No. 10-4135

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE METHYL TERTIARY BUTYL ETHER PRODUCTS LIABILITY LITIGATION

EXXON MOBIL CORP., et al.
Defendants-Appellants-Cross-Appellees,
v.

CITY OF NEW YORK,
Plaintiffs-Appellees-Cross-Appellants.

On Appeal from the
United States District Court for the Southern District of New York
No. 00-cv-1898, MDL 1358 (Scheindlin, J.)

AMICUS BRIEF FOR AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NFIB SMALL BUSINESS LEGAL CENTER, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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INTEREST OF AMICI

Amici curiae American Chemistry Council, American Coatings Association, the Chamber of Commerce of the United States of America, National Association of Manufacturers, and National Federation of Independent Businesses Small Business Legal Center respectfully submit this *amici curiae* brief in support of the Appellant, on behalf of themselves and their membership, because the rulings by the district court below depart from fundamental tort law doctrines that require plaintiffs to demonstrate an actual cognizable injury as a precondition for a jury award of damages.[1] As set forth herein, by holding that the Appellant could be held liable for the potential, future presence of MTBE in currently-unused water supplies at levels within safe drinking water standards, the district court improperly expanded the scope of judicial inquiry beyond proper Article III case-or-controversy strictures, divorced common law tort liability from the relevant legal standards protecting the City's ability to provide its residents with water meeting safe drinking water standards, and opened the floodgates to litigation against all manner of commercial enterprises for similar non-injurious operations. The following associations join in this brief:

[1] No entities other than the identified *amicus curiae* have contributed to the funding of this amicus brief, which was drafted by the counsel for *amici* identified herein. Plaintiffs-appellees have consented to the filing of this brief.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a $674 billion enterprise and a key element of the nation's economy. ACC frequently submits *amicus curiae* briefs on issues of importance to its membership. *See* ACC's website, http://www.americanchemistry.com.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. Collectively, ACA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States. ACA is actively involved in supporting its members' interests though *amicus curiae* briefing in courts across the country. *See* ACA's website, http://www.paint.org.

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

Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases, such as this one, involving issues of national concern to American business. *See* the Chamber's website, http://www.uschamber.com.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM regularly supports its membership through *amicus curiae* briefing. *See* NAM's website, http://www.nam.org

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public

interest. The NFIB Legal Center frequently files *amicus* briefs in cases that impact small businesses. *See* NFIB's website, http://www.nfib.com.

SUMMARY OF ARGUMENT

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

In this case, the City of New York seeks to defend a jury verdict that awarded the City damages in excess of $100 million based upon the *possibility* that

the City might at *some indefinite point of time* in the next 25 years seek to use water that *might* contain small amounts of one type of contaminant, the gasoline additive methyl tertiary butyl ether (MTBE), but at levels that fall *within* the City's own safe drinking water standards and thus will not injure the city's ability to provide safe drinking water to its residents. This damages award cannot stand, because the jury's factual findings demonstrate both that the City has not established a cognizable injury and that the City's damages claim is not ripe. As the vast majority of courts around the country have recognized, the proper definition of drinking water for purposes of measuring injury under common tort law is water that meets appropriate drinking water standards. Thus, by finding that MTBE levels will never exceed safe drinking water standards, the jury effectively rejected the City's claim of injury from a loss of drinking water and found that the City had not met its burden of proving cognizable injury. Moreover, it is undisputed on the factual record that the groundwater at issue is not currently being used as a source of drinking water. The City's claim thus rests solely on the alleged loss of future drinking water services. But the jury concluded that even the peak, within safe drinking water MTBE levels would not occur for 25 years and then only in the speculative event that the City takes a number of steps in the future necessary to otherwise make the water supply at issue available for drinking water services. The City thus also failed to establish for the jury – as this Court has

required for purposes of ripeness – that the alleged injury was "certainly impending and real and immediate." The district court's decisions allowing the City nonetheless to seek damages and then upholding the jury's factually-unfounded $100 million damages award were plain error and should be reversed.

