No. 13-842

In the Supreme Court of the United States

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 IN OPPOSITION

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INTRODUCTION

After an eleven-week trial, a jury found Exxon liable for $104.9 million in compensatory damages for state-law torts – negligence, public nuisance, trespass, and failure to warn – all related to contamination of New York City groundwater by the gasoline additive MTBE. Exxon knew that existing gasoline storage systems would leak, that leaked MTBE would be particularly likely to contaminate groundwater, and that this contamination would be especially costly to clean up. Nonetheless, the evidence showed, Exxon failed to take steps to mitigate or avoid the problem, such as warning of MTBE's known dangers. The evidence also showed that Exxon's own service stations had negligently spilled MTBE gasoline in the area at issue. The result of Exxon's conduct, the jury found, was costly contamination of drinking water wells that the City has concrete plans to use.

The Second Circuit affirmed after carefully considering all of Exxon's arguments in light of the complex evidentiary record. Exxon's petition offers no persuasive argument for further review. With respect to ripeness, Exxon takes well-established Article III principles, barring claims based on speculative concerns about future actions and resulting injuries, and seeks to apply them to limit run-of-the-mill state-law claims for future *damages* based on tortious conduct that has already occurred. No prior ruling of this Court has even hinted that the calculation of state-law tort damages in federal court should be constitutionalized in this manner. Nor should this Court now take that unprecedented step.

With respect to preemption, Exxon's claim of a conflict with this Court's precedents does not withstand scrutiny. Federal law simply required use of some oxygenate. It did not require use of MTBE or grant manufacturers an unfettered right to choose MTBE. Nor did the trial evidence support Exxon's claim that it was infeasible to use ethanol (an alternative oxygenate) in place of MTBE. And in any event, the jury did not find Exxon liable for "using" MTBE. Pet. ii. Rather, it found Exxon liable for *additional* tortious conduct, including its own negligent handling of MTBE and its failure to warn of MTBE's dangers – conduct for which Exxon does not even argue that federal law preempted state tort liability. The preemption claim is therefore entirely insubstantial.

Exxon's petition should be denied.

STATEMENT OF THE CASE

I. Background

1. MTBE is a chemical that, even in small amounts, can cause cancer and give drinking water a foul taste and odor. As early as 1984, Exxon's own scientists voiced "ethical and environmental concerns" about adding MTBE, including the "possible leakage of [service-station] tanks into underground water systems of a gasoline component that is soluble in water to a much greater extent" than traditional components. A2101.[1] Exxon's scientists confirmed that adding

[1] Citations to "A___" are to the Deferred Joint Appendix filed in the Second Circuit. *See* ECF Nos. 134-154, *In re MTBE Prods. Liability Litig.*, No. 10-4135 (2d Cir. Sept. 29, 2011).

MTBE to gasoline would cause groundwater contamination episodes to skyrocket and make cleanup very difficult. A2107-08. They therefore "recommend[ed] that from an environmental risk point of view MTBE not be considered as an additive to Exxon gasolines on a blanket basis throughout the United States." A2126. They cautioned, among other things, that MTBE should not be used without a nationwide risk-benefit analysis and comprehensive monitoring program. A2104; A2126.

Exxon had good reason to heed these warnings. As a refiner selling to retailers, Exxon knew that much of its gasoline would be stored by relatively unsophisticated independent service station operators, whose underground tanks were prone to leaks. A3369-70, A3276-77. In addition, as an owner or operator of service stations that sold directly to consumers, Exxon knew that large numbers of its own storage tanks leaked. A3135; A3114-15; A5130; A5189-95. Still, Exxon added MTBE without even studying – let alone implementing – the comprehensive monitoring program that its own scientists had recommended, A1724-25, A1728-29, A1763-64, A1768; *see also* A5144-46; A3274, and without warning anyone of the risks that Exxon knew MTBE posed to drinking water supplies. A3284; *see also* A1776.

In 1990 – five years *after* Exxon began adding MTBE to its gasoline – Congress amended the Clean Air Act to require gasoline sold in certain locations to include oxygenates. *See* 42 U.S.C. § 7545(k)(2)(B), (k)(6), (m)(2) (the "Clean Air Act Amendments" or the "1990 Amendments"). These provisions, which took

effect by 1995, required companies to increase the oxygen content of gasoline in New York City and other areas. They did not, however, require companies to use any *particular* oxygenate. Pet. App. 9-10.

Exxon then steadily increased its MTBE usage – despite continued information about MTBE's dangers, such as an industry-sponsored study that suggested a link between MTBE and cancer. A2950-51. Exxon's rationale for choosing MTBE was financial. In the Midwest, Exxon added ethanol – an alternative oxygenate – to its gasoline. A3571-72. But on the coasts, Exxon added MTBE because that was cheaper by a few cents a gallon. *Id.*; *see* A3274; A3495-97. During the nearly two decades in which Exxon added MTBE to gasoline, the company – by its own admission – "provided no warnings to anybody" about MTBE's threats to water. A3284; *see also* A1776.

As MTBE contamination worsened, states began banning MTBE. New York passed a ban in 2000, effective in 2004. N.Y. Agric. & Mkts. Law § 192-g (2000). Congress ultimately repealed the oxygenate requirement in 2005. Energy Policy Act of 2005, § 1504, Pub. L. No. 109-58, 119 Stat. 594, 1076-77. Exxon, for its part, now uses ethanol instead of MTBE in gasoline it distributes nationwide.[2]

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[2] Exxon and Mobil merged in 1999. ExxonMobil has never disputed that it is responsible for "heritage-Exxon" and "heritage-Mobil" conduct. "Exxon" thus refers collectively to Exxon, Mobil, and ExxonMobil. The discussion above is of "heritage-Exxon" materials, but as the trial evidence established, the story of Mobil's

2. Historically, New York City has obtained most of its water from pure upstate sources. A2182; A2181; A2274. But following a drought in the 1980s, the City determined that local groundwater could be important in case of future droughts or "major outage[s] of some of the upstate infrastructure." A2190; *see* A2186; A5035-54. Accordingly, in 1996, the City purchased 69 water wells in Queens. A2186. Many of these wells were in disrepair, while others suffered from preexisting contamination from chemicals such as perchloroethylene, a dry-cleaning solvent. A2186-87. Still, the wells could provide nearly 70 million gallons daily – enough to compensate for a complete failure of one of the two tunnels bringing water into Queens from upstate. A2190. The City planned to fix the broken wells and treat the contamination it knew about. A2187-89.

