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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY BRIEF

The jury in this case awarded $105 million to remedy future injuries that may never occur and, if they ever do, will have been caused by the decisions of Petitioners (collectively "Exxon") to take the safest, feasible route for complying with a federal mandate. Respondents (collectively "the City") are unable to deny the ripeness and preemption problems with the nine-digit windfall for injuries that they have not yet sustained and that may never need redress (after all, the jury predicted that MTBE would peak in the year 2033 at a level that would still allow the City to serve the water without any treatment for MTBE). The City instead serves up a welter of vehicle problems. But both questions are squarely presented and warrant this Court's review.

I. The Ripeness Question Warrants This Court's Review

The City does not dispute that *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), foreclose a suit based 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. Moreover, as Exxon's amici emphasize, "[t]he consequences of the decision below extend far beyond the present case." Chamber of Commerce Br. 4; *see also* Wash. Legal Found. Br. 1–2 ("enormous implications"). "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." Wash. Legal Found. Br. 8. Making matters worse, the jury not only imposed $105 million in liability by predicting a future injury, but it did so after finding that MTBE levels in Station Six would never surpass New York State's maximum contaminant level of 10 parts per billion—even in the year 2033 when the jury predicted MTBE concentrations would peak—and thus MTBE would never be a barrier to the water being potable under New York law. App. 9, 22. Because "[v]irtually all drinking water in this country" is safe notwithstanding some low-level contamination, the decision below thus threatens to 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." Chamber of Commerce Br. 4.

The City primarily opposes certiorari on the grounds that "this is not a future injury case" at all. Opp. 16. The City argues that it raises "run-of-the-mill state-law claims for future *damages* based on tortious conduct that has already occurred." Opp. 1. The City emphasizes past MTBE detections during pilot testing of Station Six, and argues that *Lujan* and *Clapper* do not address the scope of damages running from such a past injury. Opp. 1, 16–21.

The City's benign description is belied by the jury instructions and cannot be squared with the reality of the case litigated below. The jury instructions could hardly have been clearer that the City indeed sought to impose liability on Exxon for an injury that might occur in the distant future when

the City intends to use water drawn from Station Six. The instructions asked whether the city "is, *or will be, injured* by the MTBE that *will be* in the combined outflow of the Station 6 wells, given ... that: (a) the city intends, in good faith, to use the water from the Station 6 wells *within the next 15 to 20 years* to serve as a backup source of drinking water; and (b) MTBE *will peak* at a level of 10 parts per billion in the combined outflow of the Station 6 wells *in 2033.*" Tr. 7042 (JA4377) (emphases added). The district court itself recognized that it had tasked the jury with the "rar[e]" and "difficult task" of "provid[ing] numerical predictions in the *liability phase* of a trial." App. 168–70 (emphasis added). And the district court told the jury "[i]t is up to you to determine whether the level of MTBE you have found *will be* in the Station 6 wells in the future *will constitute an injury* to the city." Tr. 6604 (JA4271) (emphases added). Asking for such predictions about whether future injuries will occur in two decades is not merely "rare" and "difficult," but wholly inappropriate.

The City asserts that the instructions are "irrelevant to ripeness" because it was uncontested that MTBE was detected at injurious levels in Station Six during testing. Opp. 23. But the instructions are relevant because they confirm that the City sought recovery not for past contamination, but for a projected future injury that might occur in the distant future depending on a long chain of speculative possibilities.

If the City were correct, the instructions would make no sense. If past injury were established and the only task was assessing future damages, the jury would not be asked whether the plaintiff "is, or will

be, *injured* by the MTBE that will be in the combined outflow of the Station 6 wells," App. 22 (emphasis added); the injury would already be established. There would have been no basis for having causation or injury depend upon a prediction about the quantity of MTBE that will be in the "combined outflow of the Station 6 wells" in the distant future, App. 18; the critical question would be whether Exxon caused *past* contamination by causing spills within the *past* capture zone during testing. And there would have been no basis for asking the jury about Exxon's role as a "direct spiller" of MTBE gasoline, App. 22, because it was undisputed that Exxon was not a "direct spiller" of the past contamination. Tr. 2241–42 (JA2819–20). And if the City were correct, these instructions would have been addressed to damages. But the jury was separately instructed on damages—in subsequent instructions, App. 28–31, after the jury first determined whether the City "is, or will be, injured."

Critically, the question under Article III is not when the defendant's allegedly tortious *conduct* occurred, but whether the plaintiff's *injury* is "actual or imminent." *Lujan*, 504 U.S. at 560. But the instructions expressly treat the possibility of a future injury as sufficient. And if there is one thing that is not "actual or imminent," it is an injury that the City might (or might not) suffer many years in the future, depending on a long chain of contingencies.

