No. 02-337

IN THE
Supreme Court of the United States

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE ACADEMY OF FLORIDA MANAGEMENT ATTORNEYS, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Academy of Florida Management Attorneys, Inc. (AFMA) is a voluntary bar association which was established as a forum allowing for the free exchange of ideas and knowledge among the senior management labor and employment bar of the State of Florida. The membership consists of experienced management labor and employment attorneys who devote substantially all of their professional activities to advice and advocacy on behalf of Florida employers.

The issue at stake in this case is of direct concern to the AFMA and its members. Clients of the AFMA's members are defendants in numerous labor and employment cases filed each year. Many of these cases, including those based in whole or in part on Federal law, are originally filed in state courts, and many of these are in turn removed by defendant employers to U.S. district courts. Were the Court to adopt the strained reading of the general removal statute that Petitioner urges, the AFMA's members' clientele would be deprived of the opportunity to obtain a Federal forum for many cases arising under the Fair Labor Standards Act, and thus deprived of the developed expertise of the Federal judiciary in deciding these cases. Moreover, because the Court's decision in this case will likely have effect far beyond the Fair Labor Standards Act, the AFMA's members' clients may be deprived of the right of removal for cases arising within a whole range of Federal labor legislation.

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1. The parties have consented to the filing of this brief and written consents of the parties are being filed together with this brief. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel have made a monetary contribution to the preparation or submission of this brief.

The AFMA believes that consistency in the interpretation and application of the law, a value highly desired by its members and their clients, is best served by permitting defendants to remove Federal claims to Federal court except in those rare cases where Congress' intent to prohibit removal is so clearly and unmistakably expressed as to leave no doubt.

SUMMARY OF ARGUMENT

Despite Petitioner's arguments to the contrary, the 1938 enactment of the Fair Labor Standards Act is devoid of any indication of Congressional intent to prohibit removal of FLSA cases filed in state court. Neither the plain language of the statute, nor any of the available limited legislative history, suggest that Congress intended to prohibit removal.

Congress' use of the phrase "may be maintained" was most likely the result of its inconsistent usage in provisions authorizing suit contained in the statutory enactments of the period. Even if Congress intended "maintain" to mean something beyond merely filing an action, the word was most likely intended to guide courts in implementing the right to bring a collective action.

The use of the word maintain is common in Federal labor statutes, and the word is used in contexts which do not in any way suggest directly or indirectly an intent to prohibit removal. Indeed, Congress has on at least one occasion indicated by an amendment to Title 49 that "maintain" and "bring" are synonymous.

The 1948 amendment to the removal statutes created a requirement that any exception to removal of cases in which Federal courts have original jurisdiction must be "expressly

provided" in Congressional enactments. Even prior to the 1948 Amendment, and indeed prior to the passage of the FLSA in 1938, Congress had used express language when stating its intent to prohibit removal. Despite these precursors, Congress did not choose to use such language in the FLSA.

Given the long-running dispute among the courts and commentators as to whether the FLSA prohibits removal, there can be no doubt that the language of the act is ambiguous. Given the requirement of an express provision limiting removal, an argument that FLSA cases may not be removed cannot stand.

The interpretation argued by Petitioner will not clarify Federal labor law. To the contrary, not only will it raise the issue of whether several other Federal labor statutes also prohibit removal, it will needlessly multiply the number of appellate jurisdictions which must resolve FLSA cases. The same policy promoting consistency and even-handed treatment of litigants that may have convinced this court to grant certiorari, should lead it to conclude that removal is not prohibited by the FLSA.

ARGUMENT

I.

THE PHRASE "MAY BE MAINTAINED" IN THE FAIR LABOR STANDARDS ACT DOES NOT SATISFY THE REQUIREMENT THAT AN EXCEPTION TO THE GENERAL REMOVAL STATUTE BE "EXPRESSLY PROVIDED" BY CONGRESS

A. Neither The Plain Language Nor The Legislative Record Of The Fair Labor Standards Act Demonstrates Express Legislative Intent To Prohibit Removal

The Petitioner's arguments, like those raised in so many cases addressing this issue, rely upon two deceptively simple propositions. First, Petitioner contends, Congress' use of the word "maintain" signifies an intention to prohibit removal of FLSA cases to Federal court. Second, Petitioner urges, Congress expressed no intent in its 1948 revision of the removal statute to change that status quo. Both of Petitioner's arguments turn on Congressional intent.

