Case No. 02-337

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD, INC.,

Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the
Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

STATEMENT OF THE CASE III

SUMMARY OF THE ARGUMENT IV

ARGUMENT 1

I. CONGRESS HAS NOT EXPRESSLY PROHIBITED REMOVAL OF FLSA CLAIMS. 1

II. CONCLUSION 7

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

CASES

Baldwin v. Sears Roebuck & Co., 667 F.2d 458.....1, 5
Bingham v. Newport News Shipbuilding and Drydock Co., 3 F.Supp.2d 691 (E.D. Va. 1998).....6
Breuer v. Jim's Concrete of Brevard, Inc., 292 F.3d 1308 (11th Cir. 2002).....iv
Brown v. Sasser, 128 F.Supp.2d 1345 (M.D. Ala. 2000).....6, 7
Chapman v. 8th Judicial Juvenile Prob. Bd., 22 F.Supp.2d 583.....7
Cosme Nieves v. Deshler, 786 F.2d 445 (1st Cir. 1986).....5
Emrich v. Touche Ross &Co., 846 F. 2d 1190 (9th Cir. 1988).....5
George Moore Ice Cream Co. v. Rose 289 U.S. 373, 53 S.Ct. 620, 77 L.Ed. 1265 (1933).....3
Johnson v. Butler Bros., 162 F. 2d 87 (8th Cir. 1947).....4, 5
Pauly v. Eagle Point Software Co., 958 F.Supp. 437 (N.D. Iowa 1997).....5
Ramos v. H. E. Butt Grocery Co., 632 F. Supp. 342 (E. D. Pa. 1986).....7
Roseman v. Best Buy Co., Inc. 140 F.Supp. 2d 1332 (S.D. Ga. 2001).....3, 6
Shaw v. CF Data Corp., 2001 WL 1326528 (N.D. Tex. Oct. 15, 2001).....7
Sygenta Crop Protection, Inc. v. Henson, 2002 WL 31453983 (Nov. 5, 2002).....1
Taylor v. Brown, 461 F. Supp. 559 (E. D. Tenn. 1978).....7
United States v. Lane Motor Co., 344 U.S. 630, 73 S.Ct. 459, 97 L.Ed. 622 (1953).....7
Valdivieso v. Atlas Air, Inc., 128 F.Supp.2d 1371 (S.D. Fla. 2001).....4, 6
Waldermeyer v. ITT Consumer Fin. Corp., 767 F. Supp. 989 (E. D. Mo. 1991).....7

OTHER AUTHORITY

Ballantine's Law Dictionary 441 (3d ed. 1969).....1, 3
Black's Law Dictionary 601 (7th ed. 1999).....1, 3
Funk & Wagnalls New Comprehensive International Dictionary of the English Language 448 (Encyclopedic Ed. 1978).....2, 3
Fair Labor Standards Act 29 U.S.C. §201.....iv
Federal Employers' Liability Act.....2
Merriam-Webster's Collegiate Dictionary 410 (10th ed. 1993).....2, 3
Interstate Land Sales Full Disclosure Act.....2
Webster's New World Dictionary 494-5 (2d college ed. 1982).....2, 4

RULES

U.S. Supreme Court Rule 16.1.....v
15 U.S.C. §77.....2
15 U.S.C. §1719.....2
28 U.S.C. §1292.....iv
28 U.S.C. §§1441.....iv, 1, 5, 6
28 U.S.C. §1445.....2, 6
28 U.S.C. §1448.....2
29 U.S.C. §216.....v, 3, 6
29 U.S.C. §621.....5

