No. 15-933

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *ET AL.*
Petitioners,

v.

NEW HAMPSHIRE
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

AMICUS BRIEF FOR AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS and AMERICAN TORT REFORM ASSOCIATION

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INTEREST OF *AMICI CURIAE*[1]

The American Fuel & Petrochemical Manufacturers ("AFPM") and the American Tort Reform Association ("ATRA") (collectively, the "*amici curiae*"), on behalf of themselves and their members, respectfully submit this brief in support of the Petitioners.

AFPM is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM represents high-tech American manufacturers of nearly the entire U.S. supply of gasoline, diesel, jet fuel, and home heating oil. AFPM members also manufacture petrochemicals used in a wide variety of products, including plastic, medicines and medical devices, cosmetics, televisions and radios, computers, solar power panels, and parts used in every mode of transportation.

Members of AFPM manufactured and sold gasoline oxygenated with methyl tertiary butyl ether ("MTBE"), are regulated under the Clean Air Act Amendments of 1990, and participate in the reformulated gas program ("RFG") administered by the U.S. Environmental Protection Agency ("EPA").

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[1] Pursuant to this Court's Rule 37.2, *amici* have timely notified the parties of their intent to file an *amicus curiae* brief. The parties have consented. Pursuant to Rule 37.6, *amici* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Consequently they face potential liability in tort for the sale of MTBE-containing gasoline and will be directly affected by the Court's decision.

ATRA has, for the past thirty years, been the only national organization exclusively dedicated to bringing greater fairness, predictability, and efficiency to America's civil justice system. Members of ATRA represent several regulated industries that will be affected by the Court's decision about the preemption of state tort laws that place burdens on those who comply with federal statutes and regulations.

Amici curiae urge the Court to grant certiorari. The manufacture and sale of MTBE-containing gasoline has retroactively exposed U.S. refiners to mass tort actions by states and municipalities—for selling gasoline that complies with federal law. This exposure has occurred despite Congress's considered decision to require oxygenates in gasoline and to offer refiners a choice of permissible oxygenates, including MTBE. Under the ruling below, any refiner for which MTBE was the only practical choice in complying with federal law, may nevertheless be held liable in tort without an opportunity even to demonstrate to the jury that it had no feasible alternative. This case also represents the first in which liability has been imposed solely for the *sale* of MTBE-containing gasoline, with no allegation that the defendant had any role in spilling the gasoline and contaminating the groundwater.

This potential liability poses enormous financial implications to the industry. If the decision is allowed to stand, *amici's* members could suffer

substantial economic harm simply from the sale of gasoline in compliance with the federal Clean Air Act.

This Court's decision will not only greatly affect *amici curiae* and their members, but will also have significantly broader policy implications. The lower court's decision to hold Petitioners liable under state tort law, in the absence of any feasible alternative to comply with federal law, warrants review because the court disregarded the Supremacy Clause of the U.S. Constitution, as well as the federal government's considered judgment in determining that the benefits of MTBE outweighed the potential risks. The liability that follows from such a decision – more than two hundred million dollars in this case alone – retroactively penalizes sellers of gasoline, including *amici's* members, for lawful conduct undertaken to comply with the mandate of Congress and the EPA.

STATEMENT OF THE CASE

The Court should grant certiorari to resolve important questions of both due process and the Supremacy Clause. First, may a state, consistent with the Due Process clause, hold companies liable in tort solely for selling gasoline containing MTBE based on statistical extrapolation of groundwater contamination, and without an opportunity to contest causation on an individual basis? Second, is such liability preempted by federal statute and regulation requiring oxygenation of gasoline, for which no feasible alternative to the use of MTBE existed in the state, and despite the fact that Congress intended that MTBE be an available choice? *Amici* address the latter issue in this brief.

The RFG program's oxygenate requirement, as established by the federal Clean Air Act and implemented by EPA, required refiners selling gasoline into four New Hampshire counties to blend oxygenates into their products. MTBE, one such oxygenate specifically allowed under the program, was the only feasible choice of oxygenate for Petitioners in New Hampshire: adding oxygenate necessarily meant adding MTBE. The EPA was well aware of the risk of groundwater contamination from the spilling of MTBE. Nevertheless, balancing this risk against Congress's goal under the Clean Air Act to reduce air pollution, it gave refiners the choice to use MTBE. New Hampshire, through executive action, voluntarily entered the RFG program for four counties. Although the sale of MTBE in New Hampshire was approved by the state, New Hampshire later sued Petitioners in tort for selling gasoline containing MTBE based on statistical evidence about groundwater contamination.