The consequences of the district court's erroneous legal rulings extend far beyond the present case. By disregarding the jury's finding that MTBE levels would never exceed safe drinking water standards, the district court effectively redefined the term "drinking water" to mean "pristine water," so that the presence of *any* trace amount of *any* foreign substance can render the drinking water damaged. But as the NYDEP itself recognizes, this definition not only defies the legal meaning of "drinking water," it defies reality. In fact, virtually all drinking water in this country, while perfectly safe to drink, contains trace amounts at least some foreign substances, both man-made and naturally occurring. Unless reversed, the district court's ruling could thus transform every public drinking water supply in this country – and indeed every *potential* future drinking water supply in this country – into a ready-made multi-million dollar lawsuit. The district court's ruling would open the floodgates to claims against virtually every manner of human enterprise that could be linked with such trace detections, affecting such diverse sectors of the economy as agriculture, manufacturing, petroleum, and drug companies.

Amici accordingly urge the Court to reverse the district court's legal rulings, affirm the legal consequences that follow from the jury's factual findings, and find in favor of the Appellant.

ARGUMENT

I. The City of New York Failed to Establish Any Injury to the Drinking Water Resource.

The City of New York argues that Appellant should be held liable for over $100 million dollars because contamination or potential contamination of groundwater with MTBE has deprived the City of future drinking water services. However, after an eleven week trial, a 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 parts per billion ("ppb") and, accordingly, will at all relevant times in the future provide an available source of safe drinking water. The City accordingly failed to establish that it has suffered any cognizable injury, and judgment should be entered in favor of the Appellant.

The City's argument that levels of groundwater contamination at or below the maximum contaminant level ("MCL")[2] provide a basis for a damages claim for

[2] MCLs are "safe levels that are protective of public health." 52 Fed. Reg. 25,690, 25,693-94 (July 8, 1987). EPA establishes MCLs based on "the best available, peer-reviewed science and supporting studies," as well as "data collected by accepted methods or best available methods." 42 U.S.C. § 300g-1(4)(b)(3)(A)(i)-(ii). MCLs "represent the level of water quality that EPA believes is acceptable for

loss of drinking water has been squarely rejected by other courts. As the United States District Court for the District of New Mexico explained in responding to a similar damages claim by the State of New Mexico in response to alleged contamination of the Middle Rio Grande aquifer:

> Under New Mexico law . . . water need not be pristine to be drinkable, and use for drinking water purposes depends on whether applicable water quality standards are met, not whether the water yet remains in its primordial state, untouched by any of the chemical remnants of the modern age. As this court explained a year ago, Plaintiffs' own characterization of their alleged injury selects the legal standard to be applied to measure the existence and extent of that injury. Drinkability does not equate with pristine purity under New Mexico law, and the court remains convinced that a loss of drinking water services must be measured by applying New Mexico drinking water standards.

New Mexico v. General Electric Co., 335 F. Supp. 2d 1185, 1212 (D.N.M. 2004), *aff'd*, 467 F.3d 1223 (10th Cir. 2008); *see also Brooks v. E.I. DuPont de Nemours & Co., Inc.*, 944 F. Supp. 448, 449 (E.D.N.C. 1996) ("since the levels of contaminants estimated by plaintiffs' experts fall below the maximum allowable concentration for all contaminants at issue, the plaintiffs have failed to demonstrate even a prima facie showing that they have been damaged"); *Gleason v. Town of*

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over 200 million Americans to consume every day from public drinking water supplies." 55 Fed. Reg. 8,666, 8,750 (Mar. 8, 1990).

Bolton, No. 991194, 2002 WL 1555320, at *3 (Mass. Super. May 23, 2002) (no evidence of injury to water supply where "[t]he levels of MTBE detected in the water supply well never exceeded the MCL"); *Adams v. A.J. Ballard, Jr. Tire & Oil Co.*, Nos. 01 CVS 1271, 03 CVS 912, 03 CVS 1124, 2006 WL 1875965, at *31 (N.C. Super. Ct. June 30, 2006) ("concentration levels that do not reach the standard set by North Carolina regulations do not create a threat to human health or render the groundwater 'unsuitable for its intended usage'"). Likewise, in this case, the City of New York seeks damages arising from an alleged loss of drinking water, but it failed to establish that MTBE levels would ever reach the level at which the City's water supply would become unavailable for drinking water services.