By 2003, the City had detected significant amounts of MTBE in five of these wells located at "Station 6." A2276; A2708-09; A4051; SPA548 n.30.[3] Later that year, the City sued Exxon and other companies in state court, seeking damages for MTBE contamination of the wells.

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use of MTBE despite knowledge of its serious dangers is very similar. *See, e.g.*, A2469-72; A2483-87; A3141; A3202-09.

[3] Citations to "SPA___" are to the Special Appendix filed in the Second Circuit. *See* ECF Nos. 155-157, *In re MTBE Prods. Liability Litig.*, No. 10-4135 (2d Cir. Sept. 29, 2011).

II. Proceedings in the District Court

The defendants removed the case to the United States District Court for the Southern District of New York, where it joined a multi-district litigation ("MDL") concerning MTBE. The district court ultimately exercised supplemental jurisdiction over the City's state-law claims for defective design, public nuisance, private nuisance, negligence, trespass, and failure to warn based on the City's claim under the federal Toxic Substances Control Act. SPA340-74. Because of the case's complexity, the district court selected the five wells at "Station 6" for a bellwether trial. SPA585. All defendants except Exxon settled before trial. SPA476 n.5.

The district court divided the trial into phases. In Phase I, the City showed that it intended to use the Station 6 wells as a crucial component of its water supply plan. A2187-89; A2190-92; Pet. App. 15-18. Although the wells could not be used immediately because of preexisting contamination, the City presented concrete plans to build a treatment facility to render them operational. *E.g.*, A2195-96. The jury found that the City intended to begin constructing a treatment facility within 15 years so that it could use the water as a backup supply. A4423-24.

In Phase II, the City showed that, because MTBE gasoline already had been spilled in the area, the wells' untreated combined outflow would contain significant levels of MTBE when the City turned them on. Pet. App. 18-22. The City's expert hydrogeologist testified that, based on where MTBE gasoline had already spilled, the MTBE in the wells' combined outflow would

peak at 35 parts per billion (ppb) in 2024 and persist through 2040. A2669-71; A2742; A5210; A5542; A5544. He also varied his model to reflect different assumptions about the amount of MTBE gasoline that had spilled at each known release site. A2745-46; A2750; A5212; A5546. On the strength of his testimony, the jury found that MTBE in the wells' combined outflow between 2016 and 2040 would peak at 10 ppb in 2033. A4425-26.

In Phase III, the City established that "a reasonable water provider in the City's position would treat the water to reduce the levels or minimize the effects of the MTBE in the combined outflow of the Station 6 wells." A4270; Pet. App. 22-34. One expert testified that, "even at the lowest levels of exposure," MTBE is "mutagenic" and a "probable human carcinogen." A3126-27; *see also* A2945-46; A2948. Another expert testified that, with respect to taste and odor (which state regulations do not address), "25 percent of the population would detect [MTBE] at 3 to 4 parts per billion," and "10 percent of the population would detect it down at 1 or 2 parts per billion" – well below the levels that the jury found would be present in the wells' combined outflow. A2984. The head of water quality at the City's Department of Environmental Protection testified that if just 10 percent of those drinking the Station 6 water could notice an offensive taste or odor, that would "undermine the confidence in [the City's] water supply." A3003-04.

The City also proved in Phase III that Exxon had caused the City's injury – both as a spiller of MTBE

gasoline itself and as a manufacturer or supplier of MTBE gasoline ultimately spilled by others. Pet. App. 25-28. With respect to Exxon's own spills, the company owned or operated six service stations near Station 6. A4271. Although Exxon knew that its underground storage tanks would leak, and that spilled MTBE gasoline was uniquely harmful to the environment, it did not warn its station operators – or anyone else – to take extra precautions in storing MTBE gasoline. A3284; *see also* A1776. Consequently, each of the six Exxon stations experienced significant MTBE gasoline leaks between 1985 and 2003. A2455-89; A2492; A3842-45; A3848-49; A3852-53. These leaks contributed directly to the MTBE contamination of the Station 6 groundwater. *See, e.g.*, A2709-15. The jury found that Exxon's conduct as a spiller of MTBE gasoline was a "substantial factor" in the MTBE contamination at Station 6. A4271; *see also* A4427-28.

As for spills of MTBE gasoline that Exxon manufactured or supplied to others, virtually all Exxon-refined gasoline was commingled with gasoline refined by other companies. A3425-26; A3499. Thus, Exxon-refined MTBE gasoline "ended up in each of the retail gas stations in Queens and in their underground storage tanks" between 1985 and 2003. And when those tanks leaked MTBE gasoline, "there was some Exxon MTBE gasoline in the tanks [that] presumably went into the leaks." A3433. Crediting this evidence, the jury found that Exxon's "conduct in manufacturing, refining, supplying or selling gasoline containing MTBE was a substantial factor in causing" the MTBE contamination at Station 6. A4271; A4428-32.

At the conclusion of Phase III, the jury found Exxon liable for negligence, public nuisance, trespass, and failure to warn, but rejected the City's design-defect and private nuisance claims. A4428-32. The jury found that $250.5 million would "reasonably compensate the City" for the MTBE contamination at Station 6. A4432. That figure reflected detailed expert testimony about costs to build and operate a facility for treating the Station 6 wells for MTBE contamination. A4076-77; A4080-83; A4143-44. The jury then reduced the $250.5 million figure by $70 million to reflect the costs of treating pre-existing contamination, and by another 42% to reflect the portion of fault attributable to other oil companies. The result was a compensatory damages award of $104.69 million. SPA603.

Following trial, Exxon moved for judgment as a matter of law, a new trial, or remittitur. The court denied the motion. Pet. App. 121-90.

III. The Second Circuit's Decision

A unanimous panel of the Second Circuit affirmed. Pet. App. 1-119. As relevant here, the panel rejected Exxon's contentions that the City's claims were unripe and were preempted.

