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

BRIEF ON THE MERITS FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether an action commenced in state court under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (the "FLSA"), can be removed by the defendant to a federal district court, even though the FLSA expressly provides that the case can be "maintained" in state court?

Whether the Eleventh Circuit's interpretation of the word "maintained" as used in the jurisdictional provisions of the FLSA conflicts with this Court's pronounced definition of the word "maintain" to be used when construing federal statutes?

Whether the conflict, disparity and deadlock of opinions between the Eleventh and First Circuits and the Eighth Circuit, and between dozens of district courts around the country, regarding whether FLSA actions commenced in state court are removable to federal court, warrants that this Court, as suggested by the Eleventh Circuit in its opinion below, grant this petition to resolve the question once and for all in order to bring uniformity to the federal courts, and eliminate widespread disparity between litigants in our federal system?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this proceeding are as captioned and there are no other parties.

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2. Judgment of the United States Court of Appeals for the Eleventh Circuit, *Phillip T. Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, entered on July 5, 2002 (Pet. App. 7a)

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Eleventh Circuit filed its opinion below on June 5, 2002. No motion for rehearing or rehearing *en banc* was sought and, accordingly, the Eleventh Circuit entered its judgment as mandate on July 5, 2002. A petition for writ of certiorari was timely filed with the Court on September 3, 2002. This Court granted cetiorari on January 10, 2003.

STATUTORY PROVISIONS INVOLVED

The relevant substantive statutes involved in this case are as follows:

Section 16(b) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 216(b), provides in pertinent part:

> Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages. . . . An 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.

As originally enacted in 1938 and before subsequent amendments, section 16(b) provided:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

Section 16(c) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 216(c), provides in pertinent part:

> The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under

> this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this section owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary.

Section 1441 of 28 U.S.C., commonly referred to as the removal statute, provides in pertinent part:

> 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 defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

STATEMENT OF THE CASE

Petitioner Phillip Breuer commenced this action on June 21, 2001, in the Circuit Court in and for the Fourth Judicial Circuit, in and for Duval County, Florida. Breuer is a former employee of Respondent Jim's Concrete of Brevard, Inc. Breuer brought suit under the Fair Labor Standards Act seeking back wages, liquidated damages, prejudgment interest and attorneys' fees. Petitioner alleged that Jim's Concrete had violated the FLSA by failing for several years to pay him overtime compensation for hours he had worked in excess of forty hours per week.

On July 2, 2001, eleven days after this action was commenced in state court, Jim's Concrete filed a notice of removal to federal court. In late July, 2001, Breuer filed a timely motion to remand the case to state court. On December 7, 2001, the district court denied the motion to remand, concluding that removal of private enforcement actions is permitted under the FLSA. The district court, however, granted a motion by Breuer for certification to petition the circuit court to take an interlocutory appeal of the order denying remand pursuant to 28 U.S.C. § 1292(b).

On January 15, 2002, the Eleventh Circuit granted Breuer's petition for an interlocutory appeal. On June 5, 2002, the Eleventh Circuit Court of Appeals affirmed the decision of the district court.

Breuer filed a timely petition for writ of certiorari on September 3, 2002. This Court granted the petition on January 10, 2003.

SUMMARY OF THE ARGUMENT

I. This case is governed by the longstanding principle that the removal jurisdiction of the federal courts is to be narrowly construed. *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). That rule of construction, grounded in the "[d]ue regard for the rightful independence of state governments," serves important interests of federalism.

II. Section 16(b) of the Fair Labor Standards Act provides that a private action to recover liability under the Act "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The phrase "may be maintained" should fairly be understood to mean that an employee who has brought an FLSA action in state court may in that court continue that action until final judgment. Since this is the interpretation of section 16(b) which narrows the removal jurisdiction of the federal courts, it is the interpretation mandated by the rule of construction in *Shamrock Oil*.

This is, moreover, decidedly the most plausible interpretation of the term "maintain" in the FLSA. Prior to the enactment of the FLSA, this Court had held that the meaning of "maintain" an action is different and broader than "bring" an action. "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *Smallwood v. Gallardo,* 275 U.S. 56, 61 (1927). Removal assures the virtually immediate termination of an action in state court, and is thus inconsistent with this traditional meaning of maintain. It makes no sense to say of the instant case that petitioner was allowed to "maintain" this action in state court; the state court proceedings came to an abrupt end only eleven days after the complaint was filed.

The term maintain appeared in two different portions of

the original text of section 16(b). As enacted in 1938, section 16(b) also provided that an employee could "designate an agent or representative to maintain" an FLSA action on his or her behalf. Manifestly in this clause the word "maintain" means litigate to judgment. The same word presumptively had the same meaning in the earlier part of the same provision authorizing employees themselves to maintain an action in state court.

In 1947 the Administrator of the Wage and Hour Division concluded that the term "maintain" in section 16(b) precluded removal of such actions. This contemporaneous administrative interpretation of the FLSA is entitled to substantial weight.

The Administrator's interpretation of section 16(b) was grounded in part on his conclusion that permitting removal "would ordinarily greatly increase the employee's burden in bringing suit." As the Administrator correctly observed at the time, most claims under the FLSA were then quite small. In the years following adoption of the FLSA, most wage claims were under $250, and there were reported cases involving claims as small as $11.75. For such claimants the physical proximity of state courts, and the possibility of comparatively informal state forums such as small claims courts, were of great importance. Removal would often have required employees with quite modest claims to travel (with their attorneys and witnesses) considerable distances to federal court, and to litigate in a more formal and time-consuming manner.

III. In the 1948 revision of Title 28 Congress adopted section 1441(a), which provides that any state court action over which the federal courts would have had jurisdiction could be removed "[e]xcept as otherwise expressly provided by Act of Congress." The interpretation of the "otherwise-

provided" clause of section 1441(a) is also governed by the rule of construction in *Shamrock Oil.*

The court of appeals below assumed that the otherwise-provided clause required that any asserted removal-limitation statute must be framed in "unequivocal language." (Pet. App. 5a). But that is the interpretation of section 1441(a) which minimizes the number of statutes which could satisfy the otherwise-provided clause, and thus maximizes the removal jurisdiction of the federal courts. That is precisely the opposite of what is required by the federalism principles of *Shamrock Oil.*

Section 1441(a) should be construed to require only that any removal limitation in an Act of Congress be found in the text of the Act itself. That requirement is readily satisfied by section 16(b), since that limitation is grounded in the very language of section 16(b). Indeed, it was the Administrator's position even prior to the 1948 revision that "[t]he Congressional purpose to prevent removal of actions is evidenced by the express language of Section 16(b)." (Emphasis added).

Because the pre-1948 language of section 16(b) was sufficient to preclude removal, the issue raised by section 1441(a) is whether Congress in 1948 intended by adopting the otherwise-provided clause to broaden the removal jurisdiction of the federal courts. But, as this Court observed in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 9-10 (1951), an "important purpose [of the 1948 revision] was to limit removal from state courts." The detailed Reviser's Notes accompanying the 1948 revision detail each of the new limitations on removal, but make no mention of any expansion of removal to be brought about by the otherwise-provided clause.

