No. 98-1167

IN THE
Supreme Court of the United States

EDWARD CHRISTENSEN, *et al.*,
Petitioners,
v.
HARRIS COUNTY, *et al.*,
Respondents.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of 68 national and international labor organizations with a total membership of approximately 16 million working men and women. The parties to the case have consented to the filing of this brief as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act requires employers to compensate employees for overtime work—i.e., work in excess of forty hours in a single week—at a rate equal to one and one-half times the employees' regular rate of pay. In general, this requirement is not subject to waiver by agreement. However, the 1985 Amendments to the FLSA create a limited exception allowing public employers to negotiate agreements with their employees substituting compensatory time, earned at a rate of one and one-half hours for each hour of overtime, for overtime pay.

The question presented by this case is whether a public employer who has arranged with its employees to substitute comp time for overtime pay may direct those employees to use their comp time without having reached agreement with the employees in advance that the employer would have this authority. The Department of Labor has consistently taken the position, in interpreting the regulations implementing the FLSA's comp time provisions, that an employer may *not* direct employees to use their comp time in the absence of an agreement giving the employer this authority. The Labor Department's position represents a reasonable interpretation of the statute and the implementing regulations.

In passing the 1985 Amendments to the FLSA, Congress emphatically declared that by permitting the negotiation of comp time agreements it did not intend to diminish in any way the level of compensation required for overtime work. To ensure that comp time agreements provide employees with a level of compensation equivalent to overtime pay, Congress placed several conditions on the substitution of comp time for overtime pay.

Two statutory conditions on comp time are highly relevant to this case. First, comp time can be substituted for overtime pay only if the employer and the employees

knowingly and voluntarily agree to that substitution in advance of the performance of the overtime work. Second, an employee must be allowed to use his or her comp time on request, unless doing so would unduly disrupt the employer's ability to provide services to the public.

The Secretary of Labor's regulations implement the 1985 Amendments in a manner that fulfills the Congressional purpose of allowing public employers and employees a measure of flexibility with respect to overtime compensation, while at the same time ensuring that the value of that compensation to the employees is not materially diminished. In particular, the regulations provide that comp time agreements may contain provisions governing the preservation and use of comp time, but only so long as those provisions comply with the FLSA.

Both the statute and the implementing regulations recognize that the value of comp time as a form of compensation is largely dependent on the employee's right to use that time when it is most beneficial to him or her. Thus, both the statute and the regulations provide express protection of the employee's right to use accrued comp time at his or her request.

Given the statutory scheme and the materiality of the employee's right to control the use of accrued comp time, any provision transferring this control to the employer has to be knowingly and voluntarily agreed to by the employee in advance of performing overtime work. And, that is how the Labor Department interprets the statute and its implementing regulations. The "default rule" fashioned by the court below, allowing the employer to unilaterally assume this authority after the fact, is contrary to both basic principles underlying the FLSA and to the terms and intent of the 1985 Amendments. The Department of Labor's contrary interpretation of the statute is both permissible—and therefore entitled to be sus-

tained on that ground alone—and by far the better reading of the statute.

ARGUMENT

The question presented by this case is whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act, 29 U.S.C. § 207(o), may —absent a preexisting agreement, authorizing the agency to do so—require its employees to use accrued compensatory time at the agency's direction.

Based on its regulations implementing FLSA § 7(o)—the FLSA's comp time provision—the Department of Labor has consistently taken the position "that a public employer may *not* direct its employees to use accrued compensatory time absent an agreement that authorizes it to do so." Brief for the United States as Amicus Curiae 9-10 (emphasis added). *See, e.g.*, Opinion Letter, Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), 1992 WL 845100 ("[I]t 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).") (emphasis added). *See also* 29 C.F.R. § 553.23(a)(2).

As we demonstrate in this brief, "the Secretary [of Labor]'s approach . . . is 'based on a permissible construction of the statute,'" and, therefore, "must [be] sustain[ed]." *Auer v. Robbins*, 519 U.S. 452, 457 (1997), quoting *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

In part A, below, we examine the relevant statutory terms and their legislative history. In part B, we review the relevant regulations implementing those statutory

terms. In part C, we show how the statute and regulations bear upon the question presented in this case. And, in part D, we demonstrate that the answer to this question reached by the court below is incorrect.