This Court has long recognized two primary sources of Congressional intent in statutory interpretation. The starting point for interpreting a statute is the plain language of the statute itself. *See*, *e.g.*, *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994); *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). If statutory language is clear, reliance on other sources is unnecessary. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991). In determining whether the meaning of language is plain or ambiguous, the Court looks to the specific language

at issue, the context in which the language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). When ambiguities remain, this Court turns to the available legislative history for additional insight. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991).

Neither of these techniques avail Petitioner here. The simple irrefutable fact is that neither the language of the FLSA nor any available Congressional materials[2] regarding that statute resolve the issue of what "may be maintained" means. Were it not so, the split among Federal courts and other authorities would not have persisted for over 60 years.

While the Reviser's Notes to the 1948 amendment to the removal statute do not discuss in detail the purpose for the added phrase, no such history is needed. Unlike the phrase "may be maintained" in the FLSA, the meaning of the phrase "unless expressly provided otherwise" added to the removal statute is reasonably clear on its face. Where the will of Congress has been expressed in "reasonably plain terms,"

2. Petitioner quotes an excerpt from a 1958 Congressional report, citing no authority or source, purporting to divine the intent of a Congress 20 years earlier regarding removal of FLSA cases. Petitioner's Brief at 40. That statement is no more authoritative or dispositive than any number of post hoc opinions expressed by judges and commentators on both sides of the issue. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185-86 (1994). Petitioner also notes that the conference committee rejected prior language establishing "concurrent jurisdiction." Petitioner's Brief at 20 n.18. However, the committee also added the right to proceed collectively in this revision, suggesting a different reason for its usage of the word "maintained," as argued in Part I.B.2., below.

its language must "ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). The fair interpretation of that reasonably clear language, as expressed by the Eleventh Circuit and many other courts, is that an exception to the removal statute must be clear and unambiguous.

As argued below, the phrase "may be maintained" does not reach that standard, and should not be construed as prohibiting removal.

B. The Phrase "May Be Maintained" Does Not Imply A Prohibition on Removal

1. The Term "Maintain" Is Best Interpreted As Synonymous With The Term "Bring"

At its heart, Petitioner's argument rests upon an alleged distinction between the terms "maintain" and "bring." Petitioner's Brief at 16-21. In fact, Petitioner concedes that if the FLSA had provided that a plaintiff could "bring" a suit against any employer in any Federal or state court of competent jurisdiction, Petitioner's suit clearly would have been removable. Petitioner's Brief at 17.

The use of the term "maintained" in the FLSA does not reflect a deliberate decision by the Congress to prevent the removal of actions filed under the FLSA. At best, Petitioner has simply illustrated another instance of inconsistent usage in Congressional drafting. Indeed, Petitioner's own brief points out that during the month prior to Congress' passage of the FLSA, Congress enacted laws using operative words or phrases such as "file" an action, "institute proceedings," "apply for enforcement," or stating that an action could be

"brought" or "commenced." Petitioner's Brief at 19. This lack of consistency in drafting undercuts, not supports, Petitioner's argument that "maintain" means something different than "bring" or "file." This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997).

While Petitioner contends the use of the word "maintain" is highly unusual and thus significant, Congressional enactments prove otherwise.

In the area of labor law alone, the word "maintain" is used commonly, and is used in a context suggesting that it is synonymous with "bring." For example, the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2617(a)(2), provides that "[a]n action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . ."[3] A review of the legislative history of the FMLA reflects that the use of

