No. 18-2188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF NEW YORK,

Plaintiff-Appellant,

v.

BP P.L.C., CHEVRON CORPORATION, CONOCOPHILLIPS, EXXON MOBIL CORPORATION, AND ROYAL DUTCH SHELL PLC

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of New York
Case No. 18-cv-182 (The Honorable John F. Keenan)

BRIEF OF CONFLICT OF LAWS AND FOREIGN RELATIONS LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT'S DECISION

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae Professors Sarah H. Cleveland, Zachary D. Clopton, William S. Dodge, Harold Hongju Koh, Kermit Roosevelt III, and Christopher A. Whytock are conflict of laws and foreign relations law scholars. The appendix lists their qualifications. *Amici* submit this brief because they have an interest in the proper understanding of the presumption against extraterritoriality, the conflict of laws, and the authority of federal courts over state law causes of action.

SUMMARY OF ARGUMENT

To redress injuries stemming from Defendants' production and sale of fossil fuels, New York City brought nuisance and trespass claims against Defendants under New York common law. The district court held, *inter alia*, that the City's claims were barred by "the presumption against extraterritoriality" and "the need for judicial caution in the face of 'serious foreign policy consequences.'" *City of*

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[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), counsel for *amici* certify that no party's counsel authored the brief in whole or in part and that no one other than *amici* and their counsel contributed money that was intended to fund the preparation or submission of this brief. The Defendants-Appellees did not object to the filing of this brief and the Plaintiff-Appellant has provided blanket consent.

New York v. BP P.L.C., 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018) (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018)).

These holdings are erroneous. First, the presumption against extraterritoriality does not apply to common law claims. The presumption is a canon of statutory interpretation aimed at ascertaining legislative intent. As such, it does not apply to judge-made common law, which is instead governed by conflict-of-laws rules that in this case point to the application of New York law. Even if the federal presumption against extraterritoriality applied, that presumption would not bar the application of domestic law here.

Likewise, the notion of "judicial caution" invoked by the district court provides no basis for limiting the geographic scope of New York law. This concept arose in the Supreme Court's recent Alien Tort Statute jurisprudence, which is inapplicable to this case. This is because the City's suit concerns domestic torts and involves neither the requisite foreign policy stakes nor a request for judicial creation or expansion of a federal cause of action. Federal courts have no authority to modify or limit causes of action already in existence under state law in the name of "judicial caution."

Further, foreign affairs preemption does not apply in this case. Common law tort causes of action fall within an area of "traditional state responsibility" under *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), and may be

preempted only by federal law that has been adopted by the political branches of the federal government. Here, there is no state interference with any affirmative federal act. Standardless efforts by federal courts to narrow state common law torts, absent any guidance from the political branches, are the opposite of "judicial caution."

ARGUMENT

I. The District Court Erred in Applying the Presumption Against Extraterritoriality.

The City pleaded its claims under New York common law, not federal common law. But even if the district court were correct that the City's claims are governed by federal common law, 325 F. Supp. 3d at 471, the court erred in concluding that "the City's claims are barred by the presumption against extraterritoriality," *id.* at 475.

First, the presumption against extraterritoriality does not apply to common law claims. The presumption is a means of ascertaining the legislative intent underlying a statute. The framework that the Supreme Court has articulated for the federal presumption asks whether the statute gives a clear indication that it applies extraterritorially, a question that makes no sense when asked with respect to the common law. In a tort case, the applicable law is determined not under a presumption against extraterritoriality, but rather by applying conflict-of-law rules.

Second, under both New York and federal conflicts rules, the law applicable to property torts is the law of the place where the injury occurred. New York law applies in this case because the injury occurred in that state.

Third, even if the federal presumption against extraterritoriality applied, the district court erred in concluding that this case involves the extraterritorial application of law. As the Supreme Court recently explained in *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010), whether the application of a law is domestic or extraterritorial turns on whether the "focus" of the law at issue is located in the United States or abroad. Here, the focus of nuisance and trespass law is on preventing injury to local New York property. Under *Morrison*, applying the law of the place of injury is properly considered domestic, not extraterritorial.

