21-1446-cv

In the United States Court of Appeals for the Second Circuit

STATE OF CONNECTICUT
BY ITS ATTORNEY GENERAL, WILLIAM M. TONG

Plaintiff-Appellee,

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
District of Connecticut
Case No. 20-cv-1555 (Hon. Janet C. Hall)

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Amicus Curiae Natural Resources Defense Council, Inc., certifies that it is a non-profit environmental and public health membership organization that has no publicly held corporate parents, affiliates, and/or subsidiaries.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) is a non-profit organization that works to protect public health and the environment. Since its founding in 1970, NRDC has worked to ensure enforcement of the Clean Air Act and other federal and state laws to address major environmental challenges.

Connecticut here alleges that Defendant engaged in deceptive and unfair business practices in violation of state law, including by making commercial statements with false claims of environmentally friendly practices and misrepresentations about established climate science. Defendant contends that enforcing this state law would impermissibly undermine federal authority to regulate interstate pollution. NRDC strongly disagrees. The State's unfair trade practice claims seek redress for deceptive conduct, not emissions regulation.[1]

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[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person or entity, other than amicus, has contributed money that was intended to fund preparing or submitting the brief.

NRDC submits this brief to explain why Defendant's theory of jurisdiction misapprehends the nature of federal emissions regulation. The Clean Air Act, not historical federal common law, is the substantive source of federal emissions law. The Act sets a nationwide baseline for addressing air pollution and provides some federal remedies. But the Act does not relieve states of the responsibility to protect the health and welfare of their residents. NRDC has defended diverse state laws against challenges that they interfere with federal authority. *E.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018) (upholding Oregon clean fuels program from preemption challenges).

Action on climate change is urgently needed on many fronts. NRDC works extensively at the state and local level to help deploy a broad range of effective legal, policy, and technology tools to combat climate pollution. From the multi-state Regional Greenhouse Gas Initiative that reduces power sector carbon dioxide emissions; to requirements for utilities to supply electricity from renewable sources; to mandates for electric vehicles; to building efficiency codes, enforcing state law is an effective means to help society transition to an energy system that will not harm the climate that sustains us.

SUMMARY OF ARGUMENT

Connecticut's claims do not arise under federal environmental common law. Defendant invokes "constitutional structure" to argue the contrary—but that is a red herring. Neither removal nor district court subject matter jurisdiction are provided for in the Constitution. Both are entirely creations of statute, and these statutes do not authorize removal on Defendant's environmental common law theory.

Defendant's theory is foreclosed by authoritative construction of the phrase "arising under" in the federal-question jurisdiction statute, 28 U.S.C. § 1331. For Connecticut's action here to "arise under" federal environmental common law, "[a] right or immunity created by [federal environmental common law] must be an element, and an essential one, of [the State's] cause of action." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10–11 (1983) (citation omitted). But Defendant nowhere identifies a federal common law right that is an essential element of a Connecticut Unfair Trade Practices Act ("CUTPA") claim. Nor could it. The common law it points to does not address unfair trade conduct, and, regardless, that body of law has been displaced by the Clean Air Act and is no longer an operative source of federal rights.

Defendant instead argues that the State's CUTPA claims are "governed by" federal environmental common law, and points to cases like *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), for the proposition that "governed by" and "arising under" are the same thing. But those cases say nothing of the sort. None of them even addressed whether federal-question jurisdiction would lie over an action pleading only state-law causes of action.

In *City of New York v. Chevron Corp.*, this Court equated an indistinguishable "governed by" argument to an ordinary preemption argument. 993 F.3d 81, 91–94 (2021). Defendant avoids describing their argument here as a preemption argument, but it nowhere explains what more than preemption is required under their theory. And it is settled that more than preemption is necessary for removal. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). The "more" that is required is "complete preemption," which requires that federal law also provide a substitute federal *cause of action*. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8–11 (2003). Defendant does not—and could not—identify a federal environmental common law cause of action that exists to create jurisdiction to remove the State's CUTPA action.

ARGUMENT

Connecticut sued in state court. Defendant may remove the action to federal district court if that court would have original jurisdiction over the action. 28 U.S.C. § 1441(a). Such jurisdiction includes civil actions "arising under" federal law. *Id.* § 1331. Although this language tracks the language of Article III, and "the constitutional meaning of 'arising under' may extend to all cases in which a federal question is an ingredient of the action," the Supreme Court "ha[s] long construed the statutory grant of federal-question jurisdiction as conferring a more limited power." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (citation omitted).