ARGUMENT

I. STATUTES AFFECTING THE REMOVAL JURISDICTION OF THE FEDERAL COURTS SHOULD BE NARROWLY CONSTRUED

This case is governed by the longstanding principle that the removal jurisdiction of the federal courts is to be narrowly construed. That well-established rule of construction, which serves important principles of federalism, was articulated with particular force in *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941):

> [T]he policy of the successive acts of Congress . . .is one calling for the strict construction of [removal] legislation. The power reserved to the states under the constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 202 U.S. 263, 270 [(1934)].

In *Syngenta Crop Protection, Inc. v. Henson*, 123 S.Ct. 366, 369-70 (2002), this Court relied on that rule that removal statutes "are to be strictly construed" in concluding that the All Writs Act cannot be used to remove actions from state courts. *See Holmes Group v. Vornado Air Circulation*, 122 S.Ct. 1889, 1894 (2002)(rejecting interpretation of 28 U.S.C. § 1331

because it would "expand the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments' that our cases addressing removal require. *See Shamrock Oil & Gas Corp. v. Sheets."); Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999)(Rehnquist, C.J., dissenting)(noting "this Court's practice of strictly construing removal . . . statutes.") This enduring principle of statutory construction has been repeatedly endorsed by ten circuits[1], and has been applied by the lower courts in literally hundreds of cases[2]. Over the course of the last century most disputes reaching this Court regarding the scope of removal jurisdiction have been resolved against removal. *People of State of Illinois v. Kerr-McGee Chem. Corp.*, 677 F. 2d 571, 576 n. 8 (7th Cir. 1982).

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Nichols v. Harbor Venture, Inc., 284 F. 3d 857, 861 (8th Cir. 2002); *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F. 3d 720, 723 (5th Cir. 2002); *Whitaker v. American Telecasting, Inc.*, 261 F. 3d 196, 201 (2d Cir. 2001); *Long v. Bando Mfg. of America, Inc.*, 201 F. 3d 754, 757 (6th Cir. 2000); *Danca v. Private Health Care Systems, Inc.*, 185 F. 3d 1, 4 (1st Cir. 1999); *University of South Alabama v. American Tobacco Co.*, 168 F. 3d 405, 411 (11th Cir. 1999); *Prize Frize, Inc. v. Matrix*, 167 F. 3d 1261, 1265 (9th Cir. 1999); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F. 3d 214, 217 (3d Cir. 1999); *Doe v. Allied-Signal, Inc.*, 985 F. 2d 908, 911 (7th Cir. 1993); *Fajen v. Foundation Reserve Ins. Co., Inc.*, 683 F. 2d 331, 333 (10th Cir. 1982).

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Many of these lower court cases are set out under key number 2 in the "Removal" portion of the various editions of the Federal Practice Digest. They can be accessed at www.westlaw.com in the following manner. Select federal cases after 1944, and click on the "custom digest" key. Insert the key number 334K2 in the appropriate box, then again select federal jurisdiction.

The rule requiring strict construction of removal statutes has several sources. It is, of course, a necessary consequence of the more general principle requiring a narrow construction of any statute conferring jurisdiction on the federal courts. *Kokkonen v. Guardian Life Insurance Company of America,* 511 U.S. 375, 377 (1994) Congress, moreover, can ordinarily be presumed to have confidence in the ability and willingness of state courts to interpret and apply federal law in an impartial and competent manner, a conviction which would make removal unnecessary. That presumption can, of course, be overcome by explicit statutory language, but ambiguous terminology is simply insufficient to demonstrate a congressional decision to authorize removal of actions properly filed in state courts. In a few areas, such as civil rights, Congress has historically had concerns about the fairness of state courts. *Monroe v. Pape*, 365 U.S. 167 (1961). But no such special concerns are at issue in the instant case, since Congress especially and very deliberately authorized employees to bring FLSA actions in state courts, and section 1441(a) applies to all removal regardless of subject matter.

The abrupt removal from a state court of an action properly filed there works a serious intrusion on the prerogatives of the states and their judicial systems. This Court's habeas corpus decisions have long been animated by a concern to respect the ability of state judges to manage litigation in their courts. That solicitude is equally warranted where a party seeks, not merely to set aside a state court disposition, but to strip the state courts of the authority to decide a dispute at all. This case, too, is "a case about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

These considerations apply with particular force where removal will deny state courts the opportunity to decide state law claims. Actions over which federal courts would have

federal question jurisdiction often include supplemental state law claims. 28 U.S.C. § 1367. Many of the FLSA cases which defendants have sought to remove to federal court have involved one or more state law claims[3].

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Hesni v. Williams & Bochea, L.L.C., 2002 WL 373237 *1 (E.D.La.)(La. Rev. Stat. 23:631); *Ehle v. Williams & Boshea, L.L.C.*, 2002 WL 373271 *1 (E.D.La.)(La. Rev. Stat. 23:631); *Castillo v. Texas Can!*, 2002 WL 1733727 *1 (N.D.Tex.)(claims under Texas minimum wage and civil rights laws and under Texas state constitution); *Mincy v. Staff Leasing,L.P.*, 100 F.Supp. 1050, 1050 (D.Ariz. 2000)(violation of Ariz. Rev. Stat. § 23-353 and "other state law cause of action *quantum meruit*, breach of express and implied contract, and breach of the covenant of good faith and fair dealing"); *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1345 (M.D.Ala. 2000)("multiple state-law claims and one federal claim under the Fair labor Standards Act"); *Lopez v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 865, 865-66 (S.D.Tex. 2000)(action under Texas minimum wage law and for damages for unpaid wages); *Chapman v. 8th Judicial Juvenile Probation Board*, 22 F. Supp. 2d 583, 584 (E.D.Tex. 1998)(breach of oral contract agreement); *Lisai v. Chevron Stations, Inc.*, 1997 WL 694705 *1 (N.D.Tex.)(Texas Human Rights Act, Texas Labor Code, and claim for negligent entrustment); *Brown v. Luk, Inc.*, 1996 WL 280831 *1 (N.D.N.Y. 1996)("'various' provisions of New York's Labor Law"); *Nesbitt v. Bun Baskett, Inc.*, 780 F.Supp. 1151, 1151 (W.D.Mich. 1991)(breach of implied employment contract); *Waldermeyer v. ITT Consumer Financial Corp.*, 767 F.Supp. 989, 990 (E.D.Mo. 1991)(Missouri Civil Rights Act and state law claims for wrongful discharge and intentional infliction of emotional distress); *Isaac v. Pflaumer & Sons, Inc.*, 1990 WL 102808 *1 (E.D.Pa.)(Pennsylvania Wage Payment and Collection Law); *Spieth v. R & B Appliance Parts*, 1989 WL 56486 *1 (D.Ariz.)(unstated allegation of "violations of state law"); *Bintrim v. Bruce-Merilees Electric Co.*, 520 F. Supp. 1026, 1026 (W.D.Pa. 1981)(common law breach of contract and quantum meruit); *Rolon v. Fleximore Company of Puerto Rico, Inc.*, 216 F. Supp. 954, 954

II. SECTION 16(b) OF THE ORIGINAL 1938 VERSION OF THE FAIR LABOR STANDARDS ACT DID NOT PERMIT REMOVAL OF AN ENFORCEMENT ACTION IN STATE COURT

Section 16(b) provides that an "[a]ction to recover . . . liability [under the Act] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). In concluding that section 16(b) permits removal, the First Circuit has objected that the term maintain is "ambiguous." *Cosme Nieves v. Deshler,* 786 F. 2d 445,451 (1st Cir. 1986). This objection stands on its head the federalist principles of *Shamrock Oil.* If a statute affecting the removal jurisdiction of the federal courts is indeed ambiguous, that statute must be construed *against,* not in favor of, removal.

