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 HUMAN RESOURCE ASSOCIATION OF PALM BEACH COUNTY AND NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CHRISTINE D. HANLEY
Counsel of Record
SALLY STILL
BETTY L. DUNKUM
CHRISTINE D. HANLEY & ASSOC., P.A.
1000 Southern Boulevard – 2nd Floor
West Palm Beach, Florida 33405
(561) 659-5646

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Human Resource Association of Palm Beach County ("HRPBC") formed in 1966 to encourage the exchange of ideas, the discussion of strategies for resolution of problems facing human resources professionals, and the dissemination of information relating to the field of human resources, by and between its members. HRPBC members represent over 150 companies operating in Palm Beach County, Florida. Many of these companies do business in several states. HRPBC is a chapter of the Society for Human Resource Management, a national organization that is the leading voice of the human resource profession.

Amicus curiae National Council of Chain Restaurants ("Council") is a national trade industry group representing the interests of forty of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these forty companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, the Council's member companies and their franchisees employ in excess of three million individuals in all fifty states.

The food service industry is particularly labor intensive. Accordingly, issues arising under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), such as

[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief. *See* S. Ct. Rule 37.6.

child labor, minimum wage, overtime, and white collar exemptions, disproportionately affect the Council's member companies. Furthermore, without exception, each of the Council's member companies operates in more than one state, and many operate in all fifty states. If the typical Council member were expected to comply with the unique interpretations of this federal statute by numerous state courts, their ability to operate on a multi-state basis would be severely hampered. Thus, if the decision below were reversed and FLSA actions held nonremovable, the resulting procedural burden and judicial uncertainty on the Council's member companies would be significant, the express language of the FLSA would be ignored, and the sound policy considerations behind the removability of federal questions would be undermined.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The FLSA is a law of the United States; district courts have original jurisdiction over laws of the United States, so defendants may properly remove FLSA actions filed in state court to federal court. Nothing in the plain language of 29 U.S.C. § 216(b) expressly bars removal of an FLSA action. Petitioner's interpretation of the word "maintained" in isolation without considering the preceding words "may be" is flawed. Rather, the phrase "may be maintained" appearing in 29 U.S.C. § 216(b) establishes *inter alia*, *who* may bring an action, *where* one may bring an action, and *against* whom one may bring, file or

maintain an action – it is not an express prohibition of a defendant's right to remove an action to federal court.

Inclusio unius, exclusio alterius (*i.e.*, the inclusion of one thing indicates the exclusion of the other) is a basic principle of statutory construction. As support for his argument, Petitioner relies on language in a 1958 Senate report. Three of the laws cited in that report contain express language prohibiting removability, but the FLSA does not. As Congress did not create an express provision barring removal of FLSA actions, they are removable to federal court.

The resolution of the issue of removability will also resolve whether actions filed under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* ("FMLA") (which are patterned after the FLSA) are removable to federal court.

As the Court's opinion will impact both plaintiffs and defendants in FLSA, FMLA and ADEA actions, this Court should defer to the decision that Congress made when it created express statutory provisions governing removal of a host of other laws, but not the FLSA.

ARGUMENT

I. THE PLAIN LANGUAGE OF 29 U.S.C. § 216(B) DOES NOT EXPRESSLY BAR REMOVAL OF AN FLSA ACTION FILED IN STATE COURT; PETITIONER'S INTERPRETATION OF THE WORD "MAINTAINED" IS TAKEN OUT OF CONTEXT AND FAILS TO CONSIDER THE PERMISSIVE WORDS "MAY BE" IMMEDIATELY PRECEDING THE WORD "MAINTAINED."

The ultimate issue before this Court is whether an action filed in state court pursuant to 29 U.S.C. § 216(b) of the Fair Labor Standards Act may be removed to federal court. Certain statutes control the resolution of the issue before this Court. First, 29 U.S.C. §§ 201 *et seq.*, the FLSA, is a law of the United States enacted by Congress in 1938 through the exercise of its power to regulate commerce. 29 U.S.C. § 202. Second, 28 U.S.C. § 1331 grants to district courts original jurisdiction over all civil actions arising under the laws of the United States. Third, 28 U.S.C. § 1441(a) states that except as otherwise expressly provided, civil actions brought in state court, of which the district court has original jurisdiction, may be removed by the defendant.

