No. 13-842

IN THE

Supreme Court of the United States

IN RE: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS LIABILITY LITIGATION

EXXON MOBIL CORPORATION et al.,

Petitioners,

v.

THE CITY OF NEW YORK et al.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

February 14, 2014

QUESTIONS PRESENTED

(i) Whether a claim is ripe when it is predicated on a plaintiff's potential future injury and mere good faith intent to take steps in 15 to 20 years that could, depending on a chain of uncertain events, cause the plaintiff to suffer an actual injury some day in the future.

(ii) Whether the federal oxygenate mandate in the Clean Air Act Amendments of 1990, 42 U.S.C. § 7545 (2000), preempts a state-law tort award that imposes retroactive liability on a manufacturer for using the safest, feasible means available at the time for complying with that mandate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

STATUTES & REGULATIONS:

OTHER AUTHORITIES:

Page(s)

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF devotes substantial resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. In particular, WLF has regularly appeared as *amicus curiae* before this and other federal and state courts in cases involving preemption issues, to point out the economic inefficiencies that often result when liability under state tort laws threatens the predictability and uniformity provided by federal regulatory schemes. *See, e.g., Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011).

Likewise, WLF frequently participates as *amicus curiae* in litigation concerning the outer limits of Article III standing, to urge courts to confine themselves to deciding only cases or controversies that fall within their jurisdiction under the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

WLF is concerned that allowing this matter to proceed to trail when it is not ripe will ultimately

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

have enormous implications for the rule of law. If a plaintiff's bare allegations of remote and contingent future injuries can sustain eye-popping damages awards, such as the $104 million verdict in this case, defendants will have a very difficult time dismissing suits on ripeness grounds, especially in the Second Circuit. The appeals court's holding greatly increases the risk that juries will now be free to engage in rampant speculation about what might happen years from now, resulting in the payout of enormous verdicts for injuries that may never occur.

WLF is also deeply concerned that Petitioners are being subjected to $104 million in liability under state law for using methyl tertiary butyl ether ("MTBE") as a gasoline additive, even though Congress required Petitioners to use an oxygenate and the evidence and verdict below establish that no "safer, feasible alternative" to MTBE was available. Simply put, Petitioners should not be forced into making a Hobson's choice between complying with the Clean Air Act and incurring over $100 million in liability under state law.

As *amicus curiae*, WLF believes that the arguments set forth in this brief will assist the Court in evaluating the issues presented by the Petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

To help reduce harmful emissions, Congress enacted the Clean Air Act Amendments of 1990, which, among other things, mandated a minimum oxygen content for all gasoline sold in certain high-smog areas, including New York City. *See* 42 U.S.C. § 7545(k) (2000). To comply with this federal mandate, gasoline manufacturers were required to add an oxygenate to all gasoline sold in New York City. *See* Pet. App. 9-10. Although the law did not specify the use of a particular oxygenate, the Environmental Protection Agency ("EPA") approved both MTBE and ethanol for use as "the two major oxygenates" under the program. Regulation of Fuel & Fuel Additives, 57 Fed. Reg. 47,849, 47,852 (Oct. 20, 1992). Because MTBE "resulted in the greatest achievable reductions in toxic emissions," EPA predicted that MTBE would soon become the "most heavily used oxygenate." Standards for Reformulated & Conventional Gasoline, 57 Fed. Reg. 13,416, 13,424 (Apr. 16, 1992).

In 1996, the City purchased the Jamaica Water Supply Company ("JWSC") in Jamaica, Queens "in response to complaints about the quality of [the] water". Pet. App. 12, 110. The City did not purchase the water itself, but acquired merely usufructuary rights. A former dry cleaning facility, the West Side Corporation, had previously released large quantities of perchloroethylene ("PCE") that contaminated the groundwater, ultimately resulting in a Superfund site. *Id*. Gasoline manufacturers, including Petitioners, obviously had nothing to do with this PCE contamination.