A. "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours. . . ." *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728, 739 (1981). Toward this end, "Congress provided in § 6(a) of the Act, 29 U.S.C. § 206(a), that '[e]very employer shall pay to each of his employees . . . wages at the [stated statutory] rates,'" and "in § 7(a)(2) of the Act, 29 U.S.C. § 207(a)(2), that 'no employer shall employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.'" 450 U.S. at 739-740 n. 15.

Given Congress's statutory purpose, "[t]his Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act." *Barrentine*, 450 U.S. at 740. The Court has "held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.*, quoting *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

While this is the basic rule regarding overtime pay, "[i]n 1985, Congress amended the FLSA to provide a limited exception to this rule for state and local governmental agencies." *Moreau v. Klevenhagen*, 508 U.S. 22, 23-24 (1993). Congress was prompted to do so by this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), upholding "the

power of Congress to regulate the compensation of state and local employees," and the Department of Labor's announcement "that it would hold public employers to the standards of the Act effective April 15, 1985." *Moreau*, 508 U.S. at 25-26. "In response to the *Garcia* decision and the DOL announcement," Congress enacted "legislation designed to ameliorate the burdens associated with necessary changes in public employment practices." *Id.* at 26.

To the point here, "[u]nder the Fair Labor Standards Amendments of 1985 (1985 Amendments), public employers may compensate employees who work overtime with extra time off instead of overtime pay in certain circumstances." *Moreau*, 508 U.S. at 24. "[T]he new subsection 7(o) . . . allow[s] public employers to compensate for overtime hours with compensatory time off, or 'comp time,' in lieu of overtime pay"—but it does so *only* "so long as certain conditions [a]re met." *Id.* at 26. Careful attention to these conditions is crucial to the "interpretation of the subsection 7(o) exception," given "the well-established rule that 'exemptions from the [FLSA] are to be narrowly construed.'" *Id.* at 33, quoting *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295-296 (1959).

Section 7(o) states an authorization permitting public employers to substitute comp time for overtime pay:

> Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by [§ 7(a)(1)]. [29 U.S.C. § 207(o)(1).]

The FLSA comp time provision also states several conditions that a public employer must meet in order to substitute comp time for overtime pay, two of which are directly relevant to the question presented in this case.

The first of these conditions, set forth in § 7(o)(2), is that "[c]omp time must be pursuant to an agreement between the employer and the employee," S. Rep. No. 99-159, 99th Cong., 1st Sess. 4 (1985):

> A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency or representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2).]

The second of these conditions, set forth in § 7(o)(5), is that "[a]n employee may use comp time within a reasonable period of requesting its use, so long as the employer's operation is not unduly disrupted," S. Rep. No. 99-159 at 4:

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
>
> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), 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).]

In enacting the 1985 Amendments, Congress emphasized that it was "not retreating" from "[t]he longstanding purposes of the overtime provisions in section 7 [*viz.*,] to fairly and fully compensate employees who must work long hours while encouraging employers to reduce the hours of work and to hire additional persons." H.R. Rep. No. 99-331, 99th Cong., 1st Sess. (1985) 17. *See* S. Rep. No. 99-159 at 7. Accordingly, the sponsors of the 1985 Amendments stated in no uncertain terms that "compensatory time is not envisioned as a means to avoid overtime compensation" but "is merely an alternative method of meeting that obligation." H.R. Rep. No. 99-331 at 23.

The 1985 Amendments authorize comp time agreements not only to "provide flexibility to state and local government employers" but also to provide "an element of choice to their employees regarding compensation for statutory overtime hours." H.R. Rep. 99-331 at 19. Thus, the Senate Report explained the decision to authorize such agreements as follows:

> The Committee . . . is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements. [S. Rep. No. 99-159 at 8.]

