No. 15-933

IN THE
Supreme Court of the United States

EXXON MOBIL CORPORATION and
EXXONMOBIL OIL CORPORATION,

Petitioners,

v.

STATE OF NEW HAMPSHIRE,

Respondents.

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

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

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: February 22, 2016

QUESTIONS PRESENTED

1. Whether the Due Process Clause permits a State to use *parens patriae* standing and statistical proof of recovery to recover hundreds of millions of dollars in a "Trial by Formula" that eliminated individualized defenses that have uniformly prevented courts from certifying comparable cases as class actions and allowed the State to recover for contamination of wells that do not yet exist.

2. Whether a state-law tort duty is preempted when it retroactively outlaws the only feasible option for complying with a federal mandate.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared as *amicus curiae* in this Court in cases raising preemption issues, to point out the economic inefficiencies often created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *United States v. Locke*, 529 U.S. 89 (2000).

WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation. Excessive or conflicting rules frustrate the operation of specific federal regulatory regimes and make it impossible for regulated businesses to operate in compliance with both federal and state laws.

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondent with notice of its intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

At issue here is whether federal law preempts Respondent's causes of action. WLF agrees with Petitioners that the common-law duty that New Hampshire seeks to impose on them—a duty not to market gasoline containing methyl tertiary butyl ether (MTBE)—conflicts with a duty imposed on Petitioners by the federal government's reformulated gas (RFG) program. Petitioners presented overwhelming evidence that the only means by which it feasibly could have complied with the RFG program in New Hampshire was to add MTBE to its gasoline. Yet, the courts below did not even permit Petitioners to seek a jury determination regarding the conflict between federal and state law, instead ruling as a matter of law that no conflict existed and thus that the New Hampshire tort claim was not preempted. That ruling was based on a fundamental misunderstanding of preemption law; WLF is concerned that if the ruling (which conflicts with decisions of this Court and the federal appeals courts) is allowed to stand, other state courts hearing similar MTBE claims will follow suit.

This brief focuses primarily on the preemption issue. WLF nonetheless fully supports Petitioner's request for review of the first Question Presented—whether due process constrains the authority of a state court to conduct a "trial by formula" that deprives the defendant of the right to raise individualized defenses to each asserted claim. WLF is particularly concerned by the adoption of overly streamlined trial procedures when, as here, the plaintiff is a state government that voluntarily opted into the RFG program and now is using its own courts to extract hundreds of millions of dollars in penalties from out-of-state defendants.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the preemption issues on which this brief focuses.

In 1990, Congress established the RFG program, which required that gasoline sold in areas with substandard air quality have a minimum 2% oxygen content. 42 U.S.C. § 7545(k)(2)(B) (2000). The increased oxygen content was designed to lead to increased fuel combustion and thereby to reduce harmful emissions from motor vehicles. To meet that requirement, refiners had to add an "oxygenate" to their gasoline. New Hampshire opted into the RFG program in 1991.

The Environmental Protection Agency (EPA) authorized refiners to choose one of several different oxygenates. However, *every* refiner determined, for a variety of reasons, that it had no choice in the New Hampshire market: MTBE was the only feasible oxygenate for use in meeting the federal government's RFG mandate. EPA approved use of MTBE as an oxygenate despite its awareness that MTBE posed a risk to groundwater.

For 11 years (from 1995 to 2006), gasoline delivered by refiners to the New Hampshire market contained MTBE. During that period, state officials became increasingly concerned that accidental gasoline spills could result in MTBE contamination of groundwater. In 2004, the New Hampshire legislature enacted legislation banning the sale of MTBE gasoline,

effective in 2007. Before that ban took effect, EPA granted New Hampshire's request to opt out of the RFG program, and Congress repealed the oxygenate requirement in 2006.

In 2003, New Hampshire filed suit against several gasoline suppliers, refiners, and chemical manufacturers seeking damages for groundwater contamination allegedly caused by MTBE. Before the case came to trial in 2013, all the defendants had settled except for Petitioners Exxon Mobil Corp. and ExxonMobil Oil Corp. (collectively, "Exxon").