A. The Presumption Against Extraterritoriality Does Not Apply to Common Law Claims.

Regardless of whether New York or federal law applies, the presumption against extraterritoriality does not limit the scope of common law claims.[1] The

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[1] New York has its own presumption against extraterritoriality, which applies only to New York statutes. *See Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. 2012) ("The established presumption is, of course, against the extraterritorial operation of New York law . . . ."). "Subject to constraints imposed by federal law, the geographic scope of State statutes is a question of State law." Restatement (Fourth) of the Foreign Relations Law of the United States § 404 reporters' note 5 (Am. Law Inst. 2018). New York has never applied its state presumption against extraterritoriality to common law claims.

presumption against extraterritoriality is a presumption about legislative intent. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("This 'canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.'" (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))); *see also Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. at 255 (noting that this canon is a "presumption about a statute's meaning" which "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters"). Because judges make the common law, there is no legislative intent to ascertain. Accordingly, courts have rejected arguments that the presumption should be applied to common law claims in those few cases where the argument has been raised. *See, e.g.*, *Leibman v. Prupes*, No. 2:14-CV-09003-CAS (VBK), 2015 WL 3823954, at *6 (C.D. Cal. June 18, 2015) (holding that "the presumption is limited to statutes by its terms" and does not apply to common law claims); *see also* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 Geo. L.J. 301, 304 (2014) ("Because the presumption against extraterritoriality is wholly a creature of statutory interpretation, the presumption—

like any other rule of statutory interpretation—has no application to the common law.").[2]

The Supreme Court has articulated a "two-step framework" for the federal presumption against extraterritoriality. *RJR Nabisco Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). At the first step, a court asks "whether *the statute* gives a clear, affirmative indication that it applies extraterritorially." *Id.* (emphasis added). "If the statute is not extraterritorial, then at the second step [a court] determine[s] whether the case involves a domestic application of the statute . . . by looking to the statute's focus." *Id.* (quotation marks omitted); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 404 (Am. Law. Inst. 2018) (restating the presumption against extraterritoriality); William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL Unbound 45

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[2] In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Supreme Court applied the presumption against extraterritoriality to a federal common law cause of action created by a federal statute, the ATS. The Court looked to the "text, history, and purposes" of that statute, *id.* at 117, to determine Congress' intent with respect to the federal common law causes of action for "'torts' in violation of the law of nations," *id.* at 124. But similar statutory interpretation is not possible when examining the common law of torts, regardless of whether that law is New York or federal common law.

(2016) (explaining the two-step framework). The first step of the framework simply makes no sense when there is no statute for a court to interpret.[3]

When claims arise under common law, the appropriate mode of analysis is not statutory interpretation, but rather application of conflict-of-laws principles to the torts at issue. *See* Meyer, *supra*, at 304 ("Rather than being subject to a statutory presumption, the geographical range of state common law is subject to limit only by background principles of choice of law."). New York courts have consistently applied conflict-of-laws rules to common law claims.

B. Both New York and Federal Conflicts Rules Point to the Application of U.S. Domestic Law.

Federal courts sitting in diversity are bound to apply the conflicts rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *see also Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989) ("A federal court sitting in diversity or adjudicating state law claims that are pendent to a federal claim must apply the choice of law rules of the forum state.").

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[3] Even if the federal presumption against extraterritoriality were applicable, *amici* note that, under the second step of the Supreme Court's analysis, the application of U.S. law would be considered domestic rather than extraterritorial because the focus of the law is on injury to local property, which occurred in New York. *See infra* Section I.C.

In tort cases, the New York Court of Appeals has adopted "interest analysis," which applies "the law of the jurisdiction having the greatest interest in resolving the particular issue." *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993). For rules that regulate primary conduct, this jurisdiction is generally the place of the wrong, which is "determined by where the plaintiffs' injuries occurred." *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 681 (N.Y. 1985).[4] In *Licci v. Lebanese Canadian Bank*, 672 F.3d 155, 158 (2d Cir. 2012) (per curiam), this Court concluded that New York as the place of conduct had the greatest interest in litigation involving wire transfers that allegedly facilitated terrorist attacks in Israel. *But see Elmaliach v. Bank of China Ltd.*, 971 N.Y.S.2d 504, 516 (N.Y. App. Div. 2013) (holding under New York conflicts rules that the law of the place of injury should be applied). But *Licci* did not involve torts to local New York property, and on petition for rehearing, this Court emphasized the fact-specific character of its holding. *See Licci*, 739 F.3d at 51 (noting that facts in *Elmaliach* "differ starkly"). In cases involving torts to property, the New York

[4] *Schultz* specifically considered how to apply this principle when "the defendant's negligent conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another." 480 N.E.2d at 681. On the ground that "the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred," the court interpreted "the last event" as the event of the plaintiffs' injuries. *Id.*

Court of Appeals has held that the law of the place where the property is located must be applied, deeming it "almost unthinkable to seek the applicable rule in the law of some other place." *Heaney v. Purdy*, 272 N.E.2d 550, 551 (N.Y. 1971) (quoting *Babcock v. Johnson*, 191 N.E.2d 279, 284 (N.Y. 1963)).

