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 FOR RESPONDENT

ANDREW S. HAMENT*
GRAY HARRIS & ROBINSON, P.A.
1800 West Hibiscus Boulevard
Suite 138
Melbourne, Florida 32901
(321) 727-8100

GREGORY WILLIAMSON
HOLLAND & KNIGHT LLP
50 North Laura Street
Suite 3900
Jacksonville, Florida 32201
(904) 798-5424

Attorneys for Respondent

* *Counsel of Record*

179547

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether the phrase "[a]n action . . . may be maintained . . . in any Federal or State court of competent jurisdiction" as used in 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA") constitutes an express act of Congress prohibiting removal of FLSA claims?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Jim's Concrete of Brevard, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Statutes

Cited Authorities

Cited Authorities

Other Authorities

Cited Authorities

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case are as follows:

28 U.S.C. § 1331, the federal question statute, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(a) of the removal statute provides as follows:

> Except as otherwise expressly provided by act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Section 16(b) of the FLSA, as amended, 29 U.S.C. § 216(b), provides in 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 equal amount as liquidated damages. Any

> employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and 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.

STATEMENT OF THE CASE

This case arises out of an order from the United States District Court for the Middle District of Florida denying Petitioner Phillip T. Breuer's ("Petitioner") motion for remand. On or about June 21, 2001, Petitioner filed suit against Jim's Concrete of Brevard, Inc. ("Respondent") in state court in Duval County, Florida seeking relief solely for alleged violations of the FLSA. Respondent timely removed the case to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §§ 1441(a) and 1446. Petitioner subsequently filed a motion for remand, arguing that FLSA lawsuits may not be removed to federal court. Petitioner filed a motion for certification pursuant to 28 U.S.C. § 1292(b) to take an interlocutory appeal contemporaneously with the motion for remand. On December 7, 2001, the district court sided with the majority of courts to address the issue in recent years, and entered an order holding that FLSA actions may be removed to federal court.

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

Petitioner filed a timely petition for writ of certiorari, and this Court granted the petition on January 10, 2003.

SUMMARY OF THE ARGUMENT

The resolution of this case turns on the interpretation of statutory language contained in 28 U.S.C. § 1441(a) and 29 U.S.C. § 216(b), respectively. Specifically, the issue is whether the phrase "[a]n action . . . may be maintained . . . in any Federal or State court of competent jurisdiction," as used in the FLSA, constitutes an express act of Congress prohibiting the removal of FLSA claims. Petitioner argues that this language creates an *absolute bar* to removal of FLSA claims brought in state court. But Congress' use of the phrase "may be maintained" simply does not rise to the level of an express prohibition against removal of FLSA claims; a fact recognized by a developing majority of courts. The Eleventh Circuit Court of Appeals was correct in joining these courts by deciding that FLSA claims are properly removable.

Furthermore, Petitioner's arguments do not require reversal of the decision below which, consistent with the majority of courts to address this issue, held that there is no express Act of Congress barring the removal of FLSA actions. Petitioner is asking this Court to view the language of the FLSA in a vacuum, without regard to the express language of 28 U.S.C. § 1441(a). But even viewed in isolation, the FLSA contains no express ban on removal as Petitioner contends. Moreover, neither the legislative history to the 1948 amendments to section 1441(a), nor a stray remark in a Senate committee report to the 1958 amendments to 28 U.S.C. § 1445 provide support for Petitioner's position. In addition, the rule requiring narrow construction of jurisdictional statutes has no application in a case that, like this one, was properly removed, arises under a federal statute, and poses no risk of interfering with state courts' ability to construe state law.

Finally, aside from the express statutory language of section 1441(a), there are sound policy reasons justifying the Eleventh Circuit's conclusion that Congress has not prohibited removal of FLSA claims. First, there are other federal statutes that contain language similar to that found in the FLSA. An order reversing the decision below could eliminate a defendant's right to remove cases arising under a number of other federal statutes. Consequently, employers would be permitted to remove cases arising under some federal employment statutes, but be prohibited from doing so in cases arising under others. This would create an anomaly in the body of federal employment law. Second, contrary to Petitioner's assertions, cases arising under the FLSA oftentimes have huge ramifications for employers. FLSA actions can involve large verdicts or settlements, particularly when they are asserted as collective actions. Third, federal judges have developed an expertise borne by familiarity in

addressing FLSA cases that is not shared by their state court counterparts. Lastly, an order reversing the decision below could leave employers in the untenable position of defending a case brought by one employee in state court and another employee in federal court, both involving identical issues, without any means of consolidating the two cases.

ARGUMENT

I. By Its Plain Language, 28 U.S.C. § 1441(a) Provides That An Express Act Of Congress Is Necessary To Prohibit Removal Of An Action Arising Under A Federal Statute. Congress Has Not Expressly Prohibited Removal of FLSA Actions.

The lone issue before the Court is whether Congress has included an express prohibition against removal in the FLSA. In the case at bar, Petitioner seeks relief under a federal statute, and there are no pendant state law claims. As a result, the district court below indisputably had original jurisdiction over Petitioner's claims. 28 U.S.C. § 1331 ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Thus, the question becomes whether Congress has "expressly provided" that removal of FLSA claims is prohibited. The analysis of this issue starts, as it always does in a case of statutory interpretation, with the plain language of the relevant statutes. *K Mart Corp. v. Cartier*, *Inc*., 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988); *Robinson v. Shell Oil Co*., 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808, (1997). Here, there are two relevant statutes.

The first is 28 U.S.C. § 1441, captioned "Actions removable generally." This is often referred to as the general removal statute, and it establishes an unambiguous and quite rigid standard for determining whether a claim arising under a federal statute can be removed. Under the statute, civil actions brought in state court over which the federal courts have original jurisdiction may be removed to federal court "***[e]xcept as otherwise expressly provided by Act of Congress***." 28 U.S.C. § 1441(a) (emphasis supplied). This statute makes it unequivocally clear that absent an express declaration by Congress to the contrary, civil actions in which there is concurrent original jurisdiction in both federal and state courts are removable. *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 460 (5th Cir. 1982); *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986) ("Congress has made plain that the right of removal is to stand absent an express provision to the contrary. . . ."), *cert. denied*, 479 U.S. 824 (1986).

