No. 13-842

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *et al*.,
Petitioners,
v.
CITY OF NEW YORK, NEW YORK, *et al*.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN COATINGS ASSOCIATION, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici curiae the Chamber of Commerce of the United States of America, American Coatings Association, American Fuel & Petrochemical Manufacturers, National Association of Manufacturers, and National Federation of Independent Business respectfully submit this brief in support of the Petitioners, on behalf of themselves and their membership. *Amici* urge the Court to grant certiorari because the ruling below conflicts with the Court's rulings on two fundamental protections guaranteed to defendants under the United States Constitution: (1) the requirement that the plaintiff has suffered a concrete, particularized and actual or imminent injury and (2) the assurance that a party may not be punished under state law for actions taken in response to a federal law mandate.[1]

By holding that the Petitioners could be held liable for the potential, future presence of MTBE at levels within safe drinking water standards in currently-unused water supplies, the Second Circuit improperly expanded the scope of judicial inquiry beyond proper Article III case-or-controversy strictures, divorced common law tort liability from any proof of injury to the City's legal interest in providing water meeting safe drinking water standards, and opened the floodgates to litigation against all manner of commercial enterprises for similar non-injurious conduct. Moreover, the Second Circuit's holding that Petitioners can be liable under state law for using

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[1] The parties consented to the filing of this brief after receiving 10 days notice of *amici curiae*'s intention to file, pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

MTBE as the safest feasible alternative to comply with the federal Clean Air Act mandate to oxygenate gasoline stands in logical contradiction to the federal government's considered judgment that risks of MTBE in groundwater were outweighed by the considerable benefits of MTBE in reducing air pollution. The following associations join in this brief:

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies, trade associations, and professional organizations of every size, in every sector, and from every region of the country.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Second Circuit affirmed a jury award in excess of $100 million based upon the *possibility* that the City might at *some indefinite point of time* in the next 25 years seek to use water that *might* contain small amounts of one type of contaminant, the gasoline additive methyl tertiary butyl ether (MTBE), but at levels that fall *within* the City's own safe drinking water standards and thus would not injure the city's ability to provide safe drinking water to its residents. This ruling warrants the Court's review because it stands in sharp contravention to the clear requirements of Article III standing that "an injury must be concrete, particularized, and actual or imminent," *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1140-41 (2013) (quotations and citation omitted). Indeed, the jury verdict below rests upon a speculative chain of future events which—even if fully realized—would *never* result in a cognizable injury-in-fact.

The consequences of the decision below extend far beyond the present case. By disregarding the jury's finding that MTBE levels would never exceed safe drinking water standards, the Second Circuit effectively redefined the term "drinking water" to mean "pristine water," so that the presence of *any* trace amount of *any* foreign substance constitutes a concrete injury. But as the New York City Department of Environmental Protection ("NYDEP") itself recognizes, this definition not only defies the legal meaning of "drinking water," it defies reality. As the NYDEP has elsewhere explained, "[a]s water travels over the surface of the land or through the ground, it dissolves naturally occurring minerals and,

in some cases, radioactive material and can pick up substances resulting from the presence of animals or from human activities." *New York City Department of Environmental Protection, New York City 2009 Drinking Water Supply and Quality Report* 2 *[hereinafter NYC 2009 Drinking Water Report], available at* http://www.nyc.gov/html/dep/pdf/wsstate09.pdf. Because of this fact, "[d]rinking water, including bottled water, may reasonably be expected to contain at least small amounts of some contaminants." *Id*. However, "[t]he presence of contaminants does not necessarily indicate that water poses a health risk." *Id*. Rather, "[i]n order to ensure that tap water is safe to drink, the New York State Department of Health (NYSDOH) and [the United States] EPA prescribe regulations that limit the amount of certain contaminants in water provided by public water systems." *Id*.

