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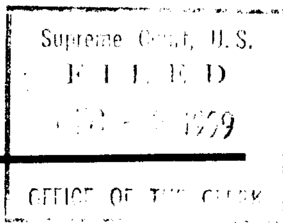


In The
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1998**

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**EDWARD CHRISTENSEN, ET AL.**
*Petitioners,*

v.

**HARRIS COUNTY, TEXAS, ET AL.**
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONERS**

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ARGUMENT:

*I. A reasonable statutory interpretation of the Fair Labor Standards Act, 29 U.S.C. § 207(a), supports the position that public employees exclusively control their compensatory time, with a very limited "undue-disruption-of-agency-operations" exception, absent an express agreement between the employee and the employer which overrides that exclusive control. The Fifth Circuit Court of Appeals seriously erred in its textural interpretation of the statute, in holding that the FLSA does not prohibit employers from forcing employees to take comp time.* 8

*II. Alternatively, to the extent that this Court determines that the Fair Labor Standards Act, 29 U.S.C. § 207(a), does not support the statutory interpretation urged by amicus curiae, because the provision is deemed to be silent on the issue of control of a public employees' compensatory time, then this Court should sustain the Secretary of Labor's approach, as reflected in its interpretations, because it is based on a permissible and reasonable construction of the statute.* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 18

*III. Public employees, including law enforcement officers, have an inherent property right in their compensatory time, and as such are entitled to nothing less than the full benefit of their labor. Under 29 U.S.C. § 207(o), compensatory time earned by a public employee is a property right belonging to that employee, because requiring employees to work overtime and be paid or*

*given compensatory time in lieu of time off is a condition of employment and not a benefit. Being arbitrarily ordered to reduce compensatory time is a retroactive deprivation of this property right, analogous to an employee being ordered by the public agency to spend the employee's pay on certain items. Besides disrupting the employee's life, such a retroactive deprivation implicates fundamental rights of fairness and due process under the Constitution, which could result in much public employee litigation if the Court affirms the Fifth Circuit's decision.* . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 21

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

*Amicus curiae* National Association of Police Organizations, Inc. (hereafter "NAPO") and its 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of the Petitioners, Edward Christensen and 127 other deputy sheriffs in Harris County, Texas.[1] NAPO seeks to reverse the judgment of the Fifth Circuit Court of Appeals, which reversed the District Court's judgment for the Petitioners. The trial court ruled that the Respondents violated the Petitioners' rights under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*., relying on the Eighth Circuit Court of Appeals' decision in *Heaton v. Moore*.[2]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through education, legislation, and advocacy of the fundamental due process and workplace rights of officers. NAPO represents 4,000 law enforcement organizations, with 250,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel), and 11,000 retired officers. In Texas and Louisiana, two of the states covered by the Fifth Circuit, NAPO represents the Combined Law Enforcement Association of Texas, the Dallas Police Association, the Police Association of New Orleans, and the Police Association, City of Kenner, LA, which altogether have a total of 30,500 sworn law enforcement officers as members.

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

[2]The court's decision is reported in 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schiriou v. Heaton*, 515 U.S. 1104 (1995).

NAPO's members have a significant interest in the important issues of law before this Court, as the impact of the Court's decision will affect law enforcement officers across the nation. This is because § 7 of the FLSA obligates public employers to compensate their employees for hours worked in excess of 40 hours per week, at premium rates, with either cash payment or compensatory time ("comp time"), subject to limitations.[3] 29 U.S.C. § 207. Consequently, law enforcement officers, as public employees, are entitled to overtime pay under the special provisions that apply to such employees. 29 U.S.C. § 207(k). NAPO seeks to ensure that the comp time earned by law enforcement officers, in lieu of overtime pay, belongs to the officer as a condition of employment for the officer's use and control, as the officer sees fit, and that its use is not governed by the unilateral dictates of the public employer, absent an express agreement giving the employer such control prior to the accrual of the comp time. Law enforcement officers are ready on short notice to place their life in harm's way to protect others. They must not have their compensatory time severely restricted and controlled by their employers, because such action violates both the spirit and the letter of the FLSA, as well as penalizes those officers who make personal sacrifices in order to work extra hours when their departments need their services the most.

## WRITTEN CONSENT OF THE PARTIES

Counsel of record for both the Petitioners and the Respondents consented in writing to the filing of this *amicus curiae* brief, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court.

## STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition

[3]FLSA limits the maximum number of comp time hours an employee can accrue. 29 U.S.C. § 207(o)(A).



for writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

The Harris County (TX) Sheriff's Department has established a policy under which each employee's accrued compensatory time is kept below a certain level, 240 allowable hours, in light of the directives set forth by the 1985 Amendments to the Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. § 207(o) (Harris County's maximum is well below the statutory limitation of 480 maximum hours set by the FLSA, § 207(o)(3)(A).) In accordance with this policy, if any Harris County Sheriff's Department officer nears this maximum number of hours, the officer is asked to voluntarily use up some of the compensatory time by taking days off from work. The Sheriff's Department attempts to arrange a mutually agreeable time for the employee to use the hours, but if an agreement cannot be reached, or if the employee does not promptly try to use up the time, the employee is ordered to use the hours at a time that is most convenient to the department. If the employee is dissatisfied with such order, he or she may informally complain within the department hierarchy. The parties involved have stipulated to these facts concerning the County's policy.

