UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI ex rel. CHRIS KOSTER, Attorney General,	)	
Plaintiff,	)	
v.	)	No. 4:11-cv-01237-AGF
MARTIN A. WEBB, et al.,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

INTRODUCTION

This case is about commercial activity – the making of loans – on the Cheyenne River Indian Reservation (the "Reservation") by Defendant Martin Webb, who is an enrolled Tribal member, and the Defendant entities, which Mr. Webb owns and controls. From the outset of this case, the Missouri Attorney General, acting on behalf of the State of Missouri (collectively, the "State"), has known that Defendants are affiliated with the Cheyenne River Sioux Tribe (the "Tribe"), that the loan-making activity occurred on the Reservation, and that the parties to the loans agreed that the loans would be governed by Tribal law and subject to the exclusive jurisdiction of Tribal courts.

Nevertheless, the State filed this case in Missouri State Court alleging violations of Missouri state statutes. On its face the State's petition challenges both the exclusive jurisdiction of Tribal courts and the application of Tribal law. Resolution of the State's frontal challenge to Tribal authority involves substantial and contested issues that must be resolved by ***federal*** law, thus creating federal question jurisdiction under *Grable & Sons Metal Pros., Inc. v. Darue Engineering and Mfg.*, 545 U.S. 308 (2005).

In the alternative, federal law governs this action because Congress has completely displaced state law when it comes to regulating economic activity conducted by Tribal members on Tribal lands. Any claim by the State, therefore, necessarily arises under federal law.

FACTUAL BACKGROUND

The State filed this case in the Circuit Court for St. Louis County. Defendants timely removed it under 28 U.S.C. § 1331 because (1) a substantial, disputed question of federal law is a necessary element of one of the claims, and (2) one of the claims is really one of federal law.

"Defendants claim . . . that they are entitled to tribal sovereignty as an 'Indian owned business operating within the external boundaries of the Cheyenne River Sioux Tribe.'" Appl. for TRO & Pet. for Prelim. & Permanent Inj., Restitution, Civil Penalties, & Other Ct. Orders ("Pet.") ¶ 54. The Petition notes that the businesses are located on the Reservation at a facility at 612 E. Street, Timber Lake, South Dakota. Pet. ¶¶ 62, 63; *see also* Pet., Ex. B at 2, 7, 11, 13, 14 (showing business addresses on the Reservation). Consumers apply on-line and Defendants receive, review, and accept or deny loan applications on the Reservation. *See* Pet. ¶ 52; Pet., Ex. C at 1 (sample loan agreement stating: "This Loan Agreement is not consummated until [the] loan is funded by [Defendant] from [its] bank account on the Cheyenne River Indian Reservation.").

The Defendant entities are Indian-owned.[1] Defendant Martin Webb is an enrolled Member of the Tribe. *See* Certificate of Indian Blood, attached as **Exhibit A**. The State alleges that "Webb controls the majority of membership votes for each of the defendant companies or

[1] As a point of reference, elsewhere in federal law, "[t]he term 'Indian-owned business' means an entity organized for the conduct of trade or commerce with respect to which at least 50 percent of the property interests of the entity are owned by Indians or Indian tribes (or a combination thereof)." 25 U.S.C. § 4302(5) (2006).

Webb controls one hundred percent (100%) of the membership votes for each of the defendant companies." Pet. ¶ 68; *see* Pet. ¶¶ 69, 70; *see also* Pet. ¶¶ 2, 4, 5, 12, 15, 17, 18, 22, 28, 34, 37, 40, 43 (describing Defendant Webb's connection to the entity Defendants variously as organizer, president, chief executive officer, manager, and registered agent). The entity websites, which the State reproduces in the Petition, communicate these facts to potential and actual customers. *See* Pet., Ex. B at 1, 2, 9, 12.

Finally, according to federal law and the loan documents themselves, Cheyenne River Sioux Tribal law governs any loans at issue, and the Cheyenne River Sioux Tribal Court has exclusive jurisdiction over any dispute relating to the loans. *See* Pet., Ex. C (sample loan agreement) at 1; *see also* Pet. ¶ 53.

ARGUMENT

I. THIS CASE IS REMOVABLE BASED ON A FEDERAL QUESTION.

When a plaintiff states a claim in terms of state law, federal jurisdiction is still available if (1) "some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims," or (2) "one or the other claim is 'really' one of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983). Defendants removed the present case on both grounds. *See* Notice of Removal ¶¶ 9-10.