For statutory purposes, the "presence or absence of federal-question jurisdiction" depends on the plaintiff's chosen cause of action. *Caterpillar*, 482 U.S. at 392. Because the State here claims rights of action under state statute, the action does not arise under federal law except in specific narrow circumstances. *See Gunn v. Minton*, 568 U.S. 251, 257–58 (2013) ("*Grable*" jurisdiction); *Beneficial Nat'l Bank*, 539 U.S. at 8 ("complete preemption"); *see also Fracasse v. People's United*

Bank, 747 F.3d 141, 144 (2d Cir. 2014). These rules are well settled. Defendant has not shown they are met.

Importantly, the rules do not change if this case is characterized, as Defendant would have it, as "premised on transboundary pollution," Br. at 20, and not "statements in [Defendant's] marketing materials," Br. at 22. The same statutory "arising under" standard applies to all removal based on Section 1331. As explained below, none of Defendant's "transboundary pollution" cases show that Connecticut's CUTPA claims arise under federal law, because none of those cases involved federal-question jurisdiction over a complaint pleading only state-law claims. And precedents that *do* involve that issue have established requirements for removal that Defendant's theory does not meet.

I. Defendant's Environmental Common Law Removal Theory Is Unprecedented.

Defendant's primary theory of federal-question jurisdiction is that "claims seeking redress for interstate pollution are governed exclusively by federal common law," and, therefore, must "necessarily arise under federal law." Br. at 13. Yet even accepting the premise, *but see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497–500 (1987), that conclusion does not follow—and none of the "interstate pollution" cases Defendant

cites in support even addressed whether a state-law action can arise under federal common law, "necessarily" or otherwise. *See* Br. at 13–26. To be sure, the Supreme Court once recognized the availability of federal causes of action under federal environmental common law. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 309 (1981) ("*Milwaukee II*"). But contrary to Defendant's suggestion, Br. at 14, those cases did not hold that state-law actions *arise* under federal law if they may ultimately be resolved by a federal common law "rule of decision." None of those cases addressed whether federal-question jurisdiction would lie over a state-created cause of action because the question was irrelevant: federal jurisdiction was already grounded elsewhere.

For example, in *Georgia v. Tennessee Copper Co.*, Br. at 15, plaintiff Georgia invoked the Supreme Court's original jurisdiction—not a district court's federal-question jurisdiction. 206 U.S. 230 (1907). *Milwaukee I*, upon which Defendant heavily relies, *e.g.* Br. at 5, 14–15, 19, 24, was also an original action in the Supreme Court. 406 U.S. at 93 ("This is a motion by Illinois to file a bill of complaint under our original jurisdiction . . . ."). The Supreme Court declined to exercise its original jurisdiction, however, because the dispute was not between two States

and "Illinois could appeal to federal common law" in "an action in federal district court." *See Milwaukee II*, 451 U.S. at 309. So, Illinois did just that, *id.* at 310, and jurisdiction lay in the district court because Illinois' complaint pled a federal common law cause of action, *id.* ("Illinois filed a complaint in [district court] seeking abatement, under federal common law . . . ."). The *Milwaukee* cases do not hold—and had no reason to hold—that an action by Illinois appealing only to *state* law could have been removed to federal court.

Whether or not the Supreme Court "applied" a federal "rule of decision" to resolve Georgia's claim in *Tennessee Copper Co.*, Br. at 15, or discussed considerations for applying federal over state law in *Milwaukee I*, Br. at 14–15, is beside the point. Jurisdiction was grounded on the nature of the parties, not on the source of the plaintiff's environmental rights in dispute. Once a federal court *has* jurisdiction, it may need to then conduct a "choice-of-law" analysis to determine whether state or federal law (including federal common law) will apply to "determine the merits of the controversy." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006). But the need to perform a "choice-of-law" analysis in the face of potential conflict

between state and federal law is not itself a *source* of federal-question jurisdiction. *Cf. Franchise Tax Bd.*, 463 U.S. at 12 ("By unimpeachable authority, a suit brought upon state statute does not arise under [federal law] because prohibited thereby.") (citation omitted).