The traditional meaning of the phrase "maintain an action" is "to prosecute [the action] to final judgment." *Apple v. Shulman Publications, Inc.,* 65 F.Supp. 677, 677 (D.N.J. 1943) Several years before the enactment of the FLSA, this Court noted that this was indeed the usual meaning of the phrase. "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 375 (1933)(*quoting Smallwood v. Gallardo,* 275 U.S. 56, 61 (1927)).

This established legal usage is consistent with the relevant non-legal usage of the verb "maintain." That word is utilized for the very purpose of indicating the continuation of a state of affairs or activity, in phrases like "maintain one's composure", "maintain appearances", "maintain a minimum

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(D.P.R. 1963)(claim under Puerto Rican minimum wage provisions).

balance in a bank account", "maintain order", "maintain the status quo", or "maintain an apartment." A helmsman commanded to "maintain a course due west" would understand that he or she was to continue until further notice to sail to the west, not simply to begin towards the west and then veer off in any other direction. A pilot directed by air traffic controllers to "climb to and maintain an altitude of five thousand feet" would remain at that height until further instruction.

This meaning of the word "maintain" was of controlling importance in *Smallwood v. Gallardo,* 275 U.S. 56 (1927). In March 1927 Congress had enacted a statute which provided that no action "shall be maintained in the District Court of the United States for P[ue]rto Rico" to restrain collection of taxes under the laws of Puerto Rico 275 U.S. at 61. The question in *Smallwood* was whether that congressional enactment required the dismissal of actions that had been commenced prior to the March 1927 date of enactment. If "maintained" had meant "commenced", those pre-1927 actions would have remained proper, because the statute would in turn have meant only that "no action shall be commenced in the District Court," a limitation inapplicable to previously filed proceedings. But if "maintained" meant "continued", the statute mandated dismissal of earlier filed lawsuits. This Court rejected the contention that "maintain" meant only commence an action, insisting it was quite clear that to "maintain an action" was to continue it to judgment:

> Apart from a natural inclination to read them more narrowly, there would seem to be no doubt that the words of the statute covered these cases. To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun. . . . To apply the statute to present suits is . . . but to take it literally . . . It simply makes it plain that

> these [pre-Act] cases are not excepted from the well known general rule against injunctions [against the collection of taxes.]

275 U.S. 61-62 (Emphasis added).

If, as in *Smallwood* and *George Moore Ice Cream* the term "maintain" in section 16(b) means continue to judgment, then removal of a private FLSA action would clearly be impermissible. A statutory right to "continue . . . a suit" in state court would be manifestly inconsistent with removal. Removal necessarily guarantees the very opposite of continuation; removal must ordinarily be requested within a few weeks of the filing of an action, and the request automatically brings the state court proceeding to an abrupt end[4]. In the instant case the state court action was filed on June 21, 2001, and came to an abrupt and permanent end on July 2, 2001, only eleven days later, when the notice of removal was filed. That result would clearly be improper if the term "maintain" in section 16(b) has its usual meaning.

The Administrator of the Wage and Hour Division, to whom Congress in 1938 assigned responsibility for administering the Fair Labor Standards Act, concluded for that reason that section 16(b) does not permit removal of an FLSA action, relying in particular on this Court's interpretation of the

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At the time a petition for removal had to be filed before the time for filing an answer. 28 U.S.C. § 72 (1940). Once the petition was filed, it was "the duty of the State court to . . . proceed no further in such suit." *Id.* Under current law a notice of removal must ordinarily be filed within thirty days of the service of the complaint. 28 U.S.C. § 1446(b). Filing of that notice brings the state proceedings to an end. 28 U.S.C. § 1446(d).

term "maintain" in *Smallwood* and *George Moore Ice Cream*:

> [It is] the Administrator's view that both the policy underlying employee suits and the specific language of the statute contemplate not only that an employee may bring his action in a State court but also that he may maintain the action to final judgment in the State court without removal to a Federal district court.[5]

Indeed, the Administrator insisted that "[t]he Congressional purpose to prevent removal of actions is evidenced by the express language of Section 16(b)"[6].

Two provisions of the 1938 original version of the FLSA make it particularly clear that the Administrator's interpretation was correct. First, as originally enacted the relevant sentence in section 16(b) used the term "maintain" in two separate clauses:

> Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

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5 Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, *Johnson v. Butler Bros.*, No. 13490 (8th Cir.), p.5 (Emphasis added). We have lodged copies of this brief with the Clerk of the Court.

6 *Id.* at 7 (emphasis added).

52 Stat. 1069[7]. Undeniably the word "maintain" in the second clause meant "litigate to judgment"; assuredly Congress did not intend that a designated agent or representative could be authorized only to file an action, and would thereafter be compelled to withdraw and abandon the suit. When Congress repeatedly utilizes the same word in a statute, it usually intends that the word have the same meaning throughout. It would be most illogical and unlikely for Congress in a single sentence to have used the identical word with two quite different intended meanings.

Second, in describing in section 12(b) of the Act the authority of the Chief of the Children's Bureau to seek injunctive relief to prevent oppressive child labor, Congress provided that the Chief could "bring" an action to seek such relief.[8] An action brought by the government under section 12(b) in state court clearly would have been removable. If section 16(b) had similarly provided only that employees could bring enforcement actions, rather than maintain them, removal of such private actions would clearly have been permissible. But the Congress which framed the FLSA acted quite deliberately when it guaranteed employees a right to "maintain" an enforcement action in state court, rather than merely to "bring" such an action in state court.

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7 The second clause was subsequently repealed.

8 "The Chief of the Children's Bureau of the Department of Labor . . . shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor . . . ." 52 Stat. 1067 (Emphasis added).

The difference between "maintain" and "bring" is of even greater significance under the FLSA in its current form. In 1974 Congress amended the FLSA to permit the Secretary of Labor to "bring"--not "maintain"--in any court of competent jurisdiction an action for unpaid wages and liquidated damages. 29 U.S.C. § 216(c). Because the statutory authorization for such actions by the Secretary differs from the language of section 216(b), a section 216(c) action brought by the Secretary in state court (unlike a private action) can be removed to federal court.

