No. 21-2728

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CITY OF HOBOKEN,
Plaintiff/Appellee,

v.

EXXON MOBIL CORP., *et al.*,
Defendants/Appellants.

On Appeal from the United States District Court for the
District of New Jersey, No. 20-cv-14243,
The Honorable John Michael Vazquez, Judge

AMICUS BRIEF OF INDIANA AND 15 OTHER STATES IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of the defendant energy producers. Federal law entitles defendants to remove this case to federal court and thereby prevent a state court from resolving a common-law claim expressly premised on *global* climate change. *Amici* States urge this Court to reverse the district court's remand order and thus ensure that one State's courts cannot dictate global climate change policy to the rest of the country.

SUMMARY OF THE ARGUMENT

In this case, the City of Hoboken, New Jersey seeks judicial resolution of one of the most complicated and contentious issues confronting policymakers today—global climate change. It seeks abatement of injuries it claims are caused by global climate change, which it in turn argues is caused by greenhouse gases emitted by countless entities around the world. *See* JA Vol. I at 17. Yet in this suit, the City takes aim at just a handful of companies: It contends that these companies, by producing

fossil fuels and promoting their use, have broken the law—but not law enacted by a legislature, promulgated by an agency, or negotiated by a president. Rather, the law the City invokes is the common law: It claims the production and promotion of fossil fuels constitutes a common-law "public nuisance" such that courts may impose on the defendant energy producers all the costs of remedying its alleged climate-change injuries. JA Vol. I at 19. Federal law gives defendants a right to have this expansive claim heard by a *federal* court.

For more than 230 years, federal law has, in certain circumstances, "grant[ed] defendants a right to a federal forum." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005). Today, the general removal statute, 28 U.S.C. § 1441, entitles a defendant to remove a case filed in state court if the state-court "action could have been brought originally in federal court"—such as when the case "raises claims arising under federal law" under the federal-question statute. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019).

Here the defendant energy producers were entitled to remove the case because the City's common-law public-nuisance claim arises under federal law. The Supreme Court has long held that federal common law

must govern common-law claims concerning interstate pollution, *see Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972), and the City's claim pertains not merely to *interstate* air pollution but to *international* air pollution: It asks courts to craft rules of decision assigning liability for global climate change—an incredibly complex, value-laden question that affects every State and every citizen in the country. The claim thus *necessarily* arises under federal common law, and the City cannot evade federal-court jurisdiction by merely affixing a state-law label to what is in truth a federal-law claim.

The district court's contrary conclusion not only contravenes binding precedent, but also threatens to give New Jersey state courts the power to set climate-change policy for the entire country. Such a result excludes other States from the climate-change policymaking process and threatens to undermine the cooperative federalism model our country has long used to address environmental problems. This Court should reject this outcome and reverse the decision below.

ARGUMENT

I. Federal Law Must Govern Any Common-Law Claims to Abate Global Climate Change

1. In *Erie Railroad Co. v. Tompkins*, the Supreme Court recognized that federal courts have no power to supplant state common law with "federal *general* common law," 304 U.S. 64, 78 (1938) (emphasis added). The Court soon made it clear, however, that this principle does not prevent *specialized* federal common law from exclusively governing areas that implicate unique federal interests. "[I]n an opinion handed down the same day as *Erie* and by the same author, Mr. Justice Brandeis, the Court declared, 'For whether the water of an interstate stream must be apportioned between the two States is a question of federal common law.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (quoting *Hinderlider v. La Plata River Co.*, 304 U.S. 92, 110 (1938)).

Indeed, less than five years after *Erie*, the Court issued its seminal decision in *Clearfield Trust Co. v. United States*, holding that federal common law governs the "rights and duties of the United States on commercial paper which it issues." 318 U.S. 363, 366 (1943). And in the nearly eighty years since *Clearfield*, the Court has held that federal common law necessarily and exclusively governs disputes in numerous

other areas as well. *See, e.g.*, *Banco Nacional de Cuba,* 376 U.S. at 425–27 (holding, in light of "the potential dangers were Erie extended to legal problems affecting international relations," that "the scope of the act of state doctrine must be determined according to federal law"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (holding that the unique federal concerns pertaining to military procurement and the potential for significant conflicts with federal policy mean that federal common law, not state common law, must govern design-defect claims brought against manufacturers of military equipment).