Effectively foreclosing Petitioners from contesting causation of any particular instance of MTBE contamination of groundwater in New Hampshire, the decision below creates tort liability for the mere sale of MTBE-containing gasoline. The decision flies in the face of the Supremacy Clause, overriding Congress's considered decision that sellers of gasoline should have a choice of oxygenates to incorporate into their products. The New Hampshire court holds Petitioners liable in state common law for actions taken to comply with federal law – indeed, actions to which they had no feasible alternative under federal law. The Supremacy Clause preempts New Hampshire from

overriding Congress's judgment and establishes that federal law takes precedence over state law decisions to the contrary.

In its decision below, the New Hampshire Supreme Court disregarded Petitioners' fundamental protection from incurring liability under state law for choosing the only feasible means to comply with a federal mandate. The court further erred in not submitting to the jury the question whether there was a feasible alternative to Petitioners' method of complying with the federal mandate, thus denying Petitioners the opportunity even to establish the factual underpinnings of their preemption defense at trial. Finally, it retroactively took away the MTBE choice that Congress intended to provide.

This holding has undermined the preemption doctrine, especially where the state itself is the plaintiff seeking recovery in tort. Allowing a state to hold regulated entities liable for the acts required by a federal law is an unlawful abandonment of the Supremacy Clause. The implications of such conduct extend far beyond the particular issues and parties in this case; they can be applied to any federally regulated product or industry. Numerous MTBE liability cases are pending around the nation. This Court's decision, therefore, is essential to enforce the constitutional protections of the Supremacy Clause. The failure to preempt New Hampshire's tort law unjustly subjects Petitioners and similarly situated entities to extraordinary retroactive liability for actions taken to comply with the federal Clean Air Act.

REASONS WHY THE WRIT SHOULD BE GRANTED

The decision of the New Hampshire Supreme Court allowed the State of New Hampshire—after effectively requiring a supplier to provide gasoline with MTBE that improved air quality—to make the same supplier pay for the resulting increased cost of cleaning contaminated ground water.

In this brief, we urge the Court to grant certiorari to address whether the Clean Air Act should preempt the State's common law tort claims.

"[T]he Supremacy Clause U.S. Const., Art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to,' federal law." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824)). "Where state and federal law directly conflict, state law must give way." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011) (citation and internal quotation marks omitted).[2] Conflict preemption operates in two ways, both of which are implicated here. First, "state and federal law

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[2] *See also*, *Wyeth v. Levine*, 555 U.S. 555 (2009), applying the impossibility preemption doctrine, but finding that the federal Food and Drug Administration labeling requirements did not preempt tort liability for failure to warn because the defendant could have properly labeled the medication without violating those federal requirements. In addition, unlike the case at bar, in *Wyeth*, the Supreme Court found that "that the FDA had *not* made an affirmative decision to preserve the [method of administration that gave rise to injury]" *Id.* at 572. (emphasis added). *Cf., Fid. Fed. Sav. & Loan Assn. v. de la Cuesta,* 458 U.S. 141 (1982).

conflict where it is 'impossible for a private party to comply with both state and federal requirements.'" *Id.* (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). Second, even in the absence of such impossibility, "a state law that 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives' of a federal law is pre-empted."[3] *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011) (citation and internal quotation marks omitted). A state law imposes such an obstacle when it eliminates a compliance choice that Congress intended to preserve.

Certiorari should be granted so this Court can address these important federal preemption issues.

I. *Certiorari* Is Necessary To Protect Suppliers of a Product From Liability Under State Law For Taking Actions Needed to Comply With Federal Law.

Here, liability attached at the moment Exxon supplied gasoline with MTBE in the State of New Hampshire. But the only reason that Exxon did so was to meet the Clean Air Act's RFG requirements that applied in the State of New Hampshire.