A. Defendants' Removal Was Proper Because Substantial, Disputed Questions of Federal Law Are Necessary Elements of the State's Claims.

The Supreme Court has long recognized that a cause of action can "arise under" federal law, even if it is alleged under state law, when a substantial federal issue is "directly drawn in question." *Smith v. Kansas City Title Co.*, 255 U.S. 180, 201 (1921). Thus, a "plaintiff's characterization of a claim as based solely on state law is not dispositive of whether federal question jurisdiction exists." *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 260 (8th Cir. 1996).

Federal-jurisdiction exists in any case in which (1) there is a federal issue that is (2) contested and (3) substantial, and (4) federal jurisdiction is consistent with Congressional decisions regarding the division of labor between state and federal courts. *Central Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009) (citing *Grable*, 545 U.S. at 314); *see also Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009).

1. The Petition Necessarily Raises Federal Issues.

To prevail on its claim, the State must demonstrate that non-Tribal courts have jurisdiction over the activities of Tribal members on the Reservation and, in particular, over Defendants' activities at issue here. The State must also demonstrate that Missouri has the authority (or jurisdiction) to regulate the economic activity of Tribal members on the Reservation. Federal law governs the resolution of these issues.

As noted, the loan agreements demonstrate that the transactions occurred on Tribal lands, between Tribal members and the borrowers, and the Tribal courts have exclusive jurisdiction over disputes. The validity of these exclusive jurisdiction provisions is an issue of federal law. "It is well established that the scope of tribal court jurisdiction is a matter of federal law." *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003); *accord Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 950 (9th Cir. 2004) ("a tribal government's authority to apply tribal law to the commercial activities of non-Indian companies . . . can be answered only by reference to federal statutory or common law").

The State could have filed its claims in the Tribal courts on the Reservation, but it chose not to do so. An "action filed in order to avoid tribal jurisdiction necessarily asserts federal law." *Gaming World*, 317 F.3d at 848. The State has, therefore, "filed an action 'arising under' federal

law within the meaning of § 1331." *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 853 (1985).

This is not, as the State would have it, merely a matter of defense. In *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, the Court rejected an argument that federal jurisdiction for purposes of removal was lacking because "federal questions about the validity of the tribal ordinance only arise in defense." 725 F.2d 572, 575 (10th Cir. 1984). To the contrary, because the power to assert "Indian sovereignty . . . against non-Indians" is "defined by federal law," a "federal question is raised necessarily." *Id.*

Similarly, federal law will determine whether the State has the authority to regulate Defendants' activities on the Reservation. The "threshold jurisdictional issue, whether the State had authority to regulate" activity on a reservation, is "a question of federal, not state, law." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994) (citing *Senaca Cayuga*, 874 F.2d at 714); *accord MacArthur v. San Juan County*, 497 F.3d 1057, 1066 (10th Cir. 2007) ("[Q]uestion of the regulatory . . . authority of the tribes . . . is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331."). The State's jurisdiction over the Defendants necessarily implicates the Defendants' asserted Tribal immunity. Tribal immunity "is a matter of federal law." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). Again, contrary to the State's belief, this is not just a matter of defense. In this case, Tribal "immunity is a jurisdictional question." *Seneca-Cayuga Tribe of Okla. v. Okla. ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989). The State cannot establish its jurisdiction – and its right to bring its claims – unless it overcomes the Defendants' immunity.

Similarly, determining the location of the transactions at issue will be essential in determining the State's authority over the Defendants. Because the State attempts to regulate

activity that is across state borders and on an Indian reservation, the Tribal and federal interests involved require application of federal law. *Cf. Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1 (1998) (discussing definition of "Indian Country" under federal law); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 617-18 (7th Cir. 1999) (federal law determines location of transaction in Commerce Clause analysis).

Additionally, any conflict-of-law determinations – *i.e.*, whether conflicting Tribal or state law applies – will be decided under federal law. *Cf. Montana v. United States*, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). Because these questions – which represent essential elements of the State's Petition against the Defendants – must be resolved under federal law, the Court has jurisdiction under the *Grable* line of cases.

By claiming jurisdiction over Defendants and filing this case in Missouri State Court, the State necessarily asserts that (1) Tribal courts do not have exclusive jurisdiction over Defendants' activities, and (2) Missouri law is not nullified by Defendants' immunity, and may otherwise supplant Tribal law. Thus, the Petition necessarily places the issues of Tribal jurisdiction, immunity and self-governance - all federal issues - directly into contention.