New Hampshire did not allege that Exxon was responsible for any specific gasoline spills that led to groundwater contamination. Rather, it sought to hold Exxon liable based solely on Exxon's having refined and sold MTBE gasoline for use in the New Hampshire market. The State adopted this litigation tactic as a means of attempting to hold Exxon liable for a share of *all* estimated groundwater contamination in the State, without having to prove direct causation with respect to the contamination of any individual well. In other words, *the sole basis for Exxon's alleged liability was its decision to meet the RFG Program's oxygenate requirement by adding MTBE to the gasoline it refined for use in New Hampshire.*

Exxon repeatedly urged the trial court to hold that New Hampshire's claims were preempted by federal law. It argued that the conduct that (according to New Hampshire) was a violation of a state common-law duty—the refining and sale of MTBE gasoline for the New Hampshire market—was required by federal law. There was no feasible means by which Exxon

could meet the requirements of the federal government's RFG program other than by using MTBE.

The trial court rejected all such entreaties, finding *as a matter of law* that federal law did not impliedly preempt New Hampshire's claims. On August 22, 2012, it denied Exxon's preemption-based motion for summary judgment. Pet. App-90 to App-97. At the close of the State's case-in-chief, it denied Exxon's motion for a directed verdict. Pet. App-136 to 148. The order denying that motion summarily dismissed Exxon's preemption claims, stating that they "are legal claims this Court has already decided and will not revisit." Pet. App-147. After the jury verdict, Exxon moved to set aside the verdict and for a new trial, arguing in part that the trial court "failed to instruct the jury on ExxonMobil's affirmative defense of preemption or include it in the jury form," and that there were sufficient facts from which the jury could have concluded that "MTBE was the only feasible oxygenate for use in New Hampshire." Pet. App-17 to App-18.

In denying post-trial motions, the district court acknowledged that Exxon had adequately raised its preemption defense pre-trial and in its directed verdict motion, but it again rejected the defense as a matter of law:

> To the extent Exxon argues the jury should have been instructed on preemption in order to find facts from which the Court could further evaluate preemption, the Court considered and rejected this argument in its [order denying

> Exxon's motion for a directed verdict]. . . . Exxon alleges the State's claims are preempted by the federal Clean Air Act and its RFG program. The Court rejected this legal argument. *There are no facts that a jury could find that would alter the legal analysis this Court already undertook.*

Pet. App-18 (emphasis added).

The jury awarded total damages of $817 million. After determining that Exxon's market share for gasoline in New Hampshire during the applicable time period was 28.94%, it entered a judgment against Exxon for $236 million plus prejudgment interest.

The New Hampshire Supreme Court affirmed the judgment against Exxon. Pet. App-1 to App-87. It stated, "We hold *as a matter of law* that the State's claims are not preempted by federal law." Pet. App-27 (emphasis added). It expressed agreement with a federal district court decision "rejecting Exxon's arguments that because there was no safer, feasible alternative to MTBE, it was impossible for Exxon to comply with federal requirements without using MTBE." Pet. App-26.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance. Major refiners and distributors of gasoline are facing scores of similar MTBE lawsuits across the country. The potential liability amounts to hundreds of billions of dollars. And all of these state-law tort suits are premised on a claim that the defendants did what was required of them by the federal Clean Air

Act: they complied with the RFG program in the only feasible manner (and in the manner they were encouraged to by federal and New Hampshire officials) by adding MTBE to their gasoline. In this and many other MTBE suits, the defendants are not accused of negligently handling gasoline or otherwise directly causing spills. The sole basis for the claims (variously styled as claims for negligence, defective design, and failure to warn of MTBE's dangerousness) is that the defendants never should have introduced MTBE gasoline into the stream of commerce. Review is urgently needed to determine whether claims based on this theory are impliedly preempted because they conflict with federal law.

It has long been settled that state laws that conflict with federal law are "without effect" and thus preempted. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Even when a State purports to be acting within its acknowledged sphere of power, its laws are preempted whenever it is "impossible for a private party to comply with both state and federal requirements," or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). Exxon has made a compelling case that New Hampshire's claims are conflict-preempted—whether analyzed under the "impossibility" prong or the "obstacle" prong of conflict preemption.

The lower courts ruled otherwise based on a fundamental misunderstanding of preemption law. Focusing on EPA regulations that permitted refiners to satisfy RFG program requirements by using any one of

several different oxygenates, they reasoned that federal law did not require Exxon to use MTBE in New Hampshire—and thus that it was not impossible for Exxon to comply both with federal law and with New Hampshire's mandate that it not use MTBE. *See, e.g.*, Pet. App-22. But conflict preemption analysis is not confined to an analysis of whether a federal statute *on its face* requires an act that is prohibited under state law. Rather, the Court analyzes whether compliance with both federal and state requirements is "impossible—*in fact or by law*." *Bartlett*, 133 S. Ct. at 2480 (emphasis added). Impossibility preemption is just as applicable when federal law on its face permits a company to comply with a state mandate but the evidence demonstrates that, as a practical matter, compliance with the state mandate is not feasible.