Defendant's remaining environmental cases, Br. at 15–16, 23, do not help them either, because, again, those courts were not addressing whether a state cause of action arose under federal law to create federal-question jurisdiction. Jurisdiction in *International Paper Co. v. Ouellette* was grounded on diversity, 479 U.S. at 500, and the plaintiffs in *American Electric Power Co. v. Connecticut* pled a federal common law cause, 564 U.S. 410, 418 (2011) ("*AEP*").[2]

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[2] Defendant's non-environmental cases are even further afield, and almost all involved jurisdiction grounded on something other than a state cause arising under federal law. For example, federal jurisdiction in *United States v. Standard Oil Co.* was solidly grounded because the United States was the plaintiff. 332 U.S. 301 (1947); *see Empire Healthchoice*, 547 U.S. at 691. *See also, e.g.*, *Kansas v. Colorado*, 206 U.S. 46, 47 (1907) (Supreme Court original jurisdiction); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 848–53 (1985) (federal court action alleging federal right of protection from tribal jurisdiction); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632–33 (1981) (federal court action alleging federal right of contribution under federal statute); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485,

In this regard, Defendant's reliance throughout on *City of New York* is particularly misplaced, as this Court went out of its way to explain the different standard applicable to removal: because the diversity of the parties there created jurisdiction, the Court was "free to consider the [defendants'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." 993 F.3d at 94. *City of New York* thus did not address whether plaintiff's claims arose under federal law so as to create jurisdiction for removal.

Finally, Defendant's reliance on *Native Village of Kivalina v. ExxonMobil Corp.*, Br. at 19, is likewise misplaced, because the plaintiff there pled a federal cause. 696 F.3d 849, 853 (9th Cir. 2012). Defendant tellingly ignores the Ninth Circuit's more recent decision in *City of Oakland v. BP plc*, which rejected a federal environmental common law removal theory like the one Defendant advances here. 969 F.3d 895, 908 (9th Cir. 2020), *cert. denied*, No. 20-1089 (U.S. June 14, 2021).

1491 (2019) (certiorari to state court); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 587–89 (2012) (same); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563–68 (1996) (same); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 100–01 & n.3 (1938) (same).

II. Defendant's Environmental Common Law Removal Theory Misapprehends the Source of Federal Air Quality Rights.

The Supreme Court "has repeatedly held that, in order for a claim to arise under the Constitution, laws, or treaties of the United States, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (citations omitted); *see, e.g.*, *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998); *Franchise Tax Bd.*, 463 U.S. at 10–11; *Pan Am. Petroleum Corp. v. Superior Ct. of Del.*, 366 U.S. 656, 663 (1961). Defendant nowhere specifies a federal environmental common law right that is essential for the State to prove for any of its CUTPA claims. *See* Conn. Gen. Stat. §§ 42-110a – 42-110q. Nor could it. As explained below, even were this an "interstate pollution" action, Br. at 13, the relevant source of federal rights—if any—would be the Clean Air Act, *AEP*, 564 U.S. at 423, 429, not federal common law.

a. Congressional legislation defines the substance of federal law to the exclusion of federal common law.

Before enactment of the major federal environmental statutes, federal courts adjudicated some pollution cases by resort to a federal

common law of nuisance. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Tennessee Copper Co.*, 206 U.S. at 237; *Milwaukee I*, 406 U.S. at 103. The courts foresaw, however, that this federal common law would be replaced by federal statutes: "It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Milwaukee I*, 406 U.S. at 107.

Those new federal laws arrived in the 1970s in the form of major updates to the Clean Water Act and the Clean Air Act.[3] The Supreme Court subsequently revisited the availability of federal common law nuisance claims for water pollution in light of the Clean Water Act. In *Milwaukee II*, the Court explained that federal common law is only "a necessary expedient," "subject to the paramount authority of Congress," "and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. at 313–14 (quotations omitted). In updating the Act, Congress "ha[d] not left the

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[3] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, *codified as amended at* 33 U.S.C. §§ 1251 *et seq*. (Clean Water Act); Pub. L. 91-604 (Dec. 31, 1970), 84 Stat. 1676, *codified as amended at* 42 U.S.C. §§ 7401 *et seq*. (Clean Air Act).

formulation of appropriate federal standards to the courts," but rather had adequately "occupied the field" so as to "supplant federal common law." *Id.* at 317. Under *Milwaukee II*, then, legislation does not add a layer of federal statutory law on top of existing federal common law. Instead, the new statute defines the substance of federal law and the federal common law on that subject ceases to exist.