The district court's erroneous ruling below allowing the City nonetheless to recover damages for an alleged chemical insult to groundwater was based, in part, upon a fundamental misunderstanding of the legal principle before it. In holding that the City had standing to pursue a claim based upon within-MCL groundwater contamination, the district court asked whether "an MCL displaces common law tort liability resulting from groundwater contamination" and concluded that it did not. *In re MTBE Products Liability Litigation*, 458 F. Supp.2d 149, 157 (S.D.N.Y. 2006). The issue here, however, is not whether drinking water standards (i.e., safe levels that are protective of human health) set the per se standard for *liability* under

state tort law but, rather, *what is the nature of the property interest* that the City claims has been damaged. Under New York law, the City "is entitled to use the water from the aquifer but does not have a property interest in the aquifer itself." *Plainview Water District v. Exxon Mobil Corp.*, 856 N.Y.S.2d 502, 2008 WL 220192, at *20 (N.Y. Super. Jan. 9, 2008) (citing cases) (unpublished table decision, text in Westlaw), *appeal dismissed*, 66 A.D.3d 754 (App. Div.), *and appeal denied*, 926 N.E.2d 1237 (N.Y. 2010); *see also Knaust v. City of Kingston*, 193 F. Supp. 2d 536, 544 (N.D.N.Y. 2002) ("Plaintiffs do not 'own' the waters in the subterranean lake beneath their property – they only have a right to the reasonable use of that water"). Accordingly, the nature of the City's ownership interest under New York law is defined by the purpose for which it would make use of the groundwater, in this case for drinking water services. *Cf. Hellert v. Town of Hamburg*, 857 N.Y.S.2d 825, 828 (App. Div. 2008) ("it is immaterial that certain metals detected in the groundwater samples taken from plaintiffs' properties exceeded drinking water standards because it was undisputed that none of the plaintiffs used groundwater or well water for drinking purposes").

But, as so understood, the City's legally protected property interest was not shown on the record below to have suffered any injury. Under New York law, "[p]otable water means a water which meets the requirements established by" the New York State Department of Health safe drinking water regulations. N.Y.

Comp. Code R & Regs. Tit. 10, § 5-1.1 (2011). The NYSDOH has set the MCL for MTBE at 10 parts per billion, the same level established by the United States EPA. The jury's finding that the groundwater from Station 6 will at all relevant times in the future meet the safe drinking water MCL requirements for MTBE means that the City has not suffered any injury from the alleged MTBE contamination to its interest in securing potable water from Station 6. *See New Mexico*, 335 F. Supp. 2d at 1210 ("The plain language of [the state regulations] states that public water systems may lawfully supply drinking water that meets the . . . MCL standards . . . . It follows that groundwater that meets those same standards has not been lost to use as drinking water"). The City accordingly has not suffered any damage and, upon finding that the City had not established the presence of any above-MCL levels of MTBE in the groundwater beneath Station 6, the jury should not have been allowed to proceed any further.

The district court likewise erred in holding that the City could somehow expand the scope of its property interest by claiming that it might reasonably choose to remediate groundwater even if the groundwater was already usable for drinking water purposes. The City can provide no legal authority for the proposition that it has a protected interest in securing pristine water for drinking water services, and, indeed, its own practice is to the contrary. *See* 8/31/09 Tr. 2982; 9/1/09 Tr. 2291 (city has provided drinking water containing low levels of

MTBE without complaint); *NYC 2009 Drinking Water Report* 10-11 (setting forth list of contaminants found in New York City drinking water within safe drinking water standards); *In re MTBE Products Liability Litigation*, 593 F. Supp.2d 549, 552 (S.D.N.Y. 2007) ("New York does not have a zero-tolerance policy on contaminants in drinking water"); *see also New Mexico*, 335 F. Supp. 2d at 1212 ("use for drinking water purposes depends on whether applicable water quality standards are met, not whether the water yet remains in its primordial state, untouched by any of the chemical remnants of the modern age").

