No. 18-16663

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND, *et al.*
Plaintiffs-Appellants,

v.

BP p.l.c., *et al.*
Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of California
Nos. 17-cv-06011, 17-cv-06012 (The Honorable William A. Alsup)

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

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Amici curiae Professors Sarah H. Cleveland, Zachary D. Clopton, William S. Dodge, Kermit Roosevelt III, Symeon C. Symeonides, 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, conflict of laws, and the authority of federal courts.

SUMMARY OF ARGUMENT

To redress injuries stemming from Defendants' promotion of fossil fuels while concealing their dangers, San Francisco and Oakland (the "Cities") brought public nuisance suits against Defendants under California law. The district court denied plaintiffs' motion to remand, *California v. BP P.L.C.*, 2018 WL 1064293 at *2-*5 (N.D. Cal. Feb. 27, 2018), and then dismissed plaintiffs' amended complaint for failure to state a claim, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022-28 (N.D. Cal. 2018). Both the district court's initial decision to find that

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[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), 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. Both parties have consented to the filing of *amicus* briefs.

federal common law preempted state law and its subsequent decision to find that there was no applicable federal common law relied on a common premise: that a suit about climate change deserved special treatment because it implicated the foreign relations of the United States. The district court held that the Cities' claims "run[] counter to . . . the presumption against extraterritoriality." *Id.* at 1025. The court also invoked the need for "judicial caution," given the risk of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

These holdings are erroneous. The district court erred in applying the federal presumption against extraterritoriality for several reasons. First, the federal presumption against extraterritoriality does not apply to state-law claims. The geographic scope of state law is a question of state law, and under California's conflict-of-laws rules, the law of the place of the injury applies. Second, the federal presumption against extraterritoriality also does not apply to claims under federal common law. The presumption is a canon of statutory interpretation aimed at ascertaining legislative intent. As such, it does not apply to judge-made common law. Third, even if the federal presumption against extraterritoriality applied, the Cities seek only a domestic application of law.

Likewise, the concept of "judicial caution" provides no basis for limiting the geographic scope of California law. The district court relied on the Supreme

Court's recent Alien Tort Statute (ATS) jurisprudence. That jurisprudence is inapplicable here because the Cities' suit concerns domestic torts that do not raise the same foreign policy stakes as ATS suits and do not seek the creation or expansion of a federal cause of action. Federal courts have no authority to modify or limit state-law causes of action in the name of "judicial caution."

Finally, foreign affairs preemption does not apply in this case. These causes of action fall within an area of "traditional state responsibility" under *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003), and may be preempted only by federal law that has been adopted by the political branches of the federal government. There is no such federal law here.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE FEDERAL PRESUMPTION AGAINST EXTRATERRITORIALITY.

The federal presumption against extraterritoriality does not apply to state-law claims. The geographic scope of state law is a question of state law. Under California's conflict-of-laws rules, California law applies to the Cities' claims because California is the place where the injury occurred.

Even if the Cities' claims were governed by federal common law, the federal presumption against extraterritoriality would not apply. The presumption against extraterritoriality is a presumption about legislative intent, which has no application to common law claims. Moreover, the Supreme Court's

extraterritoriality jurisprudence makes clear that the Cities' claims involve a domestic application of law.

A. The Federal Presumption Against Extraterritoriality Does Not Apply to State-Law Claims.

The district court appears to have applied the federal presumption against extraterritoriality. *See* 325 F. Supp. 3d at 1025 (citing federal cases). This was in error. As the Restatement (Fourth) of Foreign Relations Law notes, "[a]s a presumption about congressional intent, the federal presumption against extraterritoriality applies only to federal statutes and causes of action." Restatement (Fourth) of Foreign Relations Law § 404 cmt. a (Am. Law. Inst. 2018); *see also E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). "[T]he geographic scope of State statutes is a question of State law." Restatement (Fourth) of Foreign Relations Law § 404 reporters' note 5 (Am. Law. Inst. 2018); *see also Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 111 (2d Cir. 2012) (applying California presumption against extraterritoriality to determine the geographic scope of California statute).

California has its own presumption against extraterritoriality. *See Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) ("we presume the Legislature did not

intend a statute to be operative with respect to occurrences outside the state, unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history") (internal quotation marks and alterations omitted). In *Sullivan*, the California Supreme Court relied on California's presumption against extraterritoriality to hold that California's Unfair Competition Law did not apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs. *Id.* at 247-49.