Milwaukee II presaged the extinction of most federal common law regarding interstate pollution. Statutes would replace judicially-created federal rights with congressionally-enacted federal rights. Importantly, however, and as discussed below, statutory displacement of federal common law does not simultaneously extinguish *state* law. *See Ouellette*, 479 U.S. at 489, 491; *AEP*, 564 U.S. at 429.

b. The Clean Air Act defines the substance of federal law concerning air pollution.

Just as the Clean Water Act supplanted the federal common law for water pollution, so too did the Clean Air Act supplant the federal common law of nuisance for air pollution. In *AEP*, eight States sued major power companies in federal court, alleging that defendants' emissions contributed to global warming and thereby unreasonably interfered with public rights. 564 U.S. at 418. Plaintiffs sought an

injunction setting emissions caps for each defendant under federal common law and, in the alternative, state tort law. *Id.* at 418–19.

The case eventually reached the Supreme Court. This Court had ruled that federal common law "governed" these claims, *id.* at 419, 429, and the Supreme Court granted certiorari to address whether plaintiffs "can maintain federal common law public nuisance claims against carbon-dioxide emitters," *id.* at 415. The parties disputed the historic scope of federal common law rights, but the Court found that passage of the Clean Air Act had rendered that dispute "academic." *Id.* at 423. That was because "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id.* at 424.

Importantly, the Court held that displacement turned on the congressional decision to legislate in this area, and not on the content of federal rights that Congress provided. *Id.* at 426. Congress had not directly established a federal right to seek abatement—it had delegated authority to EPA to set a standard that would trigger federal rights. *Id.* But, the Court concluded, even if EPA declined to set a standard, "courts would have no warrant to employ the federal common law." *Id.*

In other words, even if federal common law historically provided federal rights, Congress can displace that common law without being bound to preserve those historical rights in federal law. The Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313 (quotations omitted). That paramount authority would be hollow unless Congress could reject prior judicially-created federal rights. Congress instead has the power to "strike a different accommodation" than that recognized under federal common law, *AEP*, 564 U.S. at 422, including *contracting* the scope of rights under federal law. Under *AEP*, as under *Milwaukee II*, federal legislation does not coexist with prior federal common law. The Clean Air Act now defines the substance of federal law to the exclusion of federal common law. *See City of New York*, 993 F.3d at 95–96; *Kivalina*, 696 F.3d at 857 (the Clean Air Act "extinguished" "any previously available federal common law action" within its field). At bottom, and as discussed further below, Defendant's removal theory fails because Defendant has not shown the existence of any substantive federal environmental common law right on which Connecticut could theoretically have grounded this action.

Importantly, although federal statutes and federal common law do not coexist once "Congress speaks directly" on a question, *City of New York*, 993 F.3d at 89, state law can coexist on that question if Congress has not chosen to preempt it, *see Ouellette*, 479 U.S. at 489, 491; *AEP*, 564 U.S. at 429 ("In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act."). A federal statute can readily displace federal common law while not preempting state law, because the effect of the statute on each is evaluated under different standards, and the test for preempting state law is significantly more stringent. *AEP*, 564 U.S. at 423–24; *Milwaukee II*, 451 U.S. at 316, 317 n.9; *City of New York*, 993 F.3d at 95.

III. Defendant's Environmental Common Law Removal Theory Conflicts with Controlling Removal Law.

Both removal and district court subject matter jurisdiction are creations of statute. *Gunn*, 568 U.S. at 256–58; *Home Depot U.S.A. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). Controlling interpretations of these statutes, 28 U.S.C. §§ 1331, 1441, establish defined legal requirements for removal. Defendant's theory does not meet them.