In this regard, Congress has shown itself adept at drafting language that satisfies the "express prohibition" standard created by 28 U.S.C. § 1441(a). In a number of statutes, Congress has explicitly prohibited or limited the right to remove claims to federal court. For example, 28 U.S.C. § 1445 is captioned, "Nonremovable actions," and expressly limits or prohibits the removal of several different kinds of cases.[1]

Section 1445(a) expressly prohibits removal of actions brought against a railroad or its trustees in state courts for damages under the Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"). 28 U.S.C. § 1445(a) ("[a]

1. The pertinent language of each of the statutes quoted in this section is included in Appendix "A."

civil action in any State court against a railroad . . . may not be removed to any district court of the United States."). As a result, removal of FELA actions has been prohibited without regard to the jurisdictional grounds alleged by the party seeking removal. *See*, *e.g.*, *Great Northern Railway Co. v. Alexander*, 246 U.S. 276, 38 S. Ct. 237, 62 L. Ed. 713 (1918); *Loftus v. Delaware & H.R. Corp.*, 122 F. Supp. 829, 830 (M.D. Penn. 1954) (Section 1445(a) prohibits removal even though there is diversity of citizenship or the action involves a federal question); *Brown v. National Railroad Passenger Corp.*, 725 F. Supp. 873 (D. Md. 1989) (same).

Section 1445(b) limits the removal of suits brought against a common carrier, its receivers or trustees in a state court under the Interstate Commerce Act for damages unless the amount in controversy exceeds $10,000. 28 U.S.C. § 1445(b) ("[a] civil action in any State court against a carrier . . . to recover damages . . . arising under section 11706 or 14706 of title 49 may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs."). And, in 1958, Congress made suits arising under the worker's compensation laws of the state in which the federal district court is sitting nonremovable. 28 U.S.C. § 1445(c) ("[a] civil action in any State court arising under the workmen's compensation laws of such state may not be removed to any district court of the United States."). Lastly, in section 1445(d), Congress expressly prohibited the removal of claims arising under 42 U.S.C. § 13981, the Violence Against Women Act of 1994 ("VAWA"). 28 U.S.C. § 1445(d) ("[a] civil action in any State court arising under section 40302 of the [VAWA] may not be removed to any district court of the United States.").[2]

2. This Court recently ruled that Congress lacked constitutional authority to create the VAWA's civil remedy. *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000).

Express limitations on the right of removal can be found in places other than 28 U.S.C. § 1445. By way of example, the Securities Act of 1934 creates a cause of action for misrepresentations made in connection with the sale of a security. 15 U.S.C. § 77*l*(a). As is true with the FLSA, state and federal courts have concurrent jurisdiction to enforce claims arising under the Securities Act. 15 U.S.C. § 77v. But unlike the FLSA, the Securities Act contains language expressly prohibiting the right of removal except under certain limited circumstances. 15 U.S.C. § 77v(a) ("[e]xcept as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States.").

The same can be said for the Interstate Land Sales Full Disclosure Act, enacted in 1968. 15 U.S.C. § 1701, *et seq.* ("ILSA"). Congress designed ILSA to promote full and fair disclosures by sellers of real property. James L. Oliver, *Beyond Consumer Protection: The Application of the Interstate Land Sales Full Disclosure Act to Condominium Sales*, 37 U. Fla. L. Rev. 945, 950 (Fall, 1985). The ILSA imposes certain duties on developers who make use of the mails and interstate commerce, and creates claims against those who breach those duties. 15 U.S.C. § 1709(a); 15 U.S.C. § 1703. Claims under the ILSA may be brought in either state or federal court, and Congress has expressly prohibited removal such claims unless the United States or an officer or employee of the United States in his official capacity is a party. 15 U.S.C. § 1719 ("[n]o case arising under this chapter and brought in any State court of competent jurisdiction shall be removed . . . except where the United States or any officer or employee of the United States in his official capacity is a party."). Similarly, the Condominium

and Cooperative Conversion Protection and Abuse Relief Act, 15 U.S.C. § 3601, *et seq.*, enacted in 1980, contains an identical express limitation on removal. 15 U.S.C. § 3612 ("[n]o case arising under this chapter and brought in any State court of competent jurisdiction shall be removed . . . except where the United States or any officer or employee of the United States in his official capacity is a party.").

In stark contrast to the statutes cited above, there simply is no ***express*** prohibition against removal in the FLSA, the second of the two statues relevant to this case. The term "express" has been defined to exclude ambiguity. Black's Law Dictionary defines express as "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary* p. 601 (7th ed. 1999); *see also Ballantine's Law Dictionary* p. 441 (3d ed. 1969) ("[s]tated, explicit, clear; declared; not left to implication); *Merriam-Webster's Collegiate Dictionary* p. 410 (10th ed. 1993) ("directly, firmly, and explicitly stated"); *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* p. 448 (Encyclopedic Ed. 1978) ("[s]et forth distinctly; explicit; plain; direct"); *Webster's New World Dictionary* 494-95 (2d college ed. 1982) ("specific").

There is no express prohibition against removal in the statute itself; indeed, the FLSA does not even mention the term removal. Instead, the statute provides that an action brought under the FLSA "may be maintained . . . in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). Petitioner seizes on the word "maintained," and argues that by employing this language, Congress has created an *absolute bar* to removing FLSA claims. But the statute contains no express prohibition against removal, and the only two circuit courts to address the issue in the last fifty years