A. Ripeness

The panel rejected Exxon's argument that the City's claims were unripe because they purportedly "require[] proof of a series of contingent and factually intensive predictions about the distant future." Pet. App. 73 (quoting Exxon's Br. 34). Relying on this Court's decisions in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Friends of the Earth, Inc. v.*

Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000), the court earlier had concluded that the City had standing to bring its claims regardless of whether MTBE contamination at the Station 6 wells exceeded the state maximum contaminant level (MCL). Pet. App. 62-68; *see* Pet. App. 65 (noting "specific, deleterious effects of MTBE at below-MCL levels"); Pet. App. 68 (emphasizing that "the costs incurred and projected by the City to treat the water at Station Six are directly related to MTBE contamination"). The court now explained that its conclusion that the City had standing led it "easily to conclude that its claims are constitutionally ripe." Pet. App. 74; *see id.* ("In most cases, that a plaintiff has Article III standing is enough to render its claim constitutionally ripe.").

With respect to prudential ripeness, the court reasoned that because the City had "brought suit only after testing showed the presence of MTBE in the Station Six Wells," it "alleged a *present* injury – namely, that Station Six had *already* been contaminated with MTBE." Pet. App. 75. "Exxon's extensive discussion of the current disuse of the Station Six Wells and the future steps required to use them," the court continued, "addresse[d] the scope of the *damages* flowing from the injury, not whether there is an injury at all." *Id.*; *see id.* (Exxon "mistakenly conflates the nature of the City's claimed damages with its injury").

As for damages, the court observed that "there is nothing unusual about" the fact that the City "sought to recover past, present, and future damages flowing from Exxon's conduct." Pet. App. 76. Exxon, the court

noted, had not even challenged the jury's finding that the City has a good faith intent to use the Station 6 wells within fifteen to twenty years. Pet. App. 76 n.32. And "[w]hether a particular damages model is supported by competent evidence sufficient to render it non-speculative is analytically distinct from whether the underlying claim is ripe for adjudication." Pet. App. 76.

Moreover, the court concluded, dismissing the claims as unripe "would work a 'palpable and considerable hardship'" on the City. Pet. App. 76 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985)). That is because, under New York law, a toxic-tort plaintiff must sue within three years of discovering its injury, and the common law "continuing-wrong" doctrine "does not reset the statute of limitations." Pet. App. 76-77 (discussing *Jensen v. General Electric Co.*, 82 N.Y.2d 77 (1993)). Thus, "dismissing the City's claims as unripe would effectively foreclose the possibility of relief – a hardship and inequity of the highest order." Pet. App. 77.

B. Preemption

The Second Circuit considered and rejected both impossibility preemption and obstacle preemption.

1. As to impossibility preemption, the court recognized that, under this Court's precedents, state law claims may be preempted where "state law penalizes what federal law requires," Pet. App. 46 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000)), or where those claims "'directly conflict' with federal law," *id.* (quoting *Am. Tel. & Tel. Co. v.*

Cent. Office Tel., Inc., 524 U.S. 214, 227 (1998)). Under these standards, the court explained, the City's claims were not preempted. Pet. App. 46-54.

The court observed that nothing required Exxon to use MTBE to satisfy the oxygenate mandate; rather, Exxon was free to use another oxygenate, such as ethanol. Pet. App. 48. Exxon claimed, however, that the jury's rejection of the City's design-defect claim – via its finding that the City had failed to prove that "there was a safer, feasible alternative design" when Exxon marketed its MTBE gasoline – commanded a conclusion that, "as a practical matter," Exxon "had no choice but to use MTBE to comply with the federal oxygenate requirement." Pet. App. 48 (quotation marks omitted). The court of appeals responded that the jury did not affirmatively find that MTBE was the safest feasible oxygenate; rather, the jury merely found that the City had not carried *its own* burden to prove that a safer, feasible alternative existed. *Id.* In addition, the court reasoned, "the standard for establishing the absence of a 'safer, feasible design' and thereby defeating strict liability in tort is different from, and less demanding than, the standard for establishing impossibility preemption." Pet. App. 49. Whereas tort liability under state law "requires jurors to consider the costs of alternative designs when assessing a products liability claim," establishing preemption requires a party to "do more than show that state law precludes its use of the *most* cost-effective and practical means of complying with federal law." Pet. App. 50. And although Exxon claimed that it "could have met the heightened impossibility

standard had the jury been properly instructed," the court responded that "Exxon was not entitled to its proposed instruction because that instruction misstated the law" by importing the standard for design-defect liability into the preemption context. Pet. App. 51.

Apart from the jury-instruction issue, the court of appeals also held that the trial evidence, even when viewed most favorably to Exxon, was insufficient to support Exxon's argument that it could not have used ethanol to comply with federal law. Pet. App. 52. Exxon's own expert "conceded that the supply of ethanol could adjust to meet increased demand" and that "ethanol could be transported using trains, trucks, or barges." Pet. App. 53. Another Exxon witness testified that the company used ethanol in the Midwest as early as 1995. *Id.* Finally, the City introduced evidence that using ethanol instead of MTBE during the relevant period would have increased the costs of manufacturing gasoline by just a few cents per gallon. *Id.*

2. Obstacle preemption, the court explained, "precludes state law that poses an 'actual conflict'" with the "overriding . . . purpose and objective" of federal law; "[a]s with the impossibility branch of conflict preemption, 'the purpose of Congress is the ultimate touchstone.'" Pet. App. 55 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Here, "[t]he purpose of the 1990 Amendments was to achieve a 'significant reduction in carbon monoxide levels.'" Pet. App. 57 (quoting S. Rep. No. 101-228, at 3503 (1989)).