Virtually all drinking water in this country, while perfectly safe to drink, contains trace amounts of at least some foreign substances, both man-made and naturally occurring. Thus, unless reviewed and reversed, the decision below would transform every public drinking water supply in this country—and indeed every *potential* future drinking water supply in this country—into a ready-made multi-million dollar lawsuit. The ruling would open the floodgates to claims against virtually every manner of human enterprise that could be linked with such trace detections, affecting such diverse sectors of the economy as agriculture, manufacturing, petroleum, and pharmaceuticals.

The preemption ruling below also warrants review because the state law verdict stands in logical contradiction to the federal government's considered

judgment, in requiring Petitioners to oxygenate gasoline and approving MTBE's use, that the benefits of MTBE-oxygenated gasoline in reducing air pollution outweighed any potential risks of groundwater contamination. The conflict is even sharper on the record here, where the jury rejected the City's argument that there was a safer, feasible alternative to MTBE. Under the Supremacy Clause, a defendant should not be held liable under state law for adopting the safest feasible means to comply with a federal mandate.

Amici accordingly urge the Court to grant the petition for a writ of certiorari and reaffirm the principles of constitutional standing and federal supremacy abandoned in the Second Circuit's opinion.

ARGUMENT

I. THE DECISION BELOW THREATENS THE CONTINUED VITALITY OF THIS COURT'S RULINGS ON CONSTITUTIONAL STANDING.

A. The Second Circuit Impermissibly Based Constitutional Standing On A Speculative Chain of Possibilities.

The Second Circuit properly recognized that "[u]nder New York law, the City does not actually own the water in Station Six; it simply owns the right to use that water. *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 109 n.31 (2d Cir. 2013). To establish standing in this case, the City accordingly was required to establish an injury to its interest in using groundwater below Station 6 for drinking water purposes. It is undisputed, however, that (1) the City does not pump drinking water from any wells at Station 6 (for reasons wholly independent of the alleged MTBE

contamination)[2]; (2) the City cannot begin pumping drinking water from Station 6 regardless of the alleged MTBE contamination without building a facility to treat other compounds in the water supply that *do* exceed safe drinking water standards; and (3) even crediting the jury's Phase 1 and 2 findings that the City had a "good faith intent" to begin using those wells in the future, that would not occur for many years, and even then the wells would not serve as a primary source of drinking water and it is uncertain whether MTBE would be drawn into Station 6's outflow; and (4) the jury found that even if that occurs, MTBE levels in the groundwater beneath the Station 6 wells would not peak at the still-within MCL level of 10 parts per billion ("ppb") until the year 2033.[3]

Thus, the $100 million damages award below was based entirely on the following tenuous chain of future possibilities:

- If the City builds a treatment facility within the next 10-15 years; and

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[2] *In re MTBE Prods. Liab. Litig.*, 643 F. Supp. 2d 446, 450 (S.D.N.Y. 2009) ("None of the Station 6 wells were turned off in response to MTBE contamination.").

[3] MCLs (*i.e.*, maximum contaminant levels) are "safe levels that are protective of public health." National Primary Drinking Water Regulations; Synthetic Organic Chemicals; Monitoring for Unregulated Contaminents, 52 Fed. Reg. 25,690, 25,693-94 (July 8, 1987) (to be codified at 40 C.F.R. pt. 141). MCLs "represent the level of water quality that EPA believes is acceptable for over 200 million Americans to consume every day from public drinking water supplies." National Oil and Hazerdous Substances Pollution Contingency Plan, 55 Fed. Reg. 8,666, 8,750 (Mar. 8, 1990) (to be codified at 40 C.F.R. pt. 300).

- If the City then starts pumping drinking water from the currently inactive wells at Station 6; and
- If those wells draw in MTBE (not currently present in the groundwater beneath the site) reaching a peak level of 10 ppb in the year 2033; and
- If the City elects to remediate the MTBE in this groundwater despite the fact that the water will meet all safe drinking water standards;
- Then the City will suffer an injury.