In 2000, citing concerns over possible MTBE groundwater contamination, New York State prospectively banned MTBE gasoline. *See* N.Y. Agric. & Mrkts. Law § 192-g (McKinney 2000). Acknowledging the need for gasoline manufacturers to comply with the federal mandate, New York law provided for a four-year time table, giving manufacturers until January 1, 2004 to fully modify their supply and distribution systems. *Id.* In 2005, Congress repealed the oxygenate requirement altogether. *See* Energy Policy Act of 2005, Pub. L. 109-58, § 1504, 119 Stat. 594, 1076-80.

In October 2003, New York City sued Petitioners and fifty-four other gas manufacturers for the alleged MTBE contamination of five former JWSC wells. Pet. App. 123. The five wells at issue feed into "Station Six," an uncompleted treatment facility first conceived over a decade ago, but for which construction has never commenced.[2] *Id.* "At no point since acquiring them . . . has the City pumped water from any of the Station Six Wells into its drinking water distribution system." *Id.* at 12. Furthermore, "it is undisputed that the PCE that is present at Station Six precludes the City from serving the water, even absent any MTBE contamination." *Id.* at 110. Nevertheless, alleging that Petitioners "distributed, sold, manufactured,

[2] Although the Station Six wells had long been PCE contaminated, pilot testing by the City in 2000 detected trace amounts of MTBE at 0.73 parts per billion in one well and at 1.5 parts per billion in another well. Pet. App. 12. In 2003, the City's testing revealed MTBE at 350 parts per billion in one well. *Id.*

supplied, marketed, and designed MTBE . . . when they knew or reasonably should have known that MTBE . . . would cause damage to the groundwater,"[3] the City's complaint included claims for defective design, public and private nuisance, negligence, trespass, failure to warn, and a statutory claim under the Toxic Substances Control Act, 15 U.S.C. § 2619. *Id.* at 13.

Petitioners timely removed the case to the U.S. District Court for the Southern District of New York, as part of ongoing multi-district litigation concerning MTBE. Following pretrial proceedings, the district court set the state-law claims for trial. All defendants except Petitioners settled. At trial, the jury rejected the City's defective design claim for failure to prove that a "safer, feasible alternative" to MTBE existed. Pet. App. 48. It also rejected the City's private nuisance claim. *Id.* at 33. Nevertheless, expressly finding that the City "is, *or will be*" injured, *id.* at 22, the jury found Petitioners liable for failure to warn, trespass, public nuisance, and negligence. *Id.* The jury also predicted that contamination would peak in the year 2033, but even

[3] The possibility of future contamination from any MTBE spills at Petitioners' service stations hinges entirely on the size and shape of the wells' "capture zone." Pet. App. 18. The "capture zone," in turn, largely depends on the predicted "pumping scenario," including "the location of the pumping wells, the pumping rates of the wells, and the schedule on which the wells would pump." *Id.* at 126. And because the wells are only intended to be used intermittently as a backup supply, the pumping scenario depends on how often the backup is needed, which itself depends on things including "presently unforeseen" repairs elsewhere in the water system. *See* Pet. 10.

then MTBE concentrations would not require treatment under New York law. *Id.* Ultimately, the jury awarded the City $104.69 million in damages against Petitioners. *Id.* at 33-34 (emphasis added). Arguing that the City's suit was not yet ripe and was preempted under federal law, Petitioners unsuccessfully moved for judgment as a matter of law and for a new trial. *Id.* at 121-190.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed. Rejecting Petitioners' ripeness challenge, the appeals court concluded that the City "brought suit only after testing showed the presence of MTBE in the Station Six Wells." Pet. App. 75. The complaint therefore "alleged a *present* injury—namely, that Station Six had *already* been contaminated with MTBE." *Id.* Under this view, the City's good-faith intent to develop Station Six in fifteen to twenty years sufficed: "the current disuse of the Station Six Wells and the future steps required to use them addresses the scope of the *damages* flowing from the injury, not whether there is an injury at all." *Id.*

The appeals court also rejected Petitioners' preemption defense. The panel downplayed the jury's verdict as to the lack of a safer, feasible alternative to MTBE, concluding that such a finding would not establish that Petitioners' compliance with both state and federal law was "impossible." Pet. App. 48-50. Even if obstacle preemption were triggered, the panel reasoned, the jury found that Petitioners committed "tortious acts" beyond merely using MTBE, "such as failing to exercise reasonable care when storing gasoline that contained MTBE." *Id.* at 60.