The commencement of such an action by the Secretary terminates the right of an employee "to bring" an action under section 216(b), 29 U.S. C. § 216(c), but not to "maintain" such an action; thus the filing of an action by the Secretary bars new private actions, but does not affect actions already pending. Similarly, an action by the Secretary under section 216(c) terminates the right of an employee under section 216(b) "to become" (but not, more broadly, "to be") a plaintiff in such an action; therefore previously filed private class actions may also continue unaffected. There is thus a critical difference between the current language of section 216 and the terms of the statute involved in *Smallwood;* because section 216(c), unlike section 216(b), does not use the word "maintain", it does not affect pending litigation. If section 216(b) had instead provided only that employees could "bring" enforcement actions, the commencement of litigation by the Secretary would wipe out pending private actions, a result Congress clearly did not intend[9].

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Donovan v. University of Texas at El Paso, 643 F. 2d 1201, 1207 (5th Cir. 1981)("previously filed private litigation by employees are not affected"); S. Rep. 145, 87th Cong., 1st Sess., 1961 U.S. Code and Congressional and Administrative News, 1620, 1658-59 ("Under

It is also evident from other legislation adopted at the same time as the original FLSA that Congress in 1938 acted quite deliberately when it used in section 16(b) the term "maintain", rather than a word which would have conveyed only a right to begin (but not necessarily pursue) an action in state court. During the month immediately preceding the June 1938 enactment of the FLSA, Congress enacted several statutes which repeatedly and purposely used narrower terminology that authorized only the initiation, but not necessarily the maintenance, of litigation. This contemporaneous legislation contained numerous provisions stating that a litigant could "file" a petition or action[10], "institute proceedings"[11], or "apply for enforcement"[12], that an action could be "brought"[13] or "commenced"[14], or that courts would have jurisdiction[15] or "concurrent jurisdiction."[16] In contrast, the use of the term "maintained" in section 16(b) is both unique and highly

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these amendments . . . filing of a complaint by the Secretary, pursuant to the new authority given him . . . terminates the rights of individuals to later file suit for compensation and liquidated damages under 16(b).")(Emphasis added); Conf. Rep. No. 327, May 2, 1961.

[10] 52 Stat. 1100, 1055-56, 840-933.

[11] 52 Stat. 849, § 11(e).

[12] 52 Stat. 1025.

[13] 52 Stat. 1076, 849 § 11(d).

[14] 52 Stat. 849 § 11(c).

[15] 52 Stat. 1043.

[16] 52 Stat. 870.

significant[17]. This difference in terminology is all the more telling because the conference committee which drafted section 16(b) deliberately rejected the Senate version of the bill, which would have provided only that state and federal courts would have "concurrent jurisdiction" over employee lawsuits[18].

This distinct and purposeful choice of language pervades the United States Code. When Congress expressly authorizes civil litigation, it usually uses terminology which refers only to the initiation of the litigation--e.g., "brought", "commenced", or "filed"--or which states simply which courts will have jurisdiction. Utilization of the terms "maintain" or "maintained"

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17 One district court observed in this regard:

> "Why did not Congress use the word "begun," or "filed", or "commenced" or "instituted", if Congress meant no more? They are simple words, words in daily use, as simple as "maintained." It did not use them."

Fredman v. Foley Bros., 50 F.Supp. 161, 162 (W.D.Mo. 1943).

18

S. 2475, 75th Cong., 2d sess., 81 Cong. Rec. 7957 (1937):

> "The district courts of the United States shall have jurisdiction of violations of this act or the regulations or orders thereunder, and, concurrently with State and territorial Courts, of all suits in equity and action at law brought to enforce any liability or duty created by, or to enjoin any violation of, this act or the regulations or orders thereunder . . . "

The original House bill had a similar provision. H.R. 7200; see 81 Cong. Rec. 4961, 4998 (1937).

with regard to civil actions is far less common, and this distinction is presumptively entirely deliberate. When Congress has wanted not only to bar the commencement of certain types of actions, but also to terminate any pending such litigation, it has commanded, in language like that in *Smallwood,* that no such action "may be maintained", 15 U.S.C. § 77p(d(1)(A), or that "[n]o [such] action . . . shall be brought or maintained in any court." 7 U.S.C. § 623(a)(Emphasis added); see 50 U.S.C. App. § 24 (certain actions may not be "instituted or maintained"); 28 U.S.C. §§ 673(a)(authorizing sanctions if action has been "instituted or maintained . . . for delay"), 6673(b)(same)[19]. Outside the context of civil litigation, Congress has repeatedly used the word "maintain" to refer to ongoing action.[20]

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Similarly, under Rule 11 of the Federal Rules of Civil Procedure an attorney or unrepresented party is deemed to be representing that a pleading, motion or other paper "is not being presented or maintained for any improper purpose."

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E.g., 5 U.S.C. § 552a(b)(1)(certain confidential records may be disclosed to certain "officers and employees of the agency which maintains the record"); 12 U.S.C. §§ 1782(d)(2)(A)(i)(limiting liability for credit union which "maintains procedures reasonably adapted to avoid any inadvertent error"), 2279aa-3(c)(14)(Federal Agricultural Mortgage Corporation authorized to "establish, acquire and maintain affiliates"); 15 U.S.C. § 1681a (regulating consumer reporting agency if it "compiles and maintains files on consumers on a nationwide basis"); 20 U.S.C. § 5812(1)B)(iii)(congressionally declared goal of assuring that school children "receive the nutrition, physical activity experiences, and health care needed . . . to maintain the mental alertness necessary to be prepared to learn"); 28 U.S.C. § 1827 (guidelines for selection of court interpreters to "ensure that the highest standards of accuracy are maintained in all judicial

The Administrator based his 1947 interpretation of section 16(b) in part on an intensely practical understanding of the likely consequences, particularly in the era when the FLSA was enacted, of permitting removal:

> [T]o permit removal of employee suits to the Federal courts at the instance of employers would ordinarily greatly increase the employee's burden in bringing suit. Normally the amount an employee seeks to recover in an action under Section 16(b) is comparatively small. If the employer can add to the employee's burden of proving his claim the expense of travel for himself, his lawyers and witnesses to the seat of the Federal court, and the expense of subsistence there during the course of the trial, the employee will often forego his claim rather than incur such expense.[21]

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proceedings"); 30 U.S.C. § 1265 (where necessary to prevent deterioration of certain topsoil, steps to be taken to "maintain a successful cover by quick growing plant"); 33 U.S.C. § 2005 (certain vessels to "maintain a proper look-out by sight and hearing"); 42 U.S.C. §§ 654 (state to "maintain a full record" of certain collections and disbursements), 1395ff(c)(1)(electronic database regarding certain Social Security matters to be "maintained"), 2153(a)(certain agreements to contain "safeguards [that] will be maintained with respect to all nuclear materials"), 8002 ("personal assistance" defined to include aid in "grooming, dressing and other activities which maintain personal appearance and hygiene.")

21

Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, *Johnson v. Butler Bros.*, No. 13490 (8th Cir.), p. 6.