3. Examples of lower courts holding that suits asserting claims under the FMLA are not subject to remand include *Ayotte v. Home Depot U.S.A., Inc.*, No. 3:01-CV-2604-D, 2002 U.S. Dist. LEXIS 571, at *2 (N.D. Tex. Jan. 8, 2002); *Henriquez v. Royal Sonesta, Inc.*, No. 96-0531, 1996 U.S. Dist. LEXIS 4616, 1996 WL 169237 (E.D. La. Apr. 10, 1996); *Ladner v. Alexander & Alexander, Inc.*, 879 F. Supp. 598 (W.D. La. 1995); *see also Holden v. Goodyear Tire & Rubber Co.*, No. 98-4212-RDR, 1999 U.S. Dist. LEXIS 7019 (D. Kan. Apr. 29, 1999) (holding that asserting a claim under the FMLA is sufficient to support removal). However, other courts have held the opposite and remanded FMLA claims back to state court. *See, e.g., Lloyd v. Classic Chevrolet, Inc.*, 82 Empl. Prac. Dec. (CCH) P41 017 (M.D. Fla. Jan. 31, 2002) (removed FMLA claim remanded to state court).

"maintained" was not intended to reflect a express provision prohibiting removal, but rather was simply another way of saying that a suit may be brought in state or Federal court. In the legislative history for the FMLA, Congress noted that the FMLA's "enforcement scheme is modeled on the enforcement scheme of the FLSA, which has been in effect since 1938." The Senate noted

> Rights established under the FMLA are enforceable through civil actions. Under section 107, a civil action for damages or equitable relief may be brought against an employer in any Federal or State court of competent jurisdiction by the Secretary of Labor or by an employee, except that an employee's right to bring such an action terminates if the Secretary of Labor files an action seeking monetary relief with respect to that employee.

S. Rep. No. 103-3 at 3, 35, 45 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 5, 37, 47.[4] Nothing in this history suggests any intent to preclude removal. Indeed, as will be discussed below, this history suggests that "maintain," if it means anything beyond "bring," implies an intent to allow plaintiffs to continue suits already filed if the Secretary of Labor initiates an action.

The Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. § 2001, *et seq.*, provides in 29 U.S.C. § 2005(c)(2) that "[a]n action to recover the liability prescribed in paragraph [c](1) may be maintained against the employer in

4. While it was the Senate version of the FMLA which was finally adopted, the House Report contained identical language. *See* H.R. Rep. No. 103-8, pt 1 (1993).

any Federal or State court of competent jurisdiction. . . ." There is no mention in the legislative history of the EPPA of an intention to prohibit removal of actions under the EPPA. Indeed, similar to the FMLA, the Senate Report of the Labor and Human Resources Committee supporting the legislation states that the EPPA "provides for private civil actions by employees or applicants against employers who violate the Act, for appropriate legal or equitable relief in any federal or state court of competent jurisdiction." *See* S. Rep. No. 100-284 at 52 (1988), *reprinted in* 1988 U.S.C.C.A.N. 726, 740; *see also* H.R. Rep. No. 100-208 at 14, *reprinted in* 1988 U.S.C.C.A.N. 726, 752.

The most salient example of the synonymous meanings of "maintain" and "bring" is contained in the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq*. The ADEA specifically incorporates the provisions of 29 U.S.C. § 216(b), including the "may be maintained" language. *See* 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216, and 217 of this title").[5] However, the ADEA also provides that "[a]ny person aggrieved may *bring* a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1) (emphasis added). *See also Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820,

5. Lower courts have also split on whether the ADEA permits removal. *See Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460-61 (5th Cir. 1982) (ADEA case initially filed in state court is removable); *Winebarger v. Logan Aluminum*, 839 F. Supp. 17 (W.D. Ky. 1993) (same); *Jacobi v. High Point Label, Inc.*, 442 F. Supp. 518 (same); *but see Lemay v. Budget Rent A Car Sys.*, 993 F. Supp. 1448 (M.D. Fla. 1997) (FLSA and ADEA claims not removable)

825 (1990) (holding that state courts have concurrent jurisdiction to hear claims under Title VII and noting that claims under the ADEA "may be brought 'in any court of competent jurisdiction.'"). Nothing in the text of the ADEA suggests that the intent of Congress was to prohibit removal of ADEA cases filed in state court to Federal court or that Congress would purposely create conflicting provisions. In fact, the legislative history simply notes that the ADEA "gives aggrieved individuals power to bring civil actions for legal and equitable relief," and is silent as to any intent to prevent removal of ADEA actions. H.R. Rep. No. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2223.