Thus, because the FLSA is a matter over which the federal courts have original jurisdiction, a defendant may remove an FLSA action except as otherwise expressly provided. The specific question is then whether there is any express language in the FLSA, or elsewhere, denying a defendant the right to remove an action filed in state court to federal court, and more particularly, exactly what does "expressly provided" mean?

Petitioner argues that the language contained in 29 U.S.C. § 216(b) evinces Congress's intent to preclude removal of any FLSA action filed in state court. Petitioner asserts that this language is, in fact, express denial of the right to remove:

> [A]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) 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. . . . The right provided by this subsection to bring an action . . ., shall terminate upon the filing of a complaint by the Secretary of Labor in an action under 29 U.S.C. § 217 of this title. . . . [2]

29 U.S.C. § 216(b).

However, express language is "clearly indicated, distinctly stated; definite; explicit; plain." *The Random House Dictionary of the English Language* 503 (unabridged ed. 1973). Surely, if the language of the FLSA was, indeed, an express prohibition of removability, Petitioner would not require a forty page Brief On The Merits to convince this Court that his position is sound. *Amici* assert that nothing in the plain language quoted above forecloses removal, as it contains no express language prohibiting removal. *Cf., e.g.*, 28 U.S.C. § 1445 (express nonremovability discussed below).

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[2] 29 U.S.C. § 217, in turn, provides that "The district courts . . . **shall** have jurisdiction, for cause shown, to restrain violations of § 215 of this title. . . . " 29 U.S.C. § 217 (emphasis added).

Petitioner's argument is also flawed in that Petitioner conspicuously fails to address the implications of the word "may" appearing immediately before the words "be maintained." *Amici* note first that "may" is permissive rather than prohibitive language: it explains the rights, opportunities, and avenues available to a plaintiff, but it does not preclude or limit defendants' rights. *See, e.g.*, *The Random House Dictionary of the English Language* 886 (unabridged ed. 1973) (defining "may" as "used to express possibility, opportunity, or permission"). Thus, the phrase "may be maintained," read in context and in conjunction with the other words appearing in the same sentence, simply establishes *who* may bring an action, *where* one may bring an action, *why* one may bring an action, and *against whom* one may file, bring, or maintain an action.

Petitioner also attempts to distinguish the words "file" and "bring" from "maintain" and then transmogrify that distinction into an express denial of removability, contrary to the plain language of the section. Moreover, when comparing the "may be maintained" language in 29 U.S.C. § 216(b) to language in 29 U.S.C. § 217, it is apparent that the term is not nearly as significant as Petitioner believes it to be. 29 U.S.C. § 217 directs that, when the Secretary of Labor files an action for injunctive relief, the action "**shall** be filed in district court." 29 U.S.C. § 217 never uses the term "maintained." Yet, it is understood that the Secretary will maintain the action, not merely file the action, in federal court.

In sum, while Petitioner tempts this Court to parse out the word "maintain" from its surrounding language, it is the collection of words in the phrase "may be maintained" that imparts the meaning of the section. *Amici* assert that a straightforward reading of the express

language of the section permits defendants to remove FLSA actions to federal court.

II. THE STATUTES ARE "CLEAR": ACTIONS UNDER WORKERS' COMPENSATION ACTS, THE JONES ACT, AND THE RAILWAY EMPLOYER'S LIABILITY ACT ARE NONREMOVABLE UNDER 28 U.S.C. § 1445; ACTIONS UNDER THE FAIR LABOR STANDARDS ACT *ARE* REMOVABLE.

Contrary to the view of the minority of courts that have addressed this issue, the language in a 1958 Senate report does not "clearly" show that actions under the FLSA are not removable to federal court. *See, e.g., Lemay v. Budget Rent a Car Systems, Inc.*, 993 F. Supp. 1448, 1450 (M.D. Fla. 1997) ("[T]he report clearly states if an FLSA action is filed in State court, 'the law prohibits removal to the Federal court.' "). To the contrary, and as shown below, the removal provisions of the statutes discussed in the Senate report "clearly" demonstrate Congress's intention to allow removal of FLSA actions.

