IN THE SUPREME COURT OF THE UNITED STATES

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PHILLIP T. BREUER, :

Petitioner :

v. : No. 02-337

JIM'S CONCRETE OF BREVARD. :

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Washington, D.C.

Wednesday, April 2, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

DONALD E. PINAUD, JR., ESQ., Jacksonville, Florida; on behalf of the Petitioner.

ANDREW S. HAMENT, ESQ., Melbourne, Florida; on behalf of the Respondent.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 02-337, Phillip T. Breuer versus Jim's Concrete of Brevard.

Mr. Pinaud.

ORAL ARGUMENT OF DONALD E. PINAUD, JR.

ON BEHALF OF THE PETITIONER

MR. PINAUD: Mr. Chief Justice, and may it please the Court:

This case is about the vitality and scope of the rule of construction from Shamrock Oil that says that the removal jurisdiction to Federal courts should be narrowly construed.

As we see it, the overarching question in this case is, as posed by respondent, whether or not the rule from Shamrock Oil applies to cases brought in State court, but based upon a Federal question. We think it has to for three reasons, and I'd like to, if I can, list them, and then I'll go back and -- and cover each of them individually.

First, respondent proposes an unworkable distinction whereby the -- whereby Shamrock Oil is not to be applied where a case is brought under the Fair Labor Standards Act alone, but it should be applied if it's

brought together with some State law claims.

Secondly, Florida has a right to protect its citizens.

And thirdly, the Fair Labor Standards Act is just -- just as much a part of the law of Florida as any act of the Florida legislature or any decision of the Florida courts.

Let me cover that first point first, which is the unworkable distinction.

Respondent concedes that Shamrock Oil would certainly apply in a situation where a State law claim was being brought together with a Fair Labor Standards Act claim. In this case we did not bring a State law claim. We only brought a Fair Labor Standards Act claim. We could have, but we didn't.

If you were to -- if you were to have that rule, you would have a situation where whether or not Federal jurisdiction was proper would be wholly dependent upon whether a State claim was brought with Federal action. We don't think that --

QUESTION: But there are unworkable aspects to your position, Mr. Pinaud. For example, a Title VII case combined with an equal pay case, the equal pay case could not be removed, but the Title VII case could, and then you would split what is essentially one controversy into two

parts because one is -- is not removable.

MR. PINAUD: Well --

QUESTION: The equal pay would be governed by the same thing as --

MR. PINAUD: There is --

QUESTION: -- the Fair Labor Standards Act.

MR. PINAUD: There is, I think, no question that the Equal Pay Act and the Age Discrimination Act -- Age Discrimination Enforcement Act would be covered by the Court's decision in this case because the enforcement provisions of those statutes are tied to the Fair Labor Standards Act.

QUESTION: And if you're right -- if you're right -- the equal pay case would have to stay in the State court, although the Title VII case could go forward in the Federal court.

MR. PINAUD: That would be correct.

The -- the second reason that I think Shamrock Oil applies in this case is because Florida has a right to protect its -- its citizens. This is a dispute between Phillip Breuer, Mr. Breuer, who is a resident of the State of Florida who lives in Duval County, who works for Jim's Concrete of Brevard, which is a company in Brevard County, in an employment relationship that took place in Florida, governed by Florida law. They worked in many counties in

Florida. Certainly then Florida has an interest in that relationship and in this dispute. This is not a case like Asahi where you have a -- a California court looking at a dispute between a -- you know, a Taiwanese company and a Japanese company. Florida has an interest.

The third point is that the Fair Labor Standards Act is just as much a part of the law of Florida as any decision of the Florida legislature or any -- or any opinion of its court. Under the Supremacy Clause, the laws of the United States are the laws of Florida. Florida courts have an obligation, an absolute duty, to enforce and uphold the Fair Labor Standards Act just like they have to enforce and uphold the -- the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment. It -- it would be unrealistic to say that Florida has an obligation to uphold these laws, but then has no right or no interest in having them upheld in -- in Florida courts.

So for -- for those reasons, we think that Shamrock Oil certainly has to apply to this case.

If you then go ahead and -- and apply the Shamrock -- the Shamrock analysis to either the expressly provided language of 1441 or the maintain language of the Fair Labor Standards Act, you have to reach a decision that these cases are -- are not properly to be subject to removal.

QUESTION: Well, one can certainly maintain an action in the Florida courts, and unless it's removed, it will continue there. I -- I -- it doesn't seem to me that using the word maintain means that the action must necessarily remain there.

