No. 21-2728

In The
United States Court of Appeals for the Third Circuit

CITY OF HOBOKEN,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
District of New Jersey
Case No. 20-cv-14243
Hon. John Michael Vazquez

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.

The City of Hoboken here alleges that Defendants engaged in deceptive practices in violation of state law, including by misleading the public about the harmful effects of their fossil fuel products. Defendants contend that enforcing this state law would impermissibly undermine federal authority to regulate interstate pollution. NRDC strongly disagrees. Hoboken's claims seek redress for deceptive conduct, not emissions regulation.

NRDC submits this brief to explain why Defendants' 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.[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.

SUMMARY OF ARGUMENT

Hoboken's claims do not arise under federal environmental common law. Defendants invoke "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 Defendants' environmental common law theory.

Defendants' theory is foreclosed by authoritative construction of the phrase "arising under" in the federal-question jurisdiction statute, 28 U.S.C. § 1331. For Hoboken'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 [Hoboken's] cause of action." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10–11 (1983) (citation omitted). But Defendants nowhere identify a federal common law right that is an essential element of Hoboken's pleaded state claims. Nor could they. The common law they point to does not address the subject of Hoboken's claims, and, regardless, that body of law has been displaced by the Clean Air Act and is no longer an operative source of federal rights.

Defendants instead argue that Hoboken's claims are "governed by" federal environmental common law, and point 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. Further, Defendants' "governed by" premise itself is wrong. The federal common law recognized in cases like *Milwaukee I* has been displaced by federal statute and no longer governs any claims. *E.g. Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489, 497–501 (1987).

As numerous courts have recognized, Defendants' theory is simply an argument that federal common law preempts Hoboken's claims. Defendants resist this conclusion, but they nowhere explain what more than preemption their theory requires. And it is settled that more than preemption is required to create jurisdiction for removal. The "more" that is required is "complete preemption," which requires that federal law also provide a *cause of action*. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8–11 (2003). Defendants do not identify any federal common law cause that exists to create jurisdiction to remove Hoboken's action.

ARGUMENT

Hoboken sued in state court. Defendants 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 Inc. v. Williams*, 482 U.S. 386, 392 (1987). Because Hoboken here claims rights of action only under state law, 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"); *Goepel v.*

Nat'l Postal Mail Handlers Union, 36 F.3d 306, 310 (3d Cir. 1994). These rules are well settled. Defendants have not shown they are met.

Importantly, the rules do not change if this case is characterized, as Defendants would have it, as "centered on transboundary emissions," Br. at 20, and not on Defendants' "misinformation campaigns" about the harms of fossil fuel products, Br. at 2. The same statutory "arising under" standard applies to all removal based on Section 1331. As explained below, none of Defendants' "transboundary pollution" cases show that Hoboken's 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 Defendants' theory does not meet.

I. Defendants' Environmental Common Law Removal Theory Is Unprecedented.

Defendants' primary theory of federal jurisdiction is that "claims [that] seek redress for harms allegedly caused by transboundary emissions" are "exclusively governed by federal common law," and, therefore, must "necessarily arise under federal common law." Br. at 1, 13–14. Yet even accepting that premise, *but see Ouellette*, 479 U.S.

at 497–500; *infra* Section II, that conclusion does not follow—and none of the "interstate pollution" cases Defendants cite in support even addressed whether a state-law action can arise under federal common law, "necessarily" or otherwise. *See* Br. at 14–20. 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 Defendants' suggestion, Br. at 15–16, 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 *Milwaukee I*, Br. at 2, 14–16, 25, plaintiff Illinois invoked the Supreme Court's original jurisdiction—not a district court's federal-question jurisdiction. 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' new 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 discussed considerations for applying federal over state law in *Milwaukee I*, Br. at 15–16, 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).

Defendants' remaining environmental cases, Br. at 16–20, 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* pleaded a federal common law cause, 564 U.S. 410, 418 (2011) ("*AEP*").[2]

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[2] Defendants' 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); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563–68 (1996) (certiorari to state court).

In this regard, Defendants' reliance throughout on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), is particularly misplaced. The Second Circuit there 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." *Id.* at 94. *City of New York* thus did not address whether the plaintiff's claims *arose* under federal environmental common law so as to create jurisdiction for removal.[3] In contrast, *City of Oakland v. BP plc* did address federal-question jurisdiction and rejected a federal common law removal theory like the one Defendants advance here. 969 F.3d 895, 908 (9th Cir. 2020), *cert. denied*, No. 20-1089 (U.S. June 14, 2021).

[3] *City of New York* was also wrongly decided. State law rights are enforceable unless preempted by federal law. *Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1479–80 (2018). The Second Circuit found plaintiff's state claims preempted by federal common law, 993 F.3d at 90–93; however, the Supreme Court has held that that common law was displaced by the Clean Air Act and that the existence (or not) of federal preemption must be determined by the provisions of that Act, *AEP*, 564 U.S. at 429.