have permitted FLSA claims to be removed. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d at 1310; *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986). Indeed, "the overwhelming majority of jurisdictions considering the issue in recent years have . . . permitted defendants to remove FLSA cases commenced in state court." *Bingham v. Newport News Shipbuilding and Drydock Co.*, 3 F. Supp. 2d 691, 692 (E.D. Va. 1998). *See also*, *Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d 1332, 1334 (S.D. Ga. 2001) (use of term "maintained" is not express directive of non-removability); *Valdivieso v. Atlas Air, Inc.*, 128 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001) (words "may be maintained" are not an express exemption from the general scope of the removal statute); *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347 (M.D. Ala. 2000) (there is no "Act of Congress" barring removal of FLSA claim); *Shaw v. CF Data Corp.*, 2001 WL 1326528 (N.D. Tex. Oct. 15, 2001) ("majority of courts to consider question have permitted removal" . . . "[t]his court will follow majority and permit removal."); *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F. Supp. 2d 583, 585 (use of phrase "may be maintained" does not constitute an express statement of nonremovability, and is at best, ambiguous); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F. Supp. 989, 991 (E. D. Mo. 1991) (denying motion to remand on grounds that Congress had not expressly provided that FLSA actions could not be removed from state to federal courts); *Ramos v. H. E. Butt Grocery Co.*, 632 F. Supp. 342, 343 (E. D. Pa. 1986) (denying motion to remand on grounds that unlike other federal statutes, FLSA did not include express prohibition on removal); *Taylor v. Brown*, 461 F. Supp. 559, 560 (E. D. Tenn. 1978) (holding that FLSA action could be removed to federal court).

These courts have correctly recognized that the FLSA does not expressly prohibit removal. Rather, it simply creates concurrent jurisdiction in state and federal courts and, by itself, the grant of concurrent jurisdiction is insufficient to bar removal. *See*, *e.g.*, *Dorsey v. City of Detroit*, 858 F.2d 338, 341 (6th Cir. 1988) (weight of judicial authority supports conclusion that grant of concurrent jurisdiction does not imply removal is prohibited); *see also Williams v. Ragone*, 147 F.3d 700, 703 (8th Cir. 1998)*; Johnson v. First Unum Life Ins. Co.*, 914 F. Supp. 51, 52 (S.D.N.Y. 1996); 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3729, at 495 (2d ed.1985) ("A congressional grant of concurrent jurisdiction in a statute does not imply that removal is prohibited.").

In short, this case was properly resolved by the court below in accordance with a growing trend through simple statutory interpretation. This Court recently made it abundantly clear that it takes seriously the unambiguous language of 28 U.S.C. § 1441(a). *Sygenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 374, 154 L. Ed. 2d 368 (2002). Section 1441(a) provides that "[e]xcept as otherwise expressly provided by act of Congress" civil actions in which there is concurrent original jurisdiction in both federal and state courts are removable. 28 U.S.C. § 1441(a). In this case, district courts undeniably have original jurisdiction over FLSA claims, and there is no express act of Congress prohibiting such claims from being removed.

II. Petitioner's Arguments Fail To Require Reversal Of The Decision Below Which, Consistent With The Majority Of Courts To Address This Issue, Held That There Is No Express Act Of Congress Barring The Removal Of FLSA Actions.

Furthermore, Petitioner's arguments do not require reversal of the decision below which, consistent with majority of courts to address this issue, held that there is no express Act of Congress barring the removal of FLSA actions. Petitioner is asking this Court to view the language of the FLSA in a vacuum, without regard to the express language of 28 U.S.C. § 1441(a). But even viewed in isolation, the FLSA contains no express ban on removal as Petitioner contends. Moreover, neither the legislative history to the 1948 amendments to section 1441(a), nor a stray remark in a Senate committee report to the 1958 amendments to 28 U.S.C. § 1445 provide support for Petitioner's position. Lastly, the rule requiring narrow construction of jurisdictional statutes has no application in a case that, like this one, was properly removed, arises under a federal statute, and poses no risk of interfering with state courts' ability to construe state law.

A. Petitioner Ignores The Plain Language Of 28 U.S.C. § 1441(a).

Petitioner lists three questions presented for review, but none of them mentions the express language of section 1441(a). This is astounding given that Respondent invoked section 1441(a) in removing this case, and it reveals a fundamental flaw in Petitioner's analysis. Specifically, Petitioner is asking the Court to ignore the express language in section 1441(a), and hold that the phrase "may be maintained" creates an absolute bar on removal. As support,

he relies on a fifty-five year-old decision from the Eighth Circuit Court of Appeals, *Johnson v. Butler Bros.*, 162 F. 2d 87, 89 (8th Cir. 1947), that was decided a full year before section 1441(a) took its present form. Petitioner argues that the *Johnson* case creates a split in the circuit courts on the removability of FLSA claims, and even goes so far as to reference the brief filed by the Department of Labor in the case as support for his argument.

Petitioner's reliance on *Johnson* and its progeny is tenuous at best. Even the *Johnson* court recognized that the FLSA does not contain a clear Congressional directive barring removal:

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

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

It is also important to emphasize that *Johnson* was decided in 1947, one year before Congress amended 28 U.S.C. § 1441(a) to require that any prohibition against

removal be by an express Act of Congress. Therefore, the *Johnson* court never addressed the statutory language at issue here. And, although *Johnson* has never been overruled, its continuing viability has repeatedly been called into question, even within the Eighth Circuit. As one district court within the Eighth Circuit recently put it, "since the decision in *Johnson*, the majority of district courts, and the only circuit courts which have addressed the issue, have concluded that *Johnson* is no longer good authority in light of the 1948 amendment to § 1441(a)." *Pauly v. Eagle Point Software Co.*, 958 F. Supp. 437, 439 (N.D. Iowa 1997).

By its plain language, 28 U.S.C. § 1441(a) now provides that nothing short of an express statutory provision precludes removal. Since the amendment, only two circuits have addressed this issue. *Cosme Nieves*, 786 F.2d at 451; *Breuer*, 292 F.2d at 1309-10.[3] Not surprisingly, both courts held that the "may be maintained" language in the FLSA does not constitute an express provision barring the right of removal.

Moreover, even if one ignores the command of section 1441(a), the FLSA contains no absolute ban on removal as Petitioner contends. Petitioner cites this Court's decision in *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377, 53 S. Ct. 620, 77 L. Ed. 1265 (1933), for the proposition that

3. The Fifth Circuit suggested in *dicta* that FLSA actions are subject to removal in *Baldwin v. Sears Roebuck & Co.*, 667 F.2d 458, 460-61 (5th Cir. 1982) (holding that Age Discrimination in Employment Act Claims, 29 U.S.C. § 621, *et seq.* are removable). In *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1996 (9th Cir. 1988), the Ninth Circuit cited the FLSA as an example of a federal statute which contain[s] no limitation on removal, express or otherwise, to bar removal as required under § 1441(a). This language was not, however, central to the holding in the case.