As other federal courts have properly concluded, a water supplier's only legally protected interest lies in its ability to provide potable drinking water. If that interest has not been damaged, then there are no damages to be recovered under state tort law. *See Emerald Coast Utils. Auth. v. 3M Co.*, 746 F. Supp. 2d 1216, 1231 (N.D. Fla. 2010) (rejecting the utility's argument that the court follow the reasoning of the district court in this case and dismissing claim where it was "undisputed that the level of [the chemicals] at the time [the] suit was filed were compliant with EPA provisional advisories"); *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1182 (E.D. Wash. 2006) (holding that the "existence of some contamination in the aquifers, and some detects of TCE [trichloroethylene] . . . *not above the MCL*" does not create an issue of material fact regarding the existence of injury for liability purposes) (emphasis added); *Iberville Parish*

Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc., 45 F. Supp. 2d 934, 941-42 (S.D. Ala. 1999) ("[b]ecause both District 3 and Bowling Green are in compliance with the [Safe Drinking Water Act] drinking water standards, it cannot be said that either has suffered any actual invasion of a legally protected interest."), *aff'd*, 204 F.3d 1122 (11th Cir. 1999) (unpublished opinion).

The City bore the burden at trial of convincing the jury that MTBE contamination of groundwater at Station 6 has damaged the City in its ability to provide safe drinking water to the City residents. It failed to do so. There accordingly is no legal basis for the $100 million verdict awarded to the City, and that award should be vacated.

II. The City's Claim For Damages For Alleged Future Loss of Drinking Water Services from MTBE Groundwater Contamination Is Not Ripe.

The district court's erroneous finding that the City was entitled to seek damages without any evidence that MTBE levels would impact its ability to provide safe drinking water was seriously compounded by its further ruling that the City could recover damages *now* for the claimed future loss of drinking water services despite the facts that (1) the City does not pump drinking water from any wells at Station 6 (for reasons wholly independent of the alleged MTBE

contamination at issue in this case[3]); (2) the City cannot begin pumping drinking water from Station 6 regardless of the alleged MTBE contamination without building a facility to treat other compounds in the water supply that *do* exceed safe drinking water standards; and (3) even crediting the jury's Phase 1 and 2 findings that the City had a "good faith intent" to begin using those wells in the future, the MTBE levels in the groundwater beneath the Station 6 wells would not reach the still-within MCL peak level of 10 ppb until the year 2032. The $100 million damages award below was thus based entirely on the following tenuous chain of future possibilities:

- If the City builds a treatment facility within the next 10-15 years; and
- If the City then starts pumping drinking water from the currently inactive wells at Station 6; and
- If those wells draw in MTBE not currently present in the groundwater beneath the site reaching a peak level of 10 ppb in 23 years; and
- If the City elects to remediate the MTBE in this groundwater despite the fact that the water will meet all safe drinking water standards;
- Then the City will incur damages.

[3] *In re MTBE Products Liability Litigation*, 643 F. Supp. 2d 446, 449 (S.D.N.Y. 2009) ("None of the Station 6 wells were turned off in response to MTBE contamination.").

Thus, the City's claim of potential future harm from MTBE contamination is not ripe for review, and the Court accordingly should vacate the damages award and dismiss this case for lack of jurisdiction.

As this Court has explained, "the requirement that a dispute must be ripe prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Ross v. Bank of America, N.A.*, 524 F.3d 217, 226 (2d Cir. 2008) (internal quotations omitted). "Ripeness is a doctrine rooted in both Article III's case or controversy requirements and prudential limitations on the exercise of judicial authority." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005). "As such, [the Court] must presume that [it] cannot entertain [the City's] claims 'unless the contrary appears affirmatively from the record.'" *Id.* (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)). "At its heart is whether [the Court] would benefit from deferring initial review until the claims [it is] called on to consider have arisen in a more concrete and final form." *Id.* "Ripeness, therefore is 'peculiarly a question of timing' as cases may later become ready for adjudication even if deemed premature on initial presentation." *Id.* (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974)).

In determining whether the City's claim is ripe for review, the Court is required to "'evaluate both the fitness of the issues for judicial decision and the

hardship to the parties of withholding court consideration.'" *Id.* (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In this case, both factors strongly weigh in favor of deferring consideration of the City's claims until such time as its alleged damages become "concrete" and take "final form."

