

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BENEFICIAL NATIONAL BANK, :

4 ET AL. , :

5 Petitioners :

6 v. : No. 02-306

7 MARIE ANDERSON, ET AL. :

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9 Washington, D. C.

10 Wednesday, April 30, 2003

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 11:04 a.m.

14 APPEARANCES:

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16 Petitioners.

17 MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D. C.; on

19 behalf of the United States, as amicus curiae,

20 supporting the Petitioners.

21 BRIAN M. CLARK, ESQ., Birmingham, Alabama; on behalf of

22 the Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 02-306, the Beneficial National Bank versus
Marie Anderson.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN
ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Mr. Chief Justice, and may it
please the Court:

The complaint in this case alleges that a
national bank charged excessive interest. This Court has
held repeatedly and consistently since 1875 that
section 30 of the National Bank Act of 1864 provides both
the exclusive standards governing the interest that a
national bank may charge and the exclusive judicial
remedies for any violation.

And as a result, any claim that a national bank
charged excessive interest necessarily arises under
Federal law, whether that claim is brought in State court
or Federal court. Any well-pleaded complaint would
reflect that, and therefore, any claim of usury against a
national bank, whether pleaded well or mistakenly or
deceptively, falls within the original jurisdiction of the
Federal courts and may either be filed there by a

1 plaintiff or removed there by a defendant.

2 QUESTION: Mr. Waxman, normally when the Federal
3 Government creates a cause of action that preempts State
4 causes of action, it attaches an element to that cause of
5 action that does not exist under some of the State causes
6 of action. Let's say, it -- it creates a cause of action
7 against the owners and -- and managers of nuclear
8 facilities, but the cause of action must be based on
9 something more than mere negligence. It has to be
10 intentional malfeasance or gross negligence. Okay?

11 Now, what if somebody comes in and brings a
12 cause of action in State court, alleging mere negligence
13 by the owners of the nuclear facility? Is it your
14 position that that case is removable even though it
15 wouldn't -- it wouldn't survive a motion to dismiss for
16 failure to state a claim under -- under Federal law?

17 MR. WAXMAN: Justice Scalia, with respect, I
18 don't think that I would concede the premise of your
19 question, that is, that a Federal cause of action
20 ordinarily has an additional element.

21 QUESTION: All right. Well --

22 MR. WAXMAN: But leaving that aside --

23 QUESTION: Leaving -- in my hypothetical --
24 create one --

25 MR. WAXMAN: Your -- your hypothetical actually

1 is an example of a very peculiar instance in which, with
2 respect to nuclear incidents, Congress has imported in --
3 has federalized the cause. It created an express Federal
4 cause of action --

5 QUESTION: Right.

6 MR. WAXMAN: -- and said expressly that State
7 law standards will apply and it will be the law of
8 whatever State the incident occurred.

9 QUESTION: But take my hypothetical. What do
10 you do in my hypothetical? Is it removable or not?

11 MR. WAXMAN: If -- if --

12 QUESTION: Yes or no.

13 MR. WAXMAN: If -- if any -- I hope I can
14 remember your hypothetical. The --

15 QUESTION: The hypothetical is you plead a State
16 law cause of action that does not claim all of the
17 elements which are necessary for the Federal cause of
18 action. So it's clear on the face of it that it is
19 dismissable.

20 MR. WAXMAN: It is definitely removable. It
21 definitely is completely preempted if it comes within the
22 scope of a cause of action that has been determined to be
23 exclusive. Now, that's --

24 QUESTION: It's very strange to say that you can
25 remove something that on its face does not constitute a

1 Federal cause of action.

2 MR. WAXMAN: Justice Scalia, there may -- in
3 preemption cases, there are line-drawing problems at the
4 margins about whether something is or isn't preempted.
5 This is a heartland case and the example -- the
6 hypothetical you're giving is let's say that State of
7 Alabama or the State of Delaware created strict liability
8 for excessive interest. The Federal statute says it has
9 to be knowingly under section 86. There is no question --
10 no question -- under this Court's decided cases that a
11 claim that a national bank charged excessive interest,
12 with whatever state of mind or lack of state of mind, is
13 governed exclusively by Federal standards and an exclusive
14 Federal cause of action and that --

15 QUESTION: Right, but the question is whether
16 the consequence of that is that the State law cause of
17 action must be dismissed by the State court because it's
18 preempted, or rather, the consequence is that you can
19 remove into Federal court a pleading that plainly on its
20 face does not -- does not claim a Federal cause of action.

21 MR. WAXMAN: Well, the --

22 QUESTION: It just seems very strange to me.

23 MR. WAXMAN: The -- the pleading -- the
24 complaint in this case on its face does satisfy the
25 Federal cause of action and --

1 QUESTION: I understand that. I understand
2 that. We're -- we're not talking about what happens here.
3 But I -- with regard to the general principle that you
4 want us to set forth.

5 MR. WAXMAN: I think --

6 QUESTION: That's -- what's -- what I'm
7 concerned about. Is it that all cases automatically come,
8 or is it only those that -- that set forth a Federal cause
9 of action?

10 MR. WAXMAN: It has to be one that if well
11 pleaded -- I mean, a -- on a removal -- on a notice of
12 removal, the Federal court is obligated, like any court
13 determining its own jurisdiction, to read the complaint as
14 if it were well pleaded. And if, when the court reads the
15 complaint, it says there is a Federal question necessarily
16 presented in here which has been inartfully not pleaded,
17 the court then proceeds to adjudicate on the merits that
18 claim. If the answer is no, if the answer is, hey, this
19 guy pleaded a claim under State law and I have well
20 pleaded it and it still doesn't raise a Federal question,
21 then you remand.

22 And it's that -- that's sort of -- I didn't mean
23 to quibble with you, but the principle that we suggest is
24 very straightforward is simply an application of this
25 Court's decided jurisprudence, under arising-under

1 jurisdiction, that removal jurisdiction follows original
2 jurisdiction.

3 QUESTION: Mr. -- Mr. Waxman, is what you're
4 saying essentially there is a Federal claim or there is no
5 claim? Certainly the plaintiff doesn't want there to be
6 no claim. If there is a claim, it is necessarily Federal.

7 MR. WAXMAN: Yes.

8 QUESTION: And that's what makes it removable.
9 It is treated as though it were well pleaded, when, in
10 fact, it's badly pleaded.

11 MR. WAXMAN: Indeed. And the -- the perplexing
12 thing about this case is the sort of almost Kafkaesque
13 situation that we have that's exemplified by the amicus
14 briefs on both sides where this particular instance where
15 the plaintiff says usury under State law even though the
16 Supreme -- this -- this Court has decided, since 11 years
17 after the act was passed in the Civil War, that there is
18 no such State claim, we now have a -- a group of
19 plaintiffs' lawyers from California urging this Court to
20 establish a right to plead something that in their own
21 case they say is only, quote, defensively preempted.

