No. 02-306

In The
Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

v.

MARIE ANDERSON, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR THE CONSUMER ATTORNEYS OF CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Consumer Attorneys of California (hereinafter "CAOC") is a voluntary membership organization of more than 3,000 consumer attorneys practicing throughout California.[1] The organization was founded in 1962 and its members predominantly represent individuals subjected in a variety of ways to consumer fraud practices, employment discrimination, personal injuries and insurance bad faith. Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of consumers and injured victims in both the courts and the Legislature.

The issue of whether claims involving usury against a national bank necessarily arise under section 30 of the National Bank Act, 12 U.S.C. §§ 85-86 ("NBA"), and completely preempt and displace all state statutory and common laws on this subject is of critical importance not only to the Consumer Attorneys of California and their clients but to the public in general. As part of its efforts to preserve and protect the rights of California consumers, the members of CAOC prosecute plaintiff and plaintiff class actions to challenge practices and policies of financial institutions which cause economic harm and loss to consumers including the national banks.

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[1] This brief was authored solely by the amicus and counsel listed on the cover; no part was authored by counsel for a party. No one other than the amicus or its counsel made any monetary contributions to the preparation or submission of this brief. All parties have consented to the filing of this amicus curiae brief. The consent letters are being filed with the Court along with this brief.

The CAOC is concerned that if this Court were to conclude that section 30 of the NBA completely preempts and displaces state law, and that Congress intended that banks facing usury claims in state court should have the ability to remove the case to a federal forum, this will severely impact the well-established right of plaintiffs to choose a state court as the forum in which to litigate state statutory and common law claims against banks. Moreover, if this Court were to so broadly construe sections 85 and 86 as to preempt and displace state-law claims which only remotely relate to the rate of "interest" charged by a national bank, the rights of the states to enact and enforce state laws to protect their citizens in matters concerning national banks will be severely impaired.

The concerns of the CAOC regarding the adverse impact of a decision by this Court that the NBA completely preempts all state usury laws is particularly warranted here because this case comes to this Court in the procedural context of removal and remand issues.[2] No evidence

[2] Petitioners argue that all of respondent's claims (all of which were based on state law) are nothing more than claims alleging usurious interests against a national bank, which *necessarily* arise under federal law *and* also give Petitioners the right to remove to federal court. Petitioners agree that "under the 'well-pleaded complaint' rule, a state-law claim may not be removed merely because the state-law claim is likely to be met by a federal defense (including a defense of federal preemption)". Brief for Petitioners, p. 9. However, Petitioners go on to assert that in this case, "that is not the situation here, where the usury claim itself *can only* arise under federal law, regardless of the label placed on that claim by the plaintiffs." (*Id.*) [emphasis added]. Petitioners and amicus United States assume that Congress intended to give banks sued for usury not just the ability to assert preemption as a defense, but *also* the ability to remove the case to a federal forum. The assertion by Petitioners that federal law provides the *exclusive* basis for

(Continued on following page)

was ever presented to the district court that the subject state laws are preempted and should not be enforced against Petitioners because this will interfere with or significantly impede the ability of national banks in general, to lawfully carry out the business of banking.

The CAOC thus submits this brief to explain why, under our Constitution, laws, and federal system of government, this Court should affirm the judgment of the Eleventh Circuit Court of Appeals and reject Petitioners' efforts to eviscerate a plaintiff's traditional right to select the law under which she will pursue her legal remedies as well as the forum in which she will litigate her state law based claims.

SUMMARY OF ARGUMENT

There is a long-standing presumption against preemption, which is rooted in the concept of federalism. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Petitioners seek to cast aside this presumption in favor of removal. There is no reason to conclude, as Petitioners do, that in enacting section 30 of the National Bank Act, 12 U.S.C. §§ 85 and 86, Congress intended to completely

plaintiffs' state law claims is especially troubling since it is tantamount to an assertion that plaintiffs' remedies will be limited to those provided by federal law. Such a result gives short-shrift to principles of federalism and a state's historic ability to fashion state law to remedy harm caused by a bank against its citizenry. *See generally, Sprietsma v. Mercury Marine*, ___ U.S. ___, 123 S.Ct. 518, 527 (2002) (Even when federal law expressly preempts state law, it would be rational for Congress not to preempt common law claims which necessarily perform an important remedial role in compensating victims.)

