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

REPLY BRIEF ON THE MERITS FOR PETITIONER

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I. THE RULE THAT THE JURISDICTION OF FEDERAL COURTS SHOULD BE NARROWLY CONSTRUED APPLIES TO CASES INVOLVING FEDERAL QUESTION JURISDICTION

This case turns on the scope and vitality of the longstanding rule that the jurisdiction of the federal courts is to be narrowly construed. *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941). That rule of construction plays a pivotal role in preserving the respective roles of the state and federal courts, and rests on principles that are implicit in the very structure of the Constitution and are expressly embodied in the Tenth Amendment. Any expansion of federal jurisdiction unavoidably carries with it a lessening of the authority of the states to determine cases that would otherwise be litigated in their own courts. *Healy v. Ratta*, 292 U.S. 263 (1934). Removal jurisdiction does so in a particularly intrusive manner, wrenching from the responsibility of a state court an action which was properly filed in and pending before that tribunal.

Respondent contends that *Shamrock Oil* and *Healy* are simply inapplicable when a litigant asserts that the federal courts have jurisdiction over a federal claim. The rule of construction in those decisions, Respondent insists, extends only to those cases in which a party is seeking to have a federal court adjudicate a claim arising under state law. (R.Br. 4, 12, 20-24). Respondent's contention is not (and logically could not be) limited to disputes about removal jurisdiction, but would apply with equal force to the original jurisdiction of the federal courts

Such a drastic limitation on *Shamrock Oil* and *Healy*, if adopted by this Court, would work a sea of change in the manner in which the lower courts have for decades resolved questions relating to removal jurisdiction. Since this Court's

seminal decision in *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941), the lower courts have repeatedly relied on the principles of that case in limiting the scope of federal removal jurisdiction. Many of those decisions involved federal law claims, and would have to be reconsidered if Respondent's position were accepted[1].

Respondent's contention is clearly inconsistent with this Court's decision in *Healy v. Ratta*, 292 U.S. 263 (1934), which avowedly applied the rule of narrow construction to jurisdiction over a federal claim. The plaintiff in that case, alleging that New Hampshire officials had violated his rights under the Fourteenth Amendment, brought an action in federal district court. At that time, the federal question jurisdiction of the district courts was limited to cases in which the amount in controversy exceeded $3000. 292 U.S. at 266. Referring

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See, e.g., Oregon Bureau of Labor and Industries ex rel. Richardson v. U.S. West Communications, Inc., 288 F. 3d 414 (9th Cir. 2002)(federal claim under the Labor Management Relations Act' rule of construction utilized in determining what is a "state court" within the meaning of section 1441(a)); *Prize Frize, Inc. v. Matrix*, 167 F. 3d 1261 (9th Cir. 1999)(federal claim under RICO; rule of construction utilized in application of *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972)); *Dunn v. Gaiam, Inc.*, 166 F. Supp. 3d 1273 (C.D.Cal. 2001)(federal claim under RICO; rule of construction invoked in determining timeliness of removal); *Grubbs v. Pioneer Housing, Inc.*, 75 F. Supp. 2d 1323 (M.D.Ala.1999)(federal claim under the Magnuson-Moss Warranty Act; rule of construction utilized in determining whether jurisdictional amount required by that Act was present); *Webster v. Dow United Tech. Composite Products*, 925 F. Supp. 727 (M.D.Ala. 1996)(federal claim under ERISA; rule of construction invoked in determining timeliness of removal).

specifically to the provision (now 28 U.S.C. § 1331) creating federal question jurisdiction, the Court insisted that the Tenth Amendment as well as [t]he policy of the statute calls for its strict construction." 292 U.S. at 270.

