

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   PHILLIP T. BREUER,                   :  
4                   Petitioner                   :  
5           v.                   :   No. 02-337  
6   JIM S CONCRETE OF BREVARD.                   :  
7   - - - - -X  
8                                   Washington, D. C.  
9                                   Wednesday, April 2, 2003  
10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:07 a.m.  
13   APPEARANCES:  
14   DONALD E. PINAUD, JR., ESQ., Jacksonville, Florida; on  
15           behalf of the Petitioner.  
16   ANDREW S. HAMENT, ESQ., Melbourne, Florida; on behalf of  
17           the Respondent.  
18   LISA S. BLATT, ESQ., Assistant to the Solicitor General,  
19           Department of Justice, Washington, D. C.; on behalf of  
20           the United States, as amicus curiae, supporting the  
21           Respondent.  
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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

1 brought together with some State law claims.

2 Secondly, Florida has a right to protect its  
3 citizens.

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

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

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

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

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

1 parts because one is -- is not removable.

2 MR. PINAUD: Well --

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

5 MR. PINAUD: There is --

6 QUESTION: -- the Fair Labor Standards Act.

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

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

17 MR. PINAUD: That would be correct.

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

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

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

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

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

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

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

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

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

1 unless it is expressly provided otherwise.

2 MR. PINAUD: Justice --

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

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

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

20 QUESTION: And your reading of the word  
21 maintain -- and your whole case hangs on that word,  
22 maintain -- suppose the case were brought initially in a  
23 Federal court, and there were -- there was a motion, a  
24 1404(a) transfer motion, to transfer the case from one  
25 district court to another. I take it on your reading,



1 1404(a) couldn't apply either because you would have to --  
2 if the plaintiff chose to maintain it in one Federal  
3 court, therefore it couldn't be switched to another?

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

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

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

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

4           If I could go back, just a moment, to what I was  
5 talking about, the -- the expressly provided language,  
6 addressing your question, Justice Scalia. We also think  
7 that the expressly provided language has to be the textual  
8 basis based upon this -- this Court's construction of  
9 28 U.S.C. 2283. That's the anti-injunction statute. In  
10 that statute, Congress has provided that no -- that no  
11 Federal court shall issue an injunction to enjoin a State  
12 court proceeding unless expressly authorized by Congress.  
13 We're dealing with expressly provided language in 1441.  
14 We see the language as completely indistinguishable.

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: What -- what reason would there be

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

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

8             QUESTION: Yes, all right.

9             MR. PINAUD: -- Your Honor.

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

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

14            MR. PINAUD: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

8 QUESTION: Well, ripped from him in what manner?

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

16 QUESTION: Are -- are you talking about removal?

17 MR. PINAUD: No.

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

19 MR. PINAUD: I'm --

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

22 MR. PINAUD: No.

23 QUESTION: What are you talking about?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 QUESTION: Fine, Mr. Pinaud.

7 MR. PINAUD: Thank you.

8 QUESTION: Mr. Hament.

9 ORAL ARGUMENT OF ANDREW S. HAMENT

10 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

25 In fact, in 1948, Congress created a section of



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

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

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

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

13 So these laws were in place using very direct  
14 language when the Fair Labor Standards Act was enacted in  
15 1938.

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

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

1 Standards Act cases were not removable.

2 MR. HAMENT: Number one, Justice Ginsburg, at  
3 this point the Department of Labor has changed their  
4 position, and I think that's because of the addition in  
5 1948 of the very express standard that except as otherwise  
6 expressly provided by an act of Congress, this type of  
7 case would be removable.

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

12 MR. HAMENT: No, Your Honor.

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

16 (Laughter.)

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

19 (Laughter.)

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

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

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

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

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

7                   MR. HAMENT: Correct, Your Honor.

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

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

23                   MR. HAMENT: Well, Justice Breyer --

24                   QUESTION: You know, on the purposive part.

25                   MR. HAMENT: Yes. Yes. Justice Breyer,

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

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

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

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

5           QUESTION: Is it meant to apply retroactively in  
6 1948 to those statutes passed preceding 1948?

7           MR. HAMENT: I believe -- I believe it was. If  
8 you look at the timing of the addition of that language in  
9 1948, at that time, the right to remove didn't have the  
10 expressly provided otherwise exception. It just was a  
11 right to remove, and it was at that time codified in  
12 28 U.S.C., section 71, which had the right to remove.

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

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

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

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

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

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

14 MR. HAMENT: Right.

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

17 MR. HAMENT: To the extent they --

18 QUESTION: -- meaning --

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

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

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

25           First, the underlying law in *Mitchum* was the

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

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

11 And third, in --

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

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

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

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



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

4           QUESTION: Thank you, Mr. Hament.

5           Ms. Blatt, we'll hear from you.

6           ORAL ARGUMENT OF LISA S. BLATT

7           ON BEHALF OF THE UNITED STATES,

8           AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

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

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

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

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

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

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

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

25           QUESTION: You want to be very careful about

1     answering how Federal courts don't get things.

2                     (Laughter.)

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

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

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

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

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

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

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

19           QUESTION: Thank you, Ms. Blatt.

20           Mr. Pinaud, you have 5 minutes remaining.

21           REBUTTAL ARGUMENT OF DONALD E. PINAUD, JR.

22           ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

1 without it being inordinately long or inordinately  
2 impractical. Nobody is going to take a case for \$11 or  
3 \$250.

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

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

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

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

23 QUESTION: Thank you, Mr. Pinaud.

24 MR. PINAUD: Thank you.

25 CHIEF JUSTICE REHNQUIST: The case is submitted.

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