. They're not on the hook for any downside, so wouldn't it practically be negligent to let a chance to sue pass by?

Walter Olson, *Tort Travesty*, Wall St. J., May 18, 2007, at A17.

The growing popularity of *parens patriae* lawsuits, many of which have dubious merit, is bad for American businesses and consumers. If courts continue to give states free rein to litigate otherwise-

barred class actions under their *parens patriae* authority, the instances in which businesses are forced to settle unmeritorious suits doubtless will multiply, harming the economy and consumers. The costs already imposed by having to litigate class actions are well established. It is widely recognized that "[b]usinesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices." Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004); see also Sarah Rajski, In re Hydrogen Peroxide: *Reinforcing Rigorous Analysis for Class Action Certification*, 34 Seattle U. L. Rev. 577, 607 (2011) ("These class action settlements and jury awards cost hundreds of millions of dollars – costs that must be recovered through higher prices for goods and services, which ultimately affect the economy as a whole.").

The daunting costs of litigation – coupled with the prospect of liability – impose a tremendous pressure to settle. Indeed, this Court recently recognized the perils of aggregate litigation for defendants in the class action context: "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (stating also that "[o]ther courts have noted the risk of 'in terrorem' settlements that class actions entail");

see also, *e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted).

The same pressure to settle regardless of merits is posed by *parens patriae* suits, which similarly aggregate several smaller constituent claims into one super-claim that is presented to a jury for an up-or-down vote, with potentially disastrous consequences for defendants that do not prevail at trial. Indeed, settlement pressures are magnified when the State has brought aggregate litigation through its *parens patriae* authority. After all, the risk of bias against defendants is heightened "where the state stands to recover hundreds of millions of dollars from an out-of-state defendant," Pet. 27, as this Court has recognized in the jurisdictional context. See, *e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010) (referring to "prejudice against an out-of-state party" as the "relevant purposive concern" of diversity jurisdiction); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553-54 (2005) (explaining that Court's application of complete diversity rule furthers "the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants"); *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (recounting the belief that "courts of a state may favor their own citizens" and that "[b]ias against outsiders may become embedded in a judgment of a state court").

Moreover, the absence of procedural safeguards dramatically increases the chances that a business will pay millions of dollars to settle a frivolous *parens patriae* suit. Vairo, *supra*, at 527-28 (noting that *parens patriae* "actions may provide more problems than class actions" because defendants "will not have support of the decisions in *Dukes* and *Concepcion* to help them avoid group litigation, which ups the settlement ante"). "The sheer magnitude of a statewide parens patriae suit" means that such suits "pack a significant deterrent wallop," "particularly because of the ease or comparatively low transaction costs associated with initiating such a suit." Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 Tul. L. Rev. 1919, 1938 (2000). And the lack of a single forum to consolidate all claims (as might happen in the federal system) multiplies the risks that businesses face: "Instead of a bet-your-company scenario with respect to one action, there could be fifty bet-your-company scenarios." Vairo, *supra*, at 526.

Finally, the increasing tendency of states to involve private contingency-fee counsel in *parens patriae* suits only makes matters worse. Attorneys paid on a contingency-fee basis invariably seek to maximize the number of alleged violations and the size of the penalty for each, an approach that has led to "eye-popping" verdicts in some of the cases that have gone to trial, see Peter Loftus, *States Take Drug Makers to Court Over Marketing*, Wall St. J., Apr. 22, 2013, at B3. Because state courts like the one here have steadfastly refused to impose procedural limitations on the mode of proving aggregated claims of violations of state law, *parens patriae* suits uniquely permit a "slash-and-burn-style of litigation" that

threatens to turn courts into "an engine of an industry's unnecessary destruction." *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 463-64 (E.D.N.Y. 2009).

This Court's intervention is urgently needed to safeguard bedrock guarantees of due process and to ensure that American businesses do not suffer as a result of novel efforts to establish class liability in the absence of critical procedural protections.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KATE COMERFORD TODD
SHELDON GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

JAMES M. SPEARS
MELISSA B. KIMMEL
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA
950 F Street, NW
Suite 300
Washington, DC 20004

JOHN H. BEISNER
Counsel of Record
JESSICA D. MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7000
john.beisner@skadden.com

Attorneys for Amici Curiae

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