Exxon, however, had argued that the Clean Air Act Amendments "sought to reduce air pollution

without imposing economic burdens on gasoline manufacturers," and that the jury's verdict impermissibly imposed such burdens. Pet. App. 57. Consistent with the decisions of two other courts that had considered the issue,[4] the court rejected this argument. Although Congress directed the EPA "to take 'into consideration the cost of achieving . . . emissions reductions' when drafting regulations under the Clean Air Act Amendments," it *also* directed the EPA "to consider 'any nonair-quality and other air-quality related health and environmental effects.'" Pet. App. 57-58 (quoting 42 U.S.C. § 7545(k)(1)). The latter direction, the court reasoned, "suggests a Congressional intent to permit – not preempt – suits like this one." Pet. App. 58.[5]

The court then noted "further circumstantial support" for the absence of obstacle preemption. Pet. App. 59. First, EPA itself had found no conflict between the Clean Air Act and a Nevada proposal effectively banning MTBE. *Id.* Second, Congress had "considered including a safe harbor provision that would have immunized MTBE producers and

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[4] *See Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665 (9th Cir. 2003); *Oxygenated Fuels Ass'n v. Pataki*, 293 F. Supp. 2d 170 (N.D.N.Y 2003).

[5] The court of appeals also rejected Exxon's reliance on a provision of the Clean Air Act Amendments permitting EPA to waive the oxygenate requirement if it was "'technically infeasible' to manufacture gasoline that also met the emission standard for . . . oxides of nitrogen." Pet. App. 58.

distributors from state tort liability, but ultimately chose not to do so." *Id.*

3. Finally, the court stressed that even if Exxon were correct that "the 1990 Amendments preclude imposition of a post hoc state law penalty based on its use of MTBE," the jury's verdict would still stand because it "did not rest solely on the company's use of MTBE in its gasoline." Pet. App. 60. Instead, "all of the City's successful claims required the jury to find that Exxon *both* used MTBE and committed related tortious acts, such as failing to exercise reasonable care when storing gasoline that contained MTBE." *Id.* Indeed, Exxon's own proposed preemption jury instruction had targeted only the City's design-defect claim – a claim for which the jury did *not* find Exxon liable. Pet. App. 61. The court therefore "affirm[ed] the District Court's determination that the claims on which the jury returned a verdict for the City are not preempted by federal law." Pet. App. 62.

REASONS FOR DENYING THE PETITION

The Court should reject Exxon's effort to obtain further review of the tort judgment entered in this case. Its ripeness attack on the jury's calculation of future damages caused by already-completed tortious acts is both entirely novel and entirely unwarranted. And its preemption arguments disregard the elements of the torts at issue, rest on a misreading of federal law, and depend on a mischaracterization of what the evidence showed about the options available to Exxon to comply with federal law.

I. Exxon's Ripeness Arguments Do Not Merit Review by This Court

Exxon argues that review of the ripeness issue is warranted because the Second Circuit's decision supposedly conflicts with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). The court of appeals quoted *Lujan* at length in its discussion of standing, however, *see* Pet. App. 62-63, and "easily" concluded that the City's claims were both "constitutionally ripe" and "prudentially ripe" because the City's claims were based on a "*present* injury." Pet. App. 74-75 (emphasis in original). That decision was correct and did not conflict with *Lujan* or *Clapper*.

A. This Is Not a Future Injury Case

Both *Lujan* and *Clapper* addressed claims of standing based on future injury. *See Lujan*, 504 U.S. at 565 n.2 (no standing where "the plaintiff alleges only an injury at some indefinite *future time*" (emphasis added)); *Clapper*, 133 S. Ct. at 1155 ("[R]espondents lack Article III standing because they cannot demonstrate that the *future injury* they purportedly fear is certainly impending . . . ." (emphasis added)).[6]

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[6] In *Lujan*, the plaintiffs alleged that they would be injured by a government action *if* they traveled to an overseas location. This Court held that their "'some day' intentions" to undertake such travel – "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 our cases require." 504 U.S. at 564. Similarly, in *Clapper*, the plaintiffs lacked standing to challenge a government surveillance program where it

Neither case speaks to a situation where a plaintiff has been injured and seeks compensation for future damages from the same conduct – nor, for that matter, did either case say anything about ripeness. To the contrary, *Lujan* observed that where a plaintiff has suffered "*actual* harm[,] the existence of standing is clear." 504 U.S. at 565 n.2; *see also*, *e.g.*, *id.* at 560 (injury supporting standing may be "actual or imminent" (quotation marks omitted)).

Exxon attempts to construct a conflict with *Lujan* and *Clapper* by presenting the City's claims as founded on "an injury in the future." Pet. 20. But this was not a future-injury case. Rather, as the Second Circuit noted, the City "brought suit only after testing showed the presence of MTBE in Station Six Wells." Pet. App. 75; *see also* Pet. App. 12; SPA548 n.30. Thus, the Second Circuit concluded that the City's claims rested on "*present* injury – namely, that Station Six had *already* been contaminated with MTBE." Pet. App. 75 (emphasis in original); *see also* SPA548-49 (district court's conclusion that the City presents "a very different type of claim from a future injury claim"). That the City's claims were rooted in present injury confirms that *Lujan* and *Clapper* are irrelevant to this case.

Exxon's contrary claim is founded on the same critical misconception that the Second Circuit rejected:

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was merely "speculative" whether the government would "imminently target communications to which [the plaintiffs] are parties." 133 S. Ct. at 1148.

Exxon "mistakenly conflates the nature of the City's claimed *damages* with its *injury*." Pet. App. 75 (emphasis added); *see id.* ("Exxon's extensive discussion of 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."). As the Second Circuit noted, it is axiomatic that "[w]hen [an] injury occurs, the injured party has the right to bring suit for all of the damages, past, present *and future*, caused by the defendant's acts." Pet. App. 76 (emphasis added) (quoting *Davis v. Bilge*, 505 F.3d 90, 103 (2d Cir. 2007)); *accord Restatement (Second) of Torts* § 910 (1979) ("One injured by the tort of another is entitled to recover damages from the other for all harm, past, present *and prospective*, legally caused by the tort." (emphasis added)); SPA495-96 (district court's observation that future damages "have long been available under the common law").