The House Report stated the same intent to "offer[] [public] employees and their employers the opportunity to voluntarily agree to the acceptance of compensatory time

off at a premium rate in lieu of pay for overtime." H.R. Rep. No. 99-331 at 18. The intent to foster "voluntarily . . . worked out arrangements" that are "mutually satisfactory," S. Rep. No. 99-159 at 8, is reflected in the condition that "[c]omp time must be pursuant to an agreement between the employer and employee," *id.* at 4. *See* H.R. Rep. No. 99-331 at 2. The Amendments' sponsors specified that an "express condition of employment" can qualify as a compensatory time agreement *only*

> so long as (i) the employee knowingly and voluntarily agrees to it as a condition of employment, and (ii) the employee is informed that the comp time received may be preserved, used, or cashed out consistent with the provisions of th[e] new subsection [7(o)]. [S. Rep. 99-158 at 11. *See* H.R. Rep. No. 99-331 at 20.]

The sponsors of the 1985 Amendments understood that the value to the employee of accrued compensatory time resides "in being able to make *beneficial use* of the accumulated . . . time." H.R. Rep. No. 99-331 at 23 (emphasis added). Thus, the Amendments "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." *Id.* at 21 (emphasis added). *See* S. Rep. No. 99-159 at 11 ("balance the employee's *right to make use* of comp time that has been earned and the employer's need for flexibility in operations") (emphasis added).

Congress sought to protect "the employee's right to make use of compensatory time" in two related ways. First, in order to avoid the accumulation of more compensatory time than employers could realistically be expected to let their employees use, § 7(o)(3)(A) places maximum limits on the number of hours of compensatory time

that employees can accrue. Second, Congress provided that an employee who makes a request to use compensatory time "shall be permitted by the . . . employer to use such time within a reasonable period after making the request if [it] . . . does not unduly disrupt the [employer's] operations." 29 U.S.C. § 207(o)(5)[2]. Consistent with these limitations, the sponsors of the 1985 Amendments stated that while a comp time agreement "may include other provisions governing the preservation, use or cashing out of comp time," the agreement may do so only "so long as those provisions do not conflict with this subsection or the remainder of the Act." S. Rep. No. 99-159 at 11. *See* H.R. Rep. No. 99-331 at 2.

The statutory conditions imposed on the substitution of comp time for overtime pay—that the substitution occur pursuant to "an agreement or understanding arrived at between the employer and employee before the performance of the work," 29 U.S.C. § 207(o)(2)(A), and that the affected employees "be permitted . . . to use [accrued comp] time within a reasonable period after making [a] request," 29 U.S.C. § 207(o)(5)—reflect the essential nature of comp time as a form of earned "overtime compensation." H.R. Rep. No. 99-331 at 23. It is precisely because comp time represents accrued earnings that Congress took pains to safeguard "the employee's right to make use of comp time." S. Rep. No. 99-159 at 11. *See* H.R. Rep. No. 99-331 at 23.

B. The Secretary of Labor has authority to "promulgate such regulations as may be required to implement [§ 7(o)]." 29 U.S.C. § 203 note. The regulations promulgated by the Secretary pursuant to this express authority are faithful to both the text of the 1985 Amendments and to the declared purpose of Congress. *See* 29 C.F.R. Part 553, Subpart A.

[2] Moreover, employers retain the option of paying employees for their compensatory time at the employees' regular rate of pay, 29 U.S.C. § 207(o)(3)(b), thereby preventing an accumulation of more compensatory time than they can grant in the form of leave.

The Secretary's comp time regulations effectuate the Congressional admonition that "[c]ompensatory time cannot be used as a means to avoid statutory overtime compensation." 29 C.F.R. § 553.25(b). *See* H.R. Rep. No. 99-331 at 23. In so doing, the regulations give substance to the basic proposition that "compensatory time off . . . is an alternative form for paying public employees . . . for overtime hours worked," and to the corollary that "[t]he public employee's 'comp time bank' is not the property of the employer to control, but rather belongs to the employee." 60 Fed. Reg. 2206-07 (Jan. 6, 1995).

To begin with, the regulations satisfy the condition—specified in § 7(o)(2)—that comp time agreements are "voluntarily . . . worked out arrangements" that are "mutually satisfactory" to both the employees and the employer. S. Rep. No. 99-159 at 8.

Thus, where employees have a collective bargaining representative, the regulations require that the comp time agreement "must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement." 29 C.F.R. § 553.23(b).