In the instant case, the Petitioners are deputy sheriffs who were denied permission to use their accumulated compensatory time when they requested it, and who were forced to take time off when they did not want to--all despite the fact that they had not accumulated even half of the maximum number of hours allowed under the FLSA. Consequently, in April 1994, the deputy sheriff Petitioners brought this suit against Respondents Harris County and Sheriff Tommy B. Thomas, alleging violations of Section 207(o) of the FLSA.

In November 1996, the District Court for the Southern District of Texas found that the Respondent, Harris County, Texas, had violated the FLSA in adopting a policy which forced county sheriff's deputies, against their wishes, to use their

accumulated compensatory time when their balances approached this 240 hour maximum, stating that "accumulated time credits cannot be managed differently than salary; employees have a right to use it when they choose." *Moreau v. Harris County,* 945 F.Supp. 1067, 1068 (1996). The district court entered a "final judgment" in July 1997, which stated that the County "may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act." Subsequently, the Court of Appeals for the Fifth Circuit reversed, declaring that the County could lawfully require its employees to use their compensatory time sooner than they preferred. *Moreau v. Harris County,* 158 F.3d 241 (1998).

## SUMMARY OF ARGUMENT

### I

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, was enacted to protect employees from the exploitive practices of their employers. Specifically, § 207(o) works to guarantee an employee's right to control the use of his or her compensatory time, subject only to a limited "undue disruption" exception, unless an express agreement between the employee and the employer contains contrary language giving such control to the employer. Consequently, the Fifth Circuit's decision granting the public employer Respondents the absolute power to unilaterally force employees to take comp time, regardless of the employee's needs or wishes and absent such an agreement, conflicts with the text and the intent of the statute.

First, the Fifth Circuit's decision in this case disregarded principles of statutory interpretation and substituted its own opinion in an exercise of excessive judicial activism. The Court of Appeal's reliance upon arguably relevant judicial precedent as a means of statutory interpretation is questionable and resulted in a misapplication of the statute. Consequently, the appellate court ignored the plain meaning of the words in § 207, which leave no



room for either the employee or the employer to dictate to the other party when comp time will be taken. Indeed, the statute affords a definite and reasonable procedure by which an employee may use his accrued comp-time, the existence of which strongly implies that the Congress had no intent of allowing employers to control an employee's use of comp time, absent an uncoerced and voluntary agreement between the parties. Under the interpretative doctrine of *expressio unius*, the positive implies the negative, and the words omitted from a statute may be just as significant as words set forth. Thus, by excluding any other method whereby an employer may exercise some form of control over an employee's use of comp time, Congress deliberately refused to vest employers with such authority.

Second, the Fifth Circuit failed to examine the legislative history behind the 1985 amendments, which provide for comp time, and disregarded the compromise Congress designed in balancing competing interests. In 1985, Congress decided to give public agencies the option of compensating employees with time off, in lieu of cash payment for overtime work. Congress did this in an effort to ease the financial burden on public employers' of paying overtime wages and to provide some flexibility for employers, while still guaranteeing that employees receive their full recompense, to use as they see fit, unless to do so would disrupt the agency's operations.

If adopted by this Court, the Fifth Circuit's contrary interpretation of section § 207(o) would upset Congress' careful balancing of interests reflected in the 1985 amendments, and would nullify the overall purpose of the FLSA. Indeed, to view the statute as endowing employers with more and greater benefits than the statute explicitly provides would seriously undermine the employer/employee balance that Congress sought to achieve with the FLSA, and constitutes nothing less than a rewriting of the statute, an excessive exercise of judicial activism. Consequently, any forced use of comp time deviates from Congress' intent, because employees are ordered to use comp time to their

disadvantage, rather than making "beneficial use" of it.

## II

To the extent that the FLSA is deemed to be silent on the issue before this Court, the Secretary of Labor's pronouncements on this issue must be given great deference. As this Court has stated in *Auer v. Robbins*, *infra*, "[Courts] must sustain the Secretary [of Labor's] approach so long as it is 'based on a permissible construction of the statute.' "

The Department of Labor has addressed the issue before this Court through regulation, an advisory opinion, and through a statement in a regulation. The Department takes the following position: First, a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if* a prior agreement specifically provides such a provision and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure, but that *absent such an agreement*, neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time. Second, comp time is not a form of accrued pay, nor is it a benefit provided by the employer. Rather, it is an alternative form for paying public employees for overtime hours worked. Third, accordingly, a public employee's comp time "bank" is not the property of the employer to control, but rather belongs to the employee, and comp time is an "inferior substitute" for cash; as such, it follows that an employee's use of such comp time should be allowed freely, because the diminished value of the comp time would be even greater, were the employee forced to use it against his or her wishes.

Hence, the Fifth Circuit's interpretation of § 207 conflicts with the Secretary of Labor's interpretation. The conflict occurs because employers, by unilaterally forcing public employees to use comp time, are able to avoid paying overtime wages indefinitely and to otherwise diminish the value of the comp time.



## III

Section 207(o) both creates a new property right and, separately, secures the innate property rights already held by public employees, while giving both employers and employees limited freedom to negotiate certain aspects of overtime compensation. Congress and the Department of Labor unquestionably believe that employees have a property right in the fruits of their labor, be it cash or comp time, based on legislative history and Labor Department statements. Indeed, as the Eighth Circuit in *Heaton v. Moore*, *infra*, recognized, the accrued comp time belongs to the employee, and if not used, is paid to the employee in cash upon termination of employment.