Congress' use of the word "maintain" in the FLSA creates an absolute bar on removal. The *George Moore* case however, has nothing to do with removal, and there the Court dealt with the word "maintain" in an entirely different context. In particular, the Court held that a statute authorizing a taxpayer to "maintain" a suit to recover tax, irrespective of protest, removed the requirement of protests in tax recovery actions brought after the enactment of the statute. *Id*. In *George Moore*, the Court merely found that maintain "means *no less* than to prosecute with effect." *Id.* (emphasis supplied). Significantly, the *George Moore* Court neither held nor implied that the word "maintain" cannot have meanings other than the one set out in the opinion, and the case does not even address the subject of removal, much less create an absolute bar to removal. *Roseman v. Best Buy Co., Inc.*, 140 F. Supp. 2d 1332, 1338 n.10 (S.D. Ga. 2001).

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

state; affirm"); *Webster's New World Dictionary* 854 (2d college ed. 1982)(defining maintain to mean both "to keep or keep up; continue in or with; carry on" and "to uphold or defend as by argument; affirm").

Clearly, the word "maintain" has various meanings, not just the one asserted by the Petitioner in this case. Given that the word is reasonably susceptible to more than one competing meaning, Congress' use of the term simply cannot be considered an absolute bar on removal as asserted by Petitioner. *See*, *e.g.*, *Valdivieso*, 128 F. Supp. 2d at 1373 ("I simply do not believe that Congress is unable to be more express than the word maintained . . .").

Moreover, Petitioner fails to acknowledge that the word "may" appears before the word "maintained" in the statute. The word "may" is conditional, and suggests that something may or may not occur. It in no way expresses an absolute ban on removal. If anything, the use of the word "may" signals that the right to maintain a FLSA action in state court is merely conditional, and therefore subject to contingencies such as removal.

Along those lines, Congress has taken at least three approaches in framing jurisdictional provisions like the one contained in the FLSA. It has permitted plaintiffs to sue in federal court only. *See*, *e.g.*, 15 U.S.C. § 15 (cases arising under the antitrust laws). As is true with the FLSA, Congress has given plaintiffs a choice of state or federal court, subject to the defendant's right of removal. 29 U.S.C. § 216(b); *see also* 7 U.S.C. § 1365 (suits arising under the Agricultural Adjustment Act). Finally, it has given plaintiffs a choice of state or federal court not subject to removal. *See*, *e.g.*, 28 U.S.C. § 77v (cases arising under the securities laws). In this case, Petitioner is

essentially arguing that when Congress took the second approach, it actually intended to take the third, but failed to express itself clearly. But the second and third approaches described above "express different intentions with equal accuracy," and Petitioner has not presented anything to suggest that "Congress mistook its own purpose when choosing one approach" over the other. *See*, *e.g.*, *Sicinski v. Reliance Funding Corp.*, 461 F. Supp. 649, 651 (S.D.N.Y. 1978).

B. The Legislative History Makes No Reference To Removal Of Claims Arising Under The FLSA, Much Less An Absolute Bar On Removal.

Nothing in the legislative history of the FLSA or 28 U.S.C. § 1441(a) indicates that Congress intended a bar on removal of FLSA claims. The legislative history of the FLSA instead indicates that Congress was concerned with the issue of whether employees, the government or both would have the right to bring suit, and whether there would be concurrent jurisdiction in state and federal courts. There was no debate or even any reference to the instant removal issue. *Swettman v. Remington Rand*, *Inc.*, 65 F. Supp. 940, 943 (S.D. Ill. 1946); H.R. Rep. No. 75-2738 (1938).

Similarly, the Reviser's Notes to the 1948 amendments to 28 U.S.C. § 1441(a) ("1948 Amendments") make no reference to the FLSA, much less indicate that Congress intended an absolute bar on removal of such actions. Nevertheless, Petitioner devotes a great deal of space in his brief arguing that the Reviser's Notes reveal that the amendments were not intended to "repeal the bar to removal" of FLSA claims. *See* Pet. Brief, pp. 28-40. The problem with Petitioner's argument is that it starts with a faulty premise;

that there was some sort of bar on removal of FLSA claims prior to 1948. A review of the reported decisions reveals that before 1948, the district courts of this country were divided about the removability of claims arising under the FLSA, as they are now. While Petitioner correctly points out that some district courts held that FLSA claims could not be removed, other courts reached the opposite conclusion. *See*, *e.g.*, *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 958 (D. N.J. 1940) (if Congress had intended to prevent removal of FLSA claims it would have used language more pertinent to that end) (*dicta*); *Owens v. Greenville News-Piedmont*, 43 F. Supp. 785, 789 (W.D.S.C. 1942) (denying motion to remand and stating it appears that when Congress intends to withdraw the privilege of removal, it does so in clear and unambiguous language; there is no such provision in the FLSA); *McGarrigle v. 11 West Forty-Second Street Corp.*, 48 F. Supp. 710, 711 (S.D.N.Y. 1942) (denying motion to remand FLSA claim); *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482, 484 (E.D. Ky. 1943) (denying motion to remand and holding that may be maintained language intended merely to dissipate any doubts as to state court's ability to hear FLSA claim); *Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29, 32 (D. Minn. 1944) (denying motion to remand and noting that language of FLSA cannot "be held to limit or amend the provisions of the Removal Act."); *Ellems v. Helmers*, 65 F. Supp. 566, 567 (E.D.N.Y. 1944) (denying motion to remand FLSA claim); *Swettman v. Remington Rand, Inc.*, 65 F. Supp. at 943 (denying motion to remand, holding that word "maintained" has no technical meaning, and is an insufficient basis upon which to deny a defendant the important right to removal). Consequently, there is little support for the assertion that there was an absolute ban on removal of FLSA claims before 1948.