Petitioner claims that Congress intended that actions under the FLSA not be removed to federal court. Petitioner relies in part on the following statement from a 1958 Senate report on a bill which, among other things, *expressly* prohibits the removal of state court civil actions arising under *state workers' compensation* laws:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws that are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the

> nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court. This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation act – that is, the workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court.

S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106.

The Senate report seems to suggest that the Jones Act, 46 U.S.C. § 688, the Railway Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (also known as the Federal Employers' Liability Act), and the FLSA have similar removal provisions and that the "proposed legislation" is just accomplishing the "same purpose" for state workers' compensation acts. Yet, contrary to the *suggestion* contained in the Senate report, when Congress enacted each of these laws, it specifically distinguished the statutory removal provisions of the Jones Act, Federal Employers' Liability Act, and state workers' compensation acts from the provisions contained in the FLSA.

In 28 U.S.C. § 1445, Congress *expressly* provided that civil actions under state workers' compensation acts and the Federal Employers' Liability Act are nonremovable actions. *See* 28 U.S.C. § 1445(c) (civil actions under state workers' compensation laws are nonremovable); *id.* § 1445(a) (civil actions against railroads under the Federal Employers' Liability Act are nonremovable). In the Jones

Act, Congress expressly incorporated by reference "the general provisions of the Federal Employers' Liability Act," including the provision in 28 U.S.C. § 1445(a) which "prohibits removal of cases brought in the state court." *Stokes v. Victory Carriers, Inc.*, 577 F. Supp. 9, 11 (E.D. Pa. 1983) (holding that suits brought pursuant to the Jones Act in state court are not removable to federal court) (citing *Pate v. Standard Dredging Corp.*, 183 F.2d 498, 500 (5th Cir. 1952)); *see also* Jones Act, 46 U.S.C. § 688(a) ("Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . ."); *McKee v. Merritt-Chapman & Scott Corp.*, 144 F. Supp. 423 (N.D. Ill. 1956) (granting motion to remand Jones Act case originally filed in state court). Thus, the removal of cases under the Jones Act, Federal Employers' Liability Act, and state workers' compensation acts is governed by the express and unequivocal language of 28 U.S.C. § 1445.

Conversely, 28 U.S.C. § 1445 is conspicuously silent as to the removability of FLSA actions; thus, removal of cases under the FLSA is **not** governed by 28 U.S.C. § 1445. Indeed, there is no provision in 28 U.S.C. § 1445, or anywhere else in the U.S. Code, expressly providing – as required by 28 U.S.C. § 1441(a) – that FLSA actions are nonremovable. To the contrary, unlike the other statutes, the FLSA provides that actions "may be maintained against any employer . . . in any Federal or State court"; thus, the plain language of the FLSA does not preclude removal. *See* 28 U.S.C. 216(b).

Petitioner's argument as to the significance of the Senate Report requires this Court to accept the assertions contained in the Report as straightforward matters of fact. However, a critical review of these assertions reveals that the import Petitioner places on the Report is misplaced. Certainly, the statutes enumerated in the Report all deal with workers' compensation of a sort, but they are neither like nor kind. "Workers' compensation" is a term of art used to describe a state scheme to provide medical benefits and some salary continuation for employees injured on the job and unable to work (like the Jones Act and the Federal Employers' Liability Act). *See, e.g.*, Fla. Stat. §§ 440 *et seq*. (2002), *id.* § 440.015 ("It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers' return to gainful reemployment. . . "). Conversely, the workers' compensation contemplated by the FLSA includes minimum wage requirements and overtime pay for those gainfully employed by an enterprise engaged in interstate commerce and prescribes, *inter alia*, child labor prohibitions and record-keeping requirements. 29 U.S.C. §§ 201 *et seq*. *Amici* respectfully urge this Court to resist the temptation to accept the Report as dogma – it is merely a report and not quite accurate.