Adopting Petitioner's reading of section 216(b) would lead to a direct conflict between different sections of the ADEA. Under the rules of statutory construction, "[w]hen two statutes are capable of co-existence, . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (*quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Thus, the Court is required to read the ambiguous language of section 216(b) in concert with that section 626(a)(1) and hold that it is not an express provision prohibiting removal.

That Congress does not necessarily mean by the word "maintain" something different than "bring" is also shown in the history of Chapter 443 of Title 49 of the U.S. Code. That chapter authorizes the Secretary of Transportation to offer insurance and reinsurance to air carriers conducting flights necessary to carry out the foreign policy of the United States Government. The statute, as originally enacted in the Federal Aviation Act of 1958, provided that a suit under its provisions "may be maintained" in a district court or in the

Court of Federal Claims. P.L. 85-726, § 1310, 72 STAT. 805 (1958). However, as part of a "bill to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation," the 103rd Congress enacted Public Law 103-272, Sec. 1(e), 108 STAT. 1172 (1994), which substituted "a person may bring" for "may be maintained." 49 U.S.C. § 44309. The legislative history for this enactment states that the substitution was made "for clarity." *See* H.R. Rep. 103-180 at 334 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 1151.

As illustrated, Congress regularly utilizes the term "maintain" as a synonym for "bring." All that petitioner has shown is an instance of inconsistent Congressional usage, not an express provision prohibiting removal.

2. Even If "May Be Maintained" Means Something Other Than "May Be Filed," It Does Not Mean Removal Is Prohibited

Petitioner argues at length that "maintain" means something beyond mere filing. Ironically, Petitioner assumes, rather than supports, the proposition that this "something" is a prohibition on removal.

Even if "maintain" means something beyond mere commencement of an action, it does not follow that it necessarily means "keep in state court." There are at least two reasons that are consistent with the FLSA why "maintain" could mean something beyond mere filing without implicating removal.

First, the language of Section 16(b) of the FLSA did not merely grant an employee the right to file suit; it granted "any one or more employees for and in behalf of himself or

themselves and other employees similarly situated" the right to "maintain" an "action." This language has led some courts to conclude that the provisions of Federal Rule of Civil Procedure 23 do not apply to Section 16(b) collective actions. *Bayles v. American Medical Response of Colorado*, 950 F. Supp. 1053, 1066 (D. Colo. 1996) (citing cases). That the language "may be maintained" refers to the right to institute and continue an action collectively rather than constituting a prohibition on removal is implicit in this Court's own interpretation. In *Hoffman-La Roche, Inc. v. Sperling*, this Court cited the "may be maintained" language of Section 16(b), subsequently concluding that the provision "expressly authorizes employees to *bring* collective . . . actions. . . ." and to "*proceed* collectively." 493 U.S. 165, 167, 170 (1989) (emphasis added).

Second, the word "maintain" developed additional meaning when Congress amended the FLSA in 1949 to provide standing for the "Administrator" (subsequently the Secretary of Labor) to bring actions under Sections 16 and 17, (P.L. 81-393, §§ 14-15, 63 STAT. 910, 919 (1949)), and subsequently amended the act in 1961 to terminate the right of an employee to "bring" or to "join" an action, without expressly prohibiting the employee from continuing one, upon the filing of an action by the Secretary of Labor. *See* P.L. 87-30, § 12(a), 75 STAT. 65, 74 (1961). The word "maintain" thus came to symbolize the ability of an employee to continue an individual or collective action even after the Secretary filed suit, and Congress itself used the word "maintain" in that context in the legislative history for the 1961 amendment. *See Burns v. Equitable Life Assurable Soc.*, 696 F.2d 21, 23 (2d Cir. 1982), *citing* Conf. Rep. 327, 87th Cong. 1st Sess. 20, 1961 U.S.C.C.A.N. 1706, 1714.

Because the word "maintain" has meaning within the FLSA far more directly pertinent than the concept of prohibiting removal, Petitioner's argument that the Congressional usage of "maintain" must mean a prohibition on removal merely because it means something beyond "file" is a *non sequitur*, and does not support a contention that removal was expressly prohibited.