22 QUESTION: If they had --

23 MR. WAXMAN: And no one has -- I'm sorry.

24 QUESTION: If they had pled it correctly, they
25 could still be in State court, but the defendant could

1 remove. In other words, this is not -- although it's a
2 Federal claim -- it arises only under Federal law -- it
3 could be brought in State court or Federal court.

4 MR. WAXMAN: Correct. There is concurrent
5 jurisdiction as there -- as is the norm, as this Court has
6 explained. And there are instances in which these cases
7 are litigated to the merits in State court and instances
8 in which they're litigated in Federal court either because
9 they're brought there by the plaintiff, as the plaintiff
10 could have here, or they're removed there as the
11 defendant.

12 And the other principle that this case reflects,
13 as I said, is not just the importance of parity in Federal
14 question jurisdiction between giving plaintiffs and
15 defendants parity in invoking the Federal courts if they
16 choose, but the requirement that this Court has stated
17 over and over and over again that in -- in determining its
18 own jurisdiction, the Federal court will construe the
19 complaint as well-pleaded.

20 QUESTION: Mr. Waxman, one thing that troubles
21 me about -- about the proposal that you make and that the
22 Government makes is that it seems to me in the LMRA case
23 that established this principle and in the ERISA case,
24 which is the only other case that has -- has held to the
25 same effect, those cases refer to this as being an

1 extraordinary, an unusual event. But I don't think it's
2 going to be an unusual event if we say that whenever there
3 is created a Federal cause of action, and at the same
4 time, State causes of action are preempted, it may be
5 removed to Federal court. I don't think that will be
6 unusual at all.

7 And I sort of looked upon the -- the Labor
8 Management Relations Act case as really sort of a -- a
9 platypus, I mean, a very strange case in which the courts
10 just didn't want these labor things to go into State
11 courts because they didn't trust State courts. And so
12 they said, boy, we're going to have Federal courts create
13 this whole new law of -- of contracting, of collective
14 bargaining. That's how I always regarded it. And now
15 you're telling me it's really just a little piece of a
16 much broader proposition which is not at all -- not at all
17 narrow.

18 MR. WAXMAN: No. Justice Scalia, I think it
19 actually is very, very narrow. And we can go through in
20 detail, but almost all of the statutory schemes that
21 the -- the State's amicus brief cites are not, in fact,
22 examples of complete preemption. But it -- it comes up
23 only in the instance where there is not only substantive
24 preemption by Federal law and the creation of a Federal
25 cause of action, but the determination that that cause of

1 action is, in fact, exclusive. And that is the difficult
2 and close question that this Court --

3 QUESTION: Well, was -- was that true in the
4 Farmers' and Mechanics' case? The -- the Court certainly
5 said that when you're suing for usury, that was all you
6 could get with the -- that wasn't, of course, a -- a
7 removal case at all, was it?

8 MR. WAXMAN: No, it wasn't a removal case. And
9 in fact, depending on when in 1875 it was decided, there
10 may or may not have been --

11 QUESTION: There wasn't Federal -- there wasn't
12 Federal question jurisdiction.

13 MR. WAXMAN: -- there may not have been removal.

14 QUESTION: But it is not a white horse case for
15 you, that one.

16 MR. WAXMAN: I think it is a -- if I understand
17 the reference, I think it is a white horse case in the
18 sense -- in this sense, Mr. Chief Justice. We're not
19 contending that the 1864 act evinced an intent to make
20 these causes of action removable, even if pleaded under
21 State law, because there was no general Federal question
22 jurisdiction, and it wasn't provided in the law.

23 The relevant question and the relevant question
24 that this Court deemed to be close in Metropolitan Life in
25 the ERISA context is whether -- okay, fine, Federal law

1 has substantively preempted the field or by conflict or
2 whatever. Is the creation of the Federal cause of action
3 of such force that it should be deemed to be exclusive?

4 And that, I think, is what this Court decided
5 first in Farmers' and Mechanics' Bank by saying to the
6 borrower in that case -- the borrower was maintaining that
7 under New York State law, it was entitled to void not --
8 to forfeit not just the interest, but the note. And this
9 Court said, look, New York State law has nothing to do
10 with this. This is a claim of usury by a national bank.
11 The Federal standards are exclusive, and the Federal
12 penalty expressly will not permit forfeiture of the note.
13 Only the interest.

14 QUESTION: But -- but certainly under the -- the
15 statute itself did not preclude the possibility of that
16 action having been brought in State court.

17 MR. WAXMAN: Not at all. And in fact, it was
18 expressly contemplated. Then as now, these actions can be
19 brought and are often brought in State courts. All that
20 the --

21 QUESTION: So can 3 -- 301 suits. The two cases
22 that we have so far where we have recognized that there is
23 only a Federal cause of action, that cause of action could
24 have been brought just as well in State court, but it's up
25 to the defendant to remove it. So we're not talking about

1 an exclusive Federal forum

2 MR. WAXMAN: That -- that's correct, Justice
3 Ginsburg. And the same is true for the types of ERISA
4 claims that were at issue in Metropolitan Life.

5 QUESTION: And -- and I suppose one reason -- I
6 was surprised when I went through. I thought there would
7 be a whole lot of exclusive Federal cause of action,
8 and -- and there are very few. But I suppose one of the
9 reasons we don't get it very often is just what Justice
10 Ginsburg said. There are other provisions where there's
11 an exclusive Federal forum

12 MR. WAXMAN: Correct. For example, the
13 Copyright Act.

14 QUESTION: Which is -- which is not this case.

15 MR. WAXMAN: The Copyright Act certainly is an
16 example of complete preemption, but there's a statutory
17 provision that --

18 QUESTION: Okay, why didn't we express this --
19 this principle before instead of -- instead of adhering so
20 narrowly? I mean, even the ERISA case, it didn't express
21 this -- this broad theory. It says, this is -- this is
22 very much like the section 301, and the legislative
23 history referred specifically to 301, and therefore we
24 come out the same way. Pretty -- pretty narrow.

25 MR. WAXMAN: Here's -- here's why, Justice

1 Scalia. The very difficult -- this Court made clear in
2 Metropolitan Life, if it wasn't clear before, that it
3 wasn't going to infer from congressional silence very
4 lightly that when Congress created a Federal cause of
5 action, it meant it to be exclusive so that it would
6 displace State causes of action. There's a very strong
7 and longstanding presumption to the contrary.

