

Unpuzzling Complete Preemption: Beneficial National Bank v. Anderson After Two Decades in the Circuit Courts

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UNPUZZLING COMPLETE PREEMPTION: BENEFICIAL NATIONAL BANK V. ANDERSON AFTER TWO DECADES IN THE CIRCUIT COURTS

Anthony Salzetta*

Beneficial National Bank v. Anderson, 539 U.S. 1 (2003), established the modern complete preemption doctrine—a method of finding removal jurisdiction by way of federal defense. The decision was met immediately with a great degree of confusion and critique by scholars concerned with the doctrine’s theoretical foundation (or lack thereof) and the potential disarray in its prospective execution by lower courts.

This twenty-year retrospective tackles whether clarity has emerged in the lower courts. By analyzing all 164 circuit court cases citing to Beneficial National Bank, I find minimal moments of disagreement between circuits as to application of the doctrine. Courts have overwhelmingly declined to expand the doctrine, with growth in only three key areas: the Copyright Act, the Carmack Amendment, and the Interstate Commerce Commission Termination Act. Thus, on complete preemption, academic concerns did not come to fruition. Instead, circuit courts worked in concert and with restraint to produce stability.

These findings suggest that Supreme Court decisions involving doctrinal growth with unclear implementation may warrant less skepticism. In such instances, the Court is not merely foisting a mess upon the lower courts. Rather, it is deputizing circuit courts to use judicial reasoning to construct a sensible way forward. This Essay suggests the Supreme Court’s confidence in the circuits is well placed and posits a doctrinal-growth cycle of short-term instability preceding circuit-court development of a more-coherent whole.

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INTRODUCTION

Preemption is ordinarily raised as a defense in state court to defeat a state-law cause of action that is blocked by federal law. Preemption, like most federal defenses, is emphatically not a way to remove cases from state to federal court.¹ But “complete” preemption upends this traditional rule. Under complete preemption, courts find that Congress has exerted such complete legislative authority that any state law claims on the subject are transformed into federal law claims.² In these instances of judicial transmogrification,³ the only possible well-pleaded complaint states a federal cause of action. In turn, this provides federal question jurisdiction in the district courts. That is to say, by successfully asserting the defense of complete preemption, a defendant can transform a plaintiff’s state law cause of action, filed in state court, into a federal cause of action in federal

1. See *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (“A defense that raises a federal question is inadequate to confer federal jurisdiction.”); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (“[A] suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.”).

2. See *Avco Corp. v. Aero Lodge No. 735, Int’l. Ass’n of Machinists & Aerospace Workers*, 390 U.S. 557, 559–60 (1968) (establishing the doctrine of complete preemption).

3. See *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 18–19 (2003) (Scalia, J., dissenting) (“[T]he claim of such a right is transmogrified into the claim of a federal right.”).

court.⁴ This usurps the traditional rule under which the plaintiff is the master of their own complaint.⁵

This Essay takes a hard look at the complete preemption doctrine's leading case, *Beneficial National Bank v. Anderson*⁶ (hereinafter "*BNB*"). Scholars criticized the decision, concerned with the lack of theoretical foundation and the potential for confusion in prospective execution.⁷ The Supreme Court has done little to weigh in as to the doctrine's rationale, scope, or effect.⁸ But circuit courts, left largely on their own, have managed to achieve clarity and synchrony as to how, when, and under what circumstances the doctrine applies.

This Essay proceeds in three parts. Part I explains preemption, the doctrine of complete preemption, and what *BNB* changed. Part II looks at what happened immediately following the case – an explosion of scholarship concerned with the untenability of complete preemption. Part III addresses this scholarly critique by reviewing whether stability has emerged in the circuit courts. I have read every circuit court case citing to *BNB* and found a relatively constrained application of complete preemption in the courts of appeals.⁹ Within Court-approved subject matter (NBA §§ 85, 86, LMRA § 301, ERISA § 502) the doctrine has been contained, and despite persistent invitation to expand the doctrine, it saw tailored growth only in the Copyright Act, the Carmack Amendment, and the Interstate Commerce Commission Termination Act.¹⁰

4. See, e.g., *El Paso Nat'l Gas Co. v. Neztosie*, 526 U.S. 473, 484 (1999) ("The Price-Anderson Act transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident'", even if that action sounds in state law (quoting 42 U.S.C. § 2210(n)(2)).

5. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." (citations omitted)).

6. See generally 539 U.S. 1.

7. See discussion *infra* Part II.

8. First, in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 201 (2004), the Court clarified that a state law does not create an independent legal duty if the claim could have been brought under ERISA. Second, in *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), the Court clarified that counterclaims (here, one susceptible to recharacterization through complete preemption) cannot be used as bases for federal jurisdiction through the Federal Arbitration Act.

9. For a list of every circuit court case citing *BNB*, see Appendix I.

10. See discussion *infra* Part III.

This Essay seeks to accomplish a few goals. First, to provide a practical guide to complete preemption and its scope as reflected in the Supreme Court and the courts of appeals. If nothing else, this Essay explores the areas of law are undeniably completely preempted, and which areas are more precarious. Second, the Essay reveals the surprising, reassuring, and interesting lessons this relatively contained bubble of federal jurisdiction law can teach us about how we should approach and conceptualize doctrinal change wrought by seemingly destabilizing Court decisions. Circuit courts can and do sensibly develop and clarify law through careful analysis and inter-circuit conversation.

When the Supreme Court issued *BNB* and expanded federal court jurisdiction by judicial decree, many scholars expressed profound concern over the chaos it would engender in the lower courts. Additionally, Justice Scalia referred to the doctrine as both an “unprecedented act of jurisdictional alchemy,” and “transmogrifi[cation].”¹¹ The Court’s failure to adequately theorize modern complete preemption doctrine was *supposed* to threaten the entire administration of the doctrine. Those who did see the doctrine as a positive development largely ignored the inefficiency of confusion and the potential for further doctrinal growth outside the Supreme Court. While *BNB* may have invited defendant efforts to drag state law claims into federal courts, a review of the circuit precedent indicates the circuit courts’ capacity to stand as effective gatekeepers and uniform developers of the law.

I therefore challenge the premise that the Supreme Court is, or must be, the primary source of coherence in federal common law. To be sure, the Court’s involvement is sometimes necessary to resolve an intractable split between circuits. But it is wrong to assume that intractable splits will develop wherever the Court leaves room for interpretation. When theorizing about the potential impact of novel Supreme Court doctrine, scholars would do well to remember that the circuit courts can be, and often are, communicating sources of development and stability. Rather than treat them broadly as hapless victims of disarray, we should expect that the circuits will work in concert to stabilize law.

11. *Beneficial Nat’l Bank*, 539 U.S. at 14, 18–19 (Scalia, J., dissenting).

I. COMPLETE PREEMPTION

A. Preemption and the Well Pledged Complaint Rule

At its most basic definition, preemption arises as a defense to defeat a state law cause of action through the supremacy of federal law on the subject.¹² The legislative authority of states and the federal government is often concurrent.¹³ Much of the time, the federal and state laws can coexist and can both be enforced.¹⁴ There is also a presumption against finding preemption to prevent the overbroad invalidation of state and local law.¹⁵

However, state and federal legislation will sometimes conflict to the extent that one must yield to the other (i.e., federal law says to jump, the state says to stand still). Such conflicts are found where “compliance with both federal and state regulations is a physical impossibility,”¹⁶ or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷ In these circumstances, assuming the laws are valid, the Supremacy Clause dictates we follow federal law, effectively repealing provisions of state law.¹⁸

This is called “conflict” preemption¹⁹ and occurs regardless of whether or not the federal statute expressly provides for preemption

12. *See, e.g., Avco Corp. v. Aero Lodge No. 735, Int’l. Ass’n of Machinists & Aerospace Workers*, 390 U.S. 557, 560 (1968) (holding that removal was proper despite Plaintiff’s claim being one of state contract law because § 301 of LMRA preempts certain state-law claims).

13. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990) (“Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies.”).

14. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 581 (2009) (discussing the “longstanding coexistence of state and federal law”).

15. *See id.* at 565 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”)).

16. *Fla. Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142–43 (1963).

17. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

18. *See* U.S. CONST. art. VI, cl. 2; *see also M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326–27 (1819) (holding laws made pursuant to the Constitution form the supreme law of the land).

19. The descriptor, of course, telegraphs that the preemption story shall soon grow more complex. It is worth noting, however, that this is the simplest, most readily available form of preemption.

of conflicting state law.²⁰ In *McDermott v. Wisconsin*, for example, where Wisconsin had promulgated an exclusive labeling scheme for corn syrup that outlawed the federally approved labels, the Court struck down the Wisconsin law even though the relevant congressional act did not expressly call for preemption.²¹

A second, somewhat less common, form of preemption occurs where federal law occupies a field of law such that states lose concurrent legislative authority over the arena.²² This type, called “field” preemption, exists to maintain “one ‘official’ standard – one that is ‘uniform’ and that eliminates all confusion.”²³ The Court has articulated that in these instances, “Congress . . . preempted the field and left no room for any supplementary state regulation concerning,” the same subject.²⁴ For example, field preemption has long been used to maintain the exclusive federal control over matters of immigration.²⁵ Field preemption also comes into play in international relations, where matters “demand broad national authority.”²⁶ Notably, field preemption is tailored by courts to the scope of the federal regulation. For example, while nuclear power plant safety regulation is a field preempted by federal law, economic concerns remain within state responsibility.²⁷

20. See 1 Emp. Coord. Benefits § 1:100 (Preemptive Effect of ERISA); *but see* *Savage v. Jones*, 255 U.S. 501, 533 (1912) (“[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed.”).

21. See *McDermott v. Wisconsin*, 228 U.S. 115, 137 (1913).

22. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”); *but see* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.” (citations omitted))

23. *Campbell v. Hussey*, 368 U.S. 297, 300 (1961).

24. *Id.* at 301.

25. See generally *Hines v. Davidowitz*, 312 U.S. 52 (1941) (disallowing the state from enforcing its immigrant registration scheme).

26. *Id.* at 68.

27. See *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983) (“[A]s we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the federal government should

Conflict and field preemption typically arise in state court as defenses against allegedly preempted state law causes of action.²⁸ They do not, for example, create affirmative federal causes of action to nullify state law. Though federal law governs how to determine whether a state law has been preempted, state courts are trusted to properly follow federal law.

Despite implicating federal law, preemption is not a means of asserting federal jurisdiction due to the “well-pleaded complaint” rule.²⁹ Generally, under the well-pleaded complaint rule, to remove a case from state to federal court, there must either be diversity jurisdiction or the complaint must affirmatively raise a federal claim.³⁰ The basis for federal jurisdiction must be apparent on the “face” of the properly pleaded complaint.³¹ This means that federal defenses like preemption—either raised or anticipated—are insufficient bases for federal jurisdiction.³² They have no legitimate reason to appear on complaints alleging only state-law claims. The claims themselves, or the citizenship of the parties in the case of diversity jurisdiction, must raise federal-jurisdiction-granting issues.

As a result, these standard forms of preemption are not jurisdiction-granting defenses. Ordinary preemption cannot be used as a basis to remove a case from state court to federal court.³³ It arises, for the most part, as a defense in state court and the state court rules on the question.³⁴ Because state courts are bound by the Constitution to follow federal law,³⁵ federal law’s primacy is generally not at risk.

regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.”).

28. But, in the case of field preemption, can be raised in federal court in a declaratory judgment challenge to the constitutionality of state law. *See, e.g.*, *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1 (1983) (asking the Court to declare whether federal law preempted state law).

29. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 154 (1908) (holding that federal question jurisdiction requires the federal issue to be a part of the plaintiff’s original cause of action).

30. *See id.*; 28 U.S.C. § 1441 (providing the basis for removal to federal court).

31. *See Gully v. First Nat’l Bank*, 299 U.S. 109, 113 (1936).

32. *See Mottley*, 211 U.S. at 152 (holding that an anticipated federal defense does not establish federal question jurisdiction); *see also Gully*, 299 U.S. at 116 (same).

33. *See Franchise Tax Bd.* 463 U.S. at 21.