II. Defendants' 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). Defendants nowhere specify a federal environmental common law right that is essential for Hoboken to prove for any of its claims. Nor could they. As explained below, even were this an "interstate pollution" action, Br. at 15, 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); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *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.[4] 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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[4] 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. The Second Circuit 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. *Accord Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) (under *AEP*, the Clean Air Act "extinguished" "any previously available federal common law action" within its field).

Importantly, although federal statutes and federal common law do not coexist once Congress "speaks directly" on a question, *AEP*, 564 U.S. at 424, state law can coexist on that question if Congress has not chosen

to preempt it, *id.* 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.

c. The enforceability of state law to redress transboundary pollution turns on provisions of the Clean Air Act.

The historical environmental common law that Defendants point to did not address the subject of deceptive conduct for which Hoboken here seeks redress. But even had Hoboken brought an "interstate pollution" claim here, Defendants would still be wrong that such a claim would be "governed by" federal common law and decided by federal common law "rules of decision." Br. at 13–20. Defendants' theory relies on the dubious notion that an action can be "governed by" a displaced body of law. Such a theory is flatly inconsistent with the Supreme Court's decisions in *Ouellette* and *AEP*.

Ouellette was a quintessential "interstate pollution" case: Lake Champlain divides New York from Vermont. A paper mill on the New York side discharged effluents into the lake toward Vermont, fouling residences on the Vermont side. The Vermont landowners sued the New York mill in diversity, claiming redress for the transboundary pollution under state common law of nuisance. *See* 479 U.S. at 483–85.

Contrary to Defendants' theory here that federal common law would govern such claims and the court would need to apply a federal common law "rule of decision," *see* Br. at 15–20, the *Ouellette* Court did not, because the Clean Water Act "now occupied the field, pre-empting all *federal* common law." *See* 479 U.S. at 488–89 (emphasis original). "[W]hether injured parties still had a cause of action under *state* law" was an "open . . . question." *Id.* at 489 (emphasis original). To answer that open question, the Court needed to consider "the pre-emptive scope of the Clean Water Act." *Id.* at 483.

The Supreme Court's detailed analysis of the Clean Water Act in *Ouellette* makes no sense under Defendants' theory of federal common law here. Defendants offer no explanation for why, if "state law simply does not exist" in the area of interstate pollution, Br. at 29, the

Supreme Court needed to consider the preemptive effect of the Act on state law. If federal common law "necessarily governs" all interstate pollution suits and supplies the "rules of decision," Br. at 15, the Court would not have needed to construe and apply the Act at all. If the Vermont plaintiffs' state claims were "inherently federal" common law claims, Br. at 30, the Court could have stopped writing after reiterating the *Milwaukee II* holding that "all federal common law" was preempted. *See* 479 U.S. at 489. The Court's continued construction and application of the Clean Water Act, *id.* at 489–500, only makes sense if interstate pollution claims under state law are *not* "inherently" federal common law ones, Br. at 30.

So too in *AEP*, an action seeking redress for transboundary air pollution under both federal common law and state tort law. 564 U.S. at 418. Only the federal common law claim was before the Court, *id.* at 429, but the parties' dispute about that claim was "academic," because the Clean Air Act displaced "[a]ny such claim," *id.* at 422–23; *see also id.* at 415, 424, 429. On Defendants' theory here, that holding should have disposed of the state claims there as well. But, as in *Ouellette*, the Court explained that "the availability *vel non* of a state lawsuit depends, *inter*

alia, on the preemptive effect of the federal [Clean Air] Act." *Id.* at 429. Again, as in *Ouellette*, the *AEP* Court's admonition to consider the preemptive effect of the statute only makes sense if the state tort claims were *not* "inherently federal [common law] claims." Br. at 26.

III. Defendants' 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. Defendants' theory does not meet them.

Numerous courts have recognized that theories like Defendants' 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.*

Defendants do not make a complete preemption argument for federal environmental common law, presumably because they cannot establish the stringent requirements. *See Beneficial Nat'l Bank*, 539 U.S. at 8–11. But Defendants do 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 Defendants' theory is insufficient to create jurisdiction. As also explained below, Defendants' 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 Defendants rely 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 25–27, Defendants have not shown that any provision of federal common law exists to artfully plead around.

At bottom, Defendants' removal theory fails any "arising under" test because Defendants have not shown the existence of a substantive federal environmental common law right on which Hoboken could even theoretically have grounded this action.

a. Preemption-based "arising under" removal requires a federal cause of action and conflict with federal law.

State law is enforceable unless preempted due to a conflict with an identifiable provision of federal law. *Murphy*, 138 S. Ct. at 1479–80; *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.").

As an initial matter, Defendants' conclusory assertion of a conflict between New Jersey law and federal common law is insufficient to support preemption. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978) (counseling courts against "seeking out conflicts between state and federal regulation where none clearly exists") (citation omitted). Even had federal common law survived the Clean Air Act, there would be no conflict here. Defendants point to no federal common law that would apply to the deceptive conduct that is the actual subject of Hoboken's claims. And although they vaguely suggest that Hoboken's action would put different states' air pollution regulations into conflict, Br. at 17, the Supreme Court environmental common law cases they rely on were actions against operations at discrete pollution sources, where specific competing regulations might

present identifiable conflict. *E.g. Milwaukee II*, 451 U.S. at 308–09, 311–12 (injunction to "achieve specified effluent limitations" at two sewage treatment plants and eliminate sewer overflows at "discrete discharge points"). Defendants do not identify *any* source that would face a regulatory change—much less regulatory conflict—as a result of Hoboken's deception claims here, nor do they explain how such a conflict could actually come about.