8 But that difficult question was decided in the
9 context of section 30 of the National Bank Act beginning
10 in 1875 for reasons that are explained in this Court's
11 opinion and in the Comptroller's report that the
12 Government cites that precipitated the enactment of
13 section 30, which is that this was war legislation. This
14 was a -- the creation of the national banks was hoped by
15 Congress and President Lincoln that it would provide the
16 means with which the Government could continue to fund the
17 war, and national banks would knit the country together
18 when the war was finished.

19 And the one thing that comes out of the history
20 of this case and is reflected in this Court's opinions is
21 that they feared, based on their experience with the first
22 bank of the United States and the second bank of the
23 United States, that jealous States, States that were
24 jealous of their State-chartered banks, which were issuing
25 paper at the time, would engage in predations against the

1 national banks that were created at the very same time
2 that section 30 was enacted and, in essence, smother this
3 important Federal infant in its crib.

4 QUESTION: I started to call you General Waxman.

5 (Laughter.)

6 MR. WAXMAN: Thank you.

7 QUESTION: Like the old days.

8 MR. WAXMAN: R-18.

9 QUESTION: Assume -- assume that I -- I agree
10 with you that -- that on -- on complete preemption,
11 this -- this case passes muster.

12 But assume also that in writing an opinion, I --
13 I want to say something to indicate why we do not have a
14 gathering snowball here. I mean, we -- first, we had the
15 labor management reporting. Then we got in some ERISA
16 cases. Now we recognize this.

17 Is there any criterion that you see in -- in at
18 least the cases on those three points so far, that --
19 that -- or any language that points to a criterion for
20 when preemption, particularly field preemption, for
21 example, becomes complete and when it doesn't?

22 MR. WAXMAN: Yes. There has to be
23 substantive -- Congress has to supply the exclusive
24 substantive standards. It has to create a cause of action
25 to remedy violations of those standards, and this is the

1 hard part. And it also has to make clear that that --
2 that judicial remedy is, in fact, exclusive, that is, that
3 it will not permit the existence or operation of State law
4 causes of action, even those that import the Federal
5 standards and my --

6 QUESTION: Okay. Why in other cases? Again,
7 assume you -- you made your point on -- so far as this
8 statute is concerned. Why in other cases aren't courts
9 going to be, in effect, remitted to doing what the -- the
10 Court tried to do here, and that is, say, let's find out
11 what Congress had in mind? And we don't find anything in
12 the legislative history that makes it clear, and therefore
13 it doesn't apply.

14 MR. WAXMAN: You -- you have to find out what
15 Congress had in mind, but I think this Court has made
16 clear in Metropolitan Life that it is going to be the
17 rare, rare, rare day when the Federal courts will infer
18 from congressional silence that a Federal cause of action
19 is to be exclusive.

20 And the other examples in -- in which -- in the
21 Federal law in which there is, in fact, complete
22 preemption, the FELA or the Carmack Amendment as an
23 example, Congress has gone ahead and expressly made those
24 actions nonremovable.

25 May I reserve the balance of my time?

1 QUESTION: Very well, Mr. Waxman.

2 Mr. Roberts, we'll hear from you.

3 ORAL ARGUMENT OF MATTHEW D. ROBERTS

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

6 MR. ROBERTS: Mr. Chief Justice, and may it
7 please the Court:

8 For more than 125 years, it has been clear that
9 the National Bank Act provides the exclusive cause of
10 action for a claim of usury against a national bank.
11 Because the National Bank Act provides the sole available
12 avenue of relief, any claim that a national bank has
13 committed usury can arise only under that Federal law.
14 The National Bank --

15 QUESTION: Can I ask you the same question that
16 I asked Mr. Waxman? What if -- what if the pleading makes
17 a claim of usury, but it does not contain all of the
18 elements necessary to make out a Federal cause of action?
19 Is that removable?

20 MR. ROBERTS: A failure to state a claim on
21 which relief is granted does not deprive the Federal court
22 of jurisdiction over the claim. So the simple failure to
23 state a claim wouldn't prevent it from being removable if
24 the -- if the claim was within the scope of the Federal
25 cause of action, if it was a colorable claim.

1 Now, if -- if the claim --

2 QUESTION: Well, it's not colorable. I mean,
3 one of the elements is just not there.

4 MR. ROBERTS: If -- if the claim was not
5 colorable --

6 QUESTION: It -- it claims usury when -- when
7 what they charged was 3 percent and that would not violate
8 the Federal statute.

9 MR. ROBERTS: Well, here -- here we -- we don't
10 have that situation, Your Honor.

11 QUESTION: I understand that. I want to know --

12 MR. ROBERTS: That --

13 QUESTION: We -- you're -- you're asking us to
14 set forth a new general proposition, which we haven't set
15 forth before. We've -- we've treated 301 and ERISA as --
16 as distinctive cases. Now you want a general proposition.
17 I want to know what does this general proposition cover.

18 Is the State court going to have to -- or is --
19 before removal is granted, is the court going to have to
20 decide whether a cause of action is properly stated, or --
21 or, you know, whether -- whether it could be dismissed
22 on -- on a motion to dismiss?

23 MR. ROBERTS: When it's removed, the Federal
24 court decides whether there's jurisdiction under Federal
25 law, whether there's arising-under jurisdiction, and

1 decides whether the -- the complaint is properly pleaded,
2 the true nature of the complaint states a claim under
3 Federal law. And --

4 QUESTION: So if it doesn't, then it stays in
5 State court.

6 MR. ROBERTS: If it doesn't, then it can remand
7 the State -- the case back to State court, but it would
8 have decided, in essence, that the claim should be
9 dismissed at the same time by deciding --

10 QUESTION: What happens -- what happens if the
11 cause of action is for misrepresentation under State law,
12 and the misrepresentation is that the interest rate was
13 lawful and the plaintiff alleges it was unlawful because
14 it was usurious?

15 MR. ROBERTS: Well, to the extent that the State
16 claim requires the decision that a -- a determination that
17 there were excessive interest charges by a national bank,
18 then the claim would fall within the scope of the cause of
19 action. But that wouldn't mean that there couldn't be
20 claims for misrepresentation that --

21 QUESTION: Well, in -- in my -- would this
22 removable? This is the only thing in the complaint.

23 MR. ROBERTS: The complaint --

24 QUESTION: It seems to me this might be like
25 Gully in that it -- the -- the nature of the cause of

1 action was really a State cause of action even though it
2 involves an inquiry into what the Federal law --

3 MR. ROBERTS: The State cause of action is just
4 misrepresentation.

5 QUESTION: That's it.

6 MR. ROBERTS: Then that would not be removable.

7 QUESTION: It's unlawful, and the only
8 misrepresentation is it's unlawful and it's unlawful
9 allegedly because it's usurious.