preempt and displace all state statutory and common law involving usury (such as, for example, Congress did in the area of employee health benefits when it enacted the Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*) If state law conflicts with sections 85 or 86, a national bank may assert preemption as a defense. If a national bank is sued in state court exclusively for state law based claims and these claims involve usury, there is nothing in the NBA to suggest that Congress intended to allow a defendant to recast these state law claims as ones necessarily arising from and based *exclusively* on federal law and that the defendant also has the right to remove these claims to federal court.

If complete preemption were to apply in cases such as the instant one, the historical powers of states to legislate and enforce consumer protection laws governing financial institutions, including national banks, and a citizen's right to choose what state-based consumer protection rights to litigate and in what forum, will be jeopardized.

ARGUMENT

I. THERE IS NO HISTORICAL OR LEGAL JUSTIFICATION FOR IGNORING THE WELL-PLEADED COMPLAINT RULE HERE AND DISREGARDING THE INTERESTS OF THE STATES IN REGULATING BANKS

As the court of appeals points out, the Plaintiffs (Respondents herein) alleged only state-law claims in their

complaint.[3] Nevertheless, Petitioners characterize all five causes of action as nothing more than claims arising under federal law and thus removable to federal court. Petitioners argue that "Congress has so forcefully exercised its constitutional power to supplant state law," that under the complete preemption corollary to the well-pleaded complaint rule, plaintiff's state-law based claims are "transformed into a federal claim and may be removed to federal court." Petitioners' Brief, p. 10. However, as the court of appeals correctly concluded, Congress did not intend sections 85 and 86, to preempt completely such state law based claims and thus provide a defendant with the ability to remove such cases to federal court.

It is axiomatic that in our federalist system, a plaintiff is free to choose whether to assert a state or federal claim. The plaintiff is "the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987); *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon") (Holmes, J.). The states are free, through enactment of state laws or by state common law, to make certain conduct unlawful for the protection of consumers.

As this Court has also observed, because the states are "independent sovereigns" in our federal system, "[c]onsideration of issues under the Supremacy Clause 'starts with the assumption that the historic police powers

[3] The causes of action alleged were for (1) fraud; (2) suppression; (3) breach of fiduciary duty; (4) charging an excessive interest rate under Alabama Code § 8-8-1 (1975); and (5) violation of the Alabama Mini-Code.

of the states [are] not to be superceded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. at 504 (citations omitted); *see also, Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The presumption against the preemption of state police powers is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc.*, 518 U.S. at 485. (citation omitted).

By asserting that federal law exclusively preempts *and displaces* all state claims involving usury (Petitioners' Brief, pp. 9, 15-16), and automatically gives a defendant the right to remove the case to federal court, Petitioners call into question the legitimacy of a state's interest in such matters:

> There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction. [citation omitted] That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case – which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the state. . . . Because pre-emption-based challenges merit a similar focus, the appropriate question here is not

> whether Louisiana has a substantial, legitimate interest in reducing NOPSI's retail costs below that necessary to recover its wholesale costs, but whether it has a substantial, legitimate interest in regulating intrastate retail rates. It clearly does.

New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 365 (1989). Regulation of utilities is one of the most important of the functions traditionally associated with the police power of the state. *Id., quoting Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377 (1983). Similarly here, the regulation of national banks has historically been an important function associated with a state's police powers.

States have long played a central role in regulation of national banks. As the California Supreme Court observed:

> Defendant contends that Congress, by comprehensive regulation, has occupied the field of regulation of contracts between national banks and their depositors. One hundred and fifteen years of practice under the national banking system argue to the contrary. While nationally chartered banks are subject to the paramount authority of the United States, Congress has declined to provide an entire system of federal law to govern every aspect of national bank operations. Consequently, national banks have traditionally been 'governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws.' (*National Bank v. Commonwealth* (1870) 76 U.S. (9 Wall) 353, 362, 19 L.Ed. 701; see Scott, *The Dual Banking System: A*

> *Model of Competition in Regulation* (1977) 30 Stan.L.Rev. 1.)