In response to an E-mail solicitation through law enforcement-related Internet web sites, a*micus curiae* NAPO received comments from law enforcement officers themselves to determine the practices of Police Departments and the use of comp time. This information confirms law enforcement officers' expectations that compensatory time is a property right, the decision on use of which belongs to the employee, not the employer, subject to the limited "undue disruption" exception. Often comp time is provided to the officer, in lieu of overtime pay, for hours inconveniently worked often after an officer has already served one shift, done at the request or direction of the employer. As one Texas law enforcement officer told NAPO: "Compensatory time isn't worth a tinker's shoenail unless an officer can take it when he needs it. The whole idea of forced comp time usage is [sic] to save money for the employer. ... Forcing usage of comp time denies the employee a basic right, the right to use his own property in the legal and reasonable way he chooses." *Infra*.

Since an employee undeniably has a property interest in his accrued comp time, he or she cannot be deprived of that property interest without due process of law. Forcing an employee to take his or her comp time when he or she does not want to, is

depriving that individual of the full use and enjoyment of that property, causing a diminution in the value of the employee's comp time. Therefore, the Fifth Circuit's interpretation may well undermine the constitutionality of the Respondents' application of § 207(o) statute on due process grounds.

While this issue is not now before the Court, the consequences of affirming the Fifth Circuit's decision and the practice followed in Harris County, Texas, could open the "floodgate" to public employee challenges, on due process grounds, of agency actions retroactively limiting the employee's use of comp time through agency directives ordering its use, under the analysis of this Court's 1998 decision in *Eastern Enterprises v. Apfel*, *infra*, and cases cited therein. In sum, it would also seriously interfere with the employee's property right in the comp time, with serious constitutional implications.

## ARGUMENT

**I. A reasonable statutory interpretation of the Fair Labor Standards Act, 29 U.S.C. § 207(a), supports the position that public employees exclusively control their compensatory time, with a very limited "undue-disruption-of-agency-operations" exception, absent an express agreement between the employee and the employer which overrides that exclusive control. The Fifth Circuit Court of Appeals seriously erred in its textural interpretation of the statute, in holding that the FLSA does not prohibit employers from forcing employees to take comp time.**

### I

The issue presented in the instant case centers around the Fifth Circuit's interpretation of § 207(o) of the FLSA.

In the Court of Appeals, the Respondents argued that the legislative purpose of the FLSA was best served by allowing



employers to unilaterally order reductions in an employee's comp time and to set the conditions for achieving those reductions. *Moreau*, 158 F.3d at 245. The appellate court agreed and declared that the FLSA does "not grant public employees a right to choose when they will use accrued comp time." The court found that § 207(o) is inapplicable to Harris County's policy, because this provision, first, is only triggered when an employee first requests the use of their accrued comp time, and, second, does not address whether a public employer may control an employee's accrual of comp time. The court stated, "Congress did not consider or resolve the question that we face here ... it is impossible to determine how Congress would have legislated had it confronted the question", therefore, "before devising our own solution, we must of course look to precedent." *Moreau*, 158 F.3d at 245-46. The Court of Appeal's reliance upon judicial precedent as a primary means of statutory interpretation is questionable, and resulted in a misapplication of the statute with consequences reaching beyond the statute's intended boundaries.

The ruling by the Fifth Circuit is unsupported by the legislative purpose and terms of the FLSA provision at issue. Rather, an interpretation of 29 U.S.C. § 207(o) conferring on public employees, not their employers, the right to control the use of their comp time absent an express agreement, is consistent with FLSA's provisions and obvious purpose, and is in accordance with the intentions of its drafters, as discussed below. As this Court has stated, "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982) (quoting *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940)).

Congress enacted the FLSA in order to curtail the existence of labor conditions that it believed were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers...", 29

U.S.C. § 202, not to protect employers from being the victims of abusive workers. *Moreau,* 945 F.Supp. at 1068. With this purpose in mind, Congress addressed several labor issues, including those related to setting a maximum forty hour workweek. 29 U.S.C. § 207. One such provision is the FLSA's requirement that employers pay employees one and one-half times their regular rate of pay for every hour that the employee works over forty hours. 29 U.S.C. § 207(a)(1).

In 1985, as a result of this Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), state and municipal governments became fearful that compliance with the FLSA would cause serious financial hardship.[4] In response, Congress decided to give public agencies the option of compensating employees with time off, in lieu of cash payment for overtime work. Congress did this in an effort to ease the financial burden on employers' payment of overtime wages, while still guaranteeing that employees receive full recompense.[5]

Hence, after this 1985 amendment to the FLSA, an employer could compensate an employee with overtime pay, or alternatively, subject to an agreement between the employer and the employee,[6] with comp time at a rate not less than one and one-

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[4]See 131 Cong. Rec. E4909-01 (1985) (statement of Rep. AuCoin) and 131 Cong. Rec. E5121-02 (1985) (statement of Rep. Frenzel).

[5]131 Cong. Rec. E4538-03 (1985) (statement of Rep. Murphy) and 131 Cong. Rec. E4897-02 (1985) (statement of Rep. Franklin).