"Where employees of a public agency do *not* have a recognized or otherwise designated representative," the regulations specify conditions on any "[a]greement or understanding between the public agency and individual employees," which ensure that employees freely and voluntarily enter into such agreements. 29 C.F.R. § 553.23(c) (emphasis added). In the first place, any such individual

agreement "must be reached prior to the performance of work." *Id.* Secondly, if the individual agreement "take[s] the form of an express condition of employment," the following requirements must be met:

> (i) the employee [must] knowingly and voluntarily agree[] to [comp time] as a condition of employment and (ii) the employee [must be] informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. [*Id.*]

Finally, while "[a]n agreement or understanding may be evidenced by a notice to [an] employee that compensatory time off will be given in lieu of overtime pay . . . with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay . . . , the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure." *Id.*[3]

The regulations contemplate that comp time agreements may go beyond providing that form of overtime compensation as a substitute for the overtime pay otherwise re-

[3] The initial text of the regulation provided that in the case of notice by the employer, a comp time agreement would be presumed to exist as to any employee who expressed no unwillingness to accept compensatory time, *and* "who accepts compensatory time in lieu of overtime pay after being so notified." 51 Fed. Reg. 13402, 13407 (Apr. 18, 1986). The Secretary deleted the acceptance-after-notification requirement in the final regulation after the National League of Cities protested that "employers should not have to wait for employees to work overtime in order to be certain that the 'agreement' requirement has been met," 52 Fed. Reg. 2012, 2015 (Jan. 16, 1987), and substituted the requirement for free, uncoerced and unpressured consent that appears in the final rule. *Id.* at 2035. The text of the final regulation makes clear, therefore, that the omission of this language was not intended to diminish in any way the role of free employee consent in the provision of compensatory time.

quired by the statute to spell out some or all of the terms and conditions that govern the workings of a compensatory time system in a given workplace. For example, the regulations state that the parties may agree to restrict the provision of compensatory time to certain hours of work. 29 C.F.R. § 553.23(a)(2). The regulations specify, as well, that the parties may agree that the employer will offer a combination of compensatory time and overtime pay "so long as the [FLSA] premium pay principle of at least 'time and one-half' is maintained." *Id.* § 553.23(a)(2); *see id.* at § 553.22(b). The regulations also provide that the agreement may "govern the meaning of 'reasonable period' " within which an employer must, absent undue disruption, grant a request to use comp time. *Id.* at § 553.25(c)(2). And, more generally, the regulations provide that "the 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 7(o) of the Act.*" *Id.* at § 553.23(a)(2) (emphasis added).

Very much to the point here, the regulations effectuate Congress's intent to protect "the employee's *right to make use* of comp time that has been earned." S. Rep. No. 99-159 at 11 (emphasis added). *See* H.R. Rep. No. 99-331 at 21. Thus, the regulations prohibit an employer from "coerc[ing]" an employee who has entered into a comp time agreement 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).[4] And, the regulations implement the statu-

[4] This requirement of prompt "payment" parallels the Secretary's requirements regarding prompt payment of cash overtime. *See* 29 C.F.R. § 778.106 (payment must ordinarily occur on the payday for the period in which overtime was worked; if problems arise as

tory condition that an employer may not deny a request to use comp time unless granting the request would "unduly disrupt the operations of the public agency," 29 U.S.C. § 207(o)(5), by specifying:

> For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. [29 C.F.R. § 553.25(d).]

C. As noted at the outset, it is the Labor Department's "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," Opinion Letter, Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), 1992 WL 845100, and "that a public employer may not direct its employees to use accrued compensatory time absent an agreement that authorizes it to do so," Brief for the United States as Amicus Curiae 9-10. The Department's position follows ineluctibly from FLSA § 7(o) and the Secretary's regulations implementing §7(o).

The statute and the regulations allow the employer to negotiate a comp time agreement with its employees that includes "provisions governing the preservation, use, or cashing out of compensatory time," subject to the limitation that the "provisions are consistent with section 7(o) of the Act." 29 C.F.R. § 553.23(a)(2). *See* Brief

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to computation, then "[p]ayment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due," but in no event "later than the next payday after such computation is made").

for the United States as Amicus Curiae at 10 n.6. *See also Heaton v. Moore*, 43 F.3d 1176, 1180 & n.4 (8th Cir. 1994), *cert. denied sub nom. Schiro v. Heaton*, 515 U.S. 1104 (1995) (reserving question as to the consistency of "additional agreements between the employer and the employees which may limit the time and manner of the employees' use of compensatory time" with FLSA § 7(o)).

