In the United States Court of Appeals for the Third Circuit

No. 21-2728

CITY OF HOBOKEN,

Plaintiff-Appellee,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE,

Defendants-Appellants.

On Appeal from an Order
of the United States District Court for the District of New Jersey
(20-cv-14243)

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK IN SUPPORT OF APPELLEE CITY OF HOBOKEN

SHER EDLING LLP
Victor M. Sher
Matthew K. Edling
Katie H. Jones
Quentin C. Karpilow
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com

GEORGIA PESTANA
Corporation Counsel
for the City of New York
Jamison Davies
Nathan Taylor
Alice Baker
100 Church Street
New York, NY 10007
(212) 356-2490
jdavies@law.nyc.gov

Counsel for Amicus Curiae City of New York

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes

Rules

RULE 29(a) CONSENT TO FILING

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Amicus Curiae have obtained the consent of all parties to file this brief.

INTEREST OF AMICUS CURIAE[1]

Amicus the City of New York ("City") has a unique interest in preserving the power of state courts to adjudicate state-law claims for injuries caused by deceptive commercial activities. As the sole enforcer of its Consumer Protection Law, NYC Code §§ 20-700 *et seq.*, the City is charged with protecting its residents from a broad array of deceptive trade practices, and it has done so by bringing hundreds of enforcement actions in New York state courts against local, national, and international companies who misleadingly advertised their products to the City's residents. These enforcement actions—like the climate-deception lawsuit brought by Plaintiff-Appellee City of Hoboken—seek to vindicate core state and local interests in "ensuring the accuracy of commercial information in the marketplace," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993); in combatting false "advertising," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); and in preventing "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), Amicus states: counsel for Amicus authored this brief in its entirety, and no person or entity other than Amicus and its representatives made any monetary contribution to the preparation or submission of this brief.

However, Defendants-Appellants' radical theory of federal-common-law removal would severely undermine the ability of the City and other state and local governments to seek redress in state courts for deceptive commercial activity. Relying heavily on the Second Circuit's decision in *City of New York v. Chevron*, 993 F.3d 81 (2d Cir. 2021), Appellants insist that federal common law converts state-law claims into federal ones for jurisdictional purposes whenever a federal court determines that those "claims' inherently interstate nature requires uniform *national* rules of decision." Appellants' Opening Br., ECF No. 61 ("Br.") at 17. As Hoboken rightly argues, that unprecedented theory of removal would not only "create a new doctrine of original and exclusive federal jurisdiction over all claims asserted against corporations with interstate or international operations." Appellee's Opposition Brief, ECF No. 86 ("Opp.") at 9. It would also strip "state courts . . . of their historical co-equal jurisdiction" over "whole swaths" of state-law claims. *Id.*

As the City explains in this *amicus* brief, moreover, the Second Circuit's decision in *City of New York* lends no support to such a breathtaking expansion of federal-court jurisdiction. The City was the plaintiff in that case and so is uniquely able to address how the circumstances and reasoning underlying that decision differ from those presented by the matter currently before this Court, rendering *City of New York* of little (if any) influence on the appropriate outcome here.

The City respectfully urges this Court to affirm—on all grounds—the district court's well-reasoned decision to remand Hoboken's state-law claims to Hoboken's properly chosen forum: state court.

SUMMARY OF ARGUMENT

Courts around the country have rejected Appellants' federal-common-law theory of removal in analogous climate-deception cases.[2] Under the century-old well-pleaded complaint rule, a defendant may not remove a state-law action based on "a federal defense, including the defense of preemption." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). And here, as the District Court correctly concluded, Appellants merely raise a thinly veiled preemption defense when they argue that federal common law "govern[s]"

---

[2] *See City of Oakland v. BP PLC*, 969 F.3d 895, 906–07 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (Mem), 2021 WL 2405350 (June 14, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 557–58 (D. Md. 2019), *as amended* (June 20, 2019), a*ff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020), *vacated and remanded on other grounds*, 141 S. Ct. 1532 (2021); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 964 (D. Colo. 2019), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *vacated and remanded on other grounds*, No. 20-783 (U.S. May 24, 2021); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937–38 (N.D. Cal. 2018) , *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020), *vacated and remanded on other grounds*, No. 20-884 (U.S. May 24, 2021); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) , *vacated and remanded on other grounds*, No. 20-900 (U.S. May 24, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 41–44 (D. Mass. 2020) ; *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *4–6 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *4–7 (D. Conn. June 2, 2021) , *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021); *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *2 n.8 (D. Haw. Feb. 12, 2021), *appeals filed*, Nos. 21-15313 & 21-15318 (9th Cir. Feb. 23, 2021).