Furthermore, the Reviser's Notes to the 1948 amendment to 28 U.S.C. § 1441(a) mention neither the FLSA nor the "otherwise expressly provided" language adopted in connection with the amendment. As a result, there is no way to determine the intended effect of the 1948 Amendments on the FLSA, or indeed, whether Congress ever considered the matter at all. Thus, one must rely on the explicit language of section 1441(a) in evaluating whether claims arising under the FLSA are removable, and based upon that language, such claims clearly are. *Robinson*, 519 U.S. at 340 (where the statute has a plain and unambiguous meaning, we look no further).

Petitioner also relies on a stray remark included in a Senate committee report to the 1958 amendment to section 1445(c), making worker's compensation cases non-removable. S. Rep. No. 85-1830, at 8 (1958). This report is often relied upon by those who oppose permitting removal of an FLSA action, who argue that the report somehow manifests congressional intent to bar removal of FLSA actions. *Cosme Nieves*, 786 F.2d at 451 n.18. The committee report states in pertinent part:

> 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 Employer's 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. 85-1830, at 8 (1958).

The *Cosme Nieves* court flatly rejected this argument, observing that the committee report in question involved 28 U.S.C. § 1445, making state worker's compensation claims nonremovable, and neither 28 U.S.C. § 1441(a) nor 29 U.S.C. § 216(b) were cited in relation to the statement. *Cosme Nieves*, 768 F.2d at 951, n.18. A stray remark in a committee report simply does not satisfy the rigid standard created by 28 U.S.C. § 1441(a); it does not rise to the level of an express provision by Act of Congress. *Id. See also Roseman*, 140 F. Supp. 2d at 1337 ("the fact that parties are relegated to finding obscure legislative history in support of their assertion that Congress has expressly provided that FLSA claims are not removable merely underscores the reality that the statute is not express on its face."). As a result, the Senate committee report does not provide a basis for reversing the decision below.

C. The Rule Requiring Narrow Construction Of Jurisdictional Statutes Does Not Apply Where, As Here, A Case Arising Under A Federal Statute Was Properly Removed, And There Is No Risk Of Interfering With State Courts' Ability To Construe State Law.

Petitioner relies extensively on the rule requiring narrow construction of jurisdictional statutes to support his arguments for reversal of the decision below. *See*, *e.g.*, *Healy*

v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 (1934); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). The "narrow construction" rule seems to arise most frequently in the context of challenges to the federal court's exercise of original jurisdiction based upon diversity of citizenship. This is not surprising given that the rule is intended to protect the "power reserved to the states, under the Constitution, to provide for determination of controversies in their courts." *Shamrock*, 313 U.S. at 107-108. In other words, the narrow construction rule was primarily designed to ensure that the federal government does not usurp the power of state courts to hear controversies arising under state law.

The present case, of course, does not involve a controversy arising under state law, and Petitioner does not cite a single narrow construction rule case with facts similar to this one. Specifically, none of the narrow construction cases cited by Petitioner involve defendants who have taken appropriate steps to remove cases arising under a federal statute. For the most part, the authorities cited by Petitioner involve: (1) cases lacking the requisite amount in controversy or complete diversity of citizenship; (2) cases addressing the "well-pleaded complaint" rule; (3) cases in which the defendant either failed to comply with the requirements of the removal statute; or (4) cases where the narrow construction rule was discussed, but removal was ultimately deemed proper.

For example, Petitioner relies on one of the seminal cases addressing the narrow construction rule, *Healy*. There, the plaintiff brought suit against the chief of police for the City of Manchester, New Hampshire to enjoin him from enforcing

the state's "Hawkers and Peddler's Act," Ch. 102, New Hampshire Laws of 1931.[4] *Healy*, 292 U.S. at 264. The issue before the Court was whether the amount in controversy was sufficient to permit the federal district court to exercise jurisdiction, and not whether Congress expressly prohibited removal of a claim arising under federal law. *Id.* at 267; *see also University of South Alabama v. American Tobacco Co.*, 168 F.3d 405 (11th Cir. 1999) (referencing narrow construction rule and holding district court lacked subject matter jurisdiction because of absence of complete diversity of citizenship).

Likewise, some of Petitioner's narrow construction cases involve the "well-pleaded complaint" rule. *See*, *e.g.*, *Holmes Group*, *Inc. v. Vornado Air Circulation Systems*, *Inc.*, 535 U.S. 826, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002). The well-pleaded complaint rule is used to determine whether federal question jurisdiction exists. *Holmes Group*, *Inc.*, 122 S. Ct. at 1893; *see also Caterpillar*, *Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Under the rule, federal jurisdiction exists when a federal question appears within the four corners of a plaintiff's well pleaded complaint. *Id.* In this case, of course, a federal question does indeed appear within the four corners of Petitioner's complaint.

---

4. The statute imposed a state-wide license tax on salesmen. *Healy v. Ratta*, 202 U.S. at 264. Notably, a federal court faced with a similar suit today would almost certainly decline to accept jurisdiction. *See* 28 U.S.C. § 1341 ("district courts shall not enjoin . . . the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.").

Similarly, some of Petitioner's narrow construction cases are distinguishable in that the cases involve some defect in the removal process itself. For example, in a case involving multiple defendants, 28 U.S.C. § 1446 requires that all defendants either join or consent to the removal notice. 28 U.S.C. § 1446. Where fewer than all the defendants have joined in a removal action, the removing party has the burden of explaining the absence of any co-defendants in the notice of removal. *See*, *e.g.*, *Northern Illinois Gas Co. v. Airco Ind. Gases*, 676 F. 2d 270, 273 (7th Cir. 1982); 16 James Wm. Moore, et al., *Moore's Federal Practice* § 107.11(d) (Matthew Bender 3d ed. 1997). These requirements were never satisfied, however, in *Prize Frize, Inc. v. Matrix, Inc.*, 167 F. 3d 1261 (9th Cir. 1999), one of the cases relied upon by the Petitioner. As a result, the court held that removal was improper. *Id.* at 1266-67. In the case at bar, Petitioner has never asserted that Respondent's removal was defective on procedural grounds.