STATEMENT OF THE CASE

This case arises out of an order from the United States District Court, Middle District of Florida, denying Petitioner Phillip T. Breuer's ("Petitioner's") motion for remand.[1] On or about June 21, 2001, Petitioner filed suit against Jim's Concrete of Brevard, Inc. ("Respondent") in state court in Duval County, Florida seeking unpaid wages, liquidated damages, and attorney's fees for alleged violations of the Fair Labor Standards Act 29 U.S.C. §201, *et seq.* ("FLSA"). Respondent timely removed the case to the United States District Court, Middle District of Florida pursuant to 28 U.S.C. §§1441 and 1446. Petitioner subsequently filed a Motion for Remand, arguing that FLSA lawsuits may not be removed to federal court. Petitioner filed a Motion for Certification Pursuant to 28 U.S.C. §1292(b) to take an interlocutory appeal contemporaneously with the Motion for Remand. On December 7, 2001, the district court sided with the majority of courts to address the issue in recent years, and entered an order holding that FLSA actions may be removed to federal court.

That same day, the district court entered a separate order granting Petitioner's Motion for Certification. Petitioner then filed a petition requesting that the Eleventh Circuit Court of Appeals permit him to take an immediate appeal of the district court's order denying his Motion for Remand. On or about January 15, 2002, the Eleventh Circuit entered an Order granting the petition. On June 5, 2002, after briefing and oral argument, the Eleventh Circuit, just like the district court, sided with the majority, and held that FLSA actions may be removed. As a result, the Eleventh Circuit issued an opinion affirming the District Court's order denying Petitioner's Motion for Remand. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

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[1] Appendix "C" to the Petition for Writ of Certiorari purports to contain a complete copy of the District Court's order denying the Petitioner's Motion for Remand, but does not. That order is attached hereto at Appendix A.

SUMMARY OF THE ARGUMENT

Jim's Concrete of Brevard, Inc. ("Respondent") takes no issue with Petitioner's statement of the question presented. The resolution of this case does indeed turn on the interpretation of statutory language contained in 28 U.S.C. §1441(a) and 29 U.S.C. §216(b), respectively. Specifically, the issue is whether the phrase "[a]n action . . . may be maintained . . . in any Federal or State court of competent jurisdiction" as used in FLSA, constitutes an express Act of Congress prohibiting the removal of FLSA claims.

Respondent submits that the Eleventh Circuit Court of Appeals was correct in joining a growing majority of courts deciding that Congress' use of the phrase "may be maintained" does not constitute an express prohibition against removal of FLSA claims. As a result, Respondent submits that this case was both properly removed and properly resolved by the court below. Since the opinion below is consistent with the reasoning of the growing number of courts allowing removal of FLSA claims, this case is not one that requires this Court's intervention. As a result, Respondent requests that the Court deny the Petition for Writ of Certiorari. Alternatively, Respondent requests that the Court grant the Petition, and enter an Order summarily affirming the Eleventh Circuit in accordance with Rule 16.1, Supreme Court Rules.

ARGUMENT

I. Congress Has Not Expressly Prohibited Removal of FLSA Claims.

Many of the cases that come before this Court involve both complicated facts and issues. This case is different. It has neither complicated facts, nor complicated issues. While acknowledging an apparent split in authority among opposing circuit courts, this case was easily resolved by the court below through the interpretation of straightforward statutory language.

The sole issue in this case is whether Congress has included an express prohibition against removal in the FLSA. Any analysis of this issue must start with the plain language of the relevant statutes. *See e.g., Sygenta Crop Protection, Inc. v. Henson*, 2002 WL 31453983 (Nov. 5, 2002)(right of removal is a creature of statute and statutory procedures are to be strictly construed). Here, there are two relevant statutes.

The first is 28 U.S.C. §1441, captioned "Actions removable generally." Under the general removal statute, civil actions brought in state court over which the federal courts have original jurisdiction may be removed to federal court "***[e]xcept as otherwise expressly provided by Act of Congress."*** 28 U.S.C. §1441(a)(emphasis supplied). This statute makes it unequivocally clear that absent an express declaration by Congress to the contrary, civil actions in which there is concurrent original jurisdiction in both federal and state courts are removable. *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982).