Hoboken's claims, all of which are pleaded exclusively under New Jersey state law. JA 10.

That conclusion does not conflict, in any way, with *City of New York*, which considered whether federal common law preempted the City's state-law claims for climate-related damages. Indeed, that decision is wholly inapposite for at least two reasons.

First, the Second Circuit expressly disavowed addressing any questions of removal jurisdiction. Because the City had filed its complaint originally in federal court based on diversity jurisdiction, the appellate panel was "free to consider the [defendants'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *City of New York*, 993 F.3d at 94. As a result, *City of New York* sheds no light on the jurisdictional question that this Court must answer: whether Appellants' federal-common-law preemption defense converts Hoboken's state-law claims into federal ones for jurisdictional purposes.

Second, even assuming that the Second Circuit's ordinary preemption analysis could somehow inform this Court's jurisdictional analysis, *City of New York* is entirely distinguishable on its facts. The Second Circuit found that federal common law preempted the City's claims because those claims would "regulate cross-border emissions" by "effectively impos[ing] strict liability" on the "lawful" production, promotion, and sale of fossil-fuel products. *Id.* at 87, 93 (cleaned up).

By contrast, liability in Hoboken's lawsuit is rooted in Appellants' decades-long campaigns to deceive consumers and the public about the existence, causes, and effects of climate change. Under *City of New York's* own reasoning, then, Hoboken's claims do not—and cannot—regulate cross-border emissions. They therefore fall far outside any recognized body of federal common law.

In the end, it is for New Jersey state courts to decide whether federal common law preempts Hoboken's state-law action, subject to review by the United States Supreme Court. As this Circuit has long recognized, "[s]tate courts are competent to determine whether state law has been preempted by federal law, and absent complete preemption, they must be permitted to perform that function with regard to state law claims brought before them." *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 316 (3d Cir. 1994) (cleaned up). Preemption defenses that rest on federal common law are no different. *See Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005) (rejecting federal common law as a basis for removal and concluding that "it would be up to the state court to apply federal common law"), *aff'd*, 547 U.S. 677 (2006).

This Court should therefore affirm the District Court's remand order and return Hoboken's state-law claims to state court, where they belong.

ARGUMENT

POINT I

CITY OF NEW YORK DID NOT ADDRESS REMOVAL JURISDICTION.

Appellants rely heavily on the Second Circuit's decision in *City of New York*, even though the Second Circuit expressly disavowed addressing any questions of subject-matter jurisdiction.

In that case, the City filed suit in federal court based on diversity jurisdiction. *See City of New York*, 993 F.3d at 94. The defendants, in turn, raised an ordinary preemption defense, arguing that federal common law preempted and replaced the City's state-law claims for nuisance and trespass. Because there was no doubt that the district court had subject-matter jurisdiction, the Second Circuit did *not* analyze the defendants' "preemption defense" under "the heightened standard unique to the removability inquiry." *Id.* at 94. Instead, it was "free to consider the [defendants' ordinary] preemption defense on its own terms." *Id.* In this way, the Second Circuit was able to "reconcile" its conclusion that federal common law preempted the City's state-law claims with "the parade of recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law." *Id.* at 93 (cleaned up). Far, then, from supporting Appellants, *City of New York* confirms that their federal-common-law arguments are merely "anticipated defenses" that are subject to "the well-pleaded complaint rule."

Id. at 94. Such defenses cannot give rise to federal removal jurisdiction. *See Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) ("Federal jurisdiction cannot be predicated on an actual or anticipated defense.").