[6]"Compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. This agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section [20]7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o)." 29 C.F.R. 553.23(a).



half hours for each hour of employment for which the overtime compensation is required, 29 U.S.C. § 207(o)(1), up to a maximum limit of either 240 or 480 hours depending on the type of work the employee does. (For public safety workers, including the Petitioners in this case, the maximum is 480 hours.) If an employee reaches his or her maximum accrual limit, the employer can no longer compensate the employee with comp time for working overtime, but must compensate the employee by payment of overtime wages, 29 U.S.C. § 207(o)(3)(A), thus giving employers an incentive to keep employees compensatory hours under the maximum limit allowed by law.

If an employer desires to unilaterally reduce an employee's level of comp time, the FLSA allows the employer to make cash payment to the employee, calculated at the employee's current regular rate of pay. 29 U.S.C. § 207(3)(B). If an employee desires to use their comp time, FLSA provides that:

> An employee of a public agency ... - (A) who has accrued compensatory time off [under the provisions of the FLSA], and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5). The use of comp time depends on the satisfaction of two conditions. First, the employee must have accrued compensatory time off, and, second, the employee must request his or her employer's permission to use such compensatory time. Once these conditions are satisfied, the plain language of the statute dictates that the employee "shall be permitted by the employee's employer to use such time within a reasonable period after making the request" if there is no undue disruption to the agency's operations on the day(s) involved. Given their plain meaning, the words chosen by Congress leave

no room for either the employee or the employer to dictate to the other party when comp time will be taken, but require a mutually beneficial agreement to be struck.[7] Compare with the analysis in *Griffin,* 458 U.S. 564.

Indeed, the statute affords a definite and reasonable procedure by which an employee may use his accrued comp-time. The existence of such a procedure strongly implies that Congress had no intent of including provisions not listed or embraced. Indeed, under the interpretative doctrine of *expressio unius*, the positive implies the negative; the words omitted from a statute may be just as significant as words set forth, in that the legislature had no intent of including things not listed or embraced.[8] As this Court stated in *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871), "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."

In *Heaton v. Moore*, 43 F.3d 1176 (1994), *cert. denied sub nom., Schiriou v. Heaton*, 515 U.S. 1104 (1995), the Eighth Circuit reached the same conclusion on this precise issue. There, the court stated:

> In other words, where Congress has specified in the statute the circumstances under which a public employer may exercise unilateral control over accrued compensatory time, other unilateral methods not provided for in the statute are not allowed under the statute. We conclude that Congress has limited the public employer's control over an employee's use of compensatory time only to situations where an employee's requested use of compensatory time would be "unduly disruptive" to the public employer's operations. Any further attempt by a public employer to unilaterally exercise authority over how the employee uses the employee's accrued compensatory time is inconsistent with section 207(o)(5).

43 F.3d at 1180.

Thus, Congress excluded any other method under which employers may unilaterally reduce employee comp time levels, when it enacted FLSA provisions which explicitly 1) allow public employers to unilaterally reduce employees' level of comp time hours by way of cash payments;[9] and 2) govern employees' use of comp time. Because Congress set forth directives which are clear and easily understood, there is no ambiguity. And, as this Court has stated, "[the Court's] task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin,* 458 U.S. at 570 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

To interpret the statute otherwise, as allowing employers to force employees to use comp time when they do not want to, because the plain language of the FLSA does not specifically

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[7]"The committee has sought to balance the employee's right to make use of compensatory time that has been earned and the employer's interests in avoiding a disruption in operations." House Report 99-331, 99th Cong. 1st Sess. 10 (1985). See also 131 Cong. Rec. E4538-03 (1985) (statement of Rep. Murphy) (stating that "[t]his bill is a compromise solution.") and 131 Cong. Rec. E4909-01(1985) (statement of Rep. AuCoin) (stating "I believe that Congress has tackled a complex and controversial issue and come up with a workable compromise.").

[8]William N. Eskridge, Jr. and Philip P. Fricky, Cases and Materials on Legislation Statutes and the Creation of Public Policy 638 (West Publishing Co. 2d ed. 1995) 1988.

[9]29 C.F.R. 553.26(a) states: "Overtime compensation due under section 7 [29 U.S.C. § 207] may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or in part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweek or work periods."

prohibit public employers from requiring employees to use comp time, is akin to saying that an employer, after making a cash payment to an employee in exchange for comp time, can dictate how the employee will spend the money, because the plain language of FLSA does not specifically prohibit such action by employers. Such an interpretation is inconsistent with the rest of the text, conflicts with provisions in the statute,[10] defies the intentions of the statute's drafters, and produces a result that is nothing less than absurd, because Congress simply "did not write the statute that way." *United States v. Naftlalin*, 441 U.S. 768, 773 (1979). Were the Fifth Circuit's reasoning in this case to be accepted, just imagine for a moment the implications; every time the Congress wrote a statute stating specific provisions for approved or allowable actions, it would also be required to list every possible prohibited action. Such a notion is inconceivable and would wreak havoc if accepted by this Court!