First, it is undisputed that the City is not suffering any present injury to its ability to provide safe drinking water and its claim that it could suffer such injury in the future is based upon a series of speculative findings that are not sufficiently developed in fact to be fit for present adjudication. While it may be that the City will decide at some future time to build the treatment facilities at Station 6 that would be needed because of non-MTBE contamination at the site exceeding safe drinking water standards, it has not made that decision at this time. While it may be that, if and when the City thereafter starts pumping drinking water from the Station 6 wells, it will draw MTBE into those wells, that will depend on the nature and scope of these potential future pumping activities, which are currently unknown. And while it may be that at that time the City will decide to treat the water to remove the MTBE (although as noted above such action would be inconsistent with the City's past practice in supplying safe drinking water with low-level MTBE and would not be needed to provide safe drinking water), any current conclusion that the City would in fact take such a step in the future is necessarily speculative. There can be no question that the Court would be better

served by allowing time for further factual development to demonstrate whether the claimed eventualities necessary to the City's damages claim will in fact occur. *See Id.* ("The 'fitness of the issues for judicial decision' prong recognizes the restraints Article III places on federal courts. It requires a weighing of the sensitivity of the issues presented and whether there exists a need for further factual development.").

Second, the City cannot demonstrate that it would suffer any hardship by the withholding of court consideration until the factual predicates of the City's claims have further developed. As the record below reflects, the City is not now using the wells at Station 6 for drinking water, has no immediate plans to use those wells for drinking water, and is not currently proceeding with any plans to build a treatment plant at Station 6 that would be necessary if the City were to elect to use the Station 6 wells for drinking water. Rather, the City asserted at trial only that it has a "good faith intention" to begin constructing a treatment plant at some unknown point in the next 15 years. Moreover, the jury found that, even if the City were eventually to build such a treatment plant, it still would not use the Station 6 wells as a primary source of drinking water but rather only as a backup supply. Accordingly, the City is not facing any imminent threat to its drinking water supply, nor is it even facing an imminent decision with regard to the Station 6

wells, and it will not suffer any significant hardship if its claims are presented in a more timely fashion if the facts develop as the City now speculates that they will.

Nor, as the district court below erroneously ruled, can the City circumvent the ripeness requirement by showing that it has a "good faith intention" to take the series of steps needed for its damages claim to materialize. Claims of threatened harm based upon allegations of "'some day' intentions . . . do not support a finding of the 'actual or imminent' injury that [the U.S. Supreme Court's] cases require." *Lee v. Bd. Of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 912 (2d Cir. 1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009) (same). Rather, "with respect to future injury, the Court has held that the prospect of such harm must be certainly impending and real and immediate." *Lee*, 118 F.3d at 912 (citations and internal quotations omitted).

In similar circumstances, other courts have properly held that claims brought by public water suppliers for alleged potential future risks to drinking water were not ripe for resolution. In *City of Moses Lake*, for example, the City-plaintiff brought suit against various aircraft manufacturers based upon alleged contamination of the City's water supply with trichloroethylene ("TCE"). 430 F. Supp. 2d 1164. The City was unable to demonstrate the presence of TCE in excess of MCL drinking water standards, and the Court accordingly concluded that the

City had not established any current damage. *Id.* at 1184 ("Moses Lake has not presented any evidence of an actual existing danger"). Like the City here, the City of Moses Lake argued that it should nonetheless be allowed to proceed with its claim because "if it drills new wells, they may become contaminated with TCE in excess of the MCL." *Id.* The court rejected this argument as premature, explaining that "if and when one of the wells exceeds the MCL for TCE, Moses Lake will have a cause of action because clearly then a health risk will exist." *Id.*

Likewise, in *Iberville Parish Waterworks Dist. No. 3*, the court rejected a claim brought by a public water system against an herbicide manufacturer seeking damages for water treatment costs. 45 F. Supp. 2d 934. Again, lacking any present evidence of above MCL contamination of drinking water, the water supplier argued that it should be allowed to seek damages for potential future contamination. The court dismissed the claim as not ripe, *id.* at 941, explaining that the plaintiffs' claims of potential future contamination were not sufficiently definite to provide the court with jurisdiction:

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

Id. at 942 (emphasis added). *See also Knaust*, 193 F. Supp. 2d at 543 (rejecting plaintiffs' claim of cognizable injury based upon the threat of future contamination of subterranean lake where no showing was made that such contamination was "imminent"); *Plainview Water Dist.*, 2008 WL 220192, at *22 ("Plaintiff bore the burden of proving through non-speculative evidence not only that MTBE will actually impact its Phase 1 wells in the future, but that such impacts are 'certainly impending,' 'actual and at hand' and 'real and immediate' as required by New York Law.").