Exxon's evidence did not merely demonstrate that using another oxygenate (such as ethanol) would have been inconvenient and led to increased costs. Rather, it demonstrated that during the years that New Hampshire participated in the RFG program, using ethanol in the State would have been impossible without substantial interruptions in supply. *See, e.g.*, Pet. at 30 (citing, *inter alia*, evidence of inadequate ethanol supply, impossibility of shipping ethanol-blended gasoline by pipeline, and incompatibility of ethanol with existing distribution and storage systems).

Of course, Exxon had one simple means by which it could have complied with both federal and New Hampshire requirements: it could have stopped supplying gasoline to New Hampshire during the years necessary to reconfigure its operations so as to make

them compatible with ethanol use. But the Court has emphasized that simply because an actor can "avoid liability" by "ceas[ing] to act altogether" is not reason to reject a conflict preemption claim. *Bartlett*, 750 F.3d at 2477 (explaining that "if the option of ceasing to act defeated a claim of impossibility, impossibility preemption would be all but meaningless").

Indeed, New Hampshire implicitly recognized that Exxon and other suppliers lacked the ability to supply ethanol-blended gasoline in the near term, when its legislature adopted an MTBE ban in 2004. The legislation included a three-year phase-out period, a recognition that Exxon and others would have been forced to stop supplying gasoline in the near term if the ban had been effective immediately.

Both the trial court and the New Hampshire Supreme Court rejected Exxon's conflict preemption claims "as a matter of law," Pet. App-27 and App-18, thereby precluding Exxon from even seeking the jury's factual determination that the use of ethanol as an oxygenate during the relevant years was infeasible. That rejection conflicts directly with *Bartlett*'s holding that a state law is preempted when it is "in fact" infeasible for an actor to comply with both the state law and federal law except by ceasing its operations.

The decision below also appears to conflict with post-*Bartlett* decisions from the federal appeals courts. The New Hampshire Supreme Court's no-preemption conclusion could plausibly be explained as follows: even if federal law gave Exxon no feasible option but to use MTBE, our tort judgment does not conflict with that federal mandate. Federal law does not give oil

refiners the right to market their products in New Hampshire; and if Exxon chooses to do business in the State, it can comply with both federal and state law simply by using MTBE and then agreeing to pay New Hampshire a penalty for any damages caused by its introduction of MTBE into the State. *See, e.g.*, Pet. App-26.

That rationale is in considerable tension with other post-*Bartlett* appellate decisions addressing impossibility preemption. In particular, a recent Fifth Circuit decision, *Lashley v. Pfizer, Inc.*, 750 F.3d 470 (5th Cir. 2014), rejected efforts by plaintiffs to evade *Bartlett*'s holding that conflict preemption barred failure-to-warn lawsuits against generic drug manufacturers. The Fifth Circuit held that *Bartlett*'s rationale *also* required preemption of non-failure-to-warn claims, such as the plaintiffs' "conten[tion] that generic manufacturers should be liable for any damages caused by the production and/or distribution of an unsafe product." 750 F.3d at 475. That holding cannot be squared with the New Hampshire Supreme Court's conclusion that Exxon can be held liable for distributing of an unsafe product in New Hampshire, without regard to whether Exxon had a feasible alternative for complying with federal law. Review is warranted to clear up the apparent confusion regarding *Bartlett*'s holding.

Review is also warranted of the first question presented by the petition: whether New Hampshire's use of a "trial by formula"—a trial plan that prevented Exxon from raising individualized defenses to allegations that its actions caused the contamination of

groundwater throughout the State—violated Exxon's due process rights. The Court held in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), that the Rules Enabling Act prohibits certifying a plaintiff class in federal court proceedings on the premise that the court will conduct a "Trial by Formula" of the sort conducted in the New Hampshire trial court. Review is warranted to determine whether the Due Process Clause requires that similar procedural fairness be afforded defendants in state-court proceedings.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW REWRITES CONFLICT PREEMPTION CASE LAW BY PREVENTING DEFENDANTS FROM DEMONSTRATING FACTUAL IMPOSSIBILITY