34. *See id.*

35. *See* U.S. CONST. art. VI; *see also Haywood v. Drown*, 556 U.S. 729, 735–37 (2009) (“[S]tate courts as well as federal courts are entrusted with providing a forum

State courts are trusted to get the answer right based on principles of comity and federalism.

There are two exceptions to this rule. The first is express statutory removal. Sometimes, in addition to preempting state law, Congress expressly provides for removal of preempted actions from state to federal court. The Court has allowed removal where Congress has both preempted state law on the subject *and* expressly provided for removal of those actions.³⁶ The Price-Anderson Act's 1988 Amendments, for example, grant federal district courts original and removal jurisdiction over any "public liability action arising out of or resulting from a nuclear accident . . . without regard to the citizenship of any party or the amount in controversy."³⁷ As a result, any actions filed in state court that fall within the Price-Anderson Act's scope can be removed to federal court.³⁸ This exception is anchored in clear congressional mandate to preempt and remove.³⁹

In *BNB*, the Court developed and expanded complete preemption, the second exception to the well-pleaded complaint rule.

B. Complete Preemption Before *BNB*

Prior to *BNB*, complete preemption was a narrow, but potent exception to the well-pleaded complaint rule that the Court had only recognized in two statutes. Its origins lie in the Court's "arising under" jurisprudence at its intersection with the Labor Management Relations Act (LMRA).⁴⁰

When Congress creates a right or cause of action, it need not express its desire to create a federal forum for the claims adjudicating that right or bringing that cause of action. Federal district courts have jurisdiction under 28 USC § 1331 over claims "arising under the

for the vindication of federal rights . . . a State cannot simply refuse to entertain a federal claim based on a policy disagreement.").

36. See generally *El Paso Nat'l Gas Co. v. Neztosie*, 526 U.S. 473 (1999) (discussing the removal allowed by the Price-Anderson Act).

37. 42 U.S.C. § 2210(n)(2). Note that, though not the subject of this Essay, Congress does not have complete free reign to create federal causes of action and jurisdiction in this manner. Claims arising out of cause of action-creating and jurisdiction-granting statutes are still subject to Article III and justiciability doctrine limits. See, e.g., *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 572 (1992).

38. See *El Paso Nat'l Gas Co.*, 526 U.S. at 487–88.

39. See *id.* at 484–85 ("Congress . . . expressed an unmistakable preference for a federal forum . . . both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.").

40. See 29 U.S.C. § 185.

Constitution, laws, or treaties of the United States.”⁴¹ For the purposes of § 1331 (federal question) jurisdiction, a suit only arises under the Constitution and laws of the United States where the “plaintiff’s statement of [their] own cause of action shows that it is based upon those laws or that Constitution.”⁴² Additionally, the federal question must be “(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”⁴³

However, Congress sometimes passes a statute explicitly conferring federal courts jurisdiction over specific subject matter.⁴⁴ In these instances, the test for federal jurisdiction changes: Article III, rather than § 1331, sets the jurisdictional limits. Within the confines of Article III, Congress is empowered to legislate lower court jurisdiction into existence so long as the claim contains a “federal ingredient” – a question of federal law that might arise during the case.⁴⁵

Long before complete preemption came to be, Section 301 of the LMRA⁴⁶ posed an odd jurisdictional puzzle. Section 301 of the LMRA expressly provides for federal jurisdiction over suits for violation of collective bargaining agreements without respect to the amount in controversy or diversity of citizenship.⁴⁷ But unlike the Price-Anderson Act, it does not expressly preempt state law or even identify what body of law was intended to govern the disputes once in federal court.⁴⁸ As a result, it was unclear whether any “federal ingredient” existed to justify federal jurisdiction. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Court resolved these questions by finding that Section 301’s jurisdictional language was not

41. 28 U.S.C. § 1331.

42. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

43. *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

44. *See, e.g., Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 817 (1824) (When Congress chartered the Bank, it specifically provided “the right ‘to sue and be sued’ ‘in every Circuit Court of the United States.’”).

45. *See id.* at 823 (“We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.”).

46. *See* 29 U.S.C. § 185.

47. *See id.* § 185(a) (“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”).

48. *Compare id.*, with 42 U.S.C. § 2210(n)(2).

merely jurisdictional.⁴⁹ Instead, Section 301 additionally empowered federal courts to create a body of federal common law governing suits over collective bargaining agreements, sometimes by incorporating state law where compatible.⁵⁰ This brought Section 301 within the reaches of Article III “arising under” jurisdiction because “[t]he power of Congress to regulate these labor-management controversies under the Commerce Clause is plain.”⁵¹ Remember that claims that fall within the purview of Section 301 are for breach of contract – typically state law claims.⁵² The result is that traditional state law claims could be brought in federal court and resolved under federalized state law.

If the puzzle (and why it is a predicate for complete preemption) is not yet clear, consider the question of removal. If a party begins a claim within the purview of Section 301 in state court, they will assert a breach of contract claim that appears to be an ordinary state law cause of action. In *Avco Corp. v. Aero Lodge No. 735*, the Court found that the defendant could remove the apparent state law claim on the basis of a federal question.⁵³ Because such an action arises under § 301, it will be controlled by federal law (even if it is federalized state law), and thus arises under the “laws of the United States” for the purposes of removal.⁵⁴ In this manner, the complaint itself is transformed from one containing state law claims into one containing federal law claims. As the Court later put it: “Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.”⁵⁵ In a case only a few pages long

49. See *Textile Workers Union of Am. v. Lincoln Mill of Ala.*, 353 U.S. 448, 456 (1957).

50. See *id.* at 456–57 (“We conclude that the substantive law to apply in suits under s 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.”); *but see id.* at 460 (Frankfurter, J., dissenting) (“This plainly procedural section is transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touch problems raised by collective bargaining. . . . This is more than can be fairly asked even from the alchemy of construction . . .”).

51. *Id.* at 457 (majority opinion).

52. See *Avco Corp. v. Aero Lodge No. 735*, Int’l. Ass’n of Machinists & Aerospace Workers, 390 U.S. 557, 559 (1968).

53. See *id.* at 560.

54. *Id.*

55. *Caterpillar v. Williams*, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 24 (1983)).

and containing “little elaboration or explanation,” complete preemption emerged for the first time.⁵⁶

The Court extended the “*Avco* rule” only once to include ERISA’s civil enforcement provision.⁵⁷ ERISA § 502’s jurisdiction conferral closely mimicked § 301’s, and the Conference Report on ERISA voiced its expectation that § 502 would benefit from the *Avco* rule.⁵⁸

This outcome seems somewhat incongruent with the apparent stakes of complete preemption. Conflict preemption has a somewhat limited impact, but a potentially wide scope – it asserts the supremacy of federal law where necessary, but trusts state courts to handle it.⁵⁹ Field preemption has a rather strong impact – it crowds states out of a realm of legislative authority – but it also typically exists in zones with a strong national interest, like foreign policy, immigration, interstate commerce, and nuclear safety.⁶⁰ Yet even field preemption is trusted to the states to manage appropriately.⁶¹

Complete preemption involves subject matter not trusted to the state courts. If a state law claim falls even colorably within the shadow of a federal statute with the power of complete preemption, a defendant can run to federal court for review.⁶² Given this power,

56. See *Anderson v. H&R Block, Inc.*, 287 F.3d 1038, 1042 (11th Cir. 2002) *rev’d*, 539 U.S. 1 (2003). But note, at that time, it was not yet labeled “complete preemption.” See *id.*

57. See *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (“Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.”).

58. See *id.* at 65–66.

59. See *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (“[A] defense that relies on the preclusive effect of a prior federal judgment or the preemptive effect of a federal statute will not provide a basis for removal.” (citations omitted)); *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. at 10 (“For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff’s* complaint establishes that the case ‘arises under’ federal law.”); *Gully v. First Nat. Bank*, 299 U.S. 109, 116 (“By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.”).

60. See, e.g., *Arizona v. United States*, 567 U.S. 387 (2012) (immigration and alien registration); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (conduct of foreign affairs), *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (transportation and sale of natural gas in interstate commerce), *Pac. Gas and Elec. Co. v. State Energy Res. Conserv. & Dev. Com’n*, 461 U.S. 190 (1983) (radiological safety aspects of nuclear power plant construction and operation). For additional information on field preemption, see JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 17–18 (2019).

61. See cases cited *supra* note 59.

62. If complete preemption is found, this often spells doom for the plaintiff. Where it doesn’t end the action outright, it often still weakens the claim. There is

complete preemption – not field preemption – is where one might expect to find matters of national security and foreign policy.⁶³ Instead, the typical case is more banal.

Consider *Arditi v. Lighthouse International*, for example, a standard ERISA § 502 case.⁶⁴ When Mr. Arditi was hired by Lighthouse in 2002, both parties signed a pension plan.⁶⁵ The plan contained a provision under which Lighthouse reserved the right to modify or amend the plan.⁶⁶ Unfortunately for Mr. Arditi, Lighthouse exercised that right.⁶⁷ After he retired in 2010, having suffered for Lighthouse's plan modifications, Mr. Arditi brought suit for breach of contract in state court.⁶⁸ Lighthouse removed the action to federal court.⁶⁹ The district court found federal jurisdiction under ERISA § 502 complete preemption, and dismissed Mr. Arditi's complaint for failing to state "any basis for challenging Lighthouse's authority to amend the plan."⁷⁰ The Second Circuit affirmed.⁷¹ Though the case was certainly important to Mr. Arditi, there is no obvious reason why a federal forum was necessary to regulate the scope of preemption in this case or its ilk. That is, there is no facially obvious reason why a state court could not properly adjudicate—and if necessary, determine the appropriate governing body of law over—a breach of contract claim between a state resident and his in-state former employer.

Thus, at the time of *BNB*, complete preemption applied only to two statutes in which Congress anticipated the availability of federal jurisdiction but did not expressly confer removal jurisdiction.⁷² If the subject matter did not appear so monumental that it warranted stripping state courts of the power to find preemption themselves, it at least arguably followed Congress's intention to allow removal. In *BNB*, the Court allowed complete preemption to expand and refocused the doctrine on what might be considered its underlying

usually a conscious reason behind a litigant's choice to bring a state-law claim rather than a federal claim when either is available.

63. *See supra* notes 25–27.

64. *See generally* *Arditi v. Lighthouse Int'l*, 676 F.3d 294 (2d Cir. 2012).

65. *See id.* at 297.

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.* 297–98.

70. *Id.* at 298.

71. *See id.* at 299.

72. *See* 29 U.S.C. §§ 185, 1132.

purpose: the creation of an exclusive cause of action, whether or not Congress considered the matter of jurisdiction.⁷³

C. Complete Preemption in BNB

In *BNB*, Marie Anderson represented a class of twenty-six plaintiffs who sued Beneficial National Bank in Alabama state court for “usurious”, or illegally high, interest rates.⁷⁴ Though the complaint stated no federal claims, BNB removed the case to the United States District Court for the Middle District of Alabama.⁷⁵ As grounds for jurisdiction over the case, BNB asserted that the National Bank Act (NBA) provided the exclusive provision governing national bank interest rates and the exclusive remedies available for violations of those rates.⁷⁶ The District Court denied Anderson’s motion to remand, but certified the question of federal jurisdiction.⁷⁷ The Eleventh Circuit reversed.⁷⁸ The panel applied existing precedent, noting that the “‘touchstone’ of the complete preemption inquiry [was] congressional intent.”⁷⁹ Notably, the complete preemption inquiry at the time relied on “*congressional intent to permit removal*.”⁸⁰

BNB petitioned the Supreme Court for a writ of certiorari to resolve the question of whether a usury claim against a national bank necessarily arises under the NBA so as to permit removal jurisdiction.⁸¹ The Court took the case and found in BNB’s favor with a 7-2 split.⁸² Justice Stevens wrote for the majority and Justice Scalia, joined by Justice Thomas, dissented.⁸³

Writing for the Court, Justice Stevens found that removal jurisdiction was available under the doctrine of complete preemption.⁸⁴ Specifically, Justice Stevens wrote: “When the federal statute completely pre-empts the state-law cause of action,” a claim which comes

73. *See* *Beneficial Nat’l. Bank v. Anderson*, 539 U.S. 1, 8 (2003).