The emasculated version of *Shamrock Oil* proposed by Respondent would have anomalous results. Respondent acknowledges that federal jurisdiction should be narrowly construed if it would give the federal courts jurisdiction over a state law claim, but stresses that no such state law claims were raised in the instant case. But, as we noted in our opening brief, many FLSA actions filed in state court do assert state law claims as well. (Pet. Br. 12 and n. 3). Many states have their own statutes creating rights analogous to the FLSA[2], and an FLSA claimant will often have a state law contract claim as well. At best the applicable rule of construction would vary according to whether such state law claims happened to be included in a complaint. Furthermore, in practice, Respondent's proposed limitation on *Shamrock Oil* would encourage FLSA claimants to increase the volume of litigation and add state law claims in order to decrease the likelihood of removal. Additionally, if a defendant asserted a state law counterclaim after removal had been approved, the propriety of removal would then have to be considered all over again.

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See, e.g.., Alaska Stat. § 23.10.060; Ark. Code Ann. § 11-4-202; Cal. Lab. code § 1173, *et al.*; Ill. Code § 105/1 *et seq.*; La.R.S. 33:2213, *et al* (limited application).; 26 Maine R.S. § 664; Mass. Gen. Laws ch. 151 § 1A, *et al.*; Mich. Comp. Laws § 408e, 384(a)(4); Minn. Stat. § 177.21, *et seq.*; Mont. Code Anno. § 39-3-404 & 405; N.M.Stat. Ann. § 50-4-19, *et seq.*; Ohio Rev. Code Ann. § 4111.01 *et seq.*; 43 Pa. Stat. § 333.101, et seq.; Wash. Rev. Code § 49.46, *et seq.*; W.Va. Code § 21-5C-1, *et seq.*

Respondent's proposal is wholly unworkable where, as here, the existence of federal jurisdiction turns on the construction of a statute. If the appropriate rule of construction varied depending on whether a state law claim (as the principal claim, a supplemental claim, or a counterclaim) was present in a case, then the appropriate interpretation of a particular statute might (and would at times) vary as well. In the instant case, for example, because no state law claim is involved, Respondent insists that sections 216(b) and 1441(a) should be construed without regard to the rule of *Shamrock Oil*. But when, in a subsequent FLSA case, the plaintiff had also included a state law claim in his or her state court complaint, *Shamrock Oil* would apply, and might result in a different interpretation of those very sections. The construction of sections 216(b) and 1441(a), or of any other federal statute, should not vary in that manner.

Respondent urges that *Shamrock Oil* should not apply to federal claims because state judges lack familiarity with issues of federal law. (R.Br. 4, 24, 31-33)[3]. But state judges decide federal law questions, including federal constitutional issues, all the time. Respondent warns that the FLSA regulations are "enormously complex" (R.Br. 32), and that the particular regulation at issue in this case is "difficult to understand" (R.Br. 33), as if applying them might exceed the capacity of mere state court judges. But had Congress entertained doubts about the ability of state judges to competently apply the FLSA, it would have given federal courts exclusive jurisdiction over such actions, which it did not.

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3 *But see* R.Br. at 33 ("Respondent does not mean to suggest that state court judges are incapable of interpreting the FLSA or the regulations promulgated pursuant to the statute.")

Respondent's suggestion that all federal judges (unlike state judges) are already experts in FLSA law is assuredly overstated[4]. Respondent argues, for example, that federal judges are more likely to be familiar with a particular FLSA regulation at issue in the instant case, 29 C.F.R. § 778.114. (R.Br. 32-33 and n. 19). But that regulation has been cited in only 49 federal opinions in the 45 years since it was adopted[5], which means that, as a practical matter, federal judges like state judges are unlikely to have had any prior experience with that regulation. More fundamentally, Respondent errs in suggesting that *Shamrock Oil* authorizes this Court to make a statute-by-statute assessment of the comparative expertise or competence of federal and state judges[6].

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Respondent notes that there are an average of 367 reported federal decisions a year which cite the FLSA. (R.Br. 32 n. 14). At this rate a federal judge would have occasion to mention the FLSA in an opinion only once every two years. Furthermore, many of these decisions, of course, are actually claims arising under other statutes where the opinion merely happens to mention the FLSA.

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The regulation was first adopted in January, 1968. 33 Fed. Reg. 986 (Jan. 26, 1968).