The courts below rejected Exxon's conflict preemption claim "as a matter of law." Pet. App-27 and App-18. Indeed, the trial court refused to allow Exxon to submit preemption-related factual issues to the jury because, in its view, "[*t*]*here are no facts* that a jury could find that would alter the legal analysis this Court already undertook" regarding preemption. Pet. App-18 (emphasis added). In other words, according to the courts below, Exxon's conflict preemption claim was unavailing even if Exxon's evidence demonstrated that use of any oxygenate other than MTBE was infeasible. The courts concluded that because EPA regulations expressly authorized refiners to comply with the RFG program by using oxygenates other than MTBE, Exxon failed to demonstrate that it was impossible to comply

with both federal law and state law.

The lower courts' approach to impossibility preemption conflicts sharply with this Court's case law, which requires examination of whether compliance with both state and federal law is either legally or factually impossible. Review is warranted to resolve that conflict.

A. Impossibility Preemption Applies When a Party Cannot Feasibly Comply with Both Federal and State Law, Even When Federal Law Does Not Expressly Forbid Compliance with State Law

The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. In applying the Supremacy Clause, the Court long ago determined that state laws that conflict with federal law are "without effect" and thus preempted. *Maryland v. Louisiana*, 451 U.S. at 746. Even when a State purports to be acting within its acknowledged sphere of power, its laws are preempted whenever it is "impossible for a private party to comply with both state and federal requirements," or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). State law that conflicts with federal law is preempted regardless whether any federal statute

expressly states that conflicting state laws are preempted: "The Supremacy Clause, on its face, makes federal law 'the supreme Law of the Land' even absent an express statement by Congress." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579 (2011).

The conflict preemption question in this case requires a determination regarding whether it was impossible for Exxon to comply both with the New Hampshire common-law requirement applied retroactively in this case (a prohibition on the sale of MTBE gasoline in New Hampshire) and the federal requirement imposed by the RFG program (gasoline refined for sale in covered areas must have a minimum 2% oxygen content, to be achieved by adding one of several oxygenates specified by EPA, including MTBE). If compliance with both requirements was impossible, then New Hampshire's no-MTBE mandate is conflict-preempted, and the judgment below cannot stand.

Of course, a company seeking to navigate state and federal regulatory requirements will almost always have one straightforward means of complying with both sets of requirements: suspend its business operations. Most government regulations do not impose affirmative obligations on passive individuals; rather, they impose obligations only on those who are conducting a business that is subject to government oversight. Thus, in most instances a company could bring itself into compliance with both state and federal regulations by ceasing operations altogether. The Court, however, has emphatically rejected the availability of a "stop-selling" option as a basis for rejecting impossibility preemption. *Bartlett*, 133 S. Ct.

at 2478 (stating that "[w]e reject this 'stop-selling' rationale as incompatible with our pre-emption rationale.").

Bartlett also involved a tort claim arising under New Hampshire law. A drug manufacturer faced conflicting requirements imposed by federal and state law. Federal law required that the manufacturer's drug be labeled in the precise manner prescribed by the Food and Drug Administration (FDA), while New Hampshire common law required that additional health warnings be included on the label. The First Circuit denied the manufacturer's impossibility preemption defense, concluding that the manufacturer could have complied both with federal law and with state law by ceasing sales of its drug. This Court rejected the First Circuit's stop-selling rationale, stating:

> Our preemption cases presume that an actor seeking to satisfy his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be all but meaningless. . . . . The incoherence of the stop-selling theory becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility preemption, the "direct conflict" between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.

Ibid.

Bartlett's rejection of the "stop-selling rationale" does not distinguish between conflicts that require a company to cease operations for the indefinite future (*i.e.*, for so long as the conflicting state and federal requirements remain in place) and conflicts that require a company to cease operations for an extended period of time until it can develop a feasible means of complying with both the state and federal requirements. *Bartlett*'s rationale is equally applicable in both instances.

"The question for 'impossibility' is whether the private party could *independently* do under federal law what state law requires it to do." *Mensing*, 131 S. Ct. at 2579 (emphasis added). In some instances (as in *Bartlett*), the impossibility of complying simultaneously with federal and state requirements is apparent from the face of the federal requirements. The federal requirements at issue in *Bartlett* specified the precise language to be included on the manufacturer's drug label, language that differed from the labeling language mandated by New Hampshire. The Court has recognized, however, that in other instances the impossibility of complying with both federal and state requirements will not be so readily apparent and instead will require a detailed examination of the underlying facts to determine whether "impossibility" exists. *See, e.g., Mensing*, 131 S. Ct. at 2580 ("To be sure, whether a private party can act sufficiently independently under federal law to do what state law requires may sometimes be difficult to determine.").