The FLSA initially authorized a minimum wage of only 25 cents per hour[22], and many actions under the FLSA were indeed for quite modest sums. In the early years of the FLSA a majority of the wage claims in private actions appear to have been for less than $250[23]; the smallest reported claim was for $11.75[24]. The

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22 52 Stat. 1062.

23 *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 956 (D.N.J. 1940)($119.83); *Williams v. Atlantic Coast Line R.R.Co.*, 1 Wage & Hour Cas. 289, 295 (E.D.N.C. 1940)(wage claims of $64.00, $62.40, $57.60, and $41.60); *Wigham v. Tucker Oil Co.*, 1 Wage & Hour Cas. 540, 542 (N.D.Tex. 1941)(wage claim of $85.62); *Muldowney v. Seaberg Elevator Co.*, 1 Wage & Hour Cas. 605, 613 (E.D.N.Y. 1941)($213.90); *Thompson v. Daugherty*, 1 Wage & Hour Cas. 679, 679 (D.Md. 1941)($252); *West v. Smokey Mtns. Stages Inc.*, 1 Wage & Hour Cas. 698, 698 (N.D.Ga. 1941)($166.40); *Drake v. Hirsch*, 1 Wage & Hour Cas. 702, 702 (N.D.Ga. 1941)($83.07); *Angel v. Dayton Veneer & Lumber Mills*, 1 Wage & Hour Cas. 718, 719 (N.D.Ga. 1941)(of 26 individual claims, 18 were under $250 and 4 were $100); *Magann v. Long's Baggage Transfer Co.*, 1 Wage & Hour Cas. 720, 727 (W.D.Va. 1941)($199.60); *Roberts v. Hoarel*, 1 Wage & Hour Cas. 737, 738 (N.D.Tex. 1941)($29.50); *Nelson v. Southern Ice Co.*, 1 Wage & Hour Cas. 787, 788 (N.D.Tex. 1941)($116); *Mortenson v. Western Light & Telegraph*, 1 Wage & Hour Cas. 829, 832 (S.D.Iowa 1941)($43.77); *Allen v. Moe*, 1 Wage & Hour Cas. 869, 871 (D.Idaho 1942)($206.80); *Littleton v. White Motor Co.*, 1 Wage & Hour Cas. 913, 917 (N.D.Tex. 1941)($167); *McLendon v. Bewley Mills*, 1 Wage & Hour Cas. 934, 937 (N.D.Tex. 1940)($116); *Whitson v. Wexler*, 1 Wage & Hour Cas. 1055, 1055 (Tenn. Chancery Ct. 1941)(claims of $90.25 and $11.75); *Boylan v. Liden Mfg. Co.*, 1 Wage & Hour Cas. 1063, 1066 (Mich. Circuit Ct. 1941)($135.36); *Higgins v. Carr Brothers Co.*, 1 Wage & Hour Cas. 1082, 1082 (Maine Superior Ct. 1941)($31.70); *Wagner v. Estate of Abe Feld*, 1 Wage & Hour Cas. 1097, 1100 (Indiana Superior Ct. 1941)($247.12); *Copper v. Gas Corp. of Michigan*, 1 Wage & Hour

FLSA was enacted during the Depression, when many of the covered workers were in dire economic straits.

Although state courts were no further from a private plaintiff than the local county seat, federal courts could easily be a hundred miles away. In an era long before the construction of the interstate highway system, traveling that distance to federal court could well be time-consuming and expensive. In 1938, moreover, a comparatively greater proportion of the American population lived in rural areas often far from the major cities in which federal district judges were necessarily concentrated. At that time there were only about 130 federal district court judges[25]; a dozen states had only a single federal judge[26]. Although state courts were available in every one of the nation's 3000 counties, in the overwhelming majority of those counties there was no federal courthouse. Certainly when the FLSA was first enacted, a substantial portion of all private actions under

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Cas. 1119, 1126 (Mich. Superior Ct. 1941)($156.80); *Silverman v. Ballaban,* 1 Wage & Hour Cas. 1206, 1207 (N.Y. City Ct. 1941)($41.61). Successful claimants under the FLSA would also have been entitled to liquidated damages in an amount equal to the wages awarded.

During this era the jurisdictional amount in diversity cases was $3,000.

24 *Whitson v. Wexler,* 1 Wage & Hour Cas. 1055, 1055 (Tenn. Chancery Ct. 1941).

25 28 U.S.C. § 1 and pt. 5 (1940).

26 Colorado, Delaware, Idaho, Kansas, Maine, Nevada, New Hampshire, Rhode Island, South Dakota, Utah, Vermont and Wyoming.

that statute were in fact brought in state rather than federal court[27].

At that time litigation in federal courts themselves could be comparatively slow and awkward. If a district court had several divisions, the district judges would often travel from division to division, holding court in a particular district only a few times a year[28]. The formalities of federal court assuredly required skilled legal representation and a knowledge of federal procedures that might well be unfamiliar to an attorney whose usual practice was limited to state court in a remote rural county. An employee able to pursue litigation in state court, on the other hand, might well be able to proceed in small claims court[29] or present his or her claims to a local justice of the peace[30]. These

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A review of the private enforcement actions reported in volume 1 of Wage and Hour Cases for the years 1940 and 1941 indicates that about one-third of those private FLSA actions were brought in state court. Private actions in state court, particularly in a small claims court or a justice of the peace court, were comparatively unlikely to result in reported opinions.

28

In the Fifth Division of the Minnesota District Court, to which the action in *Johnson* was removed, there were only two terms of court a year, beginning on the first Tuesday in May and the first Tuesday in December. 28 U.S.C. § 169 (1940).

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E.g., Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956, 956 (D.N.J. 1940).

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E.g., Wingate v. General Auto Parts Co., 40 F.Supp. 364, 365 (W.D.Mo. 1941).

were practical problems with which every member of the 75th Congress would have been familiar.

In *Johnson v. Butler Bros.*, 162 F. 2d 87 (8th Cir. 1947), for example, the disputed wages totaled $385.26. 162 F. 2d at 88. The plaintiff brought suit in the district court for Crow Wing County, a rural area in central Minnesota, and retained an attorney from the county seat, Brainerd. The defendant retained a law firm in St. Paul, over a hundred miles southeast of Brainerd, which then removed the case to the federal court in Duluth, an equal distance from both Brainerd and St. Paul. *Johnson v. Butler Bros.*, 65 F. Supp. 277 (1946)[31]. The appellate panel which ordered the case remanded was undoubtedly aware of the burden that removal had imposed on a claimant seeking only a modest award.

Federal district judges of this era, who well understood the serious economic problem that removal could pose for wage earners, often referred specifically to that problem in concluding that Congress would not have intended to permit removal of FLSA claims:

> The amounts involved usually are small. The places in which federal courts are held are few. They are only to be found in the larger cities. If it was not intended that state courts should have jurisdiction of these cases, then congress made this act of slight value to working men, who might easily bring suit in a justice court or other state court in the neighborhood in which they

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The same St. Paul law firm removed another FLSA action that had been brought in Crow Wing County. *Koskala v. Butler Bros., 65* F.Supp. 276, 276 (D.Minn. 1946).