The City's putative showing of a "good faith intention" to build a treatment facility at Station 6, to start pumping drinking water from Station 6 wells, and to provide further treatment of that drinking water to address MTBE levels in those wells that fall within safe drinking water standards does not transform their speculative claim of future harm into a present day ripe controversy. Simply stated, the City failed to satisfy its burden of establishing a ripe dispute, and judgment should be entered for the Appellant on this ground as well.

III. The District Court's Erroneous Legal Rulings Would Open The Floodgates to Similar Litigation Alleging Damage From the Use and Potential Use of Safe Drinking Water at Water Supply Systems Around the Country.

The district court's errors in letting the present case proceed to a jury would impose a severe adverse impact on the individual Appellant in this case. The

adverse impacts on industry and our economy if this ruling were affirmed and followed by other courts would be extraordinary. As set forth below, while almost always at levels well within regulatory limits and not posing any risk to human health, the presence of trace amounts of chemicals and other foreign substances in public drinking water supplies is ubiquitous. The district court's rulings that within-MCL detections of such substances – or indeed that the possibility of future such detections – provide a permissible legal foundation for common law tort claims would thus put virtually every water supplier in this country in the role of plaintiff and would place a litigation target on the back of virtually every business and industrial enterprise operating in the United States. As the Kentucky Court of Appeals explained in rejecting a similar claim for damages from trace detections of polychlorinated biphenyls ("PCBs") in a property damages claim:

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

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

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

The United States Department of Interior Geological Survey (USGS) and other investigators have repeatedly documented the presence of very low levels of man-made compounds in public water supplies. These same studies have also established, however, that the detected levels of such compounds are almost always well within safe drinking water limits and do not pose any health risk. For example, in one study, USGS scientists detected one or more volatile organic compounds ("VOCs") in 65% of the samples drawn from domestic wells at more than half of the nation's regionally extensive aquifers or aquifer systems. Barbara L. Rowe, *et al.*, *Occurrence and Potential Human-Health Relevance of Volatile Organic Compounds in Drinking Water from Domestic Wells in the United States*, 115 Environmental Health Perspectives 11, 1539-1546 (Nov. 2007). The vast majority of these detections however were well within safe drinking water standards: 91% of the sampled wells had total VOC concentrations less than 1 part per billion and only 1.2% of the samples had any VOC concentrations greater than a human-health benchmark. *Id.* at 1541-42. Likewise, in another study, the USGS sampled source water from nine community water systems for analysis of 258

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

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

[4] *See* USGS, *A Review of Literature for Methyl tert-Butyl Ether (MTBE) in Sources of Drinking Water in the United States*, Open-File Report 01-322, 4, 6, available at http://sd.water.usgs.gov/nawqa/pubs/ofr/ofr01_322.pdf (reporting that MTBE was detected in groundwater samples in 14 of the 33 states surveyed but that "the vast majority of concentrations in public drinking-water wells was less than 10 [ppb]"); Michael J. Moran, John S. Zogorski & Paul J. Squillace, *MTBE and Gasoline Hydrocarbons in Ground Water of the United States*, 43 Ground Water 4, 615-627

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

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(2005) (detecting MTBE in 7.6% of some 4,000 ground water samples from across the United States but with only 13 samples, or 0.3%, above the lower limit of U.S. EPA's Drinking Water Advisory).

[5] *See* Dana W. Kolpin, Jack E. Barbash, & Robert J. Gilliom, *Occurrence of Pesticides in Shallow Groundwater of the United States: Initial Results from the National-Water Assessment Program*, Environmental Science & Technology 32(5); 558-566 (1998), available at http://water.usgs.gov/nawqa/pnsp/pubs/est32/ (reporting USGS finding that "[p]esticide results from the 41 land-use studies conducted during 1993-1995 indicate that pesticides were commonly detected in shallow groundwater . . . in agricultural and urban settings across the United States," but that "[m]aximum contaminant levels (MCLs) established by the U.S. Environmental Protection Agency for drinking water were exceeded for only one pesticide . . . at a single location").