74. *See id.* at 4.

75. *See id.*

76. *See id.* at 4–5.

77. *See* *Anderson v. H&R Block*, 132 F. Supp. 2d 948 (M.D. Ala. 2000).

78. *Anderson v. H&R Block*, 287 F.3d 1038 (11th Cir. 2002), *rev’d*, 539 U.S. 1 (2003).

79. *Id.* at 1044 (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987)).

80. *Id.* at 1047 (emphasis added).

81. *See* Petition for Writ of Certiorari, *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1 (2003) (No. 02-306).

82. *See* *Beneficial Nat’l Bank*, 539 U.S. at 2.

83. *See id.* at 3–11 (majority opinion); *see also id.* at 11–22 (Scalia, J., dissenting).

84. *See id.* at 10–11 (majority opinion).

within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.”⁸⁵ That is, when an apparently state law claim is completely preempted by federal law, removal jurisdiction is appropriate because the claim is *really* a federal law claim.⁸⁶

BNB presented a new puzzle for the Court. Unlike LMRA § 301 and ERISA § 502, the NBA contained no expression of Congress’s preference for federal fora. As a result, the Court defined complete preemption’s scope at a much broader level than it ever had before. Looking at where the Court had previously found complete pre-emption – “certain causes of action under the LMRA and ERISA”⁸⁷ – Justice Stevens found two commonalities: when federal law (1) “provided the exclusive cause of action for the claim asserted,” and (2) “set forth procedures and remedies governing that cause of action.”⁸⁸ Turning to the NBA, the Court found substantive interest rate limits in § 85 and the remedies for usury claims in § 86.⁸⁹

Because §§ 85 and 86 of the NBA create an exclusive federal cause of action for usury claims against national banks, there is “no such thing as a state-law claim of usury against a national bank.”⁹⁰ In turn, any complaint that states a usury claim against a national bank, even if it makes no mention of federal law, is really stating a federal cause of action.⁹¹ This subjects the claim to removal under 28 U.S.C § 1441.⁹²

The decision’s novelty comes from its unacknowledged revisions to the complete preemption rule. The Court’s shift from congressional intent that the cause of action be removable to congressional intent to create an exclusive cause of action undermined the well-pleaded complaint rule.⁹³ The rule enshrines federalism concerns at the core of removal jurisdiction and *BNB* placed pressure on that balance. Nineteen states argued the well-pleaded complaint rule to the Court in their amicus brief:

85. *Id.* at 8.

86. *See id.*

87. *See id.* at 8 (noting that this is an exhaustive list).

88. *Id.* (citing 29 U.S.C. §§ 1132, 185)

89. *See id.* at 9 (citing 12 U.S.C. §§ 85, 86).

90. *Id.* at 11.

91. *See id.*

92. *See id.*

93. *See id.* at 9 n.5 (“[T]he proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable.”).

The [well-pleaded complaint] rule apportions cases between the state courts and federal courts in a manner that leaves state courts with considerable responsibility for construing federal law . . . [Ordinarily] when a plaintiff asserts a claim in state court that is preempted by federal law two things will transpire: the plaintiff will lose the case; and a state court, not a federal court, will issue that ruling.⁹⁴

Rather than leave the scope of preemption to state courts, as it often was, *BNB* threatened to shift those determinations into federal court, even where Congress had not intended to divest state courts of that authority.⁹⁵ Even before the ruling, the case's observers were concerned that *BNB* would imbalance federal jurisdiction by suddenly undermining the well-pleaded complaint rule.

As Justice Scalia observed, “[t]his view finds scant support in our precedents and no support whatever in the NBA or any other Act of Congress.”⁹⁶ Beyond the lack of precedent, Justice Scalia raised two federal jurisdictional principles ignored by the new complete preemption rule. First, “setting forth in state court facts that would support a federal cause of action—indeed, even facts that would support a federal cause of action and would *not* support the claimed state cause of action—does not produce a federal question supporting removal,” and second, “a federal defense to a state cause of action does not support federal-question jurisdiction.”⁹⁷

Justice Scalia breached these jurisdictional principles, arguing that the Court undermined the federal balance.⁹⁸ Where state law is completely displaced by federal law, he suggested, the courts should merely treat the complaint as stating an invalid state-law claim.⁹⁹ In those circumstances, the “proper response” is dismissal, nothing more.¹⁰⁰

Finally, he addressed the United States’ argument in favor of expanding removal jurisdiction. In its *amicus* brief, the United States explained:

94. Brief of Arizona et al. as Amici Curiae in Support of Respondents at 6, *Beneficial Nat’l Bank*, 539 U.S. 1 (No. 02-306), 2003 WL 1824625, at *6.

95. *See Beneficial Nat’l Bank*, 539 U.S. at 21 (Scalia, J., dissenting).

96. *Id.* at 11.

97. *Id.* at 17–18 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391, 393 (1987)).

98. *Id.* at 18 (“[T]oday’s holding also represents a sharp break from our long tradition of respect for the autonomy and authority of state courts.”).

99. *See id.*

100. *See id.*

[T]he plaintiff suffers no legitimate harm by the recharacterization of the claim as a federal one permitting removal. Absent removal, the state court would have only two legitimate options—to recharacterize the claim in federal-law terms or to dismiss the claim altogether. Any plaintiff who truly seeks recovery on that claim would prefer the first option, which would make the propriety of removal crystal clear. A third possibility, however, is that the state court would err and allow the claim to proceed under state law notwithstanding Congress’s decision to make the federal cause of action exclusive. The complete pre-emption rule avoids that potential error.¹⁰¹

That argument both (1) proved too much and (2) lacked an essential premise.¹⁰² First, it proved too much because the “third possibility” applies to any federal defense and, if sufficient to warrant complete preemption, suggests the elimination of the well-pleaded complaint rule.¹⁰³ And second, it leaves unstated a key premise: it is within the Court’s authority to decide when the risk of state error is so high that jurisdiction must be conferred to the federal courts.¹⁰⁴ Justice Scalia believes the authority to decide when jurisdiction must be conferred to the federal courts lays exclusively in the hands of Congress.¹⁰⁵

For all these reasons, Justice Scalia referred to the Court’s decision as an act of judicial “transmogrifi[cation],”¹⁰⁶ an unnerving, supernatural transformation of one object or creature into another.

II. SCHOLARLY RECEPTION

Justice Scalia’s dissent struck a chord with many observers. Scholars got to work on the subject, publishing, for the most part, critiques of the new complete preemption framework.

In perhaps the best-known critique of the *BNB* rule of complete preemption, Professor Gil Seinfeld argued that the Court neglected “the core values underlying the vesting of federal question

101. Brief for the United States as Amicus Curiae Supporting Petitioners at 17–18, *Beneficial Nat’l Bank*, 539 U.S. 1 (No. 02-306) 2003 WL 1824625, at *17–18.

102. See *Beneficial Nat’l Bank*, 539 U.S. at 20–21 (Scalia, J., dissenting).

103. See *id.* at 21.

104. See *id.*

105. See *id.* at 11–12.

106. *Id.* at 19.

jurisdiction,” and “established a doctrine that is unstable and unsound.”¹⁰⁷ Professor Seinfeld raised similar concerns to Justice Scalia regarding the lack of grounding in traditional federal jurisdiction principles.¹⁰⁸ This, he suggests, will result in a doctrine in practice that is out of step with the theoretical bases of federal jurisdiction: “the construct that lies at the heart of the doctrine is not particularly useful as a means of detecting those cases in which these policies are specially implicated.”¹⁰⁹

Critiques of this variety—that the doctrine is without sufficient theoretical grounding and will therefore yield unfortunate practical consequences—are what I have categorizing (using Professor Seinfeld’s language) as those declaring the doctrine unstable and unsound. Many commentators have focused on the doctrine’s expansion into new areas likely unpredicted by Congress.¹¹⁰ Others raised concerns about the bizarre outcomes of the doctrine and the gap the doctrine creates in federal question jurisdiction.¹¹¹ Finally, many have focused on the lack of clarity in application.¹¹²

Professor Seinfeld suggests a remedy: “set aside . . . state court bias against federal claims,” and “focus intently on the interest in uniformity.”¹¹³ He believes focusing on the preemptive breadth of the federal law would at least anchor complete preemption in legitimate

107. Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 539 (2007).

108. *See id.* at 566 (“The Court has declined explicitly to link the jurisprudence of complete preemption to basic jurisdictional policies.”).

109. *Id.* at 567.

110. *See generally* Amy J. Everhart, *Ritchie v. Williams and the Complete Preemption Doctrine in Copyright: The New Federal/State Debate*, 42 TENN. BAR J. 18 (2006) (raising concerns about expansion of complete preemption, including into areas already covered by ordinary preemption); Elizabeth Helmer, *The Ever-Expanding Complete Preemption Doctrine and the Copyright Act: Is This What Congress Really Wanted*, 7 N.C. J.L. & TECH. 205, 226–31 (2005) (arguing complete preemption’s expansion into copyright law undermines congressional intent and unjustly deprives plaintiffs of potential remedies).

111. *See generally* David L. Goodwin, *The Puzzle of Panel Processing: ERISA, Complete Preemption, and the Federal Jurisdiction Gap*, 64 DRAKE L. REV. 663 (2016) (charting how a state whistleblower and breach of contract claim transformed into an ERISA claim through complete preemption).

112. *See* Margaret Tarkington, *Rejecting the Touchstone: Complete Preemption and Congressional Intent after Beneficial National Bank v. Anderson*, 59 S.C. L. REV. 225, 285 (2008) (“[I]n terms of creating a test that is straightforward in its application and clear for litigants to determine when removal is proper, *Anderson* has done the opposite.”).

113. Seinfeld, *supra* note 107, at 572.

jurisdictional principles.¹¹⁴ However, it would also create uncertainty and would potentially collapse field preemption into complete preemption.¹¹⁵

Professor Seinfeld's approach might increase stability and soundness by some measure; additionally, it would also dramatically expand complete preemption and undermine federal-state parity. In response to Professor Seinfeld's approach, Professor Trevor W. Morrison has argued that while their suggestions would place complete preemption on better footing, they highlight that decisions regarding the scope of federal jurisdiction are better made by Congress.¹¹⁶ "[I]t appears," he writes, "to invite the federal courts to engage in a range of line-drawing exercises to which they may not be especially well suited [C]omplete preemption should depend on congressional intent, not judicial invention."¹¹⁷

To be clear, not all commentators found the doctrine itself wanting. Some believed that *BNB* made the complete preemption doctrine more definite and legitimate.¹¹⁸ Professor Garrick Pursley, for example, justified the doctrine as an efficiency-generating tool.¹¹⁹ Echoing the United States' arguments in the case,¹²⁰ he observed that the only thing complete preemption changes is "the time and resources that are expended by the parties to reach th[e] result."¹²¹ The practicality

114. *See id.* at 574–75.

115. *See id.*

116. *See* Trevor W. Morrison, Response, *Complete Preemption and the Separation of Powers*, 155 U. PA. L. REV. 186, 186 (2007).

117. *Id.* at 186–87.

118. *See generally* Garrick B. Pursley, *Rationalizing Complete Preemption after Beneficial National Bank v. Anderson: A New Rule, A New Justification*, 54 DRAKE L. REV. 371 (2006).

119. *See id.* at 376.

120. *See generally id.* (arguing as follows: without complete preemption removal, three things could happen. (1) The state court catches preemption and dismisses the state law claim leading the plaintiff to (a) file their action in federal court or (b) state the federal cause of action in an amended state court complaint. In either circumstance, the federal courts end up with jurisdiction. (2) The state court catches preemption and dismisses the claim. The plaintiff drops the claim to remain in state court. (3) The state court does not catch preemption and the claim improperly remains in state court, to be adjudicated under state law. Thus, the only legitimate outcomes are that either the plaintiff drops their claim or the claim ends up in federal court. Complete preemption skips ahead, lets federal courts resolve the preemption question, and does not disable the plaintiff from dismissing their own claims and remanding the remaining state law claims to state court).

121. *Id.* at 419.

of such an expedient might cut through the noise of concern over the theoretical underpinnings.