REASONS FOR GRANTING THE PETITION

Ripeness is "peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995). The panel below affirmed a staggering $104 million jury award for an injury that has not yet occurred and may never occur. The five wells at the center of this dispute feed into "Station Six," a proposed treatment facility that does not exist and which the City has not even begun to construct. And at no point since acquiring them has the City even attempted to pump water from any of the Station Six wells into its drinking water supply. Regardless, the possibility of any future contamination from MTBE spills at Petitioners' service stations is remote at best.

The City's theory of Petitioners' liability hinges entirely on the size and shape of the wells' "capture zone," which, in turn, depends on the predicted "pumping scenario," including "the location of the pumping wells, the pumping rates of the wells, and the schedule on which the wells would pump." Pet. App 126. And because the wells are only intended to be used intermittently as a backup supply, the pumping scenario depends on how often the backup is needed, which itself depends on things including "presently unforeseen" repairs elsewhere in the water system.

As a result, neither the district court nor the court of appeals should have entertained the merits of the City's conjectural state-law claims for groundwater contamination. The holding below contravenes this Court's longstanding principle that only "ripe" controversies are fit for adjudication in an

Article III court. The speculative harm that the City alleges has not and very well may never come to pass, and the City's "good faith intent" to begin developing the wells at some point over the next 20 years cannot possibly satisfy this Court's "imminence" requirement for a justiciable injury in fact.

The appeals court's ripeness holding is especially troubling given the disturbing alliance in this case between a large municipality and contingent-fee plaintiffs' lawyers. If local governments can now recover huge sums for conjectural future injuries that will never materialize, our system of civil justice will be turned upside down. By encouraging local governments to team up with private lawyers in the hopes of securing a massive payout for unrealized future injuries, the holding below significantly erodes the protections of the ripeness doctrine.

In addition to the pervasive ripeness issues, longstanding principles of conflict preemption prevent the court below from imposing $104 million in liability on Petitioners for using the most prudent means of complying with the Clean Air Act. This Court has recognized that a state law conflicts with federal law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geir v. Am. Honda Motor Co.*, 529 U.S. 861, 899 (2000). The decision below ignores this well-settled view.

The evidence and verdict establish that Petitioners, in complying with federal law, had no safer, feasible alternative to using MTBE.

Petitioners should not be forced to choose between complying with a federal mandate and incurring over $100 million of liability under state law. But if the jury's verdict is allowed to stand, Petitioners will have paid twice for their compliance with that Act—once when they were compelled to use MTBE in their gasoline and again when they are forced to satisfy the City's windfall judgment. Only discretionary review by this Court can prevent that injustice from happening.

The interests of fairness, stare decisis, and rule of law were all injured in this case. WLF joins Petitioners in urging this Court to grant the petition for writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS SHARPLY WITH THIS COURT'S STANDING JURISPRUDENCE

A. The City's Alleged Injury Is Not "Imminent" But Based On A "Speculative Chain of Possibilities"

Article III, § 2 of the U.S. Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." U.S. Const. art. III, § 2. A plaintiff's standing to sue has long been required for a justiciable case or controversy in federal court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Review is warranted in this case because the Second Circuit upheld the City's standing by applying legal standards that conflict sharply with those traditionally employed by this Court.