MR. PINAUD: Well, Mr. Chief Justice, obviously it's our position that maintain in this case does mean that it should remain in State court, and we think it's for a couple of reasons.

The first reason we would say is that once you apply the Shamrock analysis, maintain has to mean what we say because in the very worst-case scenario, at least for our position, maintain is ambiguous or -- or capable of two different constructions. Everybody here has argued -- the Government argues and respondent argues -- that it's ambiguous. Well, if it's ambiguous, if it's capable of meaning you can maintain to a conclusion in State court, or if it is, rather, capable of meaning that you can only really bring or commence it, then under Shamrock Oil, when we apply that analysis, we should use the conclusion that most limits removal, which would be to -- which would be to say that maintain means you continue on to -- to final judgment.

QUESTION: Well, except -- except that you have a later statute that says that it's removable unless --

unless it is expressly provided otherwise.

MR. PINAUD: Justice --

QUESTION: And I don't think something that is ambiguous expressly provides otherwise.

MR. PINAUD: Well, Justice Scalia, I think what you have to do, though, is I think when looking at the expressly -- expressly otherwise provided language, you have to -- first, you have to apply Shamrock Oil to that language. Now, it's -- it's our position that when Congress used the word expressly provided, otherwise expressly provided, it meant it in a textual sense.

That is, the word expressly is capable of two different meanings itself. It can mean super clear or absolutely unambiguous, or rather, it can mean grounded in some text. Because it's capable of two different meanings, we think that when you apply Shamrock to expressly, you choose the textual meaning because the textual meaning shrinks removal considerably whereas the other meaning expands it. But I think --

QUESTION: And your reading of the word maintain -- and your whole case hangs on that word, maintain -- suppose the case were brought initially in a Federal court, and there were -- there was a motion, a 1404(a) transfer motion, to transfer the case from one district court to another. I take it on your reading,

1404(a) couldn't apply either because you would have to -- if the plaintiff chose to maintain it in one Federal court, therefore it couldn't be switched to another?

MR. PINAUD: Justice Ginsburg, I -- I don't think that would be the case. I -- I don't think that that's really analogous to the situation of bringing it from the State court to the Federal court. It's -- it's -- the -- the forum choice I think is significantly different. When the employee brings his action in State court, he's choosing that State -- that State forum, and it's for a reason. And -- and we think that -- that those reasons are -- are actually well articulated in -- in the Government's 1947 brief when they were actually supporting our position. So I -- I don't think it's --

QUESTION: But if you're relying on the language of the statute, maintain in any Federal or State court, any State court, any Federal court. So if you are conceding that you could transfer from one Federal court to another, then the plaintiff's choice doesn't inevitably prevail.

MR. PINAUD: Well, I think then my -- my answer to that would have to be the rule from Shamrock Oil says if there's two reasonable interpretations, we -- we make a decision that limits removal. I'm not sure it's reasonable to say that if you bring it in one Federal

court, it can't be transferred to -- to another Federal court on -- on the -- the concerns would -- that would give rise to it.

If I could go back, just a moment, to what I was talking about, the -- the expressly provided language, addressing your question, Justice Scalia. We also think that the expressly provided language has to be the textual basis based upon this -- this Court's construction of 28 U.S.C. 2283. That's the anti-injunction statute. In that statute, Congress has provided that no -- that no Federal court shall issue an injunction to enjoin a State court proceeding unless expressly authorized by Congress. We're dealing with expressly provided language in 1441. We see the language as completely indistinguishable.

In Mitchum v. Foster, this Court construed that language in 2283 as saying, look, that language does not mean that you have to have a -- a statute that says you can issue an injunction. Rather, what the Court said was, we look at the scope -- we look at the purpose and intent of the statute and say is the purpose of -- and intent of the statute to allow an injunction. So really, what the Court is saying in -- in Mitchum --

QUESTION: That was just a magic language case. I mean, I think all it was saying is you don't have to use the -- the very words so long as you have clearly made

that disposition, but I don't know that I would go so far as to say that it -- it stands for the proposition that something has been expressly provided for when there is simply an ambiguous provision that might be interpreted that way, but then, on the other hand, might not be interpreted that way, which is -- which is what I think you have to fairly say about maintain.

I -- I don't think your maintain argument goes anywhere unless you apply to it the -- the rule of preference that you're urging upon us, that -- that you have to interpret it so as to prevent removal rather than permit it. But that -- that preference is eliminated by the later statute unless you -- unless you interpret that expressly to mean that an ambiguous provision expressly provides, and I just find it hard -- hard to swallow that. And I just don't see any of our cases that -- do you have a case that deals with what was truly an ambiguous provision and -- and nonetheless said that it expressly provided for something?