The legislative history surrounding the 1985 amendments to the FLSA supports NAPO's argument. To protect public employees, the FLSA imposes liability upon employers that exploit workers by violating the reasonable procedures that Congress set forth governing the use of comp time. Indeed, Congress clearly foresaw the potential for public employers, motivated by a desire to save money, to abuse the FLSA's comp time option in lieu of paying overtime wages.[11] That is why Congress set maximum accrual limits for comp time and included an explicit provision governing its use. This was to prevent

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[10]As this Court has stated, "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature.' (citing from Brown v. Duchesne, 19 How. 183, 194, 15 L.Ed. 595 (1857))." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

[11]See House Report No. 99-331, *supra* note 7, reprinted in Appendix F, 68a, to the Petition for a Writ of Certiorari in this case.



employers from "indefinitely replac[ing] monetary overtime compensation with compensatory time, undoubtedly an inferior substitute for cash", *Moreau*, 945 F.Supp. at 1068. In reporting the 1985 amendments, the Education and Labor Committee of the House of Representatives stated:

> The Committee is very concerned that public employees in office with regular year-round functions, short staff, and steady demands will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it within a similar period. To do otherwise would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation.

House Report No. 99-331, *supra* note 7, at 14. Consequently, any forced use of comp time deviates from Congress' intent, because under such forced use, employees must use comp time to their disadvantage, rather than make beneficial use of it.

In *Local 889, American Federation of State, County, and Municipal Employees, Council 17 v. State of Louisiana*, 145 F.3d 280 (5th Cir. 1998) (quoting *AFSCME v. Louisiana*, No. 90-4389 (E.D. La. Jan. 12, 1996), the Fifth Circuit indicated that, first, the purpose of the 1985 amendment to the FLSA would be greatly impeded if employees were allowed to "bank" their compensatory time and "force" their public employers to pay cash overtime, and second, that such an interpretation of § 207 of FLSA would "upset

the delicate balance reached by Congress when it created 207(o) in 1985," and "practically nullify the purpose of the statutory scheme".

However, just the opposite is true. To view the statute as endowing employers with more and greater benefits than the statute explicitly provides would seriously undermine the employer/employee balance that Congress sought to achieve with the 1985 amendments, and constitutes nothing less than a rewriting of the statute, an exercise of judicial activism. If employers are able to force employees to use comp time, where is that careful balance that Congress reached? The answer is simple, it is gone. If, however, employers must grant employee requests for use of comp time, unless such use causes undue hardship, the balance is secure.

The compromises incorporated in § 207(o) are carried out in several ways, for the benefit of the employer, as well as the employee. The public employer benefits from the comp time provision in the following ways: First, every time an employee is directed to work overtime for the benefit of the employer, that fills a gap in the agency's operations and through use of comp time, the agency does not have to hire as many full-time workers. Second, if the employee takes time off from work voluntarily to use the comp time, then the employer does not have to pay out the cash, reducing its actual cash outlays, one of the reasons for this alternative. But even if the employee "banks" all of his comp time, the employer benefits because they are able to defer the payment of a substantial amount of wages, sometimes for many years, all at the employer's option.

The Eighth Circuit in *Heaton* addressed the employer's "woe-is-me" argument and made clear that it is the employer which has the option to grant compensatory time in the first place. As the court there stated:

> The defendants have argued at length that if they cannot force employees to use their compensatory time balances at some point, they will have no way of controlling employee's compensatory time balances. Again, we must disagree. Employers retain the ability to control any such problem from the front end. Employers are free to schedule less overtime and/or hire more corrections officers to reduce the need for compensatory time. As we have previously observed, "[a] fundamental purpose of the Fair Labor Standards Act was to encourage employers to distribute work among a larger number of employees rather than to work employees overtime."



43 F.3d at 1181 (quoting *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444, 446 (8th Cir. 1978)).

In a recent case, the Court of Appeals for the Ninth Circuit, relying on the Fifth Circuit's ruling in this case, stated:

> We do not suggest that the FLSA requires that public employers be allowed to force employees to use comp time... [B]oth legislative history and the interpretive regulations suggest that employers and employees should reach agreements concerning the use and preservation of comp time.

*Collins v. Lobdell*, 188 F.3d 1124, 1128 (1999) (citing 1985 U.S.C.C.A.N. at 659 and 29 C.F.R. 553.23(a)). (Inexplicably, however, the Ninth Circuit went on to hold that "FLSA does not prohibit public employers from requiring employees to use comp time". *Id.* at 1129.)

Consequently, 29 U.S.C. § 207(o)(5) mandates that employers must allow employees to reap the full reward of their labor by granting employees' comp time requests, subject only to the one limited exception, and leaves no room for either party to absolutely dictate to the other when the comp time will be used.

Therefore, any forced use of comp time deviates from Congress' intent, as embodied in the statute.

**II. Alternatively, to the extent that this Court determines that the Fair Labor Standards Act, 29 U.S.C. § 207(a), does not support the statutory interpretation urged by *amicus curiae*, because the provision is deemed to be silent on the issue of control of a public employees' compensatory time, then this Court should sustain the Secretary of Labor's approach, as reflected in its interpretations, because it is based on a permissible and reasonable construction of the statute.**

To the extent that FLSA is deemed to be silent on the issue before this Court, the Secretary of Labor's pronouncements on this issue must be given great deference. As this Court has stated, "[Courts] *must* sustain the Secretary [of Labor's] approach so long as it is 'based on a permissible construction of the statute.'" *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (emphasis added).