The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). As this Court has explained, the irreducible constitutional minimum of Article III standing requires, "[f]irst, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (citations omitted). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, "a threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

In rejecting Petitioners' ripeness challenge, the Second Circuit relied in part on the jury's finding that the City evinces a "good faith intent" to develop and begin using the Station Six treatment facility at some point within the next 15 to 20 years. That holding sharply conflicts with this Court's far more stringent standard for deciding when an anticipated future injury can be sufficient to establish Article III standing. Simply put, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 301 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 5801-81 (1985)); *see also Lujan*, 504 U.S. at 564 & n.2. Nor can the City show that any alleged "injury in fact" is "certainly

impending," as required under this Court's standing precedents. *See Steel Co.*, 523 U.S. at 102-03; *Whitmore*, 495 U.S. at 158. Even if, as the jury found below, the City has a "good faith intent" to begin developing Station Six, that is a far cry from a finding that some actual harm is "imminent."

The holding below, therefore, cannot be squared with these principles. For example, for the petitioner in *Whitmore* to establish standing, he needed to show, among other things, that state judges would reach particular decisions on review of his capital case and separately in the case of another inmate on death row, and that those decisions would negatively impact his legal rights in a possible future appeal. *See id.* at 156-57. The Court explained that the petitioner had not shown that "specific and perceptible harms . . . would befall [him] imminently." *Id.* at 159. The Court rejected the claim not because it found that the "string of occurrences" could *never* occur, but because the petitioner could not allege that it "would happen *immediately*." *Id.* (emphasis added).

In this case, the City might conceivably be harmed by groundwater contamination at Station Six only if it uses that water—it has never done so. The jury below found that the City's "good faith intent" to begin developing Station Six, at some unknown point over the next 15 to 20 years, would trigger a cascade of contingent events that would produce an injury decades from now. But that finding does not mean that the City will ever take that or any other action—let alone that it will do so in the imminent future. "Such 'some day' intentions—without any description of concrete

plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury" that this Court requires. *Lujan*, 504 U.S. at 564 n.2.

Furthermore, any "good faith intent" on the part of the present City administration to "some day" develop Station Six cannot bind future administrations over the next 20 or more years. Indeed, the 2010 jury verdict was itself rendered under a previous administration, so the continued relevance of the City's "intent" four years ago is already in serious doubt. And future City administrations, whose consent will be necessary to implement Station Six, are not yet known and do not yet exist. Even if the current regime in fact has a "good faith intent," as the jury found, that intent says nothing about the intent of future leaders and policy makers of New York City.

Even if the City ultimately uses the water at Station Six, it remains uncertain whether the City will be harmed, much less by Petitioners. The possibility of any future MTBE contamination from Petitioner's service stations hinges entirely on the size and shape of the Station Six wells' "capture zone." The "capture zone," in turn, largely depends on the future "pumping scenario," including "the location of the pumping wells, the pumping rates of the wells, and the schedule on which the wells would pump." Pet. App. at 126.

And because the wells are only intended to be used intermittently as a backup supply, the pumping scenario depends on how often the backup is needed, which itself depends on things including "presently

unforeseen" repairs elsewhere in the water system. *See* Pet. 10. Even then, it remains conjectural whether any such contamination will be actionably harmful, as the jury found that MTBE concentrations would remain so low, peaking in the year 2033, that New York State has deemed such water safe enough to serve to the public. *Id*. at 22-23. Here, as in *Whitmore*, the "string of occurrences" that must occur "does not make—and could not responsibly make—a . . . claim of immediate harm." *Whitmore*, 495 U.S. at 159.

Equally flawed is the Second Circuit's suggestion that the City's lawsuit somehow alleges "a *present* injury—namely, that Station Six had *already* been contaminated with MTBE." Pet. App. 75. Because the City did not purchase the water itself, but acquired merely usufructuary rights, no injury is possible unless and until the City undertakes to pump and distribute the water from the wells. And it is undisputed that "[a]t no point since acquiring them . . . has the City pumped water from any of the Station Six Wells into its drinking water distribution system." *Id.* at 12. While it is true that "imminence is concededly a somewhat elastic concept," it "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2).