There simply is no ***express*** prohibition against removal in the FLSA, the second of the two statues relevant to this case. Lexicographers have defined the term "express" to exclude ambiguity. Black's Law Dictionary defines express as "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary* 601 (7th ed. 1999); *see also Ballantine's Law Dictionary* 441 (3d ed. 1969)("[s]tated, explicit, clear; declared; not left to implication); *Merriam-Webster's Collegiate Dictionary* 410 (10th ed. 1993)("directly, firmly, and explicitly

stated"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* 448 (Encyclopedic Ed. 1978) ("[s]et forth distinctly; explicit; plain; direct"); *Webster's New World Dictionary* 494-5 (2d college ed. 1982)("specific").

In other statutes, Congress has unambiguously prohibited the removal of claims to federal court. For instance, 28 U.S.C. §1445 is captioned "Nonremovable Actions," and *expressly prohibits* removal of claims brought under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* 28 U.S.C. §1445(a)(prohibiting removal of cases brought under the Federal Employers' Liability Act); *see also* 28 U.S.C. §1445(c) (providing that a civil action arising under state workers' compensation laws may not be removed); 28 U.S.C. §1445(d) (prohibiting removal of cases brought under the Violence Against Women Act of 1994). Similarly, Congress has, in some cases, imposed limits on the right to removal rather than barring the right altogether. *See* 15 U.S.C. §77v(a) (providing that cases under the Securities Act of 1933 may only be removed under certain circumstances); 28 U.S.C. §1445(b) (providing that claims brought pursuant to 49 U.S.C. §11706 or 14706 may only be removed if the amount in controversy exceeds $10,000); 15 U.S.C. §1719 (providing that cases brought under the Interstate Land Sales Full Disclosure Act shall not be removed to federal court unless the United States or an officer or employee of the United States in his official capacity are a party). In short, when Congress has intended to preclude or limit the right to removal, it has done so in no uncertain terms.

In stark contrast, actions brought under the FLSA are not listed among those that are designated "nonremoveable" by 28 U.S.C. §1448. Nor is there any express prohibition against removal in the statute itself; indeed, the FLSA does not even mention the term removal. Instead, the statute provides that an action brought under the FLSA "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. §216(b).

Some, including the Petitioner, have seized upon this language for the proposition that removal of FLSA claims is somehow improper, going so far as to cite this Court's decision in *George Moore Ice Cream Co. v. Rose* 289 U.S. 373, 377, 53 S.Ct. 620, 77 L.Ed. 1265 (1933) to support their argument. The *George Moore* Court, however, dealt with the word "maintain" in an entirely different context. In particular, the Court held that a statute authorizing a taxpayer to "maintain" a suit to recover tax, irrespective of protest, removed the requirement of protests in tax recovery actions brought after the enactment of the statute. *Id.* In *George Moore*, the Court merely found that maintain "means *no less* than to prosecute with effect." *Id.* (emphasis supplied). Importantly, the *George Moore* Court neither held nor implied that the word maintain cannot have meanings other than the one set out in the opinion. *Roseman v. Best Buy Co., Inc.* 140 F.Supp. 2d 1332, 1338 n.10 (S.D. Ga. 2001).

To be sure, "maintain" has meanings other than the one identified by the *George Moore* Court. In fact, Black's Law Dictionary contains six different definitions of the word. Among those definitions are "to continue (something)" and "to assert (a position or opinion)." *Black's Law Dictionary* 601 (7th ed. 1999). Ballentine's Law Dictionary defines "maintain" to mean "[t]o support; to keep in condition; to sustain," but defines a "maintainable action" as "an action capable of being maintained; capable of being sustained or entertained by a court." *Ballantine's Law Dictionary* 764 (3d ed. 1969); *see also, Merriam-Webster's Collegiate Dictionary* 702 (10th ed. 1993) (defining maintain to mean both "to continue or persevere in" and "to affirm in or as if in argument: assert"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* 768 (Encyclopedic Ed. 1978) (defining maintain to mean "to carry on or continue" and "to assert or state; affirm"); *Webster's New World Dictionary* 854 (2d college ed.