A. The Clean Air Act Required Refiners to Add an Oxygenate to All Gasoline Sold in Participating Areas.

In 1990, Congress mandated the reformulated gas program as part of its enactment of the Clean Air Act Amendments of 1990. Pub. L. No. 101-549

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[3] State law can be preempted by both federal statutes and federal regulations. *Hillsborough Cnty.*, 471 U.S. at 713.

(Nov. 15, 1990). The RFG program required that gasoline contain a minimum oxygen content of 2 percent (by weight) if it was being sold or dispensed in "covered" areas. 42 U.S.C. §§7545(k)(2)(B), (3)(A)(v) (2004).[4] Areas with over 250,000 in population with "severe" or "extreme" ozone pollution, which included 124 counties with a combined population of 73.6 million, were required to participate in the RFG program. *Id.* §§7545(k)(10)(D). Other areas that were considered to be in "nonattainment" of ozone standards were allowed to voluntarily participate in the program, regardless of their population. *Id.* §7545(k)(6). Using the latter authority, New Hampshire Governor Judd Gregg applied to EPA to join the RFG program in 1991 and beginning in 1995, the RFG program was required in four counties in New Hampshire. 56 Fed. Reg. 66444 (Dec. 23, 1991); Letter from Governor Judd Gregg to EPA Administrator, William Reilly (October 22, 1991) (informing Administrator Reilly that the four non-attainment counties would be joining the RFG program). This opt-in was a conscious choice by the State of New Hampshire, which it reconfirmed when the State later declined to opt-out of the program. 71 Fed. Reg. 47161 (Aug. 16, 2006).

In order to meet the required oxygen content level specified by the RFG program, refiners added an "oxygenate" (an oxygen containing chemical) to gasoline blendstock supplied to the covered areas.

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[4] These sections were later repealed when in 2005 Congress eliminated the oxygenate requirement in the Energy Policy Act of 2005 ("EPAct 2005"), Pub. L. 109-58. See section 1504.

However, available options for oxygenates were limited, and even fewer of the options were practical. The EPA authorized the use of only "allowed" oxygenates to meet the requirements of the RFG program, including ethanol (up to 10 percent of each gallon of the gasoline by weight), and MTBE (up to 15 percent by weight). *See* Waiver Requests Under Section 211(f) of the Clean Air Act 1-4, (revised Aug 29, 2013). EPA also recognized that ethanol and MTBE were used far more often than the remaining choices. 57 Fed. Reg. 47849, 47852 (Oct. 20, 1992). In 1999, EPA reported that "[o]ver 85 percent of RFG contains the oxygenate methyl tertiary butyl ether (MTBE) and approximately 8 percent contains ethanol." Achieving Clean Air and Clean Water, The Report of the Blue Ribbon Panel on Oxygenates in Gasoline, EPA420-R-99-021, at 1 (Sept. 15, 1999).

B. Use of MTBE Was The Only Feasible Way to Comply with the Clean Air Act in New Hampshire.

MTBE was the only viable oxygenate option in New Hampshire and in many other covered areas. Although the only other major oxygenate—ethanol—was an effective option for complying with the RFG program in the Midwest, it suffered from a host of practical, technical, and environmental obstacles that rendered it infeasible for use in areas like New Hampshire. Ethanol was not available in large quantities outside of the Midwest. As in many other covered areas across the country, therefore, MTBE was the only feasible mechanism to comply with the 2 percent oxygenate requirement during

the time that EPA required RFG to be sold in New Hampshire (through the state's request to opt-in).

Petitioners introduced extensive evidence to show that ethanol was an impracticable choice in New Hampshire. First, the supply of ethanol compared to MTBE was inadequate and unreliable. *See* Northeast States for Coordinated Air Use Management ("NESCAUM") RFG/MTBE Findings & Recommendations, at 11. Ethanol was not available in large quantities outside of the Midwest. *See Id*. Aside from supply problems, ethanol-blended gasoline suffered from distribution problems: it was too corrosive to transport by pipeline, which caused immense distribution obstacles.