> live, but who, if they had to go to some distant city to prosecute the case, would, in effect, be prohibited from seeking any remedy.

Wingate v. General Auto Parts Co., 40 F. Supp. 364, 365 (W.D. Mo. 1941); *see Tobin v. Hercules Powder Co.*, 63 F. Supp. 434, 435 (D.Del. 1945); *Fredman v. Foley Bros.*, 50 F.Supp. 161, 162 (W.D.Mo. 1943); *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451, 455 (D.Neb. 1942). Prior to 1948 "the great majority of district courts . . . that considered this question concluded that the Removal Statute d[id] not apply [to FLSA actions.]"[32]

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Brief for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, *Johnson v. Butler Bros.*, No. 13490 (8th Cir.), p. 6.

In the first decade after the enactment of the FLSA a large number of district courts concluded that actions under section 16(b) could not be removed. *Maloy v. Friedman,* 80 F.Supp. 290 (N.D.Ohio 1948); *Melching v. Armour & Co.,* 6 Wage & Hour Cas. 760 (W.D.Mo. 1947); *McGuire v. North American Aviation,* 69 F.Supp. 917 (W.D.Mo. 1946); *Young v. Arbyrd Compress Co.,* 66 F. Supp. 241 (E.D.Mo. 1946); *Crouse v. North American Aviation, Inc. of Kansas, 68* F.Supp. 934 (W.D.Mo. 1946); *Smith v. Day & Zimmerman, Inc.,* 65 F.Supp. 209 (S.D.Iowa 1946); *Weaver v. Quaker Oats Co.,* 6 Wage & Hour Cas. 570 (N.D.Ohio 1946); *McGuire v. North American Aviation of Kansas,* 6 Wage & Hour Cas. 524 (W.D.Mo. 1946); *Cikra v. Pittsburgh Plate Glass Co.,* 6 Wage & Hour Cas. 113 (N.D.Ohio 1946); *Apple v. Shulman Publications,* 65 F.Supp. 677, 677 (D.N.J. 1943)(disapproval of removal the "majority" view); *Wright v. Long,* 65 F. Supp. 279 (W.D.Mo. 1944);*Tobin v. Hercules Powder Co.,* 63 F. Supp. 434 (D.Del. 1945); *Steiner v. Pleasantville Constructors,* 59 F.Supp. 1011 (S.D.N.Y. 1944); *Sheridan v. Leitner,* 59 F.Supp. 1011 (S.D.N.Y. 1944); *Brockway v. Long, 55* F.Supp. 79 (W.D.Mo. 1944); *Brantley v. Augusta Ice & Coal Co., 52* F.Supp. 158 (S.D.Ga. 1943); *Garner v.*

III. THE 1948 REVISION OF THE JUDICIAL CODE DID NOT REPEAL THE BAR TO REMOVAL IN SECTION 16(b) OF THE FLSA

In the 1948 revision of Title 28, Congress recast the first sentence of what then became section 1441(a) to read in part:

> 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 . . . .

The prevailing pre-1948 interpretation of the FLSA was at the least that section 16(b) did indeed "otherwise . . . provid[e]." The question is whether by using the adverb "expressly" in the otherwise-provided clause Congress intended

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Mengel Co., 50 F.Supp. 794 (W.D.Ky. 1943); *Fredman v. Foley Bros., 50* F.Supp. 161 (W.D.Mo. 1943); *Duval v. Portes,* 51 F.Supp. 967 (E.D.N.Y. 1942); *Booth v. Montgomery Ward & Co.,* 44 F.Supp. 451 (D.Neb. 1942); *Phillips v. Pucci,* 43 F.Supp. 253 (W.D.Mo. 1942); *Garrity v. Iowa-Nebraska L. & P. Co.,* 1 Wage & Hour Cas. 926 (D.Neb. 1941); *Barron v. F.H.E. Oil Co.,* 1 Wage & Hour Cas. 764 (W.D.Tex. 1941); *Kuligowski v. Hart,* 43 F.Supp. 207 (N.D.Ohio 1941); *Wingate v. General Auto Parts Co.,* 40 F. Supp. 364 (W.D.Mo. 1941); *Stewart v. Hickman,* 36 F.Supp. 861 (W.D.Mo. 1941).

See also *Carter v. Hill & Hill Truck Line, Inc.,* 259 F.Supp. 429, 429 (S.D.Texas 1966)(prior to 1948 "the majority opinion" was that section 16(b) cases could not be removed.") The decision in *Brantley* cites several additional unreported cases.

to bring about a significant change in the law, authorizing removal of claims that had been non-removable prior to 1948.

The court of appeals below insisted that the otherwise-provided clause sets an exceedingly demanding standard, which can be satisfied only by "unequivocal language." (Pet. App. 5a). But the meaning of section 1441(a), like the meaning of section 16(b), is governed by the principles of *Shamrock Oil*. The otherwise-provided clause, like any other provision affecting removal, must be construed in a manner that narrows the removal jurisdiction of the federal courts. *Shamrock Oil* thus commands that in choosing among the possible interpretations of the otherwise-provided clause, the courts should select the construction that sets the least demanding standard for determining when another statute (like section 16(b)) "otherwise provides."

A. Neither The Text Nor The Legislative History of The "Otherwise-Provided" Clause Support The Conclusion That Such Clause Applies Only To Statutes Which Use The Word "Remove"

The language of the otherwise-provided clause cannot fairly be read to permit only the interpretation, suggested by the court below, that any removal-limiting statute must actually use the word "removal" or contain other absolutely "unequivocal language." Section 1441(a) requires only that a removal-limiting statute "expressly provid[e]" that an action may not be removed; section 1441(a) does not insist that such a statute "expressly" use the very word "removal." If a statute provided that actions under it "may be litigated to final judgment in any court of competent jurisdiction", such language would undeniably be inconsistent with removal. And that is precisely the meaning of section 16(b).

"Expressly," like "express", is susceptible of at least two distinct meanings. (1) A requirement that a statutory command or direction be express may mean only that such command or direction could be found in the text of the statute, as opposed to some meaning implied only from the structure or presumed purpose of the law. That usage of the word "express" is reflected in the distinction between an express and an implied contract. Courts routinely conclude that an express contract exists even though there may be disagreement about its meaning, or even a colorable argument (rejected by the court) that there was in fact no such contract. (2) A requirement that a command or direction be "express" could also be understood to demand a particular degree of clarity and/or specificity, e.g. clear, reasonably clear, very clear, or utterly unambiguous. Dictionaries commonly note the existence of both of these meanings[33].

The distinction between these two usages is illustrated by the terms of Rule 11 of the Federal Rules of Civil Procedure, which provides in part:

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record
> . . . .