Even if this Court were to decide that federal common law governs the City's claims and were to apply federal conflicts rules to determine the applicable law, the law of the place of injury should still govern. This Court has looked to the Restatement (Second) of Conflict of Laws (Am. Law. Inst. 1971) to determine federal conflicts rules. *See, e.g.*, *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996). Under the Restatement (Second) of Conflicts, the general rule with respect to actions involving injury to property—such as nuisance and trespass—is that "the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship." Restatement (Second) of Conflict of Laws § 147 (Am. Law. Inst. 1971); *see also Harris v. Polskie Linie Lotnicze,* 820 F.2d 1000, 1003-04 (9th Cir. 1987) (noting that the Restatement "creates a presumption that the law of the place where the injury occurred applies"). The draft Restatement (Third) of Conflict of Laws generally takes the same position, stating that the "law of the state where real property is located governs" claims for private nuisance and trespass. Restatement (Third) of

Conflict of Laws § 7.07 (Am. Law Inst., Preliminary Draft No. 3, 2017); *see also id.*, reporters' notes 1 & 2 (citing case authority with respect to private nuisance and trespass).[5]

C. Even if the Presumption Against Extraterritoriality Applies, This Is Not an Extraterritorial Case Because the Effects of Defendants' Activities Are Felt in New York.

Even, assuming *arguendo* that the presumption against extraterritoriality did apply to the common law claims at issue here, that presumption would not bar application of New York or federal law. The district court erred by considering the application of domestic law in this case to be extraterritorial, when the Supreme Court has clarified that applying U.S. law to domestic injuries constitutes *domestic*, not extraterritorial, application of the law.

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[5] The principle of applying the law of the place of injury to tort claims is not limited to the United States. In the courts of EU member states, the Rome II Regulation provides that "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the *country in which the damage occurs* irrespective of the country in which the event giving rise to the damage occurred." Regulation (EC) No. 864/2007 of 11 July 2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II), art. 4(1), 2007 O.J. (L 199) 40, 44 (emphasis added); *see also id.* art. 7, at 45 ("The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.").

In an earlier day, the U.S. Supreme Court defined extraterritoriality in terms of where the conduct was located. *See Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("[T]he character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."). But in *Morrison v. National Austl. Bank,* 561 U.S. 247 (2010), the Court decoupled the question of extraterritoriality from the location of the conduct, holding instead that courts must determine whether application of a federal statute would be extraterritorial by examining "the *focus* of congressional concern." *Id.* at 266 (emphasis added) (quotation marks omitted). In *Morrison*, the Court concluded that because the focus of Section 10(b) of the Securities Exchange Act was on the purchase and sale of securities, application of that provision to foreign purchases should be considered extraterritorial, despite the fact that fraudulent conduct occurred in the United States. *See id.* ("[W]e think that the focus of the Exchange Act is not upon the place where the deception originated but upon purchases and sales of securities in the United States.").

The Supreme Court reaffirmed this approach to extraterritoriality in *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090 (2016). If a statute does not speak clearly to its geographic scope, the Court said, a court must "determine whether the case involves a domestic application of the statute . . . by looking to the statute's focus." *Id.* at 2101. In *RJR*, the Court concluded that the focus of

RICO's private right of action was injury to business and property, and that the plaintiffs' claims must therefore be dismissed because they had not alleged any *injury* in the United States, even though the defendants engaged in *conduct* in the United States. *See id.* at 2111. Summarizing the Court's approach in *Morrison* and *RJR*, the Restatement (Fourth) of Foreign Relations Law says:

> If the presumption against extraterritoriality has not been rebutted, a court will determine if application of the provision would be domestic or extraterritorial by looking to the focus of the provision, for example, on conduct, transactions, or injuries. If whatever is the focus of the provision occurred in the United States, then application of the provision is considered domestic and is permitted.