Indeed, any contrary reading of that opinion would directly conflict with the Second Circuit's earlier decision in *Empire*. *See* 396 F.3d 136. As then-Judge Sotomayor succinctly explained, "satisfaction of the two-prong *Boyle* test [for federal common law] does not necessarily create federal jurisdiction under 28 U.S.C. § 1331." *Id.* at 142. Instead, "even in cases in which *Boyle* is satisfied, courts must still ask the secondary question of whether the federal common law issue appears on the face of the plaintiff's well-pleaded complaint." *Id.* at 143 n.4. To hold otherwise would "conflate[] the preemption and jurisdiction analysis," and "giv[e] short shrift to the well-pleaded complaint rule." *Id.* at 142.[3]

This Court should therefore disregard Appellants' attempts to twist *City of New York* into a jurisdictional ruling. Those attempts not only contradict the plain language of that opinion, but they also overlook Second Circuit case law that has specifically rejected analogous efforts to recast federal common law as a standalone exception to the well-pleaded complaint rule. Instead, the Court should follow the

[3] On this point, the panel was unanimous. *See id.* at 150 (Sacks, J., concurring) (noting that federal common law would give rise to subject-matter jurisdiction only "if th[e] litigant's well-pleaded complaint arises under federal law"); *id.* at 154 (Raggi, J., dissenting) (agreeing that, where a "complaint pleaded claims under only state law," "federal common law . . . was not a ground for the removal of those state claims to federal court").

"fleet" of climate-deception cases holding that "federal preemption does not give rise to a federal question for purposes of removal." *City of New York*, 993 F.3d at 94.

POINT II

CITY OF NEW YORK'S ORDINARY PREEMPTION ANALYSIS DOES NOT APPLY TO HOBOKEN'S DECEPTION-BASED CLAIMS.

Even if *City of New York* were somehow relevant to the Court's jurisdictional analysis, that decision's preemption inquiry has no application to Hoboken's claims for climate-related deception. By its terms and its logic, *City of New York's* ordinary-preemption holding applies to one and only one type of claim: those that "regulate cross-border emissions" by imposing what the Second Circuit characterized as "strict liability" on the "lawful" production, promotion, and sale of fossil fuels. 993 F.3d at 87, 93 (cleaned up). Nothing in that decision suggests that federal common law preempts and replaces Hoboken's state-law claims, all of which target "Defendants' campaign of deception." Opp. 37. In fact, under *City of New York*'s own reasoning, Hoboken's deception-based claims do not—and cannot—regulate emissions of any sort.

In its opening appellate brief in *City of New York*, the City made clear that its "particular theory of the claims" (1) sought to hold the defendants liable for "lawful economic activity," (2) "assume[d]" that defendants' activity "ha[d]

substantial social utility," and (3) did not require any proof that the defendants' conduct was "unreasonable" or violated any "standard of conduct." Opening Brief for Appellant at 19, 49, Dkt. 89, *City of New York v. Chevron Corp.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8. 2018). On reply, the City reaffirmed that the defendants' liability "turn[ed] on the extent of harm suffered, rather than the failure to satisfy a prescribed duty." Reply Brief for Appellant at 8, Dkt. 213, *City of New York v. Chevron Corp.*, No. 18-2188, 2019 WL 1380028 (2d Cir. Mar. 25, 2019).

The Second Circuit, in turn, analyzed whether federal common law preempted *that* particular theory of liability. In keeping with the City's representations to the court, the panel emphasized that the lawsuit targeted "lawful commercial activity," and that the complaint did "not concern itself with aspects of fossil fuel production and sale that are unrelated to emissions." *City of New York*, 993 F.3d at 87, 97 (cleaned up). Based on that understanding, the Second Circuit reasoned that the lawsuit "effectively impose[d] strict liability for the damages caused by fossil fuel emissions." *Id.* at 93. The defendants would therefore need to "cease global production [of fossil fuels] altogether" if they "want[ed] to avoid all liability." *Id.* And because the threat of "ongoing liability" would "no doubt compel the [defendants] to develop new means of pollution control," the court concluded that the City's lawsuit "would regulate cross-border emissions in an indirect and roundabout manner." *Id.* (cleaned up).

That conclusion was the linchpin of *City of New York's* preemption analysis. Indeed, the court said as much, observing that the defendants' preemption defenses "demand[ed] at the outset" that the court determine whether the "the City's lawsuit . . . [was] a clash overregulating worldwide greenhouse gas emissions and slowing global climate change." *Id.* at 90–91. Had the court *not* held that the City's claims "operate[d] as a *de facto* regulation on greenhouse gas emissions," *id.* at 96, its preemption holding would have marked a notable departure from precedent, as the Supreme Court has only applied the federal common law of interstate pollution to lawsuits that have the purpose and effect of regulating cross-border pollution.[4]

None of that the Second Circuit's reasoning supports applying federal common law to Hoboken's state-law claims for injuries caused by deceptive commercial activity. Hoboken does *not* seek to hold Appellants' "strict[ly] liable"