10 MR. ROBERTS: Yes. I don't think that would be
11 removable, Your Honor.

12 QUESTION: There were related claims here that
13 were strictly State claims.

14 MR. ROBERTS: That -- that --

15 QUESTION: But they fell into -- .

16 MR. ROBERTS: Yes, but the existence of pendent
17 State claims doesn't defeat removal jurisdiction just as
18 it doesn't defeat original jurisdiction. There were
19 pendent State claims in the Metropolitan Life case, yet --

20 QUESTION: And they'd come up under 1367. They
21 would travel with the 13 --

22 MR. ROBERTS: Exactly, Your Honor. The
23 supplemental jurisdiction statute, 1367, expressly
24 provides for Federal court jurisdiction in those
25 instances. They would come with -- with the claim to

1 Federal court.

2 QUESTION: But if you had this same complaint
3 and it didn't have the usury claim and it just had those
4 State law claims, then there's nothing removable.

5 MR. ROBERTS: That's -- that's right, Your
6 Honor. The -- the misrepresentation claim and the
7 suppression claim are both species of fraud claim under
8 State law. They don't come within the -- the scope of the
9 cause of action in the National Bank Act, and they're not,
10 on their own terms, arise under Federal law and they would
11 not be removable.

12 QUESTION: Mr. Roberts, can I go back to your
13 answer to Justice Scalia's question? I wonder if you
14 really meant the answer you gave.

15 Assume a case in which the plaintiff alleges
16 that 3 percent is usurious as a matter of Alabama law, and
17 under Federal law it must be at least 5 percent, say. As
18 I understand it, that would be removable because he's
19 making a usury claim and would be dismissable, that is,
20 under your -- your theory of the case. But I thought you
21 said that would have to be dismissed in State court.

22 MR. ROBERTS: What -- what -- I tried to
23 distinguish between failure to state a claim, which I
24 agree the simple failure to state a claim is -- is not a
25 ground for lack of Federal jurisdiction, Your Honor.

1 QUESTION: If you fail -- you failed to state a
2 Federal claim, but you do state an Alabama claim

3 MR. ROBERTS: There is no Alabama claim because
4 the only claim can arise under Federal law. So it -- so
5 it is removable and then the Federal court would assert
6 Federal jurisdiction, which it has over the claim and
7 dismiss it.

8 QUESTION: And the Federal court would dismiss,
9 yes.

10 MR. ROBERTS: Yes. Yes, Your Honor. But -- but
11 that was the initial question that I -- that I understood
12 Justice Scalia to be asking.

13 But then he said, if it's not colorable on the
14 face of the complaint, what happens then? But I don't
15 think it makes a practical difference.

16 QUESTION: Well, that's my -- my hypothetical.
17 It's 3 percent and the Federal law clearly says anything
18 under 5 percent is not usurious. What happens with that
19 case?

20 MR. ROBERTS: The critical -- you have to
21 know --

22 QUESTION: I've given you all the facts.

23 MR. ROBERTS: There still -- there still could
24 be a colorable claim under --

25 QUESTION: Well, is it a colorable claim or

1 isn't it when it doesn't allege a --

2 MR. ROBERTS: We don't know what the rate --

3 QUESTION: -- percentage rate that's usurious
4 under Federal law?

5 MR. ROBERTS: You don't know what the rate is,
6 Your Honor, under Federal law without -- without more
7 facts about the complaint because the National Bank Act
8 provides the -- the possibility the national bank can
9 charge any of three rates. But the --

10 QUESTION: And one was a State rate.

11 MR. ROBERTS: -- the fundamental -- the
12 fundamental point is that -- that it's removable if
13 there's jurisdiction in the original jurisdiction of the
14 Federal court.

15 QUESTION: Well, I still don't understand your
16 answer. My -- my hypothesis is the Federal law says no
17 cause of action unless it's over 5 percent. He pleads
18 3 percent and he -- and he says this violates State law.
19 He says that and the defendant comes in and says, well,
20 there's no State law cause of action. It's a Federal
21 claim I want to remove it. Does the judge remove it or
22 not?

23 MR. ROBERTS: If -- if there is -- if the claim
24 properly pleaded states a claim over which there's Federal
25 jurisdiction, if it was pled as a claim under the National

1 Bank Act --

2 QUESTION: No, it's -- that is a matter of State

3 law in usury and --

4 MR. ROBERTS: No.

5 QUESTION: -- and you say there is no such

6 animal. But then do you get to remove it or don't you? I

7 don't understand your answer.

8 QUESTION: I don't think there's authority to

9 remove it, if --

10 QUESTION: The answer is yes, isn't it? You can

11 remove it.

12 MR. ROBERTS: You can --

13 QUESTION: He might be able to remove it because

14 he doesn't have confidence in what the State judge will

15 do.

16 MR. ROBERTS: No -- no, Your Honor. You can

17 remove it if there's -- if there's original -- would be

18 original jurisdiction over the complaint. And that

19 doesn't matter whether it's characterized as a -- as a

20 complaint under State law, which doesn't -- doesn't exist

21 because it's been entirely displaced, or if it's properly

22 pled as a -- as a claim under Federal law. You could just

23 as easily ask if they state the claim --

24 QUESTION: I -- I still don't know whether

25 you're telling me yes or no to my hypothetical.

1 MR. ROBERTS: I'm telling you that if the -- if
2 there's no colorable claim --

3 QUESTION: Well, I've told you what the claim
4 is. Is that colorable or not?

5 MR. ROBERTS: Well --

6 QUESTION: He says 3 percent. Federal law is
7 5 percent, and Alabama says I'll -- I'll do it on
8 3 percent. Can he remove it or not? He -- I would think
9 he could remove it and get it dismissed, but I'm not sure
10 you agree with that.

11 QUESTION: The question -- can I ask you a
12 standard on this? I mean, I thought the standard is to
13 ask this question. Is this -- i.e., the State claim --
14 the kind of claim in respect to which Congress intended
15 the Federal action to be the exclusive substitute
16 therefor? If the answer to that question is yes, you can
17 remove it even if it doesn't state a Federal cause of
18 action. Now, have I got it right what your argument is or
19 not?

20 MR. ROBERTS: Yes, that's correct, Your Honor.

21 QUESTION: Then the answer to Justice Stevens,
22 if I have the right standard, would be yes, because
23 Congress did intend the Federal cause of action to be an
24 exclusive substitute for those State actions which allege
25 that 3 percent is usurious.