1982)(defining maintain to mean both "to keep or keep up; continue in or with; carry on" and "to uphold or defend as by argument; affirm").

Clearly, the word maintain has various meanings, not just the one asserted by the Petitioner in this case. Given that the word is reasonably susceptible to more than one competing meaning, the phrase "may be maintained" simply cannot be considered an explicit statutory directive by Congress prohibiting the removal of FLSA claims. *Valdivieso v. Atlas Air, Inc.*, 128 F.Supp.2d 1371, 1373 (S.D. Fla. 2001)("I simply do not believe that Congress is unable to be more express than the word "maintained" . . .")

Nevertheless, some courts have opined that FLSA actions commenced in state court must remain there. This line of cases has its genesis in a fifty-five year-old decision from the Eighth Circuit Court of Appeals. *Johnson v. Butler Bros.*, 162 F. 2d 87, 89 (8th Cir. 1947). Even the *Johnson* court recognized, however, that the FLSA does not contain an explicit Congressional directive prohibiting removal:

> This question as to the intent of Congress has given the federal courts much difficulty. . . . For this unfortunate situation the courts are not to blame. It is attributable to the *failure of congress to clearly and accurately express its intent*. . . . There can be no just criticism of those courts which have concluded that the language used by Congress was inadequate to disclose a clear intent that actions brought in state court under the [FLSA] should not be removable.

Id. at 89 (emphasis supplied). Not only did the *Johnson* court fail to find an express prohibition against removal, it agonized over the meaning and intent of the word maintained, and went so far as to criticize Congress for failing to be more clear in expressing its intent.

In reality, it is a misnomer to label the *Johnson* opinion as one that "conflicts" with the opinion below. The *Johnson* case was decided in 1947, one year before Congress amended 28 U.S.C. §1441 to require that any prohibition against removal be by an express Act of Congress. Therefore, the *Johnson* court never addressed the statutory language at issue here. And, although *Johnson* has never been overruled, its continuing viability has been called into question, even within the Eighth Circuit. As one district court within the Eighth Circuit recently put it, "since the decision in *Johnson*, the majority of district courts, and the only circuit courts which have addressed the issue, have concluded that *Johnson* is no longer good authority in light of the 1948 amendment to §1441(a)." *Pauly v. Eagle Point Software Co.*, 958 F.Supp. 437, 439 (N.D. Iowa 1997).

Before the decision below, only one other federal appellate court directly addressed the issue of removability of FLSA claims in light of the 1948 amendment to §1441. *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986).[2] Not surprisingly, the court held that the "may be maintained" language in the FLSA does not constitute an express provision barring the right of removal. In *Cosme Nieves*, the First Circuit specifically addressed statements included in a Senate committee report to a bill making state workers' compensation cases non-removable. *S.Rep. No.* 85-1830, at 8 (1958). This report is often relied upon by those who oppose permitting removal of FLSA, who argue that the report manifests congressional intent to bar removal of FLSA actions. *Cosme Nieves*, 786 F.2d at 451 n.18. The committee report states that "Congress

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[2] The Fifth Circuit suggested in dicta that FLSA actions are subject to removal in *Baldwin v. Sears Roebuck & Co.*, 667 F.2d at 460-61 (holding that Age Discrimination in Employment Act Claims, 29 U.S.C. §621, *et seq.* are removable) In *Emrich v. Touche Ross &Co.*, 846 F. 2d 1190, 1996 (9th Cir. 1988) the Ninth Circuit cited the FLSA as example of federal statute which contain[s] no limitation on removal, express or otherwise, to bar removal as required under section 1441(a). This language is not, however, central to the holding in the case.

itself has recognized the inadvisability of permitting removal of cases" arising under such laws as the FLSA. *Id.*

