EXAMINERS' ANALYSIS OF QUESTION NO. 2

As to the first issue, it is well-settled that a litigant may challenge a court's subject matter jurisdiction at any time in the same civil action, even for the first time on appeal. *Kontrick v Ryan*, 540 US 443, 455 (2004). This holds true because it is always the obligation of a court to determine whether subject matter jurisdiction exists, and a party cannot waive subject matter jurisdiction by failing to challenge the jurisdiction early in the proceedings. *Ins Corp of Ireland Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 702 (1982). Consequently, even if a party loses in the trial court it may still successfully raise a lack of subject matter jurisdiction for the first time on appeal because subject matter jurisdiction cannot be waived and can be challenged at any time. *Capron v Van Noorden*, 2 Cranch 126, 127 (1804); *United Food and Commercial Worker's Union Local 919 v Centermark Properties Meridan Square Inc*, 30 F3d 298, 301 (CA 2, 1994). Accordingly, the correct answer to the first question is that the city can raise an attack on the district court's subject matter jurisdiction, even though it never challenged the removal and lost at trial.

The next question is whether the district court had subject matter jurisdiction over plaintiff's complaint. As the party that initially removed the case, the tribe has the burden to establish that federal subject matter jurisdiction exists. *Ahearn v Charter Twp of Bloomfield*, 100 F3d 451, 454 (CA 6, 1996). The tribe's removal notice was based upon 28 USC § 1441(b), which provides that "any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States, shall be removable without regard to the citizenship or residence of the parties." And, pursuant to 28 USC § 1331, federal district courts have original jurisdiction over "actions arising under the Constitution, laws or treaties of the United States." Whether federal question jurisdiction exists is determined at the time of removal. *Great Northern Ry Co v Alexander,* 246 US 276, 281 (1908); *Ahearn,* 100 F3d at 453. A claim falls within a federal court's original federal question jurisdiction "only [in] those cases in which a well-pleaded complaint establishes either that federal law creates a cause of

action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd v Construction Labors Vacation Trust*, 463 US 1, 27-28 (1983). The well-pleaded complaint rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc v Williams*, 482 US 386, 392 (1987). "The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Beneficial National Bank v Anderson*, 539 US 1, 12 (2003), quoting *Caterpillar*, 482 US at 392.

Here, the city's complaint did not allege a cause of action under federal law. Indeed, the city only alleged a nuisance resulting from violations of its own zoning ordinances and in no way sought relief under federal law. The city would not have been independently able to file this case in federal court based upon this nuisance claim.

However, in the complaint the city cited to the tribe's federal immunity, and asserted that the tribe was not entitled to assert this immunity under federal law. Is reference to this federal law enough to grant subject matter jurisdiction? No, because "it is not enough that the complaint anticipates a potential federal defense." *Caterpillar Inc*, 482 US at 393. Here, the complaint's reference to federal law only anticipates, and attempts to refute, the tribe's potential defense that it is exempt or immune from the zoning ordinances because it is a recognized tribe, and those references do not give rise to federal question jurisdiction. See *Aetna Health Inc v Davila,* 542 US 200, 207 (2004) (explaining that whether case arises under federal law "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose") and *New York v Shinnecock Indian Nation*, 686 F3d 133, 139 (CA 2, 2012). In other words, the success of the city's allegations that the tribe created a nuisance by violating city zoning ordinances does not turn on the construction of federal law. *Franchise Tax Bd*, 478 US at 808 809. Rather, the only time federal law would come into play would be as a defense to the suit, and that is not enough to create federal question jurisdiction. And, the facts of the

question reveal exactly that, as the trial court ruled on the merits of the city's allegations without the need for addressing the federal defense.

Finally, a substantial federal question was not raised by the state law claims. *Grable & Sons Metal Products Inc v Darue Manufacturing*, 545 US 308 (2005). Although it would be possible for the court to have to determine whether the tribe is entitled to sovereign immunity under federal law, when reviewing the complaint it does not appear that the city's right to relief is dependent on the construction or application of federal law. *Id*, at 312-313. For example, in *Grable* the plaintiff's state law cause of action was dependent upon having superior title, which was dependent upon what notice was required under a federal statute. Here, the legal proofs and concepts between the city's claims and whether the tribe is entitled to immunity under federal law are distinct, and so the federal issue does not raise a substantial federal question. *New York*, 686 F3d at 140-141. Complete preemption, which is rare, does not apply here because there are no "federal statutes at issue [that] provide [ ] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat'l Bank,* 539 US at 8.

In summary, the proper answer is that plaintiff could challenge on appeal the district court's subject matter jurisdiction and the district court did not have jurisdiction because a federal question was not raised by the complaint.