6

Respondent suggests that removal is necessary to permit consolidation in federal court where an employer on the same day is sued by two employees, one in federal court and one in state court, with similar FLSA claims. (R.Br. 34-35). Respondent does not, however, actually suggest that this implausible scenario has ever occurred.

Respondent suggests that *Shamrock Oil* should be inapplicable to federal claims because broader federal jurisdiction over such claims, including expanded removal jurisdiction, assures that questions regarding the meaning of federal law will benefit from "the consistency provided by the federal court system." (R.Br. 28). But the structure of the federal court system is no guarantee of consistency; the dispute at issue in this case regarding the interpretation of section 216(b) has divided the federal courts themselves for some sixty years. The thirteen federal courts of appeals often disagree about the interpretation of federal statutes, as do the hundreds of federal district judges. There is no reason then to assume that state court judges are more prone than their federal colleagues to interpret federal laws in a manner that would create a conflict which did not otherwise exist.

Finally, Respondent objects that if under *Shamrock Oil* federal courts do not have removal jurisdiction over FLSA claims, that would likely mean that federal courts would also lack removal jurisdiction over claims arising under the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Equal Pay Act, and the Employee Polygraph Protection Act. (R.Br. 25-28). But such a consequence would be a matter of concern only if there were a general presumption in favor of expanded federal removal jurisdiction.[7] The presumption dictated by the principles of federalism is precisely to the contrary.

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[7] Furthermore, all these other federal acts suggested by Respondent, unlike the FLSA, were enacted after the enactment of 1441(a). As such, how the language of these post-1441(a) acts is applied and interpreted in light of 1441(a) is not at issue here and need not be resolved directly or indirectly by the Court's decision in this case.

II. SECTION 216(b) OF THE FAIR LABOR STANDARDS ACT, AS ORIGINALLY ENACTED, DID NOT PERMIT REMOVAL OF AN ACTION FILED IN STATE COURT UNDER THAT SECTION

In light of *Shamrock Oil* the dispositive question regarding section 216(b), as originally enacted[8], is whether it could reasonably be interpreted to preclude federal removal jurisdiction. Petitioner need not establish that such is the only possible interpretation of section 216(b), or even that--absent *Shamrock Oil*--it is the most likely interpretation[9]. Where there is more than one plausible interpretation of a statute, the very purpose of the *Shamrock Oil* rule of construction is to mandate

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8 Respondent objects that this portion of our opening brief asks the Court to interpret the original section 216(b) "in a vacuum, without regard to the express language of 28 U.S.C. § 1441(a)." (R.Br. 12). But section 216(b) itself was enacted in 1938 "without regard to the express language of 28 U.S.C. § 1441(a)", since section 1441 was not adopted until 1947. The original meaning of section 216(b) assuredly must be determined without regard to section 1441(a). Whether section 1441(a) altered the meaning of section 216(b) is an important, but distinct, issue.

9 This distinction provides the answer to the government's argument that section 216(b) should not be understood to bar a change of venue within a state court system. (U.S. Br. 13). Such a change of venue would not implicate the principles of federalism impinged upon by removal, and thus would not be subject to the rule of construction in *Shamrock Oil*.

the construction that will result in the narrower jurisdiction of the federal courts.

Respondent does not contend that the only reasonable interpretation of section 216(b) would be one permitting removal of FLSA actions. To the contrary, Respondent makes no claim that section 216(b) could not be interpreted to bar removal, but asserts only that such is not the sole possible interpretation of the section. Acknowledging that the term "maintain" was construed by *George Moore Ice Cream v. Rose*, 289 U.S. 373 (1933), in a manner that would preclude removal, respondent argues:

> the *George Moore* Court neither held nor implied that the word "maintain" cannot have meanings other than the one set out in the opinion . . . . "[M]aintain" has meanings other than the one identified by the *George Moore* Court. . . . [T]he word "maintain" has various meanings not just the one asserted by the Petitioner in this case. . . . [T]he word is reasonably susceptible to more than one competing meaning.

(R.Br. 15-16). The United States suggests section 216(b) "is most naturally" understood as allowing removal (U.S. Br. 10), but also characterizes the term "maintain" as "ambiguous." (U.S. Br. 8-10).