MR. PINAUD: I -- I don't have -- there -- there is no case that I know of that would be on point in -- in this situation, Justice Scalia. But I would also add that we do not -- though we think that the first analysis should start with Shamrock because -- the first analysis of maintain should start with Shamrock because at best

everyone -- everyone agrees that the statute is ambiguous and that is -- that is, that the respondent and the Government would say, well, it could mean this but maybe it doesn't. I don't think we say that it's -- that everything hangs or falls on Shamrock necessarily.

If you look at the way maintain was used in the Fair Labor Standards Act, we think that the word maintain is an express prohibition -- prohibition on its own. This is not just our opinion. This was the opinion of the -- of the majority of judges, the majority of courts that construed the statute prior to the 1948 amendment. It was also the opinion of the United States back in 1947.

QUESTION: What's the reason? I mean, leaving the word out of it, I mean, normally the background rule is -- this is an -- case arising under Federal law, and the background rule through removal is if either party wants to go into Federal court, you can. Now, you say there's an exception for this statute. Why?

MR. PINAUD: We believe that the word maintain --

QUESTION: I understand the linguistic point. I'm saying leave the linguistic point out. Why?

MR. PINAUD: Justice Breyer, I'm not exactly sure why we --

QUESTION: What -- what reason would there be

that people would want to make an exception for this statute, the normal -- I'm not saying there is none. I just want to know what the reason is. The -- the normal -- I would be just repeating myself. Have you got what I'm saying?

MR. PINAUD: I -- I think I understand what you're saying now --

QUESTION: Yes, all right.

MR. PINAUD: -- Your Honor.

The -- the reason why Congress wanted an exception in the Fair Labor Standards Act to allow employees to bring these cases in -- in State court --

QUESTION: Or Federal, yes. Give them a choice.

MR. PINAUD: Well --

QUESTION: Is because? They can bring it either place. Right?

MR. PINAUD: Well, they can -- they can bring it in -- in either place. I mean, there would be no reason why Congress --

QUESTION: The reason why Congress would want employees to have a choice, but would not want the defendant to have the choice or bring it to State court, unlike other Federal statutes is?

MR. PINAUD: Because in 1938, when this statute was passed, it was difficult for many employees around the

country to -- to effectively vindicate their rights for unpaid overtime if they had to go to Federal court. This is --

QUESTION: Mr. Pinaud, that's the same thing with respect to the FELA, and -- and Congress therefore expressly provided that if a railroad worker brings a case in State court, it cannot be removed. And Congress was responding to the problem of the person who would find it difficult to go to the big city to litigate in the Federal court rather than stay in the State court close to home. And so doesn't the -- the fact that Congress expressly provided that FELA cases are not removable cut against you?

MR. PINAUD: Justice Ginsburg, I -- there are certainly cases -- certainly statutes where Congress has said this is not removable. We don't think that Congress is to be held to a standard where they have to use magic language in order to prohibit removal. We think that the -- the real analysis should be what was Congress intending by the statute at issue or else you --

QUESTION: But -- but before the -- the 19 -- what was it -- what? 1445 -- before 1948, were FELA cases removable?

MR. PINAUD: I'm not sure. I -- I will say this. Before 1948, you know, Congress had used language

in other statutes that said you can't remove it, and -- and we recognize that. But if you -- if you hold Congress to this magic language statute, then -- then nothing they could do or nothing they could intend would matter unless they use this specific language, and we're not sure that that's what the standard should be.

QUESTION: But we have a string of specific statutes, and then we have 1445 that lists in a row non-removable actions, a catalog of actions that are not removable. And this one is left out. Wouldn't one infer from that, well, they --

MR. PINAUD: Well -- I'm sorry.

The -- the Reviser's Notes to the -- the 1948 revisions are rather meticulous. They talk about everything they're accomplishing and what they're trying to do. I -- I think it's noteworthy that with all the changes that were made to the other sections, like section (c), the other subsections, that in order to accept the proposition proposed by respondent, you would have to conclude that Congress throughout, with these other sections of 1441, certainly intended to contract removal, but yet with 1441(a), it grossly expanded removal. I mean, this is a time now where Fair Labor Standards Act cases were generally considered to be not removable. That was the prevailing opinion.