The Department of Labor has addressed this issue. First, the Department promulgated a regulation which embodied the congressional intent (discussed previously), as follows:

> Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the *right* to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

29 C.F.R. 553.25(b), (emphasis added).

In 1992, the Department (through the Acting Administrator of the Wage and Hour Division) also issued an advisory opinion



to a public employer on this issue, which stated:

> You ask whether a public agency may require its nonexempt employees to use their previously accrued FLSA compensatory time by scheduling them to take such time off as directed.
>
> As you know, FLSA compensatory time off is paid time off which is earned and accrued by an employee in lieu of immediate cash payment for statutory overtime hours. As a condition for use of compensatory time in lieu of overtime payment in cash, an agreement or understanding may be reached prior to performance of that work. That agreement or understanding may include provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with §7(o). See § 553.23 of Regulations, 29 C.F.R. Part 553.
>
> Thus, it is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed *if the prior agreement specifically provides such a provision, and the employees have knowingly and voluntarily agreed to such provision freely and without coercion or pressure*. See § 553.23(c).
>
> Absent such an agreement, *it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time*. However, as indicated in §553.27, accrued compensatory time may be paid in cash at any time. It appears that "cashing out" accrued compensatory time could achieve the objective of concern.

Opinion Letter, September 14, 1992, Karen R. Keesling, Wage and Hour Division, U.S. Department of Labor, 1992 WL 845100

(emphasis added).[12]

Because comp time is an inferior substitute for cash, the Department of Labor's regulations require that an employee's decision to accept compensatory time off in lieu of cash overtime payment must be made freely and without coercion or pressure. 29 C.F.R. § 553.23(c)(1). As such, it follows that an employee's use of such comp time should also be made freely without coercion, because the diminished value of the comp time would be even greater were that not the case.

In addition, in its commentary on its final rule on the Family and Medical Leave Act of 1993 (29 U.S.C. 2601, *et seq.*), the Department of Labor referenced the interplay of comp time with the FMLA. In response to suggestions by public agencies that use of comp time be required for FMLA leave, the Department stated its views on required use of comp time, as follows:

> The use of compensatory time off is severely restricted under the [FLSA] in ways that are incompatible with FMLA's substitution provisions. First, "comp" time is not a form of accrued paid leave mentioned in the FMLA or legislative history for purposes of substitution. It is also not a benefit provided by the employer. Rather, it is an alternative form for paying public employees (only) for overtime hours worked. The public employee's "comp time bank" is not the property of the employer to control, but rather belongs to the employee. If a public employee terminates employment, any unused comp time must be "cashed out." Thus, FMLA's provisions allowing an employer to unilaterally require substitution would conflict with FLSA's rule on public employees' use of comp time only pursuant to an agreement or understanding between the employer and the employee (or the employee's representative) reached before the performance of the work. ...

[12] *Amicus curiae* has learned from the Petitioners' counsel that ironically, the employer in this case was Harris County, Texas.



The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2206-07, January 6, 1995.

Thus, the Fifth Circuit's decision in this case directly conflicts with the Department of Labor's regulation, advisory opinion, and Federal Register statement.

**III. Public employees, including law enforcement officers, have an inherent property right in their compensatory time, and as such are entitled to nothing less than the full benefit of their labor. Under 29 U.S.C. § 207(o), compensatory time earned by a public employee is a property right belonging to that employee, because requiring employees to work overtime and be paid or given compensatory time in lieu of time off is a condition of employment and not a benefit. Being arbitrarily ordered to reduce compensatory time is a retroactive deprivation of this property right, analogous to an employee being ordered by the public agency to spend the employee's pay on certain items. Besides disrupting the employee's life, such a retroactive deprivation implicates fundamental rights of fairness and due process under the Constitution, which could result in much public employee litigation if the Court affirms the Fifth Circuit's decision.**

**I**

In this case, the Fifth Circuit held that employees do not have a property right in their comp time. *Moreau,* 158 F.3d at 246. *Amicus curiae* asserts that section 207(o) both creates a new property right and, separately, secures the innate property rights already held by the employee, while giving both employer and employee limited freedom to negotiate certain aspects of overtime compensation. Indeed, as philosopher John Locke stated:

> Though the earth and all inferior creatures be common to all men, yet every man has a property right in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say are properly his.[13]

The right to reap the fruits of one's own labor, be it produce from the earth or salary from the employer, is an undeniable property right. Hence, the appellate court's decision in the instant case not only errs in its interpretation and application of the statute, but also potentially creates constitutional problems.

Congress and the Department of Labor unquestionably believe that an employee has a property right in the fruits of their labor, be it cash or comp time. Legislative history proves this point: "Regardless of the number of hours accrued, the employee has the *right* to be paid for or use accrued compensatory time subject to this subsection." House Report 99-331, *supra* note 7, 13. "The *right* to be paid arises no later than the time of termination of employment." *Id.* at 14. DOL regulations also indicate that the employee has a *right* to use their comp time by stating that "the employee also has the *right* to use some or all of their accrued compensatory time within a reasonable period after requesting such use, provided that this does not unduly disrupt the employer's operations.", 29 C.F.R. 553.25 (emphasis added), and further, that the employee must receive the full value of wages:

> Wages, whether in cash or in facilities, cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." ...

29 C.F.R. 531.35.

[13]John Locke, *The Second Treatise of Civil Government*, in The Great Political Theories 340 (Michael Curtis ed., Discuss Books 1973).



Indeed, as the Eighth Circuit in *Heaton* recognized, the accrued comp time belongs to the employee, and if not used, is paid to the employee in cash upon termination of employment.