Rule 11 could be said to expressly require (in the first, "textual", sense) that briefs or requests for admissions be signed, since these can fairly be understood to be within the meaning of the

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Compare 1 Compact Oxford English Dictionary, vol. E, p. 445 (1971)(express means "[e]xpressed and not merely implied") *with id.* (express means "explicit); *compare* Ballentine's Law Dictionary, p. 441 (1969)(express means "[s]tated . . . declared, not left to implication") *with id.* (express means "explicit, clear").

general phrase "other paper." But in the second sense (especial specificity), it might be asserted that the only documents which Rule 11 expressly requires be signed are pleadings and written motions. In this context, at least, the textual interpretation of "expressly" would probably be the more common usage.

In light of the rule of statutory interpretation in *Shamrock Oil*, the otherwise-provided clause in section 1441(a) should be construed to require only that the bar to removal in an "Act of Congress" be grounded in the actual text of that Act. Section 16(b) of the Fair Labor Standards Act easily satisfies that requirement. The conclusion that the original 1938 Act did not permit removal rests squarely on the language of section 16(b) itself, which authorizes a plaintiff to "maintain" an action in state court, a term which this Court prior to 1938 had twice construed to mean the continuation to judgment (not merely the filing) of an action. Even if the term "expressly" is construed to require a particular degree of clarity in a removal-limiting statute, that would not mean that such a statute must actually utilize the word "removal."

The legislative history of the 1948 revision of Title 28 is entirely devoid of any assertion that section 1441(a) would expand federal removal jurisdiction or to reverse the rule of construction in *Shamrock Oil.* Indeed, although the authoritative Reviser's Notes included with the House Report meticulously catalogued and explained hundreds of often quite minor alterations in the law brought about by the revision, the otherwise-provided clause is not mentioned in the Reviser's Notes at all. The otherwise-provided clause in section 1441(a) occasioned no such comment because it had no substantive consequences, and was not intended to permit the removal of previously non-removable actions.

Rather, the otherwise-provided clause merely resolved

an awkward problem in the prior language of Title 28. Before 1948 the first two sentences of section 71 authorized removal in general terms that contained no exceptions:

> Any suit of a civil nature . . . under the Constitution or laws of the United States . . . of which the district courts of the United States are given original jurisdiction . . . in any State court, may be removed by the defendant or defendants therein . . . . Any other suit of a civil nature . . . of which the district courts of the United States are given jurisdiction . . . in any State court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State.

28 U.S.C. § 71 (1940)(Emphasis added). This language was derived from the removal provision enacted in 1874, at a time when federal law apparently contained no contrary provisions limiting removal. 18 Stat. pt. 3, 470. But in the succeeding decades Congress had adopted several such limitations, including the Fair Labor Standards Act. These post-1874 laws restricting removal were in some tension with the facially unrestricted right of removal in the original 1874 language.

The otherwise-provided clause resolved this technical problem by providing an "except[ion]" to the earlier right to remove "any" action within the original jurisdiction of the district courts. The clause did not alter the removability of any then-existing class of cases, and thus occasioned no comment by the Reviser. The purpose of the otherwise-provided clause was merely to confirm the non-removability of actions already subject to the limitation of post-1874 statutes like the FLSA.

It is unlikely that Congress, in a clause whose basic purpose was to codify certain existing *restrictions* on removability, intended through the use of the word "expressly" to actually *expand* removal. The far more plausible reading of section 1441(a) is that the term "expressly" was intended to limit this exception to statutes like the FLSA with a text-based limitation, and to assure that the otherwise-provided clause would not become a basis for reading into other statutes new, non-textual restrictions on removal. The term "expressly", like the otherwise-provided clause itself, was intended to codify and rationalize, not to alter, the legal status quo.

A number of lower courts have insisted that the otherwise-provided clause in section 1441(a) can only be satisfied by a statute which refers to "removal" in haec verba[34]. See Respondent's Brief In Opposition, p. 5 ("the FLSA does not even mention the term removal.") Unless the word "removal" is used, they suggest, an Act of Congress cannot be said to "expressly" bar removal. On this view a statute would not expressly bar removal even if it provided, for example, that a particular type of action "may be filed and litigated to final judgment in state court." If that is indeed the meaning of the otherwise-provided clause, it would affect pre-1948 statutes, and would render removable previously non-removable claims, including claims under the FLSA.

Section 1441(a) should not, however, be interpreted to authorize removal of previously non-removable claims solely because the pre-1948 limitation on removal did not use the term "remove." There is simply no evidence that Congress intended the otherwise-provided clause to bring about any change at all

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E.g. Hill v. Moss-American, Inc., 309 F.Supp. 1175, 1178 (N.D.Miss. 1970)(FLSA cannot satisfy the new standard in section 1441(a) because "[n]o mention of removal is made in the Act itself.")

regarding which then-existing claims could be removed. Absent a clear indication to the contrary, the otherwise-provided clause, like all laws affecting removal, should not be construed to have expanded the removal jurisdiction of the federal district courts.

B. Such An Interpretation Of The Otherwise-Provided Clause Would Be Inconsistent With The 1948 Revision

Neither the text nor the legislative history of the 1948 revision of Title 28 demonstrate any intent on the part of Congress to increase the removability of actions commenced in state court. To the contrary, the amendments embodied in that 1948 law were clearly intended to impose additional restrictions on removal. The "otherwise provided" clause in section 1441(a) cannot fairly be understood to have had a contrary purpose.

Prior to 1948 Title 28 had authorized removal of state court actions against out-of-state defendants, despite the absence of complete diversity, if an out-of-state defendant could show "that from prejudice or local influence he will not be able to obtain justice in such State court." 28 U.S.C. § 71 (1940). This provision was deliberately omitted from section 1441. The Reviser's Note explained:

> All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and Reconstruction period, have no place in the jurisdiction of a nation since united by three wars against foreign powers.

28 U.S.C.A. § 1441, Reviser's Note.

Second, prior to 1948 an action involving less than complete diversity could also be removed if it contained a separate "controversy which is wholly between citizens of different states." 28 U.S.C. § 71 (1940). The 1948 revision replaced the term "controversy" with a requirement that a case involve "a separate and independent claim or cause of action." 28 U.S.C. § 1441(c). Again, the Reviser's Note explained that this too would reduce the number of actions that could be removed:

> The [pre-1948] language has occasioned much confusion. . . . Subsection (c) permits removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of the United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation.

28 U.S.C. § 1441, Reviser's Note. This Court observed in *American Fire & Cas. Co. v. Finn,* 341 U.S. 6, 9-10 (1951), that an "important purpose [of the 1948 revision] was to limit removal from state courts." See 341 U.S. at 10 ("The Congress, in the revision, carried out its purpose to abridge the right of removal.")

Third, although federal law had generally prohibited removal of certain actions against railroads or common carriers, prior to 1948 removal had frequently been permitted if the defendant was in receivership or bankruptcy, because of a separate provision of Title 28 authorizing removal of actions against court officers. *Compare* 28 U.S.C. § 71 (1940) *with* 28 U.S.C. § 76 (1940). In the 1948 revision, additional language was included in the new section 1445 to forbid the removal of

such actions:

> The words "or its receivers or trustees" were inserted into both subsections to make clear that nonremovable actions against a carrier do not become removable under section 1442 of this title when filed against court receivers or trustees. . . . The cases are in conflict as to whether [under old section 76] the case becomes removable when the carrier is in receivership or undergoing reorganization. The revised section [1445] resolves the conflict by denying the right of removal to receivers and trustees where it would be nonexistent if the carrier were the party defendant.