In sum, review is warranted to resolve the considerable conflict between the Second Circuit's decision and this Court's longstanding case law governing ripeness and standing.

B. The Holding Below, If Allowed To Stand, Will Further Foster An "Unholy Alliance" Between The Plaintiffs' Bar and Local Governments

The Court's denial of the Petition in this case would have enormous implications for the rule of law. If such a remote and contingent future injury can support a $104 million judgment, defendants will have a very difficult time dismissing suits on ripeness grounds, especially in the Second Circuit. The appeals court's holding greatly increases the risk that juries will now be free to engage in rampant speculation about what might happen years from now, resulting in the payout of enormous verdicts for injuries that may never occur.

The appeals court's ripeness holding is especially troubling given the disturbing alliance in this case between a large municipality and contingent-fee lawyers. If a municipality actually incurs out-of-pocket costs to mitigate environmental contamination, it will have little or no incentive to give plaintiffs' lawyers a large percentage of any jury award. After all, it makes little sense for a cash-strapped government to give away 33 percent of a truly compensatory recovery. But if municipalities can now recover huge sums for conjectural future injuries that may never occur, our system of civil justice will soon come to resemble a casino craps table where governments get to play "on the house."

Indeed, given the enormous fiscal pressures under which many local governments currently operate, the temptation to roll the dice on a

contingent-fee basis in the hopes of obtaining a windfall will be difficult for many elected officials to resist. And if the jury's $104 million verdict is left undisturbed in this case, despite the speculative and contingent nature of the alleged injury, it will only further incentivize local governments throughout the Second Circuit to align themselves with the plaintiffs' bar in the future. Where speculation is cheap, it will be plentiful.

By encouraging private plaintiffs' lawyers working on a contingent-fee basis to partner with local governments in the hopes of obtaining a massive recovery for potential future injuries, the holding below significantly erodes the important protections of this Court's ripeness doctrine. "Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." Wm. Grayson Lambert, *Toward A Better Understanding of Ripeness & Free Speech Claims*, 65 S.C. L. Rev. 411, 415 (2013).

Such arrangements also raise serious constitutional concerns. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional & Political Implications*. 18 Sup. Ct. Econ. Rev. 77 (2010). When the government enters into contingent- fee arrangements with private attorneys, it "circumvent[s] the political and constitutional limits on its authority simply by authorizing previously private actors to exercise public power . . . [and] . . . under these circumstances, society [is] left with the worst of both worlds: public power imposed on private citizens, without any of the obligations and limitations on

public power normally associated with the dictates of constitutional democracy." *Id.* at 95.

A disturbing trend has already emerged among state attorneys general, who contract with plaintiffs' lawyers to pursue novel and speculative litigation on a contingent-fee basis. *See* U.S. Chamber of Commerce, *The New Lawsuit Ecosystem: Trends, Targets, & Players*, at 140 (Oct. 2013). In addition to pursuing massive damages awards under existing law, such arrangements seek to vastly expand liability into new areas. *Id.* at 141. But a very real danger exists that private lawyers paid on contingency will primarily seek to maximize their own pecuniary interests rather than pursue what is in the public interest. *See* Don Stenberg, *States Disserve the Public Interest When Hiring Contingent-Fee Lawyers*, WLF Legal Backgrounder (June 20, 2003).

As the Honorable Bill McCollum recently explained in testimony before the House Subcommittee on the Constitution, "when state attorneys general elect to retain contingent-fee plaintiff counsel to pursue litigation on behalf of the state, there is a substantial risk of, and opportunity for, 'pay-to-play' schemes and other types of abuse in which political contributions from plaintiff firms are traded for contingent-fee contracts." *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 112th Cong. 20 (Feb. 2, 2012) (statement of the Honorable Bill McCollum).

Unless this Court grants discretionary review,

the Second Circuit's deeply flawed ripeness holding will only exacerbate the growing problem of contingent-fee attorneys being retained by public entities to pursue speculative litigation. For this reason alone, the Petition should be granted.