Accordingly, the "clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law." Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) (quoting *Erie*, 304 U.S. at 78). And it is now firmly established that this specialized federal common law applies to the "few areas, involving 'uniquely federal interests,'" that "are so committed by the Constitution and laws of the United States to federal control" that they must be "governed exclusively by federal law." *Boyle*, 487

U.S. at 504 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

2. Of particular relevance here, for nearly half a century the Supreme Court has held that one area of "uniquely federal interest" to which federal common law must apply is *interstate pollution*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). In *Illinois*, the Court considered "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a) [the federal-question statute]." *Id.* at 99. And, crucially, the Court held "that it does." *Id.*

The Court explained that an earlier Tenth Circuit decision had "stated the controlling principle": "'the ecological rights of a State in the improper impairment of them from sources outside the State's own territory. . . [is] a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.'" *Id.* at 99–100 (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971)). The Court further analogized interstate-pollution disputes to those "concerning interstate waters," which *Hinderlider* more

than three decades prior had "'recognized as presenting federal questions.'" *Id.* at 105 (quoting *Hinderlider*, 304 U.S. at 110). The result: A common-law claim that arises from a dispute over interstate pollution implicates "an overriding federal interest in the need for a uniform rule of decision" and "touches basic interests of federalism," thereby conferring jurisdiction on federal courts to "fashion[] federal common law." *Id.* at 105 n.6 (citing *Banco Nacional de Cuba*, 376 U.S. at 421–27).

More recently, in *American Electric Power Co., Inc. v. Connecticut*, the Supreme Court again reiterated "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.'" 564 U.S. 410, 421 (2011) (quoting *Illinois*, 406 U.S. at 103). There the Court explained that specialized federal common law governs "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id.* (quoting Friendly, *supra*, at 408 n.119, 421–22). Because the "'national legislative power'" includes the power to adopt "environmental protection" laws addressing interstate pollution, federal courts can, "if necessary, even 'fashion federal law'" in this area. *Id.* (quoting Friendly, *supra*, at 421–22).

In sum, the Supreme Court has repeatedly held that federal common law governs disputes involving air in its "'ambient or interstate aspects.'" *Id.* at 421 (quoting *Illinois*, 406 U.S. at 103). Federal common law therefore must apply to the City's public-nuisance claim in this case. The City's public-nuisance claim plainly seeks redress for injuries allegedly caused by interstate air pollution. And because the City itself claims its injuries have been produced by a long chain of conduct—including conduct of third parties—that occurred all over the globe, the Court's reasons for employing federal common law in *Illinois* apply with even greater force here. Under *Illinois* and *American Electric Power*, if the complex and controversial policy questions underlying claims to abate global climate are going to be resolved by common-law adjudication at all, those defending against such claims are entitled to have federal courts resolve these claims by applying federal common law.

3. This case highlights precisely why the Supreme Court has held that in such areas of unique federal interest common-law rules must be articulated by federal courts. State courts have no business deciding how global climate change should be addressed and who—among the countless actors around the world whose conduct contributes to it—bears

legal responsibility for creating it. In addition to the obvious potential for gross unfairness, such state-court-created common-law rules would inevitably intrude upon the federal government's constitutional authority over foreign policy and "present a 'significant conflict' with federal policy" in this area. *Boyle*, 487 U.S. at 512. Among many other problems, state-common-law rules would undermine the regulatory authority States themselves have under carefully calibrated cooperative-federalism programs—programs that are administered by politically accountable officials at the federal, state, and local levels.

Making matters worse, the City is not alone in seeking judicial answers in state courts to the question of climate change. As the district court noted, numerous common-law public-nuisance claims have been filed throughout the United States. JA Vol. I at 20. Should the claims in these cases be left to state courts, at least some state courts are likely to be receptive. This will inevitably result in a patchwork of conflicting rules purporting to create liability for the same extraterritorial conduct.