Even if the Senate Report correctly portrayed the relative nature of the statutes discussed within, Petitioner also errs to the extent he argues that the mere language of a Congressional report, rather than the language of the U.S. Code, can determine whether an action is removable. *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, ___, 122 S. Ct. 1230, 1234 (2002) ("[R]eference to legislative history is inappropriate when the text of the statute is

unambiguous."). It is apparent from the language of 28 U.S.C. § 1445 that Congress knows exactly how to make an express provision against removal within the meaning of 28 U.S.C. § 1441(a). Three of the laws cited in the Senate Report have express statutory provisions governing removability, but the FLSA does not. *Inclusio unius, exclusio alterius* (*i.e.*, the inclusion of one thing indicates the exclusion of the other) is a basic principle of statutory construction. *See, e.g., O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 86-87 (1994). Because three statutes were included within 28 U.S.C. § 1445, and the statute at issue, the FLSA, was not, actions under the FLSA are removable to federal court.

III. THE COURT'S DECISION WILL AFFECT REMOVABILITY OF ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND FAMILY AND MEDICAL LEAVE ACT, WHICH ARE PATTERNED AFTER THE FAIR LABOR STANDARDS ACT.

The removability provisions in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.,* and the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, are patterned after the removability provisions in the FLSA. Thus, this Court's decision regarding the removability of FLSA cases will also affect ADEA and FMLA cases.

The ADEA expressly adopted the FLSA's provisions governing removability of state claims. *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 29 U.S.C. §§ 211(b), 216 (except for subsection (a) thereof), and 217 of this title. . . ."). Similarly the FMLA

contains language governing removability of state claims which mirrors the FLSA. *See* 29 U.S.C. § 2617(a)(2) ("An 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 by any one or more employees. . . . ").

Like the federal court split over the meaning of the "may be maintained" language in the FLSA, *see Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1309 (11th Cir. 2002), federal courts are also split over the meaning of the same language in the ADEA and FMLA. For example, in *Baldwin v. Sears, Roebuck and Company*, 667 F.2d 458 (5th Cir. 1982), *Kovalic v. DEC International, Inc.*, 855 F.2d 471 (7th Cir. 1988), *Ching v. Mitre Corporation*, 921 F.2d 11 (1st Cir. 1990), and *Winebarger v. Logan Aluminum, Inc.*, 839 F. Supp. 17 (W.D. Ky. 1993), the courts held that ADEA claims could be removed to federal court. However, in *Lemay v. Budget Rent a Car Systems, Inc.*, 993 F. Supp. 1448 (M.D. Fla. 1997), the court remanded an ADEA claim to state court, holding that the "may be maintained" language requires remand of FLSA and ADEA cases. *See id.* at 1449-51 (following *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947), and its progeny).

Similarly, in *Ayotte v. Home Depot U.S.A., Inc.*, 2002 WL 524269 (N.D. Tex. January 8, 2002), *Ladner v. Alexander & Alexander, Inc.*, 879 F. Supp. 598, 599 (W.D. La. 1995), and *Henriquez v. Royal Sonesta, Inc.*, 1996 WL 169237 (E.D. La. April 6, 1996), the district courts allowed removal of FMLA claims. However, in *Lloyd v. Classic Chevrolet, Inc.*, 2002 WL 989470 (N.D. Tex. January 31, 2002), the court remanded an FMLA claim to state court, following the line of cases holding that the similar "may be

maintained" language in the FLSA requires remand. *See id.* at *1 (citing *Johnson* and its progeny).

Accordingly, this Court's decision regarding the removability of FLSA cases will also affect the removability of ADEA and FMLA cases. *Amici,* as representatives of labor-intensive businesses operating multi-state, and of the human resources aspects of businesses operating in many states, urge this Court to hold that FLSA cases, and consequently ADEA and FMLA cases, are removable to federal court.

IV. AS POLICY CONSIDERATIONS IMPACT BOTH PLAINTIFFS AND DEFENDANTS IN FLSA, FMLA, AND ADEA ACTIONS, THIS COURT SHOULD DEFER TO THE POLICY DECISION CONGRESS MADE WHEN IT DID NOT CREATE AN EXPRESS STATUTORY PROVISION BARRING REMOVAL OF FLSA CASES.

The policy considerations underlying the Court's decision will impact both plaintiffs and defendants in FLSA, FMLA, and ADEA actions. Accordingly, this Court should defer to Congress's policy decisions that created express statutory provisions governing removal of a host of other laws, but not the FLSA. As the *Valdivieso* court noted, Congress is best suited to resolve policy considerations. *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371, 1374 (S.D. Fla. 2001).