The City's recovery here rests on that well-established principle of tort law: Having discovered that Exxon's tortious conduct had *already* contaminated the Station 6 groundwater, the City brought this suit to recover "the damages, past, present *and future*, caused by [Exxon's] acts." Pet. App. 76 (emphasis added). The City supported its claim for future damages with voluminous evidence (including expert testimony) showing that the City has concrete plans to use Station 6 for drinking water in the future, but that due to Exxon's tortious conduct, the City must first build and operate an expensive plant to treat for MTBE. Pet. App. 75. Exxon's real quarrel is

with the settled common-law principle allowing a claim for future damages. Yet as the Second Circuit observed, "there is nothing unusual about such a claim." Pet. App. 76.[7]

Indeed, immediate recovery of future damages is not just typical; under New York law, a toxic-tort plaintiff such as the City *cannot* wait to recover all of its damages. As the Second Circuit noted, "the New York Court of Appeals [has] held that the common law 'continuing-wrong' doctrine – pursuant to which a recurring injury is treated as a series of invasions, each one giving rise to a new claim or cause of action – does not reset the statute of limitations in the toxic-tort context." Pet. App. 76-77 (quoting *Jensen*, 82 N.Y.2d at 85 (1993)). Thus, the City was required to bring this action within three years of "when the City *first* discovered that it had been injured" by the contamination of Station 6. Pet. App. 77; *see also* Pet. App. 76 (under N.Y. C.P.L.R. 214-c(2), "a plaintiff asserting a toxic-tort claim must bring suit within three years of discovery (or constructive discovery) of its injury"). If, as Exxon proposes (Pet. 21-22), the City had waited to bring suit until after it had built a treatment plant and had begun to use Station 6 water,

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[7] Exxon stresses that the City does not own the groundwater in fee simple but, rather, has a "usufructuary right" in the water – *i.e.*, a right to use it. *E.g.*, Pet. 20. Exxon does not explain why this distinction should make a difference for ripeness purposes, though. Moreover, any suggestion that the case turns on such nuances merely underscores that this is a highly fact-specific dispute unsuitable for this Court's discretionary review.

its claims would have been untimely under New York law.[8] That "palpable and considerable hardship" of waiting to bring suit is yet another reason that this action was ripe. Pet. App. 76 (quoting *Thomas*, 473 U.S. at 581).

Properly construed as a suit seeking future damages based on a present injury, this action does not even implicate – let alone violate – ripeness principles. *Lujan* and *Clapper* in no way suggest that ripeness prohibits (or even limits) an award of future damages based on a present injury. And Exxon fails to cite any other precedent of this Court applying the ripeness doctrine as a bar to damages, or even any precedent addressing ripeness in the context of a tort suit.

In fact, this Court's ripeness precedents typically involve claims for declaratory and injunctive relief seeking to forestall some future government action. *See Lujan*, 504 U.S. at 561 (addressing standing "[w]hen the suit is one challenging the legality of government action or inaction"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) ("The *injunctive and*

[8] Exxon urges that it told the Second Circuit that, if the City had waited to bring this action, "[t]he statute of limitations . . . will not be a barrier." Pet. 23 n.5 (quoting Exxon Br. 38 and citing the oral argument transcript). But in fact, Exxon also told the Second Circuit that the City's claims were *already* untimely under New York's statute of limitations, devoting several pages of its briefing to this alternative argument. *See* Exxon 2d Cir. Principal Br. 41-43; Exxon 2d Cir. Reply Br. 11-14. Exxon's arguments below demonstrate that, had the City waited to sue until it had already built a treatment plant, Exxon would not have hesitated to invoke the statute of limitations.

declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." (emphasis added)). Because there is often doubt over whether the government will actually engage in a particular future action, *see, e.g.*, *Clapper*, 133 S. Ct. at 1155 – or whether it will injure the plaintiffs if it does, *see, e.g.*, *Lujan*, 504 U.S. at 560 – ripeness serves as an important bar to enjoining future events which may never transpire. *See, e.g.*, *Abbott Labs.*, 387 U.S. at 148. But in tort cases – especially where, as here, an injury has *already occurred* – there is no risk that the courts will adjudicate hypothetical disputes; the defendant has injured the plaintiff, and the dispute is real. The only question is the extent of damages to award, and that question does not implicate ripeness principles. Thus, far from demonstrating a conflict with this Court's precedents, Exxon's petition really seeks to create a completely new doctrine that limits future damages available under state law in federal courts where Article III constraints apply. There is no reason to consider creating such a new doctrine.

B. The Remaining Attacks on the Second Circuit's Ripeness Decision Do Not Warrant Certiorari

Exxon and its amici make a handful of other arguments purporting to attack the Second Circuit's ripeness decision. Some of these arguments are not about ripeness at all. In any event, each is meritless and presents no grounds for this Court's review.

1. Exxon's Argument About the Cause of "Past Contamination" Does Not Warrant Review

Exxon claims that the Second Circuit was "off-base in describing this as a plain-vanilla lawsuit seeking future damages arising from a past injury" because "the City introduced little evidence about that past contamination, which came from spills at Citgo, Atlas, and BP Amoco service stations – not Exxon stations." Pet. 23; *see also* Pet. 33-34. Yet in acknowledging "that past contamination," Exxon effectively *concedes* that the City brought this suit on the basis of an injury that already had taken place. Pet. 23. Exxon's argument that the contamination came from non-Exxon stations is an argument about causation, not ripeness. If the City brought this action based on past contamination, the suit was unquestionably ripe, because the City had already been injured. *See Lujan*, 504 U.S. at 565 n.2.

As for causation itself, the Second Circuit was correct to determine, "based on the evidence," that "a reasonable jury could conclude that Exxon's conduct . . . was indeed a substantial factor in bringing about the City's injury." Pet. App. 89. For one thing, as the Second Circuit observed, "[t]he record provided ample evidence of gasoline spills and leaks at Exxon-controlled stations." Pet. App. 91. For another thing, even with respect to stations that Exxon did *not* control, the City established that "Exxon gasoline [containing MTBE] found its way into every underground storage tank in Queens during the relevant period." Pet. App. 87. Thus, even spills from non-Exxon-controlled service stations were directly

attributable to Exxon's conduct. *See id.* The evidence, in short, clearly established that the "past contamination" of Station 6 was caused in part by Exxon.