But California has not applied its presumption against extraterritoriality to limit the application of state statutes when conduct outside the state causes injury within the state. In *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), the California Supreme Court applied a state statute prohibiting unauthorized recording of telephone conversations to a Georgia defendant who recorded its calls with California residents. The Court explained:

> Interpreting that statute to apply to a person who, while outside California, secretly records what a California resident is saying in a confidential communication *while he or she is within California* . . . cannot accurately be characterized as an unauthorized *extraterritorial* application of the statute, but more reasonably is viewed as an instance of applying the statute to a multistate event in which a crucial element—the confidential communication by the California

> resident—occurred *in California*. The privacy interest protected by the statute is no less directly and immediately invaded when a communication *within California* is secretly and contemporaneously recorded from outside the state than when this action occurs within the state.

Id. at 931. In situations of out-of-state conduct causing in-state injury, the California Supreme Court has instead applied the same conflict-of-laws approach to statutory claims that it applies to common law claims. *See, e.g.*, *id.* at 927-37 (applying comparative impairment analysis).

In tort cases, California has adopted a "comparative impairment analysis" that applies "the law of the state whose interest would be more impaired if its law were not applied." *Id.* at 925. Under this approach, a court must first determine whether the law of each potentially affected jurisdiction is the same or different and whether each jurisdiction has an interest in applying its own law in order "to determine whether a true conflict exists." *Id.* at 922. It is not clear in this case what other jurisdiction's law the defendants believe should be applied, but California clearly has a strong interest in applying its law because "[t]he public nuisance doctrine is aimed at the protection and redress of *community* interests." *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997).

When conduct and injury occur in different jurisdictions, the California Supreme Court regularly applies the law of the place of the injury, recognizing that "a state may act to protect the interests of its own residents while in their home state." *Kearney*, 137 P.3d at 920. In *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976), *superseded on other grounds by statute*, Cal. Civ. Code § 1714, *as recognized in Cory v. Shierloh*, 629 P.2d 8 (Cal. 1981), the California Supreme Court applied California law imposing liability on a tavern owner who negligently served drinks to an intoxicated person in Nevada, resulting in injury in California. California had adopted its policy to protect "members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor," *id.* at 722 (quoting *Vesely v. Sager*, 486 P.2d 151, 159 (Cal. 1971)), and had "a special interest in affording this protection to all California residents injured in California." *Id.* The Court concluded that "California's interest would be very significantly impaired if its policy were not applied to defendant." *Id.* at 725. The same is true in this case. California has a strong interest in applying its public nuisance law to provide redress for its citizens who are injured in California, even when the conduct that causes the injury occurs outside the state, and that interest would be very significantly impaired if its policy were not applied to defendants.

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

The district court was wrong to hold that federal common law preempted the Cities' state law claims. *See infra* Part II.B. But even if federal common law did govern, the federal presumption against extraterritoriality should not have been applied.

The federal presumption against extraterritoriality is a presumption about legislative intent. *See E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. at 248 ("This canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained.") (internal quotation marks omitted); *see also Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (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"). The Supreme Court has articulated a "two-step framework" for the federal presumption against extraterritoriality, each step of which requires the existence of a statute. *RJR Nabisco Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *see also* Restatement (Fourth) of Foreign Relations Law § 404 (Am. Law. Inst. 2018) (restating presumption against extraterritoriality); William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL Unbound 45 (2016) (explaining the two-step framework). At the first step, a court asks "whether *the statute* gives a clear, affirmative indication that it applies

extraterritorially." *RJR*, 136 S. Ct. at 2101 (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 and emphasis added).

In the case of judge-made common law, there is no statute to interpret and no legislative intent to ascertain. Accordingly, courts have refused to apply the presumption to common law claims in those few cases where they have been asked to do so. *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.").

The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), provides no basis for applying the presumption against extraterritoriality to common law claims. In *Kiobel*, the Supreme Court applied the presumption against extraterritoriality to determine the geographic scope of the implied cause of action under the Alien Tort Statute (ATS). *Id.* at 116 ("we think

the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS"). In applying the presumption, the Court looked to the "text, history, and purposes" of the ATS to determine Congress's intent. *Id.* at 117; *see also id.* at 117-24 (reviewing evidence of congressional intent). The Court concluded "that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in *the statute* rebuts that presumption." *Id.* at 124 (emphasis added). *Kiobel* stands for the proposition that courts may apply the presumption against extraterritoriality to causes of action implied under a federal statute, but not for the proposition that the presumption applies to common law claims generally.