> As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the bank compensatory time as the employee chooses, subject only that the employee not "unduly disrupt" the public employer's operations in doing so.

43 F.3d at 1180.

## II

In preparing for this brief, NAPO solicited information from attorneys representing police officers and their labor organizations and from law enforcement officers themselves (done through the Internet and two law enforcement officer-related web sites). We received a number of comments, including information confirming these officers expectations that compensatory time is a property right, the decision on use of which belongs to the to the employee, not the employer, subject to the limited "undue disruption" exception. We also received information on how prone public employers in Texas are to skirt compliance with the FLSA, if not violate it. Of relevance to the instant case, however, are the following comments received from law enforcement officers in Texas, used with their express permission.[14]

A deputy sheriff from Kendall County, Texas, told us in a November 3, 1999 E-mail, "I have acquired 480 hours on numerous occasions and have been forced to use 80 hours at a

[14]The E-mails referenced were received at NAPO's Washington, DC, office, and are on file and available for review by the parties in this case, with names redacted to protect identities.

time when it was not of use to me ..." Also, on November 3rd, a Port Arthur (TX) Police Department officer wrote:

> Compensatory time isn't worth a tinker's shoenail unless an officer can take it when he needs it. The whole idea of forced comp time usage is [sic] to save money for the employer. First, they give you comp time instead of paying overtime to fill a shortage. Then, when it will not create a shortage, they force you to take the time off. You might as well be a temporary employee.
>
> Forcing usage of comp time denies the employee a basic right, the right to use his own property in the legal and reasonable way he chooses.
>
> An employee works in exchange for compensatory time. Once that time is given to an employee, it becomes his property just like the payroll dollars he earns. If an employer has the authority to force him to use his time against his wishes, then the employer also has the same authority to force the employee to use vacation or money against an employee's wishes and best interest.
>
> ...
>
> Our position is that each of these leave types is provided to us as a condition of employment. These are not gifts but rather are earned for work. They are real property and when used in a reasonable and legal way constitute the same hours as regular payroll hours.[15]

On November 3, an officer with the Houston (TX) Police

[15]The officer in this E-mail is facing a different problem, not being allowed to take accrued time when the officer desires, which is still an issue of control. He wrote, "Our department does not force comp time usage. We have the opposite problem. Comp time accrues [sic] during shortages. Once earned, employees are denied usage of the time because of the same shortages that allowed them to earn it. Most of them now option for overtime wages instead because they can't take the time off."



Department, wrote, as follows:

> We used to have a policy of you could only hold your time for a year, then you had to use it. I was ordered to take off several times back then ('91-'92). They no longer do that however, ...
>
> In terms of being forced to use the time, I feel like we receive the time as a benefit and should be able to use it how and when we want (or its value as a benefit greatly diminishes). They don't tell us we have to use our medical insurance on a certain date that is convenient to the department or that we can only retire when it is convenient to them, and they should not be able to tell us when we can use our accrued overtime. When the weather starts to cool off and the number of calls start to drop, the agency could in effect furlough officers for several weeks at a time. I know I have approximately [several] months of time built up (comp, vacation, holidays, etc.) and would not want the city to tell me to take off from now until Christmas, work through New Year's, then back in March. This would seem to penalize the officers who accrue the most time (which, coincidentally, would most likely be the officers making the most arrests and working late processing them then later attending court).
>
> In the specific case you are talking about, I also find it unbelievable that the individual division commanders can set (and change) the accrual limits whenever and why ever they see fit. ...

In a second E-mail, when asked if his comments could be used in this brief, this Houston P.D. officer wrote:

> I hope I can help the [Harris County Sheriff's] deputies out. If they lose, there's no telling what our chief (who works only a few blocks from their sheriff) will do to us. ...

On November 4, 1999, a Harris County (TX) deputy sheriff (not a party to this lawsuit) wrote; excerpts of his E-mail follow:

> As a member of the Department subject to this litigation, I would like to express some constitutionally protected viewpoints about this matter, but due to department policy I must request that my name not be attributed to this article because I would probably be subject to disciplinary action.
>
> 1. It has been my personal experience that each time I was required to work overtime (comp time) it was in response to an order from a supervisor, or it was due to a mandated duty that was required of the Sheriff, and as his deputy, I was obligated by oath to perform.
>
> ...
>
> 2. Provisions of the [FLSA] require an employer to pay an employee in cash when a lifetime maximum of 480 hours has been worked. Harris County Commissioner's Court decided by their vote to voluntarily reduce this maximum to 240 hours. This was done for at least two reasons. The first was that the commissioners didn't want Harris County to ever be accused of violating the FLSA on this issue. The second was that they didn't want employees retiring or resigning with a 480 hour "gold parachute" (3 months salary)!
>
> 4. Occasionally during my career I have had the opportunity to work on the annual budgetary process. Overtime in Harris County government is an "unfunded liability" that each department head is personally responsible for. This means that if an employee exceeds the 240 hour comp time limit (County Policy), then the department head will have that amount debited from their allocated budget. This situation provided sufficient motivation for the department heads to reduce accrued overtime.
>
> ...
>
> 7. There is not a department-wide written policy statement that specifies a maximum level of comp time that may be accrued by any employee. In practice though, some bureau commanders have capriciously restricted personnel under their command a maximum comp time bank of 200 hours and others to a maximum of 180. ...[16]



## III

Because a public employee undeniably has a property interest in his accrued comp time, he or she cannot be deprived of that property interest without due process of law.[17] Forcing an employee to take his or her comp time when he or she does not want to is depriving that individual of the full use and enjoyment of that property, causing a diminution in the value of the employee's comp time.