2. The Jury Instruction on the Injury Element of the City's Tort Claims Is Irrelevant to Ripeness

Exxon also claims that the City's suit was unripe because, in considering the "injury" element of the City's claims, the jury was asked whether the City "is, or will be" injured by Exxon's conduct. Pet. 23. But that is a red herring, for the district court itself – not the jury – found that there was "uncontested evidence" that the "City's recurring injury has already begun," based on elevated levels of MTBE that had *already* been detected in the Station 6 wells. SPA548 n.30. The Second Circuit, in turn, "easily" concluded that because "Station Six had *already* been contaminated with MTBE," the City's claims were ripe. Pet. App. 74-75. For purposes of determining ripeness, nothing further was necessary.

Indeed, Exxon cites no case suggesting that a ripeness determination requires a jury finding where, as here, there is "uncontested evidence" of present injury. SPA548 n.30. That is unsurprising, for ripeness determinations normally are made at the *beginning* of a lawsuit, when concerns about conserving judicial resources are at their highest. Any complaint that Exxon has about the jury instructions here does not implicate ripeness at all; rather, it is merely a complaint about the district court's formulation of the injury

element of the City's state-law tort claims. That question plainly does not merit this Court's review.[9]

II. Certiorari Is Unwarranted on the Preemption Issue

As with the ripeness issue, Exxon does not even attempt to argue that the Second Circuit's preemption decision created a circuit split. To the contrary, Exxon itself points out that the two lower court cases on point are in full accord with the Second Circuit's preemption decision. *See* Pet. 28. In both *Oxygenated Fuels Association v. Davis*, 331 F.3d 665 (9th Cir. 2003), and *Oxygenated Fuels Association v. Pataki*, 293 F. Supp. 2d 170 (N.D.N.Y 2003), courts held that the Clean Air Act Amendments of 1990 did not preempt the outright

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[9] Amicus Chamber of Commerce of the United States argues that the City lacked standing because "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 [the 'MCL']." Chamber Amicus Br. 11. Exxon advanced a similar argument below, but it was roundly rejected by the Second Circuit. Exxon has not renewed this argument here, so it is not properly before the Court. In any event, this argument is wrong. The evidence showed that MTBE levels below the legal limit can cause odor and taste concerns as well as health concerns. And as the Second Circuit recognized, it is "illogical to conclude that a water provider suffers no injury-in-fact – and therefore cannot bring suit – until pollution becomes so severe that it would be *illegal* to serve the water to the public." Pet. App. 64-65 (quotation marks omitted).

bans on MTBE adopted by California and New York, respectively.[10]

Exxon nevertheless asserts that imposing liability on it for choosing to use MTBE to comply with the federal oxygenate mandate would conflict with this Court's decisions in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). No such conflict exists because nothing in federal law precludes New York from determining that Exxon should have used ethanol instead. In any event, *every claim* for which Exxon was found liable required the jury to find that it had engaged in tortious conduct beyond the mere manufacture or sale of gasoline containing MTBE. For that reason, the judgment would stand even if federal law did require use of MTBE.

A. The Second Circuit's Decision Does Not Conflict With *Williamson* or *Geier*

In both *Williamson* and *Geier*, a federal regulatory scheme permitted manufacturers to choose among a range of options for complying with a federal mandate. In each case, a state law suit awarded tort damages because the manufacturer had chosen an authorized option that was more dangerous than others. In *Geier*, the Court held that the tort award was preempted

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[10] Exxon notes that "there are numerous suits pending that involve MTBE groundwater contamination." Pet. 31-32. The pendency of those suits means that this Court will have ample opportunity to settle a circuit split on the preemption issue should one emerge later.

because "the maintenance of manufacturer choice" was a "significant objective" of the federal regulatory scheme at issue. *Williamson*, 131 S. Ct. at 1136 (explaining *Geier*, 529 U.S. at 866). In *Williamson*, however, the Court addressed a different federal regulatory scheme and concluded that maintaining manufacturer choice was *not* a significant objective of that scheme. *Williamson* thus concluded that, "even though the state tort suit may restrict the manufacturer's choice, it does not stan[d] as an obstacle to the accomplishment . . . of the full purposes and objectives of federal law." *Id.* at 1139-40 (citations and quotation marks omitted; alterations in original).

Exxon argues that the Second Circuit's preemption decision "conflicts with *Williamson* and *Geier*." Pet. 26. But Exxon made no serious argument of the sort in the Second Circuit, and in any event no such conflict exists.

1. Exxon Barely Made Its Present Preemption Argument in the Second Circuit

Exxon's claim that the tort award in this case is preempted under *Williamson* and *Geier* is far different from the argument Exxon presented to the Second Circuit. As explained above, both *Williamson* and *Geier* concern whether a manufacturer given a range of options for complying with federal law can be subject to state tort liability for choosing an option within the permissible range. *Williamson* and *Geier* make clear that, in such circumstances, state tort claims may be preempted only if "the maintenance of manufacturer choice" was a "significant objective" of the federal regulatory scheme at issue. *Williamson*, 131 S. Ct. at

1136 (discussing *Geier*). Yet in the Second Circuit, Exxon scarcely argued that "the maintenance of manufacturer choice" was a "significant objective" of the Clean Air Act Amendments. *Id.* Indeed, Exxon made only passing reference to *Williamson* and *Geier* in its opening brief, and it cited neither case in its reply brief.

Instead, Exxon argued for preemption on the ground that using MTBE was the *only* feasible means to comply with the federal oxygenate requirement. *See, e.g.*, Exxon 2d Cir. Reply Br. 7 (arguing for preemption because "there was no safe and feasible alternative [to MTBE] for compliance"). That theory does not implicate *Williamson* and *Geier*, which contemplate preemption only where a state tort suit is premised on a company's selection among *multiple* feasible options. *See Williamson*, 131 S. Ct. at 1136; *Geier*, 529 U.S. at 878-79. If anything, Exxon's theory in the Second Circuit ran directly contrary to a *Williamson/Geier* claim: Exxon argued for preemption not because tort liability would interfere with its choice, but because it effectively had no choice to begin with.

Because Exxon did not really develop an argument based on *Williamson* and *Geier* in the Second Circuit, a supposed conflict with those cases does not warrant this Court's review. Unsurprisingly, the Second Circuit addressed those cases only in a footnote. *See* Pet. App. 47 n.15. Regardless of whether Exxon technically preserved its present argument, its strategic choices below deprived this Court of the benefit of the Second Circuit's full consideration of

Williamson and *Geier*. Certiorari should be denied for that reason alone.