Additionally, Professor Paul E. McGreal articulates a theoretical basis for the *BNB* complete preemption doctrine by characterizing it as a “corollary” rather than an “exception” to the well-pleaded complaint rule: “[T]he doctrine creates symmetry within the well-pleaded complaint rule. The bar on pleading anticipated defenses prevents plaintiffs from improperly forcing cases *into* federal court, while the complete preemption doctrine prevents plaintiffs from improperly keeping cases *out of* federal court.”¹²² Both the efficiency benefit and the corollary justification assume that complete preemption would be faithfully applied and remain exclusively in domains of law for which no state law cause of action can legitimately be brought.

Professor Margaret Tarkington views the suggested efficiency benefit differently: first because “it is horribly inefficient to have uncertain jurisdictional rules (and an appellate court may later rule that the district court erred and that removal was granted improvidently, and thus remand the case to state court on the basis of a lack of jurisdiction),” and second, “because uncertain jurisdictional rules can be manipulated by plaintiffs and defendants.”¹²³ Explaining the second, she writes, “As the scope of complete preemption broadens, the more likely it becomes that defense attorneys will file removal petitions, either in the hope that the court will find complete preemption and remove the case or in order to delay the proceedings.”¹²⁴ She raises a strong argument that the *BNB* rule seems likely to cause some inefficiency as litigants exploit uncertainty.¹²⁵ *BNB* undeniably expanded the scope of complete preemption. But that does not mean that the circuit courts will inevitably find no limits to the doctrine. If they do find limits – and if their limits are fairly uniform – then uncertainty-based inefficiency and the capacity for exploitation should decrease.

122. Paul E. McGreal, Response, *In Defense of Complete Preemption*, 156 U. PA. L. REV. 147, 149 (2007). Note, Professor McGreal views the well-pleaded complaint as “the complaint that a reasonable lawyer would have drafted.” *Id.* at 153. That is to say, the doctrine of complete preemption is not an exception to the well-pleaded complaint rule if you view it as finding that the well-pleaded complaint did, in fact, state a federal cause of action because a reasonable lawyer would have drafted it to do so. *See id.*

123. Tarkington, *supra* note 112, at 286.

124. *Id.* She adds that defendants would benefit from “a jurisdictional rule that is opaque enough to allow a defendant to persuasively argue that it had an ‘objectively reasonable basis’ for removal and avoid being assessed attorneys’ fees and costs under 28 U.S.C. § 1447(c) even if the case is remanded.” *Id.* at 286–87.

125. *See id.* at 294.

In sum, the debate over whether *BNB* complete preemption is “unstable and unsound”¹²⁶ pits principles of federalism and separation of powers against those of efficiency and sensibility. The voices of instability and unsoundness presume unending chaos, unfettered doctrinal growth, and inescapable incoherence.¹²⁷ The voices of stability and soundness assume faithful, consistent application by both litigants and courts.¹²⁸ Neither side leaves enough room for the nuance explored in Part III: *BNB* created opportunities for litigants to delay and confuse litigation, but the circuit courts have stood as sources of doctrinal stability and soundness. It would be more accurate to envision the doctrine as undergoing a period of growth as new problems were permitted to arise, yielding instability, and then stability as the lower courts look to each other and incorporate developments into a new, coherent whole.

III. CIRCUIT REVIEW

Post-*BNB*, many scholars asserted that the doctrine would yield indeterminacy in the lower courts and cause confusion in litigants.¹²⁹ Though some believed the doctrine would be faithfully and properly applied, many assumed the Supreme Court’s incoherence would lead to lower court incoherence as well.¹³⁰ In order to provide some data points to this debate, Part III of this Essay analyzes every circuit court case citing *BNB*. At the time of this writing, 19 years since *BNB*, there have been 164 such cases,¹³¹ 111 of which actually decided the question of complete preemption.¹³² In all, these cases suggest far more stability than confusion.

126. See Seinfeld, *supra* note 107, at 539.

127. See *supra* notes 105–15 and accompanying text.

128. See *supra* notes 116–23 and accompanying text.

129. See, e.g., Tarkington, *supra* note 123, at 285 (“[I]n terms of creating a test that is straightforward in its application and clear for litigants to determine when removal is proper, *Anderson* has done the opposite.”).

130. See Seinfeld, *supra* note 107, at 539 (arguing that due to its neglect of the core values underlying the vesting of federal question jurisdiction in the federal courts, the Court has established a doctrine that is unstable and unsound.).

131. For a list of every circuit court case citing *BNB*, see Appendix I.

132. For a list of circuit court cases that have decided the question of complete preemption, see Appendix II. The other 50 either cited *BNB* for the well-pleaded complaint rule without mentioning complete preemption or complete preemption was raised, but the case decided on other grounds.

A. Containing the Three SCOTUS Conferrals

To date, the Supreme Court has only provided for complete preemption in the three circumstances previously analyzed: LMRA § 301, ERISA § 502, and NBA §§ 85 & 86.¹³³ One major question *BNB* raised was how far the circuit courts would take complete preemption as applied to these core statutes.

1. NBA

After *BNB*, there were some efforts to expand the NBA's complete preemption beyond just usury claims. The Eighth Circuit clarified that origination and discount fees qualify as interest under the NBA, bringing claims about those fees within the NBA's preemptive scope.¹³⁴ The courts have otherwise prevented growth into other claims under the NBA, including consumer protection claims¹³⁵ and claims against third-party debt collectors.¹³⁶

2. LMRA

The circuits have likewise cabined growth of the LMRA beyond cases actually requiring interpretation of collective bargaining agreement terms. The circuits have cited *BNB* to resolve LMRA complete preemption cases twenty times.¹³⁷ Circuits have declined to allow

133. See *supra* notes 45–48 (referencing LMRA § 301); *supra* notes 56–57, 62–69 (referencing ERISA § 502); *supra* notes 88–90 (referencing NBA §§ 85 & 86).

134. See *Phipps v. F.D.I.C.*, 417 F.3d 1006, 1012 (8th Cir. 2005).

135. See, e.g., *Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 89 (5th Cir. 2013).

136. See, e.g., *Madden v. Midland Funding, LLC*, 786 F.3d 246, 249 (2d Cir. 2015).

137. See *Sarauer v. Int'l Ass'n of Machinists & Aerospace Workers*, Dist. No. 10, 966 F.3d 661, 669 (7th Cir. 2020); *Johnson v. Humphreys*, 949 F.3d 413, 415 (8th Cir. 2020); *Rueli v. Baystate Health, Inc.*, 835 F.3d 53, 65 n.2 (1st Cir. 2016); *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners*, 768 F.3d 938, 947, 962 n.5 (9th Cir. 2014); *Ciferni v. Day & Zimmerman, Inc.*, 529 F. App'x 199, 202 (3d Cir. 2013); *Paul v. Kaiser Found. Health Plan of Ohio*, 701 F.3d 514, 518 (6th Cir. 2012); *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 10 n.4 (1st Cir. 2012); *Evans v. Alliedbarton Sec. Serv. LLP*, 447 F. App'x 838, 838 (9th Cir. 2011); *Kitzmann v. Loc. 619-M Graphic Comm'n Conf. of the Int'l Bhd. of Teamsters*, 415 F. App'x 714, 717 (6th Cir. 2011); *O'Donnell v. Boggs*, 611 F.3d 50, 53 (1st Cir. 2010); *Smart v. Loc. 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 803 (7th Cir. 2009); *Paluda v. Thyssenkrupp Budd Co.*, 303 F. App'x 305, 308 (6th Cir. 2008); *Banks v. Alexander*, 294 F. App'x 221, 224 (6th Cir. 2008); *Medlen v. Est. of Meyers*, 273 F. App'x 464, 466 (6th Cir. 2008); *Valinski v. Detroit Edison*, 197 F. App'x 403, 406 (6th Cir. 2006); *Nelson v. Stewart*, 422 F.3d 463, 466–67 (7th Cir. 2005); *Baker v. Kingsley*, 387 F.3d 649, 657 (7th Cir. 2004); *Alongi v. Ford Motor Co.*, 386 F.3d 716, 723 (6th Cir. 2004); *Tift v. Commonwealth Edison*

complete preemption, demanding that the resolution of the claims be ‘inextricably intertwined’ with interpretation of CBA terms,¹³⁸ and expressing that “merely consulting a CBA in the course of adjudicating state law claims is not enough.”¹³⁹

When determining whether complete preemption is available under the LMRA, courts look to whether the duties allegedly breached arise from the collective bargaining agreement.¹⁴⁰ In these circumstances, § 301 completely preempts state law claims.¹⁴¹ But when the duty actually arises from state or other federal law, and analyzing the collective bargaining agreement would be unnecessary, there is no basis for federal jurisdiction through complete preemption.¹⁴² In *Nelson v. Stewart*, for example, where retirees brought suit in state court under theories of negligence, misrepresentation, and promissory estoppel regarding their union’s negotiation of modifications to a collective bargaining agreement, the Seventh Circuit found no complete preemption.¹⁴³ While the case clearly implicated provisions of the collective bargaining agreement, the duty to fairly represent the plaintiffs arose outside the LMRA.¹⁴⁴ In such circumstances, where LMRA § 301 is not plainly involved, the circuits have cabined efforts to expand complete preemption.

3. ERISA

Similarly, in sixteen cases, the circuits have prevented ERISA complete preemption from growing beyond its § 502 civil enforcement provision.¹⁴⁵ Circuit courts regularly denied complete

Co., 366 F.3d 513, 517 (7th Cir. 2004); *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 515 (6th Cir. 2003).

138. *Paul*, 701 F.3d at 522.

139. *Valinski*, 197 F. App’x 403 at 409.

140. *See id.* at 408–09.

141. *See id.* at 407.

142. *See e.g., Sarauer*, 966 F.3d at 670; *Medlen*, 273 F. App’x at 467.

143. *See Nelson v. Stewart*, 422 F.3d 463, 470 (7th Cir. 2005).

144. The negotiations were pursuant to bankruptcy reorganization, so the duty arose from 11 U.S.C. §§ 1113, 1114.

145. *See Rudel v. Haw. Mgmt. All. Ass’n*, 937 F.3d 1262, 1271 (9th Cir. 2019); *K.B. v. Methodist Healthcare*, 929 F.3d 795, 803 (6th Cir. 2019); *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1060 (9th Cir. 2018); *Studer v. Katherine Shaw Bethea Hosp.*, 867 F.3d 721, 724 (7th Cir. 2017); *Buckley v. Slocum Dickson Med. Grp.*, 585 F. App’x 789, 794 (2d Cir. 2014); *N.J. Carpenters v. Tishman Const. Corp. of N.J.*, 760 F.3d 297, 300 (3d Cir. 2014); *Arditi v. Lighthouse Int’l*, 676 F.3d 294, 299 (2d Cir. 2012); *Quality Infusion Care Inc. v. Humana Health Plan of Tex. Inc.*, 290 F. App’x 671, 682 (5th Cir. 2008); *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare*

preemption where they identified claims or duties that arose out of state law independent of ERISA. For example, the courts have denied complete preemption over a state wage act,¹⁴⁶ state law duties to refrain from unfair and deceptive business practices,¹⁴⁷ state law negligent misrepresentation claims,¹⁴⁸ breach of contract,¹⁴⁹ fraud,¹⁵⁰ and failure to maintain a safe workplace.¹⁵¹ Despite frequent invitation to expand complete preemption under ERISA, interpretation of an ERISA plan must be material to the plaintiff's claims to find § 502 complete preemption.¹⁵²

B. Areas of growth

The circuit courts picked up on *BNB*'s more-forgiving inquiry immediately. In *Hoskins v. Bekins Van Lines*, for example, the Fifth Circuit identified its new and old complete preemption tests.¹⁵³ Prior to *BNB*, the defendant was required to show:

(1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) *there is a clear Congressional intent that claims brought under the federal law be removable*.¹⁵⁴

After *BNB*, they looked “to Congress’s intent that the federal action be *exclusive*.”¹⁵⁵ The test clearly changed in the Fifth Circuit as an immediate result of the *BNB* decision, and so did the outcome – the

Tr. Fund; 538 F.3d 594, 601 (7th Cir. 2008); *McAteer v. Silverleaf Resorts, Inc.*, 514 F.3d 411, 419 (5th Cir. 2008); *DaPonte v. Manfredi Motors, Inc.*, 157 F. App'x 328, 331 (2d Cir. 2005); *Pascack Valley Hosp. v. Loc. 464A UFCW Welfare*, 388 F.3d 393, 397 (3d Cir. 2004); *Felix v. Lucent Tech., Inc.*, 387 F.3d 1146, 1156 (10th Cir. 2004); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 448 (3d Cir. 2003); *King v. Marriott Int'l. Inc.*, 337 F.3d 421, 425 (4th Cir. 2003); *Arana v. Ochsner Health Plan*, 338 F.3d 433, 440 (5th Cir. 2003).