Lastly, a number of Petitioner's narrow construction rule cases cite the rule in passing, but then go on to hold that removal was proper. *Manguno v. Prudential Property & Cas. Ins.*, 276 F. 3d 720 (5th Cir. 2002) (diversity case affirming order denying motion for remand); *Whitaker v. American Telecasting, Inc.*, 261 F. 3d 196 (2d Cir. 2001) (same); *Danca v. Private Healthcare Sys., Inc.*, 185 F. 3d 1 (1st Cir. 1999) (ERISA case affirming order denying motion for remand).

In short, the narrow construction rule is intended primarily to ensure that federal courts do not interfere with the state courts' ability to construe state law. While the rule serves a salutary purpose, it simply has no application in a case that, like this one, arises under a federal statute. In the case of a claim arising under federal law, 28 U.S.C. § 1441(a)

mandates that such a claim may be removed, "except as otherwise expressly provided by Act of Congress." This standard contains no reference to the rule of narrow construction, and the rule has no application here.

III. There Are Sound Policy Reasons Justifying The Eleventh Circuit's Conclusion That Congress Has Not Expressly Prohibited Removal Of FLSA Actions.

Finally, aside from the express statutory language of section 1441(a), there are sound policy reasons justifying the Eleventh Circuit's conclusion that Congress has not prohibited removal of FLSA claims. First, there are other federal statutes that contain language similar to that found in the FLSA. An order reversing the decision below could affect a defendant's right to remove cases arising under a number of other federal statutes. Consequently, employers would be permitted to remove cases arising under some federal employment statutes, but prohibited from doing so in cases arising under others. This would create an anomaly in the body of federal employment law. Second, contrary to Petitioner's assertions, cases arising under the FLSA oftentimes have huge ramifications for employers. FLSA actions can involve large verdicts or settlements, particularly when they are asserted as collective actions. Third, federal judges have developed an expertise borne by familiarity in addressing FLSA cases that is not shared by their state court counterparts. Lastly, an order reversing the decision below could leave employers in the untenable position of defending a case brought by one employee in state court and another employee in federal court, both involving identical issues, without any means of consolidating the two cases.

A. This Case May Also Decide Whether Congress Has Expressly Prohibited Removal Of Claims Arising Under The Equal Pay Act, Family Medical Leave Act, Employee Polygraph Protection Act, and Age Discrimination In Employment Act.

Petitioner asserts that Congress' use of the phrase "may be maintained" in the FLSA creates an absolute bar to removal of claims arising under the statute. If the Court adopts Petitioner's position, it will create inconsistency in federal employment law. Specifically, defendants would be permitted to remove cases arising under some federal employment laws, but arguably would be prohibited from doing so under a number of others.

As an initial matter, the decision in this case will necessarily impact claims arising under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"), a portion of FLSA. In general terms, the EPA prohibits employers from establishing sex-based discriminatory rates of pay. 29 U.S.C. § 206(d). Since the EPA is part of the FLSA, the decision in this case will also determine removability of EPA claims. 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

Further, Congress has enacted a number of federal laws containing language substantially similar to that used in section 216(b) of the FLSA. By way of illustration, section 2617 of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq*. ("FMLA"), provides, in pertinent part:

> An action to recover the damages or equitable relief prescribed in paragraph (1) ***may be maintained against any employer (including a***

> ***public agency) in any Federal or State court of competent jurisdiction*** by any one or more employees for and in behalf of (A) the employees; or (B) the employees and other employees similarly situated.

29 U.S.C.A § 2617(a)(2) (emphasis supplied). Likewise, section 2005 of the Employee Polygraph Protection Act, 29 U.S.C. § 2001, *et seq*. ("EPPA"), provides:

> An action to recover the liability prescribed in paragraph (1) ***may be maintained against the employer in any Federal or State court of competent jurisdiction*** by any employee or prospective employee for or on behalf of such employee, prospective employee, and other employees or prospective employees similarly situated. No such action may be commenced more than three years after the date of the alleged violation.

29 U.S.C. § 2005(c)(2) (emphasis supplied). Based on the similarities in the statutory language, adopting Petitioner's position would not just affect claims arising under the FLSA, it would arguably prevent the removal of claims arising under the FMLA and the EPPA as well.[5]

---

5. As is true with the FLSA, federal courts are split with respect to the meaning of the phrase "may be maintained" as it is used in the FMLA. *See*, *e.g.*, *Ayotte v. Home Depot U.S.A.*, *Inc.*, 2002 WL 524269 (N.D. Tex. 2002) (permitting removal of FMLA claim); *Lloyd v. Classic Chevrolet*, *Inc.*, 2002 WL 989470 (N.D. Tex. 2002) (relying on *Johnson*, and holding FMLA claims may not be removed). Respondent has not located a case addressing this issue in a claim arising under the EPPA.

Adopting Petitioner's position could also effectively prevent the removal of claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). The relevant language in the ADEA is a bit different than that of the FLSA, FMLA and the EPPA. In particular, the ADEA provides, in pertinent part:

> Any person aggrieved *may bring a civil action in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this chapter.

29 U.S.C. § 626(c)(1). The ADEA also expressly adopts several provisions of the FLSA:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title.

29 U.S.C. § 626(b). And, at least one court has held that the language of section 626(b) requires courts to look to section 216 of the FLSA in evaluating the removability of an FLSA claim. *Lemay v. Budget Rent A Car Systems, Inc.*, 993 F. Supp. 2d 1448, 1449 (M.D. Fla. 1997).[6]

6. Petitioner spends several pages in his brief arguing that if Congress had used the word "bring" in the FLSA, as opposed to the word "maintain," FLSA claims would be removable. Pet. Brief at pp. 17-19. Apparently, this linguistic distinction is lost on some courts, including one in the district in which this case began. *Lemay v. Budget Rent A Car Systems, Inc.*, 993 F. Supp. at 1449.