But *Mensing* and *Bartlett* both make clear that the absence of language in the federal statute/requirement that facially conflicts with the state requirement is not grounds for precluding a finding of impossibility preemption. *See, e.g., Bartlett*, 133 S. Ct. at 2480 (when addressing conflict preemption claims, the Court analyzes whether compliance with both federal and state requirements is "impossible—*in fact or by law*.") (emphasis added).

B. The Courts Below Rejected Preemption as a Matter of Law, Thereby Preventing Petitioners from Demonstrating Factual Impossibility

Exxon has made a compelling case that New Hampshire's tort claims are conflict-preempted because market conditions during the relevant time period rendered it infeasible for Exxon to satisfy RFG program requirements by using any oxygenate other than MTBE. WLF does not suggest that it would have been impossible *for all time* for Exxon to supply New Hampshire with gasoline using ethanol as the oxygenate; it most likely could have done so after a several-year delay. But compliance with both New Hampshire and federal law would have required it to cease New Hampshire operations for several years while it reconfigured its operations so as to make them compatible with ethanol use. *Bartlett* dictates that the availability of that stop-selling option does nothing to undermine Exxon's preemption claim.

The Petition has explained at length why it was infeasible for Exxon to comply with the RFG program

by including ethanol in its New Hampshire-bound gasoline. WLF will not repeat that entire explanation here. In brief, Exxon's evidence demonstrated, *inter alia*, the inadequacy of ethanol supply in this country, the impossibility of shipping ethanol-blended gasoline by pipeline, and the incompatibility of ethanol with existing distribution and storage systems. The fact that *every* refiner in the Northeast used MTBE to satisfy RFG program requirements is additional evidence that use of ethanol was not feasible.

Indeed, New Hampshire's own conduct demonstrates that it recognized that use of ethanol was not a feasible near-term option. For example, in 1999 and 2001, senior New Hampshire environmental officials opposed pending legislation that would have banned MTBE because doing so would "effectively create an ethanol mandate" and ethanol was "not commercially available." Pet. 30. When the New Hampshire legislature adopted an MTBE ban in 2004, the legislation included a three-year phase-out period, a recognition that Exxon and others would have been forced to stop supplying gasoline in the near term if the ban had been effective immediately.

The lower courts rejected Exxon's conflict-preemption claim based on a fundamental misunderstanding of preemption law. Focusing on EPA regulations that permitted refiners to satisfy RFG program requirements by using any one of several different oxygenates, they reasoned that federal law did not *require* Exxon to use MTBE in New Hampshire—and thus that it was not impossible for Exxon to comply both with federal law and with New

Hampshire's mandate that it not use MTBE . *See, e.g.,* Pet. App-22.

But as the preceding discussion of *Mensing* and *Bartlett* indicates, conflict-preemption analysis is not confined to an analysis of whether a federal statute *on its face* requires an act that is prohibited under state law. Rather, the Court analyzes whether compliance with both federal and state requirements is "impossible—*in fact or by law*." *Bartlett*, 133 S. Ct. at 2480 (emphasis added). Impossibility preemption is just as applicable when federal law on its face permits a company to comply with a state mandate but the evidence demonstrates that, as a practical matter, the company cannot feasibly comply with federal law if it abides by the state mandate. By determining that impossibility preemption should be rejected "as a matter of law" because federal regulations explicitly authorized use of ethanol, Pet. App-27, and that there exist "no facts that a jury could find that would alter" the trial court's rejection of a conflict preemption defense, Pet. App-18, the decisions below directly conflict with *Mensing* and *Bartlett*. Even if, as New Hampshire contends, some evidence suggests that it was feasible for Exxon to use ethanol as an oxygenate, *Mensing* and *Bartlett* dictate that Exxon should have been permitted to attempt to prove the contrary.