There's no mention in the -- in the Reviser's Note or any of the history to the statute that -- that Congress even thought about the Fair Labor Standards Act, so I think the more realistic assumption in the enaction of -- of that legislation was that Congress accepted the -- the prevailing opinion which was that maintain was good enough, that maintain was an express prohibition against removal.

The -- when you're looking at the word maintain, also I think it's to see obviously the -- the public policy concerns that I was just addressing with Justice Breyer, but we do think it's important, as did the Government back in 1947, that in enacting this legislation, as it was -- originally appeared back when it was passed, Congress used the word maintain within 38 words in the same sentence. Congress said an action may be maintained in any court of competent jurisdiction, and then 38 words later, it said it may be maintained by an agent or representative of the employee. If you were to -- if you were to assume that maintained does not mean what this Court essentially has said it meant in the George Moore and Smallwood cases -- and that is that maintain means to -- to continue on -- to continue or uphold, continue on foot a suit already commenced --

QUESTION: When -- when you say that the -- the

provision said it could be maintained by an employee, that sounds more like a synonym for brought by the agent of the employee, that the action could be brought an agent of the employee, which of course does not help you.

MR. PINAUD: Well, the way I think we look at it, Mr. Chief Justice, is certainly Congress could not have meant by saying it could be maintained by an agent of an employee that he can file it, bring it, and then somehow have the case ripped from his control. That is why we think that if you --

QUESTION: Well, but that -- that's the case in any case of a Federal statute covered by the removal statute unless -- unless Congress says otherwise. I mean, to say it's ripped from his control by being removed, that happens all the time.

MR. PINAUD: Oh, no. I'm sorry, Mr. Chief Justice. That -- that's not what I mean. I don't -- I'm talking about when -- when the Fair Labor Standards Act was originally enacted -- it -- it no longer appears with this language.

When it was originally enacted, it said, an action under this section may be maintained in any court of competent jurisdiction, which we all agree is -- includes a State court. And it also said in the same sentence that that action can be maintained by an agent or

representative of the employee so that he didn't have to do it himself. Somebody else could do it for him.

And the point that we're making is certainly when Congress said that that other person can maintain it, they didn't mean that that person could start the case and then have the case ripped from him and have somebody else take it over. So if you -- if you --

QUESTION: Well, ripped from him in what manner?

MR. PINAUD: Well, that's exactly it, Mr. Chief Justice. If -- if you were to accept the argument proposed by respondent, you would have to accept that the -- the agent or representative of the employee in 1938 could file the case, but then after he filed it, somebody else or someone would have the authority to divest him of his right to prosecute it.

QUESTION: Are -- are you talking about removal?

MR. PINAUD: No.

QUESTION: So you -- you -- when --

MR. PINAUD: I'm --

QUESTION: -- you say ripped from him, you're not talking about the effect of removal.

MR. PINAUD: No.

QUESTION: What are you talking about?

MR. PINAUD: I am talking about what could the word -- I -- I was responding to a -- a question by

Justice Ginsburg about the definition and -- and so forth of maintain. And the point I was making is that maintain has to mean more than simply start or bring or something like that just because, if for no other reason -- if you put aside Shamrock and you put aside the policy arguments, for no other reason that Congress in this statute, in the Fair Labor Standards Act, when it enacted it, used the maintain twice, one to mean you can maintain the suit and one to mean that a person can maintain it for you on your behalf. And obviously, if Congress is going to give the employee the right to have an agent maintain the suit for him or her, certainly they didn't mean you can just bring it and then somehow, not for removal purposes, but you won't have the authority any more to prosecute it.

QUESTION: But you won't if the employee that you're representing says, I don't want you, I want another representative. Then you can no longer maintain it.

MR. PINAUD: Well, I -- that's -- I suppose that would probably be the -- be the case, but I -- I think that's -- I think that's more -- that's more akin to dismissal. I mean, if an employee brings a case in State court and brings a case in Federal court, I mean, they can always -- they wouldn't be maintaining it if they themselves choose to -- to abandon it.

QUESTION: No. He said, I -- I want -- the

employee says, I don't want you as my agent. I want somebody else.

MR. PINAUD: Yes, Justice Ginsburg, but that would be the employee's decision. That would be no different than saying an employee can maintain the case in State court when --

QUESTION: I'm just questioning your -- your saying no one could -- you couldn't wrench the case from the agent because the word maintain is used. Well, of course, the employee could wrench it from him and give it to somebody else.