If the Court holds that FLSA claims are not removable, the opinion could create uncertainty about the removability of claims arising under the EPA, FMLA, EPPA, and ADEA as well. However, these statutes are designed to protect important rights, and plaintiffs and defendants alike have an interest in the consistency provided by the federal court system. Perhaps more importantly, barring removal of claims arising under these statutes will create an anomaly in the law. It will mean that actions arising under some federal employment laws would be removable, while actions arising under other very similar federal employment laws would not be removable.

For example, defendants could remove cases for pay discrimination arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., but would be prohibited from removing a claim alleging identical facts arising under the Equal Pay Act, 29 U.S.C. § 206(d). Claims alleging disability discrimination arising under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*., or cases for race discrimination arising under Title VII could be removed, but claims for age discrimination arising under the ADEA could not. Defendants could remove cases arising under ERISA, 29 U.S.C. § 1001, *et seq*., for denial of an ERISA benefit, but could not remove cases under the FMLA for denial of FMLA leave. Such a system is simply illogical, and there is nothing in the express language of these statutes or their legislative history to indicate that Congress ever intended such an anomaly.

The court below thought it important for this Court "to resolve this issue and bring uniformity to the federal courts" with respect to removal of FLSA claims so that litigants are "not treated with such disparity in our federal

system." *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F. 2d at 1310. Reversing that court's decision, however, would have just the opposite effect.

B. Contrary To Petitioner's Assertion, Cases Arising Under The FLSA Can Have Enormous Ramifications For Employers.

Petitioner also asserts that claims arising under the FLSA often involve small sums of money, so defendants should not be permitted to remove them. Even if Petitioner were correct, this would be a policy consideration better left to the Congress. *Cosme Nieves*, 786 F. 2d at 451; *Valdivieso*, 128 F. Supp. 2d at 1374. Congress could, of course, remedy this situation fairly easily by imposing an amount in controversy minimum for removal of claims arising under the FLSA. Nonetheless, there is no such limitation in the statute.

Petitioner's argument also ignores the fact that FLSA cases can have enormous ramifications for employers, particularly when they are brought as collective actions. 29 U.S.C. § 216(b). The number of significant FLSA collective actions is on the rise. In 1999 alone, plaintiffs filed FLSA collective actions against SunRise Healthcare Corporation through a purported class of "thousands" of nurses;[7] against Longs Drug Stores, a chain with more than 300 stores in six states;[8] and, against a national auto parts company brought by a class of up to 20,000 female employees.[9] Not surprisingly, these cases can result in

7. *See* 103 Daily Lab. Rep. (BNA) A-9, 5/28/1999.

8. *See* 49 Daily Lab. Rep. (BNA) A-10, 3/15/1999.

9. *See* 02 Daily Lab. Rep. (BNA) A-4, 1/5/1999.

sizeable verdicts or settlements. Indeed, in 2001, there were more FLSA collective actions and class actions filed than class actions under the discrimination laws.[10] In just the last several months:

- Perdue Farms, Inc. agreed to pay $10 million to chicken and processing workers to resolve claims that it violated state and federal wage and hour laws by refusing to pay them for time spent putting on, taking off, and cleaning sanitary and protective equipment;[11] and

- Royal Caribbean Cruise lines announced that it was taking a $20 million charge in connection with settling an overtime lawsuit brought by past and current crew members.[12]

Petitioner's argument ignores another important point. FLSA defendants generally have no incentive to remove cases involving *de minimus* amounts because the FLSA provides that a plaintiff receive attorney's fees "in addition to any judgment awarded." 29 U.S.C. § 216(b). This language is both mandatory and one-sided. In other words, if the plaintiff prevails, the court must award attorney's fees, but if the defendant prevails, the court may not award attorney's fees.

---

10. *See* Eugene Scalia, Address at the 2002 Annual Meeting of the American Bar Association, Section of Labor and Employment Law, August 12, 2002, *reprinted at http://www.dol.gov/sol/media/speeches/abaspeech8-12-02.htm*; *see also* "Class actions for overtime on the rise" *Labor Law Reports Insight*, Issue 1299, No. 838, Part 2, December 26, 2002.

11. *See* 203 Daily Lab. Rep. (BNA) A-11, 10/21/02.

12. Gordon, Joanne, *C.H. Robinson Clocks More Lawsuit Miles*, http://www.forbes.com/2002/12/05/cz_jg_1205overtime.html.

See e.g., *Kraeger v. Solomon & Flanagan, P.A.*, 775 F. 2d 1541, 1542 (11th Cir. 1985); *Shelton v. Ervin*, 830 F.2d 182, 184 (11th Cir. 1987) ("Section 216 provides for an award of attorney's fees, as opposed to granting the court discretion in awarding such fees, to the prevailing plaintiff in FLSA cases."). Because of the remedial purpose of the statute, courts do not "place undue emphasis on the amount of the plaintiff's recovery," and uphold "'substantial awards of attorney's fees even though a plaintiff recovered only a nominal amount.'" *Fegley v. Higgins*, 19 F. 3d 1126, 1135-35 (6th Cir. 1994) *quoting Posner v. The Showroom, Inc.*, 762 F.2d 1010, 1985 WL 13108 at *2 (6th Cir. 1985) (unpublished). Thus, even small judgments can result in large fee awards.

C. Federal Courts Have More Experience Than Their State Court Counterparts With The FLSA.

Federal judges are far more experienced in dealing with FLSA claims than are their state counterparts, and there is no evidence that Congress intended to deny defendants access to that expertise. *See*, *e.g.*, *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990) (noting that federal judges have more experience with Title VII claims than do their state court counterparts, and characterizing this difference in experience as a factor that may motivate defendants to remove such cases to federal court). Indeed, the entire body of law on the FLSA is primarily federal. Research reveals that there are 1,819 reported state court decisions addressing the FLSA in one way or another.[13]

13. The research was performed on Westlaw on February 20, 2003. The search string, which was run in Westlaw's ALLSTATES database was as follows: FLSA or "Fair Labor Standards Act" or F.L.S.A.