2. The Decision Below Does Not Conflict With *Williamson* or *Geier* Because Maintaining Manufacturer Choice Was Not a Significant Objective of the Clean Air Act Amendments

As explained above, *Williamson* and *Geier* contemplate preemption where "maintenance of manufacturer choice" is a "significant objective" of the allegedly preemptive federal regulatory scheme. *Williamson*, 131 S. Ct. at 1136. Yet "maintenance of manufacturer choice" was not a "significant objective" of the Clean Air Act Amendments. As the Second Circuit noted, the Clean Air Act Amendments of 1990 merely required that "gasoline in certain geographic areas contain a minimum level of oxygen." Pet. App. 47 (citing 42 U.S.C. § 7545(k)(2)(B)). EPA certified MTBE and other additives as complying with the oxygenate requirement, but "certification of a fuel meant only that it satisfied certain conditions in reducing air pollution," *id.* (citing 42 U.S.C. § 7545(k)(4)(B)).[11] As the Second

[11] Thus, contrary to the assertions of Exxon and its amicus, *see* Pet. 5-8; Chamber Amicus Br. 22, EPA's registration of MTBE as an oxygenate is irrelevant to the preemption analysis. As the Second Circuit explained, EPA's registration of MTBE meant only that MTBE was an additive that would satisfy the Clean Air Act Amendments' *air-quality* standards; the EPA by no means found that MTBE was safe or environmentally friendly. Pet. App. 47; *see also* A1705 (district court noted that it is "simply untrue" that MTBE was federally "approved"). Indeed, the EPA expressly prohibited companies from claiming that the registration of an

Circuit correctly determined, "the choice of oxygenate options" under the Clean Air Act Amendments "is a means towards improving air quality, and the existence of the choice itself is not critical to furthering that goal." Pet. App. 48 n.15; *accord Oxygenated Fuels Ass'n*, 331 F.3d at 672 ("[T]he legislative history of the Clean Air Act does not support a conclusion that Congress meant to give gasoline producers an unconstrained choice of oxygenates.").

Exxon's contrary argument relies on a single stray remark in a 1992 EPA rulemaking. *See* Pet. 27 (quoting 57 Fed. Reg. at 47,852). That reliance is misplaced. "In *Geier*," this Court observed in *Williamson*, "the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives." *Williamson*, 131 S. Ct. at 1139. The isolated language that Exxon highlights does not come close to transforming this case into the equivalent of *Geier*.

Indeed, when the EPA directly confronted the question, it definitively concluded that a choice among multiple oxygenates was not vital: As the Second Circuit noted, "in 1999, the EPA concluded that a

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oxygenate under the Clean Air Act Amendments constituted "endorsement, certification, or approval by any agency." 40 C.F.R. § 79.21(g). And the notion that EPA somehow "approved" MTBE is directly at odds with its determination that a state-law ban on MTBE was not preempted. *See* Pet. App. 59 (citing 64 Fed. Reg. 29,573, 29,576 (June 2, 1999)).

Nevada proposal effectively banning MTBE did not conflict with the Clean Air Act." Pet. App. 59 (citing EPA, Approval and Promulgation of Implementation Plans; Nevada State Implementation Plan Revision, Clark County, 64 Fed. Reg. 29573, 29578-79 (June 2, 1999)). Exxon fails even to mention that determination, much less to distinguish it.

In short, Exxon has failed to demonstrate that "maintenance of manufacturer choice" was a "significant objective" of the Clean Air Act Amendments. As a result, there is no merit to its claim of a conflict with *Williamson* and *Geier*.

B. Exxon's Previous Preemption Theory Is Equally Meritless

Exxon also rehashes its former preemption theory – namely, that using MTBE was the only "feasible" means of satisfying the federal oxygenate requirement. But that is a factual issue that turns on the proper interpretation of the evidence presented below concerning the feasibility of using ethanol instead. There is no reason for this Court to review the Second Circuit's resolution of that question.

In any event, the Second Circuit's ruling was correct. Exxon "[c]onced[ed], as it must, that federal law did not *explicitly* mandate its use of MTBE." Pet. App. 47-48. Rather, the Clean Air Act Amendments required the use of an oxygenate. MTBE was one option, but so was ethanol, which lacks MTBE's uniquely dangerous properties. *Id.*

Exxon responds that using ethanol would have been impractical. But the record says otherwise. As an

initial matter, New York *banned* MTBE effective in 2004, and Exxon and other manufacturers have used ethanol in the state since then. It is hard to imagine clearer evidence that Exxon and other manufacturers could have used ethanol in New York during the time period at issue. As the Second Circuit explained, the trial evidence showed that using ethanol would have been – at most – "somewhat more expensive." Pet. App. 59. Exxon witnesses admitted that "the supply of ethanol could adjust to meet demand," that there were feasible ways of transporting ethanol to New York, and that Exxon had successfully transitioned from MTBE to ethanol in the Midwest. Pet. App. 53. The City, moreover, offered unrebutted expert testimony that using ethanol instead of MTBE would have increased the cost of manufacturing gasoline by just 3.5 cents per gallon. *Id.* Exxon's claim of preemption cannot be squared with this evidence.

Lacking an evidentiary basis for its claim of infeasibility, Exxon asserts repeatedly that the jury found that MTBE was the "safest, feasible means available at the time for complying with" the oxygenate requirement. Pet. ii; *see also* Pet. 1, 2, 27, 31. Those assertions do not support Exxon's claim of preemption.

First, the jury finding that Exxon cites was limited to the City's design-defect claim, on which the City bore the burden.[12] Although the jury found that the

[12] The jury answered "no" to the following question: "*Has the City proven*, by a fair preponderance of the credible evidence, that there was a safer, feasible alternative design at the time [Exxon's]

City had not carried that burden, it "did *not* also find, affirmatively, that MTBE was the safest feasible oxygenate available to satisfy the federal oxygenate requirement." Pet. App. 49 (emphasis added); *see id.* ("Exxon commits a logical fallacy in assuming that the jury's rejection of the City's design-defect claim amounted to an affirmative finding that MTBE was the safest, feasible oxygenate.").