Additionally, the blending of ethanol with non-ethanol gasoline in vehicle gas tanks, in a region where not all gasoline sold contained ethanol, led to significant increases in harmful emissions – the very result Congress sought to avoid. *Id.* at 10. "Combustion of ethanol-blend gasoline results in substantial (50 to 70 percent) increases of acetaldehyde emissions and ambient levels of acetaldehyde are presently far in excess of health-based risk standards in the Northeast." *Id*. Further complicating the distribution logistics was EPA's regulation precluding (due to volatility problems) the commingling of gasoline oxygenated with MTBE and gasoline oxygenated with ethanol at retail stations. 40 C.F.R. §80.78(a)(8).[5] Before it

[5] EPA has explained that "EPA's existing regulations prohibit the commingling of ethanol-blended RFG with RFG containing other oxygenates because the non-ethanol RFG is typically not able to be mixed with ethanol and still comply with the VOC (continued...)

could accept a different type of oxygenated gasoline, a retail station would need to be drained of the prior type of gasoline, and often the underground retail storage tank would have to be cleaned, too. Because MTBE use was much more prevalent in the Northeast, this complication, as a practical matter, prevented one refiner from using ethanol while others used MTBE. This host of practical and technical difficulties rendered the use of ethanol infeasible in the Northeast.

Thus, in New Hampshire and similarly situated states, the oxygenate mandate was essentially an MTBE mandate. Given EPA's approval of MTBE as a choice of oxygenate, and the circumstances described above, Petitioners and other refiners around the country appropriately added MTBE to their gasoline to comply with the federal law. For Petitioners and fellow refiners in New Hampshire, or more generally the Northeast, adding MTBE to their gasoline was the only feasible option for compliance. The decision below exposed Petitioners to state law tort liability for the choice of oxygenate they necessarily made to comply with federal law.

After over a decade of utilizing MTBE to comply with the RFG program, New Hampshire banned the use of MTBE in 2004. The New Hampshire legislature knew, however, that many refiners utilized MTBE as the only feasible option

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(continued...)
performance standards." 71 Fed. Reg. 8973, 8977 (Feb. 22, 2006).

for compliance in New Hampshire at that time. Therefore, rather than impose an immediate ban, the legislature phased out the use of MTBE over a nearly 3-year period. These deliberate decisions and actions by the New Hampshire legislature confirm that there was no feasible alternative to MTBE to comply with the RFG program in New Hampshire during the relevant time period.[6]

C. Because MTBE Was Petitioners' Only Commercially Feasible Alternative, New Hampshire's Tort Law Penalizing Petitioners for Supplying Gasoline With MTBE Should Be Preempted by Congress's and EPA's Law and Regulations Under the Clean Air Act.

Aside from practical and technical considerations, ethanol was less effective than MTBE at reducing air pollution, causing environmental obstacles. More specifically, ethanol created more air quality risks in the Northeast than in other areas of the country. NESCAUM RFG/MTBE Findings & Recommendations, at 10. Ethanol also suffered from a lack of compatibility with Petitioners' storage tanks. API Recommended

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[6] The New Hampshire legislature's decision was consistent with the actions of other Northeastern states, which also recognized that an immediate transition away from MTBE was impossible. *See, e.g., Oxygenated Fuels Assn., Inc. v. Pataki*, 293 F. Supp. 2d 170 (N.D.N.Y. 2003) (discussing NY's phase-out of MTBE); *see* Br. in N.H. S.Ct. at 28 n.17 (listing numerous other states and the lengths of their phase-out periods).

Practice 1626 on Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Service Stations at 2 (April 1985). Both EPA and the New Hampshire government were aware of the risks inherent in the use of MTBE, but determined that the benefits of adding MTBE to gasoline and reducing air pollution substantially outweighed the potential risks of groundwater contamination. Accordingly, EPA approved MTBE as an "allowed" oxygenate for compliance with the RFG program, and the New Hampshire legislative and executive branches elected to participate in the RFG program for over a decade.