Perdue v. Crocker National Bank, 702 P.2d 503, 520 (CA, 1985), *appeal dismissed*, 475 U.S. 1001 (1986) (noting lack of jurisdiction); *see also*, *Smiley v. Citibank*, 900 P.2d 690, 716-718 (CA, 1995) (George, J. dissent), *aff'd on other grounds,* 517 U.S. 735 (1996); *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969) (allowing application of a Florida branch bank statute to national banks in the state).

As explained in *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980), Congress has generally found that regulation of national banks should be shared with the states and not be expressly and completely preempted by federal law:

> Whatever may be the history of federal-state relations in other fields, regulation banking has been one of dual control since the passage of the first National Bank Act in 1863. . . . In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision. [¶] The judicial test has been a tolerant one. [National banks'] right to contract, collect debts, and acquire and transfer property are all based on state law.

See also, *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) ("national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions").

II. THE PROVISIONS OF THE NATIONAL BANK ACT DO NOT MANIFEST CONGRESS' INTENT TO COMPLETELY PREEMPT STATE USURY LAWS FOR PURPOSES OF REMOVAL JURISDICTION

Ordinary preemption is a defense which may be raised in state court as well as in federal court. *BLAB T.V. of Mobile, Inc. v. Comsat Cable Communications, Inc.*, 182 F.3d 851, 855 (11th Cir. 1999). Under the "well-pleaded complaint" rule, the allegations in the plaintiff's complaint determine whether there is federal jurisdiction. *Id.* at 854*, citing*, *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). Only when the plaintiff's statement of his own cause of action shows that it is based on federal law can the case be removed. *Id.* The presence of a federal defense does not make a case removable, even if the defense is preemption and even if the validity of the preemption defense is the only issue to be resolved in the case. *Id., citing Caterpillar, Inc. v. Williams*, 482 U.S. at 393.

There is a corollary to the well-pleaded complaint rule that where a statute completely preempts all state law in a particular area, an ordinary state common law complaint is converted into one stating a federal claim thus permitting removal. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987). It is rare that an area of state law is completely preempted because the pre-emptive force of a statute must be so "extraordinary" that it "converts an ordinary state common law claim into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar, Inc.,* 482 U.S. at 393, *citing Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 65.

Indeed, since this Court issued the opinion credited with originating the complete preemption doctrine more than thirty years ago, this Court has found complete preemption under only two statutes: section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and section 502(a) of the Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1132(a). *BLAB T.V. of Mobile, Inc. v. Comsat Cable Communications, Inc.*, 182 F.3d 851, 855 (11th Cir. 1999) [citations omitted].

In *Metropolitan Life Ins. Co. v. Taylor*, *supra*, this Court concluded that state common law claims asserting improper processing of employee benefits under a plan covered by ERISA were not only preempted by ERISA but also *displaced* by ERISA's civil enforcement provision. *Id.* at 60, 67. This Court was reluctant to convert the state common law claims into federal ones, but did so because it found Congress had clearly manifested its intent to make such claims exclusively governed by federal law *and* to be removable.[4] *Id.* at 67-68. Even so, the Court wisely cautioned against future attempts to expand indiscriminately and apply its holding in other cases involving other statutes: "In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court." *Id.* [emphasis in original].

[4] The Court relied heavily on the similar and parallel language between the ERISA's civil enforcement provision and that of the section 301 of the Labor Management Relations Act (the only other federal statutory schema found to completely preempt state law).

Given how rare it has been for this Court to extend complete preemption to statutes other than ERISA and LMRA (as a predicate basis for removal), the Eleventh Circuit concludes that a "narrow reading of *Metropolitan Life* suggests that complete preemption occurs only when a federal cause of action features jurisdictional language that closely parallels that of section 301 of the LMRA as well as an express statement within the legislative history that Congress intends for all related claims to arise under federal law in the same manner as section 301." *BLAB T.V. of Mobile, Inc. v. Comsat Cable Communications, Inc.*, 182 F.3d at 856.