Restatement (Fourth) of the Foreign Relations Law of the United States § 404 cmt. c (Am. Law Inst. 2018).[6]

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[6] A separate and additional requirement of conduct in the United States would be inconsistent with both the decisions of the Supreme Court and with the law of this Circuit. Dictum in *RJR* suggests that some conduct related to the focus of a provision must occur in the United States for the application of the provision to be considered domestic at step two of the presumption. *See RJR*, 136 S. Ct. at 2101 ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad . . . ."). But in applying the focus analysis to RICO's private right of action, the *RJR* Court imposed no requirement that there be any conduct in the United States. Instead, the Court phrased its test solely in terms of the location of the RICO *injury*. *See id.* at 2111 ("Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries."); *see also* Dodge, *supra*, at 49-50 (discussing the question). This Court has subsequently applied *RJR*'s domestic-injury test without

Under either New York or federal common law, the focus of nuisance and trespass claims is the place where the injury to property occurs. *See Scribner v. Summers*, 84 F.3d 554, 557 (2d Cir. 1996) ("Under New York law, trespass is the intentional invasion of another's property."); Restatement (Second) of Torts § 821B (Am. Law Inst. 1965) ("A public nuisance is an unreasonable interference with a right common to the general public."); *id.* § 821D ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land."); *see also New Jersey v. New York*, 283 U.S. 473, 482 (1931) ("The situs of the acts creating the nuisance, whether within or without the United States, is of no importance."). Thus, under the Supreme Court's current approach to these questions, a court's application of U.S. law to claims of nuisance and trespass would be considered territorial, not extraterritorial, even if some or all of Defendants' conduct that caused that injury occurred outside of New York.

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reference to whether conduct occurred in the United States. *See Bascuñán v. Elsaca*, 874 F.3d 806, 824 (2d Cir. 2017) (concluding that "the location of the property" is "the dispositive factor"). In securities fraud cases, this Court has also rejected the argument that conduct in the United States is required for the application of Section 10(b) to be considered domestic under *Morrison*'s transactional test. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012) ("[T]he transactional test announced in *Morrison* does not require that each defendant alleged to be involved in a fraudulent scheme engage in conduct in the United States.").

II. "Judicial Caution" Is Not a Basis for Limiting the Geographic Scope of New York Law.

The district court also held that the City's claims "are barred by . . . the need for judicial caution in the face of 'serious foreign policy consequences.'" 325 F. Supp. 3d at 475 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018)). In reaching this conclusion, the district court relied entirely on inapposite Supreme Court decisions limiting the federal cause of action implied under the Alien Tort Statute, 28 U.S.C. § 1350. But those decisions are wholly inapplicable here, because this is not an ATS suit. ATS claims raise entirely different foreign policy concerns, and limitations on the federal courts' authority to shape an implied cause of action under the ATS for torts "in violation of the law of nations," 28 U.S.C. § 1350, provides no basis for restricting causes of action under state common law. State tort law, addressing injuries within the state, is a traditional area of state competence into which federal courts sitting in diversity jurisdiction may not intrude. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938).

State common law may be preempted by foreign relations concerns only in limited circumstances by a federal law duly adopted by the political branches of the federal government. For a federal court to make that determination based on its own free-floating estimation of how a particular lawsuit might affect U.S. foreign policy, and to go on to limit causes of action provided by state common law, is the very antithesis of "judicial caution."

A. The Limits that the Supreme Court Has Placed on ATS Causes of Action Do Not Apply in this Case.

The district court's conclusion that the City's claims are barred by "the need for judicial caution" rests entirely on Supreme Court decisions limiting federal causes of action under the ATS. 325 F. Supp. 3d at 475 (citing *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). But this case involves domestic tort claims, not the "tort[s] . . . in violation of the law of nations" at issue in the ATS. 28 U.S. § 1350. Even assuming that the claims here arise under federal common law, this is not an ATS case, so the concerns articulated in *Jesner* and *Sosa* simply do not apply.

In *Sosa v. Alvarez-Machain*, the Supreme Court recognized a federal common law cause of action under the ATS for torts in violation of modern customary international law. 542 U.S. at 725, 732 (2004). Because holding that "a foreign government or its agent has transgressed" international law risks "adverse foreign policy consequences," the Supreme Court adopted a "high bar," *id.* at 727, for exercising its law-making authority, limiting the federal cause of action under the ATS to those "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized," *id.* at 725. In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court re-emphasized "the need for judicial caution . . . in light of foreign policy concerns," 569 U.S. at 116, and again exercised its authority to limit

the federal ATS cause of action, this time to claims that "touch and concern the territory of the United States," *id.* at 124-25. In *Jesner v. Arab Bank, PLC*, the Supreme Court, again citing the possibility of "serious foreign policy consequences," held "that foreign corporations may not be defendants in suits brought under the ATS." 138 S. Ct. at 1407.