146. *See N.J. Carpenters*, 760 F.3d at 300.

147. *See Hansen*, 902 F.3d at 1060.

148. *See Franciscan Skemp Healthcare, Inc.*, 538 F.3d at 601.

149. *See Pascack Valley Hosp.*, 388 F.3d at 397.

150. *See Felix*, 387 F.3d at 1156.

151. *See McAteer v. Silverleaf Resorts, Inc.*, 514 F.3d 411, 419 (5th Cir. 2008).

152. *See, e.g., DaPonte v. Manfredi Motors, Inc.*, 157 F. App'x 328, 331 (2d Cir. 2005).

153. *See Hoskins v. Bekins Van Lines*, 343 F.3d 769, 772–76 (5th Cir. 2003).

154. *Id.* at 775.

155. *Id.* at 776.

Fifth Circuit here held, for the first time, that the Carmack Amendment was due complete preemption.¹⁵⁶

One of the clearest developments was complete preemption's extension to claims that fall under the Carmack Amendment – tort and breach of contract claims arising from interstate transportation of goods by a common carrier under a receipt or bill of lading.¹⁵⁷ The Fifth Circuit addressed the question twice as early as 2003, in both cases applying complete preemption based on its reading of *BNB*.¹⁵⁸ When the Ninth Circuit faced the same question in 2007, it looked to the Fifth Circuit's precedent to verify its application of *BNB*, and likewise found complete preemption.¹⁵⁹ All three cases affirmed the district court decision.

One circuit has found complete preemption in 11 U.S.C. § 303(i) over damages claims in response to the filing of involuntary bankruptcy petitions.¹⁶⁰ In *In re Miles*, the plaintiffs brought state law tort claims against defendants who had filed involuntary bankruptcy petitions against them, allegedly in bad faith.¹⁶¹ The defendants removed to federal court, claiming complete preemption applied.¹⁶² The Ninth Circuit agreed, finding that section 303(i) provided the exclusive cause of action and exclusive remedies available for claims “predicated upon the filing of an involuntary bankruptcy petition.”¹⁶³ In *In re Repository Technologies, Inc.*, the Seventh Circuit constrained the Ninth Circuit's reasoning to “involuntary petitions filed in bad faith,” and declined to engage with or extend complete preemption to damages claims predicated on voluntary bankruptcy petitions.¹⁶⁴ The Third Circuit expressly disagreed with the Ninth, finding no complete preemption in § 303(i).¹⁶⁵

Four circuits have looked into whether the Interstate Commerce Commission Termination Act¹⁶⁶ (ICCTA) has the power of complete

156. *See id.* at 775.

157. *See* 49 U.S.C. § 14706.

158. *See Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003); *New Process Steel Corp. v. Union Pac. R.R. Co.*, 91 F. App'x 895, 898 (5th Cir. 2003).

159. *See Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 688 (9th Cir. 2007).

160. *See In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005).

161. *See id.* at 1087.

162. *See id.*

163. *Id.* at 1089.

164. *See In re Repository Tech., Inc.*, 601 F.3d 710, 724 (7th Cir. 2010).

165. *See Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414 (3d Cir. 2016).

166. *See* 49 U.S.C. § 10501(b).

preemption.¹⁶⁷ The statute explicitly grants the Surface Transportation Board (STB) exclusive jurisdiction, exclusive remedies with respect to regulation of rail transportation, and preempts remedies under other state and federal law.¹⁶⁸ While this bears all the marks of an exclusive cause of action, the conferral of jurisdiction to the STB rather than the federal courts should cut against a finding of complete preemption.¹⁶⁹ For this reason, the First and Eighth Circuits have not found complete preemption in the ICCTA, finding it does not create a substitute federal cause of action.¹⁷⁰ However, the Fourth and Fifth Circuit grant complete preemption where state law attempts to “manage or govern a railroad’s decisions in the economic realm.”¹⁷¹ In practice, this means that negligence per se actions are removable under complete preemption, because negligence per se is a state regulatory decision, whereas simple negligence is not removable.¹⁷²

The Copyright Act has also been granted complete preemptive power, though it has been cabined in certain, important ways. All four circuits to address the question post-*BNB* have found that the Copyright Act has complete preemptive power in some circumstances.¹⁷³ However, they have limited “copyright preemption” (which now includes a grant of jurisdiction) to its expressed and interpreted scope.¹⁷⁴ If an work falls outside of copyrightable subject matter – an idea, for example, cannot receive the protection of federal copyright law – state law on that subject matter is neither preempted nor completely preempted.¹⁷⁵ The Third Circuit has found that public entities cannot use federal copyright law to escape public access to public records because the Copyright Act does not “wholly displace state

167. See generally *Fayard v. Ne. Vehicle Servs, LLC*, 533 F.3d 42 (1st Cir. 2008); *Skidmore v. Norfolk S. Ry. Co.*, 1 F.4th 206 (4th Cir. 2021); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011); *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321 (5th Cir. 2008); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535 (5th Cir. 2005); *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182 (8th Cir. 2015).

168. See 49 U.S.C. § 10501(b).

169. See *id.* (“The jurisdiction of the Board . . . is *exclusive*.” (emphasis added)).

170. See *Fayard*, 533 F.3d at 47; *Griffioen*, 785 F.3d at 1189.

171. See *Elam*, 635 F.3d at 807; accord *PCI Transp.*, 418 F.3d at 545.

172. See *Elam*, 635 F.3d at 807.

173. See, e.g., *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004); *Bd. of Chosen Freeholders v. Tombs*, 215 F. App’x 80 (3d Cir. 2006); *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005); *Lynn v. Sure-Fire Music Co.*, 237 F. App’x 49 (6th Cir. 2007); *Dunlap v. G&L Holding Grp., Inc.*, 381 F.3d 1285 (11th Cir. 2004).

174. See *Lynn*, 237 F. App’x at 53.

175. See *Dunlap*, 381 F.3d at 1294; see also *Lynn*, 237 F. App’x at 54.

statutory or common law rights to public records . . .”¹⁷⁶ These limits on copyright preemption are not merely limits on complete preemption, but any preemption at all. In this context, *BNB* has shifted federal copyright law claims into federal court, and it has also shifted disputes about the scope of copyright preemption into federal court. Prior to *BNB*, state courts would have determined whether states can pass protections over ideas or whether a public entity can use copyright to limit access to public records.¹⁷⁷ After *BNB*, defendants can shift that inquiry into a federal district court where they might hope to find a more favorable answer. The circuit court precedent on this subject suggests that defendants will not receive more favorable outcomes in the federal courts – the circuits have restrained growth of copyright preemption, even once in their hands.

C. Declining extension

The Third Circuit has found that complete preemption *should* arise from the Public Readiness and Emergency Preparedness (PREP) Act,¹⁷⁸ but only over claims of willful misconduct.¹⁷⁹ In the PREP Act, Congress included its express creation of “an exclusive Federal cause of action.”¹⁸⁰ However, the Third Circuit declined to extend the exclusive federal cause of action beyond the statute’s expressed limits (willful misconduct) and did not actually find complete preemption in the case before it.¹⁸¹ Since then, four other circuits have declined to find complete preemption in the PREP Act despite concerted efforts

176. *Tombs*, 215 F. App’x at 82. This may act as a sort of public-policy exception to complete preemption. “The Supreme Court has carved out and protected from complete preemption certain types of claims which it has variously characterized; but the common denominator is that they depend on an obligation, usually rooted in public policy, that goes beyond the interests of the individual claimant.” *O’Donnell v. Boggs*, 611 F.3d 50, 56 (1st Cir. 2010) (first citing *Hawaiian Airlines v. Norris*, 512 U.S. 246, 260–63 (1994) (whistleblower protection claims under federal and state law for reporting aviation safety issues); then citing *Livadas v. Bradshaw*, 512 U.S. 107, 121–25 (1994) (holding state law requiring prompt payment of wages); and then citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407–13 (1988) (holding claims under state law barring retaliation for filing worker’s compensation claim)).

177. See *Hawaiian Airlines, Inc.*, 512 U.S. at 256.

178. See 42 U.S.C. § 247d-6d.

179. See *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 401 (3d Cir. 2021).

180. 42 U.S.C. § 247d-6d(d)(1).

181. See *Maglioli*, 16 F.4th at 413.

by nursing homes to federalize suits in the wake of COVID-19 related deaths.¹⁸²

In 2022, several oil companies also attempted to use complete preemption to federalize environmental suits against them, usually on the basis of the Clean Air Act.¹⁸³ Notably, the Circuit Courts in these cases referenced each other in their decisions. The First Circuit, for example, came to its decision by “leaning hard on our sibling circuits’ analyses in comparable climate-change cases.”¹⁸⁴ The circuits’ response to this recent sortie shows the means by which the circuits have been able to create coherence and uniformity in the complete preemption doctrine.

Several statutes have reached the circuit courts for a complete preemption determination in only one or two cases. For the most part, complete preemption has not been extended in those circumstances. First, two circuits have denied complete preemption to the Price Anderson Act¹⁸⁵ and the Securities Litigation Uniform Standards Act (SLUSA Act).¹⁸⁶ These decisions had essentially no impact. As discussed in Part I, the Price Anderson Act already has removal jurisdiction explicitly provided by statute.¹⁸⁷ And SLUSA has a similar removal statute.¹⁸⁸ One result of these cases is that when we speak of complete preemption, we can be sure that we are speaking of instances in which no statute provides an applicable removal provision.

Now, those instances in which the circuit courts have denied defendants efforts to expand federal removal jurisdiction through complete preemption:¹⁸⁹ The Telecommunications Act has reached two

182. See, e.g., *Solomon v. St. Joseph Hosp.*, 62 F.4th 54 (2d Cir. 2023); *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845 (6th Cir. 2023); *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237 (5th Cir. 2022); *Martin v. Petersen Health Op., LLC*, 37 F.4th 1210 (7th Cir. 2022); *Mitchell v. Advanced HCS, LLC.*, 28 F.4th 580 (5th Cir. 2022).

183. See, e.g., *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022); *Mayor of Balt. v. BP PLC.*, 31 F.4th 178 (4th Cir. 2022); *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy Inc.*, 25 F.4th 1238 (10th Cir. 2022); *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020); see also *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022) (referring to Outer Continental Shelf Lands Act, not the Clean Air Act).

184. *Rhode Island*, 35 F.4th at 50.

185. See generally *Matthews v. Centrus Energy Corp.*, 15 F.4th 714 (6th Cir. 2021); *Cook v. Rockwell Int’l Corp.*, 790 F.3d 1088 (10th Cir. 2015).

186. See generally *Proctor v. Vishay Intertech, Inc.*, 584 F.3d 1208 (9th Cir. 2009); *Spielman v. Merrill Lynch, Inc.*, 332 F.3d 116 (2d Cir. 2003).