Any argument here that Petitioners could, *in theory*, comply with the federal RFG mandate by supplying ethanol likewise fails—or, at least, should have been decided by the jury. As Petitioners demonstrated below, the infrastructure for supplying ethanol in New Hampshire—and thus complying with the RFG mandate—was unavailable to Exxon. The test is commercial feasibility. This Court's precedent does not require Petitioners to build the infrastructure and distribution systems necessary to provide ethanol. If the test was not practicality, as this Court has pointed out, "conflict pre-emption [would be] largely meaningless because it would make most conflicts between state and federal law illusory." PLIVA, 131 S.Ct. at 2579 (noting it is always *possible* "that a third party or the Federal Government *might* do something that makes it lawful for a private party to accomplish under federal law what state law requires of it").

If there was any room for debate or potential error by the court, Petitioners were, at a bare minimum, entitled to have the jury determine the

factual predicate for their argument. Petitioners were entitled to have the jury decide whether there was a safe, feasible alternative or whether the federal oxygenate mandate was equivalent to an MTBE mandate in New Hampshire. The failure of the trial court—and the New Hampshire Supreme Court—to allow this question to go to the jury had the effect of unduly restricting the preemption doctrine and the Supremacy Clause.

Finally, New Hampshire tort law cannot be used to impose liability that the New Hampshire legislature would be constitutionally prohibited from imposing. See, *e.g.*, *Geier v. Am. Honda Motor Co.,* 529 U.S. 861 (2000). If the rule were otherwise, regulated industries would be unable to comply with both federal law and state tort law, a dilemma that the Supremacy Clause was intended to avoid. Here, state tort law was used in a manner that was objectionable on many levels: beyond merely penalizing a company for complying with federal law, it also overrode the policy choices of the U.S. Congress, the U.S. Environmental Protection Agency, and the New Hampshire legislature.

II. Certiorari Is Necessary Because State Tort Law Cannot Be Used to Eliminate a Choice That Congress Intended to Preserve.

Federal preemption law also protects choices that Congress intended to preserve. As this Court wrote in the context of a federal regulation (which, like a federal statute, can have preemptive effect), a conflict "does not evaporate because the [agency's] regulation simply permits, but does not compel," the action forbidden by state law. *Fid. Fed. Sav. &*

Loan Assn., 458 U.S. at 155 (1982). More broadly, "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation and internal quotation marks omitted). As noted above, state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law." *Williamson*, 562 U.S. at 330 (citation and internal quotation marks omitted). A law is not only preempted if it conflicts with the larger purpose of a federal law, but also "if it interferes with the methods by which the federal statute was designed to reach this goal." *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

This Court's decision in *Geier* is directly on point. 529 U.S. at 886. In *Geier*, the Court considered whether a federal law obliging automobile manufacturers to equip their cars with passive restraints, but leaving it up to the manufacturer to decide what type of restraint to install, conflicted with state tort law requiring the installation of seat belts in automobiles. *Id.* at 864–65. The Court evaluated the Department of Transportation's comments, and noted that "the standard deliberately provided the manufacturer with a range of choices among different passive restraints." *Id.* at 874–75. Because "giving auto manufacturers a choice among different kinds of passive restraints was a significant objective of the federal regulation," the Court held that the State law, which frustrated this purpose, was preempted. *Williamson*, 562 U.S. at 330 (describing the Court's holding in *Geier*); *see also Fid. Fed. Sav. and Loan Ass'n*, 458 U.S. at 155–56 ("By limiting the

availability of an option [the federal entity] considers essential to the economic soundness of the . . . industry, the State has created an obstacle to the accomplishment and execution of the full purposes and objectives of the . . . regulation.") (citation and internal quotation marks omitted).

Preserving a range of RFGs from which refiners could choose was a significant objective of the Clean Air Act. *See Williamson*, 562 U.S. at 332–33 (evaluating whether choice was a significant regulatory objective under a different federal regulation and concluding that it was not).[7] When Congress enacted the RFG program, it wrote the law so that *either* MTBE *or* ethanol could be utilized. When the House of Representatives considered its version of the 1990 Clean Air Act Amendments, H.R. 3030, it adopted an amendment providing for an RFG oxygenate content of 2.0 percent by weight by January 1, 1992, 2.5 percent by weight by January 1, 1993 and 2.7 percent by weight by January 1, 1994. 136 Cong. Rec. at H 2839 (May 23, 1990). This level was referenced as a "fuel neutral" standard that "will greatly reduce carbon monoxide and ozone pollution *while not favoring any particular oxygenated fuel*." *Id.* at H 2855 (emphasis added). Different oxygenate fuels