Second, New York design-defect law – the setting for the jury's finding – "requires jurors to consider the costs of alternative designs when assessing a products liability claim." Pet. App. 50. By contrast, "[t]he party urging preemption must do more than show that state law precludes its use of the most cost-effective and practical means of complying with federal law – it must show that federal and state laws 'directly conflict.'" *Id.* (citing *Central Office Tel.*, 524 U.S. at 227); *see also Wyeth v. Levine*, 555 U.S. 555, 573-80 (2009). A finding regarding the absence of a defective design therefore says nothing about preemption.

Nor is there merit to Exxon's claim that the district court was wrong to deny the preemption jury instruction that Exxon did request. Exxon had the burden to request a *proper* instruction if it believed one was necessary. *See* Pet. App. 51 (citing *PRL USA Holdings, Inc. v. U.S. Polo Ass'n*, 520 F.3d 109, 117 (2d Cir. 2008)). As the Second Circuit held, Exxon's proposed preemption instruction was correctly denied

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gasoline containing MTBE was marketed?" Pet. App. 48 (emphasis added).

because it equated preemption with the cost-benefit analysis the jury was asked to conduct in deciding the City's design-defect claim. Exxon's request also improperly narrowed in time the analysis of whether ethanol could have been used, and it ignored the possibility that Exxon could have avoided tortious conduct while using MTBE by taking greater care. *See infra* pp. 34-36.

Exxon claims that whether its requested instruction misstated the law is "the question posed by this petition." Pet. 30-31. But Exxon's question presented does not ask whether the jury instruction was properly denied, nor does Exxon make any attempt to demonstrate that its requested instruction was sound. Indeed, the petition does not even quote the instruction that Exxon requested. Exxon certainly offers no reason why the propriety of its requested jury instruction is a matter that this Court should take up on the merits.

Finally, Exxon's proposed jury instruction on preemption was limited to the City's design-defect claim. *See* Pet. App. 61; SA82[13] ("If you find that ExxonMobil has shown . . . that ethanol was not a safer or feasible alternative . . . , then you will find that the City's *defective design product liability claim* is preempted by federal law and that the City cannot recover on that claim against ExxonMobil." (emphasis

[13] Citations to "SA___" are to the Deferred Joint Supplemental Appendix filed in the Second Circuit. *See* ECF No. 158, *In re MTBE Prods. Liability Litig.*, No. 10-4135 (2d Cir. Sept. 29, 2011).

added)). But the jury found for *Exxon* on the design-defect claim, *see* Pet. App. 60-61, and Exxon never requested a preemption instruction applying to the claims on which the City prevailed. Thus, even if the district court had given Exxon's requested preemption instruction, the case's outcome would not have changed.

C. Any Decision on Exxon's Preemption Question Would Be Advisory Because Exxon's Liability Did Not Rest on the Mere Use of MTBE

Exxon asks this Court to determine whether the "federal oxygenate mandate in the Clean Air Act Amendments of 1990 . . . 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." Pet. ii (emphasis added). As explained above, Exxon is wrong that the Clean Air Act Amendments preempted such tort judgments, or that this issue merits the Court's review. Yet there is an even more fundamental reason to deny certiorari – namely, the fact that preemption of liability for "using" MTBE would have no effect on the outcome of this case.

Exxon argues that a state tort judgment based on a company's "using" MTBE would stand as an obstacle to federal law. As the Second Circuit emphasized, however, only one of the City's claims – design defect – was premised on the mere use of MTBE, and the jury found for *Exxon* on that claim. Pet. App. 60-61. All of the claims on which the City prevailed, by contrast – negligence, failure to warn, trespass, and public nuisance – were premised on tortious conduct *beyond*

the mere use of MTBE. *Id.* For negligence and failure to warn, the jury found Exxon liable not just for using MTBE, but for handling MTBE gasoline negligently and for failing to provide adequate warnings to users about MTBE's unique dangers. And for trespass and public nuisance, the jury found that Exxon "intentionally" caused MTBE to enter the groundwater at Station 6 because Exxon's conduct made contamination "substantially certain." A4277-78; A4280-82 (jury instructions).

Even if the Clean Air Act Amendments preempted liability for merely "using" MTBE (and they did not, as explained above), it would not follow that Exxon had a license to handle MTBE gasoline negligently or to refrain from issuing proper warnings. Nor would Exxon have been permitted to *intentionally* cause MTBE to enter the groundwater. Exxon itself admits as much. *See* Pet. 34 ("Congress did not give manufacturers a license to spill MTBE gasoline." (quotation marks omitted)).[14] Yet that additional tortious conduct, as the Second Circuit held, was the basis for the jury's verdict. *See* Pet. App. 61. Because the jury did *not* award damages on account of Exxon's "using" MTBE, Pet. ii, the verdict for the City must be affirmed even if federal law effectively required the use of MTBE.

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[14] Consistent with this admission, the preemption instruction that Exxon requested in the district court was expressly limited to the City's design defect claim. *See supra* pp. 33-34.

To this point, Exxon's only response is that "to the extent there was evidence that Exxon committed 'additional tortious conduct' that caused MTBE spills, that evidence focused on spills at the otherwise remote Exxon stations that were the centerpiece of the City's future-injury claim." Pet. 34. As an initial matter, Exxon's account of the record is simply wrong: As discussed above, there was extensive evidence that, before the City brought this suit, Exxon stations repeatedly spilled MTBE gasoline into the Station 6 capture zone. *See supra* pp. 7-8, 22.

More importantly, however, Exxon's response is not an argument about preemption, but a sufficiency argument targeted at whether Exxon's "additional tortious conduct" had caused the City's injury. The jury found that this conduct had indeed caused the contamination of the Station 6 wells. A4271; *see also* A4427-28. Those findings were well-supported by the evidence, and the Second Circuit accordingly rejected Exxon's sufficiency challenge. Pet. App. 79-89. Exxon has not sought review on the sufficiency issue – nor would such a state-law issue warrant this Court's attention. Rather, the jury's finding that Exxon's "additional tortious conduct" had caused the City's injury – expressly upheld by the Second Circuit – makes this case an unsuitable vehicle for considering the preemption question that Exxon asks this Court to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

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