As the Court reaffirmed just this past term, however, a "speculative chain of possibilities does not establish that injury . . . is certainly impending or is fairly traceable" to a defendant's alleged conduct and cannot support a finding of constitutional standing. *Clapper*, 133 S. Ct. at 1150. The Second Circuit's holding in this case simply cannot be squared with *Clapper*, and it should not be allowed to stand.

This case raises the same constitutional concerns posed in *Clapper*. In *Clapper*, the Second Circuit had found constitutional standing based upon a similar speculative chain of possibilities of future injury from the FISA Amendments Act of 2008, concluding that a party could establish injury-in-fact based on an "objectively reasonable likelihood" of future harm. This Court reversed, holding that "the Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). The Court likewise rejected the Second Circuit's finding

that a party can establish standing by incurring present costs "as a reasonable reaction to a risk of [future] harm." *Id*. at 1151. The Court explained that a party "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id*. "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a non-paranoid fear." *Id*.

In keeping with *Clapper*, other courts have properly held that claims brought by public water suppliers for alleged potential future risks to drinking water are not ripe for resolution. In *City of Moses Lake*, for example, the city-plaintiff brought suit against various aircraft manufacturers based upon alleged contamination of the city's water supply with trichloroethylene ("TCE"). *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164 (E.D. Wash. 2006). The city was unable to demonstrate the presence of TCE in excess of MCL drinking water standards, and the court accordingly concluded that the city had not established any current damage. *Id*. at 1184 ("Moses Lake has not presented any evidence of an actual existing danger"). Like the City here, the City of Moses Lake argued that it should nonetheless be allowed to proceed with its claim because "if it drills new wells, they may become contaminated with TCE in excess of the MCL." *Id*. The court rejected this argument as premature, explaining that "if and when one of the wells exceeds the MCL for TCE, Moses Lake will have a cause of action because clearly then a health risk will exist." *Id*.

Likewise, in *Iberville Parish Waterworks Dist. No. 3*, the court rejected a claim brought by a public water

system against an herbicide manufacturer seeking damages for water treatment costs. *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Prot., Inc.*, 45 F. Supp. 2d 934 (S.D. Ala. 1999), *aff'd*, 203 F.3d 1122 (11th Cir. 1999) (unpublished opinion). Again, lacking any present evidence of above-MCL contamination of drinking water, the water supplier argued that it should be allowed to seek damages for potential future contamination. The court dismissed the claim as not ripe, *id*. at 941, explaining that the plaintiffs' claims of potential future contamination were not sufficiently definite to provide the court with jurisdiction:

> Plaintiffs have presented nothing to indicate that Atrazine levels in their water sources are rising in any predictable manner such that it *is clear that the levels will certainly* violate the MCL. Neither has either Plaintiff presented evidence that would, in some manner, show a significant increase in Atrazine usage which would result in a *definite increase* in Atrazine levels. Without any indication of *an imminent and nearly certain threat of injury*, both Plaintiff's claims amount to little more than conjecture and are claims for which no standing will lie.

Id. at 942 (emphasis added). *See also Knaust v. City of Kingston*, 193 F. Supp. 2d 536, 543 (N.D.N.Y. 2002) (rejecting plaintiffs' claim of cognizable injury based upon the threat of future contamination of subterranean lake where no showing was made that such contamination was "imminent"); *Plainview Water Dist. v. Exxon Mobil Corp*., 856 N.Y.S.2d 502, 2008 WL 220192, at *22 (N.Y. Sup. Ct. Jan. 9, 2008) (unpublished table decision, text in Westlaw) ("Plaintiff bore the burden of proving through non-

speculative evidence not only that MTBE will actually impact its Plant 1 wells in the future, but that such impacts are 'certainly impending,' 'actual and at hand' and 'real and immediate' as required by New York Law."), *appeal dismissed*, 66 A.D.3d 754 (N.Y. App. Div. 2009), *and appeal denied*, 926 N.E.2d 1237 (N.Y. 2010).