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[7] The Court in *Williamson* evaluated whether state law conflicted with a federal regulation permitting the installation of either lap belts or lap-and-shoulder belts. *Williamson*, 562 U.S. at 333. Like the Court in *Geier*, *Williamson* then evaluated the rule's history to ascertain whether "choice" was a significant objective of the regulation. *Id.* at 333–35. Unlike in *Geier*, however, the Court concluded that it was not.

were then listed that could meet the 2.7 percent standard, including MTBE and ethanol. *Id.*

The Senate-approved version of the 1990 Clean Air Act Amendments, S. 1630, had previously included the RFG program with an oxygenate requirement identical to that approved by the House.[8] 136 Cong. Rec. at S 3510-3514, 3524 (March 29, 1990). During the floor debate, Senator Daschle responded to arguments that his amendment to add the RFG program to the Clean Air Act was "just another attempt by the Midwestern Senators to expand the market for subsidized ethanol." *Id.* at 3513. Addressing this concern, Senator Daschle responded that "[t]he 2.7 percent oxygen standard is fuel neutral." *Id.*

The concern that higher minimum oxygenate requirements would favor ethanol continued throughout the Congressional debate on the RFG program.[9] In response, proponents of the oxygenate mandate tailored their amendments so that the

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[8] S. 1630, Section 217 (adding new subsection 211(k) to the Clean Air Act). *See* 3 A Legislative History of the Clean Air Act Amendments of 1990 at 4383-88 (1993).

[9] See, for example, statement of Minority Leader Robert Michel during House consideration of Richardson-Madigan amendment to H.R. 3030, establishing the RFG program within Clean Air Act section 211(k). "[I]t makes sense to encourage the development of reformulated gasoline that utilizes ethanol, as this amendment does. But it should also be noted that the amendment does not mandate the use of ethanol. It allows oil companies to use alternative combinations if they achieve required emission reductions." 2 A Legislative History of the Clean Air Act Amendments of 1990, at 2722.

program would not dictate one fuel additive (ethanol) over another (MTBE).

Congress ultimately adopted a 2 percent (by weight) oxygenate standard for the RFG program and a 2.7 percent oxygenate standard for a separate, wintertime oxygenate program. 42 U.S.C. §7545(m)(2). Both programs allowed the use of either MTBE or ethanol at concentrations then approved by EPA.[10] Congressional statements concurrent with the approval of these provisions indicate that the minimum standards were established specifically to provide for competition between ethanol and MTBE for both markets. "The winter . . . level of 2.7 percent was chosen in part to provide more even opportunities for competition between the two major oxygenates, methyl tertiary butyl ether (MTBE), and ethyl alcohol."[11]

In promulgating final rules to implement the RFG program, EPA cited the Congressional debate on this issue, specifically statements by various

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[10] Specifically, a level of 2.7 percent oxygenate by weight represented the use of 15 percent MTBE by volume (which was the highest volume for which MTBE was approved for use in gasoline). A level of 3.5 oxygenate by weight represented the use of 10 percent ethanol by volume (the highest percentage volume for which ethanol was then approved). A requirement of 2 percent oxygenate by weight thus meant that both ethanol and MTBE could satisfy the requirements of the RFG program; a requirement for 2.7 percent oxygenate similarly meant that either ethanol or MTBE could be used in the wintertime oxygenate program.

[11] Statement of Mr. Hall of Texas, House conferee to the Clean Air Act Amendments of 1990. 1 A Legislative History of the Clean Air Act Amendments of 1990, at 1325.

members of Congress indicating that "any oxygenate could be used that met the oxygen content and emission reduction requirements for reformulated gasoline. These statements reflect Congress' interest in retaining appropriate refiner flexibility." 59 Fed. Reg. 39258, 39265 (Aug. 2. 1994). The Congressional intent concerning the RFG program, therefore, was clearly to offer a choice of oxygenates, including MTBE, to refiners. The decision below negates this choice, penalizing Petitioners under state tort law for their choice of MTBE—a choice that Congress intended to preserve.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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