But the limits that the Supreme Court imposed on the federal cause of action under the ATS do not apply to the City's claims here for two reasons. First, the foreign policy concerns raised by ATS cases are absent here. The concerns that the Court identified in *Sosa* arose from the possibility of holding, explicitly or implicitly, that "a foreign government or its agent" had violated international law. 542 U.S. at 727. In *Jesner*, the Court concluded that the same concerns were implicated by suits against "foreign corporate defendants" which had "caused significant diplomatic tensions," 138 S. Ct. at 1406-07 (quotation marks omitted). The district court asserted that the City's claims "implicate countless foreign governments and their laws and policies" and that litigating such claims would "severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches." 325 F. Supp. 3d at 475-76. In fact, the City's claims here in no way implicate the conduct of, or U.S. diplomatic relations with, foreign governments. Nor do they allege any violations of international law. The City has simply alleged violations of the common law of torts causing injury in the

New York. The City's suit asks the Defendants to internalize some of the costs of their profit-making activities, which would otherwise have to be borne by the City and its taxpayers. Because the internalization of such costs would in no way hinder foreign or the United States governments from addressing climate change in whatever ways they deem appropriate, the reasons for "judicial caution" identified in the Supreme Court's ATS cases are absent in this context.

Second, these ATS cases involved the creation of an implied federal cause of action under a federal statute not at issue here. The City has not asked the district court to create or to expand any federal cause of action. The City simply asked the district court to apply *existing* causes of actions that are already available under the laws of New York. Concerns that the law-making authority of the federal courts should be limited are thus inapplicable. To the contrary, this case raises serious questions about the authority of a federal court to *refuse* to apply the applicable state law. While federal courts have authority to shape federal common law causes of action, as the Supreme Court has done in the ATS cases, they have no authority to shape or limit causes of action that exist under state law, as that power is reserved to the states.

B. Foreign Relations Concerns Can Preempt the Application of State Law Only in Limited Circumstances.

Broadly stated, the question of "foreign affairs" preemption asks whether "an exercise of state power that touches on foreign relations must yield to the

National Government's policy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). Foreign affairs preemption actually includes two related but distinct doctrines, each with its own requirements: "field preemption" and "conflict preemption." *Id*. at 419 n.11. Field preemption considers whether, even absent a conflict with any federal act having the power of law, state law intrudes upon federal prerogatives in the field of foreign policy. *Id.* Conflict preemption considers whether state law interferes with a particular federal law. *Id.* Neither is applicable here.

Under *Garamendi*, field preemption cannot apply to generally applicable laws within a state's "traditional competence," even if the law "affects foreign relations." 539 U.S. at 419 n.11. Otherwise, in a globalized world, such unspecified foreign relations considerations could preempt much of state law that is within the sole competence of state courts and legislatures. Thus, field preemption applies only where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Id*.

The Supreme Court's analysis in *Garamendi* clarified the foreign affairs field preemption doctrine that had been introduced in *Zschernig v. Miller*, 389 U.S. 429 (1968). In *Zschernig*, the Supreme Court invalidated an Oregon escheat statute that conditioned the rights of non-resident aliens to inherit certain property in Oregon on what the laws of the alien's country said about U.S. citizens'

inheritance rights. 389 U.S. at 430-31. The majority observed the danger of allowing states "to establish [their] own foreign polic[ies]" and held that "even in absence of a treaty, a State's policy may disturb foreign relations" and "must give way if [it] impair[s] the effective exercise of the Nation's foreign policy." *Id.* at 440-41. In concurrence, Justice Harlan criticized the majority's rule as overbroad, arguing that "[s]tates may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." *Id.* at 459 (Harlan, J., concurring). Thus, in *Garamendi,* the Supreme Court clarified the respective roles of field preemption and conflict preemption in foreign affairs by, on the one hand, proscribing general foreign policymaking by states while, on the other, applying the conflict preemption doctrine where states legislate in their areas of "traditional state responsibility." 539 U.S. at 419 n.11.

New York's common law of nuisance and trespass undoubtedly address an area of "traditional state responsibility" under *Zschernig* and *Garamendi*. The City is not seeking to regulate the sale of fossil fuels globally but simply to receive compensation for injuries sustained against local property. Thus, there can be no field preemption in this case; only conflict preemption could be at issue.