By allowing the City here to proceed based upon the contingent future possibility of harmful groundwater contamination, the Second Circuit abandoned the "fundamental limitation" on the "judiciary's proper role in our system of government" to only resolve "actual cases or controversies." *Clapper*, 133 S. Ct. at 1146. Indeed, the City's theory in this case could not even satisfy the Second Circuit's lax "objectively reasonable likelihood" standard that this Court determined in *Clapper* was unconstitutionally permissive. As the record below reflects, the City is not using the wells at Station 6 for drinking water, has no immediate plans to use those wells for drinking water, and is not currently building a treatment plant at Station 6 that would be necessary if the City were to elect to use the Station 6 wells for drinking water. Rather, the jury found only that the City has a "good faith intention" to begin constructing a treatment plant at some unknown point in the next 15 years. Moreover, the jury found that, even if the City were eventually to build such a treatment plant, it still would not use the Station 6 wells as a primary source of drinking water but rather only as a backup supply. Accordingly, the City is not facing any imminent threat to its drinking water supply, nor is it even facing an imminent decision with regard to the Station 6 wells. This is the epitome of an unripe claim.

B. Even the City's Speculative Future Injury Does Not Constitute An Injury-in-Fact That Would Provide Standing.

The lack of ripeness and the need for this Court's review is compounded by the fact that the City was unable to establish that the predicted future harm would even constitute an injury-in-fact. After an eleven-week trial, the jury found that MTBE levels in the groundwater will at all relevant times in the future meet the New York State and New York City applicable drinking water standard of 10 ppb. Accordingly, even accepting the City's full speculative chain of future possibilities, the Station 6 wells would still provide an available source of safe drinking water. The City accordingly failed to establish that it would ever suffer a cognizable injury for purposes of standing.

The Second Circuit's holding that that groundwater contamination at or below the MCL can give rise to an injury-in-fact rests upon a fundamental misunderstanding of the City's legal interests. In holding that the City had standing to pursue a claim based upon within-MCL groundwater contamination, the district court asked whether "an MCL displaces common law tort liability resulting from groundwater contamination" and concluded that it did not. *In re MTBE Prods. Liab. Litig.*, 458 F. Supp. 2d 149, 157 (S.D.N.Y. 2006). The Second Circuit, likewise, concluded that "[t]he MCL does not convey a license to pollute up to that threshold." *In re MTBE Prods. Liab. Litig.*, 725 F.3d at 109. The issue here, however, is not whether drinking water standards set the per se standard for *liability* under state tort law but, rather, *what is the nature of the property interest* that the City claims has been injured.

Under New York law, the City "is entitled to use the water from the aquifer but does not have a property interest in the aquifer itself." *Plainview Water Dist.*, 2008 WL 220192, at *20 (citing cases); *see also Knaust*, 193 F. Supp. 2d at 544 ("Plaintiffs do not 'own' the waters in the subterranean lake beneath their property – they only have a right to the reasonable use of that water"). Accordingly, the nature of the City's interest under New York law is defined by the purpose for which it would make use of the groundwater, in this case for drinking water services.

But, as so understood, the City's property interest in potential Station 6 water was not shown on the record below to be at risk of any future injury. Under New York law, "[p]otable water means water which meets the requirements established by" the New York State Department of Health safe drinking water regulations. N.Y. Comp. Codes R. & Regs. tit. 10, § 5-1.1 (2011). The NYSDOH has set the MCL for MTBE at 10 ppb. The jury's finding that the groundwater from Station 6 will at all relevant times in the future meet the safe drinking water MCL requirements for MTBE means that the City has not suffered and will not in the future suffer any injury to its legal interest. *See New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1210 (D.N.M. 2004) ("groundwater that meets those [safe drinking water] standards has not been lost to use as drinking water"), *aff'd*, 467 F.3d 1223 (10th Cir. 2008).