This Court, and many others, have recognized that theories like Defendant's environmental common law theory sound in preemption. *See, e.g.*, *City of New York*, 993 F.3d at 93–95; *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538, 555 (D. Md. 2019), *as amended* (June 20, 2019). But it is settled that more than preemption is required to create jurisdiction to remove state-law actions to federal court. *Caterpillar*, 482 U.S. at 393. The "more" that is required for removal jurisdiction is "complete preemption." *Id.*

Defendant does not make a complete preemption argument for federal environmental common law, presumably because it cannot establish the stringent requirements. *See Beneficial Nat'l Bank*, 539 U.S. at 8–11. But Defendant does not explain how jurisdiction can be had for less. As explained below, the reasons why complete preemption can create jurisdiction, where ordinary preemption cannot, demonstrate why Defendant's theory is insufficient to create jurisdiction. As also explained below, Defendant's theory likewise fails any alternative test for meeting the statutory "arising under" standard. The *Grable* test cannot be met: No substantial interpretation of the federal

environmental common law Defendant relies on could possibility be at issue here, as that body of law has been displaced by the Clean Air Act. And even assuming precedent does not foreclose an "artful pleading" test with distinct scope, Br. at 27, Defendant has not shown that any provision of federal common law exists to artfully plead around.

a. Preemption-based "arising under" theories of removal require a federal cause of action.

State law is enforceable unless preempted due to a conflict with an identifiable provision of federal law. *Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1479–80 (2018); *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("There is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it."). But preemption alone does not convert a state law cause of action into one "arising under" federal law for jurisdictional purposes. *Beneficial Nat'l Bank*, 539 U.S. at 9. To create jurisdiction, the preempting federal law must additionally provide an *exclusive* substitute federal *cause of action* that encompasses the state law claim. *Id.* at 8–11; *City of Rome v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 178 (2d Cir. 2004).

Complete preemption likely requires the federal cause of action be *statutory*. *Cf. Beneficial Nat'l Bank*, 539 U.S. at 8. But even if federal common law could theoretically supply one for jurisdictional purposes, the only potential source of a federal cause for Defendant's theory—pre-Clean Air Act federal common law—no longer exists, *AEP*, 564 U.S. at 423, and Defendant does not identify any federal environmental common law cause of action that does. As this Court concluded in *City of New York*, under *AEP* a federal statute displaces federal common law rights *in toto*: "fundamentally, . . . displacement of a federal common law claim is an all-or-nothing proposition, which does not depend on the remedy sought." 993 F.3d at 96. Without an available federal common law cause of action, jurisdictional complete preemption cannot exist.[4]

[4] After *AEP*, it is not clear that a federal district court would have federal-question jurisdiction even over a complaint that expressly pleaded a federal common law cause of action on transboundary air pollution. Although a federal district court may have jurisdiction under 28 U.S.C. § 1331 to determine that a pleaded federal cause ultimately lacks merit, it does not have jurisdiction over a cause "foreclosed by prior decisions of [the Supreme] Court," because there is no "federal controversy" as to the existence of the foreclosed cause. *See Oneida Indian Nation of N. Y. State v. County of Oneida*, 414 U.S. 661, 666–67 (1974).

Indeed, in another case that Defendant argued was a "quintessential" transboundary pollution suit, it there argued that actually "the Clean Air Act . . . 'provide[s] the exclusive cause of action for the claim asserted.'" Defs. Corr. Joint Opp. to Mot. to Remand at 7, 25, *City of Oakland v. BP p.l.c.*, No. 17-cv-6011 (quoting *Beneficial Nat'l Bank*, 539 U.S. at 8). Defendant was wrong there too, but because the Clean Air Act displaced the federal common law cause of action on transboundary air pollution, *see City of New York*, 993 F.3d at 96, the Act would be the logical place to look for a cause of action that might completely preempt state law claims. And yet Defendant does not make a serious argument for removal via the Clean Air Act here, *cf.* Br. at 31 (citing only a purpose provision of the Act), presumably because such an argument is futile. The Act's citizen suit cause of action for violations of EPA standards or orders is facially inapplicable to the deceptive trade conduct regulated by CUTPA, *see* 42 U.S.C. § 7604(a), but, regardless, that cause is explicitly *non*-exclusive, *id.* § 7604(e) ("Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief . . . .").

In short, to create federal jurisdiction out of conflict with federal law, federal law must provide an exclusive substitute cause of action. *See City of Rome*, 362 F.3d at 177–78. Defendant relies on non-removal cases to require less for their theory, but it does not explain how that can be consistent with requirements from controlling removal cases.

b. Federal environmental common law does not create *Grable* jurisdiction over CUTPA claims.