When claims arise under common law, the appropriate mode of analysis is not statutory interpretation but rather the application of conflict-of-laws rules. *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."). As noted above, California's conflict-of-laws rules point to applying the law of the place of the injury. *See supra* Part I.A. The same would be true under federal conflict-of-laws rules.

This Court has looked to the Restatement (Second) of Conflict of Laws (Am. Law. Inst. 1971) to determine federal conflicts rules. *See, e.g., Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987) ("The Restatement (Second)

of Conflict of Laws . . . [is] an appropriate starting point for applying federal common law . . . ."). Under the Restatement (Second) of Conflicts, the general rule for actions like public nuisance that involve injury to land or other tangible things 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).[1] 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" nuisance claims. 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 nuisance claims).[2]

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[1] In the vast majority of cross-border tort cases in which the conduct is lawful in the state where it occurs but tortious in the state where it causes injury, American courts have applied the law of the state of injury. *See* Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 Hastings L.J. 337, 366-379 (2009) (documenting that 89.6% of cases involving this pattern (other than products liability cases) and decided under the modern choice-of-law approaches have applied the law of the state of injury); *see also* Peter Hay, Patrick J. Borchers, Symeon C. Symeonides & Christopher A. Whytock, *Conflict of Laws* 830-835, 868-874 (West 6th ed. 2018).

[2] 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."

Finally, even if federal common law governed the Cities' claims and even if the federal presumption against extraterritoriality applied to those claims, the district court still erred in concluding that those claims involve an extraterritorial application of law. In an earlier day, the 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, 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

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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."). Fifty-two choice-of-law codifications around the world provide that cross-border tort cases are governed by the law of either the state of conduct or the state of injury, whichever favors the plaintiff. They authorize the court to apply, or the plaintiff to elect, the more favorable law, either for all cross-border torts or for some torts, such as environmental torts. *See* Symeon C. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* 59-67 (Oxford University Press 2014).

extraterritorial by examining "the *focus* of congressional concern." *Id.* at 266 (emphasis added) (quotation marks omitted).[3]

The Supreme Court reaffirmed this approach to extraterritoriality in *RJR Nabisco Inc. v. European Community*, 136 S. Ct. 2090. 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 Supreme 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.

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[3] The *Morrison* Court concluded that because Section 10(b) of the Securities Exchange Act focused on the sale and purchase of securities, the application of Section 10(b) to claims arising from foreign purchases should be considered extraterritorial, even though the fraudulent conduct occurred in the United States. *Id.*

Restatement (Fourth) of Foreign Relations Law § 404 cmt. c (Am. Law Inst. 2018).[4]

The "focus" of the public nuisance doctrine is on the injuries sustained rather than on the conduct that causes them. *See* Restatement (Second) of Torts § 821B (Am. L. Inst. 1965) ("A public nuisance is an unreasonable interference with a right common to the general public."); *id.* § 822 cmt. a ("The feature that gives

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[4] 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* suggested 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."). Similarly, in *Morrison*, the Court imposed no requirement that any fraudulent conduct occurred in the United States, phrasing its "transactional test" solely in terms of "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Morrison*, 561 U.S. at 269-70. Applying *Morrison*'s transactional test, the Second Circuit has expressly rejected the argument that conduct in the United States is also required. *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."). And this Court has adopted the Second Circuit's approach in *Absolute Activist*. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 949 (9th Cir. 2018); *see also* Dodge, *supra*, at 49-50 (discussing the question).

unity to either public or private nuisance is the interest invaded, namely either the public right or the private interest in the use and enjoyment of land."); *see also New Jersey v. City of 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.").

Under the U.S. Supreme Court's current approach to extraterritoriality, this case involves the domestic application of public nuisance law, because the focus of that law is on injuries and those injuries occur in California. Even if the federal presumption against extraterritoriality applied, the Cities' claims should not be considered extraterritorial.

II. "JUDICIAL CAUTION" IS NOT A BASIS FOR LIMITING THE GEOGRAPHIC SCOPE OF CALIFORNIA LAW.

The district court also invoked the need for "judicial caution," 325 F. Supp. 3d at 1026, citing the danger of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* (quoting *Sosa*, 542 U.S. at 727). In reaching this conclusion, the court relied entirely on inapposite Supreme Court decisions limiting the federal cause of action implied under the Alien Tort Statute (ATS). But ATS claims raise entirely different foreign policy concerns. And 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 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 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 invocation of "judicial caution" rests entirely on Supreme Court decisions limiting federal causes of action under the ATS. 325 F. Supp. 3d at 1024-25 (citing *Sosa*, 542 U.S. at 725, 727, *Kiobel*, 569 U.S. 108, 116-17, and *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018)). But in contrast to the ATS cases, this case neither alleges that a foreign government has violated international law nor asks a court to create or expand an implied cause of action under a federal statute. This case simply asks the court to applying existing state law to help abate the costs of private defendants' profit-making activities.