At the same time—and this is of the essence here—provisions governing the preservation or use of comp time —such as a provision that the employer can direct the employee's use of her comp time—must be part of the "voluntarily . . . worked out arrangements" that are "mutually satisfactory" to both the employees and the employer, S. Rep. No. 99-159 at 8, and that are embodied in "an agreement or understanding arrived at between the employer and employee before the performance of the work," 29 U.S.C. § 207(o)(2)(A).

FLSA-sanctioned comp time in its basic form is comp time the employee has a right to take when it is most useful to the employee, so long as that is not "unduly disrupt[ive]" to the employer's operations. Precisely because this is so, § 7(o)(5) provides statutory protection for this employee right by stating that an employee who has requested the use of comp time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request." 29 U.S.C. § 207(o)(5).

The statutory scheme, in other words, recognizes that the employee's right to take accrued comp time when it is most useful to the employee is a crucial determinant of the true value of this form of overtime compensation to the employee. The other side of the coin is that employer authority to direct an employee to use his or her accrued comp time when it is most useful to the employer, rather than when it is most useful to the employee, works

a substantial diminution in the value of comp time to the employee.

To put this in concrete terms, being compensated for overtime work with comp time that the employee can use as he or she sees fit closely resembles being compensated with cash that the employee can freely spend. By contrast, being compensated for overtime work with comp time that is under the employer's control closely resembles payment in script that the employee can use only at the company store.

It is to the point in this regard that with respect to union-represented employees, § 7(o)(2)(A)(i) provides that "[a] public agency may provide compensatory time . . . only pursuant to . . . applicable provisions of a collective-bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees." 29 U.S.C. § 207(o)(2)(A)(i).[5] In the collective bargaining setting, it goes without saying that an employer could not lawfully change the settled comp time arrangements by unilaterally assuming an authority to direct employees when to take their accrued leave not stated in the agreement. Nothing in the statute suggests that an employer has any greater freedom unilaterally to alter the terms of individual comp time agreements with unrepresented employees. To the contrary, the Department of Labor regulations contain special protections applicable to individual comp time agreements precisely to ensure that employees who lack the protection of union representation are not "co-

[5] In the collective bargaining setting, comp time provisions are, thus, by virtue of FLSA § 7(o)(2)(A)(i), "terms and conditions of employment" that must be "specified by the express terms of a collective-bargaining agreement" and cannot be unilaterally imposed by either party. *See Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

erc[ed or] pressure[d]" by their employers into agreements whose terms render comp time an inferior substitute for overtime pay. 29 C.F.R. § 553.23(c). *See* Pet. App. 22a.[6]

[6] This case does not require the Court to determine the extent to which a comp time agreement may provide for employer of control employee use of comp time. Nevertheless, for sake of completeness, we outline here several considerations that we believe would guide such an inquiry.

First, an agreement giving the employer a measure of control over the use of compensatory time could not waive or abridge any of the employee's FLSA rights. *Barrentine*, 450 U.S. at 740. Thus, in order to preserve the nature of compensatory time as a substitute for overtime such an agreement would need to preserve the employee's "ab[ility] to make beneficial use of the accumulated compensatory time." H.R. Rep. No. 99-331 at 23. Before requiring an employee to use an amount of accrued compensatory time on a date or dates chosen by the employer, the agreement would first need to provide the employee with a genuine option of using that leave according to his or her own desires, subject only to the statutory and regulatory provisions governing employee requests. 29 U.S.C. § 207(o)(5); 29 C.F.R. 553.25. *See* Brief for the United States as Amicus Curiae at 10 n.6. The dissent in this case suggests that further criteria "for evalutaing the reasonableness and legality of any consensual limitations upon the employee's right to use and preserve compensatory time earned" should resemble the considerations set out in the Secretary's regulations for determining the "reasonable period" during which the employer must grant a request to use compensatory time and for determining whether granting such a request would unduly disrupt the employer's operations. Pet. App. 19a. *See* 29 C.F.R. § 553.25(c). These considerations advance the statute's goal of preserving the employee's beneficial use of compensatory time without jettisoning the employer's ability to staff its operations adequately. *See* 29 C.F.R. § 553.25(d).