1 QUESTION: How does this removal statute read?
2 I mean --
3 QUESTION: Is that right or not?
4 MR. ROBERTS: The -- the removal statute gives
5 the -- gives the -- the Federal courts -- gives the
6 defendant the right to remove to a Federal forum any claim
7 that arises under the laws of the United States --
8 QUESTION: Arises under the law.
9 MR. ROBERTS: -- and so -- so the question is
10 whether it arises under, whether there's original
11 jurisdiction in the Federal court.
12 QUESTION: And could we please answer Justice
13 Breyer's question?
14 QUESTION: I want to know if I'm right or not --
15 MR. ROBERTS: Yes.
16 QUESTION: -- because I'm not asking just to
17 hear my standard. I'm asking --
18 MR. ROBERTS: I'm -- I'm sorry, Your Honor.
19 Yes.
20 QUESTION: I'm right, okay, in your opinion.
21 MR. ROBERTS: Yes, you're right.
22 QUESTION: Okay.
23 QUESTION: Okay, and by the same token, if
24 Justice Stevens' question had been asked about a subject
25 that is not under the banking act or labor management

1 reporting or that part of ERISA which has been held to be
2 complete preemption, I take it your answer would be that
3 if a -- a claim was pleaded that omitted one element of
4 the Federal cause of action in the State court, and you
5 didn't start with the assumption that there was complete
6 preemption for extraneous reasons, it wouldn't be
7 removable.

8 MR. ROBERTS: Yes. If there -- if I understand
9 the hypothetical, it's not a situation where it arises
10 under the exclusive cause of action for usury under the
11 National Bank Act.

12 QUESTION: Right. We don't start with the
13 assumption of complete preemption. What he states is, in
14 fact, a Federal claim but for one element. Is that
15 removable?

16 MR. ROBERTS: Yes.

17 QUESTION: He leaves out an element.

18 MR. ROBERTS: The Federal -- the Federal claim
19 would be removable to -- to Federal court, yes.

20 QUESTION: But it's not a Federal claim. He's
21 left out one element. Would that be removable?

22 QUESTION: Answer yes or no, and then sit down.

23 MR. ROBERTS: Yes. Yes, Your Honor, it's
24 removal.

25 Thank you.

1 QUESTION: Thank you, Mr. Roberts.

2 Mr. Clark, we'll hear from --

3 ORAL ARGUMENT OF BRIAN M CLARK

4 ON BEHALF OF THE RESPONDENTS

5 MR. CLARK: Mr. Chief Justice, and may it please
6 the Court:

7 Federal jurisdiction is necessarily limited
8 jurisdiction. Federal removal jurisdiction is limited by
9 statute to those cases that arise under the Constitution
10 or laws of the United States. Plaintiffs have brought no
11 cause of action on the face of the complaint that arises
12 under the -- the Constitution or laws of the United
13 States. As such, there's no Federal jurisdiction under
14 long-held jurisdiction --

15 QUESTION: Oh, but it's a claim of usurious
16 interest charged by a national bank.

17 MR. CLARK: It is a --

18 QUESTION: So under the theory of the
19 Government, that is a Federal claim

20 MR. CLARK: Under the theory of the Government,
21 it -- the claim, as pled, is under Alabama Code section
22 8-8-1. And any interposition of Federal law at all is
23 necessarily interposed by the defendant in this case. And
24 under this Court's decisions in Gully, which was a
25 National Bank Act case, Caterpillar, MetLife, Franchise

1 Tax Board, the imposition of a Federal defense does not
2 create --

3 QUESTION: This is not a Federal defense, Mr. --
4 Mr. Clark. This is like -- suppose you have a case in
5 State court and the plaintiff says, we're both from the
6 State of Alabama. Defendant removes it, says, I was
7 from -- I am, was from Georgia. Now, doesn't the
8 defendant have a right to remove that case even though
9 plaintiff pled it as though it were a case that could be
10 only in State court? Said we're both from --

11 MR. CLARK: Are you talking about where the --
12 where the -- a -- a complaint is pled by -- by an -- by a
13 Georgia plaintiff against an Alabama corporation, it will
14 be removed because --

15 QUESTION: Plaintiff is from Alabama.

16 MR. CLARK: -- because there's diversity?

17 QUESTION: Plaintiff says defendant is from
18 Alabama.

19 MR. CLARK: Right.

20 QUESTION: Defendant removes because defendant
21 is, in fact, from Georgia.

22 MR. CLARK: Right. Well, in that case you have
23 a -- you have a -- you have factual inaccuracy in the
24 pleading. In this case, we're not talking about their
25 basis for removal is not some factual inaccuracy of the

1 pleading, it's that they're saying that your legal theory,
2 plaintiff, which you, under the well-pleaded complaint
3 rule are allowed to choose your own legal theories, you've
4 decided to travel on the Alabama statute --

5 QUESTION: You're not allowed to choose a theory
6 that doesn't exist.

7 MR. CLARK: Well --

8 QUESTION: The notion is that there simply is no
9 claim under State law for usury against a national bank.
10 It doesn't exist. No such claim. If the plaintiff chose
11 to stand on such a claim, it would have to be dismissed
12 because the only exclusive claim for relief -- although it
13 can be brought in State or Federal court, the exclusive
14 claim is one under Federal law. That's the argument here.

15 MR. CLARK: The argument that they are making is
16 that there's no claim is -- is misstating. There is a
17 claim

18 What -- what Your Honor is discussing is the
19 principle of ordinary preemption. Whether or not that
20 Alabama State law claim may proceed is a question of
21 ordinary preemption as to be -- to be distinguished from
22 complete preemption. And the Court held in -- in
23 Caterpillar that -- that a case may not be removed on a
24 Federal defense, including the defense of preemption, even
25 if the defense is anticipated by both parties.

1 QUESTION: Of course. And there's one case -- I
2 was surprised you didn't cite it in your brief. It's
3 very -- makes that point very nicely. The Rivet case
4 against Regions Bank, which was featured on the other
5 side -- you didn't mention it at all in your brief.

6 MR. CLARK: That's an ordinary -- ordinary
7 preemption case -- case also.

8 QUESTION: That -- that distinguishes between a
9 claim for relief and a defense. And that case involved a
10 defense.

11 MR. CLARK: Right, and --

12 QUESTION: The defense of preclusion.

13 MR. CLARK: Right, and that's exactly what they
14 have in this case, a mere defense in this case. And --

15 QUESTION: Because?

16 QUESTION: Do you -- do you disagree that
17 section 86 of the National Bank Act provides the sole
18 source of the cause of action?

19 MR. CLARK: It does not provide the sole source
20 of the cause of action that the plaintiffs have pled in
21 this case, and that's the difference here is -- is the
22 source of sort of organic law as to where the -- where the
23 complaint comes from.

24 Assume there were -- the defendants never
25 brought up this -- this claim or this defense of Federal

1 preemption. The Alabama case would -- the Alabama usury
2 claim would go forward under Alabama law and would be
3 decided under Alabama law. So it's important to -- to see
4 the distinction between -- between what's being -- what's
5 being pled and a defense to what's being pled.