Defendant alternatively suggests that the State's CUTPA claims arise under federal environmental common law because the requirements for *Grable* jurisdiction are met. Br. at 30. This argument fails because a core condition of *Grable* jurisdiction—a "substantial" question of federal law, *Gunn*, 568 U.S. at 258—is plainly absent here with respect to federal environmental common law. Defendant relies on the federal common law of interstate pollution discussed in *AEP*, Br. at 15–16, but *AEP* itself held that disputes about that historical body of law present "academic question[s]" because that law has been displaced by the Clean Air Act. 564 U.S. at 423. Defendant does not explain how "academic questions" can be "substantial" for *Grable* purposes. *Cf. Gunn*, 568 U.S. at 261 ("hypothetical" questions are not substantial for *Grable* purposes).

In support of *Grable* jurisdiction Defendant also cites, without elaboration, a purpose provision of the Clean Air Act. Br. at 31. But that provision "encourage[s]" certain State and local actions, *see* 42 U.S.C. § 7401(c), and it is unclear what support Defendant seeks from it. Regardless, it is plain that any question about the meaning of a non-operative statutory purpose provision is not "substantial" under *Grable*, *see Empire Healthchoice*, 547 U.S. at 700, or, for that matter, "necessarily raised" or "actually disputed" here, *see Gunn*, 568 U.S. at 258 (explaining other requirements for *Grable* jurisdiction).

c. Defendant has not shown any federal environmental common law right exists to "artfully plead" around.

Finally, the "artful-pleading doctrine" is not, as Defendant suggests, an ad hoc inquiry into the "real" nature of a plaintiff's complaint. Br. at 27. Defendant offers no standard to guide such an inquiry, and the Supreme Court has bluntly rejected similar proposals because it had "no idea how a court would make that judgment." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 392–93 (2016). "Jurisdictional tests are built for more than a single dispute," and "a tortuous inquiry into artful pleading" is inconsistent with controlling interpretations of Section 1331. *Id.*

Defendant suggests that the outer bound of the doctrine is "not entirely clear," Br. at 29, but it cites no precedent applying the doctrine in the way it urges this Court to, or indeed any controlling precedent applying the doctrine independently of established tests for determining "arising under" jurisdiction. *See Romano v. Kazacos*, 609 F.3d 512, 519 (2d Cir. 2010); *see also Rivet*, 522 U.S. at 475; *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1019 (2d Cir. 2014) ("At issue in this case is whether [plaintiff's] state law claims fall within [*Grable*].").

Regardless, Defendant's argument fails on its own terms. Invoking artful pleading implies that the State had a federal common law right of action available to it and declined to plead it. Yet it is "beyond cavil" that pre-Clean Air Act federal environmental common law rights no longer exist in the field of that Act, *see City of New York*, 993 F.3d at 95–98, and Defendant does not identify any other federal common law right available to the State. Defendant contends nevertheless that the State's claims are "ultimately premised on transboundary pollution," Br. at 20, but, put simply: "It is illogical to say that [a] litigant's claim is really predicated on a body of law which grants him no rights." *Long Island R. Co. v. United Transp. Union*, 484 F. Supp. 1290, 1293

(S.D.N.Y. 1980) (cleaned up). This is why federal preemption—which can bar exercise of state-law rights—does not give rise to Section 1331 jurisdiction unless the preempting federal law additionally grants a federal right on which to claim relief. *See Beneficial Nat'l Bank*, 539 U.S. at 9.

The State explains in its brief why its ability to obtain relief under CUTPA "has nothing to do with pollution." *E.g.* Appellee's Br. at 26–27, 29-33, 36–37. But even were this an action "premised on transboundary pollution," Br. at 20, Defendant has not shown—or even asserted—that the State could obtain any relief under federal environmental common law on its claims. *See City of New York*, 993 F.3d at 100–103. In such a circumstance, there is nothing jurisdictionally-relevant to artfully plead around: "[W]hen a defendant argues not only that federal law preempts the state law on which a plaintiff relies but also that federal law provides no relief on the facts the plaintiff has alleged[, in] such circumstances, federal law is interposed solely as a defense, and removal jurisdiction will not lie." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986). Just so here. *See also Rivet*, 522 U.S. at 472, 475, 477–478.

CONCLUSION

The Court should affirm the district court's order remanding this case to state court.

Dated: November 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that:

This brief complies with Local Rule 29.1(c)'s type-volume limitation because it contains 5,024 words (as determined by the Microsoft Word word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the Office 365 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Pete Huffman
Pete Huffman

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2021, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Pete Huffman
Pete Huffman