The City contends that, if it waited to sue, its claims would be untimely under New York law. Opp. 19. Not so. As the City recognizes, Opp. 20 n.8, Exxon would be estopped from raising such a defense here: The statute of limitations "will not be a

barrier" because it begins running at the discovery of an "injury" and the City has not been injured at all. Pet. 23 n.5; Exxon Br. 37–38. The City asserts that Exxon "told the Second Circuit that the City's claims were *already* untimely under New York's statute of limitations." Opp. 20 n.8. But Exxon did not try to have its cake and eat it too. To the contrary, Exxon presented this timeliness argument strictly in the alternative. Exxon explained that its "primary position is that the City's claims are premature." Exxon Br. 41. But "if the District Court's injury concept is correct, however, that concept must also extend all the way back to April 2000," when MTBE was first detected, thereby rendering the City's claims untimely. *Id.* at 41–42. This alternative argument is no longer at issue here and is perfectly consistent with Exxon's primary position here (and below) that the City will not be injured for decades—if at all.

The City also asserts that "Exxon's argument that the [past] contamination came from non-Exxon stations is an argument about causation, not ripeness." Opp. 22. But it is an undisputed fact that the past detections were caused by spills at non-Exxon stations. And this fact is important to ripeness because it further illustrates the disconnect between the theory of injury the City used to open the courthouse doors and the more aggressive future-injury suit it presented to the jury to win $105 million. When trying to establish ripeness, the City asserts that it is simply seeking future damages arising from the past MTBE contamination of Station Six. But when it presented evidence below and instructed the jury, it presented a much broader

future-injury claim: it sought the potential costs of remedying any MTBE that will ever be found in Station Six in the future if, among other things, the City fulfills its good faith intent to construct the plant, uses it decades from now, and the "pumping scenario" draws otherwise remote MTBE into the capture zone at high enough concentrations so as to need treatment. The City's actual lawsuit—as reflected in the $105 million judgment here—is thus manifestly unripe and warrants this Court's review.

II. The Preemption Question Warrants This Court's Review

By putting so much weight on past detections of MTBE in opposing certiorari on ripeness, the City also highlights the need for this Court's review of the preemption question. To show that Exxon contributed to the past detections in Station Six, the City introduced evidence that, because different manufacturers' gasoline was "commingled" during distribution, Exxon's gasoline "ended up" in every underground storage tank in Queens. App. 87–88; Opp. 22–23. Exxon widely used MTBE as a gasoline additive in its role as a manufacturer, refiner, or supplier, however, only because federal law mandated the use of an oxygenate and there was no safer, feasible alternative available at the time. A state tort award against Exxon for past contamination from non-Exxon service stations is thus based on nothing more than a retroactive state-law duty for Exxon not to use MTBE to comply with the federal mandate. It follows *a fortiori* from *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), that such a state-law

duty is preempted on the facts here, as it is effectively a penalty on real-world compliance with federal law. Indeed, such a penalty at least triggers conflict preemption—if not also impossibility.

The City offers no substantive response to Exxon's argument that the oxygenate mandate 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. The City instead primarily argues that this is a poor vehicle.

First, the City asserts that Exxon "barely made its present preemption argument" below and that the Second Circuit only addressed *Williamson* and *Geier* in a footnote. Opp. 26–27. But for an argument to be preserved for this Court's review, it need only be passed upon on or presented below—and the City admits both occurred here. *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 530 (2002). Indeed, Exxon has been making the same basic argument all along. Exxon's petition asks "[w]hether the federal oxygenate mandate … 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. Exxon made the same argument in the Second Circuit: "The City's claims are preempted because federal law required ExxonMobil to add an oxygenate to its gasoline and the jury found that there was no 'safer, feasible alternative' oxygenate to MTBE." Exxon Br. 22. Exxon also made the same argument in the district court. *See* Exxon Mem. in Supp. of Renewed Mot. for J. as a Matter of Law 3 (Doc. 3078) ("Because the jury found

that there was no 'safer, feasible alternative design at the time ExxonMobil's gasoline containing MTBE was marketed,' the City's claims are preempted.…").

To the extent Exxon's emphasis changed, that is because the Second Circuit moved the goalposts. Exxon appropriately focused its Second Circuit brief on the district court's erroneous view that there is no preemption of a massive state-law tort judgment because Exxon could pay $105 million to comply with both state and federal law. App. 162 (award "simply provide[s] a counterbalancing economic incentive"). Not surprisingly, the Second Circuit did not embrace that view. It instead adopted an equally erroneous view that Exxon attacked both in anticipation and rehearing. The preemption question is thus amply preserved for this Court's review.