6 Now, as -- as was stated --

7 QUESTION: Wait. Don't leave that point because
8 you're -- you win if you're right on that. I mean, you
9 win if your particular claim is not preempted by this
10 Federal statute, you win -- and they admit it -- if this
11 particular Federal statute is not intended by Congress to
12 be the exclusive vehicle for bringing the kind of claim
13 that you have brought. So now, explain to me. You just
14 said it isn't. Why isn't it?

15 MR. CLARK: Why isn't -- Your Honor, why
16 isn't -- why isn't the -- the cause of action we've
17 brought --

18 QUESTION: Why, in your opinion, is the State
19 cause of action that you brought -- you say it is not true
20 that Congress intended the Federal cause of action as the
21 exclusive vehicle, excluding your kind of claim

22 MR. CLARK: Well --

23 QUESTION: They say it did. You say it didn't.

24 Now, all I want to hear is your arguments for
25 saying it didn't because they pointed to a lot of Federal

1 cases going back to 1886 which say usury claims are to be
2 brought under the Federal statute. The State power in
3 respect to a national bank has no power. Okay? Now, your
4 reply to that is what?

5 MR. CLARK: As this Court stated in the
6 Caterpillar case under note 4, the question of the breadth
7 of the --

8 QUESTION: I don't see what Caterpillar could
9 possibly have to do with it since it isn't a bank case.

10 MR. CLARK: Well, but the question of the
11 breadth --

12 QUESTION: Is it?

13 MR. CLARK: -- of the remedy provided --

14 QUESTION: I'm not asking you that. I asked you
15 to tell me about banking law.

16 MR. CLARK: Right.

17 QUESTION: I want to know is it the case in your
18 view -- you concede it. You seem to contest it. I'll
19 repeat it for the third time.

20 Is it the case that this Federal cause of action
21 is intended by Congress as the exclusive vehicle excluding
22 your State cause of action under the Supremacy Clause of
23 the Constitution?

24 MR. CLARK: Under Supremacy Clause --

25 QUESTION: Is the answer to my question yes or

1 no?

2 MR. CLARK: That is -- yes, that is what those
3 cases hold. However --

4 QUESTION: Okay. Well, then --

5 MR. CLARK: -- however --

6 QUESTION: -- then you can't make the argument
7 you just made.

8 MR. CLARK: However, the question of whether or
9 not a claim is preempted ordinarily is a -- a wholly
10 different question from whether or not there's
11 jurisdiction in the Federal courts.

12 QUESTION: All right. You -- you really want --
13 you conceded you have no State claim. It's preempted by
14 the Federal statutes. Is that right? Is that what you're
15 conceding?

16 MR. CLARK: We -- it appears that there is no --
17 there is no State claim on the usury.

18 QUESTION: All right. There is no State claim
19 So then the question in this case is even though you
20 concede, as I take it you have -- I don't know if you
21 really mean to.

22 (Laughter.)

23 QUESTION: But -- but I take it you just did
24 concede that the Federal cause of action is the only
25 possible cause of action that your client could have.

1 MR. CLARK: Well, if the -- if my client -- if
2 we decided to travel under the Federal cause of action --
3 and what this goes back to is the well-pleaded complaint
4 rule. Plaintiffs in -- in cases are allowed to choose
5 their remedies. And in this case the plaintiffs chose a
6 remedy under the Alabama usury statute, be --

7 QUESTION: The problem with it is your complaint
8 isn't well-pleaded if the only source of law is Federal,
9 which you conceded on your brief and again here. There is
10 no well-pleaded Alabama claim because the Alabama claim or
11 the State law claim doesn't exist. The only claim that
12 exists against a national bank for usury is a Federal
13 claim

14 MR. CLARK: Well, and again, that is a
15 defense -- the claim -- as the Court said in *MetLife*, the
16 touchstone is not whether or not preemption is obvious,
17 but the question is whether or not that creates removal
18 jurisdiction.

19 QUESTION: No, but the -- the --

20 MR. CLARK: And that has to appear from the face
21 of the complaint.

22 QUESTION: But I --

23 QUESTION: But the face of a well-pleaded
24 complaint. And there's a difference between preemption as
25 a defense to a claim that is well pleaded and here where

1 you have badly pleaded a complaint that can arise only
2 under Federal law that simply can't arise under State law.

3 MR. CLARK: The problem with that test is it's
4 not a -- it's not a test. It adds another layer of -- of
5 litigation to -- to almost any claim. And what you're
6 going to have is, instead of following a well-pleaded
7 complaint rule that for years has served this Court,
8 you're going to have all manner of State law causes of
9 action all of the sudden removed and then you're going to
10 have this litigation over -- over, well, does it state a
11 cognizable cause of action under -- under State law or is
12 it part of --

13 QUESTION: We have one simple question. Has
14 Congress provided for exclusive Federal law to govern this
15 claim? That's not a complicated question. .

16 MR. CLARK: Congress has not provided for
17 exclusive Federal cause of action to govern an Alabama
18 usury claim.

19 QUESTION: So then you are not conceding --

20 QUESTION: Then you just withdrew your
21 concession.

22 (Laughter.)

23 QUESTION: -- complete preemption as opposed to
24 ordinary preemption.

25 MR. CLARK: As a matter of ordinary preemption,

1 and maybe --

2 QUESTION: You're conceding ordinary preemption,
3 but not complete preemption.

4 MR. CLARK: Exactly. And if I -- if I
5 misunderstood the question, then I misunderstood the
6 question.

7 QUESTION: I'm sorry. It probably was --

8 MR. CLARK: As a matter of ordinary preemption,
9 it may very well be that -- that --

10 QUESTION: Congress --

11 MR. CLARK: -- the State Law claim and
12 Congress -- and Congress intended that.

13 QUESTION: Let him finish answering the question
14 that somebody else asked.

15 QUESTION: Oh, I'm sorry.

16 MR. CLARK: But as a matter of complete
17 preemption, under -- under what I was saying in the
18 MetLife and the Caterpillar case, those do not
19 jurisdiction make. In the Gully -- Gully case itself, it
20 said a suit brought upon a State statute does not arise
21 under an act of Congress because prohibited thereby.

22 That is exactly the situation that we have here.
23 We have a State law cause of action. We have the
24 defendant interposing a defense saying, your State law
25 cause of action is prohibited by that -- by that -- by the

1 Federal act, and now we want to create removal
2 jurisdiction because of that.

3 It's interesting. This Court has always
4 found --

5 QUESTION: Mr. Clark, I'm -- can we go back
6 to -- you just cited Gully and maybe I have it wrong, but
7 I thought that that was a suit to collect a State tax
8 under State law.