Muhammad v. Comanche Nation Casino, 742 F. Supp. 2d 1268 (W.D. Okla. 2010), is directly on point. The plaintiff in that case was injured in a slip and fall on a reservation, and filed a state-law tort claim in state court. The casino removed. Applying *Grable*, the Court denied the motion to remand. "The issue of whether the State . . . can validly exercise authority over Indian lands presents a substantial question of federal constitutional, statutory, and decisional law." 742 F. Supp. 2d at 1275. The Court had federal-question jurisdiction over the

action because, although the plaintiff's complaint made no reference to it, "[a] necessary element of the state-law claim asserted in Plaintiff's pleading is the legal right of the State . . . to exercise civil-adjudicatory authority over conduct by an enterprise of a federally recognized Indian tribe occurring on Indian lands." *Id.*

Here, as in *Muhammad*, "State regulatory authority over Indian [activity] in Indian Country depends on a determination either that federal law has not preempted state authority, or that state regulation would not infringe on tribal self-government." *Seneca-Cayuga*, 874 F.2d at 714. The State must satisfy both standards to proceed against Defendants. Regardless of the outcome, because this determination is made under federal law, there is a federal issue raised by the Petition which is sufficient to invoke this Court's federal-question jurisdiction.

The State attempts to distinguish *Grable* on the basis that its claim only requires interpretation of "Missouri consumer protection laws," rather than any federal laws. State's Br. at 4. The Court will never reach Missouri law unless it first determines that the State has jurisdiction and that state law, rather than Tribal law, will apply – both federal questions. The State "may not circumvent federal jurisdiction by omitting federal issues that are essential to [its] claim." *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1234 (10th Cir. 2006). *Accord*, *Muhammad*, 742 F. Supp. 2d at 1275 (federal court has jurisdiction when plaintiff has "simply failed to plead a federal question that is an essential element of her state-law claim").

2. The Federal Issues Are Contested.

There can be no doubt that the issues of jurisdiction – Tribal and State – presented here are contested. By asserting its claims under Missouri law, the State rejects Defendants' assertion of their Tribal immunity, the Tribal court's exclusive jurisdiction, the preeminence of the Tribal law, and the inapplicability of Missouri law. Accordingly, the Petition sufficiently demonstrates

that there exist disputes over the State's jurisdiction, Defendants' entitlement to Tribal immunity, and the jurisdiction of Tribal laws and courts.

Similarly, the State claims that it "brought this action based on Defendants' actions in the State of Missouri." State's Br. at 6. The loan documents, however, demonstrate that all applications are received, reviewed, and approved or denied on the Reservation, and that the loans are governed by Tribal law, in conjunction with federal law, and are subject to the exclusive jurisdiction of Tribal courts. Pet. Ex. C (sample loan agreement) at 1, 2, 3, 4, 5. Because the location of the transactions has a particularly strong bearing on questions of Tribal and State jurisdiction, these questions present contested issues of federal law and they ought to be resolved in a federal court.[2]

Finally, the State claims that Defendants are not entitled to Tribal immunity. State's Br. at 8-10. As explained more fully in Defendants' memoranda of law relating to their motion to dismiss, this is also a contested issue of federal law. Because the State's lawsuit infringes on the Tribe's right to regulate conduct of Tribal members on the Reservation, Defendants do have the right to claim immunity:

> To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians and the legislation confers individual rights. This Court has therefore held that the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

McClanahan v. State Tax Com'n, 411 U.S.164 181 (1973).

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[2] The State's suggestion that Defendants "effectively concede" any of these contested issues by not raising a personal-jurisdiction defense is wrong. State's Br. at 8. In fact, there are substantial personal jurisdiction and venue defenses. However, rather than risk delaying this action with a non-merits, personal-jurisdiction or venue challenge, Defendants chose to exercise their right of removal and submit the dispositive issues of Tribal immunity and preemption to this Court.

3. The Contested Federal Issues Are "Substantial."

A federal issue is "substantial" as long as it is ***not*** "(1) wholly insubstantial or obviously frivolous, (2) foreclosed by prior cases which have settled the issue one way or another, or (3) so patently without merit as to require no meaningful consideration." *Nicodemus*, 440 F.3d at 1236. "[I]n determining whether the federal question is a substantial one, courts should inquire into whether resolution of the issue in federal court would benefit from 'the advantages thought to be inherent in a federal forum.'" *Id.* (quoting *Grable*, 545 U.S. at 313).