We explained in our opening brief why the use of the word "maintain" is most plausibly construed as meaning that FLSA actions filed in state court could be litigated there to final judgment. (Pet. Br. 13-27). That was the prevailing judicial interpretation of section 216(b) during the first decade after it was enacted in 1938. The reasonableness of that interpretation

is confirmed as well by the contemporaneous agency construction of the statute. The Administrator of the Wage and Hour Division, to whom Congress gave the authority to enforce and frame regulations implementing the FLSA, concluded in 1947 that section 216(b) precluded removal. (Pet. Br. 16). Such a contemporaneous interpretation of the statute is entitled to considerable weight. That agency interpretation remained unaltered for sixty-six years, until the Secretary of Labor decided to join the government's amicus brief in this case. (U.S.Br. 6 n.1). Originally, the Administrator read section 216(b) to contain "express language" precluding removal (*see* Pet. Br. 16); but now, however, the government is unable to find in that section even an implication of such a prohibition. (U.S.Br. 9-10). Even today, however, the United States does not disavow the Administrator's original characterization of the burdens that removal would place on FLSA plaintiffs. (*See* Pet. Br. 22).

Respondent objects that if section 216(b) were construed to bar removal, an "anomalous" situation would result, because some federal employment claims (such as Title VII) would be removable, while others (such as the FLSA) would not. But that is simply the inevitable result of the fact that Congress chose to frame these various statutes in different terms. Equally importantly, if section 216(b) precluded removal when it was first adopted in 1938, the subsequent enactment of Title VII (1965), ERISA (1974) and the Americans with Disabilities Act (1990) cannot have changed the meaning of the FLSA. (*See* R.Br. 28).

Even if, as we urge, "maintain" means "litigate to final judgment", the United States suggests that this would be consistent with removal because a plaintiff who commenced the action in state court is ultimately allowed to litigate it to final judgment, albeit in federal court. (U.S.Br. 11). But this is

surely a strained interpretation of section 216(b), which as originally enacted provided that an "[a]ction to recover . . . liability may be maintained in any court of competent jurisdiction." 52 Stat. 1069. This language clearly contemplates that the action will be maintained in a single court, not several courts in succession[10]. The assertion that "The Fair Housing Act guarantees a black couple the right to maintain an apartment in any state" does not mean that an Alabama landlord could evict such couples on the basis of race so long as they could still find open housing in San Francisco.

Finally, the United States argues that construing section 216(b) to bar removal would violate the presumption against repeals by implication because, in 1938, 28 U.S.C. § 71 (1934) provided for removal of "[a]ny" civil suit arising under federal law. (U.S.Br. 21-22)[11]. Our proffered interpretation of the

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The United States also suggests that once a notice of removal has been filed, the state court is no longer a "court of competent jurisdiction." (U.S.Br. 13-14). But this argument is circular since, if removal is held to be improper, this case will be remanded to state court. The state court lacks jurisdiction to proceed only so long as the removed case is pending in federal court. The government does not of course mean that an improper (e.g. untimely) notice of removal would permanently strip a state court of jurisdiction to hear a case.

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As we noted in our opening brief, the apparent purpose of the 1948 Revision was to put an end to such arguments. (Pet. Br. 37). The government's invocation of that presumption is somewhat selective. If, as we urge, section 216(b) originally barred removal, that same presumption would necessarily counsel against acceptance of the government's contention that

original meaning of section 216(b), on the other hand, is supported by the maxim that "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

More importantly, in this instance the presumption against repeal by implication conflicts with the *Shamrock Oil* presumption in favor of the interpretation of federal law which narrows the jurisdiction of federal courts. In such a conflict the *Shamrock Oil* rule, which protects the core principles of federalism, must prevail.