Both the trial court and the New Hampshire Supreme Court focused their conflict preemption analysis on this Court's decision in *Geier v. American*

Honda Motor Co., 529 U.S. 861 (2000).[2] That focus is entirely misplaced, given that Exxon's preemption argument in the New Hampshire Supreme Court did not rely on *Geier*. The court's inexplicable focus on *Geier* apparently caused it to overlook the central premise of Exxon's preemption argument: that New Hampshire's no-MTBE mandate conflicted with federal law because compliance both with that mandate and with federal law was infeasible. The New Hampshire Supreme Court is correct that *Geier* does not support Exxon's conflict-preemption argument, but Exxon does not contend otherwise.

The New Hampshire Supreme Court's reliance on *In re MTBE Prods. Liability Litig.*, 725 F.3d 65 (2d Cir. 2013), is similarly misplaced. The court cited the Second Circuit's decision as one whose conflict-

---

[2] *Geier* held that federal vehicle-safety requirements impliedly preempted a state tort-law requirement that cars be equipped with air bags, because (the Court concluded) the federal standard was adopted for the purpose of ensuring that *some*, but not all, cars would be equipped with air bags—thereby making it more likely that consumers would ultimately accept the new technology. 529 U.S. at 875. The New Hampshire Supreme Court rejected Exxon's preemption claim in substantial part because, unlike the federal vehicle-safety requirements at issue in *Geier* (which granted automakers an option to either install or not install airbags), the RFG program was not designed for the purpose of granting refiners the right to use whichever oxygenate they deemed most appropriate. Pet. App-24 (stating that "Exxon does not point to any part of the Clean Air Act or its legislative history that supports a conclusion that the choice among oxygenate options was a significant objective of the federal law"). But Exxon's conflict-preemption argument focuses on the infeasibility of ethanol, not on claims the RFG program granted refiners an unrestricted right to choose either ethanol or MTBE.

preemption analysis it agreed with. Pet. App-26. But the Second Circuit rejected preemption claims asserted by a refiner/distributer of MTBE gasoline because the jury found that the defendant "fail[ed] to exercise reasonable care when storing gasoline that contained MTBE," 725 F.3d at 104, not simply because (as alleged here) the defendant used MTBE to satisfy RFG program requirements. The Second Circuit decision stands for the unremarkable proposition that even if federal law made it infeasible for refiners to use ethanol to satisfy RFG program requirements, it was not impossible for the defendant to comply with those requirements while simultaneously complying with state-law requirements that MTBE be handled in a non-negligent manner.

Finally, Exxon's evidence demonstrated that New Hampshire's claims were also impliedly preempted under the "stands as an obstacle" branch of conflict preemption. All agree that a principal purpose of the federal Clean Air Act is the improvement of air quality. Had Exxon and other refiners chosen to comply with the conflicting demands of federal and New Hampshire law by ceasing operations in the State, motorists would have been required to drive to neighboring States to refill their gas tanks. That scenario would entail increased driving and thus increased discharge of noxious exhaust chemicals into the atmosphere—a result that would clearly stand as an obstacle to accomplishment of the Clean Air Act's goals. *See Bartlett*, 133 S. Ct. at 2481 (Breyer, J., dissenting) (arguing that although it is not "impossible" for a company to comply with both federal and state law if it can do so by ceasing business operations,

requiring a withdrawal from the market as a means of avoiding conflicting laws is subject to conflict preemption if the state law "stands as an obstacle to the accomplishment of the federal law's objectives.")

C. The Decision Below Conflicts with Other Post-*Bartlett* Decisions Regarding the Scope of Impossibility Preemption

If the decision below is viewed as an effort by the New Hampshire Supreme Court to interpret and apply *Mensing* and *Bartlett*, the decision appears to conflict with post-*Bartlett* decisions from the federal appeals courts. Review is warranted to resolve the apparent confusion regarding *Bartlett*'s meaning.

The New Hampshire Supreme Court's no-preemption conclusion could plausibly be explained as follows: even if federal law gave Exxon no feasible option but to use MTBE, our tort judgment does not conflict with that federal mandate. Federal law does not give oil refiners the right to market their products in New Hampshire; and if Exxon chooses to do business in the State, it can comply with both federal and state law simply by using MTBE and then agreeing to pay New Hampshire a penalty for any damages caused by its introduction of MTBE into the State. *See, e.g.*, Pet. App-26.