9 MR. CLARK: Yes.

10 QUESTION: That the source of law that was
11 applied to the private actor was State law, the State tax.

12 MR. CLARK: Yes.

13 QUESTION: And here, the source of law that
14 would be applied is Federal law, not State law.

15 MR. CLARK: The -- the source of law pled in the
16 complaint is Alabama State law. Now, the fact that it may
17 be ordinary -- ordinarily preempted is something that --
18 that the defendants can raise and the State courts can
19 decide. And the State courts have often -- often decided
20 matters of Federal preemption.

21 QUESTION: I just --

22 QUESTION: May I ask -- may I ask this one
23 question? It seems to me there's a slight difference in
24 the text of section 85 and 86. And section 85 reads as a
25 defense, and if that's all there were here, I would

1 understand your argument completely.

2 But I think one can read section 86 as creating
3 an affirmative Federal cause of action, and one can argue
4 that that's the only cause of action that can be
5 prosecuted. Now, if that's true, would there not be --
6 would it not -- not -- would you not have to say then that
7 the affirmative remedy in -- under the Federal statute is
8 exclusive?

9 MR. CLARK: Well, in -- in -- there are many
10 Federal statutes that would run concurrently with State
11 regulation of -- of business. And if -- if the question
12 is, is the fact that there's a Federal remedy provided, in
13 addition to the State remedy -- does that provide --
14 provide removal jurisdiction, the answer would be -- would
15 be no to that question.

16 QUESTION: It's not only that there's a Federal
17 remedy provided, but it's been construed to be the
18 exclusive remedy.

19 MR. CLARK: Right.

20 QUESTION: That those are the only remedies that
21 one can get.

22 MR. CLARK: But again, I would --

23 QUESTION: Doesn't that distinguish it from some
24 of these other hypothetical cases?

25 MR. CLARK: Well, again, I would go back to this

1 Court's concept of federalism wherein the -- the State
2 courts are allowed to make that call. And in Avco, which
3 established the -- this platypus of -- of field preemption
4 or complete preemption is very limited to -- to those
5 actions construing the collective -- collective bargaining
6 agreements. And then it was reluctantly extended by this
7 Court in the Metropolitan Life and Taylor cases, and --

8 QUESTION: Well, the argument of the Government
9 is that this is another one of those rare cases. That's
10 their whole point.

11 MR. CLARK: But if this --

12 QUESTION: And if it is, then you're just wrong
13 about it being only a defensive maneuver.

14 MR. CLARK: This -- if this is another case, it
15 is a wholly separate and -- and distinguished -- distinct
16 way to go because the National Bank Act carries with it
17 none of the indicia of the intent of Congress to
18 completely preempt that the LMRA does.

19 QUESTION: But it's been interpreted by a number
20 of cases to have precisely that effect.

21 MR. CLARK: To have ordinary preemptive effect,
22 which --

23 QUESTION: No. No. That was not the
24 interpretation. You want us to overrule earlier cases
25 about --

1 MR. CLARK: Absolutely not.

2 QUESTION: -- the meaning of the National Bank
3 Act?

4 MR. CLARK: No.

5 But in the -- in the LMRA context, you have
6 specific jurisdictional grant to the district courts of
7 the United States. Then when ERISA came along, with
8 Taylor you have -- you have specific legislative history
9 saying that this is to be interpreted under the Avco rule,
10 which is to -- which is to -- to have a body of Federal
11 law deciding all cases, no matter where brought, under --
12 under ERISA or deciding all cases under collective
13 bargaining.

14 In this case, there's no -- in National Bank
15 Act, there's no -- there is no body of Federal law that
16 could ever arise, and it's because the nature of the
17 National Bank Act is really more of a hierarchy of State
18 laws. It says, National Bank Act, you can -- you can
19 charge either the interest rate in the State in which the
20 claim is brought, you can charge the interest rate in the
21 State in which the bank is located, or you can charge --
22 and there's a default Federal interest rate. So what
23 you're going to have here is sort of a patchwork of State
24 law decisions concerning the State -- State law of
25 Delaware versus Alabama versus Kentucky versus Michigan.

1 QUESTION: I'm still trying to get back to my --
2 I'm beginning to see what I think your answer is, but
3 please don't agree with me if you really disagree.

4 All right. First, if I were to ask the
5 question, is there Federal law in the area? Yes. Ask the
6 question, does Federal law preempt State law? Yes.

7 MR. CLARK: Ordinarily.

8 QUESTION: Yes, here. Yes, well, you'll say
9 right here, but wait.

10 So you -- if I ask this question, is this
11 State -- Federal cause of action -- did Congress intend it
12 to preempt a State cause of action substituting the
13 Federal cause of action therefor? I think now you're
14 prepared to say the answer to this question is yes.

15 MR. CLARK: Ordinarily preempt.

16 QUESTION: But you will answer the following
17 question no. Is there an intent here by Congress that
18 this Federal cause of action that preempts the State cause
19 of action by substituting an exclusive Federal remedy --
20 is there an intent of Congress to allow removal when it's
21 pleaded? The answer is we have no evidence of that.

22 MR. CLARK: The answer to that question is no.

23 QUESTION: And what they're saying on their
24 side -- and now this is exactly the issue between them and
25 the lower courts. And indeed, there's language that's

1 unclear in the lower cases -- is that we need evidence of
2 that latter point. That's what you're saying. And
3 they're saying no.

4 MR. CLARK: Well --

5 QUESTION: They're saying, look, all you have to
6 have are the first three things I mentioned. Stop after
7 you decide that Congress has created a Federal action with
8 the intent that it provide an exclusive substitute for
9 this State action. Stop there. Don't ask for any further
10 evidence of anything. One, because you'll never get it.
11 Congress never thinks of this sort of esoteric issue. And
12 second, because there's just no reason.

13 Now, okay. Now I get the -- the clash, and now
14 I can get the answer.

15 MR. CLARK: I'm sorry if I -- I misunderstood
16 your question before.

17 QUESTION: No, no. It's my fault. I didn't get
18 it.

19 MR. CLARK: And in fact, in the -- in Justice
20 Brennan's concurring opinion in the MetLife/Taylor case,
21 he said, you know, that -- that congressional intent is
22 the touchstone here, and that this Court would be well
23 served not to infer removal jurisdiction unless there is
24 some clear evidence of congressional intent to do so like
25 in an ERISA case or like in the LMRA case.

1 QUESTION: Mr. Clark, I should perhaps have
2 asked this question of the other side, but they're not
3 going to have a lot of time left when they get back up.

4 I assume that it -- it is a given that merely
5 setting forth all of the elements of a Federal cause of
6 action in a complaint is not enough to provoke removal.
7 That is to say, if there is both a Federal cause of action
8 and a State cause of action which has the same elements,
9 if you plead those elements, which would constitute a
10 Federal cause of action, but you protest that you are not
11 asserting a Federal cause of action, you are only
12 asserting a State cause of action, that would not be
13 removable. Would it?