III. THE 1947 REVISION OF THE JUDICIARY CODE DID NOT MAKE REMOVABLE THOSE ACTIONS PREVIOUSLY NON-REMOVABLE UNDER SECTION 216(b)

The interpretation of section 1441(a) is also governed by *Shamrock Oil.* The controlling question is whether section 1441(a) could reasonably be construed in a manner which left unaffected the non-removability of actions under section 216(b). The particular issue is whether the words "[e]xcept as otherwise expressly provided by Act of Congress" could have no possible meaning other than a requirement that any such statute refer in *haec verba* to removal.

Both respondent and the United States insist that a statute can satisfy the "expressly provided" clause only if it indeed refers to removal as such. Respondent suggests that this is the "plain and unambiguous meaning" of section 1441(a).

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the subsequent enactment of section 1441(a) modified section 216(b) by implication.

(R.Br. 19; *see id.* at 6 (section 1441(a) is "unequivocally clear", 11 (section 1441(a) is "unambiguous"), *but see id.* ("there is no way to determine the intended effect of the 1948 Amendments on the FLSA."). Similarly, the government argues that "there is no ambiguity in the breadth of the removal statute to which a principle of narrow construction would be relevant." (U.S.Br. 21).

This proposed reading of section 1441(a), however, is squarely inconsistent with this Court's longstanding interpretation of the similar language in 28 U.S.C. § 2283. Section 2283 forbids the federal courts from granting an injunction to stay proceedings in a state court "except as expressly authorized by Act of Congress." This is indistinguishable from the section 1441(a) proviso: "[e]xcept as otherwise expressly provided by Act of Congress." Section 2283, however, has never been understood to require that an Act of Congress relied on to permit such injunctions must expressly mention either "injunctions" or "state court."

As this Court explained in *Mitchum v. Foster*, 407 U.S. 225 (1972),

> [d]espite the seemingly uncompromising language of the anti-injunction statute prior to 1948, the Court soon recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope.

407 U.S. at 233-34. By 1948 this Court had recognized nine different circumstances in which injunctions could be granted against state proceedings. Three of these circumstances were not grounded on the terms of a particular Act of Congress. 407 U.S. at 235-36. Of the six statutes found sufficient to meet the

section 2283 proviso, 407 U.S. at 234, none mentioned the anti-injunction statute, and three made no specific mention of state proceedings. 407 U.S. at 237. "A federal law need not expressly authorize an injunction of a state proceeding in order to qualify as an exception [to section 2283.]" 407 U.S. at 237.

In interpreting the "expressly authorized" clause in section 2283, the touchstone has been not the particular language of the Act of Congress invoked but the underlying purpose of that statute:

> [I]n order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.

407 U.S. at 237-38 (footnote omitted).

Congress can be presumed to have been familiar with this interpretation of section 2283 when it utilized similar language in section 1441(a). But reliance on such a presumption is in this instance is unnecessary. In the same 1948 Revision of Title 28 which added section 1441(a), Congress also

amended section 2283 to endorse this Court's longstanding broad interpretation of the "expressly authorized" clause:

> In *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, the Court in 1941 issued an opinion casting considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions. The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which as the Reviser's Note makes evident, served not only to overrule the specific holding of *Toucey,* but to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision.

407 U.S. at 236.

This broad understanding of what statutes satisfy the "expressly authorized" clause of section 2283, specifically endorsed by Congress when it enacted the 1948 Revision, should be utilized as well to construe the "expressly provided" clause of section 1441(a), enacted as part of that very same Revision. There is no meaningful distinction between the language of the two provisions. The differing approach to section 1441(a) urged by the United States would stand traditional principles of federalism on their head.

The "expressly authorized" clause of section 2283, which governs the authority of federal courts to interfere with state proceedings through the issuance of injunctions, has long been broadly construed, thus augmenting the power of federal courts. A similarly broad construction of the textually indistinguishable "expressly provided" language of section 1441(a) would have the virtue of protecting the states from

federal interference in the form of removal. What is sauce for the national government goose should be sauce for the federalism gander.

Even if the established interpretation of the "expressly authorized" clause of section 2283 does not mandate a similar interpretation of the "expressly provided" clause of section 1441(a), that is assuredly a plausible construction of section 1441(a). In such circumstances *Shamrock Oil* is controlling.

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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