C. When Congress Has Intended To Prohibit Removal, It Has Done So Clearly, Even Prior To The Amendment Of The Removal Statute

The general removal statute provides that cases initially filed in state courts over which a Federal district court has original jurisdiction are subject to removal to a Federal district court, unless Congress has expressly provided otherwise. Specifically, 28 U.S.C. § 1441(a) provides, in pertinent part, as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). Thus, unless Congress has expressly provided otherwise, a case filed in state court based upon a Federal law is subject to removal to district court, if the case originally could have been filed in Federal court. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997) (*citing Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could

have been filed in federal court may be removed to federal court by the defendant.")); *Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983).

As argued earlier, the starting point for interpreting a statute is the statute itself. *See Alvarez-Sanchez*, 511 U.S. at 356; *Hallstrom*, 493 U.S. at 25. In this case, the language of the operative statute is clear: it requires an act of Congress which "expressly provides" that removal is prohibited. There is no dispute that the Federal district courts have original jurisdiction to hear claims brought against employers pursuant to the FLSA.[6] Thus, the issue in this case is whether the term "may be maintained" in the FLSA satisfies the "expressly provided" requirement and therefore represents an exception to the general rule of the removal statute. The district court and the Eleventh Circuit held that the FLSA did not expressly provide that removal was not permitted.

In affirming the district court, the Eleventh Circuit noted that when Congress intends to exempt a cause of action from the general removal provisions, Congress does so with specificity. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1310 (11th Cir. 2002).

Congress has explicitly prohibited removal of certain suits filed in state court asserting Federal law claims.[7] These

6. Congress has provided that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It is clear that Petitioner's FLSA claim is a civil action arising under the laws of the United States.

7. Congress also provided, in 1958, that notwithstanding diversity jurisdiction, actions arising under state worker's compensation laws are not subject to removal. P.L. 85-554, § 5, 72 STAT. 415 (1958) (codified in 42 U.S.C. § 1445(c) (2003)).

specifically enumerated causes of action that are not subject to removal include an action in state court against a railroad under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-54, 55-60, and a civil action under section 40302 of the Violence Against Women Act of 1994, 42 U.S.C. § 13981.[8] 28 U.S.C. §§ 1445(a), (d). In addition, a civil action against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under 49 U.S.C. § 11706 or 49 U.S.C. § 14706, may not be removed to any district court "unless the matter in controversy exceeds $10,000, exclusive of interest and costs." 42 U.S.C. § 1445(d). Congress has also provided that actions brought pursuant to the Securities Act of 1933 are not subject to removal. 15 U.S.C. § 77(v)(a) ("no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.") Similarly, both 15 U.S.C. § 1719 and 15 U.S.C. § 3612 state, in part, that "[n]o case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party."

Many of these causes of action that are not subject to removal were enacted prior to the passage of the FLSA in 1938. For example, the relevant provision of the Federal Employers' Liability Act was enacted on April 5, 1910. 36 STAT. L. 291, c. 143. *See*, *generally*, *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918). The relevant portion of the Securities Act of 1933 was enacted on May 27, 1933. Others, like the prohibition on removal of certain actions

8. In *United States v. Morrison*, 529 U.S. 598 (2000), this Court determined that the civil enforcement provision of the Violence Against Women Act was unconstitutional.

based upon the Violence Against Women Act, were enacted long after the FLSA. In either case, Congress has made it clear that suits filed under these statutes are not subject to removal.

Unlike these statutes, the language of the Fair Labor Standards Act is simply not explicit about whether or not it prohibits removal to Federal district court. Section 216(b) only provides, in pertinent part, that an action under the FLSA (or Equal Pay Act)[9] "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."[10] The language of section 216(b) does not contain the explicit prohibition on removal that is found in these other statutes where the Congressional intent to prohibit removal is clear.

In light of the ability of Congress, both before and after the enactment of the FLSA, to clearly express when removal is not permitted, the argument that "may be maintained" is an express prohibition on removal flies in the face of Congressional usage and practice.

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9. The Equal Pay Act, 29 U.S.C. § 206(d), relies upon the enforcement provisions of the FLSA.

10. Originally, the FLSA provided that an action "may be maintained in any court of competent jurisdiction. . . ." The FLSA was amended in 1974 to the current language. Fair Labor Standards Amendments of 1974, P. L. 93-259 § 6(d)(1), 88 STAT. 61 (1974).