Unlike ERISA and the LMRA, there is no clear Congressional mandate expressed in sections 85 and 86 or their legislative history that *all* actions (including those which assert only state law based claims) which involve questions concerning bank interest rates necessarily must be regarded as arising under federal law *for purposes of removal*. If there is a conflict with federal law, a bank may of course assert preemption as a defense. However, to displace state laws which relate to usury on the basis that such claims exclusively arise under federal law and that they are also removable to federal court is contrary to well-established law that allows for federal, and state, regulation of national banks and state court jurisdiction over such disputes.

III. THE STATES HAVE TRADITIONALLY LEGISLATED IN AREAS AFFECTING BANKING PRACTICES

Federal courts have long recognized the historic police powers of states and municipalities to regulate in the areas of consumer protection and banking. *California v.*

ARC America Corp., 490 U.S. 93, 101 (1989) (there is a long history of state common-law and statutory remedies against monopolies and unfair business practices); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (regulation to "prevent the deception of consumers"); *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992), *cert. denied,* 506 U.S. 1052 (1993) (consumer protection and banking are historic areas of state and local concern); *Committee of Dental Amalgam Manufacturers & Dist. v. Stratton*, 92 F.3d 807, 811 (9th Cir. 1996) [consumer protection]; *Valley Bank v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990) (banking); *Perdue v. Crocker National Bank*, 702 P.2d 503, 521 (CA, 1985) ("under the Comptroller's interpretation [regarding bank deposits], any banking matter related to deposits would be exempt from state law. The result would be far-reaching and extremely disruptive. Currently, California and most other states extensively regulate all banks within their territory. . . . There is nothing to suggest that Congress, by authorizing banks to receive deposits, intended such a result".)

In the absence of an express statement by Congress that state law is preempted, there are two bases for finding preemption: one, when Congress intends that federal law occupy a given field, and two, when state law conflicts with federal law such that compliance with both is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989) [citations omitted].

There is a strong presumption against preemption of state laws in areas traditionally regulated by the states. *Id.* at 101. In such cases, "we start with the assumption

that the historic police powers of the states were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In *Perdue v. Crocker Nat'l Bank*, *supra*, the California Supreme Court considered several federal statutes and regulations, including the National Bank Act, as an alleged basis for preemption of California laws relating to bank deposits. The bank contended that federal law preempted state laws requiring that bank fees for processing fees on checks drawn on accounts with insufficient funds not be unreasonable or unconscionable. The Court rejected as "palpably erroneous" the assertion that state laws limiting bank service charges are preempted by a comprehensive federal statutory scheme. The Court observed:

> There is no comprehensive federal statutory scheme governing the taking of deposits. There is one relevant statute, section 24 of the National Bank Act, and that one merely authorizes banks to accept deposits. Section 24 may by implication also authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits, but such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law.

Perdue v. Crocker Nat'l Bank, 702 P.2d at 521.

As the California Supreme Court observed ten years after *Perdue*:

> So solicitous has Congress historically been of the interests of the states in the regulation of banking, both state and federally chartered, that the high court has adopted an especially restrictive

> standard of preemption by which to judge federal laws that impact state regulation of federal banks. That test, announced by the high court at least a century ago in such cases as *McClellan v. Chipman* (1896) 164 U.S. 347 [ ], requires the invalidation of a state law *only* where it 'incapacitates the [national] banks from discharging their duties to the government. . . . '

Smiley v. Citibank, 900 P.2d at 715 [emphasis in original].

The overreaching of the bank's position in *Perdue* is similar to the position asserted by Petitioners here. The assertion that federal law completely preempts and displaces *any* state law based claim relating to usury, and gives a defendant the ability to remove the case to a federal forum, cannot be justified by the language of 12 U.S.C. §§ 85 and 86. Nor is there any reason to conclude that Congress implicitly intended to preempt completely and displace all state laws pertaining to bank interest rates on the basis of conflict preemption. *See McClelland v. Gronwaldt*, 155 F.3d 507, 516, (5th Cir. 1998) ns. 23 and 24, and cases cited therein (discussing important differences between complete preemption and conflict preemption *vis a vis* removal jurisdiction and exception to the well-pleaded complaint rule).