The contested federal issues here are "substantial" under these standards. Rather than being frivolous, insubstantial, or patently without merit, issues of Tribal jurisdiction and self-government have long been recognized as important federal issues. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S., 324, 334-335, & n.17 (1983).

Additionally, no prior case forecloses the federal questions at issue. Rather, Defendants' position has substantial merit. The only cases that Defendants have discovered touching the issues support Defendants' position. *Muhammad*, 742 F. Supp. 2d at 1275; *MacArthur*, 497 F.3d at 1066 n.4 (case is "one arising under federal law because it turns on substantial questions of federal law"). Therefore, the issues would benefit from the inherent advantages of a federal forum, including its familiarity with the "historical scope of tribal sovereignty and the evolving place of the tribes within the American constitutional order." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010).

4. Federal Jurisdiction Is Consistent with Congress' Decisions Regarding the Division Between State and Federal Courts.

Congress intended for state regulatory jurisdiction to be limited on the Reservation. Under the Indian Civil Rights Act of 1968 ("ICRA"), a state may exercise civil jurisdiction over

Tribal lands only with the consent of the Tribe.[3] 25 U.S.C. § 1322(a) (2006). Because it is rare to have a case in which state regulation confronts Tribal immunity and federal preemption, proceeding in this Court "will portend only a microscopic effect on the federal-state division of labor." *Grable*, 545 U.S. at 315. There is no reason to believe it would apply to "garden variety" state law claims or "materially affect or threaten to affect, the normal currents of litigation." *Grable*, 545 U.S. at 318-19.

"Given the absence of threatening structural consequences and the importance for availability for a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of this state-law claim." *Muhammad*, 742 F. Supp. 2d at 1277 (quoting *Nicodemus*, 440 F.3d at 1237; *Grable*, 545 U.S. at 319-20) (internal punctuation omitted). In upholding removal, the Supreme Court held in *Grable* that "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." 545 U.S. at 312. So it is here.[4]

B. Removal Was Proper Because the State's Claims Are Completely Preempted.

Under "complete preemption," if the pre-emptive force of federal law is "extraordinary," it effectively converts a state-law claim into a federal claim for purposes of the well-pleaded complaint rule. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). Under this analysis, for example, a "state-law complaint that alleges a present right to possession of Indian tribal lands

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[3] The Tribe has not consented to state civil jurisdiction on Reservation land. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1167-68, 1174 (8th Cir. 1990).

[4] The State's reliance on *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), is misplaced. That case does not even mention the *Grable* line of cases. "Cases are not authority for propositions not considered." *Sloan v State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1231 (10th Cir. 2004).

necessarily asserts a present right to possession under federal law, and is thus completely pre-empted and arises under federal law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 n.8 (1987) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974)). Related to the extraordinary steps it has taken to preserve tribal rights, Congress has wielded its "broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3," to promote tribal sovereignty through self-governance and economic development. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *see Mescalero Apache*, 462 U.S. at 327-28.

The United States Code is replete with Acts of Congress directed at economic activity on reservations. *E.g.*, 25 U.S.C. §§ 261-264 (limiting who may trade with Indians); 25 U.S.C. §§ 305, *et seq.* (promoting Indian arts and crafts); 25 U.S.C. §§ 450, *et seq.* (Indian Self-Determination and Education Assistance Act of 1975); 25 U.S.C. §§ 461, *et seq.* (Indian Reorganization Act of 1934); 25 U.S.C. § 1451, *et seq.* (Indian Financing Act of 1974); 25 U.S.C. § 1521 (Indian Business Development Program); 25 U.S.C. §§ 2701–2721 (Indian Gaming Regulatory Act). Furthermore, federal authority over these matters does not yield to state jurisdiction unless Congress explicitly consents. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986); *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (Indian commerce is "under the exclusive control of the Federal Government"). Congress has not relinquished this authority, exhibiting "jealous regard for Indian self-governance." *Three Affiliated Tribes*, 476 U.S. at 890.

The Supreme Court has held repeatedly that the interests of tribal sovereignty override alleged state interests. *See, e.g.*, *Mescalero Apache*, 462 U.S. at 327-28 (tribal economic interests predominate over state's interest in enforcing fishing and hunting laws); *Three Affiliated Tribes*, 476 U.S. 877 (state's management of its own court system must yield to tribal

sovereignty). The predominance of a tribe's interest in self-governance is paramount when a state seeks to supplant tribal law with its own. *See Williams v. Lee*, 358 U.S. 217, 220 (1959); *White Mountain Apache Tribe v. Smith Plumbing Co., Inc.*, 856 F.2d 1301, 1305 (9th Cir. 1988) ("[i]t is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute") (internal punctuation omitted); *see also McClanahan*, 411 U.S. at 171-72 ("absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them").