D. Pre-1948 Judicial Interpretations Of The Phrase "May Be Maintained," Even Those Construing The Phrase As Proscribing Removal, Acknowledge That The Phrase "May Be Maintained" Is Ambiguous

When Congress revised the general removal statute in 1948 to incorporate the phrase "[e]xcept as otherwise expressly provided by Act of Congress . . . ," it also consolidated the removal provisions contained in the various statutes relating to removal. 28 U.S.C. § 1441(a). The revised and current removal statute makes it unequivocally clear that, except as expressly provided by an Act of Congress, a defendant may remove any civil action that could have been originally brought in Federal court. *See* 28 U.S.C. § 1441(a).

Prior to this 1948 revision, a provision requiring "express" prohibition of removal did not exist in the various statutes relating to removal. *See* 28 U.S.C. § 71 (1940)**.** Accordingly, prior to 1948, the issue of whether FLSA's "may be maintained" language proscribed removal was not analyzed in relation to today's requirements. However, even without the guidance of 28 U.S.C. § 1441, the issue was extensively examined by the courts and yielded to numerous "irreconcilable conclusions." *Korell v. Bymart, Inc.*, 101 F. Supp. 185, 185 (E.D.N.Y. 1951). Some of these cases have been cited by Petitioner in his Brief.

For example, there is a line of cases interpreting the "may be maintained" language of § 216(b) as meaning that a case commenced in state court must remain in state court. That line of cases has its genesis in *Johnson v. Butler Bros.*, 162 F.2d 87, 89 (8th Cir. 1947), which held that, by using the phrase "may be maintained," Congress demonstrated its intent to grant plaintiffs the right to designate the forum in

which their lawsuits will both be brought and prosecuted to final judgment.

The *Johnson* case was decided one year before Congress revised 28 U.S.C. § 1441. As such, the reasoning in *Johnson* and its prodigy were superceded by those revisions, which were designed to eliminate these ambiguities and conflicting interpretations. As the Reviser's Notes to 28 U.S.C. § 1441 elucidated, these revisions were "intended to resolve ambiguities and conflicts of decisions." *See* Reviser's Notes to 28 U.S.C. § 1441 (cited in *Asher v. William L. Crow Constr. Co*., 118 F. Supp. 495, 496 (S.D.N.Y. 1953)).

The *Johnson* court did not in any way decide that the "may be maintained" language was an unambiguous expression of Congress' intent. Indeed, the *Johnson* court, because it made its decision prior to the 1948 amendment, had no reason to consider whether the word "maintain" was an express directive of non-removability. Rather, the court, observing that "[t]his question as to the intent of Congress has given the Federal district courts much difficulty," found that "[f]or this unfortunate situation the courts are not to blame. It is attributable to the failure of Congress clearly and accurately to express its intent." 162 F.2d at 89. Therefore, the *Johnson* court construed legislative intent not from the plain meaning of the text, but rather through various intrinsic and extrinsic sources of interpretation.[11]

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11. Indeed, the first and only circuit court prior to the present case to address the issue since the 1948 amendment held that "[t]he words 'may be maintained' are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal." *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir.), *cert. denied*, 479 U.S. 824 (1986).

Likewise, even the district court cases prior to *Johnson* that rejected removability interpreted the phrase as ambiguous, as evidenced by their reliance upon extrinsic interpretive aids. *See*, *e.g.*, *Booth v. Montgomery Ward & Co*., 44 F. Supp. 451, 455-56 (D. Neb. 1942) (finding that "[p]erhaps the word is not imperatively convincing" and looking beyond text to legislative purpose and to "popular thinking" that the word "maintained" enjoyed a "liberal connotation"); *Fredman v. Foley Bros., Inc*., 50 F. Supp. 161 (W.D. Mo. 1943) (to resolve ambiguities, looking beyond text to evaluate legislative history, legislative purpose, and the use of "maintained" in other statutes); *Brantley v. Augusta Ice & Coal Co*., 52 F. Supp. 158, 159 (D. Ga. 1943) (interpreting ambiguities by looking to "[t]he tokens of intention [both] within the statute and outside of it"); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241, 242 (E.D. Mo. 1946) (to resolve ambiguities, looking beyond text to Congressional Record and other interpretive aids); *Garner v. Mengel Co.*, 50 F. Supp. 794, 796 (W.D. Ky. 1943) (in deciding which interpretation of the term "maintain" to adopt, declaring "[t]his Court feels that there is strong support for each viewpoint").