In *Sosa*, 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. 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 727-28, 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*, 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*, 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 claims in this case. When the Court in *Sosa* counseled "judicial caution" and cited the risk "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," its concerns 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. This ATS-specific possibility merited caution because "[i]nternational human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators 'enem[ies] of all mankind.'" *Jesner*, 138 S. Ct. at 1401-02 (*quoting Sosa*, 542 U.S. at 732).

In contrast, the Cities do not allege any violations of international law that might brand the Defendants as "enemies of all mankind." Nor do their claims implicate the conduct of, or U.S. diplomatic relations with, foreign governments. The Cities' claims merely ask the Defendants to bear some of the costs of their profit-making activities, which would otherwise have to be borne by the Cities and their taxpayers. Internalizing such costs would in no way hinder the U.S. or foreign 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.

Further, these ATS cases involved the creation of a "new cause of action" under a federal statute. *Sosa*, 542 U.S. at 725. The Cities have not asked the district court to create or expand any new federal cause of action. The Cities have simply asked the district court to apply *existing* causes of action that are already available under the laws of California. Concerns that the law-making authority authority of the federal courts should be limited are thus inapposite. To the contrary, this case raises serious questions about the authority of a federal court to *refuse* to apply the applicable law of a state. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). 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 modify 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 Not Present Here.

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." *Garamendi*, 539 U.S. at 413. 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." *Id.* at 419 n.11. Otherwise, in a globalized world, such unspecified foreign relations considerations could preempt much of state law that is within the ordinary 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). 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.

California's law of public nuisance undoubtedly addresses an area of "traditional state responsibility" under *Zschernig* and *Garamendi*. The Cities are not seeking to regulate the sale of fossil fuels, but simply to obtain funds to abate

the injuries caused to their local property. Thus, there can be no field preemption in this case; only conflict preemption could be at issue.

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) ("rules [that] do not have the force of law . . . cannot preempt [state law]"); *see also 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." 552 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 the interests of countless governments, both foreign and domestic" and are "the subject of international agreements." 325 F. Supp. 3d at 1026. 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.

Foreign affairs preemption thus supports neither the district court's refusal to remand this case to state court nor its dismissal of the case for failure to state a claim.[5]

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[5] If this Court finds that the Cities' claims are governed by state common law, any defense of preemption should be addressed by the state court on remand. *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1130 (9th Cir. 1992) ("[I]n the case of a pleaded state cause of action in state court, a defendant must raise federal preemption as a defense in the state cause of action, and seek redress for any erroneous rulings on the preemption issue in the state court system first.").

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to reverse the district court's decision to the extent that it dismissed the Cities' claims because of either the presumption against extraterritoriality or foreign affairs concerns and to remand the case to state court.

Dated: March 20, 2019

Respectfully submitted,

s/ *Michael R. Lozeau*
Counsel for *Amici Curiae* Sarah H. Cleveland, Zachary D. Clopton, William S. Dodge, Kermit Roosevelt III, Symeon C. Symeonides, and Christopher A. Whytock

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 Associate 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. Kermit Roosevelt III is Professor of Law at the University of Pennsylvania. He currently serves as the Reporter for the American Law Institute's *Restatement (Third) of Conflict of Laws*. His publications include *Conflict of Laws: Cases, Comments, Questions* (West 9th ed. 2013) (with Herma Hill Kay & Larry Kramer) and *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 Nw. U. L. Rev. 1 (2012).

5. Symeon C. Symeonides is Dean Emeritus and Alex L. Parks Distinguished Chair in Law at the Willamette University College of Law. He drafted the choice-of-law codifications for Louisiana and Oregon and currently serves as an Adviser for the American Law Institute's *Restatement (Third) of Conflict of Laws*. His publications include *Conflict of Laws* (West 6th ed. 2018) (with Peter Hay, Patrick J. Borchers & Christopher A. Whytock) and *Oxford Commentaries on American Law: Choice of Law* (Oxford University Press 2016).

6. Christopher A. Whytock is Professor of Law and Political Science at the University of California, 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 *Conflict of Laws* (West 6th ed. 2018)

(with Peter Hay, Patrick J. Borchers & Symeon C. Symeonides) and *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719 (2009).

UNITED STATES COURT OF APPEALS
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