The Fifth Circuit's interpretation of the FLSA may well undermine the constitutionality of the Respondents' application of section 207(o) statute on due process grounds. While this issue is not now before the Court, the consequences of affirming the Fifth Circuit's decision and the practice followed in Harris County, Texas, could open the floodgate to public employee challenges, on due process grounds, of actions retroactively limiting the employee's control of comp time usage through employing agency directives ordering its use.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131

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[16]See note 14, concerning this and the other E-mails received.

[17]"The Fifth Amendment to the U.S. Constitution prohibits the federal government from 'taking' private property 'for public use without just compensation.' This limitation on governmental power applies to the state governments through the fourteenth amendment, which prohibits the states from 'depriving' citizens of property 'without due process of law.'" Joseph William Singer, Property Law Rules Policies and Practices, 2nd Ed., 1284 (Aspen Law and Business 1997).

(1998), this Court applied the Due Process and Takings Clauses and held unconstitutional a federal statute that retroactively applied to past activity. In its plurality opinion, the Court concluded that stricter limits on governmental action apply when legislation operates in a retroactive manner and that governmental action is improper and unconstitutional if it places a severe, disproportionate, and extremely retroactive liability on a limited class of parties, under the Takings Clause of the Fifth Amendment.[18] 118 S.Ct. at 2149. As the Court stated:

> Those opinions in *Turner Elkhorn, Connolly, and Concrete Pipe*, make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. And Congress may impose retroactive liability to some degree, particularly where it is "confined to the short and limited periods required by the practicalities of producing national legislation," [Pension Benefit Guaranty Corporation v. R. A.] Gray & Co., 467 U.S., at 731. ... Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and extent of that liability is substantially disproportionate to the parties' experience.

*Eastern Enterprises*, 118 S.Ct. at 2149. In reaching this result, the Court applied the three factors that traditionally considered in a regulatory takings' analysis: first, the economic impact of the

[18]In *Eastern Enterprise*, Justice Kennedy, joined in the judgment of the Court but dissented from the plurality opinion by Justice O'Connor. He concluded that the statutory provision in the Coal Act must be invalidated, without regard to the Takings Clause of the Fifth Amendment, because the statute violated the proper bounds of settled due process principles. "Accepted principles forbidding retroactive legislation of this type are sufficient to dispose of this case." 118 S.Ct. at 2158 (Kennedy, J., concurring in judgment and dissenting in part).



regulation or action on the claimant; second, the extent to which the action has interfered with the employee's investment-backed expectation--which in this case are the overtime wages; and third, the character of the governmental action. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986).

Clearly, *amicus curiae* NAPO does not contend that the comp time provision of the FLSA give rise to a potential due process or takings violation. To the contrary, we believe that the Congress acted deliberately and rationally in creating this provision. However, we do contend that the Fifth Circuit's interpretation substitutes its own vision and version of what it would like the statute to do--judicial activism not at its best--, and creates serious constitutional concerns. If accepted by this Court, the application of the this interpretation could result in an unconstitutional taking or a violation of substantive due process or both, depending on the circumstances surrounding each employer action.

Affirming the Fifth Circuit's decision would have two consequences. First, it would likely cause severe conflict with the fundamental principles of fairness and justice, which underlie both the Takings Clause, as well as the general Due Process Clause. Second, it would disregard the Congress' efforts to abide by such principles when it enacted this FLSA provision in 1985. Consequently, an acceptance of the Fifth Circuit's interpretation could create a world wherein employers can summarily infringe on employees' property rights and avoid complying with section 207(o) by refusing to pay cash overtime wages.

Consequently, if the Supreme Court adopts the Fifth Circuit's interpretation of § 207(o), it is just a matter of time before many public employers nationwide take control and direct their employees' use of the employee's comp time, potentially placing a severe, disproportionate, and extremely retroactive liability on public safety officers. Employers would be able to retroactively place on those employees who have already earned their wages in the form of comp time, a significant economic burden effecting

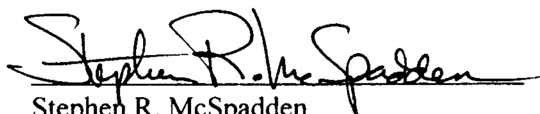
their past and future wages, that would substantially interfere with their "investment-backed expectation".

While *amicus curiae* recognizes that these constitutional issues are not now before this Court, it is only a matter of time before litigation arises on these issues, not only in Texas, but elsewhere in the Country, if this Court affirms the Fifth Circuit's ruling in this case and signals a "green light" to state and local governments to take control over their employees' use of their comp time. We ask the Court to consider these constitutional implications before rendering a decision in this case.

## CONCLUSION

For the foregoing reasons, *amicus curiae* NAPO urges this Court to reject the Fifth Circuit's interpretation of §702(o) of the FLSA and either to adopt the only reasonable statutory interpretation of this provision, following the Eight Circuit's decision in *Heaton, supra,* or, alternatively, to accept the Department of Labor's interpretation of the statute, based on a permissible and reasonable statutory construction under *Auer*. Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment of the Fifth Circuit Court of Appeals.

*Respectfully submitted this second day of December 1999.*



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