Other courts have rejected the position the Second Circuit's adopted below. As one such court explained:

> [W]ater need not be pristine to be drinkable, and use for drinking water purposes depends upon whether applicable water quality standards are met, not whether the water yet

> remains in its primordial state, untouched by any of the chemical remnants of the modern age. As this court explained a year ago, Plaintiffs' own characterization of their alleged injury selects the legal standard to be applied to measure the existence and extent of that injury. Drinkability does not equate with pristine purity under [state] law, and the court remains convinced that a loss of drinking water services must be measured by applying [state] drinking water standards.

New Mexico, 335 F. Supp. 2d at 1212; *see also Brooks v. E.I. DuPont de Nemours & Co., Inc*., 944 F. Supp. 448, 449 (E.D.N.C. 1996) ("since the levels of contaminants estimated by plaintiffs' experts fall below the maximum allowable concentration for all contaminants at issue, the plaintiffs have failed to demonstrate even a prima facie showing that they have been damaged"); *Gleason v. Town of Bolton*, No. 991194, 2002 WL 1555320, at *3 (Mass. Super. Ct. May 23, 2002) (no evidence of injury to water supply where "[t]he levels of MTBE detected in the water supply well never exceeded the MCL"); *Adams v. A.J. Ballard, Jr. Tire & Oil Co*., Nos. 01 CVS 1271, 03 CVS 912, 03 CVS 1124, 2006 WL 1875965, at *31 (N.C. Super. Ct. June 30, 2006) ("concentration levels that do not reach the standard set by North Carolina regulations do not create a threat to human health or render the groundwater 'unsuitable for its intended usage'").

Nor can the City manufacture constitutional standing by claiming that it might reasonably choose to remediate groundwater even if the groundwater was already usable for drinking water purposes. As other federal courts have properly concluded, a water

supplier's only legally protected interest lies in its ability to provide potable drinking water. If that interest has not been damaged, then there is no cognizable injury-in-fact. *See Emerald Coast Utils. Auth. v. 3M Co.*, 746 F. Supp. 2d 1216, 1231 (N.D. Fla. 2010) (rejecting the utility's argument that the court follow the reasoning used by the Second Circuit here and dismissing claim where it was "undisputed that the level[] of [the chemicals] at the time [the] suit was filed were compliant with EPA provisional advisories"); *City of Moses Lake*, 430 F. Supp. 2d at 1182 (holding that the "existence of some contamination in the aquifers, and some detects of TCE [trichloroethylene] . . . not above the MCL" does not create an issue of material fact regarding the existence of injury); *Iberville Parish Waterworks Dist. No. 3*, 45 F. Supp. 2d at 941-42 ("[b]ecause both District 3 and Bowling Green are in compliance with the [Safe Drinking Water Act] drinking water standards, it cannot be said that either has suffered any actual invasion of a legally protected interest.").

C. The Second Circuit's Erroneous Ruling Would Open The Floodgates To Similar Litigation Alleging Damage From the Use and Potential Use of Safe Drinking Water at Water Supply Systems Around the Country.

Review is warranted here because the Second Circuit's constitutional error in finding a concrete and imminent injury has improperly extended federal-court jurisdiction over the Petitioners in this case. The importance of this case extends far beyond the Petitioners. If the ruling is allowed to stand and is followed by other courts, the consequences could extend to all corners of our economy. As set forth

below, while almost always at levels well within regulatory limits and not posing any risk to human health, the presence of trace amounts of chemicals and other foreign substances in public drinking water supplies is ubiquitous.