28 U.S.C. § 1445, Reviser's Note.

In light of the highly specific and meticulous manner in which Congress acted in 1948 where it did choose to alter existing law, it is highly unlikely that the mere inclusion of the word "expressly" in the otherwise-provided clause was intended to bring about any such change. Where Congress wanted to alter the removability of a class of cases, it did so with great particularity, identifying precisely the types of cases whose removability would be altered. Any change that would have been occasioned by use of the term "expressly" would not have been limited to or focused on some particular type of civil action, but could have applied to an indeterminate number of other federal statutes. Its impact could have been understood only by reviewing the entire corpus of the United States Code as it stood in 1948, and might have affected any number of distinct provisions. If, on the other hand, Congress had specifically wished to permit removal of FLSA actions, it would undoubtedly have referred with particularity to actions under that statute, as it did in the other removal-affecting provisions of

the 1948 revision.

One of the avowed purposes of the amendments to section 1441 was to reduce the confusion that had existed under the pre-1948 statutory language. If, however, the term "expressly" had indeed created a new requirement for removal-limiting statutes, particularly existing statutes, it would have introduced a whole new element of confusion into removal litigation. In light of the longstanding congressional practice of narrowing statutory authorization of removal, a practice reflected in several explicit 1948 amendments to Title 28, inclusion of the term "expressly" in the otherwise-provided clause should not be construed as creating a new, open-ended basis for removal.

The authoritative Reviser's Notes meticulously detail and explain every change in the law, however minor, made by the 1948 recodification, including the new provisions limiting removal. But those Notes contain absolutely no reference to the otherwise-provided clause in section 1441(a). It is unlikely that such was merely an oversight, particularly in light of the three clear and carefully explained changes made for the purpose of reducing removal. It is even less likely that the drafters of § 1441, disregarding the general practice of reducing removal, intended the otherwise-provided clause actually to increase removal. Had that indeed been the purpose of the clause, the Reviser's Notes would assuredly have called that alteration to the attention of Congress.

The circumstances which in 1938 had prompted Congress to bar removal of FLSA claims had not substantially changed in 1948, or even later. Many FLSA actions continue to be for "relatively modest-sized claims." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 746 (1981)(Burger, C.J., dissenting). It remains the case that for such plaintiffs in particular removal "burdens . . . claimants . . . [forcing them] to

go to trial in federal rather than state courts due to the fact that the state courts are likely to be closer to [a] . . . worker's home." *Horton v. Liberty Mut. Ins. Co., 367* U.S. 348, 351 (1961). *See Lemay v. Budget Rent A Car Systems, Inc., 993* F.Supp. 1448, 1451 (M.D.Fla. 1997); *Wilkins v. Renault Southwest, Inc.,* 227 F.Supp. 647, 648 (N.D.Tex. 1964). Many of the supporters of the 1938 FLSA were still in Congress when the 1948 recodification was adopted. If section 1441(a) had been understood to overturn by implication the earlier congressional decision to bar removal of FLSA claims, assuredly such a proposed change would have occasioned comment and controversy.

C. The Existence of Removal-Precluding Statutes Which Do Use The Word "Remove" Does Not Render The Language of the FLSA Insufficient To Satisfy the Otherwise-Provided Clause

The First Circuit has suggested that the FLSA is insufficient to meet the requirements of the otherwise-provided clause because the FLSA, unlike several other removal-limiting statutes, does not actually use the term "removal:"

> If Congress wished to give plaintiffs an absolute choice of forum it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here.

Cosme Nieves v. Deshler, 786 F. 2d 445,451 (1st Cir. 1986)(footnote omitted). This argument might have some force if Congress had first enacted section 1441(a) (establishing the standard), then enacted statutes utilizing the term "removal" (showing itself capable of using that particular unmistakable term), and then finally enacted the FLSA (failing to follow the easily available model of the earlier statutes).

The actual order of enactment, however, was entirely different. Section 16(b) of the FLSA was enacted in 1938, a full decade before the language of section 1441(a)--whatever standard it may have embodied--was adopted. It would have been impossible--not easy--for the 75th Congress to have considered and met some standard that was not created until the 80th Congress enacted section 1441(a) ten years later.

Of the statutes relied on by the First Circuit, and by the Eleventh Circuit below, several were also enacted prior to 1948. *E.g.* 15 U.S.C. § 77v(a)(1933)[35], 28 U.S.C. §§ 1445(a)(1911)[36], 1445(b)(1914)[37]. But these pre-1948 laws could not be said to show that Congress (in 1911, 1914 and 1933, respectively) somehow foresaw how to meet a standard which would only come into existence years later.

Other statutes relied on by the First and Fourth Circuits were adopted after 1948. *E.g.*, 15 U.S.C. §§ 1719 (1968), 3612 (1980)[38]; 28 U.S.C. §§ 1445(c) (1958), 1445(d) (1994). Even if these post-1948 laws could be said to show that Congress after 1948 deliberately opted to utilize particular language to satisfy the otherwise-provided clause, that was not a practice which could have been known to (and thus tellingly have been

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35 48 Stat. 86, 87. A specific reference to removal was needed because section 77v(a) provided for concurrent federal and state court jurisdiction.

36 36 Stat. 1095.

37 38 Stat. 278 c. 11.

38 An express reference to removal was necessary because sections 1719 and 3612 provided for "concurrent" jurisdiction in federal and state courts.

disregarded by) Congress in 1938. The fact that Congress in the years after 1948 did not reach back and amend the FLSA proves nothing. The removability of FLSA claims turns on the original terms and meaning of that 1938 law and of the 1948 enactment of section 1441(a); if FLSA claims remained non-removable in 1949, subsequent congressional inaction (or the subsequent enactment of other statutes) does not alter the removability of FLSA claims. Post-1948 inaction or legislation on other topics cannot change the meaning of the 1938 and 1948 legislation.

When Congress in 1958 enacted section 1445(c), barring removal of workers' compensation cases, it did so with the express intent of giving to workers in those cases the same right already enjoyed by employees in FLSA claims to sue and remain in state court:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which 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 workmen 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.

S.Rep. No. 1830, 85th Cong., 2d Sess. (1958), 9[39]. It would be

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39 Workers' compensation cases had previously been

quite perverse if the adoption of section 1445(c), enacted for the express purpose of assuring that workers' compensation and FLSA actions would be treated alike, could now be invoked to demonstrate that Congress in fact wanted to treat these two types of claims differently.

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removable on the basis of diversity.

CONCLUSION

For the above reasons, the opinion of the court of appeals should be reversed, and the case remanded to the Circuit Court, in and for the Fourth Judicial Circuit, in and for Duval County, Florida.

Respectfully submitted,

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