MR. PINAUD: Yes, Justice Ginsburg. The employee could wrench it from him just as the employee who was maintaining his suit could choose to dismiss it. I mean, the employee controls the suit. I think it's more analogous to the -- to the employee's power --

QUESTION: But nobody else could appoint an agent. So I can't see the other wrencher in the picture.

MR. PINAUD: Well, if the -- the point I -- I am trying to make is that if this representative is maintaining the suit for the employee, if it only means bring, then one could conceivably fashion reasons why that person wouldn't have a -- would not be able to continue on foot that suit aside from the employee.

I -- I know we're kind of dealing with -- with

the semantics of the word, but I think it's important to show that the word means more than just bring or commence. At this same time also -- and we've cited the statutes in our brief -- the -- the Government passed a whole host of laws where they used words like bring and commence. Why choose the word maintain if it doesn't mean something -- something more in -- in this case?

Also -- and I know I've mentioned this a couple times -- the word maintain itself -- it was the prevailing opinion back then, before 1948, that maintain was express. That is the exact language that the Government used in its brief filed in the Johnson case, that this was an express prohibition against removal. So these are the people that lived contemporaneous at the time, that understood the -- the public policy arguments of it, that understood the -- the semantics of it, that understood presumably the intent of it. And we think that that -- those are entitled to some weight.

There's -- you know, there is another argument that is addressed by respondent that, you know, State court judges are -- are not competent to handle these -- these kind of things. Or I shouldn't say competent, but they're not experienced enough to handle it and so forth and so on. We don't think that that's realistic. State courts handle matters of Federal jurisdiction all the

time. We depend upon State courts to interpret the Constitution and properly apply the Fourth, Fifth, other amendments. There's no reason why they -- they can't handle Fair Labor Standards Act cases, and they handle them all the time. We filed many -- we have brought many Fair Labor Standards Act cases. Most are removed to Federal court because removing to Federal court makes the case take a lot longer.

QUESTION: No one would suggest that a State court isn't competent to hear an ordinary tort case, an ordinary contract case, but if there's a diversity of citizenship, it can be removed to the Federal court. Removal doesn't mean that the State court is in -- in any respect incompetent.

MR. PINAUD: I agree. I don't think removal means that the State court is incompetent. I -- I was addressing an argument made that essentially that, well, State court judges don't have enough experience, they're not -- Federal courts are better at handling these things. I don't think that that's fair nor realistic. State courts handle these matters all the time.

Fair Labor Standards Act cases are not overly complex. They're certainly not as complicated as Title VII cases which States handle all the time and handle their own similar anti-discrimination cases all the

time. So there -- there's just no -- that particular argument made by respondent we don't believe has much import.

Mr. Chief Justice, I'd like to reserve the balance of my time.

QUESTION: Fine, Mr. Pinaud.

MR. PINAUD: Thank you.

QUESTION: Mr. Hament.

ORAL ARGUMENT OF ANDREW S. HAMENT

ON BEHALF OF THE RESPONDENT

MR. HAMENT: Mr. Chief Justice, and may it please the Court:

Since 1875, a defendant in a civil action has had a right to remove a case arising under Federal law to a U.S. district court. This right is currently codified in 28 U.S.C. 1441(a), which authorizes a civil action -- the removal of a civil action of which the Federal district court has original jurisdiction except as otherwise expressly -- otherwise expressly prohibited by an act of Congress. The except as otherwise expressly provided language was added in 1948.

The court below correctly ruled that respondent had a right to remove this case for three reasons.

First, the plain language of 1441(a) which allows removal of a case arising under Federal law, such

as a Fair Labor Standards Act case, unless Congress has expressly prohibited removal. There is nothing in the text of the Fair Labor Standards Act or its legislative history which even mentions the word removal much less expressly prohibits it.

Second, Congress has explicitly prohibited removal in a series of enactments, and when it has done so, it has used very explicit language directly referring to removal.

Third, the words, may be maintained, in any court -- or any Federal or State court of competent jurisdiction in the Fair Labor Standards Act is identical to language that Congress has used in other statutes, including the Family Medical Leave Act and the Employee Polygraph Protection Act. If this Court were to rule that removal is barred under the Fair Labor Standards Act, then this would affect those statutes. And again, there is nothing in the text of those statutes which suggests that Congress was attempting to prohibit removal. The word is not mentioned in the text or the legislative history.

When Congress has prohibited removal in a series of statutes, starting in 1910, it has very directly used the word removal, and this has happened both before and after it enacted the Fair Labor Standards Act in 1938.