Any worldwide allocation of responsibility for remediation of climate change requires national or international action, not ad hoc intervention by individual state courts acting at the behest of a handful of

state and local governments. It is for this exact reason that the Supreme Court long ago held that if plaintiffs are going to ask courts to give common-law answers to questions of interstate pollution, defendants have a right to ensure that any such courts are federal courts applying federal common law. *See Illinois*, 406 U.S. at 103.

II. Because the City's Public-Nuisance Claim Is Governed by Federal Common Law, It Necessarily Arises under Federal Law, and Removal Is Therefore Proper

"It is well settled" that the federal-question statute, 28 U.S.C. § 1331, confers jurisdiction over "'claims founded upon federal common law as well as those of a statutory origin.'" *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)). Accordingly, because the City's public nuisance claim necessarily arises under federal common law, this action "could have been brought originally in federal court" under Section 1331. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). And this in turn means "the general removal statute[] permits" the defendant energy producers "to remove that action to federal court." *Id.* at 1746.

1. The federal-question statute gives federal district courts "original jurisdiction" over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. And it is by now well-established that a "case 'arising under' federal common law presents a federal question and as such is within the original subject matter jurisdiction of the federal courts." 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4514 (3d ed. 2021); *see also, e.g., Nat'l Farmers Union*, 471 U.S. at 850. The Supreme Court has repeatedly applied this rule, including in *Illinois v. City of Milwaukee*: There it held that common-law claims that, as here, seek abatement of interstate pollution must be governed by federal common law and thus create "actions arising under the 'laws' of the United States within the meaning of § 1331(a)." 406 U.S. at 99.

2. Under these principles, the district court had jurisdiction over this case. The City's public-nuisance claim—rather than merely being subject to a federal-law defense—*necessarily arises* under federal common law. And the City cannot avoid this result—and thereby deprive federal courts of jurisdiction—simply by stamping its public-nuisance claim with a state-law label.

Of course, a plaintiff is generally "the master of the claim" and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Yet, "[a]llied as an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 22 (1983)). This means that the City cannot evade the reach of federal law or federal courts here by declaring unilaterally that its claims arise under state law: "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* In other words, "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum," and "occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n. 2 (1981) (quoting 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722 at 564–66 (1976)).

This understanding of the well-pleaded complaint rule is the foundation of the Supreme Court's decision in *Avco Corp. v. Aero Lodge No. 735*, which held that an action to enforce a provision of a collective bargaining agreement was "controlled by federal substantive law even though it is brought in a state court"—and was therefore removable to federal court—because the action necessarily arose under federal law. 390 U.S. 557, 560 (1968).

And several circuit courts have since applied this same reasoning to uphold removal of cases raising purportedly state-law claims that in truth arise under federal law. *See, e.g.*, *Caudill v. Blue Cross & Blue Shield of N. Carolina*, 999 F.2d 74, 79 (4th Cir. 1993) (holding that "federal jurisdiction existed over this [purportedly state-common-law breach-of-contract] claim and removal was proper" because the claim was necessarily governed by federal common law under *Boyle*); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926–28 (5th Cir. 1997) (citing *Illinois* and holding that, notwithstanding plaintiff's nominal plea of a state-law claim, federal common law applies to—and confers federal-question jurisdiction over—air-transit lost-cargo claims because Congress preserved a "federal common law cause of action against air carriers for

lost shipments"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (holding that federal, rather than state, common law provides the rule of decision—and a basis for federal question jurisdiction—to a dispute over a federal defense contract).

Indeed, the Second Circuit recently held that New York City—which raised a markedly similar climate-change public-nuisance claim against many of the same defendants—could not evade the reach of federal law by simply declaring that its claim arose under state law. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91–93 (2d Cir. 2021). Federal common law must govern claims "seeking to recover damages for the harms caused by global greenhouse gas emissions," the Second Circuit explained, regardless of the label used in the complaint: "Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *Id.* at 91. As here, it was "precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the [plaintiff was] seeking damages." *Id.*

3. In response to these authorities, the district court did not seriously contest that the City's public-nuisance claim "is ultimately gov-

erned by the federal common law." JA Vol. I at 25. The district court instead insisted, *id.* at 27, that removal is nevertheless barred under this Court's decision in *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306 (3d Cir. 1994). *Goepel*, however, merely suggested that "a federal court may not recharacterize what purports to be a state law claim *as a claim arising under a federal statute* unless the state claim is completely preempted by federal law." 36 F.3d at 314 (emphasis added; internal quotation marks and citation omitted). And here, the point is not that the City's claim could be brought under a federal *statute*, but that it is an avowedly *common-law* claim that necessarily arises under *federal* common law.