It is difficult to believe that persons would be deterred from borrowing money from national banks if those banks were prohibited by state law from charging unreasonable or unconscionable interest rates. Such laws would not unduly burden the bank's ability to perform its functions such that Congress by implication intended to preempt and displace all such state laws. Cf. *Perdue v. Crocker Nat'l Bank*, 702 P.2d at 522 ("it is difficult to believe that persons would be deterred from depositing in federally

chartered banks by the knowledge that such banks were prohibited by state law from enforcing unreasonable charges or unconscionable contracts").

Perdue recognized that Congress did not intend the usury provisions of the National Bank Act to preempt *completely* all state laws in the field:

> The Senate committee report on the 1980 Act states that "[i]n exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers." (Sen. Rep. No. 96-368, 1st Sess., p. 19 (1979).) Thus the committee intended to leave many features of the contract between a bank and a borrower to be governed by state law, including state provisions which placed a limit on the amount the bank could charge.

702 P.2d at 523, fn 37.[5]

In *Smiley* the California Supreme Court answered the question whether the term "interest" in section 30 of the

[5] The court in *Perdue* similarly rejected the claim that bank directors might deem compliance with a state law to be an unsound banking practice which creates an actual conflict sufficient to preempt state law. In reasoning equally applicable to this case, the court concluded that "such actual conflict is a remote and unlikely possibility; a contractual term must be overreaching and oppressive before it is denominated 'unreasonable' or 'unconscionable.' Surely sound business practices would rarely, if ever, require the enforcement of oppressive contracts." 702 P.2d at 524.

National Bank Act, 12 U.S.C. § 85, may be construed to cover late payment fees. The Court concluded the answer was "yes, if such fees are allowed by a national bank's home state." This conclusion stemmed in part from the same conclusion made in *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). The Court's conclusion was also based in part on the fact that historically, the police powers of the States have extended to consumer protection laws, including laws affecting banking. *Smiley v. Citibank*, 900 P.2d at 696, citing *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *National State Bank Elizabeth, N.J. v. Long*, 630 F.2d 981, 985-986 (3d Cir. 1980); cf. *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 38 (1980) ("both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern"). The California Supreme Court emphasized that "[t]he issue . . . is not the *existence* of preemption under section 85, but rather its *scope*." *Smiley v. Citibank*, 900 P.2d at 696.

The *Smiley* court analyzed the intent of Congress in enacting section 30 of the National Bank Act and, relying on numerous U.S. Supreme Court decisions, concluded that "the purpose of section 30 of the National Bank Act was to grant national banks "most favored lender" status in their home states – to protect them from possible unfriendly state legislation, whether such legislation was unfriendly in intent or effect." *Smiley v. Citibank*, 900 P.2d at 698. In analyzing the term "interest" in section 85, *Smiley* concluded that Congress intended the term to include late payment fees and further, that Congress "entrusted the question of the lawfulness of a national

bank's late payment fees to its home state and to its home state alone." *Id.* at 704.

Notwithstanding the expansive definition of "interest" found in *Smiley*, this does not mean that section 85 *completely* preempts and displaces state law for purposes of removal. Simply because federal law ultimately controls on the question of what "interest" rate a national bank may charge is not tantamount to concluding that federal law completely preempts and displaces all state-based laws relating to usury.

CONCLUSION

Consumer protection and banking have historically been areas of state concern. If a state law is shown to conflict with federal law, there is no doubt that in such instances, federal law is supreme. Nevertheless, the historic role states have played in regulating banks whose conduct harms consumers cannot blindly be ignored. Similarly, the long tradition of allowing the plaintiff to be the "master of his complaint" should not be jettisoned in favor of removal. To extend this Court's reasoning with respect to complete preemption under only ERISA and LMRA and conclude that Congress intended to displace completely all state law impacting the field of usury and that section 30 of the NBA completely preempts the laws of all fifty states involving usury is unwarranted, unwise and contrary to the storied principles of federalism.

Accordingly, for the reasons stated above, the Consumer Attorneys of California, as amicus curiae, supports

Respondents and urges this Court to affirm the decision of the court of appeals below.

Dated: April 3, 2003 Respectfully submitted,

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