Second, the City argues that "Exxon's liability did not rest on the mere use of MTBE," as each of the torts here had additional elements. Opp. 34–35. But this argument is only skin-deep as to the City's unripe future injury claims[1]—and utterly fails as to

[1] To avoid preemption of its future-injury claims, the City would need to distinguish between MTBE gasoline spills and leaks caused by Exxon's allegedly tortious conduct beyond the mere use of MTBE, on one hand, from spills and leaks that were caused by third parties or that could not have been avoided even with the exercise of due care or additional warnings, on the other. But the preemption rulings below relieved the City's need to draw this distinction, and the City did not introduce evidence proving it. For example, to support negligence, the City's expert testified that Exxon could have avoided MTBE contamination by deciding "not to use MTBE." Tr. 3376 (JA3154). But a negligence verdict based on this evidence imposes a retroactive state-law duty not to use MTBE and is thus preempted.

the past detections that the City contends make this suit ripe.

The City points to Exxon's alleged negligence in "handling MTBE gasoline." Opp. 35. But Exxon's handling of MTBE gasoline has nothing to do with the past detections, which came from spills or leaks at non-Exxon stations. Similarly, the City asserts that, "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.'" Opp. 35. But Exxon's only "intentional" act that could have contributed to the past detections was the act of choosing to use MTBE as a gasoline additive to comply with the federal mandate. The City also asserts that Exxon could have "provided adequate warnings to users about MTBE's unique dangers." *Id.* But "the City's failure to warn claim looked to the future, not the past," as the City did not identify an alternative warning Exxon should have given to non-Exxon service stations, much less try to show that such a warning would have prevented any of the leaks or spills that actually caused the past contamination. Pet. 35. The City also never explains how Exxon could have provided extensive warnings about the dangerousness of MTBE without frustrating the objectives of the federal mandate. To the extent the City alleviates the ripeness problem by recasting this suit as assessing responsibility for a "past injury," it thus magnifies the preemption problem.

Third, the City contends that the jury did not find that there was no "safer, feasible alternative" to MTBE; it found that the City failed to prove that

there was such an alternative. This argument again highlights the unfairness in this case. Exxon requested a separate preemption instruction precisely because Exxon bore the burden of proof on preemption (but not design defect). Yet the district court rejected Exxon's request on the grounds that the design-defect instruction would affirmatively establish preemption. E.g., Tr. 5510–15 (JA3960–63); Tr. 5433 (JA3931) (the design-defect special verdict "answers the conflict preemption point"). After the design-defect verdict for Exxon, however, the district court reversed course and refused to use the verdict affirmatively, reasoning that the burdens were different. App. 159.

The City argues that Exxon's requested instruction was nonetheless "correctly denied because it equated preemption with the cost-benefit analysis" required under New York design-defect law. Opp. 32–33. But Exxon's requested instruction did not mention cost-benefit analysis at all. Exxon asked the jury to find "that ethanol was not a safer, feasible alternative to MTBE at the time that [Exxon] was deciding what oxygenate to use to comply" with the federal mandate, and stated that such a finding would trigger preemption of the City's design-defect claim. SA82. As the City recognizes, a jury finding that there was no safer, feasible alternative would preempt a design-defect claim. *Id*.

Moreover, contrary to the City's suggestions, Exxon's reference to design defect in the instruction would not limit the impact of such an affirmative finding on the City's other claims. Indeed, neither of the lower courts embraced the City's cramped reading of the instruction. What matters for

preemption is not the name of the state-law tort, but the duties state law actually imposes. *See Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2573 (2011) (preemption analysis "begin[s] by identifying the state tort duties"). Here, the City's state-law claims—and in particular any purported "past injury" claim that Exxon contributed to past contamination from non-Exxon stations by manufacturing, refining, or supplying MTBE gasoline—impose a retroactive duty on Exxon not to use MTBE at a time and place when there was no safer, feasible alternative for complying with the federal mandate. Those claims are therefore preempted outright or at a minimum Exxon's instruction should have been granted. The Second Circuit's contrary ruling is wrong, important, and warrants this Court's review.

Absent this Court's review, Exxon will be forced to pay $105 million for a future injury that may never occur, and if it ever does, will have been caused by Exxon using the safest, feasible means available of complying with a federal mandate. That result is both manifestly unfair and impossible to reconcile with this Court's precedents.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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