Likewise, the interests of individual Tribal members supersede any State enforcement efforts. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220. In *Williams*, a non-Indian who operated a general store on the Navajo Indian Reservation filed suit against Navajo Indians (Mr. and Mrs. Williams) in state court in Arizona to recover for goods sold in the store on credit. Judgment was entered against Mr. and Mrs. Williams in the trial court, and the Supreme Court of Arizona affirmed the judgment. The United States Supreme Court reversed, holding that, unless Congress expressly grants power to the states, the states have no authority to govern the affairs of Indians on a reservation. *Id.* at 220-223. The *Williams* court concluded its opinion by stating:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [*i.e.* the store owner bringing suit] is not an Indian.

Id. at 223.

The Supreme Court reaffirmed this holding in *Montana v. United States*, 450 U.S. 544 (1981), in which it further emphasized that state law does ***not*** govern contracts between Indians and non-Indians:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter ***consensual relationships with the tribe or its members, through commercial dealing, contracts***, leases, or other arrangements.

Id. at 565 (emphasis added); *see also Three Affiliated Tribes*, 476 U.S. at 891 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States").

If a tribe consents to state civil jurisdiction, federal law no longer fully fills the field of regulation. When, as here, the Tribe has not agreed to state civil jurisdiction, federal law fully occupies the field, and all claims based on state law which attempt to govern commercial activity on Tribal lands are completely preempted. As a result, any attempt by the State to supplant Tribal immunity or Tribal law regarding economic activity on the Reservation, and instead apply Missouri law, is completely preempted.[5]

C. Supplemental Jurisdiction

If the Court determines that it lacks federal-question jurisdiction over any portion of the state-court Petition, 28 U.S.C. § 1367(a) and § 1441(c) provide additional bases for subject-matter jurisdiction over said claim or claims. *See* Notice of Removal at 3 n.1.

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[5] The State cites *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), for the proposition that complete preemption is limited to federal labor law, ERISA, and the National Bank Act. Br. at 4. *Beneficial* specifically cites *Oneida*, applying the doctrine to Indian land claims. 539 U.S. at 8 n.4.

II. *YOUNGER* ABSTENTION IS INAPPLICABLE.

The State's call for application of *Younger* abstention is misplaced. *Younger* abstention applies only if there is (1) an ongoing state judicial proceeding (2) that implicates important, substantial, or vital state interests and (3) provides an adequate opportunity to raise the federal claims advanced in the federal lawsuit. *Norwood v. Dickey*, 409 F.3d 901, 903 (8th Cir. 2005) (citing cases). The State cannot satisfy the first of these requirements.

The linchpin of *Younger* abstention is the existence of a pending state case. *See Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) ("[a]bsent any ***pending*** proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous.") (emphasis in original). A removed case cannot satisfy this requirement because it "does not leave behind a pending state proceeding that would permit *Younger* abstention." *Village of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 783 (7th Cir. 2008); *accord In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 477-78 (8th Cir. 1995) ("since the entire state court action was removed to federal court," there "is no ongoing state action in favor of which to abstain."), *overruled on other grounds*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Kirkbride v. Cont'l Cas. Co.*, 933 F.2d 729, 734 (9th Cir. 1991); *Noonan South, Inc. v. County of Volusia*, 841 F.2d 380, 382 (11th Cir. 1988).

III. THE STATE IS NOT ENTITLED TO RECEIVE COSTS AND FEES.

Regardless of the outcome of the Motion to Remand, the State is not entitled to costs and fees. The decision whether to award costs and fees under § 1447(c) rests in the Court's discretion, but that discretion should rarely be exercised in favor of an award:

> Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). The proper inquiry is whether the removing party had a legitimate, fair, or objectively reasonable basis for removing the case. *Id.* at 136.

Defendants had a legitimate, fair, or objectively reasonable basis for removing this case. Neither the Supreme Court nor the Eighth Circuit has ruled on this application of *Grable* or on this preemption argument. In fact, the only courts to have dealt with the former issue support Defendants' position. *See, e.g.*, *Muhammad*, 742 F. Supp. 2d at 1277; *MacArthur*, 497 F.2d at 1066.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiff's Motion to Remand.

DATED this 16th day of August 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2011, I served a copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REMAND** by way of email, through the Court's electronic filing system (CM-ECF), on the following:

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