That rationale is in considerable tension with other post-*Bartlett* appellate decisions addressing impossibility preemption. In particular, a recent Fifth Circuit decision, *Lashley v. Pfizer, Inc.*, 750 F.3d 470

(5th Cir. 2014), rejected efforts by plaintiffs to evade the holdings of *Mensing* and *Bartlett* that conflict preemption barred failure-to-warn lawsuits against generic drug manufacturers.[3]

Like *Bartlett, Lashley* also involved a product liability claim against a generic drug manufacturer. The plaintiffs argued that: (1) the manufacturer was distributing an unsafe product; (2) FDA approval of the drug did not bestow a federal right to market it, and thus imposing monetary sanctions under state-law non-failure-to-warn claims did not conflict with any federal right; and (3) *Bartlett* did not mandate preemption of tort claims that were not explicitly premised on a failure to provide additional health warnings. The Fifth Circuit rejected that argument and held that *Bartlett* required preemption of the plaintiffs' non-failure-to-warn claims: "State law claims for damages are not available as an end-run around preemption." *Lashley*, 750 F.3d at 476.

In sharp contrast to the Fifth Circuit's approach, the New Hampshire Supreme Court rejected Exxon's conflict preemption claim despite Exxon's evidence that using MTBE was the only feasible means by which it could comply with federal requirements. Review is warranted to resolve the clear tension between *Lashley*

---

[3] As noted above, *Bartlett* held that New Hampshire's efforts to require generic manufacturers to add new health warnings to their drug labels was subject to impossibility preemption because FDA had prescribed the precise label wording from which the manufacturer was not permitted to deviate. *Bartlett*, 133 S. Ct. at 2477.

and the decision below.

II. REVIEW IS ALSO WARRANTED TO CONSIDER PETITIONERS' "TRIAL BY FORMULA" CLAIM

Review is also warranted of the first question presented by the petition: whether New Hampshire's use of a "trial by formula"—a trial plan that prevented Exxon from raising individualized defenses to allegations that its actions caused the contamination of groundwater throughout the State—violated Exxon's due process rights. The Court held in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), that the Rules Enabling Act prohibits certifying a plaintiff class in federal court proceedings on the premise that the court will conduct a "Trial by Formula" of the sort conducted in New Hampshire trial court. The Court concluded that such proceedings improperly abridge the rights of defendants to raise defenses to individual claims. *Ibid.* Review is warranted to determine whether the Due Process Clause requires that similar procedural fairness be afforded defendants in state-court proceedings.

Indeed, the procedural unfairness here is far worse than anything proposed in *Wal-Mart*. New Hampshire's "Trial by Formula" included adoption of market-share liability. That is, the trial court permitted the State to extrapolate Exxon's liability based not simply (as in *Wal-Mart*) on a sampling of a small subset of the defendant's activities but rather on a sampling of a small subset of wells—without regard to whether Exxon's activities could have had any

impact on the tested wells. The net effect of the trial court's unique evidentiary rulings was to relieve the State of any obligation to demonstrate that Exxon's activities bore any relationship to the wells for whose alleged contamination Exxon is being held responsible.

The New Hampshire courts' adoption of trial procedures that deprived Exxon of important rights is particularly disturbing because it arises in a case in which New Hampshire itself is the plaintiff. This Court holds that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The fairness of the proceedings below is subject to serious question when the State itself is the chief beneficiary of the New Hampshire Supreme Court's decision to affirm the largest tort award in state history and to approve troublesome trial-court procedural shortcuts that redounded to the plaintiff's benefit. The State has awarded itself a large jackpot, yet there is scant evidence that it plans to use the proceeds for environmental clean-up, the ostensible purpose for the award of damages.

Finally, it is also troublesome that the preemption issue that is the major focus of this brief arises only because New Hampshire has been so insistent on conducting the sort of "trial by formula" condemned in *Wal-Mart*. Had New Hampshire been content to seek groundwater contamination damages from those directly responsible for the spills that led to contamination (as some previous MTBE plaintiffs have done), preemption would not have been an issue. Even though federal law left suppliers with no feasible

options other than the distribution of MTBE gasoline, no one was required by the federal government to handle the gasoline in a negligent manner leading to spills and leakage. Accordingly, conflict preemption would play little if any role in traditional tort suits of that sort. But by seeking to hit the litigation jackpot by imposing massive liability on deep-pocketed entities that were attempting in good faith to comply with federal environmental requirements, New Hampshire and its contingency-fee attorneys seemingly have gone out of their way to create the federal preemption issue that sooner or later the Court will be forced to confront.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Found.
2009 Massachusetts Ave, NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

February 22, 2016