II. REVIEW IS WARRANTED TO VINDICATE THIS COURT'S CONFLICT PREEMPTION RULINGS

Congress, by amending the Clean Air Act, required Petitioners to use an oxygenate in their gasoline, and the jury in this case found that there was no "safer, feasible alternative" to using MTBE. In light of that finding, Petitioners should not be forced to choose between complying with the Clean Air Act and incurring over $100 million in liability under state law. Principles of conflict preemption prevent state law from imposing liability on Petitioners for using the most prudent means of complying with a federal mandate.

The Second Circuit's preemption analysis is manifestly wrong and threatens to cause significant and unjustified harm to numerous stakeholders in the oil and gas industry. In rejecting Petitioners' preemption defense, the appeals court reasoned that, although the jury found that Petitioners had no "safer, feasible alternative" than to use MTBE, it was not impossible for Petitioners to use another oxygenate. And because it was conceivably "possible" to comply with federal law without using MTBE, the court held there was no preemption of a retroactive state-law duty barring the use of the safest, most feasible option. Pet. App. 48-50.

But Petitioners proved at trial that eliminating MTBE from its gasoline would have contradicted the Clean Air Act because there was no feasible substitute to MTBE for purposes of complying with the Act's oxygen mandates. The evidence at trial underscored, and the jury's verdict should be read to confirm, that it would have been impossible for Petitioners to comply with both state laws concerning MTBE and federal oxygenate requirements under the Clean Air Act. In other words, once Petitioners had no feasible alternative to using MTBE to comply with the Clean Air Act's requirements, Petitioners' actions were effectively required by the Clean Air Act. Simply put, Petitioners should not be exposed to runaway damages verdicts even though they took the most prudent steps to comply with federal law. *See Mut. Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2477 ("Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability.").

Conflict or obstacle preemption is even more clearly established. A state law conflicts with federal law where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geir*, 529 U.S. at 899. Here, Congress intended for refiners to be able to choose among oxygenates, including MTBE, for purposes of complying with the Clean Air Act's gasoline oxygenate requirements. Eliminating MTBE by retroactively imposing state tort liability interferes with Congress's goals. Where a federal law imposes a mandate but leaves affected stakeholders with a choice of how to comply, a state-law tort duty

that would eliminate one of those options obstructs federal objectives when the maintenance of a choice is itself a "significant objective." *See Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1135-36 (2011). Such an obstacle exists where a state-law duty "interferes with the methods by which the federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). And the obstacle is far greater here, because the state did not eliminate one of several essentially equal options. Instead, it eliminated the safest, feasible means of complying with the mandate.

The holding below is thus fundamentally unfair. The jury found that Petitioners had no other reasonable alternative but to use MTBE. As a matter of public policy, courts should not incentivize unreasonable behavior at the expense of reasonable behavior. Contrary to the appeals court's holding, the rule of law should embrace reasonable efforts to comply with federal law, not require unreasonable behavior to avoid massive state tort liability. Under such circumstances, "state action must ordinarily be invalidated if its manifest effect is to penalize or discourage conduct that federal law specifically seeks to encourage." Lawrence H. Tribe, *American Constitutional Law* § 6-29, 1181-82 (3d ed. 2000).

Finally, the decision below, if allowed to stand, will also drastically undermine regulatory flexibility. Congress imposed a federal mandate on all gasoline refiners to use an oxygenate for clean air purposes. If that mandate had been MTBE-specific, impossibility preemption would be inescapable. But because federal regulators wanted to provide some regulatory flexibility to the industry, Petitioners face

over $100 million in liability in just this case alone—even when Petitioners had no safer, feasible alternative to MTBE available to them. Unfortunately, unless this Court intercedes, the lesson for regulated entities will be to insist on more specific and less flexible federal regulation, which is both counterintuitive and unproductive.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave. N.W.
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

February 14, 2014