But, upon inspection, no conflict preemption issue arises here either. Conflict preemption applies only where state law interferes with an affirmative federal act that is "fit to preempt" state law. *Garamendi*, 539 U.S. at 416, 418-19.

Federal acts that do not have the force of law cannot preempt state law. *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *see Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."). General federal foreign policy – even "plainly compelling" foreign policy interests of a "sensitive" nature – cannot displace state law without some law-making authority having been exercised by federal authorities. *Medellin v. Texas,* 552 U.S. 491, 523-24 (2008).

In *Medellin*, the federal government argued that, with respect to a Mexican national on death row, Texas courts had to follow a decision of the International Court of Justice. The Government urged that state law had to yield to federal interests in compliance with international treaties, the need to protect relations with foreign governments, and the need to demonstrate "commitment to the role of international law." 522 U.S. at 524. Yet the Supreme Court held that there was no federal law with the authority to preempt "generally applicable" state law. *Id.* at 498-99.

The district court here articulated no foreign policy concerns that rise even to the level of those presented in *Medellin*, let alone any federal acts that carry the force of law and are therefore "fit to preempt" state law under *Garamendi*'s conflict preemption test. Instead, the district court simply observed that the claims

here "implicate countless foreign governments and their laws and policies," and are "the subject of international agreements." 325 F. Supp. 3d at 475. Such vague, speculative concerns with respect to foreign policy matters on which judges are not experts are plainly insufficient to preempt generally applicable state law.

If the opposite were true, "foreign policy consequences" or the fact than an issue is "the subject of international agreements" could be invoked to preempt valid state initiatives on grounds of "judicial caution," even where states undeniably act within their "traditional competence," *Garamendi*, 539 U.S. at 419 n.11, to protect their citizens, residents, and property from local injury caused by actions that may also have foreign impacts. Under this logic, state civil suits against foreign corporations in the United States for violations of state labor law might be deemed precluded because of U.S. membership in the International Labour Organization. State civil suits against foreign corporations for violations of discrimination law might be deemed precluded because of U.S. ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195. And the state common law tort of false imprisonment might be significantly narrowed because of U.S. ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *adopted* May 25, 2000, 2171 U.N.T.S. 227. Under the district court's reasoning, it is hard to

know where this kind of unmoored federal preemption of valid state initiatives would end. The path of "judicial caution" cannot lead to preemption of state law based on speculation. Instead, judicial caution must only preempt state law when there is an actual conflict with federal law made by the political branches of government. No such conflict has been alleged here.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to reverse the district court's decision to the extent that it disallows the City's claims due to either the presumption against extraterritoriality or federal foreign affairs concerns.

Dated: November 15, 2018

Respectfully submitted,

/s/ *Michael J. Wishnie*

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APPENDIX

LIST OF *AMICI CURIAE*[†]

1. Sarah H. Cleveland is Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School. She served as a Coordinating Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law*. Her publications include *The* Kiobel *Presumption and Extraterritoriality*, 52 Colum. J. Transnat'l L. 8 (2013), and Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975 (2001).

2. Zachary D. Clopton is Assistant Professor at Cornell Law School. His publications include *Diagonal Public Enforcement*, 70 Stan. L. Rev. 1077 (2018), and *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. Rev. 1 (2014).

3. William S. Dodge is Martin Luther King, Jr. Professor of Law at the University of California, Davis, School of Law. He served as a Co-Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law* and currently serves as an Adviser for its *Restatement (Third) of Conflict of Laws*. His publications include *International Comity in American Law*, 115 Colum. L. Rev.

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2071 (2015), and *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL Unbound 45 (2016).

4. Harold Hongju Koh is Sterling Professor of International Law at Yale Law School. He served as Legal Adviser to the U.S. Department of State from 2009 to 2013, and as an Adviser for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law.*

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6. Christopher A. Whytock is Professor of Law and Political Science at UC Irvine School of Law. He currently serves as an Associate Reporter for the American Law Institute's *Restatement (Third) of Conflict of Laws*. His publications include *State Remedies for Human Rights*, 98 B.U. L. Rev. 397 (2018) (with Seth Davis), and *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719 (2009).

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Local Rule 29.1(c) because this brief contains 5,406 words, excluding the items excluded by the Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Wishnie, hereby certify that on November 15, 2018, the foregoing document was filed and served through the CM/ECF system.

Respectfully submitted,

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