The *Cosme Nieves* court observed, however, that the committee report in question involved 28 U.S.C. §1445, making state workers' compensation claims nonremovable, and neither 28 U.S.C. §1441 nor 29 U.S.C. §216(b) was cited in relation to the statement. *Id.*[3] Given the clear language barring removal in other federal statutes, the stray remark in a committee report unrelated to the FLSA does not rise to the level of an express provision by Act of Congress. *Id. See also, Geier v. American Honda Motor Co.,* 529 U.S. 861, 895, 120 S.Ct. 1913, 1933, 123 L.Ed.2d 387 (1993)(best evidence of a statute's meaning is the text itself); *Roseman v. Best Buy Co., Inc.,* 140 F.Supp.2d at 1337 ("the fact that parties are relegated to finding obscure legislative history in support of their assertion that Congress has expressly provided that FLSA claims are not removable merely underscores the reality that the statute is not express on its face.").

By its plain language, 28 U.S.C. §1441(a) provides that nothing short of an express statutory provision precludes removal. The FLSA, however, contains no such express prohibition, and the court below joined "the overwhelming majority of jurisdictions considering the issue in recent years" permitting defendants to remove FLSA cases commenced in state court. *Bingham v. Newport News Shipbuilding and Drydock Co.,* 3 F.Supp.2d 691, 692 (E.D. Va. 1998). *See, also, Roseman v. Best Buy Co., Inc.,* 140 F.Supp.2d 1332, 1334 (S.D. Ga. 2001)(use of term "maintained" is not express directive of non-removability); *Valdivieso v. Atlas Air, Inc.,* 128 F.Supp.2d at 1373 (words "may be maintained" are not an express exemption from the

[3] Nor, for that matter, does the Senate Committee Report constitute an "Act of Congress" as is required by the plain language of 28 U.S.C. §1441. *Brown v. Sasser,* 128 F.Supp.2d 1345, 1347 (M.D. Ala. 2000).

general scope of the removal statute); *Brown v. Sasser,* 128 F.Supp.2d at 1347 (there is no "Act of Congress" barring removal of FLSA claim); *Shaw v. CF Data Corp.*, 2001 WL 1326528 (N.D. Tex. Oct. 15, 2001)("majority of courts to consider question have permitted removal" . . . "[t]his court will follow majority and permit removal."); *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F.Supp.2d 583, 585 (use of phrase "may be maintained" does not constitute an express statement of nonremovability, and is at best, ambiguous); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989, 991 (E. D. Mo. 1991) (denying motion to remand on grounds that Congress had not expressly provided that FLSA actions could not be removed from state to federal courts); *Ramos v. H. E. Butt Grocery Co.*, 632 F. Supp. 342, 343 (E. D. Pa. 1986)(denying motion to remand on grounds that unlike other federal statutes, FLSA did not include express prohibition on removal); *Taylor v. Brown*, 461 F. Supp. 559, 560 (E. D. Tenn. 1978)(holding that FLSA action could be removed to federal court).

In short, this case was properly resolved by the court below in accordance with a growing trend through simple statutory interpretation. It is not a case that requires this Court's intervention, and as a result, the Petition for Writ of Certiorari should be denied. Alternatively, if the Court is inclined to grant the Petition, it should summarily dispose of the case by affirming the decision below. *See e.g., United States v. Lane Motor Co.*, 344 U.S. 630, 73 S.Ct. 459, 97 L.Ed. 622 (1953) (granting petition and summarily disposing of case to resolve conflict where the judgment below is obviously correct and the conflicting decision is so clearly wrong).

II. Conclusion

For the foregoing reasons, Respondent respectfully submits that the Eleventh Circuit Court of Appeals correctly affirmed the district court's order denying Petitioner's Motion for Remand. As a result, Respondent requests that this Court deny the Petition for Writ of

Certiorari. Alternatively, Respondent requests that the Court summarily dispose of the Petition for Writ of Certiorari by affirming the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Donald E. Pinaud, Jr., 4069 Atlantic Blvd. Jacksonville, Florida 32207 by U.S. Mail this ____ day of November, 2002.

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