187. See *supra* Part I.

188. See *Proctor*, 584 F.3d at 1223.

189. See *infra* Table 1.

circuits, neither of which found complete preemption.¹⁹⁰ The Sixth Circuit has declined an invitation to find complete preemption in the Internal Revenue Code over torts for causing tax overcharges¹⁹¹ or shareholder actions for misreporting taxable dividends.¹⁹² The Ninth Circuit has held that the Alternative Mortgage Transaction Parity Act did not completely preempt state law on alternative mortgage transactions.¹⁹³ So too, the Civil Service Reform Act by the Fifth Circuit,¹⁹⁴ and cable franchise fees under 47 U.S.C. 542(a) in the Seventh Circuit were found to not completely preempt state law.¹⁹⁵ Embezzlement claims,¹⁹⁶ the Electronic Fund Transfer Act,¹⁹⁷ and the Depository Institutions Deregulation and Monetary Control Act¹⁹⁸ have each been denied complete preemption. Two circuits have denied § 332 of the Federal Communications Act complete preemption.¹⁹⁹ Twice, the Ninth Circuit has declined to extend complete preemption to securities cases.²⁰⁰ Two circuits have denied the Petroleum Marketing Practices Act²⁰¹ complete preemption.²⁰² The Fifth Circuit has declined to grant the defense of tribal sovereign immunity complete preemption,²⁰³ and the Ninth Circuit has declined to find complete

190. See *City of Rome v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 177–78 (2d Cir. 2004); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 839 (9th Cir. 2004).

191. See *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 565 (6th Cir. 2007).

192. See *Mikulski v. Centerior Energy Corp.*, 435 F.3d 666, 673–74 (6th Cir. 2006), *vacated on reh'g*.

193. See *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir. 2003).

194. See *Gutierrez v. Flores*, 543 F.3d 248, 256 (5th Cir. 2008).

195. See *City of Chi. v. Comcast Cable Holdings, LLC.*, 384 F.3d 901, 905 (7th Cir. 2004).

196. See *AmSouth Bank v. Dale*, 386 F.3d 763, 776 (6th Cir. 2004).

197. See *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 553 (5th Cir. 2008).

198. See *Thomas v. U.S. Bank Nat'l Ass'n ND*, 575 F.3d 794, 797 (8th Cir. 2009).

199. See *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004); *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 703 (10th Cir. 2015).

200. See *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013) (finding no complete preemption for Dodd-Frank Exchange Act § 78n-1) (“[U]nlike ERISA, the LMRA, and National Bank Act – created neither a federal cause of action nor a complex federal regulatory scheme. On the contrary, it created no new fiduciary duties and explicitly preserved existing state laws.”); *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1042 (9th Cir. 2003) (finding that the SEC does not create exclusive jurisdiction for any and all false advertising and deceptive sales practices state law claims regarding securities sales).

201. See 15 U.S.C. §§ 2801–06.

202. See *Bellfort Enters. Inc. v. PetroTex Fuels Inc.*, 339 F. App'x 416, 419 (5th Cir. 2009); *Johnson v. MFA Petrol. Co.*, 701 F.3d 243, 253 (8th Cir. 2012).

203. See *Mitchell v. Bailey*, 982 F.3d 937, 941–42 (5th Cir. 2020).

preemption over claims related to Indian trust lands.²⁰⁴ The Harter Act covering seaport trade still receives no complete preemption as it does not create any exclusive federal cause of action.²⁰⁵ In the only Federal Power Act (FPA) case to receive complete preemption review by a circuit court, the Seventh Circuit found that the duties in the claim arose outside the act and received no complete preemption, but that the FPA likely grants no complete preemption in any circumstance.²⁰⁶ A foreclosure case was disallowed where the defendant failed to identify a cause-of-action creating federal statute.²⁰⁷ Two circuits have blocked complete preemption for the Federal Employee Health Benefits Act,²⁰⁸ and one has done so with the Federal Employees Group Life Insurance Act.²⁰⁹ The Seventh Circuit denied complete preemption to the Nutrition Labeling and Education Act.²¹⁰ The Tenth Circuit denied it to the Mineral Leasing Act.²¹¹ The Federal Aviation Act²¹² and the Federal Railroad Safety Act²¹³ have received no complete preemption. The Eleventh Circuit did not extend complete preemption to the Medicare Act.²¹⁴ The Sixth Circuit did not find complete preemption over claims alleging violations of state election law.²¹⁵ Despite proximity

204. See *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1029 (9th Cir. 2011).

205. See *Moore v. Young Bros.*, 289 F. App'x. 149, 151–52 (9th Cir. 2008).

206. See *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 895–96 (7th Cir. 2013). Note that 16 U.S.C. § 825p explicitly confers *exclusive* jurisdiction to the federal courts but does not mention removal. If claims arose in state court under duties created by the FPA, would this statute be sufficient for a finding of complete preemption? Likely no. See *id.* at 893 n.6. This statute might preempt state court jurisdiction but does not create an exclusive federal cause of action. Nor does it expressly call for removal jurisdiction like the Price-Anderson Act.

207. See *Dutcher v. Matheson*, 733 F.3d 980, 988–87 (10th Cir. 2013).

208. See *López-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 8 (1st Cir. 2014); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 150 (2d Cir. 2005).

209. See *Miller v. Bruenger*, 949 F.3d 986, 995 (6th Cir. 2020).

210. See *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 425 (7th Cir. 2011).

211. See *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1207 (10th Cir. 2012).

212. See *Webb v. Desert Berm. Dev. Co.*, 518 F. App'x. 521, 522 (9th Cir. 2013) (“The FAA does not create a federal cause of action for personal injury suits.”).

213. See *Hampton v. R.J. Corman R.R. Switching Co.*, 683 F.3d 708, 713 (6th Cir. 2012); *Bates v. Mo. & N. Ark. R.R. Co.*, 548 F.3d 634, 638 (8th Cir. 2008).

214. See *Dial v. Healthspring of Ala., Inc.*, 541 F.3d 1044, 1047 (11th Cir. 2008).

215. See *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 531 (6th Cir. 2010) (“The Secretary does not maintain that federal law completely preempted these state-law claims. And with good reason: the doctrine of ‘complete preemption’ applies only to Employee Retirement Income Security Act claims, Labor Management Relations Act claims, and National Bank Act claims. Ohio’s laws about the eligibility of provisional ballots do not implicate any of these statutes.” (citations omitted)).

to the LMRA, the Fourth Circuit has twice declined to extend complete preemption to the National Labor Relations Act because it does not create an exclusive cause of action.²¹⁶

D. Reduction

Conversely, the *BNB* decision appears to have reduced instances of complete preemption under the Railway Labor Act (RLA). No circuit to address the question (Second Circuit, Sixth Circuit, Eighth Circuit, and Ninth Circuit) has allowed removal jurisdiction by defendants claiming RLA preemption.²¹⁷ This was not so before *BNB*. By incorporating the *BNB* test, the Second Circuit reconsidered and withdrew the complete preemption it previously granted the RLA.²¹⁸ And in the Ninth Circuit, *BNB* helped resolve an intra-circuit split over whether or not the RLA received complete preemption.²¹⁹

Table 1²²⁰

Statutes / Causes of Action by Complete Preemption Result		
Core	<i>Complete preemption from Supreme Court</i>	ERISA § 502 LMRA § 301 NBA §§ 85, 86
Extension	<i>Complete preemption consistently from circuits after BNB</i>	Carmack Amendment Copyright Act
Possible Split	<i>Disagreement among circuit courts since BNB</i>	11 U.S.C. § 303(i) Interstate Commerce Commission Termination Act

216. See *Barbour v. Int'l Union*, 594 F.3d 315, 328 (4th Cir. 2010) (“[W]e believe the district court and the [defendant] have conflated complete preemption and ordinary preemption.”); *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005).

217. See *Krakowski v. Allied Pilots Ass’n*, 973 F.3d 833, 836 (8th Cir. 2020); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245 (9th Cir. 2009); *Wray v. United Air Lines, Inc.*, 184 F. App’x 120, 121 (2d Cir. 2006); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 277 (2d Cir. 2005); *Roddy v. Grand Trunk W. R.R.*, 395 F.3d 318, 326 (6th Cir. 2005).

218. See *Sullivan*, 424 F.3d at 276 (noting, “only adjustment boards, not federal courts, have primary jurisdiction over claims arising under the RLA.”).

219. See *Moore-Thomas*, 553 F.3d at 1245.

220. This table collects the results of the circuit review described in detail above. This data was compiled by analyzing, categorizing, and comparing the results of all circuit court cases citing to *BNB*.

Denied	<i>Extension declined by circuit courts²²¹</i>	47 U.S.C. 542(a) AMTPA Civil Service Reform Act Clean Air Act DIDMCA EFTA Embezzlement FAA FCA § 332 Federal Power Act FEGLIA FEHBA Foreclosure FRSA Harter Act Indian Trust Land Claims Internal Revenue Code Medicare Act Mineral Leasing Act NLEA NLRA PMPA Public Readiness and Emergency Preparedness Act Price Anderson Act Securities SLUSA State Election Law Telecomm. Act Tribal Sovereign Immunity
Reduction	<i>Complete preemption lost after BNB</i>	Railway Labor Act

CONCLUSION

This Essay challenges the notion that the Supreme Court must be the primary source of coherence in federal law. *BNB* may have caused uncertainty and short-term litigant confusion.²²² But the doctrine did not end with the Supreme Court. The circuit courts largely brought clarity through consistency and constraint. This counsels some anti-

221. Statutes above 25 characters are abbreviated here for brevity. Full names in text above.

222. I do not have data on district court disruption and acknowledge that this Essay's methodology may undercount *BNB*'s disruptive potential, as these cases (and many more) were first decided in district courts. Moreover, when complete preemption cases are remanded, circuit courts usually do not have appellate jurisdiction unless there is another hook providing for circuit review like the federal officer removal statute. *See* 28 U.S.C. § 1447(d) (providing for appellate review of remand orders in cases of removal under §§ 1442 and 1443); *see also* *BP PLC v. Mayor of Balt.*, 141 S. Ct. 1532 (2021) (finding that appellate review of remand under § 1442 (federal officer removal) allows for complete review of the remand order, including other grounds for removal). However, one potential sign of litigant confusion might be instances of missing the removal timeline. Without a working understanding of complete preemption, a defendant might take the plaintiff's apparently state-law complaint on its face and fail to notice its transmogrifiability. *See, e.g.*, *Barbour v. Int'l. Union*, 640 F.3d 599 (4th Cir. 2011). It is unclear how often this happened. Because circuit courts do not typically have appellate jurisdiction over remand orders, untimely removal orders are extremely unlikely to have been captured by this dragnet.

alarmism in instances like *BNB* where a novel decision seems poised to destabilize law.

There was a conceptually distinct, but related, criticism regarding whose regulatory authority is implicated by *BNB* complete preemption—whether congressional intent really is the “touchstone” of the doctrine. At least in the courts, complete preemption is attributed to realizing Congress’s will.²²³ But by shifting analysis away from congressional intent to provide for removal jurisdiction—that is, congressional *intent to do what is actually done*—expressions of reliance upon congressional intent appear hollow. As a result, scholars have looked elsewhere to make sense of the doctrine. Professor Hessick, for example, has used the doctrine as evidence that the Court has situated itself as the primary regulator of federal question jurisdiction rather than Congress, as the Court claims.²²⁴ Others have suggested that complete preemption is a tool to maintain the federal judiciary’s control over a body of law exclusively within their domain,²²⁵ or a form of the long-maligned protective jurisdiction.²²⁶

From these perspectives, complete preemption takes shape not as a congressional tool, but as a judicial tool to ensure the primacy of federal common law. This makes some sense of why a federal forum was available for Mr. Arditi’s pension dispute.²²⁷ Unlike conflict or field preemption, perhaps complete preemption protects robust bodies of federal common law from state judicial interference *particularly* where state judiciaries might be inclined to apply their own precepts. Following federal nuclear safety and immigration standards makes

223. See, e.g., *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005) (“[Complete preemption] ensures compliance with congressional intent that federal courts be available to resolve certain claims which are peculiarly national in scope.”).

224. See F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 898 (2009).

225. See JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* 166 (2018) (Complete preemption “operates to protect an exclusive federal judicial right of action (and the associated body of federal law) from the risk of improper characterization in state court and the associated possibility that the state court will apply state, rather than federal, law precepts The regulatory authority protected is . . . that of the federal courts.”).

226. See Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775, 1812 (2007) (“Like protective jurisdiction, complete preemption ultimately rests on the notion that ‘arising under’ federal law should be interpreted expansively to cover not only cases in which federal law provides the rule of decision but also cases in which a federal forum for *state* claims is deemed necessary to protect federal interests stemming from a federal regulatory scheme.”).