14 MR. CLARK: No, it would not be. And that --

15 QUESTION: Okay. So we're -- we're talking
16 about a -- a distinctive rule here that where you set
17 forth the elements of a -- of a cause of action that you
18 do not assert to be a Federal cause of action, we are
19 going to allow it to be removed nonetheless. Right?

20 MR. CLARK: If -- if what the defendants are
21 arguing, it would be a new rule. And it -- it is a
22 departure from --

23 QUESTION: But may I understand this further
24 point? What Justice Scalia's described seems to me quite
25 common. You have State human rights laws. You have

1 Federal human rights laws. The same facts that I was
2 discriminated against. If I make my choice that I want to
3 bring it under, say, New York law rather than Title VII,
4 that's my prerogative. And the defendant certainly can't
5 remove that case by saying, well, you could have pleaded
6 those same facts as a Title VII case. Quite different.
7 That's where there's concurrent lawmaking authority, both
8 State and Federal.

9 Here the argument is there is no State lawmaking
10 authority. There is no parallel source of law, State and
11 Federal, and that's what makes it different from the
12 ordinary case where you plead the facts and they would
13 state a claim under either State law or Federal law. The
14 pleader has her choice.

15 MR. CLARK: There -- there is concurrent
16 lawmaking authority. However, because of the Supremacy
17 Clause, the courts have held that -- that there is
18 ordinary preemption in this case. But that does not
19 answer the question whether or not should -- there should
20 be removal jurisdiction in the case.

21 And it's -- in other words, the Alabama
22 legislature certainly has the right to make -- make law
23 regulating Federal banks. In fact, this Court decided way
24 back in 1870 that national banks are subject to State law
25 regulation. And in fact, the quote from the case

1 something like in their daily activities, they're
2 regulated much more under --

3 QUESTION: But not usury. I mean, you -- it's a
4 question of how you characterize this, but I think you
5 agree that on the question of usury, the Federal
6 legislation is conclusive and it was done, indeed, for the
7 very purpose of having national banks escape from whatever
8 jealous, mean legislation the State might pass.

9 So the only law -- I mean, the choice would be
10 if you want to say, yes, I want to stick with Alabama law,
11 no Federal 85, 86 for me, that case must get dismissed.
12 You can't get past the door because there is no such
13 claim

14 MR. CLARK: If -- if the preemption, ordinary
15 preemption, is -- is applied, it -- it would -- applied as
16 it has been, it would be dismissed.

17 However, that is a wholly separate question from
18 whether the case arises under Federal jurisdiction. It is
19 a question of ordinary preemption that the State courts --

20 QUESTION: Why would a plaintiff want to bring
21 us a suit that inevitably must be dismissed?

22 MR. CLARK: Well, and -- plaintiffs have
23 different reasons for pleading the things they do. Under
24 the well-pleaded complaint rule, of course, it's their
25 prerogative to rise and fall on the causes of action that

1 they choose to plead.

2 However, I go back to the MetLife case which the
3 Court said it's not the obviousness of preemption defense
4 but the intent of Congress. And I think in answer to the
5 question over there, is why -- why go that extra step?
6 Well, because this Court has decided in MetLife that that
7 extra step is necessary to stop this slippery slope down
8 where every case that is removed out of a State court, you
9 now have this other layer of -- of litigation over, well,
10 is there another cause of action and -- and perhaps that
11 we have to find some -- we have to litigate over whether
12 it's an exclusive cause of action.

13 And the answer to that is this Court has
14 provided, for right or for wrong, since 1887 that we
15 follow the well-pleaded complaint rule and it follows the
16 language in the -- at the end of the Gully opinion saying
17 that what you need is a clear bright line limitation. And
18 only where we find some clear congressional intent, such
19 as in the LMRA situation, such as in the ERISA situation,
20 do we make this extreme and extraordinary grant of field
21 preemption or complete preemption or whole preemption.

22 If there are no further questions, I will sit
23 down.

24 QUESTION: Thank you, Mr. Clark.

25 Mr. Waxman, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF SETH P. WAXMAN
2 ON BEHALF OF THE PETITIONERS

3 MR. WAXMAN: Justice Scalia, the answer to your
4 question is yes, if there are --

5 QUESTION: What was my question?
6 (Laughter.)

7 MR. WAXMAN: Your question was if -- if you --
8 you said this would take time, and it will. You pleaded
9 all the elements of a Federal cause of action, but it
10 also -- it also satisfies a State cause of action. If the
11 Federal cause of action is not exclusive except in that
12 rare instance, it is not removable.

13 Justice Breyer, yes, indeed we say that you stop
14 at point 3. That is, you determine whether or not this is
15 the rare instance in which there's not only substantive
16 preemption but exclusive Federal remedies. And the reason
17 you stop is because we have Federal question jurisdiction.
18 It says that removal is tied to original jurisdiction,
19 and therefore, the question is, does the complaint
20 well-pleaded necessarily state a cause of action? Justice
21 Holmes indicated in a statement that is oft repeated and,
22 if it's anything, is under-inclusive, as this Court
23 indicated I think in Merrell Dow, that a suit arises under
24 the law that creates the cause of action. If the cause of
25 action is exclusively Federal, in that rare instance, it's

1 under arising-under jurisdiction.

2 Justice Kennedy I think asked what for me is the
3 most difficult question in this Court's sometimes not
4 fully explicated arising-under jurisdiction, which is the
5 question that was addressed in Merrell Dow and in
6 particular in footnote 1 in this Court's opinion in
7 Merrell Dow, which is if you have a State cause of action
8 misrepresentation, but it has embedded with it as a
9 necessary matter a conclusion about whether Federal law
10 was or was not satisfied, does that State claim arise
11 under Federal jurisdiction?

12 In Franchise Tax Board, this Court repeated
13 dicta that suggests that the answer is yes. And in Smith
14 versus Kansas City Title and Trust, this -- this Court
15 seemed to indicate yes. But in Moore versus Chesapeake --
16 the Chesapeake and Ohio Railway, the Court suggested that
17 the embedded Federal question has to be central to the
18 State cause of action and really important.

19 And the result, as I -- as I think things stand
20 now, is we have a very long footnote 1 in this Court's
21 opinion in Merrell Dow that says many people have
22 difficulty resolving our jurisprudence in this area, but
23 in the Merrell Dow context, where there was a State tort
24 claim that could -- may I finish my --

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

1 The case is submitted.
2 (Whereupon, at 11:57 a.m., the case in the
3 above-entitled matter was submitted.)
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