Second, as to the form of permissible agreement, the Secretary has taken the position that any terms governing the use of compensatory time must appear in a "specific[] . . . provision" of the compensatory time agreement. Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 846100. In the event that the employer and employee have an agreement that is not in writing, the regulations make it clear that the employer must nonetheless keep a record of any consensual limits on

In sum, given the centrality of employee control over comp time use and the difference in value between employe-controlled comp time and employer-controlled comp time, an employee cannot be deemed to "knowingly and voluntarily agree" to an arrangement providing for employer-controlled comp time in lieu of overtime pay, 29 C.F.R. § 553.23(c), if the substitution of employer control for employee control is not explicitly stated in the agreement before the overtime work is performed. And, that is precisely how the Labor Department's interprets the statute and its regulations.

D. The court of appeals proceeded in total disregard of the overall FLSA statutory scheme, the core FLSA concept of comp time as a form of compensation that includes an employee right to control the use of accrued leave, and the statutory requirement that comp time agreements be "voluntarily . . . worked out arrangements" that are "mutually satisfactory" to the parties, S. Rep. No. 99-159 at 8. The court below did so by ruling that, because "the parties have not identified any controlling provisions" in their agreement expressly addresing the employer's authority to direct the use of accrued comp time, it was the court's "obligation . . . to fashion a background rule, which the parties remain free to displace in future negotiations," and by deriving its "default rule" implying into comp time agreements a provision "allowing an employer to establish uniform employment policies with respect to questions not previously negotiated" from "the general principle that the employer can set workplace

an employee's ability to use accrued compensatory time. 29 C.F.R. §§ 553.23(c)(1), 553.50(d).

Finally, and as discussed in text, the legitimacy of any provision in a compensatory time agreement ceding control to the employer over the use of such time, regardless of the form it takes, also hinges on the employee's free, uncoerced, and unpressured consent to such conditions prior to the performance of the work. 29 C.F.R. § 553.23(c)(1).

rules in the absence of a negotiated agreement to the contrary." Pet. App. 12a-13a citing Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989) (discussing "the legal rules of contracts and corporations").

To begin with the most elementary flaw, the FLSA "was *not* designed to codify or perpetuate [industry] customs . . ." *Barrentine*, 450 U.S. at 741, quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944) (emphasis added). Whatever "the general [employer prerogative] principle" may be, the law established by FLSA § 7(o) is that 'in the absence of a negotiated agreement," Pet. App. 12a, there will be no substitution of comp time for overtime pay at all. 29 U.S.C. § 207(o)(2)(A). That being so, it was entirely improper for the court below to import into the FLSA an employer prerogative rule that would imply into comp time agreements a provision that materially interferes with the employee's "ab[ility] to make beneficial use of the [employee's] accumulated compensatory time." H.R. Rep. No. 99-331 at 23.

Equally to the point, the court below erred in proceeding as if it were free to "impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843; *Auer*, 519 U.S. at 462.[7] Here there is "an administrative

[7] The reliance of the court below on § 7(o)(3)(B) was completely misplaced. Pet. App. 9a. That provision allows an employer to pay "an employee for accrued time off . . . at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. 207(o)(3)(B). As the dissent recognized, this section simply permits employers to reduce the amount of compensatory time in each employee's bank "by paying cash—the usual and superior form of overtime compensation." Pet. App. 22a. *See* 29 C.F.R. § 553.27(a) (this provision allows employers "at any time" to make payments at the regular rate for accrued compensatory time.

interpretation," and the court was required to determine whether the Labor Department's answer to the question presented here, that is embodied in that administrative interpretation, was "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Had it done so, as we have shown, the court below could only have concluded that the Department's position that an employer is prohibited from unilaterally requiring employees to use their compensatory time is "based on a permissible construction of the statute."

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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