When a claim is governed by and arises under federal common law, artful pleading cannot be allowed to avert removal, for barring removal would put *state* courts in the position of creating *federal* common-law. And that would undermine the very purpose of federal common law, which is to ensure that in "a few areas, involving uniquely federal interests," the rules of decision "are governed exclusively by federal law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal quotation marks and citations omitted). Where, as here, the rules of decision "must

be determined according to federal law," "state courts [are] not left free to develop their own doctrines." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–27 (1964).

In contrast with disputes over the meaning of federal statutory or constitutional provisions, common-law cases require courts to make difficult judgments about what "seem[s] to [them] sound policy," *Boyle*, 487 U.S. at 513, which is why state-court common-law decisions are usually understood to announce *state* common law. Permitting plaintiffs to compel state-court adjudication of federal-common-law claims would thus put state courts in the position of deciding for themselves *federal* common law—or perhaps instead guessing what policy judgments the Supreme Court would adopt.

The district court missed these points because it fundamentally misunderstood the justification for removal here: It is not "that the federal common law preempts Plaintiff's claims," which of course would merely "amount[] to an argument for ordinary preemption." JA Vol. I at 25. Instead, removal is justified because this action "could have been brought originally in federal court" *Home Depot*, 139 S. Ct. at 1748. Critically, the Supreme Court has repeatedly held that federal courts have

jurisdiction over common-law claims that necessarily arise under federal common law. In *Illinois v. City of Milwaukee*, for example, the key question was whether the defendants could "be sued by Illinois in a federal district court." 406 U.S. at 98. And the Court answered this question in the affirmative, explaining that "federal law govern[ed]" Illinois's common-law nuisance claim, *id.* at 107, which fell within federal-court jurisdiction because "pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of s 1331(a)," *id.* at 99.

The Court applied this same reasoning in *Oneida Indian Nation of New York State v. Oneida County, New York*, where it held that federal-question jurisdiction encompassed a suit brought by an Indian tribe for "damages representing the fair rental value of . . . land" for which the tribe claimed a right to possession. 414 U.S. 661, 665 (1974). In doing so, the Court reversed a Second Circuit decision that—much like the district court's decision below—had held "that the jurisdictional claim 'shatters on the rock of the well-pleaded complaint rule for determining federal question jurisdiction,'" on the theory that "the federal issue was not one of the necessary elements of the complaint, which was read as essentially

seeking relief based on the right to possession of real property." *Id.* (quoting *Oneida Indian Nation of N.Y. State v. Oneida Cty., N.Y.* 464 F.2d 916, 918 (2d Cir. 1972)). The Supreme Court explained that because "the governing rule of decision would be fashioned by the federal court in the mode of the common law," *id.* at 674, the case "arises under the federal law within the meaning of the jurisdictional statutes and our decided cases," *id.* at 678.

The upshot of these decisions is that in certain areas, such as those involving interstate pollution, any common-law claims must be decided under federal common-law rules. And because such claims arise under federal law, defendants have the right to ensure such rules are crafted by *federal* judges—that is, judges appointed by a nationally elected president and confirmed by a senate in which every State is entitled to equal representation. Here, because the City's interstate-pollution public-nuisance claim necessarily arises under federal common law, the district court had jurisdiction to consider the claim, and the defendants were therefore entitled to remove the case to federal court.

CONCLUSION

This Court should reverse the district court's remand order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(1)(7)(B)(i) because it contains 3,604 words, as determined by word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

3. This brief complies with this Court's Rule 28.3(d) because at least one of the attorneys whose names appear on the brief, including Thomas M. Fisher, is a member of the bar of this Court.

4. This brief complies with this Court's Rule 31.1(c) because: (1) the text of the electronic brief is identical to the text in the paper document, and (2) the document has been scanned with version 1.353.1418.0 of Windows Defender and is free of viruses.

Dated: November 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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