In fact, in 1948, Congress created a section of

the 28 -- Title 28 under section 1445 and entitled it Non-Removable Actions.

In 1910, Congress stated that certain railroad -- cases against railroads under the Federal Employer Liability Act, FELA, that actions arising under those laws may not be removed -- used the words, may not be removed.

In 1914, Congress passed an enactment stating that certain actions against common carriers may not be removed.

In 1933, they passed the Securities Act and used the words, shall not be removed.

So these laws were in place using very direct language when the Fair Labor Standards Act was enacted in 1938.

Since the Fair Labor Standards Act was enacted, we have examples of four different laws that were passed by Congress, some in 1441(a), some stand alone, that use the words, may not be removed or shall not be removed. The last one was the actions under the Violence Against Women's Act of 1994. So we know from example after example what Congress had in mind in 1948 when it used the words, except as other expressly provided.

QUESTION: But the Wage and Hour Division didn't. In 1947, it expressed the opinion that Fair Labor

Standards Act cases were not removable.

MR. HAMENT: Number one, Justice Ginsburg, at this point the Department of Labor has changed their position, and I think that's because of the addition in 1948 of the very express standard that except as otherwise expressly provided by an act of Congress, this type of case would be removable.

QUESTION: Well, what do we care what their position is? This is not a matter that's within their administration, is it? Do they administer the -- the removability of matters in -- in Federal courts?

MR. HAMENT: No, Your Honor.

QUESTION: So, you know, their -- their view on that matter is -- is no more persuasive than -- than yours, if I may say so.

(Laughter.)

QUESTION: And yours might be very persuasive. They have the --

(Laughter.)

QUESTION: They have the power to persuade, and they're knowledgeable.

MR. HAMENT: Respondent's relying on the view of Congress which set forth a very clear standard in 1441(a) that these types of actions are removable unless expressly prohibited, and we're relying on Congress.

QUESTION: Is your position they were never removable or that the law changed in 1948?

MR. HAMENT: Our position is that they were never removable.

QUESTION: And the -- the Department was just wrong on its opinion.

MR. HAMENT: Correct, Your Honor.

QUESTION: Though what he I guess was driving at is what the -- in 1938, the year I was born, I'm in San Francisco, but there are a lot of workers down in Salinas putting artichokes in cans. And their employer perhaps was violating the law, so they go into the State court in Salinas and the employer runs up to San Francisco. And once he can remove that case to San Francisco, it's too expensive for the employee to run up there. And that was why your opponent says they -- they wrote this statute. They used the word maintained, and the administrator who was present at the creation, so to speak, had followed that for quite a long period of time.

Now, you're -- you're saying look at the language. The language just isn't good enough. Is there anything else you want to add on that?

MR. HAMENT: Well, Justice Breyer --

QUESTION: You know, on the purposive part.

MR. HAMENT: Yes. Yes. Justice Breyer,

there -- there is no legislative history to support that Congress was intending to prohibit removal for that or for -- or for any other reason. And -- and yes, in -- there are small claims that are possible under the Fair Labor Standards Act, but there are also very large claims, including very large collective actions. If Congress wanted to put a limit on the amount of claim that could be brought in a Federal court, then Congress could certainly do that, as it has done in other statutes, and as -- as it has also done in limiting removal of certain cases based on amount. But Congress hasn't chosen to do that.

Turning to the point of the effect of a ruling that these words, may be maintained, could bar removal under the Fair Labor Standards Act, as mentioned and as counsel for the petitioner concedes, this would also prohibit removal under the Family Medical Leave Act, the Employee Polygraph Protection Act --

QUESTION: Well, it might if you -- it might not if you, in fact, did put considerable weight on the knowledgeable views of the -- of the administrators who were present at that time and the presence of a good reason for wanting to have achieved that result. I -- I grant you, I see problems with the approach I'm enunciating, but -- but it wouldn't necessarily change those other acts.

MR. HAMENT: I -- I think the problem would be that the Court would have to -- to eliminate from 1441(a) the expressly provided otherwise language to -- to achieve that result.

QUESTION: Is it meant to apply retroactively in 1948 to those statutes passed preceding 1948?

MR. HAMENT: I believe -- I believe it was. If you look at the timing of the addition of that language in 1948, at that time, the right to remove didn't have the expressly provided otherwise exception. It just was a right to remove, and it was at that time codified in 28 U.S.C., section 71, which had the right to remove.