[4] *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 419 (2011) (seeking "injunctive relief" that would "require[e] each defendant to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade" (cleaned up)); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 311 (1981) (seeking an order requiring "petitioners to eliminate all overflows and to achieve specified effluent limitations on treated sewage"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (same); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (seeking "an injunction" that would "restrain[] the city from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches"); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (seeking to "permanently enjoin[]" defendant from "discharging . . . sewage" into the New York harbor); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (seeking "to enjoin the defendant copper companies from discharging noxious gas"); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (seeking "to restrain the discharge of . . . sewage"); *see also North Dakota v. Minnesota*, 263 U.S. 365, 371–72 (1923) (seeking "an order enjoining the continued use of [certain] ditches" that were causing floods in neighboring state).

for harms caused by "lawful commercial activity." *City of New York,* 993 F.3d at 87, 93 (cleaned up). Rather Hoboken's "theory of liability" is that "[Appellants'] unlawful deceptions drove the increased production, marketing, and sale of fossil fuels that injured Hoboken." Opp. 36–37. As a result, Appellants would *not* need to cease their "global production [of fossil fuels] altogether" to avoid "all liability" under Hoboken's complaint. *City of New York,* 993 F.3d at 93. In fact, they would not need to reduce production at all. Appellants could eliminate any ongoing liability by simply stopping "the deceptions about climate change that are at the heart of [Hoboken's] Complaint." Opp. 40. Under *City of New York*'s own logic, then, Hoboken's climate-deception lawsuit cannot "regulate cross-border emissions." *City of New York*, 993 F.3d at 93.[5] *Id.* It therefore falls far outside any recognized body of federal common law.

[5] Appellants suggest that *City of New York* applies to Hoboken's deception-based theory of liability because the Second Circuit noted, in the *background section* of its opinion, that the defendants "downplayed the risks" of their fossil-fuel products. *City of New York*, 993 F.3d at 86–87. But judicial opinions do not resolve "[q]uestions which merely lurk in the record." *Polansky v. Exec. Health Res. Inc*, 17 F.4th 376, 385 n.9 (3d Cir. 2021). And they offer no insight into questions that they do not "squarely address[]." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). Nowhere in *City of New York's* preemption analysis did the panel mention the fossil-fuel companies' deceptive conduct. *See* 993 F.3d at 89–103. Instead, that analysis started from the premise that the City sought to hold the defendants "strict[ly] liabl[e] for the damages caused by fossil fuel emissions." *City of New York*, 993 F.3d at 93. Accordingly, nothing in that opinion supports preempting Hoboken's deception-based claims.

POINT III

STATE COURTS ARE COMPETENT TO ADJUDICATE APPELLANTS' FEDERAL PREEMPTION DEFENSES.

Ultimately it is for New Jersey state courts—not federal courts—to decide in the first instance whether federal common law preempts Hoboken's state-law claims, subject to final review by the United States Supreme Court. That allocation of decisional authority is not a mere formality; instead, it reflects the constitutional "divi[sion of] powers between the national government and the states." *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 400 (3d Cir. 2021).

As the Supreme Court has reaffirmed "time and again," federal courts must "give due regard to the rightful independence of state governments—and more particularly, to the power of the States to provide for the determination of controversies in their courts." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 (2016) (cleaned up). This longstanding "respect for state courts" has manifested itself in "a deeply felt and traditional reluctance to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." *Id.* at 389–90 (cleaned up). And it has laid the foundations for "[o]ur system of 'cooperative judicial federalism,' [which] presumes [that] federal and state courts alike are competent to apply federal and state law." *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020).

Those federalism concerns are heightened where, as here, the preemption of state law is at stake. That is because state-law preemption "represents 'a serious intrusion into state sovereignty.'" *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019) (Gorsuch, J.) (leading opinion). Accordingly, federal courts must tread with particular care when a defendant attempts to remove state-law claims on the basis of "preemption-like arguments." *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 165 n.4 (3d Cir. 2014), *aff'd*, 578 U.S. 374 (2016). Accepting such an argument would, after all, necessarily extinguish substantive state law. *See Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) (determining whether state law is preempted is "a serious obligation, and not something that federal courts may easily take for themselves" on a motion to remand).