227. See *Arditi v. Lighthouse Int’l*, 676 F.3d 294, 301 (2d. Cir. 2012).

sense to most everyone . . . but deciding whether to apply federal or state contract dispute common law to the poor Mr. Arditis of the country might, ironically, prove thornier. State law makers and courts might wish to protect consumers and pensioners from exploitation by national corporations in ways that Congress and federal courts have foreclosed.

This Essay does not directly address this question, but its results and methodology can inform further inquiry into the purpose of complete preemption, the efficacy of common law control over jurisdiction, and the circuit courts' roles in developing law. Moreover, its findings implicate gaps in discourse concerning these issues.

Rather than the chaos promised by *BNB*'s scholarly observers, a review of complete preemption over the last two decades reveals relative stability. Complete preemption *has* grown—mainly in the Copyright Act, the Carmack Amendment, and the ICCTA. But that growth seems slight compared to the more-than-two-dozen statutes for which the circuits have declined to extend the doctrine. Looking over the results, this is not a story of confusion, but of stabilization.

This Essay's findings suggest that scholars misapprehended *BNB*'s impact. But more than that, they suggest that the misapprehension grew, in part, from a failure to adequately theorize the circuit courts' roles in stabilizing and developing common law.

When scholars greet doctrinal change or expansion from the Supreme Court with tremendous concern over the impracticality of implementation—or ignore implementation altogether—they miss part of the story. Sudden change does come at the cost of confusion and uncertainty. But the circuit courts are also sources of coherence, development, and uniformity in federal law. The Supreme Court, and our entire judicial system, necessarily places confidence in the capacity of circuit courts to judge well, faithfully apply federal law, and uphold legal virtues of clarity and consistency.

Doctrinal change can be confusing and concerning. But it is also a core part of our legal system. When there is instability or confusion following the Court's pronouncements, it is the circuits' jobs to find the way forward. At least with complete preemption, they have.

APPENDIX I: EVERY CIRCUIT OPINION CITING TO BNB

Massamore v. RBRC, Inc., No. 22-5381, 2023 WL 4505074 (6th Cir. July 3, 2023), Poet Theatricals Marine, LLC v. Celebrity Cruises, Inc., No. 21-10410, 2023 WL 345614 (11th Cir. May 15, 2023), *In re* Ford Motor Co., 65 F.4th 851 (6th Cir. 2023), Minnesota v. Am. Petrol. Inst., 63 F.4th 703 (8th Cir. 2023), Solomon v. St. Joseph Hosp., 62 F.4th 54 (2d Cir. 2023), Hudak v. Elmcroft of Sagamore Hills, 58 F.4th 845 (6th Cir. 2023), City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022), Manyweather v. Woodlawn Manor, Inc., 40 F.4th 237 (5th Cir. 2022), Martin v. Petersen Health Operations, LLC, 37 F.4th 1210 (7th Cir. 2022), Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022), Mayor of Balt. v. BP PLC, 31 F.4th 178 (4th Cir. Mar. 14, 2022), Parker v. W. Carroll Special Sch. Dist., No. 21-5700 2022 WL 2913982 (6th Cir. 2022), Mitchell v. Advanced HCS, L.L.C., 28 F.4th 580 (5th Cir. 2022), Bd. of Cnty. Comm'rs. of Boulder Cnty. v. Suncor Energy Inc., 25 F.4th 1238 (10th Cir. 2022), Ysleta del Sur Pueblo v. City of El Paso, No. 20-50313, 2021 WL 5504744 (5th Cir. Nov. 23, 2021), Estate of Maglioli v. Alliance HC Holdings LLC, 16 F.4th 393 (3d Cir. 2021), Matthews v. Centrus Energy Corp., 15 F.4th 714 (6th Cir. 2021), Tantaros v. Fox News Network, LLC, 12 F.4th 135 (2d Cir. 2021), Richardson v. BNSF Ry. Co., 2 F.4th 1063 (8th Cir. 2021), Skidmore v. Norfolk S. Ry. Co., 1 F.4th 206 (4th Cir. 2021), Mitchell v. Bailey, 982 F.3d 937 (5th Cir. 2020), Krakowski v. Allied Pilots Ass'n, 973 F.3d 833 (8th Cir. 2020), City of Oakland v. BP PLC, 969 F.3d 895 (9th Cir. 2020), Sarauer v. Int'l. Ass'n of Machinists & Aero. Workers, Dist. No. 10, 966 F.3d 661 (7th Cir. 2020), City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), Miller v. Bruenger, 949 F.3d 986 (6th Cir. 2020), Johnson v. Humphreys, 949 F.3d 413 (8th Cir. 2020), Rudel v. Haw. Mgmt. All. Ass'n, 937 F.3d 1262 (9th Cir. 2019), K.B. v. Methodist Healthcare-Memphis Hosps., 929 F.3d 795 (6th Cir. 2019), Boldt v. N. States Power Co., 904 F.3d 586 (8th Cir. 2018), Hansen v. Grp. Health Coop., 902 F.3d 1051 (9th Cir. 2018), Studer v. Katherine Shaw Bethea Hosp., 867 F.3d 721 (7th Cir. 2017), Funderwhite v. Loc. 55, United Ass'n, 702 F. App'x 308 (6th Cir. 2017), Rueli v. Baystate Health, Inc., 835 F.3d 53 (1st Cir. 2016), Jenkins v. Methodist Healthcare-Memphis Hosps., No. 15-6195, 2016 U.S. App. LEXIS 10598 (6th Cir. May 6, 2016), MHA LLC v. HealthFirst, Inc., 629 F. App'x 409 (3rd Cir. 2015), Cook v. Rockwell Int'l. Corp., 790 F.3d 1088 (10th Cir. 2015), Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015), Griffioen v. Cedar Rapids & Iowa City Ry. Co., 785 F.3d 1182 (8th Cir. 2015), Ballard v. Fernandez, 599 F. App'x 333 (10th Cir. 2015), Johnson v. Am.

Towers, LLC, 781 F.3d 693 (10th Cir. 2015), *Smith v. Bank of Am. Corp.*, No. 14-50256, 2015 WL 546707 (5th Cir. Feb. 11, 2015), *Berera v. Mesa Med. Grp.*, 779 F.3d 352 (6th Cir. 2015), *Lundahl v. Home Depot, Inc.*, 594 F. App'x 453 (10th Cir. 2014), *Retail Prop. Tr. v. United Bhd. of Carpenters*, 768 F.3d 938 (9th Cir. 2014), *Buckley v. Slocum Dickson Med. Grp.*, 585 F. App'x 789 (2d Cir. 2014), *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027 (9th Cir. 2014), *N.J. Carpenters v. Tishman Constr. Corp.*, 760 F.3d 297 (3d Cir. 2014), *Lóopez-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1 (1st Cir. 2014), *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014), *Fracasse v. People's United Bank*, 747 F.3d 141 (2d Cir. 2014), *Jim Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78 (5th Cir. 2013), *Giannangeli v. Target Nat'l Bank, N.A.*, 543 Fed. App'x, 785 (10th Cir. 2013), *Dutcher v. Matheson*, 733 F.3d 980 (10th Cir. 2013), *Dennis v. Hart*, 724 F.3d 1249 (9th Cir. 2013), *JPMorgan Chase Bank, N.A. v. Johnson*, 719 F.3d 1010 (8th Cir. 2013), *Ciferni v. Day & Zimmerman, Inc.*, 529 F. App'x 199 (3d Cir. 2013), *McFadden v. Fed. Nat'l Mortg. Ass'n*, 525 F. App'x 223 (4th Cir. 2013), *Webb v. Desert Berm. Dev. Co.*, 518 F. App'x 521 (9th Cir. 2013), *Powers v. Cottrell, Inc.*, 728 F.3d 509 (6th Cir. 2013), *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883 (7th Cir. 2013), *Paul v. Kaiser Health Plan of Ohio*, 701 F.3d 514 (6th Cir. 2012), *Johnson v. MFA Petrol. Co.*, 701 F.3d 243 (8th Cir. 2012), *Firstenberg v. City of Santa Fe, N.M.*, 696 F.3d 1018 (10th Cir. 2012), *Milford-Bennington R.R. Co. v. Pan Am Rys., Inc.*, 695 F.3d 175 (1st Cir. 2012), *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195 (10th Cir. 2012), *Hampton v. R.J. Corman R.R. Switching Co.* 683 F.3d 708 (6th Cir. 2012), *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1 (1st Cir. 2012), *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), *Arditi v. Lighthouse Int'l.*, 676 F.3d 294 (2d Cir. 2012), *Turek v. Gen. Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011), *Cmty. State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011), *Evans v. Alliedbarton Sec. Servs. LLP*, 447 F. App'x 838 (9th Cir. 2011), *K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011), *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir. 2011), *Kitzmann v. Loc. 619-M Graphic Commc'ns Conf. of the Int'l Bhd. of Teamsters*, 415 F. App'x 714 (6th Cir. 2011), *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011), *Scarborough v. Carotex Const., Inc.*, 420 F. App'x 870 (11th Cir. 2011), *Barbour v. Int'l. Union*, 640 F.3d 599 (4th Cir. 2011), *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527 (6th Cir. 2010), *O'Donnell v. Boggs*, 611 F.3d 50 (1st Cir. 2010), *Romano v. Kazacos*, 609 F.3d 512 (2d Cir. 2010), *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson*

Constr. Co., 607 F.3d 1268 (11th Cir. 2010), *Nelson v. Welch (In re Repository Techs., Inc.)*, 601 F.3d 710 (7th Cir. 2010), *Mendenhall v. City of Akron*, 374 F. App'x 598 (6th Cir. 2010), *Estate of Lipin v. Lipin*, 369 F. App'x 236 (2d Cir. 2010), *Kenmore Assocs. v. Burke*, 367 F. App'x 168 (2d Cir. 2010), *Barbour v. Int'l Union*, 594 F.3d 315 (4th Cir. 2010), *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208 (9th Cir. 2009), *Thomas v. U.S. Bank Nat'l Ass'n ND*, 575 F.3d 794 (8th Cir. 2009), *Bellfort Enters. Inc. v. PetroTex Fuels Inc.*, 339 F. App'x 416 (5th Cir. 2009), *Smart v. Loc. 702 Int'l. Bhd. of Elec. Workers*, 562 F.3d 798 (7th Cir. 2009), *Swanson v. Bank of Am., N.A.*, 559 F.3d 653 (7th Cir. 2009), *Pet Quarters, Inc., v. Depository Tr. & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009), *Lay v. Burley Stabilization Corp.*, 312 Fed. App'x, 752 (6th Cir. 2009), *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241 (9th Cir. 2009), *Taylor Chevrolet Inc. v. Med. Mut. Servs. LLC*, 306 F. App'x 207 (6th Cir. 2008), *Paluda v. ThyssenKrupp Budd Co.*, 303 F. App'x 305 (6th Cir. 2008), *Fitzgerald v. Harris*, 549 F.3d 46 (1st Cir. 2008), *Bates v. Mo. & N. Ark. R.R. Co.*, 548 F.3d 634 (8th Cir. 2008), *Gutierrez v. Flores*, 543 F.3d 248 (5th Cir. 2008), *Banks v. Alexander*, 294 F. App'x 221 (6th Cir. 2008), *Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859 (11th Cir. 2008), *Dial v. Healthspring of Ala., Inc.*, 541 F.3d 1044 (11th Cir. 2008), *Mamot Feed Lot & Trucking v. Hobson*, 539 F.3d 898 (8th Cir. 2008), *Quality Infusion Care Inc. v. Humana Health Plan of Tex. Inc.*, 290 F. App'x 671 (5th Cir. 2008), *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Tr. Fund*, 538 F.3d 594 (7th Cir. 2008), *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42 (1st Cir. 2008), *Moore v. Young Bros.*, 289 F. App'x 149 (9th Cir. 2008), *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321 (5th Cir. 2008), *Medlen v. Estate of Meyers*, 273 F. App'x 464 (6th Cir. 2008), *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546 (5th Cir. 2008), *McAteer v. Silverleaf Resorts Inc.*, 514 F.3d 411 (5th Cir. 2008), *Cambridge Literary Props. Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg.*, 510 F.3d 77 (1st Cir. 2007), *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555 (6th Cir. 2007), *Blue Cross Blue Shield v. Cruz*, 495 F.3d 510 (7th Cir. 2007), *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *Lynn v. Sure-Fire Music Co.*, 237 F. App'x 49 (6th Cir. 2007), *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683 (9th Cir. 2007), *Bd. of Chosen Freeholders of Cnty. of Burlington v. Tombs*, 215 F. App'x 80 (3d Cir. 2006), *Valinski v. Edison*, 197 F. App'x 403 (6th Cir. 2006), *Wray v. United Air Lines, Inc.*, 184 F. App'x 120 (2d Cir. 2006), *Navarro v. Eagle Mt. Casino*, 183 F. App'x 659 (9th Cir. 2006), *Hays v. Bryan Cave LLP*, 446 F.3d 712 (7th Cir. 2006), *Mikulski*