The Second Circuit's finding that the mere possibility of future within-MCL detections provides standing for an immediate suit for multi-million-dollar damages would put virtually every water supplier in this country in the role of plaintiff and would place a litigation target on the back of virtually every business and industrial enterprise operating in the United States. As the Kentucky Court of Appeals explained in rejecting a similar claim for damages from trace detections of polychlorinated biphenyls ("PCBs") in a property damages claim:

> Were we to accept the landowners' argument that such evidence is sufficient, the implication for future cases would be that in any negligent trespass case, the mere deposit of a potentially toxic substance on property in an amount not detectable by unassisted human senses would satisfy the element of actual injury to property. Such a decision would open the proverbial floodgates of litigation, allowing a suit to proceed any time a landowner can show the presence, however minute, of a substance known to be harmful in greater concentrations. Given that there was testimony presented that PCBs are present in miniscule amounts on nearly every piece of property wherever located, and that after a century and a half of industrialization there is most likely no land in the continental United States that is completely free from

> one or more potentially toxic or harmful substances, the landowners would have us authorize a suit by any landowner in the Commonwealth against any individual or enterprise which has ever emitted a potentially harmful substance that can be detected on real property in any amount.

Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604, 621 (Ky. Ct. App. 2003).

The United States Department of Interior Geological Survey (USGS) and other investigators have repeatedly documented the presence of very low levels of man-made compounds in public water supplies. These same studies have also established, however, that the detected levels of such compounds are almost always well within safe drinking water limits and do not pose any health risk. For example, in one study, USGS scientists detected one or more volatile organic compounds ("VOCs") in 65% of the samples drawn from domestic wells at more than half of the nation's regionally extensive aquifers or aquifer systems. Barbara L. Rowe, *et al., Occurrence and Potential Human-Health Relevance of Volatile Organic Compounds in Drinking Water from Domestic Wells in the United States*, 115 Environmental Health Perspectives 11, 1539-1546 (Nov. 2007). The vast majority of these detections, however, were well within safe drinking water standards: 91% of the sampled wells had total VOC concentrations less than 1 ppb and only 1.2% of the samples had any VOC concentrations greater than a human-health benchmark. *Id*. at 1541-42.

Likewise, in another study, the USGS sampled source water from nine community water systems for analysis of 258 man-made organic compounds and

detected more than half of the compounds in at least one source water sample, with six compounds detected in more than half of the samples. USGS, *Anthropogenic Organic Compounds in Source Water of Nine Community Water Systems that Withdraw from Streams, 2002-05: Scientific Investigations Report 2008-5209* (2008), available at http://pubs.usgs.gov/sir/2008/5208/pdf/sir2008-5208.pdf. Again, though, the USGS found that the detected levels did not raise any human health concerns. "Even when single-sample maximum concentrations are considered, few compounds were detected in finished water at concentrations within a factor of 10 of their human-health benchmarks." *Id*. at 37.

The presence of such low-level concentrations of man-made compounds cannot be linked to any one industry or any one sector of our economy. In the present case, the City of New York seeks damages against an oil company for within-MCL levels of MTBE in groundwater, a claim that the USGS studies suggest could be made by hundreds of other water suppliers across the country against similarly-situated defendants.[4] But under the Second Circuit's

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[4] *See* USGS, *A Review of Literature for Methyl tert-Butyl Ether (MTBE) in Sources of Drinking Water in the United States*, Open-File Report 01-322, 4, 6, *available at* http://sd.water.usgs.gov/nawqa/pubs/ofr/ofr01_322.pdf (reporting that MTBE was detected in groundwater samples in 14 of the 33 states surveyed but that "the vast majority of concentrations in public drinking-water wells was less than 10 [ppb]"); Michael J. Moran, John S. Zogorski & Paul J. Squillace, *MTBE and Gasoline Hydrocarbons in Ground Water of the United States*, 43 Ground Water 4, 615-627 (2005) (detecting MTBE in 7.6% of some 4,000 ground water samples from across the United States but with only 13 samples, or 0.3%, above the lower limit of U.S. EPA's Drinking Water Advisory).

legal theory, similar lawsuits could be filed against a broad swath of the U.S. economy. For example, farmers and agribusinesses could be targeted based on low-level detections of pesticides in groundwater (as identified in over 50% of samples in one study).[5] Likewise, the pharmaceutical and cosmetics industries could be sued for the widespread presence of those products in public water supplies, also at levels well below any human health concern.[6] And lawsuits