The cases supporting Petitioner's position identify policy concerns that, these cases argue, might lead this Court to hold that FLSA actions are nonremovable. For example, in *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647 (N.D. Tex. 1964), the court pointed to the

1958 Senate Report's concern that the costs of travel are less in state court than federal court. *Id.* at 648 ("Where the employee commences such a suit in a state court far removed from the nearest federal court the cost of travel and subsistence of the claimant, his witnesses and attorneys, would amount to a denial of the very cause of action conferred by Congress in [29 U.S.C.] § 216(b)."); *see also* S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106 ("Very often cases removed to the federal courts require the workman to travel long distances and to bring his witnesses at great expense."). *Amici* submit that these concerns were stated almost fifty years ago, when there were fewer United States District Courts and transportation and communication were more difficult and expensive than they are today. Today, the main cost of an FLSA action is attorney's fees, which are a much greater burden on defendant employers than on plaintiffs, who are often represented by attorneys on a contingency fee basis. Moreover, the FLSA has a one-way fee-shifting provision: a winning plaintiff may obtain attorney's fees from the defendant, but a winning defendant may not obtain attorney's fees from the plaintiff. *See* 29 U.S.C. § 216(b).

In *Lemay*, another case supporting Petitioner's position, the court stated that one reason for holding that FLSA actions are nonremovable is that "this Court's case load is one of the country's highest in both civil and criminal cases," whereas "state court judges assigned to the civil division hear only civil cases and can proceed with a claim more rapidly." 993 F. Supp. at 1451. *Amici* observe that the relative congestion of the federal and state court dockets in the Middle District of Florida may not be the same in other areas of this country. Moreover, the court's anecdotal observation does not serve to override the

statutory language and policy concerns permitting removal of FLSA actions.

Contrary to Petitioner's claim, many public policy reasons support removal of FLSA actions. First, the FLSA has detailed regulations and interpretations: over six hundred pages of the Code of Federal Regulations are devoted to interpreting the FLSA, *see* Regulations Relating to Labor, 29 C.F.R. Parts 500-899 (2001), and hundreds, if not thousands, of federal cases interpret the FLSA. Second, if states are allowed to add their own interpretations of the FLSA into the mix, it will be almost impossible for multi-state employers to keep track of the differing laws governing employees in each state. This will prove particularly costly to employers: the one-way attorney's fee-shifting provision of the FLSA makes any error in FLSA interpretation costly. Finally, certain benefits of federal court jurisprudence, such as consistency and uniformity, will be undermined by the lack of removability. The need for federal court control over FLSA actions is especially important in light of the unique "opt-in" procedure found in collective FLSA actions. *See* 29 U.S.C. § 216(b). Consequently, the threat of lack of consistency and uniformity between the courts is particularly troublesome to *Amicus* HRPBC, whose members are expected to provide human resources support to businesses operating both within Florida and outside of Florida, and to *Amicus* Council, whose members are concerned with labor intensive operations in all fifty states.

Congress has resolved the policy considerations by creating express statutory provisions governing removal of a host of other laws but not creating an express statutory provision barring removal of FLSA claims. *See* discussion *supra*; *see also* 28 U.S.C. § 1445(b) (providing that claims

under 49 U.S.C. § 11706 or 14706 may only be removed if the amount in controversy exceeds $10,000); 28 U.S.C. § 1445(d) (prohibiting removal of cases brought under the Violence Against Women Act of 1994); 15 U.S.C. § 77v(a) (providing that cases under the Securities Act of 1933 may only be removed in certain circumstances); 15 U.S.C. § 1719 (providing that cases under the Interstate Land Sales Full Disclosure Act shall not be removed unless the United States or an officer or employee of the United States in his official capacity is a party). Accordingly, because Congress has not expressly barred the removal of FLSA actions despite numerous opportunities to do so since the FLSA was enacted in 1938, Congress has made the decision that FLSA actions, and thus ADEA and FMLA actions, are removable.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

CHRISTINE D. HANLEY
Counsel of Record
SALLY STILL
BETTY L. DUNKUM
CHRISTINE D. HANLEY &
ASSOCIATES, P.A.
1000 Southern Boulevard,
2nd Floor
West Palm Beach, Florida 33405
(561) 659-5646

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