[6] Shane A. Snyder, *Occurrence, Treatment, and Toxicological Relevance of EDCs and Pharmaceuticals in Water*, 30 Ozone: Science and Engineering, 65-69 (2008), available at http://www.informaworld.com/smpp/section?content=a791197768&fulltext=713240928 (noting detections of trace amounts of some pharmaceuticals in upwards of 90% of sampled water treatment plants but at levels not relevant to human health); *see also* New York City Department of Environmental Protection, *Occurrence of Pharmaceuticals and Personal Care Products (PPCPs) in Source Water of the New York City Water Supply* 17-18 (May 26, 2010), available at http://home2.nyc.gov/html/dep/pdf/quality/nyc_dep_2009_ppcp_report.pdf ("several screening level risk assessments have concluded that no appreciable human health risk exists for the trace levels of PPCPs detected in this and other

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

None of these potential lawsuits would have anything to do with protecting human health or protecting a public water supplier's property interest in providing safe drinking water. As New York City has itself elsewhere acknowledged, the presence of trace levels of man-made substances in surface and groundwater is an unavoidable consequence of a developed human society and does not jeopardize

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comparable studies. . . . Consistent with the[se] conclusions . . . the[] large [margins of exposure found in this study] suggest that the risks to the health of New York City consumers, if any, are likely to be *de minimis*.")

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

governments' ability to provide safe drinking water to its citizens. *See NYC 2009 Drinking Water Report*, *supra*; *see also*, *e.g.*, Merijin Schriks, *et al.*, *Toxicological relevance of emerging contaminants for drinking water quality*, Water Research 44; 461-476, 473 (2010) ("The evaluation as presented here supports the conclusion that the majority of selected compounds as found in surface waters, groundwater, and drinking water do not pose an appreciable concern to human health").

Rather, these lawsuits would reflect part of a growing trend – exemplified by the present lawsuit – of standardless liability, whereby government entities, often (as in this case) in collaboration with contingent-fee private plaintiffs' attorneys, seek to extract monetary tort recoveries from businesses for conduct that has not imposed any damage to either individuals or to the societal health at large. *See* James A. Henderson, *The Lawlessness of Aggregative Torts*, 34 Hofstra Law Review 329-343 (2005).

The present lawsuit – and future lawsuits that would follow the same pattern if the case were affirmed – highlights what Cornell Law Professor and co-reporter on the products liability section of the Restatement (Second) of Law of Torts, James Henderson, has characterized as a new legal strategy of "aggregative torts," that is, torts whereby large, informally defined groups of victims are alleged to be the collective victims of a defendant's wrongdoing. *Id.* at 329. Aggregative

torts, Professor Henderson warns, "are inherently lawless and unprincipled." *Id.* at 337. "The lawlessness of aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards." *Id.* at 338. These "vague standards leave it to the discretion of triers of fact to 'do what is right' in factual contexts that juxtapose large numbers of putative victims against affluent groups of commercial actors." *Id.* at 339. "[T]he parties become supplicants, begging for enough of the tribunal's sympathy to cause it to bless them with a favorable exercise of its unreviewably boundless discretion." *Id.*

Thus, in this case, Exxon Mobil was not held liable because it took any action that does or will deprive the City of safe drinking water or that negatively impacts public health. Rather, Exxon Mobil was held liable, *inter alia*, because the district court failed to properly apply the relevant legal standards defining safe drinking water and imminent injury and left it to a jury to decide, based on only vague, open-ended standards, whether to side with the governmental plaintiff who purported to be protecting the public health, on the one hand, or with an easy-to-vilify, affluent oil company, on the other. Unless the district court's flawed rulings are reversed, other governmental plaintiffs – and the private plaintiff attorneys who finance their lawsuits – will have a ready litigation model to export throughout the Second Circuit and the country at large. As Professor Henderson

warned, unless the judiciary stands up against these types of standardless lawsuits, "it is certain that more of these claims will be forthcoming." *Id.* at 341. *Amici Curiae* urge this Court to take such a stand and, by reversing the district court's erroneous rulings, return the law to its traditional moorings in properly-defined legal standards that protect public health and safety.

CONCLUSION

For the reasons set forth herein, *amici curiae* ACA, ACC, the Chamber, NAM, and the NFIB Small Business Legal Center urge the Court to reverse the verdict below and enter judgment in favor of the Appellant.

Respectfully submitted,

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