But coupled in that same paragraph were two examples of cases where Congress said there was no right to remove, the FELA action and the action under the Interstate Commerce Act dealing with loss of -- or injury under certain actions against common carriers. So right in the same paragraph was this language, may not remove these two types of cases.

When they reorganized, they moved that language to 1440 -- 1441 -- 1445 and I think they were just making clear, when they left the right to remove, that they may from time to time, as they have, expressly prohibit removal of certain actions. So I -- I think the -- the addition of that language changed nothing. It is just

simply adopting what the Congress had already applied as a standard.

QUESTION: Are you saying then what it did was to clarify what was ambiguous before, and the clarification made it apparent that the Wage and Hour Division had been wrong? Is that -- is that your argument?

MR. HAMENT: I would be a little disingenuous if I said I think that Congress had looked to the Wage and Hour brief or the Johnson decision in doing that. I'm not sure that they did and my guess is --

QUESTION: But in any -- in any event, they clarified --

MR. HAMENT: Right.

QUESTION: -- what they did in 1948 so the error of the Wage and Hour Division --

MR. HAMENT: To the extent they --

QUESTION: -- meaning --

MR. HAMENT: -- considered it, they overruled it because Johnson in that case, although it reached the rule that -- that there was no removal by implication, said repeatedly in the decision that Congress was not clear in expressing its intent. So to the extent that Congress was paying attention to Johnson, it overruled it with the expressly provided other language in 1948.

If removal were barred in this case, just to finish on the point of the effect on these other laws, you could have a very problematic situation, which I'm sure Congress never intended, of having, for example, an age discrimination case which would not be removable under the ADEA, but a race discrimination case under Title VII that is removable, or a handicap or disability discrimination case under the American with Disabilities Act which would be removable. You'd have ERISA claims which would be removable, but not claims for leave benefits under the Family Medical Leave Act. You'd have a Title VII sex discrimination claim due to unequal pay that would be removable, but not an Equal Pay Act case under the Fair Labor Standards Act. And again, there's no indication that Congress, in using the words, may be maintained -- it simply confers right of action -- would have ever intended this effect.

Finally, I'd like to just briefly address petitioner's argument in the reply brief dealing with Mitchum v. Foster. They're arguing that there's similar language in the anti-injunction statute which says that except as expressly authorized, a State court injunction -- a -- a Federal court may not enjoin a State court, and relies on Mitchum. This reliance is misplaced.

First, the underlying law in Mitchum was the

Civil Rights Act, the 42 U.S.C. 1983 action. And the Court determined that the power to enjoin a State court under that statute was inherent in the necessary and indispensable power to remedy civil rights violations. And the -- the right to enjoin State court actions was absolutely essential to the purpose of 1983.

Second, the Court observed that it had a long history of making exceptions to the anti-removal statute without directly referring to the anti-removal statute or State court injunctions.

And third, in --

QUESTION: Are you talking about the Anti-Injunction Act or the anti-removal statute?

MR. HAMENT: Anti-injunction statute, I'm sorry.

And third, in Vendo Company versus Lektro, this Court said that the fact that in Mitchum there was no direct reference to the anti-injunction statute or staying State court injunctions was cured by the fact that there was relevant legislative history.

None of those factors are present here. Obviously, the Fair Labor Standards Act does not rise and fall on this removal issue. Second, Congress has repeatedly made exceptions very expressly and directly referring to removal when it made an exception. And third, there is no legislative history.

For these reasons, the respondent respectfully requests that this Court affirm the Eleventh Circuit's decision that this case was removable.

QUESTION: Thank you, Mr. Hament.

Ms. Blatt, we'll hear from you.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

The general policy of the removal statute is to give the defendant the same right as the plaintiff to have his case heard in Federal court. The removal statute achieves that objective by permitting the defendant to remove an action to -- to Federal court if the plaintiff could have originally filed his suit there.

There is no dispute in this case that the plaintiff could have filed this action in Federal court even had the -- even had the defendant preferred that the -- that a State court adjudicate the dispute. The policies underlying the removal statute are therefore served by giving the defendant the same right to insist upon a Federal forum.

Now, the removal statute creates a narrow exception to this policy when another statute expressly

bars removal. And Congress has foreclosed removal in a number of statutes in direct and explicit terms by providing most notably in section 1445 of Title 28 that, quote, a civil action in any State court may not be removed, or in other statutes that no case brought in any State court shall be removed. There is no similar prohibition in the Fair Labor Standards Act, which does not address the issue of removal at all.