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[5] *See* Dana W. Kolpin, Jack E. Barbash, & Robert J. Gilliom, *Occurrence of Pesticides in Shallow Groundwater of the United States: Initial Results from the National-Water Assessment Program*, Environmental Science & Technology 32(5); 558-566 (1998), *available at* http://water.usgs.gov/nawqa/pnsp/pubs/est32/ (reporting USGS finding that "[p]esticide results from the 41 land-use studies conducted during 1993-95 indicate that pesticides were commonly detected in shallow ground water . . . in agricultural and urban settings across the United States," but that "[m]aximum contaminant levels (MCLs) established by the U.S. Environmental Protection Agency for drinking water were exceeded for only one pesticide . . . at a single location").

[6] Shane A. Snyder, *Occurrence, Treatment, and Toxicological Relevance of EDCs and Pharmaceuticals in Water*, 30 Ozone: Science and Engineering, 65-69 (2008), *available at* http://www.tandfonline.com/doi/abs/10.1080/0191951070179927 8#.UvU_wmJdUlk (noting detections of trace amounts of some pharmaceuticals in upwards of 90% of sampled water treatment plants but at levels not relevant to human health); *see also* New York City Department of Environmental Protection, *Occurrence of Pharmaceuticals and Personal Care Products (PPCPs) in Source Water of the New York City Water Supply* 17-18 (May 26, 2010), *available at* http://home2.nyc.gov/html/dep/pdf/quality/nyc_dep_2009_ppcp_report.pdf ("several screening level risk assessments have concluded that no appreciable human health risk exists for the trace levels of PPCPs detected in this and other comparable studies. . . . Consistent with the[se] conclusions . . . the[] large [margins of exposure found in this study] suggest that the risks to the health of New York City consumers, if any, are likely to be *de minimis*.")

likewise could be filed against virtually every manufacturing or industrial company in the country, based upon their use of various VOCs as a necessary part of their operations.[7] Indeed, in its 2008 survey of man-made compound detections in surface water, the USGS identified over a dozen different business category sources of such trace detections: (1) disinfection by-products, (2) fungicide-related compounds, (3) fungicides, (4) gasoline hydrocarbons, oxygenates, and oxygenate degradates, (5) herbicides and herbicide degradates, (6) insecticide and insecticide degradates, (7) manufacturing additives, (8) organic synthesis compounds, (9) pavement—and combustion-derived compounds, (10) personal care and domestic-use products, (11) plant- or animal-derived biochemicals, (12) refrigerants and propellants, and (13) solvents. Source Water of Nine Community Water Systems, at App. 1. The potential targets of litigation are virtually endless.

None of these potential lawsuits would protect human health or a public water supplier's property interest in providing safe drinking water. As New York City has itself elsewhere acknowledged, the presence of trace levels of man-made substances in surface and groundwater is an unavoidable consequence of a developed human society and does not injure governments' interest in providing safe drinking water to its citizens. *See NYC 2009 Drinking Water Report, supra; see also, e.g.*, Merijin Schriks, *et al., Toxicological relevance of emerging contaminants for drinking water quality*, Water Research 44; 461-476, 473 (2010) ("The evaluation as presented here supports the conclusion that the majority of selected compounds as found in surface

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[7] *See* Rowe (2007), *supra*.

waters, groundwater, and drinking water do not pose an appreciable concern to human health"). Rather, these lawsuits would reflect part of a growing trend of standardless liability, whereby government entities, often (as in this case) in collaboration with contingent-fee private plaintiffs' attorneys, seek to extract monetary tort recoveries from businesses for conduct that has not imposed any concrete, particular and actual or imminent injury to either individuals or to the societal health at large. *See* James A. Henderson, *The Lawlessness of Aggregative Torts*, 34 Hofstra Law Review 329-343 (2005).