Courts that upheld the removability of FLSA actions prior to 1948 also perceived this "may be maintained" language as ambiguous. *See*, *e.g.*, *Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29, 32 (D. Minn. 1944) ("so many different and conflicting constructions appear to have been given to the word, according to the citations in Corpus Juris, that its character for exactitude of meaning is badly damaged"); *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 958 (D.N.J. 1940); *Owens v. Greenville News-Piedmont*, 43 F. Supp. 785, 789 (D.S.C. 1942).

Courts have struggled with interpreting FLSA's "may be maintained" language for over 60 years. The ongoing divergence in interpretations demonstrates the ambiguities inherent in the phrase. The fact that Congress has had the time and ability throughout this timeframe to expressly prohibit removal, but has chosen not to do so, despite otherwise amending the FLSA, further supports the conclusion that Congress did not intend to prohibit removal of FLSA action to Federal court. *See Roseman v. Best Buy Co*., 140 F. Supp. 2d 1332, 1334 (S.D. Ga. 2001).

While there is no consensus as to the meaning of the phrase "may be maintained," courts generally are in agreement that the language is ambiguous. Since there is no "express" provision in the FLSA capable of consistent interpretation, the requirement of 28 U.S.C. § 1441(a) has not been met.

II.

DENYING REMOVAL OF FLSA CASES WOULD INCREASE UNCERTAINTY AND INCONSISTENCY IN THE APPLICATION OF FEDERAL LABOR AND EMPLOYMENT STATUTES

Petitioner's reading would increase confusion and inconsistency in the application of Federal labor and employment law. If Petitioner's argument were adopted, then the complex thicket of Federal labor and employment law would become even more tangled for both employees and employers.

While resolving the FLSA issue, a decision by this Court reversing the Eleventh Circuit would raise the issue of whether cases arising under the ADEA, FMLA, EPA and

EPPA, statutes relying upon or incorporating the same language found in the FLSA, are subject to removal to Federal court. This decision would create a quagmire of jurisdictional questions for counsel on all sides of employment cases. Claims arising under one set of Federal laws would be subject to removal, while similar claims under other Federal laws might not be.

It is generally conceded that claims of individuals asserting discrimination in violation of Title VII based upon their race, color, national origin, sex, or religion may be filed in state court, but are subject to removal. *See*, *e.g.*, *Yellow Freight Sys.*, *Inc. v. Donnelly*, 494 U.S. 820, 825 (1990) (holding that state courts have concurrent jurisdiction to hear claims under Title VII). The same is true with claims of disability discrimination under the ADA.[12] However, claims of age discrimination under the ADEA, a statute interpreted consistent with Title VII[13], might not be subject to removal. Nor might those suits of individuals alleging violations of the FMLA, even though closely-related ADA cases could be removed. Wage discrimination claims based upon gender risk the same inconsistent treatment. Under Petitioner's analysis, a claim brought under the Equal Pay Act would not be subject to removal, because the EPA utilizes the FLSA's enforcement mechanism. *See* 29 U.S.C. § 206(d)(3). If the claim arose under Title VII, it could be removed.

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12. Title I of the ADA is enforced through the procedures established for Title VII. *See* 42 U.S.C. § 12117(a).

13. *See*, *e.g.*, *Reeves v. Sanderson Plumbing Prods.*, *Inc.*, 530 U.S. 133, 141-42 (2000).

In addition, while the AFMA has the utmost respect for state court judges,[14] and its members litigate many matters in state courts, the potential for inconsistent rulings will expand greatly if the Court adopts Petitioner's position. Already employers are confronted with the expense of having to ensure compliance with intertwined and overlapping Federal, state and local employment laws and regulations. Adopting Petitioner's proposed reading of the FLSA would mean that employers would have to worry not only about how the terms of the Federal employment laws have been interpreted by the United States Courts of Appeals, but also by each of numerous states' appellate courts.