The language in the Fair Labor Standards Act providing that an action may be maintained in any Federal or State court of competent jurisdiction does not expressly foreclose removal. Rather, it grants an employee a cause of action over which State and Federal courts have concurrent jurisdiction.

The language does not purport to trump or override generally applicable rules that affect the disposition of the proceeding such as whether the action may be stayed or transferred under other express statutory provisions.

QUESTION: What you're saying sounds so sensible. Why was it that a number of Federal courts didn't get it, Ms. Blatt? There was quite a division of authority on this question and the Wage and Hour Division originally took the other view.

QUESTION: You want to be very careful about

answering how Federal courts don't get things.

(Laughter.)

MS. BLATT: There was division and there still is division today, but we think that the 1948 revision makes amply clear that what's required is an express bar. And when compared to the established template of the other statutes where Congress has foreclosed jurisdiction in direct, unambiguous terms, it makes clear that the -- the correct answer is that the actions are subject to removal.

And the example I wanted to give was about why the word maintain doesn't speak to how the action may be disposed of under other provisions was a bankruptcy petition. Under Federal law that would operate to stay the continuation of any judicial proceeding, and a similar result would hold true under State and Federal venue provisions. And we think the same result is true under a Federal removal legislation.

There's nothing in the Fair Labor Standards Act that suggests that the plaintiff's initial choice of a State law -- State court forum must prevail over the defendant's express statutory right to remove an action under section 1441(a), and we think the employee's right to sue accordingly is subject to removal.

And the only thing I -- I'd like to address in response to the petitioner's argument is this principle of

narrow construction. We don't think that principle applies for basically two reasons.

And the first is that because there was no dispute about the Federal court's jurisdiction to hear this case, again notwithstanding Florida's interest in the case or even if the -- had the defendant preferred the State court forum, the plaintiff could have insisted that the Federal court hear the dispute. And thus the only relevant inquiry is not one of narrow interpretation, but it's a standard that's set forth on the -- under the plain terms of the statute itself, and that is whether another statute expressly bars removal. And we think for the reasons that have been given, even if one were to apply a principle of narrow construction, it would not be plausible to construe the word maintain as an express bar to removal.

And for those reasons, we would urge that this Court affirm the judgment of the Eleventh Circuit.

QUESTION: Thank you, Ms. Blatt.

Mr. Pinaud, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF DONALD E. PINAUD, JR.

ON BEHALF OF THE PETITIONER

MR. PINAUD: Thank you, Mr. Chief Justice.

Justice Ginsburg, you had asked respondent a question about whether or not the -- the 1948 amendments

could have in any way been intended to -- to clarify the removability of Fair Labor Standards Act cases. And as -- as I think I mentioned earlier, I -- I just wanted to add, I think respondent agreed with that. I don't agree because, as I stated, if you look through the Reviser's Notes, they -- they are extraordinarily meticulous. They list what they are doing and why --

QUESTION: I didn't ask whether they intended to. I asked whether they did. I don't know that -- that Congress paid any attention to this particular Johnson against Butler Brothers case.

MR. PINAUD: Oh, no. No, it did not. It certainly did not. And I -- I think that is important.

I -- I think also that these public policy concerns that -- that Justice Breyer was -- was discussing, these are really very important concerns that we don't think should be overlooked. This is a time where you don't have an interstate highway system. You don't have a whole lot of time -- a whole lot of lawyers who want to practice in Federal court or who can practice in Federal court. There were claims at the time for as low as -- as low as $11. Even the cases today, when they're individually brought, they're not typically enormous cases. These are -- these are employees suing for their wages, trying to have an opportunity to -- to collect them

without it being inordinately long or inordinately impractical. Nobody is going to take a case for $11 or $250.

QUESTION: Was there ever a proposal made in Congress to give workers who have FLSA claims the same express provision that is there for railroad workers?

MR. PINAUD: Not that we know of, but it's our position that that would be because Congress, at the time it passed this law, believed it was express, that that was the prevailing opinion, and that even now that was still the opinion of about half of -- about half of the courts, half of -- half of the district courts. You know, this is -- district courts every day -- in fact, after this -- I think just before this Court granted certiorari, there was a district court in -- in Texas that said, absolutely these cases need to be staying in State court.

So I think Congress didn't get -- I don't know why Congress didn't get involved in it, but I would think it would be because they thought maintained was express enough, that maintain was good enough.

Mr. Chief Justice, if there are no further questions, I have nothing further.

QUESTION: Thank you, Mr. Pinaud.

MR. PINAUD: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 10:54 a.m., the case in the above-entitled matter was submitted.)