v. Centerior Energy Corp., 435 F.3d 666 (6th Cir. 2006), *Miles v. Okun* (*In re Miles*), 430 F.3d 1083 (9th Cir. 2005), *Palkow v. CSX Transp., Inc.*, 431 F.3d 543 (6th Cir. 2005), *DaPonte v. Manfredi Motors, Inc.*, 157 F. App'x 328 (2d Cir. 2005), *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005), *Nelson v. Stewart*, 422 F.3d 463 (7th Cir. 2005), *Disher v. Citigroup Glob. Mkts. Inc.*, 419 F.3d 649 (7th Cir. 2005), *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005), *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005), *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535 (5th Cir. 2005), *McNally v. Port Auth.* (*In re WTC Disaster Site*), 414 F.3d 352 (2d Cir. 2005), *Lontz v. Tharp*, 413 F.3d 435 (4th Cir. 2005), *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), *Binder & Binder PC v. Barnhart*, 399 F.3d 128 (2d Cir. 2005), *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005), *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *Roddy v. Grand Trunk W. R.R.*, 395 F.3d 318 (6th Cir. 2005), *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005), *Pascack Valley Hosp., Inc. v. Loc. 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393 (3d Cir. 2004), *Baker v. Kingsley*, 387 F.3d 649 (7th Cir. 2004), *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146 (10th Cir. 2004), *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir. 2004), *City of Chi. v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901 (7th Cir. 2004), *AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004), *Dunlap v. G&L Holding Grp., Inc.*, 381 F.3d 1285 (11th Cir. 2004), *Loc. Union No. 12004, UWS v. Massachusetts*, 377 F.3d 64 (1st Cir. 2004), *Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424 (4th Cir. 2004), *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831 (9th Cir. 2004), *Ten Taxpayer Citizens Grp. v. Cape Wind Ass'n, LLC*, 373 F.3d 183 (1st Cir. 2004), *Briarpatch Ltd. v. Phx. Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004), *Tiffit v. Commonwealth Edison Co.*, 366 F.3d 513 (7th Cir. 2004), *City of Rome v. Verizon Commc'ns, Inc.*, 362 F.3d 168 (2d Cir. 2004), *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004), *Metheny v. Becker*, 352 F.3d 458 (1st Cir. 2003), *New Process Steel Corp. v. Union Pac. R.R. Co.*, 91 F. App'x 895 (5th Cir. 2003), *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442 (3d Cir. 2003), *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (5th Cir. 2003), *Cross-Country Bank v. Klussman*, 74 F. App'x 796 (9th Cir. 2003), *Anderson v. H&R Block, Inc.*, 344 F.3d 1131 (11th Cir. 2003), *Loftis v. UPS.*, 342 F.3d 509 (6th Cir. 2003), *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033 (9th Cir. 2003), *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858 (9th Cir. 2003), *King v. Marriot*

Int'l. Inc., 337 F.3d 421 (4th Cir. 2003), *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003), *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003).

APPENDIX II: CIRCUIT CASES DECIDING COMPLETE PREEMPTION

Solomon v. St. Joseph Hosp., 62 F.4th 54 (2d Cir. 2023), *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845 (6th Cir. 2023), *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237 (5th Cir. 2022), *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210 (7th Cir. 2022), *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022), *Mayor of Balt. v. BP PLC*, 31 F.4th 178 (4th Cir. 2022), *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580 (5th Cir. 2022), *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Sunco Energy Inc.*, 25 F.4th 1238 (10th Cir. 2022), *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021), *Matthews v. Centrus Energy Corp.*, 15 F.4th 714 (6th Cir. 2021), *Skidmore v. Norfolk Southern Railway Co.*, 1 F.4th 206 (4th Cir. 2021), *Mitchell v. Bailey*, 982 F.3d 937 (5th Cir. 2020), *Krakovski v. Allied Pilots Ass'n*, 973 F.3d 833 (8th Cir. 2020), *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *Sarauer v. Int'l Ass'n of Machinists, Dist. No. 10*, 966 F.3d 661 (7th Cir. 2020), *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *Miller v. Bruenger*, 949 F.3d 986 (6th Cir. 2020), *Johnson v. Humphreys*, 949 F.3d 413 (8th Cir. 2020), *Rudel v. Haw. Mgmt. Alliance Ass'n*, 937 F.3d 1262 (9th Cir. 2019), *K.B. v. Methodist Healthcare*, 929 F.3d 795 (6th Cir. 2019), *Hansen v. Grp. Health Coop.*, 902 F.3d 1051 (9th Cir. 2018), *Studer v. Katherine Shaw Bethea Hosp.*, 867 F.3d 721 (7th Cir. 2017), *Rueli v. Baystate Health, Inc.*, 835 F.3d 53 (1st Cir. 2016), *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088 (10th Cir. 2015), *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182 (8th Cir. 2015), *Johnson v. Am. Towers, LLC*, 781 F.3d 693 (10th Cir. 2015), *Retail Prop. Tr. v. United Bhd. of Carpenters*, 768 F.3d 938 (9th Cir. 2014), *Buckley v. Slocum Dickson Med. Grp.*, 585 F. App'x 789 (2d Cir. 2014), *Hawaii v. HSBC Bank Nevada*, 761 F.3d 1027 (9th Cir. 2014), *New Jersey Carpenters v. Tishman*, 760 F.3d 297 (3d Cir. 2014), *Lóopez-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1 (1st Cir. 2014), *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78 (5th Cir. 2013), *Dutcher v. MATHeson*, 733 F.3d 980 (10th Cir. 2013), *Dennis v. Hart*, 724 F.3d 1249 (9th Cir. 2013), *Ciferni v. Day & Zimmerman, Inc.*, 529 F. App'x 199 (3d Cir. 2013), *Webb v. Desert Bermuda Development Co.*, 518 F. App'x 521 (9th Cir. 2013), *Ne. Rural Elec. Membership Corp. v. Wabash Valley*,

707 F.3d 883 (7th Cir. 2013), *Paul v. Kaiser Found. Health Plan of Ohio*, 701 F.3d 514 (6th Cir. 2012), *Johnson v. MFA Petroleum Co.*, 701 F.3d 243 (8th Cir. 2012), *Devon Energy Prod. Co., v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195 (10th Cir. 2012), *Hampton v. R.J. Corman R.R. Switching Co.*, 683 F.3d 708 (6th Cir. 2012), *Cavallaro v. UMass Memorial Healthcare, Inc.*, 678 F.3d 1 (2012), *Arditi v. Lighthouse Int'l*, 676 F.3d 294 (2d Cir. 2012), *Turek v. Gen. Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011), *Evans v. Alliedbarton Sec. Servs.*, 447 F. App'x 838 (9th Cir. 2011), *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011), *Kitzmann v. Loc. 619-M Graphic Communications*, 415 F. App'x 714 (6th Cir. 2011), *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796 (5th Cir. 2011), *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527 (6th Cir. 2010), *O'Donnell v. Boggs*, 611 F.3d 50 (1st Cir. 2010), *In re Repository Technologies, Inc.*, 601 F.3d 710 (7th Cir. 2010), *Barbour v. International Union*, 594 F.3d 315 (4th Cir. 2010), *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208 (9th Cir. 2009), *Thomas v. U.S. Bank Nat'l Ass'n ND*, 575 F.3d 794 (8th Cir. 2009), *Belfort Enterprises Inc. v. PetroTex Fuels Inc.*, 339 F. App'x 416 (5th Cir. 2009), *Smart v. Loc. 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798 (7th Cir. 2009), *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241 (9th Cir. 2009), *Paluda v. ThyssenKrupp Budd Co.*, 303 F. App'x 305 (6th Cir. 2008), *Bates v. Mo. & N. Ark. R.R. Co.*, 548 F.3d 634 (8th Cir. 2008), *Gutierrez v. Flores*, 543 F.3d 248 (5th Cir. 2008), *Banks v. Alexander*, 294 F. App'x 221 (6th Cir. 2008), *Dial v. Healthspring of Ala., Inc.*, 541 F.3d 1044 (11th Cir. 2008), *Quality Infusion Care Inc. v. Humana Health Plan of Tex. Inc.*, 290 F. App'x 671 (5th Cir. 2008), *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd.*, 538 F.3d 594 (7th Cir. 2008), *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42 (1st Cir. 2008), *Moore v. Young Bros.*, 289 F. App'x 149 (9th Cir. 2008), *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321 (5th Cir. 2008), *Medlen v. Estate of Meyers*, 273 F. App'x 464 (6th Cir. 2008), *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546 (5th Cir. 2008), *McAteer v. Silverleaf Resorts, Inc.*, 514 F.3d 411 (5th Cir. 2008), *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555 (6th Cir. 2007), *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *Lynn v. Sure-Fire Music Co.*, 237 F. App'x 49 (6th Cir. 2007), *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683 (9th Cir. 2007), *Bd. of Chosen Freeholders of Cnty. of Burlington v. Tombs*, 215 F. App'x 80 (3d Cir. 2006), *Valinski v. Detroit Edison*, 197 F. App'x 403 (6th Cir. 2006), *Wray v. United Air Lines, Inc.*, 184 F. App'x 120 (2d Cir. 2006), *Mikulski v. Centerior Energy Corp.*, 435 F.3d 666 (6th Cir. 2006), *In re Miles*, 430 F.3d 1083 (9th Cir. 2005), *DaPonte v. Manfredi Motors, Inc.*, 157

F. App'x 328 (2d Cir. 2005), *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005), *Nelson v. Stewart*, 422 F.3d 463 (7th Cir. 2005), *Phipps v. FDIC*, 417 F.3d 1006 (8th Cir. 2005), *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535 (5th Cir. 2005), *Lontz v. Tharp*, 413 F.3d 435 (4th Cir. 2005), *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), *Binder & Binder PC v. Barnhart*, 399 F.3d 128 (2d Cir. 2005), *Roddy v. Grand Trunk W, R.R.*, 395 F.3d 318 (6th Cir. 2005), *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005), *Pascack Valley Hosp. v. Loc. 464A UFCW Welfare*, 388 F.3d 393 (3d Cir. 2004), *Baker v. Kingsley*, 387 F.3d 649 (7th Cir. 2004), *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146 (10th Cir. 2004), *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir. 2004), *City of Chi. v. Comcast Cable Holdings, LC*, 384 F.3d 901 (7th Cir. 2004), *AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004), *Dunlap v. G&L Holding Grp., Inc.*, 381 F.3d 1285 (11th Cir. 2004), *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831 (9th Cir. 2004), *Briarpatch Ltd., v. Phx. Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004), *Tift v. Commonwealth Eddison Co.*, 366 F.3d 513 (7th Cir. 2004), *City of Rome, N.Y. v. Verizon Commc'ns, Inc.*, 362 F.3d 168 (2d Cir. 2004), *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004), *New Process Steel Corp. v. Union Pac, R.R. Co.*, 91 F. App'x 895 (5th Cir. 2003), *DiFelice v. Aetna U.S. Healthare*, 346 F.3d 442 (3d Cir. 2003), *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (5th Cir. 2003), *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509 (6th Cir. 2003), *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033 (9th Cir. 2003), *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858 (9th Cir. 2003), *King v. Marriot Int'l Inc.*, 337 F.3d 421 (4th Cir. 2003), *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003), *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003).