The State of Florida, where this case arises, provides a salient example. With most FLSA cases now either being filed in or removed to Federal court,[15] Florida employers (and their counsel) can rely upon the decisions of the Eleventh Circuit Court of Appeals as binding precedent to guide their application of the act to their workforces. AFMA members not only represent their clients in FLSA litigation, but are routinely called upon to provide advice and assistance regarding FLSA compliance by these employers. If Eleventh Circuit appellate precedent is on point, Florida employers can be certain of the state of the law throughout the Federal courts of the State of Florida, as well

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14. *See, generally*, *Martin v. Hunter's Lessee*, 14 U.S. 304, 346-47 (1816).

15. Because of the prevalence of FLSA litigation in Federal court, Federal judges are more likely, in many lawyers' views, to have experience interpreting the FLSA. The AFMA has no doubt that state court judges can develop this expertise, if called upon, but its members often prefer to seek a Federal tribunal which may already have this expertise in interpreting Federal law.

as Georgia and Alabama. Since an employer's compliance with the FLSA requires analysis of the act's requirements, and, in particular, correct application of the so-called "white collar" exemptions, certainty and consistency in decisions interpreting the law are crucial to effective personnel management.

Within the Florida State Court system, however, consistency will be more elusive. In addition to the Florida Supreme Court, which like this Court is a court of limited jurisdiction,[16] Florida has five intermediate appellate courts, the District Courts of Appeal. *See* Art. V, § 4(b), FLA. CONST.; §§ 35.01-35.043, FLA. STATS. (2002). The jurisdiction of these courts is divided geographically. Decisions of one of the District Courts of Appeal are not binding on another. *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *Virginia Ins. Reciprocal v. Walker*, 765 So. 2d 229, 233 (Fla. 1st DCA 2000), *review granted*, 779 So. 2d 275 (Fla. 2001); *McDonald's Corp. v. State of Florida Dept. of Transp.*, 535 So. 2d 323, 325 (Fla. 2d DCA 1988); *Durham v. Palm Court, Inc.*, 558 So. 2d 59, 60 (Fla. 4th DCA 1990). The Florida Supreme Court may, but is not required to, resolve certified inter-district conflicts. Art. V, § 3(b)(4), FLA. CONST. Most significantly, while the decisions of this Court on matters of Federal law are binding on all Florida tribunals,[17] the decisions of the U.S. Circuit Courts of Appeals, and most notably the Eleventh Circuit, are not. *Gross v. State*, 765 So. 2d 39,45 (Fla. 2000); *Pignato v. Great Western Bank*, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995); *Donald & Co. Securities v. Mid-Florida Community Servs., Inc.*, 620 So. 2d 192, 193-94 (Fla. 2d DCA 1993). As a result, an

16. Art. V, § 3(b), FLA. CONST.

17. *See Howlett v. Rose*, 496 U.S. 356, 366 n.14, 369 n.16 (1990).

employer with operations in Tampa and Orlando, major cities less than 90 miles apart and both within the jurisdiction of the U.S. Middle District, is subject to the potentially conflicting decisions of two different state appellate courts.[18]

In its decision below, the Eleventh Circuit encouraged this Court to resolve the issue of removal under the FLSA, concluding that "litigants should not be treated with such disparity. . . ." 292 F.3d at 1310. The AFMA wholeheartedly agrees with this sentiment, and believes it applies to the outcome of this case as well. Labor law is already complex enough for employers who attempt in good faith to comply with Federal labor and employment laws. Absent clear Congressional intent, it is unnecessary and unwise to subject litigants to the disruptive effects of the potential inconsistency and forum-shopping that eliminating removal from state courts in FLSA cases may bring. The AFMA thus requests this Court to affirm the decision of the Eleventh Circuit and to confirm the removal jurisdiction of the district courts in FLSA and similar cases.

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18. The city of Tampa, in Hillsborough County, lies within the jurisdiction of the Second District Court of Appeal. The city of Orlando, within Orange County, lies within the jurisdiction of the Fifth District Court of Appeal.

CONCLUSION

The AFMA requests that the Court affirm the Eleventh Circuit, adopt the reasoning of that Court and of the First Circuit in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986), and lay to rest this issue once and for all.

Respectfully submitted,

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