The present lawsuit—and future lawsuits that would follow the same pattern if the Second Circuit's ruling is allowed to stand—highlights what Cornell Law Professor and co-reporter on the products liability section of the Restatement (Second) of Law of Torts, James Henderson, has characterized as a new legal strategy of "aggregative torts," that is, torts whereby large, informally defined groups are alleged to be the collective victims of a defendant's wrongdoing. *Id*. at 329. Aggregative torts, Professor Henderson warns, "are inherently lawless and unprincipled." *Id*. at 337. "The lawlessness of aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards." *Id*. at 338. These "vague standards leave it to the discretion of triers of fact to 'do what is right' in factual contexts that juxtapose large numbers of putative victims against affluent groups of commercial actors." *Id.* at 339. "[T]he parties become supplicants, begging for enough of the tribunal's sympathy to cause it to bless them with a favorable exercise of its unreviewably boundless discretion." *Id*.

Thus, in this case, Petitioners were not held liable because they injured or imminently will injure the City's ability to provide safe drinking water. Rather, Petitioners were held liable because the Second Circuit failed to abide by the limitations of constitutional standing and affirmed a jury decision—based on only vague, open-ended standards and speculation as to potential future injury—to side with the governmental plaintiff who purported to be protecting the public health over an easy-to-vilify, affluent oil company. Unless the Second Circuit's flawed ruling is reversed, other governmental plaintiffs (and the private plaintiff attorneys who finance their lawsuits) will have a ready litigation model to export throughout the Second Circuit and the country at large. As Professor Henderson warned, unless the judiciary stands up against these types of standardless lawsuits, "it is certain that more of these claims will be forthcoming." *Id*. at 340-41.

Amici curiae accordingly urge this Court to accept review in this matter and, by reversing the Second Circuit's erroneous ruling, return the law to its traditional moorings in properly-defined legal standards for injury and the strictures of constitutional standing.

II. THE DECISION BELOW IMPERMISSIBLY HOLDS PETITIONERS LIABLE UNDER STATE TORT LAW FOR USING THE SAFEST FEASIBLE MEANS OF COMPLYING WITH THE FEDERAL CLEAN AIR ACT'S OXYGENATE MANDATE.

The jury in this case held Petitioners liable under state law for adopting the safest feasible means available to comply with a federal mandate under the Clean Air Act Amendments of 1990. Placing form over substance, the Second Circuit held that there is no

preemption in this case because the federal government did not require Petitioners to use MTBE in its gasoline. The record is clear, however, that the federal government required Petitioners to oxygenate their gasoline to reduce harmful emissions into the air, expressly approved the use of MTBE and stated that it was the most effective oxygenate available for that purpose, and made this decision with full knowledge of the potential risks that MTBE might pose to groundwater. Pet. at 5-8. Moreover, the record and jury verdict establish that MTBE was the safest, feasible means available at the time for Petitioners to comply with the federal mandate.

This case accordingly poses a particularly sharp conflict between federal and state law. Even *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), presents less of a conflict. In *Geier*, the Court held that a state law claim based upon a defendant's *failure* to adopt one of a mix of safety measure suggested by the federal government impermissibly conflicted with the intentionally flexible federal requirement. Here, however, Petitioners affirmatively *did* adopt what was on this record the undisputed safest feasible means available to comply with a federal requirement and, in so doing, accomplished an important federal objective to clean the nation's air.

If allowed to stand, the Second Circuit's opinion would effectively put corporations in a position where they can be compelled to take action under federal law for which they later can be held liable under state tort law (with purported damages of hundreds of millions of dollars), even where the alleged adverse consequence of the mandated action is one that the federal government specifically considered and deemed acceptable in imposing the federal require-

ment at issue. This is wholly improper. Under the Supremacy Clause, the federal government's decisions on such matters preempt state law decisions to the contrary. *Amici curiae* accordingly urge the Court to accept review on this ground as well.

CONCLUSION

Accordingly, *amici curiae* the Chamber, AFPM, ACC, the NAM, and the NFIB urge the Court to grant the petition for certiorari.

Respectfully submitted,

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