By comparison, there are more than two times as many reported federal court decisions addressing the FLSA ***in the last ten years.***[14] The gap in experience is even more pronounced when claims arising under FMLA and ADEA are included in the calculation. Over the last ten years, there have been more than 16,000 reported federal decisions interpreting the FMLA, the ADEA or both.[15] State courts, on the other hand, have addressed these same statutes in only 1,913 reported cases.[16]

This disparity in experience would not be so much of an issue if the FLSA were a simple statute, but it is not. More than six hundred pages in the Code of Federal Regulations are devoted to both interpreting and expanding upon the provisions of the FLSA. *See* 29 C.F.R. Parts 500-899 (2001). Some of these regulations are enormously complex. For example, in this case, Respondent has alleged a defense based upon 29 C.F.R. § 778.114. This regulation permits an employer, under certain circumstances, to pay its employees a fixed salary for working fluctuating workweeks. It describes the circumstances upon which such a salary may be

---

14. Research on February 20, 2003 in Westlaw's ALLFEDS database using a date restriction designed to search for cases reported on or after January 1, 1993, and applying the same search string identified in the previous note produced 3,675 results.

15. This research was also performed on Westlaw on February 20, 2003. The search string included a date restriction designed to search for cases reported on or after January 1, 1993, and was as follows: FMLA or ADEA or A.D.E.A. or "Age Discrimination in Employment Act." The search produced 16,799 results.

16. This research was performed on Westlaw on February 20, 2003. The search string did not include a date restriction, and was as follows: FMLA or ADEA or A.D.E.A. or "Age Discrimination in Employment Act."

paid, and it sets out a formula for calculating overtime payments when the method is applicable. 29 U.S.C. § 778.114. The regulation is difficult to understand, and even more difficult to apply to a given set of facts. State courts have addressed this specific regulation in eleven reported cases.[17] There are, on the other hand, more than four times as many reported federal decisions that touch upon the regulation.[18]

Respondent does not mean to suggest that state court judges are incapable of interpreting the FLSA or the regulations promulgated pursuant to the statute. Instead, Respondent simply submits that given the language of the relevant statutes, defendants who wish to take advantage of the federal courts' experience in addressing the issues raised by the FLSA ought to be permitted to do so.[19]

---

17. This assertion is based on research performed on Westlaw on February 20, 2003. The search was performed in Westlaw's ALLSTATES database using the search string: 778.114 /s Fixed. It produced 11 results.

18. This assertion is based on research performed on Westlaw on February 20, 2003. The search was performed in Westlaw's ALLFEDS database using the search string: 778.114 /s Fixed. It produced 49 results.

19. Respondent does not have employees outside the state of Florida. Nevertheless, it seems apparent that state courts could have varying interpretations of individual regulations promulgated pursuant to the FLSA. This would, of course, make it extremely difficult for multi-state employers to comply with the statute.

D. Removal Eliminates The Risk Of Simultaneously Litigating The Same Issue In State and Federal Forums.

Lastly, an order reversing the decision below could place employers in the untenable position of litigating cases involving identical issues against two employees in two different courts. The problem can be illustrated with a hypothetical. Suppose that two employees of ABC Company file claims arising under the FLSA on the same day, one in state court and the other in federal court. If the state court case is removable, then the claims can be consolidated and the issues addressed by a single judge.[20] If the state law case cannot be removed, there is no mechanism for consolidating the two cases. ABC Company would be forced to defend the two cases in different forums. More importantly, ABC Company is at risk of receiving conflicting rulings placing it in the Catch-22 of choosing which of the two rulings to follow. Such an outcome is irrational, and there is nothing to indicate that Congress intended such a result.

---

20. There are any number of ways that this can happen. For example, Rule 42, Federal Rules of Civil Procedure, permits consolidation where two cases within the same district involve common questions of law or fact. Fed. R. Civ. P. 42(a). And the same factors that support consolidation may be considered in ruling on a motion to transfer venue. *See*, *e.g.*, *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 24-25, 4 L. Ed. 2d 1540, 80 S. Ct. 1470 (1960); 28 U.S.C. § 1404(a). Moreover, actions arising under the FLSA and pending in different districts may be consolidated in accordance with 28 U.S.C. § 1407. *See In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litigation*, 196 F. Supp. 2d 1373, 1374-75 (J.P.M.L. 2002).

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Eleventh Circuit Court of Appeals correctly affirmed the district court's order denying Petitioner's motion for remand. As a result, Respondent requests that this Court affirm the decision below.

Respectfully submitted,

ANDREW S. HAMENT*
GRAY HARRIS & ROBINSON, P.A.
1800 West Hibiscus Boulevard
Suite 138
Melbourne, FL 32901
(321) 727-8100

GREGORY WILLIAMSON
HOLLAND & KNIGHT LLP
50 North Laura Street
Suite 3900
Jacksonville, FL 32201
(904) 798-5424

Attorneys for Respondent

* *Counsel of Record*

APPENDIX — STATUTES EXPRESSLY PROHIBITING REMOVAL

28 U.S.C. § 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under section 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States.

(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

Appendix

The Securities Act of 1934 provides, in pertinent part:

15 U.S.C.A. § 77v Jurisdiction of offenses and suits

> (a) Federal and State courts; venue; service of process; review; removal; costs
>
> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Appendix

The Interstate Land Sales Full Disclosure Act provides, in pertinent part:

15 U.S.C.A. § 1719. Jurisdiction of offenses and suits

> The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this chapter and under the rules and regulations prescribed by the Secretary pursuant thereto, and concurrent with State courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of Title 28. No case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party. No costs shall be assessed for or against the Secretary in any proceeding under this chapter brought by or against him in the Supreme Court or such other courts.

Appendix

The Condominium and Cooperative Conversion Protection and Abuse Relief Act provides, in pertinent part:

15 U.S.C.A. § 3612. Concurrent State and Federal jurisdiction; venue; removal of cases

> The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction under this chapter and, concurrent with State courts, of actions at law or in equity brought under this chapter without regard to the amount in controversy. Any such action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place and process in such cases may be served in other districts of which the defendant is an inhabitant or wherever the defendant may be found. No case arising under this chapter and brought in any State court of competent jurisdiction shall be removed too any court of the United States, except where any officer or employee of the United States in his official capacity is a party.