In keeping with these foundational rules of federalism, this Circuit has held that the preemptive effects of federal law create arising-under jurisdiction only when they satisfy the strict requirements of the complete-preemption doctrine. *See Goepel*, 36 F.3d at 312 (identifying complete preemption "as the only basis for recharacterizing a state law claim as a federal claim removable to a district court"). "Complete preemption is rare." *Maglioli*, 16 F.4th at 408. And as Hoboken aptly explains in its appellate brief, Appellants do not—and cannot—avail themselves of that narrow exception to the well-pleaded complaint rule. Opp. at 16 n.3. "[A]bsent

complete preemption," however, state courts "*must* be permitted" to "determine whether state law has been preempted by federal law." *Goepel*, 36 F.3d at 316 (emphasis added) (cleaned up). This bedrock principle of federalism does not admit any exceptions for lawsuits against multinational corporations or for cases that touch upon issues relating to global warming. *Cf. Maglioli*, 16 F.4th at 400 ("There is no COVID-19 exception to federalism.").

This Court should therefore affirm the remand of Hoboken's state-law claims to New Jersey state court, which has full competence to adjudicate fairly any federal-common-law preemption defenses that Appellants might raise.

POINT III

APPELLANTS' FEDERAL-COMMON-LAW THEORY OF REMOVAL WOULD UNDERMINE THE ROLE OF MUNICIPALITIES IN EFFECTUATING PUBLIC POLICY.

Cities, no less than any other plaintiff, have an interest in bringing their claims in the forum of their choosing. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This interest is, if anything, heightened by the fact that municipalities are important actors in administering and enforcing their own ordinances and state consumer protection laws—as the City is currently doing in its own consumer

protection lawsuit against many of the same defendants in the present case.[6] Cities are political subdivisions of their states, and promote municipal and state public welfare objectives, both through their administrative apparatus, and where necessary, through litigation. Furthermore, cities litigate to defend their own considerable proprietary interests.

Appellants seek to expand the "complete preemption" doctrine and apply novel readings of other limited exceptions to the well-pleaded complaint rule. The effect would be to allow their federal preemption defense to deprive the municipality of its right to "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. It may be true that Hoboken, like the plaintiffs in *Caterpillar*, "could have brought suit under [a federal cause of action]. As master[] of the complaint, however, [it] chose not to do so." *Id.* at 395. Appellants' arguments would undermine the well-pleaded complaint rule, and in so doing, make it more difficult for municipalities to defend their proprietary interests, and undermine the important role municipalities play in effectuating the policies demanded by their constituents and the states of which they are a part.

[6] *See City of New York v. Exxon Mobil Corporation et al.*, No. 451071/2021 (N.Y. Cnty. Sup. Ct. 2021). The defendants removed this case to the Southern District of New York (No. 21-cv-04807), which then stayed the matter pending appeal of an order by the District of Connecticut remanding another climate-deception case brought by the State of Connecticut.

CONCLUSION

This Court should affirm the District Court's order and decline to fashion a new jurisdictional rule of removability out of *City of New York*'s ordinary preemption analysis.

Dated: December 22, 2021

Respectfully submitted,

GEORGIA M. PESTANA
Corporation Counsel of the City of New York
Attorney for Amicus Curiae

/s/ Jamison Davies
JAMISON DAVIES
100 Church Street
New York, New York 10007
Tel: (212) 356-2490
Email: jdavies@law.nyc.gov
hmeltzer@law.nyc.gov
albaker@law.nyc.gov
ntaylor@law.nyc.gov

SHER EDLING LLP
Matthew K. Edling
Victor M. Sher
Katie H. Jones
Quentin C. Karpilow
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: matt@sheredling.com
vic@sheredling.com
katie@sheredling.com
quentin@sheredling.com
Attorneys for Amicus Curiae City of New York

CERTIFICATIONS

1. **Bar Membership.** I certify that the undersigned counsel is a member of good standing of the Bar of this Court.

2. **Word Count and Style**. This brief complies with Rule 29(a)(5) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,837 words, excluding the parts of the brief exempted by Rule 32(f). This brief also complies with Rule 32(a)(5) and Rule 32(a)(6) because it was prepared in a 14-point proportionally spaced font.

3. **Service.** I certify that on December 22, 2021, I electronically filed and served this brief on all parties via this Court's CM/ECF system.

4. **Local Rule 31.1(c).** I certify that the text of the electronic brief is identical to the text of the ten paper copies mailed to the Court. I further certify that the electronic brief was scanned with anti-virus software and that no virus was detected.

/s/ Jamison Davies
JAMISON DAVIES