Regardless, federal 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; *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 407 (3d Cir. 2021).

Complete preemption likely requires the federal cause of action be *statutory*. *Cf. Beneficial Nat'l Bank*, 539 U.S. at 8; *Maglioli*, 16 F.4th at 407. But even if federal common law could theoretically supply one for jurisdictional purposes, the only potential source of a federal cause for Defendants' theory—pre-Clean Air Act federal common law—no

longer exists, *AEP*, 564 U.S. at 423, and Defendants do not identify any federal environmental common law cause of action that does. Without an available federal common law cause of action, jurisdictional complete preemption cannot exist.[5]

Indeed, in another case that various Defendants argued was a "quintessential" transboundary pollution suit, they 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). Those Defendants were wrong there too, but because the Clean Air Act displaced the federal common law cause of action on transboundary air pollution, *e.g. AEP*, 564 U.S. at 423; *Kivalina*, 696 F.3d at 856–58, the Act would be the logical place to look

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[5] 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).

for a cause of action that might completely preempt state law claims. And yet Defendants do not make any argument for removal via the Clean Air Act here, 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 conduct of which Hoboken complains, *see* 42 U.S.C. § 7604(a), but, regardless, that cause of action 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 Maglioli*, 16 F.4th at 407. Defendants rely on non-removal cases to require less for their theory, but they do not explain how that can be consistent with requirements from controlling removal cases.

b. Federal environmental common law does not create *Grable* jurisdiction over Hoboken's claims.

Defendants alternatively suggest that Hoboken's claims arise under federal environmental common law because the requirements for *Grable* jurisdiction are met. Br. at 31. 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. Defendants rely on the federal common law of interstate pollution discussed in *AEP*, Br. at 16–17, 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. Defendants do 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). Regardless, it is plain that any question about the meaning of a provision of long-since-displaced historical federal common law is not "substantial" under *Grable*, *see Empire Healthchoice*, 547 U.S. at 700, or, for that matter, "necessarily raised" or "actually disputed" here either, *see Gunn*, 568 U.S. at 258 (explaining other requirements for *Grable* jurisdiction).

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

Finally, the "artful-pleading principle," Br. at 26 & n.2, is not, as Defendants suggest, an ad hoc inquiry into the "real nature" of a plaintiff's complaint, Br. at 27. Defendants offer 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.*

This Court has equated the "artful pleading" principle with the doctrine of "complete preemption." *See Goepel*, 36 F.3d at 310 & n.5. Defendants suggest that the outer bound of the "artful-pleading principle" is actually unclear, Br. at 26 n.2, but they cite no precedent applying the principle in the way they urge this Court to, or indeed any controlling precedent applying the principle independently of established standards for determining "arising under" jurisdiction.

Instead, relying on a footnote in *Federated Department Stores, Inc. v. Moitie*, Defendants urge this Court to ignore those established standards and simply determine whether "the real nature" of Hoboken's claims are federal. Br. at 27 (citing 452 U.S. 394, 397 n.2 (1981)). But Defendants fail to acknowledge that the footnote they rely on—inapposite here to begin with—was "confine[d] to its specific context" by

a unanimous Supreme Court in *Rivet*, *see* 522 U.S. at 472, 477–478, a case Defendants do not cite in their brief. *Rivet* recognized that "*Moitie*'s enigmatic footnote . . . ha[d] caused considerable confusion in the circuit courts," 522 U.S. at 478 (citation omitted), and explained that "[t]he artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim," *id.* at 475.

Regardless, Defendants' artful pleading argument fails on its own terms. Invoking artful pleading implies that Hoboken had a federal common law right of action available to it and declined to plead it. But under *AEP*, pre-Clean Air Act federal common law rights no longer exist in the field of that Act, 564 U.S. at 423–24, and Defendants do not identify any other federal common law right available to Hoboken. *Cf. Kivalina*, 696 F.3d at 857 (under *AEP*, the Clean Air Act "extinguished" "any previously available federal common law action" within its field). Defendants contend nevertheless that Hoboken's claims are "really" based on federal common law, *see* Br. at 27, 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.

Hoboken seeks relief under New Jersey laws that provide rights of action for deceptive conduct. But even were this an action, as Defendants would have it, "to base liability on interstate [pollution]" and "to regulate interstate emissions," Br. at 2, Defendants have not shown—or even asserted—that Hoboken has a right to relief under federal environmental common law on its claims. 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.

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Respectfully submitted,

/s/ Pete Huffman

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CERTIFICATE OF COMPLIANCE

I certify that:

I am a member of the bar of this Court.

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 5,800 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).

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/s/ Pete Huffman
Pete Huffman

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Third 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.

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